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COMMENT

THE FIFTH AMENDMENT AND THE PRODUCTION OF DOCUMENTS: A NEW RATIONALE

During its last term, the Supreme Court decided two cases involving the production of documents and papers; one involved the use of a search warrant,¹ the other a subpoena duces tecum.² Both cases raised the fifth amendment issues.³ In both instances, the Supreme Court found no violation of the privilege against self-incrimination.⁴

This comment will examine the history of the privilege as applied in cases involving the production of documents. It will set forth the rationale that seems to have emerged in the recent decisions and will note how the current rationale differs from the principles utilized in the earlier cases. Finally, the comment will analyze the scope of the decisions.

BACKGROUND AND HISTORY

The fifth amendment right against self-incrimination evolved "as an essential part of due process and as a fundamental principle of liberty and justice."⁵ Its basic purpose was to overcome inquisitions, eliminate coerced confessions⁶ and prevent abuses of power by law enforcement officials.⁷ It was based on the evolving principles of Magna Carta and the English common law,⁸ the common laws court drawing no distinction between compelled oral testimony and the forced production of written documents.⁹

In America, the privilege was extended to private papers and documents by the Supreme Court's decision in *Boyd v. United States*.¹⁰ In a civil suit for forfeiture against the members of a partnership, an order was issued to claimants to produce an invoice indicating the quantity and value of

1. *Andresen v. Maryland*, 96 S. Ct. 2737 (1976).

2. *Fisher v. United States*, 96 S. Ct. 1569 (1976).

3. The fifth amendment states in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

4. *Andresen v. Maryland*, 96 S. Ct. 2737, 2747 (1976); *Fisher v. United States*, 96 S. Ct. 1569, 1582 (1976).

5. L. LEVY, *JUDGMENTS* 268 (1972).

6. *Id.* at 269.

7. *Ullmann v. United States*, 350 U.S. 422, 428 (1956).

8. L. LEVY, *JUDGMENTS* 267 (1972).

9. 3 *HOFSTRA L. REV.* 467 (1975).

10. 116 U.S. 616 (1886).

thirty-five cases of plate glass.¹¹ The claimants obeyed the order, but objected on fifth amendment grounds to admission of the invoice into evidence.¹² Merging the protections of the fourth and fifth amendments on the theory that the seizure of a man's private papers to be used in evidence against him was virtually equivalent to compelling him to be a witness against himself,¹³ the Court held that the statute¹⁴ providing for the order was unconstitutional.¹⁵ Therefore, the admission of the invoice into evidence violated the claimant's fourth and fifth amendment rights.¹⁶ While there was no blatant intrusion upon the claimant's constitutional rights, the principles of the amendments were said to apply to all invasions "of the sanctity of a man's home and the privacies of life" by the government or its employees.¹⁷ The Court noted that if the constitutional provisions were not liberally construed, they would lose their vitality.¹⁸ The language of *Boyd* was broad and far-reaching and was intended to deter the slightest encroachment on an individual's rights.¹⁹

11. *Id.* at 618.

12. *Id.*

13. *Id.* at 633. The merger of the fourth and fifth amendments is known as the "convergence theory." Justice Bradley borrowed the idea from the language of the English case of *Entuck v. Carrington*, 19 How. St. Tr. 1029 (1765). Justice Bradley stated that:

[A]ny 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, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

Boyd v. United States, 116 U.S. 616, 630 (1886).

He noted further that:

'[U]nreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment.

Id. at 633.

14. The statute provided that if the defendant or claimant failed to produce the "book, invoice, or paper" upon notice from the court, "the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court." *Id.* at 620. Justice Bradley held that this provision was tantamount to forcing the defendant or claimant to be a witness against himself. *Id.* at 635.

15. *Id.* at 638.

16. *Id.*

17. *Id.* at 630.

