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TO ACT OR NOT? THAT IS THE QUESTION: SELF-INCRIMINATION AND THE SOLE PROPRIETOR

INTRODUCTION

Imagine that a sole proprietor is being criminally prosecuted by the government. She has a series of documents in her possession that incriminate her based upon the charges brought by the government. The government has issued a *subpoena duces tecum* requesting that these incriminating documents, in existence prior to the issuance of the subpoena, be turned over.

In light of the Supreme Court's latest pronouncements regarding the Fifth Amendment privilege against self-incrimination,¹ and the circuit courts' interpretation of those pronouncements, how would she fare in claiming this privilege? The matter is hardly well-settled, but the issues may be illuminated through an investigation into the various arguments the sole proprietor may raise. This Comment will examine the historical background leading up to the current state of the law,² the possible outcomes of a defense that asserts the right to protection of the subpoenaed material's contents,³ and finally,

1. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law" *Id.*

2. See *infra* notes 5-33 and accompanying text.

3. See *infra* notes 34-74 and accompanying text.

will investigate the merits of the argument that production itself is incriminating and, accordingly, should not be compelled.⁴

I. BACKGROUND

The privilege against self-incrimination originated in the common law procedures and ecclesiastical courts,⁵ probably in reaction to abusive policies carried out by the courts of the Star Chamber and the High Commission. Previously, the defendant's primary procedural safeguard was the right to speak on his own behalf,⁶ without the assistance of counsel.⁷ As the system evolved from inquisitorial to adversarial, lawyers sought to exclude those statements⁸ of their clients that would bolster prosecutors' case through self-incrimination.⁹

By the end of the seventeenth century, the privilege had successfully taken hold in the American courts.¹⁰ The Fifth Amendment was introduced as one of the proposed Constitutional amendments during the first session of Congress in 1789, by then Representative James Madison.¹¹ Adopted into the Bill of Rights, the Amendment provides that "no person shall

4. See *infra* notes 75-119 and accompanying text.

5. See 8 JOHN HENRY WIGMORE, EVIDENCE ON TRIALS AT COMMON LAW § 2250, at 269 (John T. M'Naughton ed., 1961).

6. 92 MICH. L. REV. 1047 (1994).

7. *Id.* at 1049.

8. Jean F. Rydstrom, Annotation, *Supreme Court's Views As To Application Of Fifth Amendment Privilege Against Self-Incrimination To Compulsory Production Of Documents*, 48 L. Ed. 2d 852, 855 (1977) (revisiting the desire of the early courts to hear an admission of guilt from the defendant's own lips).

9. Eben Moglen, *Origins of the Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1130 (1994).

10. See WIGMORE, *supra* note 5, at 292; George T. Felkenes, CONSTITUTIONAL LAW FOR CRIMINAL JUSTICE 283 (2d ed. 1988).

11. Daniel E. Will, "Dear Diary - Can You Be Used Against Me?": *The Fifth Amendment and Diaries*, 35 BOSTON C. L. REV. 965, 969 (1994) (citing 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789)).

be compelled in any criminal case to be a witness against himself”¹²

The purpose of the privilege against self-incrimination is said to be no less than the preservation of the adversarial system of justice itself.¹³ A sense of fair play and balance in the state-individual relation requires that the government, by its own labors, bear the full weight of evidence production in a criminal prosecution.¹⁴ As it developed, the privilege was understood to prohibit evidentiary searches which relied on torture or other forms of coercion.¹⁵ Various forms of coerced testimony have been endorsed or disallowed through the history of the Republic, but for the purposes of this Comment, we need only consider coercion through the use of a *subpoena duces tecum*.¹⁶ The Supreme Court has ruled that compulsion to testify by means of such a subpoena is sufficiently coercive to require protection under the Fifth Amendment.¹⁷

The parameters of the privilege against self-incrimination began to emerge slowly in the United States.¹⁸ The seminal case of *Boyd v. United States*¹⁹ defined the Supreme Court's construction

12. U.S. CONST. amend. V, cl. 3.

13. *Garner v. United States*, 424 U.S. 648, 655 (1976).

14. *Rydstrom*, *supra* note 9, at 857.

15. *Moglen*, *supra* note 10, at 1129.

16. A *subpoena duces tecum* is “a court process, initiated by a party in litigation, compelling production of certain specific documents and other items, material and relevant to facts in issue in a pending judicial proceeding, which documents are in custody and control of person or body served with process.” BLACK’S LAW DICTIONARY at 1426 (6th ed. 1990).

17. *See United States v. Mandujano*, 425 U.S. 564, 572 (1976) In accord, New York State endorses the view that legal compulsion is a sufficient basis for invoking this privilege. *People v. Sobotker*, 61 N.Y.2d 44, 47. 459 N.E. 187, 189, 471 N.Y.S.2d 78, 80 (1984). In New York, the use of a subpoena to force testimony from a reluctant witness satisfies the requirement that the testimonial communication be compelled. *Matter of Vanderbilt* 57 N.Y.2d 66, 78, 439 N.E.2d 378, 385, 453 N.Y.S.2d 662, 669 (1982).

