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Note

An Analysis of *In re Grand Jury Subpoena Duces Tecum (United States v. Doe)*: Does the Fifth Amendment Protect the Contents of Private Papers?

"The privilege against self-incrimination is a right that was hard-earned by our forefathers. The reasons for its inclusion in the Constitution—and the necessities for its preservation—are to be found in the lessons of history."

Chief Justice Earl Warren¹

I. Introduction

The Fifth Amendment right against self-incrimination has been interpreted repeatedly by the Supreme Court of the United States. In the past, the Court had held that in order to protect this constitutional right, the Fifth Amendment must be construed broadly.² However, down through the years, the Supreme Court has limited this protection by excluding certain types of documents from its reach.³ Most recently, the Court declined to address the issue in *In re Grand Jury Subpoena Duces Tecum Dated October 29, 1992 (United States v. Doe)*⁴ ("*In re Grand Jury Subpoena Duces Tecum*").

In 1976, the Supreme Court changed its analytical approach to the Fifth Amendment privilege from one that histori-

1. *Quinn v. United States*, 349 U.S. 155, 161 (1955).

2. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

3. See, e.g., *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976); *Bellis v. United States*, 417 U.S. 85 (1974); *United States v. White*, 322 U.S. 694 (1944); *Wilson v. United States*, 221 U.S. 361 (1911). For a further discussion of these cases see *infra* part II.C.

4. 1 F.3d 87 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994).

cally protected the contents of a person's business or private papers to one that excludes the contents of such papers from its protection unless otherwise privileged under a compelled production theory.⁵ Despite this theoretical alteration, the Court has never expressly overruled nor indicated its intent to overrule the seminal case, *Boyd v. United States*,⁶ which held that the contents of one's private papers were absolutely protected by the Fifth Amendment.⁷ Thus, the Supreme Court's analytical shift has created confusion in the lower courts and disagreement amongst the federal circuit courts of appeal.

In an effort to highlight the split in the federal circuit courts of appeals, this Note will discuss the recent decision by the United States Court of Appeals for the Second Circuit, *In re Grand Jury Subpoena Duces Tecum*.⁸ The court in *In re Grand Jury Subpoena Duces Tecum* undermined the *Boyd* holding and held that the Fifth Amendment right against self-incrimination did not extend to the contents of voluntarily prepared private papers.⁹

Part II of this Note highlights the origin, intent and significance of the Fifth Amendment privilege against self-incrimination.¹⁰ Additionally, it sets forth the original role of the Fifth Amendment in its protection of personal and non-personal documents and the modern trend narrowing this protection. Finally, Part II identifies the theoretical shift in the Supreme Court's reasoning from a content-based standard enunciated in *Boyd* to a compelled production theory explicated in *Fisher v.*

5. *Fisher*, 425 U.S. at 405-13. This theory provides that, as long as a document is created voluntarily, its required disclosure does not offend the Fifth Amendment unless the very act of producing would involve a testimonial incrimination, such as authenticating the document. *Id.* at 410-13. See also *United States v. Doe*, 465 U.S. 605 (1984). For further discussion of testimonial incrimination and the "act of production" theory, see Charles Gardner Geyd, *The Testimonial Component of the Right Against Self-Incrimination*, 36 CATH. U. L. REV. 611 (1987). See *infra* notes 127-32 and accompanying text.

6. 116 U.S. 616 (1886).

7. *Id.* at 630.

8. 1 F.3d 87 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994).

9. *Id.* at 93. The court concluded that the Fifth Amendment "act of production" privilege did not protect voluntarily prepared private papers which had been produced and authenticated in a prior administrative proceeding. *Id.* at 93-94.

10. See generally LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (1968) (explaining the history of the Fifth Amendment).

United States.¹¹ Part II will discuss selected decisions from various federal circuit courts of appeals to exemplify how the Supreme Court's analytical shift has generated confusion and disharmony amongst the circuit courts.¹²

Part III discusses the reasoning of the majority and dissenting opinions in *In re Grand Jury Subpoena Duces Tecum*.¹³ Part IV examines the erosion of the Fifth Amendment's protection of private papers.¹⁴ It also suggests that the Second Circuit in *In re Grand Jury Subpoena Duces Tecum* erred by not following established Supreme Court precedent.¹⁵ Finally, Part IV suggests that the reasoning of certain circuit courts provides an appropriate balance between the competing interests of disclosure versus protection of purely private documents.¹⁶

This Note concludes that the Court of Appeals for the Second Circuit should have more broadly construed the Fifth Amendment right against self-incrimination. Such a broad construction would have honored Supreme Court precedent and would have retained a distinctive protection of private papers consistent with the purpose of the Fifth Amendment.¹⁷

II. Background

A. *The Fifth Amendment*

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal

11. 425 U.S. 391 (1976).

12. See *United States v. Wujkowski*, 929 F.2d 981 (4th Cir. 1991); *In re Grand Jury Investigation (Heller)*, 921 F.2d 1184 (11th Cir. 1991); *In re Steinberg*, 837 F.2d 527 (1st Cir. 1988); *Butcher v. Bailey*, 753 F.2d 465 (6th Cir.), cert. dismissed, 473 U.S. 925 (1985); *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3d Cir. 1980).

13. 1 F.3d 87 (2d Cir. 1993), cert. denied, 114 S. Ct. 920 (1994). See *infra* notes 186-218 and accompanying text.

14. See, e.g., *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976); *Bellis v. United States*, 417 U.S. 85 (1974); *United States v. White*, 322 U.S. 694 (1944); *Wilson v. United States*, 221 U.S. 361 (1911).

15. See, e.g., *Boyd v. United States*, 116 U.S. 616 (1886).

16. See, e.g., *In re Steinberg*, 837 F.2d 527 (1st Cir. 1988); *Butcher v. Bailey*, 753 F.2d 465 (6th Cir.), cert. dismissed, 473 U.S. 925 (1985); *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3d Cir. 1980).

17. See, e.g., *Fisher v. United States*, 425 U.S. 391, 414-15 (1976) (Brennan, J., concurring); *Boyd v. United States*, 116 U.S. 616 (1886); *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3d Cir. 1980).

case to be a witness against himself.”¹⁸ The privilege against self-incrimination came to the United States as part of the English common law system of criminal justice.¹⁹ By the mid-1700s, the American colonies generally accepted the privilege as a settled legal concept.²⁰ It then became a right under the Fifth Amendment to the United States Constitution when the privilege was drafted into the Bill of Rights.²¹ In 1964, it was made applicable to the states through the Due Process Clause of the Fourteenth Amendment.²²

A central purpose of the constitutional privilege was to prevent the criminal justice system from forcefully extracting evidence from an accused in the form of documents or oral testimony, which could then be used against him or her to ob-

18. U.S. CONST. amend. V.

19. See LEVY, *supra* note 10; see also Kathleen Maloney, *Abolition of Fifth Amendment Protection For The Contents of Preexisting Documents: United States v. Doe*, 38 Sw. L.J. 1023 (1984).

The privilege against self-incrimination began in England in the twelfth century during the struggle against the inquisitorial procedures of the ecclesiastical courts. LEVY, *supra* note 10, at 43-51; Maloney, *supra*, at 1024-25. The ecclesiastical courts were religious tribunals that had jurisdiction over a large number of crimes that would today be considered secular crimes. LEVY, *supra* note 10, at 43-44. The English ecclesiastical courts administered an *ex officio* oath to the accused without 1) charging him or her formally, 2) identifying the accusers, or 3) revealing the evidence against the accused. *Id.* at 46-47. The oath was administered by a judge to an accused who was then compelled to testify regarding the facts of the charges brought against him. *Id.* at 46-49. After the judge administered the oath, the accused was required to respond to questions that were intended to elicit a confession. *Id.* The oath was ultimately abolished in 1641 “and the right against compulsory self-incrimination was established . . . in the ecclesiastical courts” in order to prevent a recurrence of the inquisitorial procedures. *Id.* at 281-82.

Since the religious courts were separate from the common law criminal courts and the early English common law criminal courts did not use inquisitorial methods, the right against compulsory self-incrimination did not extend to common law criminal procedure until many years later. *Id.* at 330-32. Slowly, English society recognized that the right was necessary to assure a fair procedure to one accused of crimes and, therefore, it became part of the English law and known as “one of the great landmarks of man’s struggle to make himself civilized.” *Id.* at 332 (quoting ERWIN N. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955)).

20. LEVY, *supra* note 10, at 368-404.

21. Maloney, *supra* note 19, at 1024. Maloney indicates that the title “privilege against self-incrimination” is actually a misnomer because, despite its English origin, it “was made a constitutional right in this country as part of the Fifth Amendment, which was ratified in 1791.” *Id.* at 1031 n.10. This Note agrees with Maloney, but uses the terms interchangeably.

22. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

tain a conviction.²³ The motivating force behind the privilege was an "inten[tion] to shield the guilty and imprudent as well as the innocent and foresighted."²⁴ Other policies and purposes underlying the Fifth Amendment included a "preference for an accusatorial rather than an inquisitorial system of criminal justice";²⁵ and a profound respect for each person's right "to a private enclave where he may lead a private life."²⁶

The basic test for the applicability of the Fifth Amendment privilege has been "whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination."²⁷ In addition, the Supreme Court has interpreted the right against self-incrimination as "essentially a personal one,"²⁸ applying only to the individual asserting it and "not to [the] information that may incriminate him."²⁹ Nor does the right extend to all types of incriminating evidence "but applies only when the accused is compelled to make a *testimonial* communication that is incriminating."³⁰

In *Schmerber v. California*,³¹ the Court identified the determinative factor as whether or not the individual is compelled "to be a witness against himself."³² The Court concluded that while the Fifth Amendment protects an "accused's communica-

23. *United States v. White*, 322 U.S. 694, 698 (1944); *see also* *Knapp v. Schweitzer*, 357 U.S. 371, 380 (1958).