18. *Id.* at 635. Justice Bradley felt that the courts must be the watchdog of the constitutional rights of the citizen. He expressed some doubt about the competence of the legislature to discern future constitutional problems with a particular statute. *Id.*

19. *Id.* at 624. However, property rights dominated the Court's inquiry into the constitutional issues. The Court recognized that there are instances where the government has a

The fast growth and increasing complexity of the business world, which accompanied the twentieth century, necessitated the passage of regulatory legislation, such as the Sherman Anti-Trust Act.²⁰ The Court was soon faced with determining whether the privilege against self-incrimination would apply to a corporation,²¹ which the Sherman Act expressly deemed to be a person entitled to the same immunities as an individual.²² The Court held that there was a clear distinction between a natural individual and a corporate²³ or other collective entity.²⁴ The fifth amendment protection against self-incrimination was held to be available only to the person against whom disclosure was sought,²⁵ not to a third party, even if he were the agent of that person.²⁶ An officer of a corporation who might be incriminated by the contents of corporate documents could not claim the fifth amendment privilege,²⁷ neither could a sole shareholder who contended that the corporate papers and books were his individual property.²⁸ Because legal title to these documents was in the corporation,²⁹ they were held subject to examination by virtue of their character and the rules of law applicable to them.³⁰

This reasoning was also applied to unincorporated associations, such as labor unions³¹ and partnerships.³² If an organization had a character so

superior interest and is entitled to the property in question, such as in the case of seizure of stolen goods or required records open to the inspection of the revenue officers. *Id.*

20. 15 U.S.C. § 1 *et seq.* (1970).

21. *Wilson v. United States*, 221 U.S. 361 (1911); *McAlister v. Henkel*, 201 U.S. 90 (1906); *Hale v. Henkel*, 201 U.S. 43 (1906).

22. *See* 15 U.S.C. §§ 7, 12 (1970).

23. *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906).

24. *Rogers v. United States*, 340 U.S. 367, 371-72 (1951); *United States v. White*, 322 U.S. 694, 704 (1944).

25. *McAlister v. Henkel*, 201 U.S. 90, 91 (1906).

26. *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906); *McAlister v. Henkel*, 201 U.S. 90, 91 (1906).

27. *Wilson v. United States*, 221 U.S. 361, 380-82 (1911). The Court noted, however, that the privilege would protect an officer against the compulsory production of his private books and papers. *Id.* at 378.

28. *Grant v. United States*, 227 U.S. 74 (1913). The defendant shareholder contended that the papers and books were his individual property and that to disclose their contents or whereabouts or to produce them would tend to incriminate him. The Court rejected this contention, holding that the legal title to the books and papers was in the corporation, so that the fifth amendment privilege was not available to the defendant under the holding in *Wilson*. *Id.* at 80. If the principles of *Boyd* had not been circumscribed by *Wilson*, this result would not have been reached because of the close personal identification between the defendant and the corporation, a relationship that served as the basis of the holding in *Boyd*. *See generally* 3 HOFSTRA L. REV. 467, 474 (1975).

29. *Grant v. United States*, 227 U.S. 74, 77 (1913).

30. *See Wilson v. United States*, 221 U.S. 361, 382 (1911).

31. *United States v. White*, 322 U.S. 694 (1944).

32. *Bellis v. United States*, 417 U.S. 85 (1974). *See generally* 39 ALBANY L. REV. 545 (1975);

impersonal that it could not be said to embody or represent the purely private or personal interests of its members, the fifth amendment privilege was not available to it or its representatives in their official capacity.³³ An individual who held the records of an unincorporated association was presumed to be acting in a purely representative capacity³⁴ and could not claim his personal privilege for the association's records.

If a statute requires that records be maintained to aid in regulatory programs,³⁵ these records fall outside the protection of the fifth amendment because of their public character.³⁶ However, the Supreme Court has been hesitant to expand the required records doctrine,³⁷ and in fact has limited it to records of a type usually kept for non-criminal regulatory purposes.³⁸

In *Couch v. United States*,³⁹ the Court was presented with the documents question in a slightly different context. The Court held that the

3 HOFSTRA L. REV. 467 (1975). In *Bellis* the institutional identity of the partnership was analogized to that of the labor union in *White*. "While small, the partnership did have an established institutional identity independent of its individual partners." 417 U.S. at 85. Many factors, such as the state partnership statutes, partnership employees, separate partnership checking accounts, separate partnership tax returns for federal tax purposes and the fact that the state regards a partnership as a distinct entity for numerous purposes, led to this conclusion. *Id.* at 95-97. This identity was stressed as the important factor in determining whether the privilege would be available to the partnership. The Court refused to decide whether the same result would have been reached if a small family partnership had been involved or if there were some other pre-existing relationship among the partners. *Id.* at 101.

