

“DEAR DIARY—CAN YOU BE USED AGAINST ME?”: THE FIFTH AMENDMENT AND DIARIES

[I]t frightens me to think that the private thoughts, hopes, dreams and despairs of all our citizens can now be seized by the government.

Senator Bob Packwood¹

INTRODUCTION

The recent struggle between the Senate Select Committee on Ethics and Senator Bob Packwood over enforcement of an Ethics Committee subpoena for Senator Packwood's personal diaries frames an important and unsettled issue in Fifth Amendment law: the extent, if any, of a Fifth Amendment protection for the contents of personal diaries.² In 1992, the Senate Select Committee on Ethics began an investigation of Senator Bob Packwood's alleged sexual misconduct, intimidation of victims and misuse of staff in efforts to intimidate and discredit the alleged victims.³ The Ethics Committee investigation ultimately included a subpoena for over eight thousand pages of a personal diary Senator Packwood maintained since 1969.⁴

Packwood offered information from his diaries during his Ethics Committee deposition, thus informing the committee that the diaries existed and contained information relevant to the investigation.⁵ Packwood and the committee then negotiated a deal pursuant to which Packwood allowed the committee to examine the diaries.⁶ Packwood broke the agreement after the committee sought information from the diaries outside of the initial scope of the investigation.⁷ In response,

¹ Katharine Seelye, *Packwood Gives up, Agreeing to Deliver Diary to Committee*, N.Y. TIMES, Mar. 15, 1994, at A21.

² See Interview (CNN television broadcast, Nov. 3, 1993) (Transcript on LEXIS) (according to former U.S. Attorney Joseph DiGenova, Supreme Court has not decided Fifth Amendment Protection for diaries).

³ See 139 CONG. REC. S14,725 (daily ed. Nov. 1, 1993) (statement of Sen. Bryan). See generally 139 CONG. REC. S14,725 (daily ed. Nov. 1, 1993) through 139 CONG. REC. S14,832 (daily ed. Nov. 2, 1993) for complete record of Senate debate and vote on the Packwood diaries subpoena.

⁴ See 139 CONG. REC. S14,735-36 (daily ed. Nov. 1, 1993) (statement of Sen. Packwood).

⁵ See 139 CONG. REC. S14,726 (daily ed. Nov. 1, 1993) (statement of Sen. Bryan); see also 139 CONG. REC. S14,733 (daily ed. Nov. 1, 1993) (statement of Sen. McConnell).

⁶ 139 CONG. REC. S14,726 (daily ed. Nov. 1, 1993) (statement of Sen. Bryan).

⁷ See *id.* (statement of Sen. Bryan). The committee discovered information that indicated possible additional violations of Senate rules as well as public laws. *Id.*

the committee issued a subpoena for the diaries, and the Senate voted overwhelmingly to allow the committee to seek enforcement of the subpoena in federal court.⁸

In February of 1994, in response to Senator Packwood's effort to invoke Fifth Amendment protection for the contents of his diaries, the United States District Court for the District of Columbia held that the Fifth Amendment does not protect the contents of any personal papers, and therefore does not protect Senator Packwood's personal diaries from the reach of the Ethics Committee subpoena.⁹ Accordingly, the D.C. District ordered Packwood to comply with the subpoena and turn his diaries over to the committee.¹⁰ In March of 1994, the Supreme Court denied Senator Packwood's request for a stay of the district court order pending his appeal.¹¹ On March 15, 1994, Packwood, citing legal bills of over \$1 million, discontinued his appeal of the D.C. District's order, and agreed to provide the Senate Ethics Committee with his diaries.¹²

Three United States Supreme Court opinions, spanning nearly 100 years, bear on whether the Fifth Amendment protects the contents of any documents.¹³ In the earliest, *Boyd v. United States*, the Court held that the Fifth Amendment protected an individual from compelled production of all personal documents.¹⁴ In so holding, the *Boyd* Court struck down an Act to combat customs duties fraud that gave prosecuting attorneys authority to compel documents necessary for their case.¹⁵ The *Boyd* Court recognized a broad Fifth Amendment protection of privacy against compelled disclosure of personal documents.¹⁶ By 1976, in *Fisher v. United States*, the Court shifted the focus of Fifth Amendment analysis from the contents of the documents to the act of producing those documents, at least with respect to documents prepared for taxpayers by their accountants.¹⁷ In *Fisher*, the Court held

⁸ See 139 CONG. REC. S14,832 (daily ed. Nov. 2, 1993). In light of Senator Packwood's potential criminal violations, the Department of Justice subsequently issued a subpoena for Senator Packwood's diaries. See Craig Winneker, *Heard on the Hill*, ROLL CALL, Jan. 13, 1994.

⁹ See Senate Select Committee on Ethics v. Senator Bob Packwood, Misc., No. 93-0362 (TPJ), 1994 U.S. Dist. LEXIS 472, at *20 (D.D.C. Jan. 24, 1994).

¹⁰ See *Packwood*, 1994 U.S. LEXIS 472, at *21.

¹¹ See *Bob Packwood, Applicant v. Senate Select Committee on Ethics*, No. A-704, 1994 U.S. LEXIS 2044 at *5 (Mar. 2, 1994).

¹² See Seelye, *supra* note 1, at A21.

¹³ See Glenn R. Simpson, *Packwood Precedents Go Back As Far As 1884*, ROLL CALL, Dec. 23, 1993.

¹⁴ See *United States v. Boyd*, 116 U.S. 616, 635, 638 (1886).

¹⁵ See *id.* at 619-20.

¹⁶ See *id.* at 630.

¹⁷ *Fisher v. United States*, 425 U.S. 391, 409-10 (1976).

that although the Fifth Amendment did not protect the contents of the documents in question, the Fifth Amendment could protect the act of production of those documents when the act resulted in an incriminating testimonial communication.¹⁸ According to the Court, an act of production became testimonial when the act verified a document's existence, possession or authentication.¹⁹ In 1984, in *United States v. Doe*, the Court relied on the *Fisher* act of production analysis to deny Fifth Amendment protection to the records of a sole proprietor.²⁰

Neither *Fisher* nor *Doe* explicitly overruled *Boyd*, nor determined whether the Fifth Amendment continues to protect the contents of certain personal documents.²¹ Thus, circuit and district courts have split over any remaining contents-based Fifth Amendment protection for personal documents.²² In 1985, the Supreme Court appeared interested in resolving the issue when it granted certiorari in *United States v. (Under Seal)*.²³ *Under Seal* involved a challenge to a subpoena for various personal documents, including checking and savings account records, deeds, mortgages and others.²⁴ Prior to argument, however, the Court vacated the case as moot.²⁵

Recently, the Court has foregone opportunities to clarify the nature of Fifth Amendment protection for personal diaries.²⁶ In July of 1993, in *In Re Grand Jury Duces Tecum*, the United States Court of Appeals for the Second Circuit indicated that the Fifth Amendment provides no protection for the contents of voluntarily prepared, personal documents.²⁷ Although *Duces Tecum* specifically involved intimately personal documents, in January of 1994, the Court, by unani-

¹⁸ See *id.* at 410-11.

¹⁹ See *id.* at 410.

²⁰ *United States v. Doe*, 465 U.S. 605, 612-13 (1984).

²¹ *Doe*, 465 U.S. at 610 (Court notes that *Fisher* declined to determine Fifth Amendment protection for documents); *Fisher*, 425 U.S. at 414 (Court explicitly declines to determine Fifth Amendment shield for private papers); see also Gordon E. Hunt, Note, *Fifth Amendment Limitations on the Compelled Production of Evidence*, 24 AM. CRIM. L. REV. 801, 806 (1987); Barbara Daniels Davis, Note, *The Fifth Amendment and Production of Documents After United States v. Doe*, 66 B.U. L. REV. 95 (1986).

²² See *infra* notes 202-85 for discussion of circuit split.

²³ See 745 F.2d 834 (4th Cir. 1984), *cert. granted sub. nom.* *United States v. Doe*, 469 U.S. 1188 (1985); see also Hunt, *supra* note 21, at 806.

²⁴ See *United States v. (Under Seal)*, 745 F.2d 834, 835-36 (4th Cir. 1984).

²⁵ See *United States v. Doe*, 471 U.S. 1001 (1985) (not same case as *United States v. Doe*, 465 U.S. 605 (1984) discussed elsewhere).

²⁶ See, e.g., *In re Grand Jury Duces Tecum*, 1 F.3d 87 (2d Cir. 1993), *cert. denied sub. nom.* *Doe v. United States*, No. 93-523, 1994 U.S. LEXIS 1170, at *1 (Jan. 24, 1994).

²⁷ *Grand Jury Duces Tecum*, 1 F.3d at 92-93.

mous vote, denied certiorari and declined to hear the appeal.²⁸ In March of 1994, the Supreme Court relied in part on its unanimous denial of certiorari in *Duces Tecum* to deny Senator Packwood a stay of the D.C. District order pending his appeal.²⁹ According to Justice Rehnquist, the Court will issue a stay upon a finding that at least four justices would vote to review the issue in a petition for certiorari.³⁰ Pointing to the recent denial of certiorari in *Duces Tecum*, Rehnquist concluded that four justices would not vote to review the Fifth Amendment issue in Senator Packwood's case, and thus denied a stay.³¹

The effort to compel production of Senator Packwood's personal diaries provokes strong reaction from many of the millions of Americans who keep their most intimately personal musings in their diaries.³² According to one writer, once a court enforces the Packwood subpoena, no hiding place will provide adequate diary protection from a persistent litigant.³³ According to the American Civil Liberties Union, fundamental constitutional principals of privacy weigh in on Packwood's side.³⁴ Senator Packwood, terminating his appeal in the wake of the Court's denial of the stay of the D.C. District's order, expressed concern that the private "thoughts, hopes, dreams and despairs of all our citizens can now be seized by the government."³⁵ Many circuit and district courts apparently agree.³⁶ Thus, the Supreme Court, by denying both certiorari to the parties in *Duces Tecum* and a stay pending appeal to Senator Packwood, has passed up two opportunities to clarify an area of Fifth Amendment law left ambiguous since 1984.³⁷

This Note argues that the Court's opinions in *Fisher* and *Doe*, by limiting a judicially imputed Fifth Amendment protection of privacy,

²⁸ See *Doe v. United States*, No. 93-523, 1994 U.S. LEXIS 1170 at *1 (Jan. 24, 1994).

²⁹ See *Bob Packwood, Applicant v. Senate Select Committee on Ethics*, No. A-704, 1994 U.S. LEXIS 2044, at *5 (Mar. 2, 1994).

³⁰ *Id.* at *2.

³¹ See *id.* at *5.

³² See, e.g., Bonnie Miller Rubin, *Teens Seeking Words To Live By Still Write 'Dear Diary'*, CH11. TRIB., Nov. 14, 1993, section 2 at 3; Lena Williams, *Private Thoughts, Public Revelations*, N.Y. TIMES, Dec. 16, 1993, at C1. Williams notes that since 1980, annual global sales of bound diaries have doubled to ten million. See Williams, *supra*, at C4. Americans buy five million per year, and have been served since 1988 by a magazine entitled *Diarist's Journal*. See *id.*

³³ See Williams, *supra* note 32, at C1.

³⁴ See Nadine Strossen, *Packwood Rightly Argued for Privacy*, N.Y. TIMES, Nov. 9, 1993, at A32 (letter to editor from American Civil Liberties Union President).

³⁵ See Seelye, *supra* note 1, at A21.

³⁶ See *infra* notes 263-82.