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

19. *Id.*

of both the Fourth²⁰ and Fifth Amendments²¹ as general protectors of privacy and private information.²² The mutual reliance on and comparison between the two amendments has abated with time²³ thus their similarities will not be examined here other than parenthetically. Despite the flaws perceived by later Justices, *Boyd* dominated the Fifth Amendment discussion until quite recently.²⁴

Although the Self-Incrimination Clause ascended to Constitutional stature in 1789, it was nearly one hundred years before the Supreme Court would find occasion to bring the clause within sustained focus.²⁵ In *Boyd*, the Court examined the constitutionality of statutes which required defendants in forfeiture actions to produce incriminating evidence regarding the items subject to forfeiture.²⁶ The items at issue were thirty-five cases of polished plate glass which were allegedly subject to import duties.²⁷ At trial, the district attorney was granted an order, resembling a *subpoena duces tecum*,²⁸ directing the defendants to produce an invoice for twenty-nine cases of glass previously imported.²⁹ After complying with the order, under protest, the defendants were found guilty of fraudulently depriving the government of lawful duties.³⁰ After the circuit

20. U.S. CONST. amend. IV. The Fourth amendment states in pertinent part: "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated" *Id.*

21. U.S. CONST. amend. V; *Boyd*, 116 U.S. at 633 ("We have already noticed the intimate relation between the two amendments. They throw great light on each other . . . we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."). *Id.*

22. *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d 87 (2d Cir. 1993).

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

24. *Id.*

25. Kate E. Bloch, *Fifth Amendment Compelled Statements: Modeling the Contours Of Their Protected Scope*, 72 WASH. U. L.Q. 1603, 1609 (1994).

26. *Id.*

27. *Boyd*, 116 U.S. at 618.

28. Bloch, *supra* note 25, at 1609.

29. *Boyd*, 116 U.S. at 618.

30. *Id.*

court affirmed the judgment, certiorari was granted by the Supreme Court.³¹

The Court found that the action, though technically civil in nature, was essentially a criminal prosecution for Fifth Amendment purposes in that forfeiture was premised on a violation of the law.³² However, the Court held "that the Fifth Amendment, combining with the Fourth Amendment prohibition against unreasonable searches and seizures, erected a constitutional barrier to the compulsory production of incriminating documents."³³ Thus, any forcible and compulsory extortion of a person's private papers, to be used as evidence in an action in which he or she may be held criminally liable, was found to be the equivalent of prohibited compelled testimony.³⁴

II. CONTENT ARGUMENT

The Court in *Boyd* extended protection from compelled incrimination to a "man's private books and papers,"³⁵ absolutely and without exception.³⁶ Its' proposal that the constitutional provision be "liberally construed"³⁷ for the continued protection of personal rights has received something less than a warm reception. In fact, the Court's own words proved prescient as the ensuing interpretations unfolded:

31. *Id.*

32. *Id.* at 634 (noting that subsequent decisions have extended the scope of Fifth Amendment privilege to "any judicial proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory"); *See also* Gordon E. Hunt, *Fifth Amendment Limitations on the Compelled Production of Evidence*, 24 AM. CRIM. L. REV. 801, 802 (1987) (quoting *Kastigar v. United States*, 406 U.S. 547, 562 (1972)). New York State recognizes as valid an assertion of the privilege where criminal liability, including sanctions, may result from the testimony. *Anonymous Atty's v. Bar Ass'n of Erie Cty.*, 41 N.Y.2d 506, 510, 362 N.E.2d 592, 596, 393 N.Y.S.2d 961, 964 (1977).

33. Rydstrom, *supra* note 8, at 855-56.

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

35. *Id.* at 633.

36. Rydstrom, *supra* note 8, at 863 (noting that the invasion of the indefeasible rights of personal security, personal liberty and private property constitutes the essence of the violation).

37. *Boyd*, 116 U.S. at 635.

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.³⁸

History chronicles a long line of decisions which limited the protection enunciated by the Court in *Boyd*.³⁹ Accordingly, the initial erosion of the broad Fifth Amendment protection foreseen in *Boyd* involved corporate, partnership and labor union documents and then, documents of a personal nature in the possession of third parties.⁴⁰ The applicability of the privilege to corporations was negatively ruled on, with the Court noting that corporations were not guaranteed any constitutional rights.⁴¹ A corporate president could not refuse to produce corporate books which established his criminal conduct.⁴² A debtor could not prevent evidentiary use of books and records, from which he or she feared criminal charges might result, because the title and possession of the books had passed to the receiver in

38. *Id.* at 635.

39. *See, e.g.*, *Braswell v. United States*, 487 U.S. 99 (1988); *United States v. John Doe*, 465 U.S. 605 (1984); *Andresen v. Maryland*, 427 U.S. 463 (1976); *Fisher v. United States*, 425 U.S. 391 (1976); *Bellis v. United States*, 417 U.S. 85 (1974); *Couch v. United States*, 409 U.S. 322 (1973); *Schmerber v. California*, 384 U.S. 757, 762-63 (1966); *United States v. White*, 322 U.S. 694 (1944); *Johnson v. United States*, 228 U.S. 457 (1913); *Wilson v. United States*, 228 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906);

40. Sharon Worthy-Bulla, *An Analysis of In re Grand Jury Subpoena Duces Tecum (United States v. Doe): Does the Fifth Amendment Protect the Contents of Private Papers?*, 15 PACE L. REV. 303, 312 (1994).