The Court distinguished its decision as to partnerships in this case from that in *Boyd*, which also involved a partnership, by stating:

[A]t [the *Boyd*] stage in the development of our Fifth Amendment jurisprudence, the potential significance of this fact [of partnership] was not observed by either of the parties or the Court. The parties treated the invoice at issue as a private business record, and the contention that it might be a partnership record held in a representative capacity, and thus not within the scope of the privilege, was not raised. The Court therefore decided the case on the premise that it involved the 'compulsory production of a man's private papers.' . . . It was only after *Boyd* had held that the Fifth Amendment privilege applied to the compelled production of documents that the question of the extension of this principle to the records of artificial entities arose. We do not believe that the Court in *Boyd* can be said to have decided the issue presented today.

Id. at 95 n.2 (citations omitted).

33. *United States v. White*, 322 U.S. 694, 701 (1944).

34. See 39 ALBANY L. REV. 545, 553-54 (1975).

35. *Shapiro v. United States*, 335 U.S. 1 (1948). In this case, records were required to be kept by the Emergency Price Control Act.

36. *Id.* at 33-34. See Note, *The Taxpayer's Expectation of Privacy as a Bar to Production of Records Held By His Attorney*, 16 WM. & MARY L. REV. 666, 691-92 (1975).

37. The Supreme Court has not yet applied *Shapiro* to tax records, although several lower courts have. 16 WM. & MARY L. REV. 666, *supra* note 36, at 692.

38. See *Marchetti v. United States*, 390 U.S. 39, 57 (1968).

39. 409 U.S. 322 (1973).

protection of the fifth amendment was not available to a taxpayer who asserted her privilege to avoid the production of her business records by her accountant.⁴⁰ Finding neither a legitimate expectation of privacy in the records⁴¹ nor any semblance of governmental compulsion against the accused,⁴² the Court enforced the production of the documents. Possession, rather than ownership,⁴³ of the documents sought "bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment."⁴⁴ In dictum, the Court noted that constructive possession or temporary divestment of possession may leave the compulsion on the accused substantially intact.⁴⁵

These decisions have sharply narrowed the principles of *Boyd*. Collectively, the cases indicate that the fifth amendment privilege can only be claimed by an individual holding documents in a private or personal capacity. The Court has disregarded its own admonition that the fifth amendment must be liberally construed to prevent a gradual deterioration of its protection.⁴⁶ The amendment has been construed literally, not liberally, in the last several years.⁴⁷

40. *Id.* at 335-36. The Internal Revenue Service issued a summons to the taxpayer's accountant for the production of the records of the taxpayer's business, a sole proprietorship. *Id.* at 324. For the statute authorizing the issuance of an IRS summons, see INT. REV. CODE OF 1954, § 7602. For a discussion of the use of the summons, see *Donaldson v. United States*, 400 U.S. 517 (1971), where the Court held that:

Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. . . . There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. . . . To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law.

Id. at 535-36 (citations omitted), quoted in *Couch v. United States*, 409 U.S. 322, 326 (1973).

41. 409 U.S. at 335. See generally Note, *The Fifth Amendment and the Production of Records: Are Ownership and Possession Always Necessary?*, 9 GA. L. REV. 658 (1975).

42. 409 U.S. at 336.

43. See 9 GA. L. REV. 658 (1975), *supra* note 41, for a discussion of the role of ownership and possession in invoking the fifth amendment in cases involving the production of documents.

44. 409 U.S. at 331.

45. *Id.* at 333.