³⁷ See *supra* notes 26 and 29 and accompanying text; see also *Interview* (CNN television broadcast, Nov. 3, 1993) (Transcript on LEXIS) (according to former U.S. Attorney Joseph DiGenova, Supreme Court has not decided Fifth Amendment Protection for diaries); Davis, *supra* note 21, at 95; Hunt, *supra* note 21, at 806.

effectively overruled *Boyd* with respect to all documents regardless of the private nature of their contents. An extension to personal documents of the penumbral right of privacy emanating from the Fifth and other amendments is inappropriate in both practice and policy. Rather, the act of production analysis outlined in *Fisher* and *Doe* serves to protect truly intimate and personal documents without providing a haven of protection for incriminating documents in which a privacy interest is lacking. This Note concludes that the modern standard of Fifth Amendment analysis better protects truly intimate, personal documents while providing lower courts with a workable standard to apply in document subpoena cases. Section I examines the protection of privacy within the Fifth Amendment as well as the penumbral right to privacy emanating from the Fifth and other amendments.³⁸ Section II reviews circuit and district court attempts to define the remaining scope, if any, of a contents-based Fifth Amendment protection for personal papers, in light of the Court's opinions in *Fisher* and *Doe*.³⁹ Section III explains why a contents-based protection does not provide an appropriate foundation for Fifth Amendment protection.⁴⁰ Section III also shows how the act of production analysis established in *Fisher* and *Doe* provides an easier standard for lower court application and will actually better protect truly intimate personal documents such as diaries.⁴¹

I. THE RIGHT TO PRIVACY

The Self-incrimination Clause of the Fifth Amendment reads, in relevant part, "nor shall [any person] be compelled in any criminal case to be a witness against himself"⁴² The origins of the Self-Incrimination Clause date back to at least the Sixth Century, A.D.⁴³ By the close of the Seventeenth Century, the clause began to take root in America.⁴⁴ During the legislative session of the First Congress in 1789, Representative James Madison introduced the Fifth Amendment, including the Self-incrimination Clause, as one of several amendments he wished to propose to the states for ratification.⁴⁵ The First Congress

³⁸ See *infra* notes 42-201 and accompanying text.

³⁹ See *infra* notes 202-85 and accompanying text.

⁴⁰ See *infra* notes 286-328 and accompanying text.

⁴¹ See *infra* notes 329-40 and accompanying text.

⁴² U.S. CONST. amend. V, cl. 3.

⁴³ LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 433 (1968); Davis, *supra* note 21, at 97.

⁴⁴ See LEVY, *supra* note 43, at 367.

⁴⁵ 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789).

ultimately included the Fifth Amendment as part of the Bill of Rights proposed to the states on September 25, 1789.⁴⁶ The states completed ratification by December 15, 1791.⁴⁷

Several policy underpinnings provide support for the privilege against self-incrimination.⁴⁸ The inquisitorial proceedings of the Star Chamber in the Middle Ages, for example, prompted a drive toward a fair criminal procedure.⁴⁹ The idea of a protection against self-incrimination emerged as part of the transformation from an inquisitorial to an accusatorial criminal justice system fair to the accused.⁵⁰ Sparse congressional debate over adoption of the Self-incrimination Clause in America, however, left unclear whether the First Congress simply embraced the same policies that prompted the development of the self-incrimination concept in England, or sought additional safeguards with the Self-incrimination Clause of the Fifth Amendment.⁵¹

Absent clear original intent, the United States Supreme Court has offered several policies underlying the privilege.⁵² The Court has often recognized the English, post-Star Chamber policies of fairness to the accused in a criminal justice system.⁵³ Thus, on several occasions the Court has noted that the Fifth Amendment exists to protect an accused from compulsion to testify to his or her own detriment.⁵⁴ The Court has also imputed policies into the Self-incrimination Clause of the Fifth Amendment that appear to derive solely from the Court.⁵⁵ In the 1964 decision, *Murphy v. Waterfront Commission of New York Harbor*, perhaps the most explicit exposition of Fifth Amendment policy, the Court identified seven fundamental values emanating from the Fifth Amendment.⁵⁶ The Court included a preference for an accusatorial rather than inquisitorial criminal justice system, as well as a sense of fair play between the state and the individual, a desire to protect the innocent, and a respect for the inviolability of the human personality and of the

⁴⁶ *Id.* at 88, 779.

⁴⁷ THE WORLD ALMANAC AND BOOK OF FACTS 1994 at 437 (Robert Famighetti ed.).

⁴⁸ See, e.g., *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55-56 (1964). See generally 8 WIGMORE, EVIDENCE § 2251 (1961); LEVY, *supra* note 43, at 331-32.

⁴⁹ LEVY, *supra* note 43, at 331-32.

⁵⁰ See *id.*

⁵¹ See 8 WIGMORE, *supra* note 48, at 324-25.

⁵² See, e.g., *Murphy*, 378 U.S. at 55-56 (Court lists seven "fundamental values" reflected by the Fifth Amendment).

⁵³ See, e.g., *Andresen v. Maryland*, 427 U.S. 463, 470 (1976); *Bellis v. United States*, 417 U.S. 85, 88 (1974); *Couch v. United States*, 409 U.S. 322, 327 (1973).

⁵⁴ See, e.g., *Andresen*, 427 U.S. at 470; *Bellis*, 417 U.S. at 88; *Couch*, 409 U.S. at 327.

⁵⁵ See, e.g., *Murphy*, 378 U.S. at 55-56; see also WIGMORE, *supra* note 48, at 318.

⁵⁶ *Murphy*, 378 U.S. at 55-56.

right of the individual to a private enclave where he or she may lead a private life.⁵⁷

The concept of a Fifth Amendment umbrella protection of an individual's private enclave is simply a specific manifestation of a broader Fifth Amendment protection of privacy frequently cited by the Court.⁵⁸ The scope of that policy, however, has varied considerably over time.⁵⁹ In 1965, in *Griswold v. Connecticut*, for example, the Court recognized a broad, Fifth Amendment zone of privacy, which in conjunction with other amendments established a broad right to privacy that prohibited state restrictions of contraceptives.⁶⁰ Conversely, in 1976, in *Fisher v. United States*, the Court recognized a limited Fifth Amendment protection of privacy that protected only against use of compelled, self-incriminating testimony.⁶¹

Thus, the Self-incrimination Clause of the Fifth Amendment finds support in various policies assigned to it.⁶² Some of the policies, such as maintenance of a fair criminal justice system, tie directly to the English origins of the privilege against self-incrimination.⁶³ Others, such as the protection of privacy, derive from Court construction of the Fifth Amendment, and vary significantly in scope over time.⁶⁴ The following material traces the sources and scope of the Fifth Amendment with respect to personal privacy.

A. Boyd, Fisher and Doe: Privacy Based on Contents and Privacy Based on Compulsion

In 1886, in *Boyd v. United States*, the United States Supreme Court held that the Fourth and Fifth Amendments protected individuals

⁵⁷ *Id.* at 55.

⁵⁸ See *Fisher v. United States*, 425 U.S. 391, 399 (1976); *Couch*, 409 U.S. at 327; *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Murphy*, 378 U.S. at 55; *Davis v. United States*, 328 U.S. 582, 587 (1946); *Boyd v. United States*, 116 U.S. 616, 630 (1886).

⁵⁹ See, e.g., *Fisher*, 425 U.S. at 399 (Fifth Amendment protection of privacy does not prevent every invasion of privacy but only compelled, self-incriminating invasion of privacy); *Couch*, 409 U.S. at 327 (privilege protects inner sanctum of individual feeling and thought); *Griswold*, 381 U.S. at 484 (Fifth Amendment creates broad zone of privacy around individual which in conjunction with other amendments establishes broad, general right to privacy); *Murphy*, 378 U.S. at 55 (privilege reflects our respect for right of an individual to private enclave of private life); *Davis*, 328 U.S. at 587 (privilege protects privacy of individual both in terms of right to be left alone and right against use of compulsory production of evidence to be used against individual); *Boyd*, 116 U.S. at 630 (Fourth and Fifth Amendments protect individuals from all invasions of home and privacies of life).

⁶⁰ See *Griswold*, 381 U.S. at 484-85.

⁶¹ See *Fisher*, 425 U.S. at 399.

⁶² WIGMORE, *supra* note 48, at 318.

⁶³ See LEVY, *supra* note 43, at 330-32.

⁶⁴ See *supra* note 59.

from compelled production of private books and papers.⁶⁵ The case involved an investigation of a shipping company's fraudulent non-payment of duties on imported glass, and arose when a government attorney sought to compel production of the plaintiffs' shipping invoice for the glass.⁶⁶ The Court characterized personal documents, including the invoice, as important personal property of their owner, and reasoned that forcing their removal via subpoena amounted to a trespass.⁶⁷ Further, according to the Court, such an "invasion" violated an individual's right of personal security and personal liberty.⁶⁸

The government charged the *Boyd* plaintiffs with fraudulent non-payment of customs duties under an 1874 Act to enforce payment.⁶⁹ Section five of the Act allowed the prosecuting attorney to compel any defendant to come to court at a specified date with specified documents.⁷⁰ To establish the quantity and value of the shipment at issue, the prosecutor sought, under section five, to compel the invoice accompanying the shipment of glass.⁷¹ Although the *Boyd* plaintiffs complied with the subpoena, they objected on Fifth Amendment grounds.⁷² The jury found for the government and the circuit court affirmed.⁷³ The plaintiffs appealed to the Supreme Court.⁷⁴

The Supreme Court noted that neither the laws of England, nor others in America, granted law enforcement such broad power to compel the production of evidence.⁷⁵ The Court first determined that the Act violated the Fourth Amendment, reasoning that compulsion under section five of the Act amounted to an unreasonable search and

⁶⁵ *Boyd v. United States*, 116 U.S. 616, 634-35, 638 (1886).

⁶⁶ *See id.* at 618.

⁶⁷ *See id.* at 627-28.

⁶⁸ *See id.* at 630.

⁶⁹ *See id.* at 617-18.

⁷⁰ *Boyd*, 116 U.S. at 619-20. Section five read, in relevant part:

In all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects it to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice. . . .

Id.

⁷¹ *Id.* at 618.

⁷² *Id.* at 618, 621.

⁷³ *Id.* at 618.

⁷⁴ *Id.*

⁷⁵ *Boyd*, 116 U.S. at 622-23.

seizure.⁷⁶ The Court distinguished compelled production under section five from permissible searches and seizures of stolen goods, or goods subject to unpaid duties.⁷⁷ In those examples of permissible seizures, either the true owner or the government possess an interest superior to the privacy interest of the target of the search.⁷⁸ The Court found the latter reasonable and acceptable, but concluded that compelled production of personal papers advanced no governmental interest beyond extortion of personal property to pin criminal liability on the owner.⁷⁹ According to the Court, the government committed the equivalent of a trespass in seizing an individual's private property—in this case, papers.⁸⁰

The Court discussed section five of the Act and the Fourth and Fifth Amendments in the context of personal liberty and privacy, describing a near intersection of the two amendments.⁸¹ Specifically, the Court reasoned that in addition to an invasion of private property, compelling the production of papers amounted to an invasion of a person's indefeasible right of personal security and personal liberty.⁸² After asserting that compelled production of an individual's private books or papers contravenes the principles of a free government, the Court concluded that the Act compelled an individual to incriminate himself or herself within the meaning of the Fifth Amendment.⁸³

Until 1976, the Court continued to recognize some form of Fifth Amendment protection for the contents of personal documents, while narrowing *Boyd's* holding with respect to less intimate documents.⁸⁴ In 1910, in *Wilson v. United States*, the Court determined that the privilege

⁷⁶ *Id.* at 622.

⁷⁷ *Id.* at 624.

⁷⁸ *See id.*

⁷⁹ *See id.*

⁸⁰ *Boyd*, 116 U.S. at 627-28.

⁸¹ *Id.* at 630.

⁸² *Id.*

⁸³ *Id.* at 631-32, 635. Justice Miller concurred separately to indicate his disagreement with the majority's Fourth Amendment analysis, and to assert that the Fifth Amendment governed the case. *See id.* at 639.