41. *Id.* at 310 (citing *Hale v. Henkel*, 201 U.S. 43 (1906)).

42. *Rydstrom*, *supra* note 8, at 858 (citing *Wilson v. United States*, 221 U.S. 361 (1911)).

bankruptcy.⁴³ A labor union official was held to have no privilege to refuse to furnish union records sought by a grand jury.⁴⁴ There, the Court explained that the protection of individuals, rather than entities, was the purpose of the privilege.⁴⁵ A taxpayer who had turned over her books and records to her accountant could assert no Fifth Amendment privilege against compelled production of the books, the Court reiterated that the privilege was personal, adhering to the person but not the information that might incriminate her.⁴⁶ Possession of a partnership's financial records in a representational capacity compelled the Court to hold that the personal privilege was inapplicable and production could be compelled under such circumstances.⁴⁷

Fisher v. United States seriously eroded the scope of the *Boyd* decision.⁴⁸ Declaring that "the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him,"⁴⁹ the Court held that a taxpayer's attorney could be compelled to furnish tax records which were in the attorney's possession without violating the taxpayer's Fifth Amendment rights. Noting that "several of *Boyd's* express or

43. *Id.* (citing *Johnson v. United States*, 228 U.S. 457, 458 (1913)), noted for Justice Holmes' statement that "[a] party is privileged from producing the evidence, but not from its production.").

44. *Worthy-Bulla*, *supra* note 40, at 313 (citing *United States v. White*, 322 U.S. 694 (1944)).

45. *Id.*

46. *Rydstrom*, *supra* note 8, at 859 (citing *Couch v. United States*, 409 U.S. 322 (1973)). New York State interprets the privilege similarly; only the private property of the claimant, or property in her possession in a personal capacity is protected. *See People v. Doe*, 90 A.D.2d 669, 455 N.Y.S.2d 866 (4th Dep't 1982).

47. *Hunt*, *supra* note 32, at 801 (citing *Bellis v. United States*, 417 U.S. 85, 92 (1974)) (denying the right of "collective entities," including any "organization which is recognized as an independent entity apart from its individual members," to assert the privilege).

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

49. *Id.* at 409

implicit declarations have not stood the test of time,"⁵⁰ Justice White's majority opinion found that the Fifth Amendment was not designed to deal with privacy issues generally, but rather within the confines of compelled self-incrimination.⁵¹

Thus, the focus of the inquiry regarding the Fifth Amendment privilege shifted from whether the contents of the documents are privileged to whether production of the documents is a privileged act.⁵² The Court, however, noted that the act of producing evidence in response to a subpoena had its own communicative aspects, including tacit concession of the existence of the papers.⁵³ Protection of privacy, it held, was to be found in other sections of the Constitution, namely the First and Fourth Amendments, and from evidentiary privileges such as the attorney-client privilege.⁵⁴ Left unanswered was whether the Fifth Amendment would shield the contents of private papers, such as tax records privately held, from compelled production.⁵⁵

The Court further clarified its position in holding that the seizure of an attorney's business records, and their subsequent admission into evidence, did not violate his or her right against compelled self-incrimination.⁵⁶ The seized records did not compel the attorney's testimony because he neither aided in their delivery nor was he forced to compile the records initially.⁵⁷ The

50. *Id.* at 407.

51. *Id.* at 400-01 ("We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy - a word not mentioned in its text and a concept directly addressed in the Fourth Amendment.").

52. Hunt, *supra* note 33, at 805.

53. Rydstrom, *supra* note 8, at 860.

54. Hunt, *supra* note 32, at 805. New York State case law reflects the shift in focus from a contents-based inquiry, holding that the privilege does not protect information, personal or private, per se. *Matter of Vanderbilt* 57 N.Y.2d 66, 78, 439 N.E.2d 378, 385, 453 N.Y.S.2d 662, 669, 6 (1982) (citing *Andresen v. Maryland*, 427 U.S. 463, 477 (1976)).

55. *See In re Grand Jury Subpoena Duces Tecum*, 1 F.3d 87, 91 (2d Cir. 1993).