46. See *Boyd v. United States*, 116 U.S. 616, 635 (1886).

47. While the basic fifth amendment premises in *Boyd*, as applied to documents, were being narrowed, another body of law involving the fifth amendment was developing. See *United States v. Mara*, 410 U.S. 79 (1973); *United States v. Dionisio*, 410 U.S. 1 (1973); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *Schmerber v. California*, 384 U.S. 757 (1966). These decisions concerned use of identifying physical characteristics of an accused. Generally, they held that such use was outside the protection of the fifth amendment and distinguished physical and testimonial evidence. See

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*Fisher v. United States*⁴⁸ involved two circuit court decisions⁴⁹ with almost identical fact situations. In both cases Internal Revenue agents had contacted taxpayers in connection with an investigation. Later, the taxpayers retained attorneys and obtained their accountants' work papers, turning them over to the attorneys to use in representing them. The agents issued documentary summonses to the attorneys, both of whom refused to produce the specified documents.⁵⁰ The third⁵¹ and fifth⁵² circuits reached different results, and the Supreme Court granted certiorari to resolve this conflict.⁵³

e.g., *Schmerber v. California*, 384 U.S. 757 (1966), where the Court stated that the fifth amendment "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. . . ." *Id.* at 761.

48. 96 S. Ct. 1569 (1976).

49. *United States v. Fisher*, 500 F.2d 683 (3d Cir. 1974); *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974).

50. *Fisher v. United States*, 96 S. Ct. 1569, 1572-73 (1976); *United States v. Fisher*, 500 F.2d 683, 685-86 (3d Cir. 1974); *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974).

51. *United States v. Fisher*, 500 F.2d 683 (3d Cir. 1974). The Court of Appeals for the Third Circuit held that the clients' fifth amendment privilege was not available to the attorney unless the taxpayers could prove that their brief possession of the accountant's records before delivering them to the attorney had created a right of constructive possession. *Id.* at 692. The court noted that the taxpayers should not lose their privilege because they surrendered actual possession to the attorney if they could have successfully resisted the summons because the documents were in a "rightful personally private possession." *Id.* at 689. The court found that the taxpayers' possession of the documents had been "temporary and insignificant" and therefore did not give rise to the necessary element of personal compulsion. *Id.* at 691. Compelled incrimination is what the fifth amendment prohibits. The privilege is not equated with ownership. Elements of ownership, possession and expectation of privacy are "effective as jurisprudential tools . . . [but] are not, in and of themselves, controlling." *Id.* at 689-90.

52. *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974). The Court of Appeals for the Fifth Circuit held that had the taxpayer retained possession of the documents, he could have asserted his fifth amendment privilege. *Id.* at 452-53. Because of the confidential nature of the attorney-client relationship, he had a legitimate expectation of privacy as to the documents transferred to the attorney pursuant to that relationship. The taxpayer has different expectations when he transfers documents to an attorney than he does when he transfers them to an accountant. The accountant is under a legal duty to disclose at least some of the information while the attorney has an ethical obligation to prevent disclosures of confidential material. While the taxpayers retained this expectation of privacy when the documents were transferred to the attorney, the placing of the documents in the attorney's hands did not create a fifth amendment privilege. *Id.* at 453. However, such a legitimate expectation of privacy coupled with his right to actual possession constituted constructive possession by the taxpayer, so that to compel production of the documents would violate the taxpayer's fifth amendment protection. *Id.* See CODE OF PROFESSIONAL RESPONSIBILITY, EC 4-4 (1975).

53. 420 U.S. 906 (1975).

Documents in the Hands of a Third Party

At the outset of its opinion, the Court noted that all the parties in the case had agreed that "if the Fifth Amendment would have excused a taxpayer from turning over the accountant's papers had he possessed them, the attorney to whom they are delivered for the purpose of obtaining legal advice should also be immune from subpoena."⁵⁴ While the Court agreed with this proposition for reasons discussed later in its opinion, it held that the taxpayer's fifth amendment privilege would not excuse the attorney from production because the taxpayer's fifth amendment privilege was not violated by the enforcement of the subpoena to the attorney to produce his client's records.⁵⁵

The Court found that the taxpayer himself was not compelled to do anything, and that the fifth amendment only prohibits "the use of 'physical or moral compulsion' exerted on the person asserting the privilege."⁵⁶ The essential element of compulsion against the accused was lacking, as it had been in *Couch*.⁵⁷ The taxpayer's fifth amendment privilege was not violated by enforcement of the subpoena directed to the attorney,⁵⁸ regardless of whether the privilege would have barred a subpoena directing the taxpayer to produce the documents while they were in his possession.⁵⁹ No constructive possession or insignificant, temporary relinquishment of possession of the papers was found to exist in this situation.⁶⁰ The taxpayer's delivery of the records to his attorney was not any different than the delivery of records to the accountant in *Couch*.⁶¹

The Court discredited the expectation of privacy language of *Couch* and *Boyd*.⁶² While noting that privacy purposes may be served by the fifth amendment, the Court stated that not every invasion of privacy violates the privilege against self-incrimination.⁶³ Under appropriate safeguards,

54. *Fisher v. United States*, 96 S. Ct. 1569, 1573 (1976) (emphasis in original).