⁸⁴ *See, e.g., Bellis v. United States*, 417 U.S. 85, 87 (1974) (privilege applies to personal documents containing intimate information about individual's private life); *Couch v. United States*, 409 U.S. 322, 336 (1973) (privilege exists where legitimate expectation of privacy exists); *Schmerber v. California*, 384 U.S. 757, 763-64 (1966) (protection clearly reaches accused's communications such as compliance with subpoena to produce private papers); *Shapiro v. United States*, 335 U.S. 1, 33 (1948) (privilege for personal papers does not exist for papers required to be maintained under government regulation); *Davis v. United States*, 328 U.S. 582, 593 (1946) (documents maintained and kept at place of business not accorded same protection as private papers); *Wilson v. United States*, 221 U.S. 361, 386 (1911) (privilege that exists for private papers not available to corporations).

existing for personal documents did not protect a representative of a corporation from producing corporate documents.⁸⁵ The Court noted that the *Boyd* opinion emphasized the protection of personal documents and that *Boyd* implied that the character of corporate documents and the capacity in which they are held overrides a Fifth Amendment claim.⁸⁶ In 1945, in *Davis v. United States*, the Court held that records pertaining to gasoline rationing required to be kept at filling stations could not find protection within the Fifth Amendment.⁸⁷ The Court recognized a broad protection for the contents of personal documents in a private residence, and distinguished the rationing documents based on their content and location.⁸⁸ In 1973, in *Couch v. United States*, the Court reiterated a contents-based Fifth Amendment protection for documents, asserting that the protection respects a private inner sanctum of individual feeling and thought.⁸⁹ The Court concluded that the Fifth Amendment would not protect documents lacking a legitimate expectation of privacy.⁹⁰ Finally, in extending the *Wilson* holding to partnership documents in 1974, the Court noted that Fifth Amendment protection extends to personal documents containing intimate information about the individual's life.⁹¹

In 1976, in *Fisher v. United States*, the Court held that compelled production of personal tax records would not constitute incriminating testimony within the protection of the Fifth Amendment.⁹² In *Fisher*, two taxpayers sought Fifth Amendment protection against an Internal Revenue Service ("IRS") summons for certain tax related documents.⁹³ In rejecting their claim, the Court reasoned that the Fifth Amendment protects against compelled self-incrimination, and not the disclosure of private information.⁹⁴ According to the Court, an individual cannot invoke Fifth Amendment protection based on the incriminating contents of voluntarily prepared papers.⁹⁵ Rather, the Fifth Amendment provides protection only when the act of producing the document itself results in compelled communicative and incriminating testimony.⁹⁶

⁸⁵ See *Wilson*, 221 U.S. at 379-80.

⁸⁶ See *id.* at 380.

⁸⁷ *Davis*, 328 U.S. at 593.

⁸⁸ *Id.*

⁸⁹ *Couch*, 409 U.S. at 327.

⁹⁰ See *id.* at 336.

⁹¹ See *Bellis v. United States*, 417 U.S. 85, 87-88 (1974).

⁹² *Fisher v. United States*, 425 U.S. 391, 414 (1976).

⁹³ *Id.* at 394.

⁹⁴ *Id.* at 401.

⁹⁵ *Id.* at 409-10.

⁹⁶ *Id.* at 410-11.

Under an IRS investigation, the taxpayers in *Fisher* transferred various tax-related documents prepared by their accountants to their attorneys for advice in connection with the investigation.⁹⁷ Shortly thereafter, the IRS issued a summons to the attorneys demanding the documents.⁹⁸ The attorneys refused to comply with the summons, raising attorney-client privilege as well as their clients' Fifth Amendment rights.⁹⁹

The Court determined that the attorney-client privilege would only protect the papers in the attorneys' possession if the Fifth Amendment protected the papers in the taxpayers' possession.¹⁰⁰ The Court reasoned that the attorney-client privilege exists to encourage full disclosure by clients to their attorneys during the course of legal representation.¹⁰¹ The Court further reasoned that, because the attorney-client privilege effectively withholds information from the trier of fact, the privilege can only apply when necessary to achieve its purpose of full client disclosure.¹⁰² According to the Court, the attorney-client privilege only serves to protect those disclosures clients would not make in the absence of protection.¹⁰³ The Court concluded that pre-existing documents, obtainable by the Court from an individual, do not become protected by the attorney-client privilege when the individual transfers them to an attorney.¹⁰⁴ Only if the taxpayers could successfully invoke Fifth Amendment protection for the documents when in their possession could their attorneys successfully invoke the attorney-client privilege against the subpoena.¹⁰⁵

Although the Court conceded that prior opinions established a broad Fifth Amendment protection of privacy, the *Fisher* opinion stressed that the amendment only protects privacy within the parameters of its more textually explicit purpose, preventing compelled, self-incriminating testimony.¹⁰⁶ The Court noted that the Framers of the Fifth Amendment sought not to achieve a general protection of privacy, but to prevent compelled self-incrimination.¹⁰⁷ Noting that the text of the Fifth Amendment does not mention the word privacy, the

⁹⁷ *Fisher*, 425 U.S. at 394.

⁹⁸ *Id.* at 394.

⁹⁹ *Id.* at 395. In addition to their clients' Fifth Amendment defenses, the attorneys also raised accountant-client privilege and Fourth Amendment rights. *See id.*

¹⁰⁰ *Id.* at 405.

¹⁰¹ *Id.* at 403.

¹⁰² *Fisher*, 425 U.S. at 403.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 403-04.

¹⁰⁵ *Id.* at 405.

¹⁰⁶ *See id.* at 399.

¹⁰⁷ *Fisher*, 425 U.S. at 400.

Court inferred that the scope of any Fifth Amendment protection of privacy derives solely from judicial construction of the amendment.¹⁰⁸ The Court concluded that the establishment of a broad protection of privacy within the boundaries of the Fifth Amendment would divorce the language of the amendment from its meaning.¹⁰⁹

In light of the language of the Fifth Amendment prohibiting compelled self-incrimination, the Court asserted that not even personal privacy would prevent the use of otherwise properly acquired evidence.¹¹⁰ The Court indicated that Fifth Amendment protection extends to compelled disclosures of incriminating information, and not to every disclosure of any private information.¹¹¹ The Court concluded that any protection for private, non-compelled, self-incriminating information, such as voluntarily prepared documents, must stem from other sources.¹¹²

The Court examined the *Boyd* holding that the Fifth Amendment prevents the compelled production of documents.¹¹³ The Court asserted that the foundations of the absolute protection against compelled production of documents amounted to a rule searching for a rationale.¹¹⁴ According to the Court, a subpoena requiring a person to produce voluntarily prepared written records compels neither oral testimony nor a restatement or affirmation of the truth of the contents of the documents sought.¹¹⁵ The Court stressed that incriminating testimony must be compelled in order to receive Fifth Amendment protection.¹¹⁶ Therefore, incriminating contents of voluntarily prepared papers would not give rise to Fifth Amendment protection, because those contents were not themselves compelled.¹¹⁷ The Court concluded that the taxpayers in *Fisher* could not avoid compliance with

¹⁰⁸ See *id.* at 401. Indeed, the Court explicitly declined to "cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy. . . ." *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 399.

¹¹¹ *Id.* at 401.

¹¹² See *Fisher*, 425 U.S. at 401. The Court indicated that such protections may be found in the Fourth Amendment's protection against overbroad subpoenas, or in the First Amendment. *Id.* See also, Robert Heidi, *The Fifth Amendment Privilege and Documents—Cutting Fisher's Tangled Line*, 49 MO. L. REV. 439, 464 (1984) (author suggests First Amendment to protect document contents).

¹¹³ See *Fisher*, 425 U.S. at 405.

¹¹⁴ *Id.* at 409.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 409–10.

the subpoena merely by asserting that the papers sought contained some incriminating content.¹¹⁸

The Court outlined the scope of Fifth Amendment protection of documents.¹¹⁹ According to the Court, the Fifth Amendment offers protection where the compelled act of producing documents results in incriminating, testimonial communication.¹²⁰ The Court reasoned that an act of producing a document may tacitly concede either the existence or authentication of the papers, or possession by the person compelled.¹²¹ In any of those circumstances, the act of producing documents results in a testimonial communication.¹²² The Court also noted that the testimonial act of production may also be incriminating.¹²³ The Court concluded that when the act of producing a document results in a compelled, self-incriminating testimonial communication, the Fifth Amendment protects that act.¹²⁴

The Court cautioned, however, that where an individual, through an act of production, adds little or nothing to the sum total of the government's information, the act does not qualify as testimonial.¹²⁵ In *Fisher*, the taxpayers' act of producing the accountants' documents did not rise to the level of testimony because the existence and possession of the papers was a "foregone conclusion."¹²⁶ According to the Court, the government did not rely on the act of production to prove existence, possession or control of the documents.¹²⁷ Further, the taxpayers' accountants prepared the documents, and therefore the taxpayers' act of producing the papers could not authenticate them—only the accountant could authenticate the compelled papers.¹²⁸ Accordingly, the act of production of the papers did not add to the sum total of the government's case, and thus did not give rise to Fifth Amendment protection.¹²⁹

¹¹⁸ *Fisher*, 425 U.S. at 410.

¹¹⁹ *Id.* at 410–11.

¹²⁰ *Id.* at 410.

¹²¹ *Id.*

¹²² *Id.* at 410–11.

¹²³ *Fisher*, 425 U.S. at 410–11.

¹²⁴ *See id.*

¹²⁵ *Id.* at 411.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *See Fisher*, 425 U.S. at 411.

¹²⁹ *See id.* The Court offered another example of a testimonial act that would not implicate the Fifth Amendment. *Id.* An accused required to submit a handwriting sample would admit an ability to write, and authenticate his own handwriting sample. *Id.* The Court indicated, however, that his ability to write would amount to a near truism, and thus, his authentication would be self evident. *Id.* Therefore, the act of producing the compelled evidence would not violate his Fifth

Both Justices Brennan and Marshall concurred separately in the *Fisher* decision.¹³⁰ Although Justice Brennan concurred in the specific judgment that the Fifth Amendment did not provide a protection for the two taxpayers in *Fisher*, he expressed concern that the majority failed to address the extent of any remaining Fifth Amendment, contents-based protection for other, more personal documents.¹³¹ A historical survey of the Fifth Amendment convinced Brennan that, at least until the Court's opinion in *Fisher*, the Fifth Amendment did protect the contents of personal records.¹³² In support of that conclusion, Brennan relied on the protection of personal privacy, which he identified as a central purpose of the amendment.¹³³ Brennan reasoned that an individual's books and papers serve as an extension of that individual's mind, revealing no less than could be revealed upon direct questioning.¹³⁴ As the Fifth Amendment protects against compelled disclosure of the contents of one's mind, that protection must extend to the contents of documents serving as extensions of one's mind.¹³⁵ Brennan concluded that Fifth Amendment analysis based on the act of producing a document ignores a recognized zone of privacy surrounding certain materials.¹³⁶

Although he did not set forth a specific standard to determine which documents lie within the zone of privacy, Justice Brennan did offer some guidelines.¹³⁷ According to Brennan, the Fifth Amendment zone of privacy should extend where one enjoys a reasonable expectation of privacy in the contents of a document.¹³⁸ An individual establishes an expectation of privacy by keeping the documents private rather than disclosing their contents to third parties.¹³⁹ In addition to that guideline, Brennan offered a broad standard of privacy, asserting

Amendment privilege because the act would not be sufficiently testimonial for the purposes of the privilege. *Id.* Once the target of the subpoena establishes that compliance would result in compelled, self-incriminating testimony, the government may rebut by showing that the act of production adds little or nothing to its case. See Scott D. Price, Note, *Braswell v. United States: An Examination of a Custodian's Fifth Amendment Right to Avoid Personal Production of Corporate Records*, 34 VILL. L. REV. 353, 373 (1989). Indeed, the government's ability to independently authenticate may become the critical issue in many document subpoena cases. See Kenneth J. Melilli, *Act of Production Immunity*, 52 OHIO ST. L.J. 223, 264 (1991).

¹³⁰ *Fisher*, 425 U.S. at 414 (Brennan, J., concurring) and 430 (Marshall, J., concurring).

¹³¹ *Id.* at 414 (Brennan, J., concurring).

¹³² *Id.* at 419-20.

¹³³ *Id.* at 416.

¹³⁴ *Id.* at 420.

¹³⁵ See *Fisher*, 425 U.S. at 420.

¹³⁶ See *id.* at 423.

¹³⁷ *Id.* at 424.