56. Rydstrom, *supra* note 8, at 861

57. *Andresen v. Maryland*, 427 U.S. 463, 473 (1976).

focus of the analysis, the Court reasoned, rests solely on the voluntariness of the communication.⁵⁸

The Court revisited the question in the context of a claim by a sole proprietor that the compelled production of his business records infringed upon his Fifth Amendment rights.⁵⁹ Any protection claimed on the basis of the content of the documents was rejected.⁶⁰ Thus, the question left open in *Fisher*, whether privately held business records were protected by the Fifth Amendment, was answered negatively in *United States v. Doe*.⁶¹ The Court characterized the business records as less personal than the tax records in *Fisher*⁶² which were not protected and further stated “if the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.”⁶³

The argument over the protection afforded by the Fifth Amendment to the contents of private papers was hardly over.⁶⁴ Justice O'Connor, in a separate concurrence to *Doe*, stated flatly that “the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind.”⁶⁵ Chastising Justice O'Connor for her eagerness to declare the *Boyd* doctrine dead, Justice Marshall, joined by Justice Brennan, wrote separately to note that the decision in *Doe* rested on the act of production and did not explicitly rule on the contents argument.⁶⁶ Justice Stevens, in yet another separate opinion, also expressed his view that the contents argument was dispositive in *Doe*.⁶⁷ “Nonetheless, *Fisher*, *Andresen*, and *Doe* clearly signal that *Boyd*, at best, must be read in a very limited fashion.”⁶⁸

58. *In re Steinberg*, 837 F.2d 527 (1st Cir. 1988) (citing *Andresen*, 427 U.S. 463).

59. *United States v. Doe*, 465 U.S. 605 (1984).

60. *Braswell v. United States*, 487 U.S. 99, 104 (1988).

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

62. *In re Steinberg*, 837 F.2d at 530.

63. *Doe*, 465 U.S. at 612 n.10.

64. Will, *supra* note 11, at 981.

65. *Doe*, 465 U.S. at 618 (O'Connor, J., concurring).

66. *Id.* at 618 (Marshall, J., concurring in part).

67. *Id.* at 619 (Stevens, J., concurring in part).

68. *In re Steinberg*, 837 F.2d at 530.

The opinions of the circuit courts since *Doe* have split on the issue of protection afforded by the Fifth Amendment to the contents of any documents.⁶⁹ Four of the circuits have concluded that no document, personal or business, is protected if it is voluntarily prepared.⁷⁰ Four others remain undecided on the extent of protection afforded private papers.⁷¹ Three remaining circuits continue to recognize some Fifth Amendment protection based on the contents of the document.⁷² While it is possible that one's private diary will be protected from public scrutiny,⁷³ depending on which circuit the action arises in, the contents of one's business records will receive no such protection.⁷⁴ Until the Supreme Court definitively rules that the contents of a document are immaterial for granting the privilege of Fifth Amendment protection, there remains no certain answer to the dilemma faced by a defendant seeking to protect his private papers from scrutiny.

That the owner of a sole proprietorship may seek Fifth Amendment protection for the contents of subpoenaed material on

69. Will, *supra* note 11, at 984.

70. *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d 87, 93 (2d Cir. 1993) (noting that the Second, Fourth, Ninth and D.C. Circuit Courts have concluded that no document, personal or business, is protected if it is voluntarily prepared and holding that contents of voluntarily prepared private papers are not privileged), *cert. denied sub nom.*, *Doe v. United States*, 510 U.S. 1091 (1994); *United States v. Wujkowski*, 929 F.2d 981 (4th Cir. 1991) (finding contents of appointment books not privileged), *aff'd after remand sub nom.*; *United States v. Stone*, 976 F.2d 909 (4th Cir. 1992), *cert. denied* 507 U.S. 1029 (1993); *In re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989) (finding that the contents of voluntarily prepared records, including personal ones, are not privileged); *In re Grand Jury Proceedings*, 759 F.2d 1418 (9th Cir. 1985) (explaining that without a showing of compulsion, contents of business and personal documents are not privileged).

71. Will, *supra* note 11, at 984 n.203. The First, Seventh, Eighth, and Eleventh Circuits remain undecided.

72. *Id.* at 984 n.203. The Third, Fifth, and Sixth Circuits recognize some degree of protection based on the Fifth Amendment. *See Butcher v. Bailey*, 753 F.2d 465 (6th Cir. 1985), *cert. dismissed*, 473 U.S. 925 (1985); *United States v. Davis*, 636 F.2d. 1028 (5th Cir. 1981), *cert. denied*, 454 U.S. 862 (1981); *In re Grand Jury Proceedings*, 632 F.2d 1033 (3d Cir. 1980).

73. Worthy-Bulla, *supra* note 40, at 337.

74. *Andresen*, 427 U.S. 463, 477 (1976).

the grounds that such documents are incriminating, swims against the tide of the recent decisions in this area. On the more placid seas of *Boyd*, and its acceptance of a zone of privacy protected by both the Fourth and Fifth Amendments, such a stance would have gained safe harbor. In the more turbulent waters surrounding *Fisher*, the privilege might well have been ship-wrecked on any number of procedural sea mounts. In the wake of *Doe*, any effort to invoke the privilege under such circumstances would be akin to an attempt to turn the tide.

Therefore, the sole-proprietor's attempt to invoke his Fifth Amendment privilege based on the contents of the documents would likely be unsuccessful. *Fisher* informs us that the focus of the inquiry into privilege rests on the act of production.⁷⁵ *Doe* further explains that the records of a sole proprietor are without privilege in the context of Fifth Amendment challenge.⁷⁶ To the extent that the documents are truly personal, the sole proprietor's defense would profit from emphasizing the act of production aspect of self-incrimination.