24. *Marchetti v. United States*, 390 U.S. 39, 51 (1968).

25. *Murphy v. Waterfront Commission of New York*, 378 U.S. 52, 55 (1964).

26. *Id.* (quoting *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)).

27. *Marchetti*, 390 U.S. at 53 (citing *Rogers v. United States*, 340 U.S. 367, 374 (1951)). *Marchetti* noted that the risk of incrimination could extend to prospective acts and held that compelling persons involved with gambling to register for payment of an occupational tax would "significantly enhance the likelihood of their prosecution for future acts, and . . . readily provide evidence which [would] facilitate their convictions." *Id.* at 52-54.

In addition, despite the precise language—"shall be compelled in any criminal case"—the Fifth Amendment privilege has been held to apply in other legal situations. *See, e.g., In re Gault*, 387 U.S. 1 (1967) (juvenile proceedings); *Watkins v. United States*, 354 U.S. 178 (1957) (congressional investigations); *McCarthy v. Arndstein*, 266 U.S. 34 (1924) (civil proceedings); *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (grand jury proceedings).

28. *United States v. White*, 322 U.S. 694, 698-99 (1944).

29. *Couch v. United States*, 409 U.S. 322, 328 (1973).

30. *Fisher*, 425 U.S. at 408.

31. 384 U.S. 757 (1966).

32. *Id.* at 761.

tions, whatever form they may take,"³³ it does not protect non-communicative evidence.³⁴ Thus, the Court did not extend the privilege to the results of a blood sample analysis.³⁵ The Court reasoned that, although evidence from the blood test was an "incriminating product of compulsion, [it] was neither petitioner's testimony nor evidence relating to some communicative act or writing by [him]."³⁶

Similarly, in *Gilbert v. California*³⁷ the Supreme Court refused to apply the privilege to handwriting exemplars taken of the petitioner.³⁸ Although the Court noted the communicative aspects of handwriting, it held that the handwriting exemplar was merely a physical characteristic and, therefore, was outside the scope of Fifth Amendment protection.³⁹

In sum, the Fifth Amendment historically has provided protection for verbal and written communications that are incriminating and testimonial.⁴⁰ The Supreme Court enunciated its first standard of Fifth Amendment protection in *Boyd v. United States*.⁴¹ The *Boyd* standard provided broad Fifth Amendment protection for the contents of personal papers.⁴² In subsequent decisions, however, the Supreme Court limited the

33. *Id.* at 763-64.

34. *Id.* at 761.

35. *Id.* at 765.

36. *Id.* The Court noted that lower federal and state courts had held that the Fifth Amendment did not protect an individual from compulsory submission to "fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Id.* at 764.

For a general discussion of the testimonial aspects of the Fifth Amendment, see Geyd, *supra* note 5.

37. 388 U.S. 263 (1967).

38. *Id.* at 266.

39. *Id.* at 266-67. The *Gilbert* Court acknowledged that "voice and handwriting are, of course, means of communication," but emphasized that an exemplar is simply an identifying characteristic. *Id.* at 266. In other words, the content of the exemplar in *Gilbert* was not a "communicative matter" within the protection of the Fifth Amendment. *Id.* at 266-67.

40. *Fisher v. United States*, 425 U.S. 391 (1976). See also *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (holding that the accused's testimony would not have to support a conviction on its own but need only "furnish a link in the chain of evidence needed to prosecute").

41. 116 U.S. 616 (1886).

42. See *infra* notes 45-59 and accompanying text.

Fifth Amendment protection of certain types of documents.⁴³ The Court ultimately changed its standard from one that protected the contents of personal papers to one that protected only the act of producing such documents.⁴⁴

B. *The Content-Based Standard for the Protection of Papers Under the Fifth Amendment*

The first Supreme Court case to examine the extent of the Fifth Amendment privilege against the compelled production of an individual's documents was *Boyd v. United States*.⁴⁵ In *Boyd*, a civil forfeiture action was brought against a partnership for importing thirty-five cases of plate glass without paying the prescribed statutory duty.⁴⁶ At trial, the prosecution sought to establish the quantity and value of previously imported glass by obtaining an invoice belonging to the partners.⁴⁷ The prosecution relied upon a statute which required defendants to produce "any business book, invoice, or paper belonging to, or under the control of, the defendant"⁴⁸ demanded by the prosecution as necessary to prove particular allegations made in the government's case.⁴⁹ The trial court ordered the partners to comply with the statute.⁵⁰ The partners produced the demanded invoice, but ar-

43. See, e.g., *United States v. Doe*, 465 U.S. 605, 612, 617 (1984) (holding that although the Fifth Amendment privilege protected a sole proprietor from producing his business records, it did not protect their contents); *Fisher v. United States*, 425 U.S. 391, 414 (1976) (holding that a taxpayer's lawyer could not invoke the privilege to avoid producing the taxpayer's accountant's financial records, which had been previously transferred to the lawyer); *Bellis v. United States*, 417 U.S. 85, 101 (1974) (holding that a partner in a small law firm could not invoke the Fifth Amendment privilege to avoid producing the partnership's financial records); *United States v. White*, 322 U.S. 694, 705 (1944) (holding that neither a labor union nor its agents or representatives could invoke the Fifth Amendment privilege to avoid producing the union's business records); *Wilson v. United States*, 221 U.S. 361, 385-86 (1911) (holding that the Fifth Amendment did not protect a president of a corporation who refused to comply with a subpoena to produce his business records because they contained personal information); see *infra* notes 68-79, 91-114, 127-34 and accompanying text.

44. *Fisher v. United States*, 425 U.S. 391, 401 (1976).

45. 116 U.S. 616 (1886). See Samuel A. Alito, *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 29 (1986).

46. *Boyd*, 116 U.S. at 617-18.

47. *Id.* at 618.

48. *Id.* at 619-20.

49. *Id.* at 620.

50. *Id.* at 618.

gued that its compulsion was unconstitutional under the Fourth and Fifth Amendments.⁵¹ The invoice was introduced into evidence, the jury found the partners guilty of violating the statute and the Court ordered forfeiture of the thirty-five cases of glass.⁵²

The Supreme Court ultimately reversed the trial court's decision.⁵³ The Court rejected the prosecution's argument that the statute was constitutional because it did not authorize a search and seizure of the invoices but mere production of them.⁵⁴ The Court held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods" violated both the Fourth and Fifth Amendments to the Constitution.⁵⁵

The Court concluded that compelling Boyd to produce his invoices or private papers was "compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution."⁵⁶ The *Boyd* Court thus provided broad pro-

51. *Id.*

52. *Id.*

53. *Id.* at 638.

54. *Id.* at 621.

55. *Id.* at 630. In such cases, the Court continued, "the Fourth and Fifth Amendments run almost into each other." *Id.*

Boyd's peculiar combination of Fourth and Fifth Amendment principles became problematic in later cases because the protections of the amendments were directed toward different types of governmental intrusion. See Alito, *supra* note 45, at 27, 35-38.

The Fourth Amendment to the United States Constitution declares that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. Fourth Amendment prohibitions are based upon the reasonableness of searches and seizures. Conversely, the Fifth Amendment "forbids any force or compulsion for the purpose of extracting self incrimination" whether reasonable or not. Alito, *supra*, note 45, at 35-36.

56. *Boyd*, 116 U.S. at 634-35. The *Boyd* Court referred to Lord Camden's discussion in *Entick v. Carrington*, 19 Howell's State Trials 1029 (K.B. 1765) (Camden, C.J.), regarding the secrecy of one's private papers. The *Boyd* Court emphasized that "[p]apers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection.'" *Boyd*, 116 U.S. at 627-28 (quoting *Entick*, 19 Howell's State Trials at 1066). The Howell's State Trials version of the *Entick* opinion differs in mate-

tection for the contents of one's personal papers.⁵⁷ The Court noted that historically such compulsion contradicted the "principles of a free government."⁵⁸ Therefore, the Court declared the forfeiture statute unconstitutional and ruled that the invoices could not be admitted into evidence.⁵⁹

For nearly a century, *Boyd* was relied upon by the courts for the proposition that private documents fell within a "zone of privacy"⁶⁰ and could not be subpoenaed without violating the Fifth Amendment.⁶¹ Despite such reliance, however, *Boyd's* vitality has been called into question by more recent Supreme Court decisions.⁶²

rial respects from the official opinion. *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765).

The *Boyd* Court relied upon *Entick* when it declared that it was the "invasion of his indefeasible rights of personal security, personal liberty and private property, [that] constitute[d] the essence of [the offense]" against *Boyd* and not the mere search and seizure of his documents. *Boyd*, 116 U.S. at 630. Thus, *Boyd* continued the historical protection against the intrusion into one's personal zone of privacy as enunciated in *Entick* and established a broad constitutional protection of private documents under the Fifth Amendment. *Id.* See also LEVY, *supra* note 10, at 393 (quoting *Entick*, 19 Howell's State Trials at 1038, 1041, 1063, 1073).

57. It should be noted that the documents at issue in *Boyd* were business invoices, as opposed to more personal papers such as diaries, journals, etc. The Court simply decided that all of the contents would be protected without characterizing the contents as personal or nonpersonal. For this reason, commentators have referred to the *Boyd* holding as a content-based or content-neutral standard. See, e.g., Alito, *supra* note 45, at 31.

58. *Boyd*, 116 U.S. at 631-32.

59. *Id.* at 638.

60. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (stating that "[t]he Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment"); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (recognizing that the Constitution guarantees certain zones of privacy and citing *Boyd* for its roots in the Fifth Amendment). See also *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) (stating that *Boyd* was "a case that will be remembered as long as civil liberty lives in the United States" for recognizing a constitutional right to personal privacy under the Fifth Amendment); *Schmerber v. California*, 384 U.S. 757, 775-76 (1966) (declaring *Boyd* as "among the greatest constitutional decisions of this Court" because it construed liberally the Bill of Rights by recognizing a zone of privacy under the Fifth Amendment).

61. See, e.g., *Bellis v. United States*, 417 U.S. 85, 87 (1974); *Couch v. United States*, 409 U.S. 322, 328 (1973); *Gilbert v. California*, 388 U.S. 263, 266 (1967); *United States v. White*, 322 U.S. 694, 698-99 (1944); *Wilson v. United States*, 221 U.S. 361, 375 (1911).

62. See, e.g., *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976); *Andresen v. Maryland*, 427 U.S. 463 (1976). For a

C. *Erosion of the Boyd Contents-Based Standard*

The erosion of the broad Fifth Amendment protection enunciated in *Boyd* began first in those cases involving corporate, partnership, and labor union documents and, second, in personal documents in the possession of third persons. In 1906, the Supreme Court addressed the issue of corporate documents in *Hale v. Henkel*.⁶³ In *Henkel*, the Court held that a corporation could not invoke the Fifth Amendment right against self-incrimination.⁶⁴ The Court distinguished persons from corporations, noting that the former were guaranteed constitutional rights but the latter were not.⁶⁵ Reasoning that a corporation was a "creature of the state,"⁶⁶ which was granted special privileges but limited statutory rights, the Court held that a corporation could not refuse to produce its books and records when charged with abusing its privileges.⁶⁷

Two years later, in *Wilson v. United States*,⁶⁸ the Supreme Court extended the *Henkel* rule to officers of a corporation. In *Wilson*, the issue was whether a president of a corporation could invoke the privilege when he was issued a subpoena by the federal court of appeals to produce corporate records and books to a grand jury.⁶⁹ Relying on *Boyd*, *Wilson* asserted his Fifth Amendment right and refused to comply with the order, arguing that the records were kept and used by him alone in his office and contained personal information and other correspondence relating to the business.⁷⁰ However, the Court distinguished the compelled production of private books and papers in *Boyd* from the documents subpoenaed in *Wilson*, that had been described in the summons as "books of the corporation."⁷¹ Although the Court acknowledged and even suggested that *Wilson* could remove his private papers from the books to avoid

general discussion of the erosion of the Fifth Amendment protections after *Boyd*, see Maloney, *supra* note 19.

63. 201 U.S. 43 (1906).

64. *Id.* at 75-76.

65. *Id.* at 74-75.

66. *Id.* at 74.

67. *Id.* at 74-75.

68. 221 U.S. 361 (1911).

69. *Id.* at 367.

70. *Id.* at 363, 368-69.

71. *Id.* at 377-78.

scrutiny, the Court held that the corporate records and other related documents did not fall within the ambit of the Fifth Amendment privilege.⁷² Therefore, the Supreme Court held that the constitutional right against self-incrimination did not extend to the official custodian of corporate records whose personal documents were not at issue.⁷³

In 1944, the Supreme Court expounded on its reasoning in *Henkel* and *Wilson* by addressing the issue of labor union documents in *United States v. White*.⁷⁴ In *White*, the Court noted that the historic purpose of the privilege was to protect individuals, rather than corporate entities from compulsory incrimination by the government.⁷⁵ It then determined that labor unions were structurally and functionally more like corporations than individuals.⁷⁶ Reasoning that the government had the power to make reasonable demands on corporations to enforce federal and state regulations and law,⁷⁷ the Court determined that it had a similar power to make reasonable regulatory demands for documents relating to union activities.⁷⁸ The Court thus con-

72. *Id.* at 378. "[T]he mere fact that [Wilson] himself wrote, or signed, the official letters copied into the books, neither conditioned nor enlarged his privilege." *Id.* The test was whether the nature or content of the documents was private or corporate. *Id.* at 378-79. Under the Fifth Amendment, corporate documents in the possession of an individual were not protected even if the papers would incriminate the individual. *Id.* On the other hand, the Court noted that the Fifth Amendment would protect an individual from the compelled production of incriminating *private* documents in his possession, even if they were authored by another person. *Id.* at 378.

Noting that the *Boyd* Court emphasized that it was the nature of the private papers themselves that justified the Fifth Amendment privilege, the *Wilson* Court stated that "in the case of public records and official documents, made or kept in the administration of public office," neither possession nor custody would permit the officer to claim Fifth Amendment protection in order to resist inspection. *Id.* at 380. Noting that the corporation was not a public office, the Court stated that "the principle applie[d] not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation." *Id.*

73. *Id.* at 386.

74. 322 U.S. 694 (1944).

75. *Id.* at 698-99.

76. *Id.* at 701. The Court identified the test as whether the organization seeking to invoke the privilege "ha[d] a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interest of its constituents, but rather to embody the common or group interests only." *Id.*

77. *Id.* at 700-01.

78. *Id.* at 701.

cluded that neither a labor union nor its officers or agents could invoke the personal privilege of the Fifth Amendment to avoid producing union records.⁷⁹

Thus, in *Henkel* and *Wilson*, respectively, the Supreme Court established that the Fifth Amendment privilege would not protect corporate records or the custodian of such documents. Following that line of reasoning, the Supreme Court in *White* held that the privilege did not extend to labor unions. Still undecided, however, was whether the privilege would extend to an individual's personal documents in the possession of a third party. This issue was ultimately addressed in *Couch v. United States*.⁸⁰

In *Couch*, the sole proprietor of a restaurant invoked the Fifth Amendment privilege to resist a subpoena to produce her financial records.⁸¹ For more than fifteen years, the proprietor had been disclosing financial information to her tax accountant.⁸² Although she had relinquished possession of the business records to her accountant, she retained ownership of all the financial documents.⁸³ In connection with an Internal Revenue Service investigation of the proprietor's tax liabilities, the government issued a summons to her accountant requiring the accountant to produce the proprietor's "books, records, papers, or other data . . . as may be relevant or material to such inquiry."⁸⁴

On appeal,⁸⁵ the Supreme Court stated that the Fifth Amendment privilege was "an intimate and personal one" that attached to the person seeking its protection rather than to the information that might be incriminating.⁸⁶ The Court emphasized that it was the proprietor's accountant who was compelled by the subpoena to produce the financial records, and not the proprietor herself.⁸⁷ The Court distinguished the proprietor from a person that the privilege was intended to protect, stating

79. *Id.* at 704-05.

80. 409 U.S. 322 (1973).

81. *Id.* at 324-25.

82. *Id.*

83. *Id.*

84. *Id.* at 325 n.5.

85. The lower courts determined that the Fifth Amendment privilege did not extend to the proprietor. *Id.* at 324.

86. *Id.* at 327-28 (citing *White*, 322 U.S. at 698).

87. *Id.* at 329.

that "the ingredient of personal compulsion against an accused [was] lacking."⁸⁸ The Court concluded that the benchmark for protection under the Fifth Amendment was "'not the ownership of property but the 'physical or moral compulsion' exerted.'"⁸⁹ Therefore, the Court held that the Fifth Amendment did not protect the documents because there was "no semblance of governmental compulsion against the person of the accused."⁹⁰

In 1974, one year after *Couch*, the Supreme Court in *Bellis v. United States*⁹¹ reexamined the reasoning in *Boyd*, *Wilson* and *White* to determine whether the compelled production of partnership records of a small dissolved law firm violated the Fifth Amendment right against self-incrimination.⁹² In *Bellis*, a former partner of a three-partner law firm was issued a subpoena requiring him to produce the firm's financial records and appear before a grand jury.⁹³ The partner complied with the appearance order but refused to produce the records, claiming his Fifth Amendment privilege.⁹⁴ Relying on *Boyd*, the partner argued that the small firm was not a separate entity but the embodiment of "the personal legal practice of the individual partners."⁹⁵

Writing for the Supreme Court majority, Justice Marshall reaffirmed *Boyd's* holding "that the Fifth Amendment privilege . . . protect[ed] an individual from compelled production of his

88. *Id.* Although the Court acknowledged that actual possession of the compelled documents was the most significant factor in determining the relationship between the Fifth Amendment privilege and compulsion of the accused's documents, the Court noted that there could be situations where "constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." *Id.* at 333.

Constructive possession "exists where one does not have physical custody or possession, but is in a position to exercise dominion or control over a thing." BLACK'S LAW DICTIONARY 314 (6th ed. 1990).

89. *Couch*, 409 U.S. at 333, 336 (citing *Perlman v. United States*, 247 U.S. 7, 15 (1918)).

90. *Id.* at 336. The Court also noted that there was "no legitimate expectation of privacy." *Id.*

91. 417 U.S. 85 (1974).

92. *Id.* at 86.