¹³⁸ *Id.*

¹³⁹ *Id.* at 425.

that documents containing a requisite element of privacy or confidentiality merit Fifth Amendment protection.¹⁴⁰

Justice Brennan conceded the impossibility of exhaustively listing protected documents, although he did offer a partial list.¹⁴¹ According to Brennan, the Fifth Amendment should protect the contents of economic records in the possession of the individual, such as canceled checks or tax records, or written records amounting to mental notes of one's business affairs.¹⁴² Such records merit Fifth Amendment protection, Brennan reasoned, because they either provide insights into a person's total lifestyle, or they act as extensions of an aspect of a person's activities.¹⁴³ More clearly within the Fifth Amendment zone of privacy, according to Brennan, fall personal letters and personal diaries.¹⁴⁴ Personal diaries, a fortiori, merit Fifth Amendment protection.¹⁴⁵

Justice Marshall's concurrence noted that despite an inherent analytical imprecision, the Court's prior cases involving compelled document production illustrate a deeply held belief in the privacy of certain documents.¹⁴⁶ He indicated, however, that the Court's new focus of inquiry—the act of production—may afford the most complete protection against compulsory production of private papers.¹⁴⁷ Marshall reasoned that the existence of certain documents such as corporate record books does not derive solely from the act of production.¹⁴⁸ The existence of a personal diary, however, cannot generally be established absent the production of that diary—a tacit admission of existence by the target of the subpoena.¹⁴⁹ The truly private nature of a personal diary serves to ensure that third parties cannot generally verify its existence.¹⁵⁰ Marshall described an inverse relationship between the private nature of a document and the permissibility of assuming its existence.¹⁵¹ The more personal and intimate the document, the less likely third parties can assume the document's exist-

¹⁴⁰ *Fisher*, 425 U.S. at 425–26.

¹⁴¹ *Id.* at 426.

¹⁴² *Id.* at 427.

¹⁴³ *Id.* at 426–27. Justice Brennan recognized that business and economic records may lack the expectation of privacy found in other types of documents due to disclosure to third parties. *Id.*

¹⁴⁴ *Fisher*, 425 U.S. at 427.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* at 431–32 (Marshall, J., concurring).

¹⁴⁷ *See id.* at 432.

¹⁴⁸ *See id.* at 432.

¹⁴⁹ *See Fisher*, 425 U.S. at 432–33.

¹⁵⁰ *See id.*

¹⁵¹ *Id.* at 433.

ence.¹⁵² The establishment of a truly intimate and personal document could not be assumed because it is not inherently private.¹⁵³ Conversely, the existence of a corporate record book could nearly always be assumed.¹⁵⁴

Marshall also discussed how an incriminating act of production could serve to protect personal papers.¹⁵⁵ According to Marshall, although maintaining a diary may not be incriminating, the Fifth Amendment would protect that diary to the extent of a "real danger" that the diary led to incriminating evidence.¹⁵⁶ Marshall concluded that the majority merely supplanted an ad hoc analysis with a technical one, and that a de facto protection of privacy would result from the lower courts' application of that standard.¹⁵⁷

Thus, in *Fisher* the Supreme Court held that the Fifth Amendment will not protect the contents of certain tax records.¹⁵⁸ According to the Court, only when the act of producing a document in response to a subpoena amounts to an incriminating testimonial communication will the Fifth Amendment protect an individual from compulsion to perform that act.¹⁵⁹ The Court, however, explicitly declined to determine whether the Fifth Amendment would shield personal documents rather than documents prepared by accountants on behalf of taxpayers.¹⁶⁰

In 1984, in *United States v. Doe*, the Court applied the act of production analysis detailed in *Fisher* to hold that the Fifth Amendment offers no protection for the contents of a sole proprietor's business records.¹⁶¹ The Court reversed the findings of the United States Court of Appeals for the Third Circuit that the Fifth Amendment protected the sole proprietor's records because of their personal nature.¹⁶² The Supreme Court rejected the Third Circuit's contents-based analysis, asserting that the Fifth Amendment protection extends only to compelled self-incrimination.¹⁶³ The Court declined to reverse district court findings, however, and therefore affirmed that the sole

¹⁵² *Id.*

¹⁵³ *Id.* at 432-33.

¹⁵⁴ *Fisher*, 425 U.S. at 432-33.

¹⁵⁵ *See id.* at 433.

¹⁵⁶ *See id.* at 433.

¹⁵⁷ *Id.* at 434.

¹⁵⁸ *See id.* at 414.

¹⁵⁹ *See Fisher*, 425 U.S. at 410.

¹⁶⁰ *Id.* at 414.

¹⁶¹ *United States v. Doe*, 465 U.S. 605, 606, 617 (1984).

¹⁶² *Id.* at 609.

¹⁶³ *Id.* at 610.

proprietor's act of production resulted in an incriminating, testimonial communication sufficient to invoke Fifth Amendment protection.¹⁶⁴

In conjunction with an investigation into corrupt county and municipal contract awards, a grand jury subpoenaed a variety of records from Doe, a sole proprietor.¹⁶⁵ The grand jury sought, *inter alia*, ledgers, journals, paid bills, invoices, tax returns and several other categories of documents relating to business activity.¹⁶⁶ The district court inquired solely into the nature of the act of production.¹⁶⁷ According to the district court, production of the documents would compel the sole proprietor to admit he possessed the documents and they existed, and to authenticate the documents.¹⁶⁸ The Third Circuit affirmed the district court, adding that a sole proprietor acts in a personal capacity, and thus creates personal documents privileged under the Fifth Amendment.¹⁶⁹

On appeal to the Supreme Court, the sole proprietor argued that under *Boyd*, his papers fell within a Fifth Amendment zone of privacy.¹⁷⁰ The Court, however, characterized the business records at issue in *Doe* as even less personal than the tax documents in *Fisher* that did not merit Fifth Amendment protection.¹⁷¹ Rather than focus on the contents of the documents, however, the Court stressed that the sole proprietor created them voluntarily, and not under compulsion.¹⁷² Because the sole proprietor prepared the documents voluntarily, without compulsion, the subpoena would not force him to restate, repeat or affirm the truth of their contents.¹⁷³ The Court concluded that voluntarily prepared documents lack the compulsion necessary to trigger Fifth Amendment protection, although the Court held that the act of production doctrine protected the documents.¹⁷⁴

¹⁶⁴ *Id.* at 613-14.

¹⁶⁵ *Id.* at 606.

¹⁶⁶ *Doe*, 465 U.S. at 605 n.1.

¹⁶⁷ *In re Grand Jury Empaneled March 19, 1980*, 541 F. Supp. 1, 3 (D.N.J. 1981).

¹⁶⁸ *Id.*

¹⁶⁹ *See In re Grand Jury Empaneled March 19, 1980*, 680 F.2d 327, 330, 338 (3d Cir. 1982).

¹⁷⁰ *Doe*, 465 U.S. at 610 n.7.

¹⁷¹ *Id.*

¹⁷² *Id.* at 610.

¹⁷³ *Id.* at 611-12. The Court also examined the act of producing the documents, holding that the record could support the district court's explicit findings of fact that the act of production involved compelled testimonial self-incrimination. *See id.* at 613-14.

¹⁷⁴ *See id.* at 610, 613-14. *See also* *Baltimore Dep't of Social Serv. v. Bouknight*, 493 U.S. 549 (1990). The *Bouknight* case involved the compelled production of a child. *Id.* at 551. *In dicta*, the Court indicated that a person may not claim Fifth Amendment protection based on the incrimination that may result from the contents or nature of the thing demanded. *Id.* at 555. Instead, according to the Court, a person may claim Fifth Amendment protection when the act

Illustrating the tension on the Court surrounding the extent, if any, of a Fifth Amendment protection for the contents of any personal papers, Justices O'Connor and Marshall issued separate concurrences to clarify the issue.¹⁷⁵ Justice O'Connor briefly but firmly concluded that although the majority did not explicitly conclude that the Fifth Amendment offers no protection for personal papers, the reasoning of the majority opinion implied such a conclusion.¹⁷⁶ Justice Marshall, joined by Justice Brennan, however, argued that no person ought to be compelled to produce certain types of documents due to their intrinsically personal nature.¹⁷⁷

B. *Griswold: The General Zone of Privacy*

In addition to the limited Fifth Amendment protection of privacy described in *Fisher* and *Doe*, the Supreme Court identified a broad protection of privacy in the 1965 case, *Griswold v. Connecticut*.¹⁷⁸ In *Griswold* the Court held that the right to privacy, emanating from penumbras of the Fifth and several other amendments, guaranteed married couples unhindered access to contraceptives.¹⁷⁹ In his *Fisher* concurrence, Justice Brennan cited *Griswold*, among other cases, as support for his assertion that the Fifth Amendment creates a zone of privacy that surrounds the contents of certain intimately personal documents.¹⁸⁰ Additionally, at least one lower court as well as a commentator have based Fifth Amendment protection of personal documents in part on *Griswold*.¹⁸¹

Griswold involved a challenge to a Connecticut law establishing criminal fines and sanctions against anyone who used or sold contraceptives.¹⁸² In striking down the law, the Court reasoned that penumbras of several amendments, including the Fifth Amendment, create a zone of privacy.¹⁸³ A marital relationship, according to the Court, falls within that zone.¹⁸⁴ The Court concluded that a law attempting to

of complying with a subpoena testifies to the existence, possession or authentication of the thing produced. *Id.*

¹⁷⁵ See *Doe*, 465 U.S. at 618 (O'Connor, J., concurring) (Marshall, J., concurring in part).

¹⁷⁶ *Id.* at 618 (O'Connor, J., concurring).

¹⁷⁷ *Id.* at 619 (Marshall, J., concurring).

¹⁷⁸ See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

¹⁷⁹ *Id.* at 485-86.

¹⁸⁰ *Fisher v. United States*, 425 U.S. 391, 416 (1976).

¹⁸¹ See, e.g., *In re Grand Jury Proceedings*, 632 F.2d 1033, 1043 (3d Cir. 1980); Joyce B. LaVacca, *Protecting the Contents of a Personal Diary From Unwanted Eyes*, 19 RUTGERS L.J. 389, 415-17 (1988).

¹⁸² *Griswold*, 381 U.S. at 480.

¹⁸³ *Id.* at 485.

¹⁸⁴ *Id.*

regulate an intimate aspect of that relationship violated the penumbral right to privacy.¹⁸⁵

The statute at issue in *Griswold* sanctioned fines and imprisonment for anyone convicted of using or assisting or abetting the use of contraception.¹⁸⁶ Griswold, the executive director of the Planned Parenthood League of Connecticut, and Buxton, the medical director of the League, regularly provided information, instruction and advice about contraception to married couples in contravention of the statute.¹⁸⁷ Buxton and Griswold appealed their conviction and \$100 fine to the Supreme Court.¹⁸⁸

The Court, trying to avoid pure substantive due process analysis, sought textual support for a right to privacy.¹⁸⁹ The Court identified penumbral rights of repose emanating from the First, Third, Fourth, Fifth and Ninth Amendments.¹⁹⁰ The Court reasoned that these amendments create a zone of privacy within which the marital relationship resides.¹⁹¹ The Court concluded that regulation of an intimate realm of the marital relationship violates the notions of privacy surrounding that relationship.¹⁹² Thus, the Connecticut law violated a constitutional right to privacy.¹⁹³

The Court identified the Fifth Amendment as one source of the penumbral right to privacy.¹⁹⁴ Citing *Boyd's* broad, privacy-based protection of documents, the Court indicated that the Fifth Amendment, in conjunction with the Fourth, protects against all governmental invasions of the sanctity of a person's home and the privacies of life.¹⁹⁵ The Court traced this Fifth Amendment protection back to *Boyd's* concern for the invasion of one's indefeasible right to personal security, personal liberty and private property.¹⁹⁶ The Court concluded that the Fifth Amendment creates a distinct zone of privacy, which in connection with the other listed amendments combine to form a

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 480.

¹⁸⁷ *Griswold*, 381 U.S. at 480.

¹⁸⁸ *Id.*

¹⁸⁹ *See id.* at 481-82. The Court continued to repudiate substantive due process, and thus in order to justify the decision as one mandated by text, the Court created a right to privacy out of penumbras and emanations of various amendments. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 760 (4th ed. 1991).

¹⁹⁰ *Griswold*, 381 U.S. at 484.

¹⁹¹ *Id.* at 485.

¹⁹² *See id.*

¹⁹³ *See id.* at 485-86.

¹⁹⁴ *Id.* at 484.

¹⁹⁵ *Griswold*, 381 U.S. at 484.