III. ACT OF PRODUCTION ARGUMENT

The Supreme Court, in *Fisher*, changed the focus of its approach to Fifth Amendment privilege questions. From the historical concern of *Boyd* with the privacy of the contents of personal or business documents to one that excludes those contents from protection unless otherwise privileged under a compelled production theory.⁷⁷ The new approach indicates that the testimonial aspects of the act of producing voluntarily prepared documents may be privileged.⁷⁸ *Fisher* is significant in that in addition to its rejection of *Boyd*,⁷⁹ it recognizes that

75. *Fisher*, 425 U.S. 391, 411 (1976).

76. *Doe*, 465 U.S. at 612.

77. *Worthy-Bulla*, *supra* note 40, at 303.

78. Samuel A. Alito, *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27 (1986).

79. *Fisher*, 425 U.S. at 409 (stating "the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment.").

admissions of authentication, possession, and existence can be testimonial communication.⁸⁰

Boyd, which was never explicitly overturned in any subsequent decision, extended the privilege against self-incrimination to “any forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him”⁸¹ In *Fisher*, the Court recognized “that compliance with an [Internal Revenue Service] summons directing the production of documents would tacitly admit three facts: that the documents exist, that the summonsee controls or possesses them, and that they are the documents specified in the summons.”⁸² Similarly, in *Doe*, the Court accepted the findings of both the District Court⁸³ and the Court of Appeals⁸⁴ that the subpoena issued would compel the admission that the records exist, are authentic, and are in his possession.⁸⁵ Conversely, in *Andresen v. Maryland*,⁸⁶ the seizure of evidence described in a search warrant did not violate the petitioner’s rights because he was not required to aid in the discovery, production, or authentication of the incriminating evidence.⁸⁷

The act of production in *Fisher* was not found to be incriminating to the defendant taxpayer. There, the taxpayer, under investigation for possible civil or criminal liability under federal income tax laws, transferred certain documents relating to their accountants’ preparation of their tax return to their attorney. The Internal Revenue Service served a summons on the attorney

80. Brief in Opposition for Respondent at 41, *United States v. Doe*, 465 U.S. 605 (1984) (No. 82-786) [hereinafter Respondent’s Brief].

81. *Boyd*, 116 U.S. at 630.

82. Hunt, *supra* note 32, at 811-12 (citing *Fisher*, 425 U.S. at 410).

83. *In re Grand Jury Empanelled March 19, 1980*, 541 F. Supp. 1, 3 (D.N.J. 1981).

84. *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 335 (3d Cir. 1982).

85. *Doe*, 465 U.S. at 613 n.11 (citing *In re Grand Jury Empanelled March 19, 1980*, 541 F. Supp. at 3).

86. *Andresen*, 427 U.S. at 463.

87. *Id.* at 475 (analogizing the seizure of evidence pursuant to a search warrant to the petitioner’s right against self-incrimination under the Fifth Amendment).

directing that the records be produced. The attorney refused, claiming "that enforcement would involve compulsory self-incrimination of the taxpayers . . . and would violate [the right of] the taxpayers . . . to communicate in confidence with their attorney."⁸⁸ The taxpayer intervened and made similar claims.

The Court affirmed the findings below in holding that the taxpayers' privilege under the Fifth Amendment was "not violated by the enforcement of the summonses."⁸⁹ The privilege attaches only when a person is compelled to be a witness against himself. Here, because the taxpayer was not compelled to produce the documents himself, "the ingredient of personal compulsion against [the] accused is lacking."⁹⁰ Additionally, even the taxpayers' own production of these documents would have "minimal testimonial significance"⁹¹ because "the existence and location of the papers" were well known and the fact that the defendant had possession of them added little to the Government's information.⁹²

The Court reached the opposite conclusion regarding the act of production in *Doe*. There, the owner of several sole proprietorships was served with subpoenas demanding production of certain business records in connection with an investigation into corruption in the awarding of municipal contracts.⁹³ *Doe*

88. *Fisher*, 425 U.S. at 395 (finding that a violation of the taxpayers' Fourth Amendment right against unreasonable searches and seizures was also claimed).

89. *Id.* at 397.

90. *Couch v. United States*, 409 U.S. 322, 329 (1973).

91. *Fisher*, 425 U.S. at 412.

92. *Id.* at 411.

93. *Doe*, 465 U.S. at 607. The *Doe* Court set forth broad categories of records sought by the subpoena:

general ledgers; general journals; cash disbursement journals; petty cash books and vouchers; purchase journals; vouchers; paid bills; invoices; cash receipts journal; billings; bank statements; canceled checks and checkstubs; payroll records; contracts and copies of contracts, including all retainer agreements; financial statements; bank deposit tickets; retained copies of partnership income tax returns; retained copies of payroll tax returns; accounts payable ledger; accounts receivable ledger; telephone company statement of calls and telegrams, and all telephone toll slips; records of all

sought to quash the subpoenas in District Court.⁹⁴ The motion was granted to the extent that all records not required to be kept by law were deemed protected by the privilege. The court found that the act of production had communicative aspects which warranted Fifth Amendment protection.⁹⁵

