Confusion Among the Courts: Should the Contents of Personal Papers Be Privileged by the Fifth Amendment's Self-Incrimination Clause?

Anne Marie DeMarco

Elisa Scott

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CONFUSION AMONG THE COURTS: SHOULD THE CONTENTS OF PERSONAL PAPERS BE PRIVILEGED BY THE FIFTH AMENDMENT’S SELF-INCrimINATION CLAUSE?

The Fifth Amendment of the United States Constitution provides individuals with protection against compelled self-incrimination. Traditionally, this protection was applied to oral testimony. However in 1886, the Supreme Court extended Fifth Amendment protection to documents in Boyd v. United States.

1 U.S. CONST. amend. V. The Fifth Amendment provides in relevant part: “No person shall be... compelled in any Criminal Case to be a witness against himself...” Id.

2 See Fisher v. United States, 425 U.S. 391, 401 (1976). “We adhere to the view that the Fifth Amendment protects against ‘compelled self-incrimination.’” Id.; Bellis v. United States, 417 U.S. 85, 87 (1974). “[T]he Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony.” Id.; Griswold v. Connecticut, 381 U.S. 479, 484 (1965). “The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.” Id.; LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCrimINATION 432 (1968). Mr. Levy states: The framers of the Bill of Rights saw their injunction, that no man should be a witness against himself in a criminal case, as a central feature of the accusatory system of criminal justice. While deeply committed to perpetuating a system that minimized the possibilities of convicting the innocent, they were not less concerned about the humanity that the fundamental law should show even to the offender. Above all, the Fifth Amendment reflected their judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty. 

Id.; see also Samuel A. Alito, Jr., Documents and the Privilege Against Self-Incrimination, 48 U. PITTM. L. REV. 27, 36 (1986). “The Fifth Amendment is... much narrower, applying only to compelled self-incrimination. Nevertheless, within this limited sphere its prohibition is absolute. It does not merely regulate procedures, and it forbids any force or compulsion for the purpose of extracting self-incrimination.” Id.

3 See Fisher, 425 U.S. at 415. The Court noted that historically, the privilege against self-incrimination has been applied by the courts to avoid compelling one to disclose the contents of one’s mind or private-written thoughts. Id.; Robert Heidt, The Fifth Amendment Privilege and Documents—Cutting Fisher’s Tangled Line, 49 Mo. L. REV. 439, 460 (1984). “Consider the application of the privilege to testimony. There the application of the privilege turns solely on whether the testimony is incriminating. If the information sought is incriminating, the privilege affords complete protection; if not, it offers no protection.” Id.; Kevin Urick, Note, The Right Against Self-Incrimination in Early American Law, 20 COLUM. HUM. RTS. L. REV. 107, 125 (1988). “[T]he state common law decisions... routinely excluded compelled testimony, whether obtained by state officers or private individuals.” Id.

4 116 U.S. 616 (1886). “[A] compulsory production of the private books and papers of the owners of the goods... is compelling him to be a witness against himself...” Id. at 634-
The *Boyd* Court articulated a contents-based privilege which denied disclosure of the contents of one's personal papers.\(^5\) The decision in *Boyd* relied on the notion that the private property rights of an individual were superior to the government's interest in acquiring evidence in a criminal investigation.\(^6\) Although *Boyd* has been interpreted as a protector of privacy, the language in the decision that focused on the nature of private papers,\(^7\) was merely dicta.\(^8\) Nonetheless, the Supreme Court has relied on the dicta in *Boyd* for ninety years.\(^9\)

5 See *Boyd*, 116 U.S. at 622-24 (standing for proposition that contents of one's papers are privileged); 1 Richard J. McCormick, McCormick on Evidence § 127, at 464 (4th ed. 1992). "The conceptual basis for [Boyd's] protection of the contents of private papers was never entirely clear, but seemed to rest upon the combined effect of the Fifth Amendment's privilege and the Fourth Amendment's protection against unreasonable searches and seizures." Id.; Robert S. Gerstein, The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court, 27 UCLA L. Rev. 343, 344 (1979). "Under [Boyd's] influence, the sharp outlines of the Fifth Amendment were overlain with an undifferentiated concern for allowing people to maintain the privacy of all of their papers and effects." Id.; see also infra notes 30-36 and accompanying text (analyzing *Boyd* decision and its ramifications).