¹⁹⁶ *Id.* at 484 n.* (citing *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

fundamental, constitutional right of privacy violated by the Connecticut statute.¹⁹⁷

In the wake of *Fisher* and *Doe*, courts may turn to the *Griswold* zone of privacy to protect the contents of documents.¹⁹⁸ Justice Brennan, in his *Fisher* concurrence, construed the Fifth Amendment as a broad protector of privacy, citing *Griswold's* construction of the Fifth Amendment for support.¹⁹⁹ Additionally, at least one post-*Fisher* circuit court opinion relied in part on *Griswold* to support a broad Fifth Amendment policy of protecting privacy.²⁰⁰ Thus, the *Griswold* right to privacy, based on penumbras emanating from the Fifth and other amendments, may provide an arguable alternative protection for the contents of personal documents.²⁰¹

II. THE CIRCUITS, POST-FISHER AND DOE

By declining to explicitly overturn *Boyd*, neither *Fisher* nor *Doe* explicitly foreclose the possibility of a remaining limited contents-based Fifth Amendment protection for certain types of personal documents.²⁰² Accordingly, circuit court opinions since *Fisher* and *Doe* have split on the issue of whether Fifth Amendment protection, in any circumstances, extends beyond the act of production to the contents of any documents.²⁰³ The most recent circuit opinions, including one in late 1993, applied the act of production analysis to documents

¹⁹⁷ See *id.* at 484-86; see also *In re Grand Jury Proceedings*, 632 F.2d 1033, 1043 (3d Cir. 1980) (citing *Griswold*, Third Circuit recognizes Fifth Amendment right to privacy).

¹⁹⁸ See, e.g., *Fisher v. United States*, 425 U.S. 391, 416 (1976) (Brennan cites *Griswold* to support Fifth Amendment protection of privacy); *In re Grand Jury Proceedings*, 632 F.2d 1033, 1043 (3d Cir. 1980) (Third Circuit relies on *Griswold* to support Fifth Amendment protection of privacy after *Doe*); LaVacca, *supra* note 181, at 415-17 (commentator asserts that *Griswold* right to privacy should protect contents of personal diaries).

¹⁹⁹ See *Fisher*, 425 U.S. at 416.

²⁰⁰ See *In re Grand Jury Proceedings*, 632 F.2d 1033, 1043 (3d Cir. 1980). See generally *infra* notes 263-68 and accompanying text for a discussion of the Third Circuit case.

²⁰¹ See *supra* note 198.

²⁰² See, e.g., *Doe v. United States*, 487 U.S. 201, 209 (1988) (Court notes that *Doe* neither announced a universal test to determine the scope of the privilege, nor established a more narrow boundary applicable to acts alone) (not same case as *United States v. Doe*, 465 U.S. 605 (1984) discussed elsewhere); *United States v. Doe*, 465 U.S. 605, 618-19 (1984) (Justices O'Connor and Marshall differ over the extent of *Boyd's* survival); *Fisher*, 425 U.S. at 414 (Court declines to determine whether Fifth Amendment protects personal documents).

²⁰³ The Ninth, Fourth, Second and District of Columbia Circuits do not recognize a Fifth Amendment contents-based protection for any documents. See *In re Grand Jury Duces Tecum*, 1 F.3d 87, 92 (2d Cir. 1993), *cert. denied sub. nom.* *John Doe v. United States*, No. 93-523, 1994 U.S. LEXIS 1170, at *1 (Jan. 24, 1994); *United States v. Wujkowski*, 929 F.2d 981, 983 (4th Cir. 1991), *appeal after remand*, *United States v. Stone*, 976 F.2d 909 (4th Cir. 1992); *In re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989), *cert. denied sub. nom.* *Roe v. United States*, 493 U.S. 1044 (1990); *In*

irrespective of their personal nature.²⁰⁴ Several other circuits remain deliberately undecided on the issue, indicating that any contents-based protection remaining after *Fisher* and *Doe* enjoys an extremely limited scope.²⁰⁵ Still other circuits continue to recognize a limited but impenetrable zone of privacy around certain intimate, personal documents.²⁰⁶

A. No Contents-Based Fifth Amendment Protection

In 1985, in *In re Grand Jury Proceedings On February 4, 1982*, the United States Court of Appeals for the Ninth Circuit held that the Fifth Amendment does not protect the contents of any voluntarily prepared documents.²⁰⁷ The case involved a subpoena for personal documents in conjunction with an investigation of possible tax violations.²⁰⁸ Relying on *Fisher*, the court indicated that absent a showing of compelled creation of a document, no paper would enjoy contents-based Fifth Amendment protection.²⁰⁹ The court concluded that the appellant had not created the documents under compulsion, and therefore could not invoke Fifth Amendment protection.²¹⁰

In 1991, in *United States v. Wujkowski*, the United States Court of Appeals for the Fourth Circuit determined that no broad, contents-based Fifth Amendment privilege exists for any documents.²¹¹

re Grand Jury Proceedings On February 4, 1982, 759 F.2d 1418, 1419 (9th Cir. 1985). The First, Seventh, Eighth and Eleventh circuits remain deliberately undecided. See *In re Grand Jury Investigation*, 921 F.2d 1184, 1187 n.6 (11th Cir. 1991); *United States v. Mason*, 869 F.2d 414, 416 (8th Cir.), cert. denied sub. nom. Napieralski v. United States, 492 U.S. 907 (1989); *In re Jeffrey Steinberg*, 837 F.2d 527, 530 (1st Cir. 1988); *United States v. McCollum*, 815 F.2d 1087, 1090 (7th Cir. 1987). Finally, the Third, Fifth and Sixth circuits continue to recognize a contents-based protection for personal documents. See *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir.), cert. dismissed, 473 U.S. 925 (1985); *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir.), cert. denied, 454 U.S. 862 (1981); *In re Grand Jury Proceedings*, 632 F.2d 1033, 1042 (3d Cir. 1980).

²⁰⁴ See, e.g., *Duces Tecum*, 1 F.3d at 92-93.

²⁰⁵ See *Grand Jury Investigation*, 921 F.2d at 1187 n.6; *Mason*, 869 F.2d at 416; *Steinberg*, 837 F.2d at 530; *McCollum*, 815 F.2d at 1090.

²⁰⁶ See *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir. 1985); *Davis*, 636 F.2d at 1043; *Grand Jury Proceedings*, 632 F.2d at 1044.

²⁰⁷ See *In re Grand Jury Proceedings On February 4, 1982*, 759 F.2d 1418, 1419 (9th Cir. 1985). In *United States v. MacKey*, the Ninth Circuit recognized a Fifth Amendment, contents-based protection for personal documents. See 647 F.2d 898, 900-01 (9th Cir. 1981). Thus, the decision in *February 4* represents a post-*Doe* shift in Ninth Circuit analysis.

²⁰⁸ *February 4*, 759 F.2d at 1418-19.

²⁰⁹ *Id.* at 1419.

²¹⁰ *Id.* at 1420. The Ninth Circuit, noting the personal nature of some of the documents requested, indicated that the act of production of the document may have testimonial aspects. See *id.* at 1421. Accordingly, the court remanded the case back to the district court for a determination of whether the Fifth Amendment protected the act of production. *Id.* See also *In re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989) (D.C. Circuit notes that Fifth Amendment does not protect the contents of any voluntarily prepared papers, including personal ones).

²¹¹ *United States v. Wujkowski*, 929 F.2d 981, 983 (4th Cir. 1991).

Wujkowski involved a subpoena for various personal documents, including desk and pocket calendars, appointment books, planner schedules and daily meeting logs, pursuant to a Department of Energy investigation of one of its contractors.²¹² Relying on *Fisher*, the court noted that with respect to voluntarily prepared documents, a subpoena compels no more than the act of producing the document.²¹³ The court then remanded the case back to the district court for a determination of whether the act of production of the subpoenaed documents contained self incriminatory, testimonial elements.²¹⁴

In 1993, in *In Re Grand Jury Subpoena Duces Tecum*, the United States Court of Appeals for the Second Circuit held that the Fifth Amendment does not protect the contents of voluntarily prepared documents.²¹⁵ *Duces Tecum* involved a subpoena issued pursuant to a Securities and Exchange Commission investigation.²¹⁶ The subpoena demanded various documents including a daily calendar, which the district court judge characterized as an intimate, personal document.²¹⁷ In its opinion, the most recent circuit pronouncement on the issue to date, the Second Circuit, citing three reasons, unequivocally disagreed with the appellant's assertion that the Fifth Amendment protects the contents of any non-business document.²¹⁸ First, the court noted that *Boyd* concerned business documents, rendering the opinion dicta with respect to personal papers.²¹⁹ Second, according to the court, *Fisher* and *Doe*, in which the Supreme Court refused to extend contents-based Fifth Amendment protection to certain documents, indicate that proper Fifth Amendment document analysis now lies in the act of production and not the contents of the document compelled.²²⁰ Finally, the

²¹² *Id.* at 982.

²¹³ *Id.* at 983.

²¹⁴ See *id.* at 986. On remand, in *United States v. Stone*, the Fourth Circuit affirmed the district court's finding that despite the personal nature of the documents, the act of producing them did not involve self-incriminating testimony. 976 F.2d 909, 911 (4th Cir. 1992). The court considered the existence, possession and authentication of the documents a foregone conclusion, and thus the documents contributed little or nothing to the sum total of the government's information. *Id.*

²¹⁵ *In re Grand Jury Duces Tecum*, 1 F.3d 87, 93 (2d Cir. 1993).

²¹⁶ *Id.* at 88.

²¹⁷ *Id.* at 90 n.1.

²¹⁸ *Id.* at 92. The decision in this case marks a shift in Second Circuit opinion regarding the Fifth Amendment and the contents of documents. See *In re Grand Jury Subpoena Duces Tecum* Dated April 23, 1981, 657 F.2d 5, 6 (2d Cir. 1981) (Second Circuit recognizes contents-based protection for personal papers).

²¹⁹ *Duces Tecum*, 1 F.3d at 92. The Second Circuit indicated that dicta may be respected but ought not control the judgment in a subsequent suit in which the dicta is on point. *Id.* at 92-93.

²²⁰ *Id.* at 92.

court interpreted opinions from the Fourth, Ninth and District of Columbia Circuits as establishing that under modern Fifth Amendment analysis, voluntarily prepared documents enjoy no Fifth Amendment protection.²²¹

In 1994, in *Senate Select Committee on Ethics v. Senator Bob Packwood*, the most recent federal opinion on the issue, the United States District Court for the District of Columbia denied Fifth Amendment protection to the contents of documents.²²² In *Packwood*, the Ethics Committee sought to enforce a subpoena for the extensive diaries of United States Senator Bob Packwood as part of an investigation into sexual misconduct.²²³ The D.C. District Court interpreted *Fisher* and *Doe* as repudiating the *Boyd* protection of personal documents.²²⁴ The court concluded that although the Fifth Amendment protects incriminating, testimonial acts of production, it provides no protection for the contents of voluntarily created documents.²²⁵

In late 1992, the Senate Ethics Committee began an investigation into widely publicized allegations of Senator Packwood's sexual misconduct, intimidation and misuse of staff.²²⁶ Following a deposition at which Packwood referred to the diaries in defense to committee questioning, the committee issued a subpoena for the diaries in October of 1993.²²⁷ After negotiations, the committee and Packwood agreed that the committee could examine the diaries in the presence of Packwood's counsel, after Packwood masked those entries relating either to attorney-client or doctor-patient privilege, or containing highly personal, family material.²²⁸ The committee staff, in the presence of Packwood's counsel, could mark pages containing material relevant to its

²²¹ *Id.* at 93. The court then concluded that the act of production of the diary required mere surrender of the calendar and not testimony. *Id.* Thus, appellant could claim no Fifth Amendment privilege. *Id.* at 94. In a dissenting opinion, Judge Altamari noted that the Supreme Court never explicitly overruled *Boyd*, and therefore the dicta in *Boyd* describing Fifth Amendment protection of documents controlled this case. *Id.* at 95. Altamari also disagreed with the majority that the other circuits cited actually agreed with the majority, and then cited several other circuit opinions supporting a *Boyd* argument. *See id.* at 96. On January 24, 1994, nine Justices on the Supreme Court agreed to deny certiorari to *Duces Tecum*. *See Doe v. United States*, No. 93-523, 1994 U.S. LEXIS 1170, at *1 (Jan. 24, 1994).

²²² *See Senate Select Committee on Ethics v. Senator Bob Packwood*, 1994 U.S. Dist. LEXIS 472, at *20 (D.C. Dist. Jan. 24, 1994).

²²³ *Id.* at *1.

²²⁴ *Id.* at *19.

²²⁵ *Id.*

²²⁶ *Id.* at *2.