93. *Id.* In addition to the three partners in the firm, there were approximately six employees: two additional of counsel attorneys, three secretaries, and one receptionist. *Id.*

94. *Id.*

95. *Id.* at 94-95.

personal papers and effects as well as compelled oral testimony.⁹⁶ However, the Court then analogized the partnership's subpoenaed documents to the corporate papers in *Wilson* and the labor union records in *White* and reasoned that the partnership similarly "represent[ed] organized institutional activity so as to preclude any claim of Fifth Amendment privilege with respect to the partnership's financial records."⁹⁷ Thus, despite the small size of the partnership and the incriminating aspects of the documents, the Court rejected the partner's claim of Fifth Amendment protection.⁹⁸

D. *The Analytical Shift to the Compelled Production Standard*

In 1976, just two years after *Bellis*, the Supreme Court decided *Fisher v. United States*.⁹⁹ In *Fisher*, the issue before the Supreme Court was whether a taxpayer could invoke his Fifth Amendment right against self-incrimination when his attorney was issued a subpoena to produce the taxpayer's tax documents and the documents themselves had been prepared by the taxpayer's accountant.¹⁰⁰ The Court stated that to invoke the Fifth Amendment privilege, the individual asserting the right had to be the one compelled to produce the documents in question.¹⁰¹ Therefore, even if the privilege could protect the documents while in the claimant's possession, the privilege could not be in-

96. *Bellis*, 417 U.S. at 87. This statement reiterates the *Boyd* Court holding that the Fifth Amendment privilege extended to the private business documents of an individual. *Id.* at 87-88 (citing *Boyd*, 116 U.S. at 630).

97. *Id.* at 93. See *Wilson v. United States*, 221 U.S. 361 (1911). Accord *Wheeler v. United States*, 226 U.S. 478 (1913); *Grant v. United States*, 227 U.S. 74 (1913); *Dreier v. United States*, 221 U.S. 394 (1911).

98. *Bellis*, 417 U.S. at 101. The Court noted that the result might have been different if the small firm was a "small family partnership," thus giving some credence to the petitioner's argument that the records were personal in nature. *Id.*

99. 425 U.S. 391 (1976).

100. *Id.* at 393. In *Fisher*, Internal Revenue Service agents interviewed taxpayers pursuant to an investigation into violations of federal income tax laws. *Id.* at 393-94. The accountants for the taxpayers then prepared documents related to the tax returns of the taxpayers. *Id.* at 394. The documents were given to the taxpayers who then transferred them to the attorneys retained in connection with the IRS investigation. *Id.* The IRS served summonses on the attorneys requiring them to produce the documents. *Id.* When the attorneys refused to comply with the summonses, the IRS commenced enforcement proceedings. *Id.* at 395.

101. *Id.* at 396-97.

voked by the claimant's agent once these same documents had been transferred to the agent.¹⁰² Thus, relying on the *Couch* holding that the Fifth Amendment did not protect documents in the possession of a third party, the Supreme Court rejected the taxpayer's assertion of a Fifth Amendment privilege.¹⁰³ The Court held that enforcing the summonses against the attorneys "would not 'compel' the taxpayer to do anything—and certainly would not compel him to be a 'witness' against himself."¹⁰⁴

Additionally, the Court noted that the accountants had prepared the tax documents rather than the taxpayers themselves, and that they were prepared voluntarily without coercion.¹⁰⁵ Therefore, the Court held that the documents would not have been protected even if they were in the hands of the taxpayers because the documents did not constitute compelled testimony.¹⁰⁶ The Court acknowledged that in some situations the mere act of producing the subpoenaed documents might involve some "communicative aspects," such as authenticating the documents or acknowledging their existence, independent of the documents' contents.¹⁰⁷ However, the Court determined that the accountants' preparation and control of the documents precluded a finding that the taxpayers had been compelled to give the government any valuable information.¹⁰⁸

102. *Id.* at 397-99.

103. *Id.* at 397. Analogizing the facts to those in *Couch*, the Court discerned "no difference between the delivery to the attorneys . . . and delivery to the accountant in the *Couch* case . . . [because] . . . the documents sought were obtainable without personal compulsion on the accused." *Id.* at 398.

104. *Id.* at 397.

105. *Id.* at 409-10. The Court also analyzed whether the privilege would have protected the documents if they had remained in the possession of the taxpayer because of the attorney-client privilege. *Id.* at 403-05. The Court acknowledged that documents privileged in the hands of the taxpayer could not lose their privileged status simply because they were transferred to the taxpayer's attorneys for the purpose of obtaining legal advice. *Id.* at 404-05. Such reasoning, the Court noted, would defeat a major purpose of the attorney-client privilege. *Id.*

106. *Id.* at 409-10.

107. *Id.* at 410. See also *Curcio v. United States*, 354 U.S. 118, 125 (1957).

108. *Fisher*, 425 U.S. at 410-11. In his concurring opinion, Justice Brennan noted the majority's emphasis on the compelled production of documents that are prepared voluntarily and stated that even if one's private papers were prepared voluntarily, "it is the compelled *production* of testimonial evidence, not just the compelled creation of such evidence, against which the privilege protects." *Id.* at 423 (Brennan, J., concurring).

Finally, the Court conceded that a significant purpose of the Fifth Amendment right against self-incrimination was the protection of "personal privacy," but stated that the Fifth Amendment should not "serve as a general protector of privacy."¹⁰⁹ Noting that the *Boyd* Court prohibited the compulsory production of private books and papers, the *Fisher* Court labelled the *Boyd* holding as "a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him."¹¹⁰ Thus, the Court shifted its analytical approach from one that emphasized the protection of an individual's private documents to one that focused on the communicative aspects of producing any documents prepared voluntarily.¹¹¹ Apparently acknowledging its analytical shift in reasoning, the Court cautiously noted in a footnote that there could be "[s]pecial problems of privacy which might be presented by subpoena of a personal diary, [which were] not involved here."¹¹² Moreover, the Court expressly left open the question "[w]hether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession."¹¹³ Thus, the Court did not overrule *Boyd*, but declined to address the issue of what specific type of documents would receive the protection of the Fifth Amendment as established in *Boyd* and reaffirmed the line of pre-*Fisher* Supreme Court decisions.¹¹⁴

109. *Id.* at 399-401.

110. *Id.* at 409.

111. *Id.* at 406-09.

112. *Id.* at 401 n.7 (citations omitted).

113. *Id.* at 414.

114. *Id.* Justice Brennan concurred in the holding, but emphasized the level of involvement by the accountants and the business, rather than the private nature of the documents. *Id.* at 414 (Brennan, J., concurring). In his concurring opinion, Justice Brennan noted that the question left open by the majority implied "that the privilege might not protect against compelled production of tax records that are . . . 'private papers,'" and labelled this implication as "contrary to settled constitutional jurisprudence." *Id.* at 415. Justice Brennan further noted that the scope of the privilege was enunciated in *Boyd* and reiterated in a long line of Supreme Court decisions that remained unquestioned until the majority opinion in *Fisher*. *Id.* at 419-20.

Justice Brennan provided ample precedent for his contention that the protection of personal privacy was a fundamental purpose of the Fifth Amendment privilege against self-incrimination. *Id.* at 416-17. Referring to pre-colonial British authorities, he argued that the privilege historically protected the production of books and papers. *Id.* at 418.

The new approach of the *Fisher* Court was evident later in 1976 when the Supreme Court decided *Andresen v. Maryland*.¹¹⁵ The issue before the Supreme Court was whether the admission into evidence of a lawyer's business records seized pursuant to a valid warrant violated the Fifth Amendment privilege against self-incrimination.¹¹⁶

Andresen was a real estate attorney under investigation by state authorities for fraud.¹¹⁷ The investigators procured a search warrant and seized documents from Andresen's law office.¹¹⁸ Several of these documents were admitted into evidence at Andresen's criminal trial, some of which had been prepared voluntarily by Andresen himself.¹¹⁹

Andresen relied on *Boyd* and *Henkel* and argued that the seizure of his business records for the purpose of using them against him at trial violated his constitutional right against self-incrimination.¹²⁰ Relying upon *Couch* and *Fisher*, however, the Supreme Court rejected Andresen's argument and found that he "was not asked to say or to do anything."¹²¹ Nor was he compelled to testify at the trial.¹²² He merely prepared the documents that were later authenticated at trial by a handwriting expert.¹²³ Therefore, the Court held that Andresen's personal business records and subsequent introduction into evidence at his trial did not violate his Fifth Amendment privilege even though the documents contained incriminating information.¹²⁴

As a practical matter, Justice Brennan argued that "[t]he ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or the events of those memories would become the subjects of criminal sanctions." *Id.* at 420.

115. 427 U.S. 463 (1976).

116. *Id.* at 465. A second question presented was whether the search and seizure of the attorney's business records from his office was "unreasonable" within the meaning of the Fourth Amendment. *Id.* This Note will not address that issue.

117. *Id.* at 465-66.

118. *Id.* at 466-67.

119. *Id.* at 468.

120. *Id.* at 471-72.

121. *Id.* at 472-73.

122. *Id.* at 473.

123. *Id.*

124. *Id.* at 471-77. Justice Brennan dissented and contended that Andresen's business records fell within the Fifth Amendment zone of privacy acknowledged in *Bellis*. *Id.* at 484-86 (Brennan, J., dissenting).

The Court reaffirmed that the Fifth Amendment protected persons from compelled acts that could be construed as incriminating, but that it would not protect one from the contents disclosed by the act of production.¹²⁵ The Court also reiterated that in some cases the privilege could apply because the mere act of producing the papers might "constitute a compulsory authentication of incriminating information."¹²⁶

Finally, in *United States v. Doe*,¹²⁷ five grand jury subpoenas were issued to a sole proprietor in an effort to obtain his private business records.¹²⁸ Applying the reasoning of *Fisher* that the constitutional right protected only compulsory self-incrimination, the Supreme Court held that the contents of the records were not privileged because the records had been created voluntarily and because the sole proprietor was not compelled to affirm the truth of their contents.¹²⁹ However, the government could not use the incriminating evidence resulting from the act of producing the records.¹³⁰

In a one-paragraph concurring opinion, Justice O'Connor declared "that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind."¹³¹ Additionally, Justice O'Connor stated that *Fisher* "sounded the death knell for *Boyd*."¹³²

125. *Id.* at 473.

126. *Id.* at 473-74.

127. 465 U.S. 605 (1984).