6 See infra notes 37-43 and accompanying text (analyzing *Boyd* Court's reliance on private-property rationale).

7 See infra notes 39-43 and accompanying text (discussing privacy rationale behind *Boyd*).

8 See *Fisher* v. United States, 425 U.S. 391, 408 (1976). "The pronouncement in *Boyd* that a person may not be forced to produce his papers has nonetheless often appeared as dictum in later opinions of this Court." *Id.*; *Doe*, 1 F.3d at 91 (repeating language in *Fisher* referring to dicta in *Boyd*).

9 See *Bellis* v. United States, 417 U.S. 85, 87 (1974). The *Bellis* Court stated that while contents of private papers are privileged, the privilege does not extend to compelled production of partnership records. *Id.*; United States v. Calandra, 414 U.S. 338, 346 (1974) (holding that grand jury may not compel person to produce incriminating books and papers); *Couch* v. United States, 409 U.S. 322, 330 (1973) (holding that because individual in question did not personally own documents in question, *Boyd* doctrine did not apply); *Gilbert* v. California, 388 U.S. 263, 266 (1967) (holding that self-incrimination privilege applies only to compelled production of accused's communications including papers); United States v. *Wade*, 388 U.S. 218, 221 (1967) (stating that self-incrimination privilege protects accused from being compelled to produce incriminating evidence); *Davis* v. United States, 328 U.S. 582, 587-88 (1946) (focusing on *Boyd's* role in protecting accused from compelled production of incriminating evidence); United States v. *White*, 322 U.S. 694, 698-99 (1944) (reflecting view that only person entitled to claim privilege is owner of documents subpoenaed); *Wheeler* v. United States, 226 U.S. 478, 489 (1913) (holding that corporate officer could not invoke privilege because subpoenaed books were not his private property); *Wilson* v. United States, 221 U.S. 361, 375 (1911) (stating that *Boyd* applies to compelled production of pri-
Beginning with *Fisher v. United States*, the Supreme Court articulated an alternative analysis to the contents-based privilege for determining whether documents were privileged. This approach, rather than focusing on the contents of the documents, as in *Boyd*, analyzed whether the act of producing the document triggered Fifth Amendment protection.

In recent years, the Supreme Court has concentrated on the act of production analysis. This emphasis on the act of production analysis has caused lower courts to question the validity of the contents-based privilege. As a result of the Supreme Court's failure to produce documents, not business records); ICC v. Baird, 194 U.S. 25, 45 (1904) (stressing Justice Bradley's analysis in *Boyd* of overlap of Fourth and Fifth Amendments with respect to production of documents); see also Alito, supra note 2, at 29 (stating that *Boyd* doctrine upheld for over 90 years); Davis, supra note 4, at 101 (tracing history of *Boyd*).


11 *Fisher*, 425 U.S. at 409. The Court explained: The foundations for the rule [against compelling production of private papers] have been washed away. In consequence, the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscription of Fifth Amendment against compelling a person to give "testimony" that incriminates himself. Accordingly, we turn to the question of what if any, incriminating testimony within the Fifth Amendment's protection, is compelled by a documentary summons.

12 *Fisher*, 425 U.S. at 391 (creating new analysis for determining whether production of documents is privileged); *McCormick*, supra note 5, § 126, at 307. "By producing certain items, the respondent communicates at least the following information: (a) the items produced exist; (b) the items were within the possession or control of the respondent; and (c) the respondent believes or has some reason to believe that the items produced are those described in the subpoena." *Id.*; see infra notes 48-65 and accompanying text (analyzing application of act-of-production privilege for documents).

13 See *Doe*, 465 U.S. at 612 (reaffirming *Fisher's* act-of-production analysis); *Andersen v. Maryland*, 427 U.S. 463, 473-74 (1976). "The Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating evidence . . . ." *Id.*; *Fisher*, 425 U.S. at 410 (establishing new act-of-production analysis for determining whether self-incrimination privilege can be properly invoked); Alito, supra note 2, at 41-51 (distinguishing act of production analysis from contents-based approach); Davis, supra note 4, at 105-10 (focusing on impact of *Fisher* on compelled production of papers); Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683, 683 (1982) [hereinafter *Aftermath of Fisher*]. "Lower courts must recognize that *Fisher v. United States* and other recent Supreme Court decisions represent a fundamental shift in Fifth Amendment jurisprudence from a concern with privacy to a focus on compulsion." *Id.*

14 See *Fisher*, 425 U.S. at 407 (questioning validity of *Boyd*); United States v. Doe, 1 F.3d 87, 91 (2d Cir. 1993) (noting that continuing validity of *Boyd* questionable after Supreme Court's decisions in *Fisher* and *Doe*), petition for cert. filed, 62 U.S.L.W. 3289 (U.S. Oct. 4, 1993) (No. 93-529); *Aftermath of Fisher*, supra note 13, at 685. "[B]ecause *Fisher* explicitly did not decide whether *Boyd's* protection of private papers is still required by the Fifth
ure to clarify the law regarding Fifth Amendment protection of private documents, circuit courts have applied the self-incrimination privilege inconsistently. A need has therefore arisen for the Supreme Court to clearly state whether a contents-based privilege exists today.