²²⁷ *Packwood*, 1994 U.S. Dist. LEXIS 472, at *3.

²²⁸ *Id.* at *4.

investigation which Packwood would then reproduce and deliver to the committee.²²⁹

During the examination process, the committee discovered and marked material pertaining to additional possible ethics and criminal violations.²³⁰ Packwood then suspended his agreement with the committee.²³¹ On October 20, 1993, the Senate Ethics Committee voted unanimously to issue a subpoena for the diaries, and on October 21, voted unanimously to report a resolution to enforce the subpoena to the full Senate for debate and a vote.²³² On November 2, 1993, the full Senate, by a vote of 94-6, adopted the resolution, and thus authorized the committee to seek enforcement of the subpoena in federal court.²³³

The D.C. District court dispensed with Senator Packwood's Fifth Amendment claim in one paragraph.²³⁴ The court first examined *Boyd*, noting that even Senator Packwood conceded the erosion of the *Boyd* holding.²³⁵ Turning to *Fisher* and *Doe*, the district court reasoned that the Fifth Amendment protection now extends only to incriminating, testimonial acts of production, and not to the contents of voluntarily prepared, and thus non-compelled, personal documents.²³⁶ Accordingly, the district court held that the Fifth Amendment did not provide protection for the contents of Senator Packwood's personal diaries.²³⁷ Packwood applied to the Supreme Court for a stay pending his appeal of the district court order.²³⁸ On March 2, 1994, the Supreme Court denied Senator Packwood's application.²³⁹

Most recent circuit opinions reflect a trend repudiating the broad, contents-based Fifth Amendment document protection enunciated in *Boyd*.²⁴⁰ Those circuits interpret *Fisher* and *Doe*, in which the Court

²²⁹ *Id.*

²³⁰ *Id.* at *5.

²³¹ *Id.* at *6.

²³² *Packwood*, 1994 U.S. Dist. LEXIS 472, at *6.

²³³ *Id.* at *8; see also 139 CONG. REC. S14,725 (daily ed. Nov. 1, 1993) through 139 CONG. REC. S14,832 (daily ed. Nov. 2, 1993) (complete record of Senate debate and vote on subpoena enforcement).

²³⁴ *Packwood*, 1994 U.S. Dist. LEXIS 472, at *17-18.

²³⁵ *Id.*

²³⁶ *Id.* at *19; see also *In the Matter of Trader Roe*, 720 F. Supp. 645, 647 (N.D. Ill. 1989) (no protection for contents of any voluntarily prepared documents); *United States v. Cates*, 686 F. Supp. 1185, 1190 (D. Md. 1988) (inherent in *Fisher* and *Doe* is proposition that Fifth Amendment does not protect contents of any documents).

²³⁷ See *Packwood*, 1994 U.S. Dist. LEXIS 472, at *17.

²³⁸ See *Bob Packwood, Applicant v. Senate Select Committee on Ethics*, No. A-704, 1994 U.S. LEXIS 2044, at *1 (Mar. 2, 1994).

²³⁹ See *id.* at *5. The Court relied on its denial of certiorari in the Second Circuit case, *Duces Tecum*, to conclude that four justices would not vote to review the issue. See *id.*; see also *supra* notes 28-31 and accompanying text.

²⁴⁰ See *In re Grand Jury Duces Tecum*, 1 F.3d 87, 92-93 (2d Cir. 1993); *United States v.*

limited Fifth Amendment protection to the act of production of documents, as indicating that the Fifth Amendment no longer protects the contents of any voluntarily prepared document.²⁴¹ In several circuits, therefore, personal diaries not protected by an incriminating, testimonial act of production receive no contents-based Fifth Amendment protection.²⁴²

B. *Deliberately Undecided*

Several additional circuits that have not clearly repudiated a contents-based Fifth Amendment protection in the wake of *Fisher* and *Doe* remain explicitly undecided.²⁴³ In 1988, in *In re Jeffrey Steinberg*, for example, the United States Court of Appeals for the First Circuit expressly declined to decide whether the Fifth Amendment provides any protection for the contents of personal documents.²⁴⁴ *Steinberg* involved a grand jury investigation into fraud in fund raising activities on behalf of then presidential candidate Lyndon Larouche.²⁴⁵ In response to the grand jury subpoena for certain notebooks containing information about the Larouche campaign fund raising activities, Jeffrey Steinberg sought Fifth Amendment protection based on incriminating contents of the notebooks.²⁴⁶ The First Circuit noted that no other justices joined O'Connor's concurrence in *Doe* asserting that the Fifth Amendment no longer protects the contents of any documents.²⁴⁷ The court reasoned, however, that *Fisher* and *Doe* indicate that the contents-based protection established in *Boyd* enjoys, at best, extremely limited application.²⁴⁸ The First Circuit then noted that Steinberg presented no evidence to rebut the government's assertions that the notebooks at issue pertained to the Larouche campaign organization, and lacked any intimate or personal character.²⁴⁹ Thus, the court con-

Wujkowski, 929 F.2d 981, 983 (4th Cir. 1991); *In re Scaled Case*, 877 F.2d 83, 84 (D.C. Cir. 1989); *In re Grand Jury Proceedings On February 4, 1982*, 759 F.2d 1418, 1419 (9th Cir. 1985).

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ See *In re Grand Jury Investigation*, 921 F.2d 1184, 1187 n.6 (11th Cir. 1991) (absent explicit overturn of *Boyd* and government's failure to pursue issue, question remains open); *United States v. Mason*, 869 F.2d 414, 416 (8th Cir. 1989) (no need to determine whether Fifth Amendment protects documents' contents given district court's reasonable finding that documents are non-personal); *In re Jeffrey Steinberg*, 837 F.2d 527, 530 (1st Cir. 1988) (whether contents protected explicitly left undecided); *United States v. McCollum*, 815 F.2d 1087, 1090 (7th Cir. 1987) (no need to decide question of *Boyd* protection where documents not prepared under compulsion).

²⁴⁴ *Steinberg*, 837 F.2d at 530.

²⁴⁵ *Id.* at 527.

²⁴⁶ *Id.* at 528.

²⁴⁷ *Id.* at 530.

²⁴⁸ *Id.*

²⁴⁹ *Steinberg*, 837 F.2d at 530.

cluded, even if any shred of *Boyd* remained, a matter that the court declined to decide, the protection would not extend to the type of documents at issue.²⁵⁰

Similarly, in the 1989 case, *United States v. Mason*, the United States Court of Appeals for the Eighth Circuit deliberately declined to decide whether the Fifth Amendment protects the contents of any documents.²⁵¹ *Mason* involved an investigation of marijuana cultivation and trafficking pursuant to which law enforcement officials searched and seized, among other items, several "pocket day timers" detailing the marijuana cultivation operation.²⁵² The Eighth Circuit accepted the district court's characterization of the documents as non-personal.²⁵³ The court then noted the erosion of the broad, *Boyd* contents-based protection, reasoning that even if the Fifth Amendment protects the contents of certain personal documents, the court would only extend such protection where compelled production would "break the heart of our sense of privacy."²⁵⁴ The Eighth Circuit, however, expressly declined to determine whether the Fifth Amendment protects the contents of any documents in the absence of findings that the day timers contained highly personal material.²⁵⁵

In 1991, in *In re Grand Jury Investigation*, the United States Court of Appeals for the Eleventh Circuit similarly declined to determine the extent, if any, of a Fifth Amendment, contents-based protection of documents.²⁵⁶ *Grand Jury Investigation* involved subpoenas to an attorney for several documents relating to an investigation for money laundering and tax fraud.²⁵⁷ The Eleventh Circuit noted that although some circuits deny any Fifth Amendment protection to the contents of documents, the issue remained undecided in the Eleventh Circuit.²⁵⁸ Citing the Supreme Court's reluctance to explicitly overrule *Boyd*, as well as the government's failure to press the point, the court opted to leave the question open in the Eleventh Circuit.²⁵⁹

The majority of circuits examining the extent of a Fifth Amendment protection for documents most recently have either concluded

²⁵⁰ *Id.*

²⁵¹ *United States v. Mason*, 869 F.2d 414, 416 (8th Cir. 1989).

²⁵² *Id.* at 415-16.

²⁵³ *Id.* at 416.

²⁵⁴ *Id.* (citing Justice Marshall's concurrence in *United States v. Doe*, 465 U.S. 605, 619 n.2 (1984)).

²⁵⁵ *Id.* at 416.

²⁵⁶ See *In re Grand Jury Investigation*, 921 F.2d 1184, 1187 n.6 (11th Cir. 1991).

²⁵⁷ *Id.* at 1185.

²⁵⁸ *Id.* at 1187 n.6.

²⁵⁹ *Id.*

that no such protection exists, or that the *Boyd* contents-based protection at most provides protection only in extreme cases apparently not faced by those courts.²⁶⁰ Part of the indecision in some circuits stems from the Supreme Court's reluctance to overrule *Boyd*.²⁶¹ In addition, however, many of the undecided circuits recognize that *Fisher* and *Doe* have substantially weakened and possibly eliminated, the *Boyd* contents-based protection.²⁶²

C. Privacy-Based Fifth Amendment Protection

In contrast, some circuits still hold that a *Boyd* contents-based Fifth Amendment protection continues to shield personal documents from compelled production.²⁶³ In 1980, in *In re Grand Jury Proceedings*, (hereinafter "*Johanson*") the United States Court of Appeals for the Third Circuit held that the Fifth Amendment protects an individual from compelled production of self-incriminating private papers.²⁶⁴ *Johanson* involved a grand jury subpoena for notes, memoranda, appointment books and other documents of a target of the Abscam investigation.²⁶⁵ The court asserted that the *Fisher* language that the Fifth Amendment protects against compelled self-incrimination and not disclosure of private information, in no way contradicts protection of private papers.²⁶⁶ The court cited prior cases in which the Supreme Court announced a Fifth Amendment policy of protecting privacy, and interpreted the historical origins of the Fifth Amendment as protecting the privacy of personal papers.²⁶⁷ The court noted that *Johanson* created and personally maintained all of the documents at issue, and concluded that he established a rightful expectation of privacy that merited Fifth Amendment protection.²⁶⁸

²⁶⁰ See *supra* notes 202-62 and accompanying text.

²⁶¹ See, e.g., *Grand Jury Investigation*, 921 F.2d at 1187 n.6.

²⁶² See, e.g., *Steinberg*, 837 F.2d at 528-29.

²⁶³ See *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir. 1985); *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir. 1981); *In re Grand Jury Proceedings*, 632 F.2d 1033, 1044 (3d Cir. 1980) (hereinafter "*Johanson*").

²⁶⁴ 632 F.2d at 1042.

²⁶⁵ *Id.* at 1037 n.7.

²⁶⁶ *Id.* at 1042.

²⁶⁷ *Id.* at 1042-43. Among other policies underlying the protection of personal papers, the court cited respect for the inviolability of the human personality and the right of each individual to a private enclave where he may lead a private life (citing, *inter alia*, *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) and *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)), as well as the chilling effect on thought and expression that the absence of a Fifth Amendment protection could cause. See *id.* at 1043.

²⁶⁸ *Id.* at 1044. Although *Johanson* pre-dates *Doe*, it remains good law to the extent that *Doe* declined to overrule *Boyd*, and that no subsequent Third Circuit opinion has overruled *Johanson*.