128. *Id.* at 606-07.

129. *Id.* at 610-12. The Court applied the *Fisher* rationale that the Fifth Amendment protected only against compelled self-incrimination, even though the *Fisher* Court declined to decide whether the privilege protected the contents of personal business records. *Id.* at 610-11.

The Court then analyzed whether the act of producing the documents required Fifth Amendment protection. *Id.* at 612-13. Here the Court was bound by the trial court's finding of fact, affirmed by the court of appeals, that the act of production involved self-incriminating testimony. *Id.* at 613. Therefore, the Supreme Court did not disturb this finding of fact. *Id.* at 613-14.

130. *Id.* at 615 n.14.

131. *Id.* at 618 (O'Connor, J., concurring).

132. *Id.* In a recent act of production case, *Baltimore Dep't of Social Servs. v. Bouknight*, 493 U.S. 549 (1990), a mother invoked the Fifth Amendment privilege as a shield to defy a Maryland juvenile court order to produce her child. *Id.* at 551-54. Justice O'Connor wrote the majority opinion, which cited *Doe* and held that "a person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded." *Id.* at 555. The Court reasoned that the privilege would not protect anything that could be

Justice Marshall, in an opinion concurring in part and dissenting in part and joined by Justice Brennan, contended that "[t]his case presented nothing remotely close to the question that Justice O'Connor eagerly poses and answers."¹³³ Justice Marshall also argued that purely private papers should receive some Fifth Amendment protection.¹³⁴

E. *The Present Conflict in the United States Courts of Appeals*

The Supreme Court's shift from a content-based standard to a compelled production standard in its Fifth Amendment jurisprudence has resulted in confusion and conflict in the federal circuit courts of appeals. The following selected cases reflect this conflict.

1. *Cases Supporting the Boyd Content-Based Standard*

The lead case supporting the *Boyd* approach to the Fifth Amendment protection of private papers is *In re Grand Jury Proceedings (Johanson)*.¹³⁵ The case arose from a widespread federal investigation (known as Abscam) into alleged governmental corruption.¹³⁶ A federal grand jury subpoenaed certain personal papers and records belonging to one of its targets,

otherwise revealed by an examination of the child. *Id.* The Court conceded that the act of producing a child encompassed communicative assertions that could aid the state in prosecuting the mother. *Id.* Despite the applicability of the privilege to this act of production, however, the Court held that the mother could not assert the privilege "because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory regime." *Id.* at 555-56. Analogizing the mother's status to that of a custodian of corporate records, the Court held that "[w]hen a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers, the ability to invoke the privilege is reduced." *Id.* at 558. The Court noted, however, that the Fifth Amendment might limit the use of the testimonial aspects in the act of producing the child at any subsequent criminal proceedings against the mother. *Id.* at 561-62.

133. *Doe*, 465 U.S. at 619 (Marshall, J., concurring in part and dissenting in part).

134. *Id.* at 618-19 (Marshall, J. concurring in part and dissenting in part).

135. 632 F.2d 1033 (3d Cir. 1980).

136. *Id.* at 1035-36.

Louis Johanson, a Philadelphia City Councilman.¹³⁷ Johanson had given the subpoenaed documents to his attorney.¹³⁸

The Court of Appeals for the Third Circuit acknowledged that *Fisher* directed an inquiry into whether the grand jury could subpoena the documents directly from Johanson.¹³⁹ The court held that "the fifth amendment protects an accused from government-compelled disclosure of self-incriminating private papers."¹⁴⁰ The court relied upon the Supreme Court's holding in *Bellis*, reiterating that the privilege protected against the compelled production of personal documents that are self-incriminating.¹⁴¹ The court noted that this principle was strengthened "by virtue of the *Fisher* court's explicit efforts to distinguish its facts from the facts in *Boyd*."¹⁴²

The court then cited *Griswold v. Connecticut*¹⁴³ for the proposition that the Fifth Amendment privilege allows persons to maintain a "zone of privacy" into which the government may not intrude.¹⁴⁴ The court acknowledged the importance to intellectual development of placing one's thoughts in writing and stated that "persons who value privacy may well refrain from reducing thoughts to writing if their private papers can be used against them in criminal proceedings."¹⁴⁵

The Third Circuit then alluded to the historical British and colonial American abhorrence of "the compelled use of a man's private papers as evidence used to convict him."¹⁴⁶ The court concluded "that failure to continue to preserve this right, which we believe basic, would be a step backward in what has been a long and bitterly contested battle to accord rights to persons who stand accused of crime."¹⁴⁷

137. *Id.* at 1036-37.

138. *Id.* at 1037.

139. *Id.* at 1042.

140. *Id.*

141. *Id.* (citing *Bellis*, 417 U.S. at 87).

142. *Id.* at 1043.

143. 381 U.S. 479, 484 (1965) (stating that "the Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.").

144. *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033, 1043 (3d Cir. 1980) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

145. *Id.*

146. *Id.* (citations omitted).

147. *Id.* at 1044.

Several other circuits have expressly left open the possibility that the Fifth Amendment may protect certain private papers.¹⁴⁸ These cases reflect the difficulty of applying the confusing Fifth Amendment standards created by the Supreme Court's shift in analysis in *Fisher* and *Doe*.

In *Butcher v. Bailey*,¹⁴⁹ a debtor was adjudicated bankrupt in a proceeding brought under the federal bankruptcy laws.¹⁵⁰ The bankruptcy trustee demanded that the debtor surrender "all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate."¹⁵¹ The debtor asserted a Fifth Amendment privilege to resist producing certain documents.¹⁵² The bankruptcy court directed the debtor "to produce all nonpersonal records relating to property of the estate."¹⁵³ The bankruptcy court also directed the debtor to produce "all personal records relating to property of the estate, unless the contents of those records would be incriminating or the act of producing the records would be incriminating."¹⁵⁴ The trustee appealed from that part of the court's order permitting the debtor to assert a Fifth Amendment privilege with respect to personal records.¹⁵⁵ The Sixth Circuit analyzed whether the contents of the demanded records were privileged under the Fifth Amendment, noting that "the protection afforded contents has been largely eroded" by cases such as *Fisher* and *Doe*.¹⁵⁶ The court expressly refused to hold that "the contents of private papers are *never* privileged," but indicated that contents could be protected "only

148. See *In re Grand Jury Investigation*, 921 F.2d 1184 (11th Cir. 1991). Noting the "Supreme Court's own reluctance to overrule *Boyd*," the Court of Appeals for the Eleventh Circuit indicated in 1991 that it would leave open the question of whether the Fifth Amendment protected the contents of private papers in that circuit. *Id.* at 1187 n.6. See also *In re Grand Jury Investigation*, 921 F.2d 1184 (11th Cir. 1991); *United States v. Mason*, 869 F.2d 414 (8th Cir. 1989), *cert. denied*, 492 U.S. 907 (1989).

149. 753 F.2d 465 (6th Cir. 1985).

150. *Id.* at 466.

151. *Id.* (quoting 11 U.S.C. § 521(3) (1983)).

152. *Id.*

153. *Id.* at 467.

154. *Id.*

155. *Id.*

156. *Id.* at 468-69. Before analyzing the Fifth Amendment issue, the court rejected the trustee's first contention that the Fifth Amendment privilege was not available in a bankruptcy proceeding. *Id.* at 467-68.

in rare situations, where compelled disclosure would break 'the heart of our sense of privacy.'"¹⁵⁷ The court then determined that papers relating to the property in the debtor's estate were not the type of personal records that would "evoke serious concern over privacy interests," and, therefore, reversed that part of the lower court's order permitting Fifth Amendment protection of the documents' contents.¹⁵⁸

The Court of Appeals for the First Circuit reached a similar conclusion with respect to the Fifth Amendment zone of privacy analysis in *In re Steinberg*.¹⁵⁹ In this case, Steinberg was indicted on conspiracy charges arising out of a federal investigation of fund-raising activities in a 1984 presidential campaign.¹⁶⁰ Prior to trial, the prosecution subpoenaed notebooks possessed by Steinberg that contained any information relating to the investigation.¹⁶¹ The district court directed Steinberg to obey the subpoena, but granted him immunity from any evidence derived "from the *act of producing* the records."¹⁶² However, the court did not grant immunity to the contents of the records.¹⁶³ Steinberg refused to produce the notebooks and was held in contempt.¹⁶⁴

On his appeal of the contempt order to the Court of Appeals for the First Circuit, Steinberg argued that the notebooks were personal papers and, therefore, were protected by the Fifth Amendment.¹⁶⁵ The court acknowledged that the *Boyd* holding had been eroded by the recent Supreme Court decisions in *Fisher*, *Andresen* and *Doe*, but emphasized that the Supreme Court had not determined whether the contents of personal pa-

157. *Id.* at 469 (citing *United States v. Doe*, 465 U.S. 605, 619 n.2 (1984) (Marshall, J., concurring in part)).

158. *Id.* The Sixth Circuit remanded the case to the bankruptcy court for further fact-finding relating to act of production issues. *Id.* at 469-70.

159. 837 F.2d 527 (1st Cir. 1988).

160. *Id.* at 527.

161. *Id.* at 527-28.

162. *Id.* at 528. Since Steinberg was granted immunity, he did not need to assert a Fifth Amendment privilege against self-incrimination. *Id.* However, he was not immune from incriminating evidence found in the contents of the documents. *Id.*

163. *Id.*

164. *Id.* at 527.