On appeal, the Third Circuit affirmed the holding below, endorsing the view that the act of production would compel Doe to admit to the existence of the records, affirm his possession of the records, and authenticate that the records are those described in the subpoenas. Additionally, it noted that the government had failed to show that it knew, as a certainty, that each of the documents demanded of Doe was in his control or possession,⁹⁶ as distinguished from the situation in *Fisher* where the possession of the records sought was held insignificant. Further, the Government was in effect asking Doe to furnish the "missing link" in its evidentiary chain by demanding information which would show that he operates the businesses and controls the bank accounts.⁹⁷ These findings were accepted by the Supreme Court, which held that the record supported the decision reached.⁹⁸

escrow, trust, or fiduciary accounts maintained on behalf of clients; safe deposit box records; records of all purchases and sales of all stocks and bonds; names and home addresses of all partners, associates, and employees; W-2 forms of each partner, associate, and employee; workpapers; and copies of tax returns.

Id. at 607 n.1.

94. *In re Grand Jury Empanelled*, 541 F. Supp. at 2.

95. *Id.*

96. *In re Grand Jury Empanelled*, 680 F.2d at 335.

97. *Id.* at 335 n.12 ("It is precisely this sort of expedition that the fifth amendment traditionally has been interpreted to prevent."). *Id.* at 336.

98. *Doe*, 465 U.S. at 614. New York State, in a case closely paralleling *Doe*, held that the act of production would compel a sole practitioner to incriminate himself. *See Henry v. Lewis*, 102 A.D.2d 430, 478 N.Y.S.2d 263 (1st Dep't 1984). In *Lewis*, the psychiatrist-defendant sought to quash a subpoena compelling the production of medical and office records for an investigation into possible insurance fraud. *Id.* at 430-31, 478 N.Y.S.2d at 265. The court found that the contents of the records were not protected, but that production of the records would admit their existence, their possession by defendant and would verify their identification as the records sought. *Id.* at 434, 478 N.Y.S.2d at 267. The court, therefore, ordered the subpoena

The essential elements in any claim of Fifth Amendment privilege include the testimonial nature of the statement, compulsion, and incrimination. Questions of whether averments of the defendant or summonsee are testimonial *vel non* defy easy categorization. Their resolution will probably rely on the particular circumstances of the case at bar.⁹⁹ However, the result of that characterization will determine the outcome of the defendant's claim. If the statements are not found to be testimonial, but only attest to some factual or physical evidence, the defendant will not be successful in his claim and will subsequently be forced to testify.

Courts have held that evidence which merely incriminates, but otherwise contains no testimonial statement, passes constitutional muster.¹⁰⁰ The privilege protects the witness only from being compelled to testify against himself, or otherwise provide evidence of a testimonial or communicative nature.¹⁰¹

quashed to the extent that it required production of these records. *Id.* at 437, 478 N.Y.S.2d at 269.

99. *Fisher*, 425 U.S. at 410.

100. *Schmerber v. California*, 384 U.S. at 757, 761 (1966). In *Schmerber*, petitioner was subjected to blood withdrawal and a chemical analysis after being involved in a motor vehicle accident despite his objection to the test. *Id.* at 758-59. After a chemical analysis of the blood sample revealed that petitioner had "a percent by weight" of alcohol in his blood at the time of the [accident], petitioner was arrested and charged with the "criminal offense of driving an automobile while under the influence of intoxicating liquor." *Id.* Petitioner argued against the admissibility of the chemical analysis on the ground that the circumstance under which the blood was drawn and the admission of the chemical analysis into evidence violated "his privilege against self-incrimination under the Fifth Amendment." *Id.* at 759. However, the Court rejected petitioner's argument finding that his "testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of test, which depend[ed] on chemical analysis and on that alone." *Id.* at 765. Thus, the Court determined that petitioner's right against self-incrimination was not violated even though the chemical analysis was "an incriminating product of compulsion . . . since the blood test evidence . . . was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner." *Id.*

101 *People v. Damon*, 24 N.Y.2d 256, 261, 247 N.E.2d 651, 654, 299 N.Y.S.2d 830, 834 (1969). The New York courts, mirroring the federal courts, hold the privilege applicable only to testimonial or communicative

Compulsion which makes the witness the source of factual or physical evidence does not violate the privilege.¹⁰² Therefore, the Fifth Amendment's Self-Incrimination Clause only protects individuals from having assertions which convey information, explicitly or implicitly, about their knowledge and state of mind compelled by their own acts.¹⁰³ Whenever a response requires that a suspect communicate an assertion of fact or belief, he or she faces the "cruel trilemma of self-accusation, perjury, or contempt" and thus offers testimonial evidence.¹⁰⁴

Compelling a witness to testify affords the witness protection under the Fifth Amendment if it is invoked. In order to ensure that the defendant's right against compelled self-incrimination is not compromised, the court must determine whether the act of production itself would be testimonial.¹⁰⁵ Upon an affirmative finding in that inquiry, the court must then choose measures which may be employed to protect the defendant's Fifth Amendment rights. One such measure is the granting of the defendant's request for a motion to quash the order compelling production or testimony, as did the district court in *Doe*.¹⁰⁶ Another approach would be to require a grant of immunity from prosecution issued by the court or the prosecutor.¹⁰⁷

Immunity is a rational compromise between the legitimate demands of the prosecution to compel citizens to testify and the right of those citizens not to be compelled to indict

evidence provided by the defendant himself. *Id.* (citing *Schmerber*, 384 U.S. at 761).