Part One of this Note focuses on the history of the Fifth Amendment and the Supreme Court's interpretation of the self-incrimination clause. Part Two examines the nature of the contents-based privilege, as opposed to the act of production privilege. Part Three illustrates the confusion among the circuit courts as to whether a contents-based privilege still exists. Finally, Part Four analyzes the New York courts' interpretation of the Fifth Amendment privilege based on the holdings in Fisher v. United States and United States v. Doe.

I. THE HISTORICAL DEVELOPMENT OF THE PRIVILEGE AGAINST SELF-INCrimINATION

The people of the United States are protected against compelled self-incrimination by the Fifth Amendment of the Constitution. However, the history of this privilege has much deeper roots. The self-incrimination privilege as it exists in the United States, defendants may argue that Boyd continues to protect their private papers.”

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15 See infra notes 73-126 and accompanying text (examining alternative approaches used by circuit courts).
18 U.S. CONST. amend. V; see supra note 2 and accompanying text (discussing self-incrimination privilege as applied to oral testimony).
19 See Andresen v. Maryland, 427 U.S. 463, 470 (1976). The Supreme Court noted that “the development of this protection was in part a response to certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber . . . .” Id.; see also R.H. Helmholtz, Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune, 65 N.Y.U. L. Rev. 962, 964 (1990). “[The] twin sources of European law were joined together in most aspects of legal practice in continental countries and were known as the ius commune . . . . The ius commune itself contained a rule against forced self-incrimination . . . .” Id. The English common-law privilege against self-incrimination can be traced back to the Roman canon law and the European ius commune, or common law. Id. at 964-87. The author focused European law as the birthplace of the privilege against self-incrimination. Id. Davis, supra note 4, at 97; Urick, supra note 3, at 108-15 (tracing history of American protection against self-incrimination to its English roots in common-law system). The Jewish Talmud provided that incriminating statements made by an accused could not be used against the accused in a criminal trial, even if the statements were voluntarily made. Id. See generally Levy, supra note 2, at 433-35. The author traces the development of the self-incrimination privilege from its Talmudic origins through English common law and into the 18th century in the United States Constitution. Id.
can be traced to English common law. In England, the historical basis for the privilege began with a movement against the inquisitorial system of law, used by the ecclesiastical courts, in which the accused had no right against self-incrimination. In contrast, the English common-law courts used an accusatorial system which upheld the right of an accused to face his accusers and maintain his innocence. In the fourteenth century, the King's courts began to use the inquisitorial approach, while the English common-law courts continued to use the accusatorial approach. The conflict between the inquisitorial approach and the accusatorial approach was not resolved until the mid-seventeenth century, when the right against self-incrimination was recognized. Although the

20 See Urick, supra note 3, at 108-09. The English common-law system has its roots in Germanic law which was brought to England by the Saxons when they defeated the Celts. Id.; see also infra notes 21-26 and accompanying text (discussing history of privilege against self-incrimination as it developed in England).

21 See Helmholz, supra note 19, at 964-67. The English ecclesiastical courts used the ex officio oath which required the accused to answer truthfully all questions asked of him or her. Id. The ecclesiastical or church courts were concerned with the punishment of heretics, and the accused were afforded no rights to confront their accusers. Id. "Since defendants in criminal cases did not necessarily know precisely what the questions would be at the time they took the oath, this common practice resulted in their swearing to give evidence against themselves." Id. at 965; Urick, supra note 3, at 110. The inquisitorial system was used by the church courts. Id. Criminal cases in the church courts used the ex officio oath and the accused was not allowed to know the accusation or the identity of the witnesses against him. Id. "Torture was the ecclesiastical courts' favored means of forcing individuals into incriminating themselves." Id. at 110-11. The ex officio oaths provided a forceful method for suppressing heresy where the crime was the accused's belief. Id. See generally Levy, supra note 2, at 432 passim (providing in-depth analysis of inquisitorial approach used by church courts).