165. *Id.* at 528.

pers should receive Fifth Amendment protection.¹⁶⁶ The court also observed that these particular Supreme Court decisions had generated divergent analytical approaches in the courts of appeals.¹⁶⁷

Refusing to express an opinion on whether there should be Fifth Amendment protection for the contents of personal papers, the court seemingly approved of the Sixth Circuit's analysis in *Butcher v. Bailey*.¹⁶⁸ Similar to the Sixth Circuit's methodology in *Butcher*, the court then analyzed whether the subpoenaed documents were truly personal, and concluded that they were not.¹⁶⁹ Therefore, the documents were not protected by the Fifth Amendment.¹⁷⁰

2. Cases That Reject the Boyd Content-Based Standard

The leading case among the courts of appeals that has rejected the *Boyd* standard is *United States v. Wujkowski*.¹⁷¹ In *Wujkowski*, the Department of Energy subpoenaed records from officers of firms doing business with the department in connection with an ongoing investigation of corruption amongst the department's employees and contractors.¹⁷² The subpoena mandated that the officers produce "all original desk and pocket calendars, appointment books, planner schedules, and daily meeting logs maintained or kept on a personal and/or business basis for [specific] calendar years."¹⁷³ In addition to business

166. *Id.* at 528-29.

167. *Id.* at 528-30.

168. *Id.* at 530. The court noted that the Supreme Court in *Doe* limited the Fifth Amendment protection of private papers and that "if the contents of private papers are protected at all—a matter to which we express no opinion today—it is only in rare situations, where compelled disclosure would break 'the heart of our sense of privacy.'" *Id.* (quoting *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir.), *cert. dismissed*, 473 U.S. 925 (1985) (citing *United States v. Doe*, 465 U.S. 605, 619 n.2 (1984) (Marshall, J., concurring in part))).

169. *Id.* at 530. Accord *United States v. Mason*, 869 F.2d 414, 416 (8th Cir. 1989) (acknowledging the erosion of the *Boyd* holding but implicitly approving of the narrow Fifth Amendment privacy protection articulated in *Butcher*).

170. *Steinberg*, 837 F.2d at 530.

171. 929 F.2d 981 (4th Cir. 1991).

172. *Id.* at 982. One of the department's contractors, Technology and Management Services, Inc. (TMS) allegedly gave "gratuities to Department employees in return for favorable treatment on contracts and mischarged the Department on contracts." *Id.* The appellants in this case, *Wujkowski* and *Stone*, were the officers of TMS to whom subpoenas were issued. *Id.*

173. *Id.*

records, the subpoena required that one officer produce "records related to a beach home he owned,"¹⁷⁴ including "a list of names and addresses of all people who had used the house" within a given period of time and "any correspondence related to its use."¹⁷⁵

The officers agreed to submit the business documents to the district court for an *in camera* review but refused to produce them to the department for inspection, asserting a Fifth Amendment claim that the documents were privileged because they were personal.¹⁷⁶ Rejecting this argument, the district court ordered the officers to produce the records to the department for inspection.¹⁷⁷ When one officer refused to produce the documents relating to his beach house, the court held him in contempt.¹⁷⁸

On appeal, the Fourth Circuit reviewed the two approaches used by the Supreme Court to decide whether the Fifth Amendment privilege should apply to particular papers.¹⁷⁹ Citing *Bellis*, the court noted that the initial analytical approach emphasized "whether the contents of a subpoenaed item would be self-incriminating."¹⁸⁰ The court then noted that the Supreme Court in *Fisher* shifted its Fifth Amendment standard

174. *Id.* Specifically, "[t]he Department contended that Wujkowski had allowed its employees to use the house in return for preferential treatment for his business interests." *Id.*

175. *Id.*

176. *Id.* Initially, the officers obeyed a court order to produce the calendars and schedules for an "*in camera* review to determine whether the materials were corporate or personal." *Id.* However, the department then contended that an *in camera* review was unnecessary and requested the court to so rule. *Id.* Holding that the contents of the documents were not protected by the Fifth Amendment, the court determined that an *in camera* review of the papers was unnecessary and ordered their production to the department. *Id.* at 983-84. It is this order that the officers refused to obey, claiming a Fifth Amendment right against self-incrimination. *Id.*

177. *Id.* The district court held that neither the business records nor the calendars' and schedules' contents were protected by the Fifth Amendment privilege. *Id.* at 983. The court further held that "the act of producing any personal notations in these materials did not create any additional threat of self-incrimination beyond the unprivileged act of producing the corporate notations." *Id.*

178. *Id.*

179. *Id.* On appeal, the department contended that neither the documents' contents nor the act of producing them was protected by the Fifth Amendment privilege. *Id.*

180. *Id.* (citing *Bellis*, 417 U.S. at 87).

to "whether the act of production associated with relinquishing an item would be self-incriminating."¹⁸¹

Relying upon holdings of the Eighth¹⁸² and First¹⁸³ Circuits, the Fourth Circuit held that the officers could not invoke the Fifth Amendment privilege to shield the documents' contents from scrutiny.¹⁸⁴ The court reasoned that the only compulsion created by the department's demand was the act of producing the documents.¹⁸⁵

III. *In re Grand Jury Subpoena Duces Tecum*

In *In re Grand Jury Subpoena Duces Tecum*,¹⁸⁶ the Securities and Exchange Commission (SEC) investigated Doe in 1989 in connection with suspected violations of federal securities laws.¹⁸⁷ Because the investigation involved Doe's personal brokerage accounts, the SEC issued a subpoena demanding the production of certain documents, including Doe's personal

181. *Id.* (citing *Fisher*, 425 U.S. at 410).

182. *Id.* See *United States v. Mason*, 869 F.2d 414, 416 (8th Cir. 1989) (holding that the admission of day-timers as private papers did not violate the Fifth Amendment right against self-incrimination). The Fourth Circuit's reliance on *Mason* is curious since the *Mason* court suggested that certain private documents could possibly receive Fifth Amendment protection. *Mason*, 869 F.2d at 416.

183. *Wujkowski*, 929 F.2d at 983. See *In re Steinberg*, 837 F.2d 527, 530 (1st Cir. 1988) (holding that the contents of notebooks were not protected by the Fifth Amendment privilege). The Fourth Circuit's reliance on *Steinberg* is also curious since the First Circuit in *Steinberg* indicated approval of at least a modest content-based protection. *Id.* at 530.

184. *Wujkowski*, 929 F.2d at 983. Accord *In re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989) (holding that the Fifth Amendment privilege "does not cover the contents of any voluntarily prepared records, including personal ones"); *In re Grand Jury Proceedings*, 759 F.2d 1418, 1419 (9th Cir. 1985) (stating that "the Supreme Court has now made it clear that regardless of the precise characterization of the [subject] papers, the contents of such documents are not privileged under the Fifth Amendment in the absence of some showing that creation of the documents was the product of compulsion").

185. *Wujkowski*, 929 F.2d at 983 (citing *Fisher*, 425 U.S. at 410 n.11). Noting that some of the subpoenaed documents were corporate records, the court stated that any official records would not be protected by the personal privilege against self-incrimination. *Id.* Because the determinative factor in the act of production analysis was whether the documents were personal or corporate, the court remanded the case to the district court for further factfinding regarding the nature of the documents. *Id.* at 984-86.

186. 1 F.3d 87 (2d Cir. 1993), cert. denied, 114 S. Ct. 920 (1994).

187. *Id.* at 88. Doe had previously testified before the SEC about the "trading of securities in his personal brokerage accounts." *Id.* at 89.

"[d]esk calendars, diaries and appointment books.'"¹⁸⁸ Doe complied with the subpoena and produced photocopies of documents along with a letter from his attorney indicating that the material produced was "entitled to confidential treatment . . . and that access to them by any third party not a member of the Commission or its Staff [would] be denied."¹⁸⁹

During this civil investigation, the U.S. Attorney for the Southern District of New York requested that the SEC turn over the Doe documents for government inspection and the SEC complied.¹⁹⁰ The U.S. Attorney suspected that the original calendar had been altered before it was photocopied and given to the SEC.¹⁹¹ Therefore, a grand jury issued a subpoena demanding the production of Doe's original personal calendar.¹⁹²

Doe refused to surrender his calendar, arguing that the subpoena should not be enforced because "the contents of the calendar as well as the act of producing it were protected by the Fifth Amendment."¹⁹³ The district court agreed and held that the calendar was an "intimate personal document" and that both the original and altered calendar were protected by the Fifth Amendment privilege.¹⁹⁴

A. *The Second Circuit Majority Opinion*

On appeal to the United States Court of Appeals for the Second Circuit, Doe relied on *Boyd*, continuing his argument that "the contents of the calendar [were] protected from compelled production" under the self-incrimination clause of the

188. *Id.*

189. *Id.* The following information was stamped on every page of Doe's documents: "This document is provided to the United States Securities and Exchange Commission solely for its use, and neither the document nor its contents may be disclosed to any other person or entity, pursuant to a claim of confidentiality made by letter dated JAN 28 1991." *Id.*

190. *Id.*

191. *Id.* When the photocopied calendar was examined by the U.S. Attorney, the government became suspicious that entries in the original version of the calendar had been "whited-out" with "liquid paper" before it was copied and produced to the SEC. *Id.* The government confirmed its suspicions when Doe's attorney allowed the U.S. Attorney to look at the documents. *Id.*

192. *Id.*

193. *Id.* Doe also contended that the government had breached the confidentiality agreement between Doe and the SEC "by providing a copy of the calendar to the U.S. Attorney's Office." *Id.*

194. *Id.* at 90.