55. *Id.* at 1573-74.

56. *Id.*

57. *Couch v. United States*, 409 U.S. 322, 336 (1973).

58. 96 S. Ct. at 1574.

59. *Id.* at 1573-74, 1576.

60. *Id.* at 1574.

61. *Id.* As the Court stated in *Couch*:

[A]ctual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime. Yet situations may well arise 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.

409 U.S. at 333.

62. *See* 96 S. Ct. at 1575.

63. *Id.*

private information obtained without compelling self-incriminating testimony may be used in evidence, and "disclosure of private information may be compelled if immunity removes the risk of incrimination."⁶⁴ The fifth amendment prohibits compelled self-incrimination, not the disclosure of private information.⁶⁵ The Court found that privacy interests are adequately protected by the fourth amendment "or evidentiary privileges such as the attorney-client privilege."⁶⁶

Attorney-Client Privilege

Although the taxpayer relied on his fifth amendment privilege and did not directly raise the attorney-client privilege, the Court noted that the relevant body of law and policies that govern the attorney-client privilege had been invoked.⁶⁷ For the attorney-client privilege to apply, the documents must have been protected in the hands of the client and must have been transferred for the purpose of obtaining legal advice.⁶⁸ Documents that could have been obtained by court process from the client when they were in his possession may also be obtained from the attorney to whom they have been transferred.⁶⁹ When the client himself would be privileged from production of the documents, the attorney who has possession is not required to produce them.⁷⁰ Thus the Court was squarely presented with the question whether, under the fifth amendment, the documents could have been obtained from the client while they were in his possession.⁷¹

Documents in the Hands of the Fifth Amendment Claimant

The element of compulsion would have clearly been present had the

64. *Id.*

65. *Id.* at 1576.

66. *Id.*

67. *Id.* All parties agreed that the taxpayer should not be forced to surrender otherwise protected documents because he had turned them over to his attorney in order to obtain legal assistance. The lower courts have been in conflict over whether a similar privilege should be extended to the accountant-client relationship. See generally Comment, *The Fifth Amendment Privilege Against Self-Incrimination in Tax Investigations*, 6 TEXAS TECH U. L. REV. 1055 (1975); *Tax Symposium*, 2 HOFSTRA L. REV. 129 (1974).

68. *Fisher v. United States*, 96 S. Ct. 1569, 1576-77 (1976).

69. *Id.* at 1577.

70. *Id.* See 8 J. WIGMORE, EVIDENCE § 2307, at 591 (McNaughton rev. 1961).

71. For a discussion of the attorney-client privilege, see Petersen, *Attorney-Client Privilege in Internal Revenue Service Investigations*, 54 MINN. L. REV. 67 (1969). See also Note, *United States v. Kasmir: A Clarification of Fifth Amendment Rights Regarding Documents Held by an Attorney?*, 36 U. PITT. L. REV. 728 (1975); Comment, *United States v. Kasmir: Taxpayer's Privilege Against Self-Incrimination—Accountant's Work Papers in Attorney's Possession with Taxpayer-Client as Conduit*, 10 TULSA L.J. 646 (1975).

subpoena been directed to the taxpayer himself.⁷² As the Court forcibly stated: "A subpoena served on a taxpayer requiring him to produce an accountant's work papers in his possession without doubt involves substantial compulsion."⁷³ The contents of the papers might even be assumed to incriminate him, said the Court; however, the papers must be testimonial as well as compelled and incriminating before a valid fifth amendment claim can be asserted.⁷⁴ The Court found that the contents of the papers were not testimonial because the taxpayer had not prepared them. Rather, they were the uncoerced product of the taxpayer's accountant.⁷⁵