22 See Helmholz, supra note 19, at 963. "[T]he English common law... upheld, with only occasional backsliding, the rights and liberties of the subject. The traditions and practitioners of the common law forged the right not to be compelled to answer incriminating questions." Id. (citing Leonard W. Levy, Origins of the Fifth Amendment 216-18 (2d ed. 1986)); Urick, supra note 3, at 109. "Individuals levied charges against others by making a proper accusation, for which there were formal rules to satisfy before the accused was required to answer." Id. (citing Levy, supra, at 2-42).

23 See Urick, supra note 3, at 111. "While the English common law courts maintained accusatorial procedures, gradually both King's Council and Chancery adopted procedures similar to those in the ecclesiastical courts... King's Council and Chancery subjected the accused to interrogatory examinations." Id. In 1368, Edward III outlawed the use of inquisitorial procedures by the ecclesiastical courts, however, in 1400, Henry IV provided the church courts greater authority. Id. There remained great dissent over the power of the church courts to use inquisitorial procedures. Id.

24 See Helmholz, supra note 19, at 964-65. "[T]he first unequivocal expressions of the privilege against the self-incrimination occurred during the constitutional struggles of the seventeenth century, specifically in the dispute over the legality of the ex officio oath used by the English ecclesiastical courts." Id. (citing 8 John H. Wigmore, Evidence in Trials at Common Law § 2250, at 270-284 (1st ed. 1904)); Urick, supra note 3, at 108. The right against self-incrimination was born during the period when the modern, centralized state developed. Id. During the reign of Queen Elizabeth I, the Court of High Commission and the Court of Star Chamber were created to suppress heresy. Id. at 112 n.21.
privilege was originally a "right of silence," which only protected speech, in the early eighteenth century, the English courts extended the privilege to documents.

The evolution of the English right against self-incrimination was evident in the early history of American jurisprudence. Prior to the enactment of the Bill of Rights, several state constitutions protected the right to be free from incriminating oneself. Moreover, when the Constitution and the Bill of Rights were written, the right against self-incrimination was incorporated as a fundamental right to be extended to all persons in the United States.

It was during the trial of John Lilburne that the common-law right against self-incrimination was asserted in the Court of Star Chamber. The spark that ignited the popular outrage was the trial of John Lilburne, an anti-Stuart Leveller known as Freeborn John. Lilburne refused in two trials to answer questions placed before him by the Court of Star Chamber, and he "refused to take the oath in the Court of Star Chamber and is generally credited with having provided the strongest impetus to the affirmation of the right against self-incrimination." The English version of the privilege surfaced in the seventeenth century in response to the tactics of the prerogative courts, which inquired in political and religious crimes. Lilburne's refusal almost cost him his life, but generated enough publicity to cause Parliament to abolish both the Star Chamber Court and the prerogative oaths. By the early 1650s, the privilege was cemented in English common law.

25 See Levy, supra note 2, at 390; supra note 3 and accompanying text (discussing self-incrimination privilege as applied to oral testimony).

26 See Fisher v. United States, 425 U.S. 391, 418 (1976) (Brennan, J., concurring). Beginning in the early eighteenth century the English courts widened that right to include protection against the necessity of producing books and documents that might tend to incriminate the accused . . . . Id.; see also Davis, supra note 4, at 97-98 (discussing England's broadening of privilege against self-incrimination to encompass documents).

27 See Urick, supra note 3, at 115. The Puritans were strong advocates of the right against self-incrimination in England. When they began to migrate to the colonies, they continued to fight for this right because they continued to face religious intolerance. Id.

28 Id. at 116. "As the colonies acquired statehood and adopted constitutions and bills of rights, many states enacted constitutional provisions guaranteeing the right against self-incrimination." Id. (citing R. Carter Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 VA. L. REV. 763, 764-65 (1935)); Davis, supra note 4, at 98. "Upon declaring independence from England, several states incorporated the common law privilege into their state constitutions." Id. (citing Levy, supra note 2, at 405).