Fifth Amendment.¹⁹⁵ The court acknowledged the holding of *Boyd* but interpreted its appearance in later cases as “dictum,” thus indicating to the Second Circuit that certain aspects of the majority decision in *Boyd* did not survive *Fisher*.¹⁹⁶

The Second Circuit reasoned that the Fifth Amendment could not act as a “general protector of privacy.”¹⁹⁷ The court then stated that the Fifth Amendment would not protect against disclosing private information but would protect against compelling self-incrimination.¹⁹⁸ Following *Boyd*, Doe argued that the Fifth Amendment protected the contents of the voluntarily prepared non-business related calendar.¹⁹⁹

The first issue analyzed by the *In re Grand Jury Subpoena Duces Tecum* court was whether the contents of the calendar were protected by the Fifth Amendment.²⁰⁰ The court determined that they were not for three reasons.²⁰¹ First, the court distinguished *Boyd* from *In re Grand Jury Subpoena Duces Tecum* because the documents in *Boyd* were business related while the calendar in *In re Grand Jury Subpoena Duces Tecum* was a non-business document.²⁰² Second, the court reasoned that *Fisher* and its progeny had undermined the *Boyd* holding and, therefore, protection of privacy was provided for under the Fourth Amendment rather than under the Fifth Amendment.²⁰³ That is, under *In re Grand Jury Subpoena Duces Tecum*, *Andresen* and *Fisher*, the right to invoke the privilege against self-incrimination turned on whether the desired document was created voluntarily and whether the act of producing it would con-

195. *Id.*

196. *Id.* at 90-91. The court relied on *Fisher*, which reasoned that the contents of a document created voluntarily cannot be deemed compelled evidence within the ambit of the Fifth Amendment. *Id.* at 91. The court then observed that the *Fisher* Court concluded that summonses for documents created voluntarily could be enforced “unless the act of producing the documents was itself subject to a valid Fifth Amendment privilege.” *Id.*

197. *Id.* at 93.

198. *Id.* at 91 (citing *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975)).

199. *Id.* at 92.

200. *Id.* at 90-93.

201. *Id.* at 92-93.

202. *Id.* at 92.

203. *Id.* at 93.

stitute compulsory testimony.²⁰⁴ Third, the court was guided by the opinions of three other courts of appeals, which held that the Fifth Amendment did not protect the contents of voluntarily created business or personal documents.²⁰⁵

The second issue analyzed by the *In re Grand Jury Subpoena Duces Tecum* court was whether producing the calendar itself constituted self-incriminating testimony.²⁰⁶ The court noted that since Doe had already given a copy of the calendar to the SEC and testified to the Grand Jury about its whereabouts, existence, and use, producing the actual calendar would disclose nothing more to the government than Doe himself had already disclosed to the SEC.²⁰⁷ Thus, producing the calendar would neither "implicitly authenticate" the document nor disclose the location or existence of the subpoenaed calendar to the government.²⁰⁸ The court concluded that compliance with the subpoena would only constitute "surrender" of the calendar rather than testimonial evidence.²⁰⁹ The court held, therefore, that the Fifth Amendment privilege against self-incrimination did not apply to the act of producing Doe's calendar.²¹⁰

B. *The Dissenting Opinion*

Judge Altimari dissented and contended that the Supreme Court had applied its Fifth Amendment holding in *Boyd* regarding the protection of the contents of private papers in subsequent decisions.²¹¹ He noted that the *Boyd* holding as it relates to protection of private papers has never been reversed,²¹² "nor has a majority of the Court indicated that it would so rule in a

204. *Id.* However, the Second Circuit noted that *Fisher* did not address whether the Fifth Amendment created a zone of privacy that would shield private documents created voluntarily. *Id.* at 91.

205. *Id.* at 93 (citing *Wujkowski*, 929 F.2d at 983, 985; *In re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989); *In re Grand Jury Proceedings*, 759 F.2d 1418, 1419 (9th Cir. 1985)).

206. *Id.* at 93-94.

207. *Id.* at 93.

208. *Id.*

209. *Id.*

210. *Id.* at 93-94.

211. *Id.* at 95 (Altimari, J., dissenting) (citing *Wilson v. United States*, 221 U.S. 361, 377 (1911); *United States v. White*, 322 U.S. 694, 698 (1944); *Couch v. United States*, 409 U.S. 322, 330 (1973); *Bellis v. United States*, 417 U.S. 85, 87 (1974)).

212. *Id.*

case dealing with personal papers.”²¹³ Moreover, Judge Altimari criticized the majority for its failure to even mention the Third Circuit decision, *In re Grand Jury Proceedings*,²¹⁴ in which the court held that the Fifth Amendment provides protection against compulsory disclosure of “self-incriminating private papers, such as purely personal date books.”²¹⁵ He then noted the four other circuits²¹⁶ that had suggested that the Fifth Amendment privilege against self-incrimination may still apply to the contents of certain private documents.²¹⁷ Thus, Judge Altimari concluded that the Second Circuit should follow the *Boyd* holding until the Supreme Court itself overrules *Boyd*.²¹⁸

IV. Analysis

Boyd and later Supreme Court cases indicated that the Fifth Amendment protected the contents of private papers.²¹⁹ Although *Boyd* held specifically that the contents of private papers were protected,²²⁰ the Court in subsequent cases did not directly address the issue of protection of purely private papers.²²¹ Instead, the Court decided issues involving the protection of papers held by third persons²²² and those of partnerships²²³ and corporations.²²⁴ Therefore, one could argue that the Court had been referring to the protection of private papers merely in dicta.²²⁵

However, the better view is that the repetition of the *Boyd* holding in later cases reflected an established standard of law.

213. *Id.*

214. 632 F.2d 1033 (3rd Cir. 1980).

215. *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d at 96 (Altimari, J., dissenting) (citing *In re Grand Jury Proceedings*, 632 F.2d 1033, 1042 (3d Cir. 1980)).

216. See *Butcher v. Bailey*, 753 F.2d 465 (6th Cir.), cert. dismissed, 473 U.S. 925 (1985); *In re Steinberg*, 837 F.2d 527 (1st Cir. 1988); *United States v. Mason*, 869 F.2d 414 (8th Cir.), cert. denied, 492 U.S. 907 (1989); *In re Grand Jury Investigation*, 921 F.2d 1184 (11th Cir. 1991).

217. *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d at 96.

218. *Id.*

219. *Boyd v. United States*, 116 U.S. 616, 634-35 (1886); *Couch v. United States*, 409 U.S. 322, 330 (1973); *Bellis v. United States*, 417 U.S. 85, 87 (1974).

220. *Boyd*, 116 U.S. at 634-35.

221. See *supra* notes 80-114, 127-34 and accompanying text.

222. *Couch v. United States*, 409 U.S. 322 (1973).

223. *Bellis v. United States*, 417 U.S. 85 (1974).

224. *Wilson v. United States*, 221 U.S. 361 (1911).

225. *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d at 91.

Nowhere is this clearer than in *Bellis* when the Court, in 1974, stated that "it has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony."²²⁶

This standard has been questioned because the *Fisher* Court emphasized that the Fifth Amendment would only protect the contents of private papers if the act of producing them involved self-incrimination.²²⁷ *Fisher*, decided only two years after *Bellis*, involved a taxpayer's business papers that had been transferred to his attorney.²²⁸ The Court held that the taxpayer's self-incrimination privilege was "not violated by enforcement of the summonses directed toward" his lawyer.²²⁹ The Court reasoned that there was no more personal compulsion directed at the taxpayer in *Fisher* than that which was directed against the taxpayer in *Couch* where the subject papers were in the hands of an accountant.²³⁰

The taxpayer in *Fisher* argued that the *Boyd* holding prohibited the production of his papers.²³¹ The Court found, however, that preparation of the subject papers was "wholly voluntary"²³² and, therefore, could not be considered "compelled testimonial evidence."²³³ This reasoning has become the basis of the claim that the *Boyd* holding did not survive *Fisher*.²³⁴ The problems with this claim are that 1) the *Fisher* Court did not overrule *Boyd*, 2) the *Fisher* Court did not question the validity of the longstanding principle of law regarding Fifth Amendment privacy protection, which had been repeated two

226. *Bellis*, 417 U.S. at 87.

227. *Fisher*, 425 U.S. at 408.

228. *Id.* at 394.

229. *Id.* at 397.

230. *Id.* at 397-98.

231. *Id.* at 395, 405.

232. *Id.* at 409.

233. *Id.* at 409-10.

234. See *United States v. Doe*, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring). Justice O'Connor's concurring opinion contended that the *Boyd* holding had been repeated as dicta, but that it did not survive *Fisher*. *Id.* See also *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d 87 (2d Cir. 1993), cert. denied, 114 S. Ct. 920 (1994).

years earlier in *Bellis*,²³⁵ and 3) the *Fisher* Court expressly stated that the protection of truly private papers was not at issue in the case.²³⁶

The Second Circuit in *In re Grand Jury Subpoena Duces Tecum*²³⁷ overlooked these three problems and applied the reasoning of *Fisher* to purely private papers.²³⁸ The court reasoned that the *Fisher* rationale undermined the continued validity of *Boyd*.²³⁹ Additionally, it relied heavily on Justice O'Connor's concurring opinion in *Doe*.²⁴⁰ However, Justice O'Connor's concurrence was a conclusory one-paragraph opinion that lacked historical analysis.²⁴¹ Although the Second Circuit conceded that no other justice joined in her opinion, the court determined that the Supreme Court majority in *Bouknight*²⁴² indicated agreement with her conclusion in *Doe*.²⁴³ However, *Bouknight* involved the production of a child²⁴⁴ and did not consider documents of any kind, private or otherwise. Therefore, *Bouknight* should not have been relied upon to implicitly overrule the well established Fifth Amendment protection of private papers.

The Second Circuit also relied upon decisions of other circuit courts to determine that the Fifth Amendment does not protect the contents of subpoenaed documents.²⁴⁵ The Second Circuit's reliance on these cases is appropriate because the Fourth, Ninth and District of Columbia Circuits considered and rejected the view that the *Boyd* content-based standard is still good law.²⁴⁶

235. *Bellis*, 417 U.S. at 87; see *supra* text accompanying note 226.