102. *Id.* at 764.

103. *Braswell*, 487 U.S. at 122.

104. *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990).

105. Robert Marshall Heier, Note, *Books and Records and the Privilege Against Self-Incrimination*, 33 BROOK. L. REV. 70, 73 (1966). Among the methods employed to permit judicial inspection of records while preserving their secrecy are presenting the documents in a sealed envelope to the judge and presenting photostatic copies of the records with the incriminatory portions removed. *Id.* at 73-74.

106. *United States v. Doe*, 465 U.S. 605 (1984).

107. *Doe*, 465 U.S. at 616.

themselves.¹⁰⁸ Immunity statutes were adopted as a response to the needs of the government to require its citizens to bear witness in the investigation of crime and have been characterized as essential to the enforcement of various criminal statutes.¹⁰⁹ Recognition that the privilege against self-incrimination did not apply when immunity had been granted came soon after the privilege itself was recognized.¹¹⁰

The government in *Doe* argued that Doe's act of production would not be used against him in any way, negating any contention on his part that his testimony would be incriminating.¹¹¹ Doe had refused to produce the requested documents, despite the government's averments, on the grounds that without a formal grant there was no indication of the extent of immunity.¹¹² The government countered that Doe, in claiming a blanket Fifth Amendment privilege, had left the government with a choice of granting an overly broad immunity to which he was not entitled or granting no immunity at all. Instead, it urged the court itself to grant Doe the necessary immunity.¹¹³ The district court declined the invitation, as did both the Third Circuit and the Supreme Court.

Compelling a witness to give testimony is not the only source of the prosecutor's obligation to refrain from using the testimony against the witness. The obligation may also arise as part of an immunity agreement in which the witness provides the information in exchange for a promise from the prosecutor not to use it against him, known as "use immunity," or not to prosecute

108. *Kastigar v. United States*, 406 U.S. 441, 446 (1972) *reh'g denied*, 408 U.S. 931 (1972). In *Kastigar*, the district court ordered petitioner to answer questions under the grant of immunity when petitioners were likely to assert their Fifth Amendment privilege. *Id.* at 442. The issue was whether the United States government may compel testimony from an unwilling witness by conferring immunity upon him or her. *Id.* The Court held that immunity is sufficient to compel testimony over a claim of one's Fifth Amendment privilege. *Id.* at 453.

109. *Id.* at 447.

110. *Id.*

111. *Doe*, 465 U.S. at 616.

112. Respondent's Brief, *supra* note 80.

113. *In re Grand Jury Empanelled*, 680 F.2d at 337.

the witness at all, known as "transactional immunity."¹¹⁴ A grant of immunity cannot supplant the claimed Fifth Amendment privilege, but must be at least coextensive with the privilege in order to be held adequate.¹¹⁵ A statute which leaves the witness subject to prosecution for the offense to which he has testified fails to meet the requirements of the Constitution.¹¹⁶

Immunity from prosecution based on an assertion of Fifth Amendment privilege is currently provided for in Title 18 U.S.C. sections 6002¹¹⁷ and 6003.¹¹⁸ Until section 6002 was enacted in

114. *United States v. Eliason*, 3 F.3d 1149, 1152 (7th Cir. 1993).

115. *Kastigar*, 406 U.S. at 450.

116. *Id.* at 450-451.

117. 18 U.S.C. § 6002 (1996). Section 6002 provides in pertinent part:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to-

(1) a court or grand jury of the United States. . .

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Id.

118. 18 U.S.C. § 6003 (1996). § 6003 provides:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held *shall issue*, in accordance with subsection (b) of this section, *upon the request of the United States attorney* for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in sections 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant

1970, the various federal immunity statutes endorsed the use of transactional immunity.¹¹⁹ Ruling on the constitutionality of section 6002 in *Kastigar*, the Court considered the relative merits of transactional and use immunities.¹²⁰

A witness afforded transactional immunity would be assured that his or her compelled testimony could in no way lead to the infliction of criminal penalties.¹²¹ Thus, the prosecution would be barred from charging the witness on any matter related to the compelled testimony. Arguments that transactional immunity provided more protection than was constitutionally required centered on the fact that a witness who was granted such immunity received a greater amount of protection than a person whose testimony had merely been coerced.¹²² The witness whose testimony had been coerced would still be liable for criminal prosecution if the evidence he or she provided could be verified through other sources. Thus, leads which develop as a result of the coerced testimony, the "fruits" of the testimony, may uncover evidence which would subject the witness to prosecution.¹²³

Attorney General, request an order under subsection (a) of this section when in his judgment-

- (1) the testimony or other information from such individual may be necessary to the public interest; and
- (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Id. (emphasis added)

119. New York State, in contrast, has retained transactional immunity for witnesses compelled to give testimony by an offer of immunity. N.Y. CRIM. PROC. L. §50.10 (McKinney 1992).