29 See Davis, supra note 4, at 98-99. "Thus the Framers of the Constitution decided to uphold human dignity by establishing a system of justice that did not require the accused to contribute to his own criminal conviction." Id. (citing Levy, supra note 2, at 432); Urick, supra note 3, at 116. "The persons who promulgated the Fifth Amendment understood that the right against self-incrimination which the Fifth Amendment was to guarantee would assume the same attributes with which common law courts, in England and in America, had invested that right." Id.
II. THE DEVELOPMENT OF THE CONTENTS-BASED PRIVILEGE AND THE ACT OF PRODUCTION ANALYSIS

A. Boyd v. United States

In *Boyd v. United States*, the Supreme Court first addressed the issue of whether the Fifth Amendment's self-incrimination protection applied to the production of documents requested in a subpoena. In *Boyd*, the government subpoenaed a firm's invoices for shipments of glass into the United States. The firm complied with the subpoena under protest, and certain quantities of the glass were forfeited for tariff violations. The Supreme Court reversed the decision of the trial court on the grounds that the compelled production of the documents violated the Fourth and Fifth Amendments. Justice Joseph Bradley, writing for the majority, stated that forcing the firm to produce the documents in question was analogous to a search and seizure. Therefore, since the government's rights to the documents were not superior to the rights of the firm, the seizure was unconstitutional. The Court stated

30 116 U.S. 616 (1886).

31 See Andresen v. Maryland, 427 U.S. 463, 471 (1976). "Thus, in *Boyd v. United States*, 116 U.S. 616, 633 (1886), the Court stated: "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.*; Fisher v. United States, 425 U.S. 391, 405 (1976). "The proposition that the Fifth Amendment prevents compelled production of documents over objection that such production might incriminate stems from *Boyd v. United States*, 116 U.S. 616 (1886)." *Id.*; Alito, supra note 2, at 31. "The Supreme Court's efforts to explain how the privilege against compelled self-incrimination applies to subpoenas for documents began a century ago with *Boyd v. United States*, in which the Court held that an individual's private papers were absolutely protected." *Id.*; Urick, supra note 3, at 126. "In *Boyd v. United States*, the Supreme Court seems to have adopted the rule that the right... affords some protection when documentary evidence and the writings of the accused are sought." *Id.*; see also Davis, supra note 4, at 100-01 (stating that contents-based approach established in *Boyd* was followed by Supreme Court for ninety years).

32 See *Boyd*, 116 U.S. at 618; Foster, supra note 11, at 1608. "At trial, the quantity and value of a previous glass shipment became important, and the government secured a court order directing the Boyds to produce an invoice for the earlier shipment." *Id.* (citing *Boyd*, 116 U.S. at 618).

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

34 *Id.* at 630; see Foster, supra note 11, at 1608. "In *Boyd*, Justice Bradley stressed the need to construe liberally constitutional provisions intended to protect people and property; in so doing, he made the protections provided by the Fourth and Fifth Amendments overlap." *Id.*

35 *Boyd*, 116 U.S. at 622; see Alito, supra note 2, at 34. Justice Bradley concluded that the subpoena was the equivalent of a search and seizure and because the government's interest in the papers was not superior to the interest of the private party, the search was unconstitutional. *Id.*; Mitchell L. Rothman, *Life After Doe? Self-Incrimination and Business Documents*, 56 U. CINN. L. REV. 387, 391-92 (1987). The author noted:

In today's terms, however, no search or seizure occurred; the trial court's order demanding the invoice was the functional equivalent of a subpoena duces tecum requir-
that compelling an individual to produce private papers was a violation of the Fifth Amendment's privilege against self-incrimination.\(^\text{36}\)

Although the Court's argument was founded upon a private property rationale,\(^\text{37}\) *Boyd* has since been viewed as a case espousing general privacy rights.\(^\text{38}\) The privacy rationale is based on the

...
premise that one's written thoughts are closely connected to the person. These personal-written thoughts are no different than what a person may orally divulge. Written thoughts are an extension of the person, and reflect his or her innermost thoughts. Without Fifth Amendment protection over the contents of personal papers, individuals would be discouraged from writing down their ideas, fearing that their thoughts might be self-incriminating. Therefore, the Boyd Court recognized a contents-based privilege against the compelled production of documents.

The Boyd decision has faced a great deal of criticism and many of the standards articulated in the case have since been overruled. Although Boyd dealt with business documents, the

the privilege, or at least in his possession in a purely personal capacity." Id.; Hale v. Henkel, 201 U.S. 43 (1906) (holding that Fifth Amendment right is personal and cannot be asserted by corporation or collective entity).

Collective entities do not enjoy a Fifth Amendment privilege because the privilege is purely personal. See McCormick, supra note 5, § 128, at 311. Corporations and their custodians have no Fifth Amendment protection because the self-incrimination privilege only applies to individuals. Id. Representatives of these entities likewise have no protection because they are acting on behalf of the organization and there is no expectation of a personal privacy interest within the group. Id.