In 1981, in *United States v. Davis*, the United States Court of Appeals for the Fifth Circuit held that under *Boyd*, the Fifth Amendment protects any incriminating papers in the actual or constructive possession of an individual.²⁶⁹ In *Davis*, the Internal Revenue Service issued a summons for records of financial transactions and other documents relating to an investigation of tax fraud.²⁷⁰ The court read *Boyd* and *Fisher* as creating two basic frameworks for Fifth Amendment analysis.²⁷¹ The Fifth Circuit recognized the *Fisher* protection based on the act of production.²⁷² The court also recognized, however, a *Boyd* protection, which it construed as creating a zone of privacy around personal documents in the hands of the owner.²⁷³ The Fifth Circuit reasoned that documents created, held and maintained by an individual in an individual capacity, fall within the *Boyd* zone of privacy.²⁷⁴ The Fifth Circuit remanded the case for proceedings to identify the purely private documents meriting Fifth Amendment protection.²⁷⁵

In 1985, in *Butcher v. Bailey*, the United States Court of Appeals for the Sixth Circuit stated that *Fisher* and *Doe* do not indicate that the Fifth Amendment may never protect the contents of private papers.²⁷⁶ The dispute in *Butcher* arose out of a Chapter VII bankruptcy proceeding in which the statute required Butcher to turn over any records relating to the property of the bankruptcy estate.²⁷⁷ The Sixth Circuit denied Butcher's Fifth Amendment claim after determining that the records at issue lacked the intimately personal nature necessary to invoke privacy concerns.²⁷⁸ The court recognized that although *Fisher* and *Doe* limit the extent of a Fifth Amendment, contents-based protection, neither case eradicated such protection for private papers.²⁷⁹ According to the Sixth Circuit, in rare situations "where compelled disclosure would 'break the heart of our sense of privacy,'" the Fifth Amendment would protect the contents of a private document.²⁸⁰ The

²⁶⁹ *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir. 1981). Like *Johanson*, *supra* note 268, *Davis* also pre-dates *Doe*, but continues to control in the Fifth Circuit.

²⁷⁰ *Davis*, 636 F.2d at 1032. Specifically, the Internal Revenue Service sought to determine whether certain people engaged in drug trafficking had paid taxes on their drug-related income. *Id.*

²⁷¹ *Id.* at 1041.

²⁷² *Id.*

²⁷³ *Id.* at 1042.

²⁷⁴ *Davis*, 636 F.2d at 1043.

²⁷⁵ *Id.* at 1044.

²⁷⁶ *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir. 1985).

²⁷⁷ *Id.* at 466.

²⁷⁸ *Id.* at 469.

²⁷⁹ *See id.*

²⁸⁰ *See id.* (citing Justice Marshall's concurrence in *United States v. Doe*, 465 U.S. 605, 619

court then analyzed the contents of the documents, noting that they pertained solely to the property of the bankrupt's estate.²⁸¹ The Sixth Circuit concluded that information relating to property of the bankruptcy estate lacks the intimate, personal nature necessary to evoke concern over privacy interests.²⁸²

Despite the recent trend among the circuits repudiating *Boyd's* contents-based Fifth Amendment protection for personal papers, some circuits continue to extend the Fifth Amendment to the contents of personal documents. While many of these circuits incorporate the *Fisher* act of production analysis into their examination of Fifth Amendment issues, they do not necessarily supplant the *Boyd* contents-based analysis with the newer *Fisher* analysis.²⁸³ Rather, they use the *Fisher* act of production analysis as an extension of the *Boyd* analysis.²⁸⁴ As long as the Supreme Court continues to forego opportunities to clarify this area of Fifth Amendment law, the tremendously varying circuit approaches will likely continue.²⁸⁵

III. PROTECTING THE PRIVACY OF PERSONAL DIARIES

A. *Current Status of Fifth Amendment Protection of Diaries*

The current status of any explicit Fifth Amendment protection for diaries varies to a large extent with the circuit of venue.²⁸⁶ The trend in modern Fifth Amendment jurisprudence, however, edges away from a privacy-founded, contents-based Fifth Amendment protection for diaries, and toward a focus on the implications of the act of producing those diaries.²⁸⁷ Although some lower courts will continue to recognize a contents-based Fifth Amendment protection for certain personal diaries, *Fisher* and *Doe* raise serious questions about the continuing viability of a privacy based Fifth Amendment analysis.²⁸⁸

n.2 (1984)). The court then recognized that the act of production may also involve self-incriminating testimony, and thus could provide another avenue for Fifth Amendment protection. See *Butcher*, 753 F.2d at 469. Although the court concluded the act of production did involve a testimonial communication through authentication, the court remanded the case for a determination of the incriminating nature of that testimonial communication. *Id.* at 469-70.

²⁸¹ *Butcher*, 753 F.2d at 469.

²⁸² *Id.*

²⁸³ See *supra* notes 263-85 and accompanying text.

²⁸⁴ See, e.g., *Butcher*, 753 F.2d at 469; *Davis*, 636 F.2d at 1041.

²⁸⁵ See *supra* notes 202-82 and accompanying text.

²⁸⁶ See *supra* notes 202-86 and accompanying text for a discussion of the varying ways circuit courts of appeals treat personal papers.

²⁸⁷ See *supra* note 260-62 and accompanying text.

²⁸⁸ See, e.g., *Baltimore Dep't of Social Servs. v. Bouknight*, 493 U.S. 549, 555 (1990). The

The protection of privacy within the Fifth Amendment derives from the Supreme Court, and displays vulnerability to redefinition and refinement. In *Fisher*, for example, the Court examined the text of the Fifth Amendment to determine that the amendment does not serve as a general protector of privacy.²⁸⁹ Yet in opinions prior to *Fisher*, the Court frequently recognized a broad, general Fifth Amendment protection of privacy.²⁹⁰ The scope of that right varied from a broad protection for the contents of any personal documents, to an even broader general protection of marital privacy.²⁹¹ The protection of privacy element of the Fifth Amendment, therefore, appears malleable and unstable, leading to the conclusion that the protection enjoys a scope neither more expansive nor limited than the Court's most recent statement. The *Fisher* and *Doe* revisions of the Fifth Amendment protection of privacy, therefore, most likely limit that protection to the act of production and not to the contents of personal documents such as diaries.

The *Doe* opinion further clarified the limited extent to which the Fifth Amendment protects privacy, by applying the *Fisher* analysis in the context, arguably, of more personal documents.²⁹² The contents of the documents at issue in *Doe* reflect non-personal, business concerns, whereas the contents of the *Fisher* documents contain personal tax information of two individuals.²⁹³ In *Doe*, however, an individual in an individual capacity created and kept the documents, whereas in *Fisher*, an accountant prepared and kept the documents.²⁹⁴ The documents at issue in *Doe*, therefore, entirely personal to the sole proprietor and disclosed to no third parties, seem more personal than those in *Fisher*, despite their business nature.²⁹⁵ Thus, *Doe* reiterated *Fisher's* limited

United States Court of Appeals for the Second Circuit, in the most recent case on the issue, cited *Bouknight* as an indication that the Fifth Amendment no longer protects the contents of anything, including personal documents. See *In re Grand Jury Duces Tecum*, 1 F.3d 87, 93 (2d Cir. 1993).

²⁸⁹ *Fisher v. United States*, 425 U.S. 391, 400-01 (1976).

²⁹⁰ See *supra* notes 84-91 and accompanying text.

²⁹¹ See, e.g., *Boyd v. United States*, 116 U.S. 616, 631-32 (1886) (contents-based protection for all personal documents); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (penumbras of the Fifth and other amendments create a zone of privacy preventing state restriction of marital relationship).

²⁹² See *United States v. Doe*, 465 U.S. 605, 610 n.7 (1984).

²⁹³ See *id.* The documents at issue in *Doe*, though personal to the sole proprietor, pertained to his business dealings. *Id.* at 607. The documents in *Fisher* pertained to personal tax records, but were created by the taxpayers' accountants and in the possession of their attorneys. See *Fisher*, 425 U.S. at 394.

²⁹⁴ See *Doe*, 465 U.S. at 610 n.7.

²⁹⁵ But see *Doe*, 465 U.S. at 610 n.7. The *Doe* Court noted that the *Fisher* documents related to the taxpayers' personal taxes, whereas the *Doe* documents related to the sole proprietor's

construction of the privacy interest within the Fifth Amendment, in the context of documents of a greater personal nature than *Fisher*.²⁹⁶

Consistent with *Fisher* and *Doe*, the more recent opinions in the lower courts recognize the shift in Fifth Amendment analysis from privacy based on the contents of the documents, to the act of producing the compelled documents.²⁹⁷ Some circuits have contravened prior circuit precedent to recognize the Supreme Court's shift in analysis.²⁹⁸ The Ninth Circuit, for example, which in 1981 implicitly recognized a limited contents-based protection, firmly held in 1985 that after *Doe*, the Fifth Amendment no longer protected the contents of voluntarily created papers.²⁹⁹ The Second Circuit, in the most recent circuit court opinion on the issue, also repudiated its former recognition of a contents-based protection.³⁰⁰

Several additional circuits, in recognition of the weakness of *Boyd* as well as the fact that the Supreme Court has not overruled *Boyd*, decline to rule either way on the issue.³⁰¹ These opinions generally recognize the Court's limitation of the once broad *Boyd* protection.³⁰² In light of that limitation, undecided circuits conclude that if any aspect of a contents-based protection remains, it extends only to the most intimately personal documents, none of which have apparently been at issue.³⁰³ Although *Fisher* and *Doe* do not explicitly preclude a privacy, contents-based Fifth Amendment protection for purely personal documents, the two opinions, in combination with the more recent lower court opinions, raise strong doubts about the continued viability of that protection.

Finally, the Second and Ninth Circuits' post-*Doe* shift from a contents-based analysis to an act of production analysis may shed light on

business. *Id.* Therefore, the *Doe* Court concluded that in some respects, the *Fisher* documents were more personal than the *Doe* documents. *Id.*

²⁹⁶ The Court's recent denial of certiorari in the Second Circuit case, *In re Duces Tecum*, and denial of Senator Packwood's application for a stay pending appeal may further indicate that the Court deems the issue settled in favor of *Fisher* and *Doe*, and against *Boyd*, particularly because the disputed lower court opinions in both instances denied contents-based Fifth Amendment protection.

²⁹⁷ See *supra* notes 202-42 and accompanying text.

²⁹⁸ Both the Second and Ninth Circuits have shifted their Fifth Amendment analysis in light of *Fisher* and *Doe*. See *supra* notes 268-69.

²⁹⁹ See *supra* note 268.

³⁰⁰ See *supra* note 269.

³⁰¹ See *supra* notes 243-62 and accompanying text.

³⁰² See *id.*

³⁰³ See *id.* In fairness, it is entirely possible that faced with a subpoena for a document as intimately personal as a private diary, many of the undecided circuits would extend a contents-based protection.

those circuits that still recognize a contents-based protection. The decisions in many of the circuits recognizing a contents-based protection pre-date *Doe*.³⁰⁴ Thus, the recognition of a contents-based protection in some circuits may stem more from the absence of a case revisiting the issue than from a steadfast urge to extend Fifth Amendment protection to the contents of personal documents.

B. *The Alternative Rights to Privacy as Protection for Personal Diaries*

The suggestion of an enforceable subpoena for personal diaries evokes a strong reaction from diary keepers who wish to preserve the inviolable sanctity of their private musings.³⁰⁵ Diary writers relying on an imputed Fifth Amendment protection of privacy, however, risk continual redefinition, or even eradication of that protection. Ultimately, the varying scope of an imputed Fifth Amendment protection of privacy renders that protection inadequate for the contents of intimately personal writings.

1. Practical Problems With a Fifth Amendment Protection of Privacy

In practical terms, a Fifth Amendment protection of privacy presents several problems. The application of the protection of a right to privacy to truly intimate, personal papers requires either a definition of the protected papers, or a standard that courts can apply to determine in each case which papers merit protection. Yet creating such a list may prove an insurmountable task.³⁰⁶ According to Justice Brennan's concurrence in *Fisher*, for example, only certain economic and business records which function as an extension of an aspect of a person's activities merit protection.³⁰⁷ Similarly, non-business economic records in the possession of an individual, such as canceled checks, may merit protection because they provide insight into a person's total lifestyles, or may not merit protection due to disclosure to third parties, and thus a reduced expectation of privacy.³⁰⁸ According to Brennan, personal letters, although disclosed to third parties, definitely merit protection because of their peculiarly private nature.³⁰⁹ As Justice Bren-

³⁰⁴ See, e.g., *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir. 1981); *In re Grand Jury Proceedings*, 632 F.2d 1033, 1042 (3d Cir. 1980).

³⁰⁵ See, e.g., Nadine Strossen, *Private! Keep Out! Our Diaries—Even Sen. Bob Packwood's—Are Nobody's Business But Our Own*, USA TODAY, Dec. 2, 1993, at 13A.

³⁰⁶ See *Fisher v. United States*, 425 U.S. 391, 426 (1976) (Brennan, J., concurring) (concedes impossibility of enumerating exhaustive list of protected documents).

³⁰⁷ *Id.* at 426.

³⁰⁸ *Id.* at 427.