However, the Court's fifth amendment analysis did not end here. Since the element of compulsion would have been present, the Court probed further, examining the act of producing the documents, and indicating that if the "tacit averments" made in complying with a subpoena were both incriminating and testimonial, a valid claim would be present, regardless of the character of the contents of the documents.⁷⁶ As the Court noted:

Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It would also indicate the taxpayer's belief that the papers are those described in the subpoena.⁷⁷

In the fact situation presented, the Court found that these implicit admissions were not sufficient testimony so as to fall within the fifth amendment's protection.⁷⁸ Furthermore, the Court found nothing incriminating in them, even "assuming . . . minimal testimonial significance."⁷⁹

72. *Fisher v. United States*, 96 S. Ct. 1569, 1580 (1976).

73. *Id.*

74. *Id.*

75. *Id.* The Court attacked the lack of testimonial communication more broadly in a footnote, where it stated:

The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege And, unless the Government has compelled the subpoenaed person to write the document . . . the fact that it was written by him is not controlling with respect to the Fifth Amendment issue.

Id. at 1580 n.11 (citations omitted). Is the Court merely emphasizing the independence of the elements of testimony, incrimination and compulsion; or is it suggesting that it is going to take a very restrictive view of things testimonial?

76. *Id.* at 1580.

77. *Id.*

78. *Id.* at 1581.

79. *Id.*

AN EMERGING FIFTH AMENDMENT RATIONALE

When the requested documents are in the hands of the claimant, the elements of compulsion, incrimination and testimonial communication must all be present to invoke the protection of the fifth amendment privilege. The pivotal element is compulsion. If there is no compulsion upon the claimant, the Court's inquiry is over.

Compulsion exists in the forced production of documents by a motion to produce or a subpoena duces tecum issued to the person claiming the privilege.⁸⁰ The compulsion must be upon the claimant, not a third person. If the person claiming the privilege is not compelled to do something himself, his fifth amendment rights are not violated.⁸¹ An agency relationship does not alter this result.⁸²

Possession of the documents is important in aiding the Court in evaluating whether personal compulsion has been exerted on the person claiming the privilege, although it is not a controlling consideration. It is evident that the compulsion requirement will be more easily met if a person is forced to produce papers that are in his possession. Seemingly, certain constructive possessions may be sufficient to satisfy the compulsion requirement.⁸³

If the Court finds that there is compulsion exerted on the claimant, it will look to see whether the claimant is compelled to make an incriminating and testimonial communication.⁸⁴ This communication may be oral testimony, a written statement or a communicative or assertive act.⁸⁵ First, the Court will examine the *contents* of the documents. The contents may be either incriminating or testimonial, or both. If either of these elements is missing, the Court will next look beyond the contents to the compelled *act of producing* the papers. If the act of producing the documents is both incriminating and testimonial, then there is a valid fifth amendment claim.⁸⁶

This rationale in *Fisher* differs from that in the earlier cases in that it

80. *See id.* at 1574.

81. *Id.* Compare the holdings in *Wilson*, *Grant* and *White*, which seem to turn on the elements of ownership and an expectation of privacy.

82. *Id.*

83. The Court in *Fisher* did not give further guidelines as to what would constitute constructive possession.

84. *Fisher v. United States*, 96 S. Ct. at 1579. *See generally* 8 J. WIGMORE, EVIDENCE § 2263, at 378 (McNaughton rev. 1961).

85. 8 J. WIGMORE, EVIDENCE § 2264, at 379-80 (McNaughton rev. 1961). *See* MCCORMICK, EVIDENCE § 126, at 267-68 (1972).

86. *See Fisher v. United States*, 96 S. Ct. 1569, 1580-81 (1976).

has completely eliminated any privacy considerations.⁸⁷ Beginning with *Boyd*,⁸⁸ and continuing through *Couch*, an individual's right to or expectation of privacy was a primary concern of the Court in determining whether there was a valid fifth amendment claim. In *Fisher*, the Court has stated that this will no longer be part of an inquiry into a fifth amendment claim.⁸⁹ Possession and ownership are not primary considerations under this rationale. They are still important factors, but only when considered in relation to the elements of compulsion, testimony and self-incrimination.