See infra notes 60-65 and accompanying text (discussing Justice William Brennan's reasoning for continued application of contents-based privilege based on privacy rationale).

See In re Grand Jury Subpoena Duces Tercum, 741 F. Supp. 1059, 1069 (S.D.N.Y. 1990). “To the extent that one's private papers reveal the contents of one's mind, there is no defensible line to be drawn between extracting a confession from one's lips and doing the same by subpoenaing the thoughts recorded in one's diary . . . .” Id.; Alito, supra note 2, at 39. (“Boyd has) endured because its reasoning contained a kernel of truth . . . forcing an individual to give up possession of these intimate writings may be psychologically comparable to prying words from his lips.” Id.

See In re Grand Jury, 741 F. Supp. at 1068. “Implicit in Boyd [is the reality] that one's papers can be an extension of oneself . . . .” Id.; see also infra notes 61-62 and accompanying text (examining Justice Brennan's rationale that papers are extension of one's mind).

See In re Grand Jury, 741 F. Supp. at 1069. The court stated: If the Fifth Amendment is to stand for our constitutional preference for an accusatorial system, it must protect the divulgence of the contents of one's mind, one's thought processes, when those testimonial divulgences—be they oral or written communications—would self-incriminate . . . . [T]he interests of privacy, the desire to preserve the autonomous functioning of the individual, and practical considerations outweigh the need for incriminating evidence and support the retention of the privilege for private papers. Id.; see also infra notes 60-65 and accompanying text (discussing Justice Brennan's fear that limitation of Fifth Amendment self-incrimination privilege would hamper free expression).

See supra notes 4-8 and accompanying text (reviewing Supreme Court's application of Boyd doctrine).

See Katz v. United States, 389 U.S. 347, 352 (1967) (holding that, in proper circumstances, testimonial evidence may be seized and used as evidence); Warden v. Hayden, 387 U.S. 294, 302-03 (1967) (holding that purely evidentiary, non-testimonial evidence may be searched for and seized); Hale v. Henkel, 201 U.S. 43, 69-70 (1906) (limiting application of Fourth Amendment to subpoenas).

Since Boyd, the Supreme Court has held that the Fifth Amendment applies only when the individual is compelled to make a testimonial communication that is incriminating. See
Supreme Court has overruled the application of the Fifth Amendment privilege against self-incrimination to corporate entities. In applying a contents-based privilege, documents containing private information, such as diaries and datebooks, would be protected from disclosure.

B. Fisher v. United States

In Fisher v. United States, the Supreme Court articulated a new test for determining whether the compelled production of documents was self-incriminating. In Fisher, the attorneys for two taxpayers received subpoenas from the Internal Revenue Service directing them to produce certain workpapers, which were prepared by the taxpayers' accountants. While the Fisher Court analyzed several issues, the relevant issue was whether the tax-
payers were protected from producing the subpoenaed documents pursuant to the Fifth Amendment.52

The Court declared that proper examination of Fifth Amendment self-incrimination protection involved the question of whether the act of producing the papers was compelled, testimonial, and incriminating.53 The Court held that since the documents were prepared by the accountants, and not the taxpayers themselves, the preparation of the papers was not compelled.54 The production of the documents may have been compelled, but the preparation was not.55

The Court also stated that because the government already knew of the existence and location of the documents, there was no testimonial aspect to the production.56 Further, the Court held that neither the fact that the documents existed, nor the fact that the taxpayer possessed them, was incriminating.57 Because the production of the documents was not compelled, testimonial, and incriminating, the act of producing the subpoenaed documents did not violate the Fifth Amendment.58 The Court expressly stated that it was not examining whether the Fifth Amendment would

production would violate the taxpayers' Fifth Amendment rights and determined that it would not. Id. at 402-14.

52 Fisher, 425 U.S. at 405-14 (analyzing history of contents-based privilege derived from Boyd and proposing alternative approach based on act of production).

53 Id. at 409-10. The Supreme Court stated that "the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence . . . ." Id. at 409. Because the creation of the contents of the document was not compelled, the Court reviewed whether the act of producing the documents was compelled. Id. at 409-10. "The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced." Id. at 410. The Court recognized to manners in which the act of complying with the subpoena could violate the self-incrimination clause. Id. at 409-10. "Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena." Id. at 410.

54 Fisher, 425 U.S. at 409. "A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession . . . does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought." Id.