120. *Kastigar*, 406 U.S. 441 (1973).

121. *Id.* at 466 (Douglas, J., dissenting).

122. *Id.* at 461. Transactional immunity affords the witness absolute immunity from prosecution for any offense related to the testimony. *Id.* at 453. In contrast, a witness may be prosecuted through the use of evidence gathered independently of her coerced testimony. *Id.* at 461.

123. *Id.* at 466 (Douglas, J., dissenting); see *United States v. Washington*, 860 F. Supp. 479 (N.D.Ill. 1994) (stating "[t]he fruit of the poisonous tree doctrine . . . derives from the Fourth Amendment and mandates the exclusion of evidence secured as a result of unlawful searches and seizures." The

Use immunity provides a narrower band of protection for the compelled witness in that he or she is protected against prosecution only for the precise testimony given. As in the case of the coerced witness, leads from that testimony may be pursued and used later to convict him.¹²⁴ Derivative use immunity requires that any direct or indirect evidence derived from the testimony is inadmissible in future prosecutions of the witness.¹²⁵ In *Kastigar*, the Court endorsed the constitutionality of use immunity with respect to 18 U.S.C. section 6002, finding that immunity from use and derivative use is coextensive with the scope of the privilege provided by the Fifth Amendment.¹²⁶

Under 18 U.S.C. section 6003, the court is required to grant immunity when it is requested by the prosecution.¹²⁷ However, without a request by the U.S. Attorney, the statute does not grant that authority to the court.¹²⁸ In *Doe*, "the Government never made a statutory request [for] immunity," instead urging the court "to adopt a doctrine of constructive use immunity."¹²⁹ In affirming the decision below, the Supreme Court declined to extend the jurisdiction of the courts to prospective grants of immunity without a request from the government.¹³⁰ Noting that the decision to seek use immunity requires a balancing of the government's interest in obtaining information and the risk that without immunity the prosecution of the subject of their investigation may be jeopardized, the Court found that Congress had expressly left this decision to the Justice Department.¹³¹

Title 18 U.S.C. sections 6002 and 6003, as federal statutes, necessarily apply only to the federal court system. However, each state has analogous statutes providing for the granting of either

doctrine applies in situations where a constitutional right has been violated, where there is a "poisonous tree." Moreover, the doctrine has been applied to violations of the Fourth, Fifth, and Sixth Amendments.) *Id.* at 482.

124. *Id.* at 466-67 (Douglas, J., dissenting).

125. *Id.* at 441.

126. *Id.* at 453.

127. *See* 18 U.S.C. § 6003.

128. *Doe*, 465 U.S. at 616.

129. *Id.*

130. *Id.*

131. *Id.* at 616-617.

transactional or use immunity.¹³² Additionally, the federal government is mandated to recognize the grant of immunity provided by states to the accused, as the states are mandated to recognize the immunity grants of both the federal government and its' sister states.

Without any indication that the government has information which would tend to render the sole proprietor's act of production insignificant, it will have difficulty showing that the testimonial element of his production is lacking. To the extent that the records are lawfully required to be kept, the act of production is merely factual and not privileged under the Fifth Amendment's Self-Incrimination Clause. Because the documents were in existence before the subpoena was issued, she has no argument that their assembly was compelled. A grant of immunity from prosecution would also remove the element of incrimination from the calculus the court must undertake to determine whether the testimony is privileged. However, the likelihood that the government is more interested in her testimony, than in her conviction, is remote.

CONCLUSION

An analysis of the likelihood of a particular defendant prevailing on a Fifth Amendment claim of privilege must consider several important variables. Primarily, since the Supreme Court has yet to rule decisively, a consideration of the question of content bears mentioning. Until the Court rules on the issue, vestiges of the *Boyd* doctrine will remain. The split in the circuit courts regarding the applicability of *Boyd*, in light of *Fisher* and *Doe*, reflects the role chance and geography will play in any informed discussion of a defendants' prospects.¹³³ Justice O'Connor's epitaph for *Boyd*¹³⁴ appears to have been delivered prematurely.

Proceeding to an act of production analysis, several factors must be examined: the testimonial nature of the

132. *Kastigar*, 406 U.S. at 447.

133. See *supra* notes 60-85 and accompanying text.

134. *Doe*, 465 U.S. at 618 (O'Connor, J., concurring).

production, the voluntariness *vel non* of the documents' assembly, the presence of a compelling force, and the nature of the evidence.¹³⁵ Again, the circuit courts are not in agreement on their application of the standards for each of these categories. In the face of irreconcilable court decisions, the attorney representing a defendant in a self-incrimination case has few reliable guideposts. Her or his task is therefore encumbered by the Supreme Courts' failure, thus far, to define the parameters of the privilege in a meaningful way. Such an attorney may be better able to state definitively when the privilege does not apply rather than when it does.

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135. See Hunt, *supra* note 32, at 804-814.