³⁰⁹ *Id.*

nan concludes, establishing even a partial list of documents residing within the zone of privacy proves impossible.³¹⁰

Nomenclature of documents raises additional problems for the establishment of a list. Although nearly everyone wants to protect the contents of personal diaries, the term "diary" contemplates several possible documents, including appointment books and daily planners, as well as small, locked notebooks. The use of the term "diary" within the circuits illustrates the problem.³¹¹ The Second Circuit, for example, recently characterized daily planners as diaries, and recognized them to be of a highly personal nature.³¹² Yet, the Fourth Circuit indicates that day planners and calendars defy categorical characterization as corporate or personal.³¹³ The term "personal diary" may suffer either under or over inclusiveness, either providing inadequate protection to intimately personal documents, or providing contents-based protection to documents lacking that intimately personal nature.

A standard against which courts can determine whether a document merits Fifth Amendment privacy protection proves equally difficult to establish. Several courts and commentators have suggested standards.³¹⁴ Justice Brennan, while declining to offer a universal standard, suggests disclosure as a guideline.³¹⁵ Brennan reasons that an individual's disclosure of a document to a third party reduces any expectation of privacy in that document.³¹⁶ Brennan identifies two examples in which disclosure fails as an adequate standard.³¹⁷ Personal letters, an individual's thoughts disclosed to a third party, enjoy a

³¹⁰ *Id.* at 426.

³¹¹ The circuits' uses of "diary" vary significantly. *See, e.g.*, *United States v. Wujkowski*, 929 F.2d 981, 984 (4th Cir. 1991) (court cannot state categorically that such things as appointment books, day planners, and pocket calendars are intrinsically either corporate or personal); *United States v. Mason*, 869 F.2d 414, 416 (8th Cir. 1989) (no protection for pocket sized "day-timers" notebooks); *United States v. McCollum*, 815 F.2d 1087, 1088 (7th Cir. 1987) (personal checks distinguished from "personal diary" and not protected).

³¹² *See In re Grand Jury Duces Tecum*, 1 F.3d 87, 90 n.1 (2d Cir. 1993).

³¹³ *See Wujkowski*, 929 F.2d at 984.

³¹⁴ *See, e.g.*, *Fisher v. United States*, 425 U.S. 391, 424 (1976) (Brennan, J., concurring) (several standards discussed); *In re Steinberg*, 837 F.2d 527, 530 (1st Cir. 1988) (court applies use standard, declining to protect notebooks that show no "highly personal" entries); *United States v. (Under Seal)*, 745 F.2d 834, 840 (4th Cir. 1984) (standard considers whether incriminating papers are in personal possession and held in individual, as opposed to a representative capacity); *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir. 1981) (standard considers various factors including whether incriminating papers are in actual or constructive possession of individual, held in individual and not representative capacity, authored by holder or under holder's supervision); *see also Note, Formalism, Legal Realism and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 988 (1977).

³¹⁵ *Fisher*, 425 U.S. at 425.

³¹⁶ *See id.*

³¹⁷ *Id.* at 427.

peculiarly personal aspect, according to Brennan, that merits Fifth Amendment protection.³¹⁸ Brennan would also apply contents-based protection to canceled personal checks in some situations, because they provide clear insights into a person's total lifestyle.³¹⁹ Ultimately, Brennan's exceptions will simply swallow the rule. Thus, disclosure alone cannot militate which documents merit Fifth Amendment protection.

Other efforts to define a standard for contents-based privacy similarly fail to provide the necessary analytical framework for lower courts to determine which documents merit protection. In *United States v. Davis*, for example, the Fifth Circuit offered contents-based protection for "any incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, rather than in a representative capacity, and which he himself wrote or which were written under his immediate supervision."³²⁰ An application of the Fifth Circuit standard requires a determination of constructive possession, circumstances of authorship, including what constitutes immediate supervision, and the capacity of the individual who wrote the papers. One commentator urges courts to "secure a significant range of human experience intimately related to the private aspect of personality," and then to "impose limitations on the protection afforded in a principled manner consistent with the values underlying the right."³²¹ These standards ultimately leave courts groping for an analytical foundation, and reduce courts to case-by-case, ad hoc determinations of Fifth Amendment privacy. The standards also leave law enforcement officials, attorneys and individuals under subpoena unsure as to what may or may not be demanded by subpoena. Indeed, the establishment of a workable Fifth Amendment standard for personal documents, independent of a subjective characterization of the documents in any given case, may, in part, have driven the Court in *Fisher*.³²²

2. Policy Problems of a Fifth Amendment Protection of Privacy

As a policy matter, a malleable, Fifth Amendment protection of privacy, with no explicit textual support, fails to reliably protect the contents of intimately personal documents. Both circuit courts and commentators argue that the penumbral right to privacy can and

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir. 1981).

³²¹ See Note, *supra* note 314, at 988.

³²² See 425 U.S. at 434 (Marshall, J., concurring) (characterizes act of production approach as replacement for prior, ad hoc, contents-based approach).

ought to encompass protection for personal documents.³²³ The penumbral right to privacy outlined in *Griswold*, however, protects privacy of a different nature than compelled production of personal diaries.³²⁴ Specifically, the right extends to certain personal activities such as marital, sexual and reproductive matters.³²⁵ The extension of the privacy protection of the marital relationship to personal papers would imply a nearly unlimited application of the penumbral right to and protection of privacy. An extension of the penumbral right to a situation so removed from the context in which the Court created the penumbral right would invite attempts to assert a right to privacy against government actions of all types. The Supreme Court cautions against the very type of extension of the penumbral right to privacy an application to personal diaries would require.³²⁶ The Court's asserted unwillingness to expand the penumbral right to privacy beyond its current context likely precludes any extension of that right to personal diaries.³²⁷

Nor does the Fifth Amendment protection for the contents of documents, as currently construed, offer a sound basis for protection of personal diaries. As the sources of that right lie neither in constitutional text nor legislation, the scope of that right varies with time and court. In *Fisher*, the Court simply trimmed and redefined its own judicially created protection to fit within the confines of the Fifth Amendment as the Court now interprets the Fifth Amendment.³²⁸ A consideration of the progression from *Boyd* to *Fisher* leads to the conclusion that the scope of Fifth Amendment privacy, rather than providing consistent protection for personal documents such as diaries, will continue to change and evolve. True protection for such documents, therefore, must come from other analyses.

B. *The Act of Production as a Guardian of Privacy*

Rather than fear that the demise of a privacy approach heralds the end of private documents, proponents of personal paper protec-

³²³ See *In re Grand Jury Proceedings*, 632 F.2d 1033, 1043 (3d Cir. 1980); see also LaVacca, *supra* note 181, at 417; Note, *supra* note 314, at 988.

³²⁴ See NOWAK & ROTUNDA, *supra* note 189, at 757; see also LaVacca, *supra* note 181, at 415.

³²⁵ See NOWAK & ROTUNDA *supra* note 189, at 757. Nowak and Rotunda indicate that the penumbral right may be even more limited, in that the Court has not recognized a right to engage in any sexual activity done in private. *Id.*

³²⁶ See *id.* at 798.

³²⁷ See *id.* at 798. In *Bowers v. Hardwick*, for example, the majority indicates that there should be great resistance to expanding the substantive reach of the right to privacy, particularly if it requires the redefining of rights deemed to be fundamental. See *id.*

³²⁸ See *supra* notes 106-12 and accompanying text.

tion ought to welcome *Fisher* and *Doe*. By implementing act of production analysis, the Supreme Court has gone a long way toward eliminating the vagaries of the analytically imprecise *Boyd* contents-based approach.³²⁹ Within the realm of private or personal papers, certain types seem intrinsically more private than others. The act of production protection will more consistently safeguard the most intimate of personal documents, such as diaries, while allowing subpoena of those personal documents that do not carry such high expectations of privacy, such as canceled checks. Thus, where the ad hoc, privacy-based protection may fail to protect documents of a truly intimately personal nature and protect personal documents lacking such a personal nature, the clearer guidelines of the act of production doctrine, though neither perfect nor fail-safe, will generally protect truly private documents.

The act of production doctrine espoused in *Fisher* triggers Fifth Amendment protection when the act of producing a document conveys a testimonial communication, such as the existence, possession or authentication of the documents sought.³³⁰ The key component of a truly intimate, personal diary, secrecy, ensures that others will rarely know of its existence or possession, or be familiar with it to provide independent authentication.³³¹ Indeed, many diary writers trace Senator Packwood's difficulties to the fact that rather than keep them secret, he dictated them to a secretary, and then raised them as a defense during his deposition.³³² The act of producing a truly intimate diary, however, will generally concede either existence, possession or authentication, and will be protected by the Fifth Amendment.

A document such as a canceled check, however, that lacks the intimately personal nature of a diary, may not merit the same protection as a personal diary.³³³ Although such a document may reveal information about an individual's personal life, it cannot be described as intimately personal. A canceled check reveals no more to the government through a subpoena than it reveals to a chain of third parties, including the payee and the bank officials who release the funds.³³⁴ To the extent that third parties could establish existence, possession or

³²⁹ See *Fisher*, 425 U.S. at 431 (Marshall acknowledges analytical imprecision of prior documents analysis).

³³⁰ See *id.* at 410.

³³¹ See *id.* at 433 (Marshall, J., concurring).

³³² See Williams, *supra* note 32, at C4.

³³³ See *Fisher*, 425 U.S. at 426.

³³⁴ See *id.* at 427.

authentication, the Fifth Amendment should not protect a canceled check.³³⁵

Fisher also requires that the act of production, not the contents of the document, provide incriminating testimonial communication.³³⁶ According to Justice Marshall's concurrence, a testimonial act of production becomes incriminating when that act provides the sole lead to other incriminating evidence.³³⁷ Thus, while no crime results from keeping a diary, the act of production of that diary would become incriminating if it led to incriminating evidence.³³⁸ One commentator asserts that the act of production protection thus places an overly difficult burden on prosecutors and investigators who must show independent sources of incriminating evidence.³³⁹ That burden, however, effectively protects the privacy of personal documents, and will better serve to protect the sanctity of intimately personal documents than will a continually evolving, imputed Fifth Amendment protection of privacy.

The shift from a contents-based protection to an act of production protection results in additional privacy safeguards. Courts that implement a contents-based protection may require an *in camera* inspection to determine the precise nature of the contested document. By focusing on the act of production, however, an individual may avoid producing a personal diary even for the court's inspection, further safeguarding the privacy of that document. Second, the replacement of an ad hoc, case-by-case Fifth Amendment analysis with clear guidelines and standards will allow for planning. Thus, one who desires incontrovertible privacy in a personal document such as a diary will not, for example, hire someone to transcribe it for him, disclose it voluntarily to a Senate committee, or speak at length about it on the floor of the Senate.³⁴⁰

³³⁵ Arguably, someone seeking to avoid providing insights into his or her lifestyle or associations will pay in cash.

³³⁶ See *Fisher*, 425 U.S. at 410-11.

³³⁷ See *id.* at 433.

³³⁸ See *id.* Marshall would protect the act of production if he saw a substantial danger that the act of production would lead to incriminating evidence. *Id.*

³³⁹ See Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 77-78 (1986) (author concludes that act of production places onerous burdens on prosecutors).

³⁴⁰ As one commentator indicates, the most reliable protection may come not from the Court, but from Congress, through the adoption of legislation defining and clarifying the scope of documents that can be compelled. See Alito, *supra* note 339, at 80-81. In the absence of imminent legislative activity in this area, however, the act of production approach is a vast improvement over the ad hoc, contents-based approach to Fifth Amendment analysis.

CONCLUSION

By failing to overrule *Boyd* and thus providing two possible Fifth Amendment document analyses, the Supreme Court has laid down a smoke screen behind which lower courts may continue to enforce a *Boyd* style grant of privacy through the Fifth Amendment and undermine document subpoenas. Given both the practical and philosophical difficulties in consistently applying a privacy standard, and the strong dicta in *Fisher* against such Fifth Amendment privacy protection, courts should shift from a privacy analysis to an act of production analysis in all documents cases. The *Fisher* act of production analysis fits within the Court's current view of the Fifth Amendment, and provides a standard that lower courts can apply consistently. The emphasis on the act of producing the documents and not on the contents of the documents will ultimately provide greater protection for truly intimate and personal documents, but will not tend to shield personal documents of a less private nature.

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