55 See supra note 53 and accompanying text (explaining that while production of documents under subpoena would be compulsory, preparation of documents would not).


57 Id. at 412. "[W]e are quite unprepared to hold that either the fact of existence of the papers or of their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer." Id.

58 See id. at 410-14 (creating test for determining whether act of production would violate Fifth Amendment's self-incrimination clause, but holding that facts in Fisher did not allow taxpayers to invoke Fifth Amendment).
have protected the taxpayer had the documents in question been his own personal papers, rather than workpapers prepared by an accountant.\textsuperscript{59}

In a concurring opinion, Justice William Brennan explained that the Fifth Amendment protected individuals from compelled production of private papers.\textsuperscript{60} In determining that the Fifth Amendment extended to private papers whether the act of creating them was compelled or not,\textsuperscript{61} Justice Brennan stated that compelling a person to disclose the contents of his or her private papers was analagous to compelling one to disclose the contents of his or her mind.\textsuperscript{62} Although he approved of the act of production analysis for business and nonpersonal documents,\textsuperscript{63} he argued on historical grounds that the Court should not eliminate the contents-based privilege in favor of the act of production privilege.\textsuperscript{64} Justice Brennan argued that the \textit{Fisher} holding eroded the protection against self-incrimination contained in the Fifth Amendment.\textsuperscript{65} Justice Brennan's rationale, as opposed to that espoused by the majority, was more consistent with the historical back-

\textsuperscript{59} \textit{Id.} at 414. "Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers.'" \textit{Id.}

\textsuperscript{60} \textit{Fisher,} 425 U.S. at 414 (Brennan, J., concurring). Justice Brennan would not join in the majority's opinion because of its negative impact upon the privilege against compelled production of private books and documents. \textit{Id.}

\textsuperscript{61} See \textit{id.} at 418-23 (1976) (examining history of self-incrimination privilege); see also \textit{supra} notes 20-29 and accompanying text (discussing history of privilege against self-incrimination).

\textsuperscript{62} \textit{Fisher,} 425 U.S. at 420 (Brennan, J., concurring). Justice Brennan stated:

An individual's books and papers are generally little more than an extension of his person . . . I perceive no principle which does not permit compelling one to disclose the contents of one's mind but does permit compelling the disclosure of the contents of that scrap of paper by compelling its production. \textit{Id.}

Justice Brennan further stated that the ability to write one's private thoughts on paper and to preserve memories in such a way would be impeded if those writings could be used to incriminate the person who wrote them. \textit{Id.} He stated that the historical purpose of the privilege was to enable people to record their thoughts without fear. \textit{Id.}

\textsuperscript{63} See \textit{id.} at 414 (stating that Brennan agreed that contents of tax records in question would not be protected by self-incrimination clause).

\textsuperscript{64} \textit{Id.} at 414-415. "[I]t is but another step in the denigration of privacy principles settled nearly 100 years ago in \textit{Boyd v. United States . . . [O]nce again the Court is laying the groundwork for future decisions . . . against the availability of the privilege." \textit{Id.} If the protections of the Fifth Amendment were diminished, Justice Brennan stated people would be afraid to write their most personal thoughts on paper for fear that the contents would be used against them. \textit{Id.}

\textsuperscript{65} \textit{Fisher,} 425 U.S. at 415. Justice Brennan stated that Court had interpreted the Fifth Amendment as preventing governmental intrusions into one's privacy either through compelled testimony or compelled production of one's private books or documents. \textit{Id.}
C. United States v. Doe

The Supreme Court, in United States v. Doe, reaffirmed Fisher and continued to erode the validity of the contents-based privilege. In Doe, the owner of several sole proprietorships was served with a subpoena for the production of business records. The defendant's motion to quash the subpoena was granted by the district court and affirmed by the Third Circuit. On certiorari, the Supreme Court determined that the contents of the business records were not privileged because the documents were prepared voluntarily. In Doe, as in Fisher, the Supreme Court did not expressly overrule the contents-based privilege established in Boyd, but rather, applied the act of production analysis to nonpersonal papers.