SUBSEQUENT APPLICATION

With *Fisher* just decided, the Court had no problem dealing with the fifth amendment issues presented in *Andresen v. Maryland*.⁹⁰ While fourth amendment questions were also presented, the Court refused to follow the directives of *Boyd* and considered each issue separately and independently.⁹¹

Andresen was an attorney and a sole practitioner. During an investigation of allegations of real estate settlement fraud, his activities came under scrutiny. Investigation disclosed that he had defrauded a purchaser. Having obtained a warrant, police searched Andresen's office and seized certain real estate papers and files. Andresen claimed that his fourth and fifth amendment rights had been violated.⁹²

The Supreme Court applied the elements of the rationale developed in *Fisher* to the facts of this case to determine whether Andresen's privilege against self-incrimination had been violated. The Court found that the search and seizure, made lawfully under the fourth amendment,⁹³ of statements voluntarily committed to writing did not involve compulsion within the meaning of the fifth amendment.⁹⁴ Andresen was not required to aid

87. See *id.* at 1575-76.

88. The Court stated the following:

Several of Boyd's express or implicit declarations have not stood the test of time Purely evidentiary (but "non-testimonial") materials, as well as contraband and fruits and instrumentalities of crime, may now be searched for and seized under proper circumstances Also, any notion that "testimonial" evidence may never be seized and used in evidence is inconsistent with *Katz v. United States* [389 U.S. 347 (1967)]

96 S. Ct. at 1579 (citations and footnote omitted).

89. *Id.* at 1575-76.

90. 96 S. Ct. 2737 (1976).

91. See *id.* at 2744.

92. *Id.* at 2741-44.

93. *Id.* at 2747-50.

94. *Id.* at 2744-45.

in any way in the discovery, production or authentication of evidence.⁹⁵ With a finding of no compulsion, the fifth amendment inquiry ended.

THE SCOPE OF THE RATIONALE

So far, the new fifth amendment rationale has only been applied to the compelled production or seizure of business documents. The Court has not directly addressed the question of whether the fifth amendment privilege would be available if an individual's personal papers were involved. However, with the elimination of privacy interests as an element of inquiry, it would seem that, absent physical or moral compulsion against the accused, there would be no valid fifth amendment claim even in the case of strictly personal papers.⁹⁶ Mr. Justice Brennan, concurring in *Fisher*, suggested that the majority was "laying the groundwork" for future restrictions of the privilege even as to "private papers."⁹⁷ Dissenting in *Andresen*, he found the fifth amendment circumvented by the Court's refusal to find compulsion in the defendant's non-resistance to the search.⁹⁸ He noted that what the government cannot force the accused to produce, it can secure through the mechanism of search and seizure.⁹⁹

In earlier decisions, the expectation of privacy was used as a measuring device to help determine whether certain papers would be considered personal and private and, therefore, be protected by the fifth amendment. It is now unclear what standard will apply in evaluating whether they are private, if indeed the Court recognizes any distinction at all when next confronted with the issue.

CONCLUSION

Fisher represents a genuine attempt by the Court to articulate its reasoning in fifth amendment document cases. The decision at least makes it clear that a fifth amendment claim is not to be determined by a defendant's expectations of privacy. From *Andresen* it seems that fourth and fifth amendment issues will receive separate and independent analysis. The open question is whether the rationale in *Fisher* will apply to the production of materials previously called "private papers." The import-

95. *Id.* at 2745.

96. See *Fisher v. United States*, 96 S. Ct. 1569, 1590-92 (1976) (Marshall, J., concurring). Justice Marshall stated that "the Court's approach should still focus upon the private nature of the papers subpoenaed and protect those about which *Boyd* and its progeny were most concerned." *Id.* at 1591.

97. *Id.* at 1583 (Brennan, J., concurring).

98. *Andresen v. Maryland*, 96 S. Ct. 2737, 2751 (1976) (Brennan, J. dissenting).

99. *Id.*

ance of *Fisher*, and to a lesser extent *Andresen*, lies not in the erosion of the principles of *Boyd*, but rather in what seems to be their gradual replacement of the same.

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