236. *Fisher*, 425 U.S. at 401 n.7.

237. 1 F.3d 87 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994).

238. *Id.* at 91.

239. *Id.*

240. *Id.* at 92.

241. See *United States v. Doe*, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring).

242. 493 U.S. 549 (1990).

243. *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d at 92.

244. *Baltimore Dep't of Social Servs. v. Bouknight*, 493 U.S. 549, 551 (1990).

245. *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d at 93 (citing *In re Grand Jury Proceedings*, 759 F.2d 1418, 1419 (9th Cir. 1985); *United States v. Wujkowski*, 929 F.2d 981, 983, 985 (4th Cir. 1991); *In re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989)).

246. *Wujkowski*, 929 F.2d at 983; *In re Grand Jury Proceeding*, 759 F.2d at 1419; *In re Sealed Case*, 877 F.2d at 84.

However, the Second Circuit's analysis is seriously flawed because the court ignored important and recent decisions in other circuits. The court's holding in *In re Grand Jury Subpoena Duces Tecum* directly conflicts with *In re Grand Jury Proceedings*,²⁴⁷ in which the Third Circuit held that the Fifth Amendment prohibited the compelled production of private papers.²⁴⁸ The Third Circuit convincingly detailed the Supreme Court's repeated reaffirmation of the *Boyd* content-based standard.²⁴⁹ The court also explained how the Fifth Amendment's privilege against self-incrimination helped to create a "zone of privacy" into which the government may not intrude.²⁵⁰ Echoing Justice Brennan's concurring opinion in *Fisher*,²⁵¹ the Third Circuit reasoned:

Committing one's thoughts to paper frequently stimulates the development of an idea. Yet, persons who value privacy may well refrain from reducing thoughts to writing if their private papers can be used against them in criminal proceedings. This would erode the writing, thinking, speech tradition basic to our society.²⁵²

In *In re Grand Jury Subpoena Duces Tecum*, however, the Second Circuit ignored this powerful argument.

Finally, the Third Circuit based its holding upon its view of the Framers' intent of the American Constitution and the his-

247. 632 F.2d 1033 (3rd Cir. 1980).

248. *Id.* at 1044.

249. *Id.* at 1042-43.

250. *Id.* at 1043.

251. 425 U.S. at 414 (Brennan, J., concurring). Justice Brennan eloquently argued:

Many of the matters within an individual's knowledge may as easily be retained within his head as set down on a scrap of paper. I perceive no principle which does not permit compelling one to disclose the contents of one's mind but does permit compelling the disclosure of the contents of that scrap of paper by compelling its production. Under a contrary view, the constitutional protection would turn on fortuity, and persons would, at their peril, record their thoughts and the events of their lives. The ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or the events of those memories would become the subjects of criminal sanctions however invalidly imposed.

Id. at 420.

252. *In re Grand Jury Proceedings*, 632 F.2d at 1043.

torical setting in which they drafted the Fifth Amendment.²⁵³ The court quoted a mid-18th century English decision prohibiting a search for private papers as wrongfully "compelling self accusation."²⁵⁴ The Third Circuit further noted that the English court observed that "papers are often the dearest property a man can have."²⁵⁵

In addition, the Second Circuit in *In re Grand Jury Subpoena Duces Tecum* ignored the interesting compromise position advanced by the First,²⁵⁶ Sixth²⁵⁷ and Eighth Circuits,²⁵⁸ which rejected the broad *Boyd* content-based standard and suggested a limited Fifth Amendment protection for the contents of private papers. The Sixth Circuit initially articulated this limited protection by indicating that contents could be protected "only in rare situations, where compelled disclosure would break 'the heart of our sense of privacy.'"²⁵⁹

Furthermore, Judge Altimari's dissent in *In re Grand Jury Subpoena Duces Tecum* noted correctly that *Boyd* has never been overruled.²⁶⁰ Judge Altimari distinguished the production

253. *Id.* at 1043-44.

254. *Id.* at 1043 n.19 (quoting *Entick v. Carrington*, 19 Howell's State Trials 1029, 1038, 1041, 1063 (K.B. 1765)).

255. *In re Grand Jury Proceedings*, 632 F.2d at 1044 (citing O. J. ROGGE, *THE FIRST AND THE FIFTH* 178 (1949) (quoting *Entick v. Carrington*, 95 Eng. Rep. 807, 817-18 (1765))).

The Third Circuit also observed that the constitution of Virginia in 1776 contained a self-incrimination clause, even though an accused was not permitted to testify in his own defense at that time. *Id.* The court then reasoned that the constitutional guarantee "would have been meaningless" if "an accused could . . . be forced to give his private writings to be used as evidence against him in a criminal trial." *Id.*

256. *In re Steinberg*, 837 F.2d 527, 529-30 (1st Cir. 1988).

257. *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir.), *cert. dismissed*, 473 U.S. 925 (1985).

258. *United States v. Mason*, 869 F.2d 414, 416 (8th Cir.), *cert. denied*, 492 U.S. 907 (1989).

259. *Butcher*, 753 F.2d at 469 (quoting *United States v. Doe*, 465 U.S. 605, 618 n.2 (1985) (Marshall, J., concurring in part)). *Accord Steinberg*, 837 F.2d at 530; *Mason*, 869 F.2d at 416.

260. *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d at 95. Judge Altimari also observed that two Supreme Court Justices, Marshall and Brennan, responded jointly to Justice O'Connor's concurrence in *United States v. Doe*, 465 U.S. 605, 618-19 (1984), with their beliefs that the Fifth Amendment continued to protect some private papers. *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d at 95.

of a child in *Bouknight* from the production of documents containing "one's innermost thoughts."²⁶¹

The Supreme Court considered but denied a petition for certiorari filed by appellee Doe in *In re Grand Jury Subpoena Duces Tecum*.²⁶² Had the Supreme Court granted certiorari, the proper outcome should have been a reaffirmation of the *Boyd* Fifth Amendment content-based standard and of the values enunciated in *In re Grand Jury Proceedings*.²⁶³ Such an outcome would assure the vitality of the Framers' original intent regarding the Fifth Amendment's protection of privacy. An acceptable alternative would be the limited protection accorded the contents of private papers as suggested by the First, Sixth and Eighth Circuits.²⁶⁴

Given the confusion amongst the circuits regarding the Fifth Amendment's protection of private papers, it is likely that a case similar to *In re Grand Jury Subpoena Duces Tecum* will soon again be before the Supreme Court. Eventually, the Supreme Court will be forced to resolve the disharmony amongst the circuits. At that point, if the rationale and holding of the Second Circuit in *In re Grand Jury Subpoena Duces Tecum* becomes the law of the land, the Supreme Court will have issued an astonishing re-interpretation of the Fifth Amendment. The Self-Incrimination Clause would no longer have any role in the protection of American privacy.²⁶⁵

261. *Id.* at 95-96.

262. 1 F.3d 87 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994).

263. 632 F.2d 1033 (3rd Cir. 1980).

264. *In re Steinberg*, 837 F.2d at 530; *Butcher*, 753 F.2d at 469; *Mason*, 869 F.2d at 416.

265. In 1976, Justice Brennan observed that "[e]xpressions are legion in opinions of [the Supreme] Court that the protection of personal privacy is a central purpose of the privilege against compelled self-incrimination." *Fisher*, 425 U.S. at 416 (Brennan, J., concurring). Justice Brennan further demonstrated that "[w]ithout a doubt, the common-law privilege against self-incrimination in England extended to protection against the production of incriminating personal papers prior to the adoption of the United States Constitution." *Id.* at 418 n.4.

The threat to the historical foundation of the Self-Incrimination Clause is best and most simply expressed by Leonard Levy in his description of the refusal of an English court in 1744 to honor the prosecution's request that a defendant be required to turn over his business records: "Lord Mansfield summed up the law by declaring that the defendant, in a criminal case, could not be compelled to produce any incriminating documentary evidence 'though he should hold it in his hands in Court.'" LEVY, *supra* note 10, at 330.

V. Conclusion

The Fifth Amendment privilege against self-incrimination was first taken away from corporations, then from partnerships, and later from persons who had transferred their personal documents to a third party. In the Second Circuit, because of *In re Grand Jury Subpoena Duces Tecum*, the Fifth Amendment no longer protects one's personal papers, calendars, diaries or other private documents, which may contain thoughts that were never intended to be published. Thus, a prosecutor in the Second Circuit can now expose one's innermost written thoughts to the public.

The Supreme Court has undeniably shifted its position on whether the Fifth Amendment protects private papers without adequately explaining why its shifts were necessary or how its position has remained consonant with the original intent of the Framers of the Fifth Amendment. Until the Supreme Court decides the scope of Fifth Amendment protection to be accorded to private papers, however, the federal circuit courts of appeals will continue to apply their own interpretations of the Constitution. Thus, it is possible that in one part of our nation, a private diary containing one's innermost thoughts will be protected from public scrutiny while in another part of this country, those same thoughts will be open to public scrutiny.

Since the Supreme Court has chosen, once again, not to decide this constitutional issue, the fate of the constitutional right against self-incrimination regarding the contents of one's personal papers remains unclear. Meanwhile, the Second Circuit's decision in *In re Grand Jury Subpoena Duces Tecum* has created more disharmony amongst the circuits regarding this issue, and the Supreme Court's denial of certiorari to *In re Grand Jury Subpoena Duces Tecum* has only thwarted its resolve.

Sharon Worthy-Bulla*

* To my loving family, parents, friends, and my mentor Alex Smith.