Although the Court held that the contents of the business documents were not privileged, the issue of whether personal papers would have been protected was not before the court and, therefore, not addressed. Nevertheless, the Justices of the Court approved

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67 Id. at 610. "The Court in Fisher expressly declined to reach the question of whether the Fifth Amendment privilege protects the contents of an individual's tax records in his possession. The rationale underlying our holding in that case is, however, persuasive here." Id.; see also United States v. Doe, 1 F.3d 87, 89 (D.C. Cir. 1993) (stating Doe answered open question in Fisher, that contents of personal papers not privileged), petition for cert. filed, 62 U.S.L.W. 3289 (U.S. Oct. 4, 1993) (No. 93-523).
68 Doe, 465 U.S. at 606 (stating that respondent, owner of several sole proprietorships, was served with number of subpoenas to produce documents).
69 See id. at 607-08 (stating that respondent's motion to quash subpoenas granted by district court for District of New Jersey and affirmed by Third Circuit).
70 Id. at 611-12. The Court stated that the respondent did not claim that the preparation of the documents was compelled or that the subpoena would force him to authenticate the documents. Id. Therefore, the contents of the documents were not privileged. Id.
71 See supra note 59 and accompanying text (stating that Fisher Court was not concerned with question of private papers); see also infra note 72 and accompanying text (discussing Justice Marshall's view that Doe did not overrule Boyd). But see infra note 72 and accompanying text (analyzing Justice O'Connor's opinion that decision in Doe overruled contents-based privilege).
Contrary to what Justice O'Connor contends, . . . I do not view the Court's opinion in this case as having reconsidered whether the Fifth Amendment provides protection for the contents of "private papers of any kind." This case presented nothing remotely close to the question that Justice O'Connor eagerly poses and answers . . . . The documents at stake here are business records which implicate a lesser degree of concern for privacy interests than, for example, personal diaries. . . . Were it true that the Court's opinion stands for the proposition that "the Fifth Amendment provides absolutely no
of the act of production analysis, but felt that there was still room for a protection of private documents based on the historical context of the Fifth Amendment.

III. CONFUSION AMONG THE CIRCUITS REGARDING THE EXISTENCE OF THE CONTENTS-BASED PRIVILEGE

A. The Circuits Which Do Not Recognize a Contents-Based Privilege

As a result of the Supreme Court's emphasis on the act of production privilege, some circuits have abandoned the traditional contents-based privilege for the act of production analysis. The Second, Fourth, Ninth, and District of Columbia Circuits have decided that the contents of voluntarily prepared documents protection for the contents of private papers of any kind," I would assuredly dissent. I continue to believe that under the Fifth Amendment "there are certain documents no person ought to be compelled to produce at the Government's request." Id. But see id. at 618. Justice O'Connor wrote a separate concurring opinion in which she announced that she considered the decision in Doe to effectively destroy any protection which was afforded to the contents of documents, both private and nonprivate. Id.

See id. at 606-17 (Supreme Court followed Fisher's act of production analysis in protecting business papers of sole proprietor); see also Fisher v. United States, 425 U.S. 391, 397-414 (1976) (Supreme Court first articulated act of production privilege in Fisher, reasoning that act of producing documents in relation to subpoena may be compelling testimony); Aftermath of Fisher, supra note 13, at 683. "[F]isher v. U.S. and other recent Supreme Court decisions represent a fundamental shift in Fifth Amendment jurisprudence from a concern with privacy to a focus on compulsion." Id.


See United States v. Wykowski, 929 F.2d 981, 983 (4th Cir. 1991) (contents of documents, including desk, pocket calendars, appointment books, planners are not privileged), appeal after remand sub nom., United States v. Stone, 976 F.2d 809 (4th Cir. 1992), cert. denied, 113 S. Ct. 1843 (1993); United States v. Lang, 792 F.2d 1235, 1238 (4th Cir. 1986) (custodian of corporate records could not invoke Fifth Amendment privilege).

See United States v. Lacoste, 800 F.2d 981, 984 (9th Cir. 1986) (former police chief's records subject to disclosure, without reaching question of contents of documents); United States v. Terry, 759 F.2d 1418, 1419 (9th Cir. 1985) (contents of documents, including personal journals, stock transactions, escrow statements, receipts are not privileged). But see Lacoste, 800 F.2d at 984-87 (Poole, J., dissenting) (arguing that because Doe only dealt with business documents, holding not applicable to personal non-business records).

are not protected by the Fifth Amendment. In rejecting the contents-based privilege, these courts have exceeded the holdings in Fisher and Doe because both of these decisions applied the act of production privilege in the context of business documents and not in the realm of personal papers.

Recently, the Second Circuit in United States v. Doe held that the Fifth Amendment did not protect the contents of personal documents. Doe was subpoenaed to produce his pocket calendar in connection with possible securities violations. The Second Circuit explained that since Boyd dealt with business records, the Supreme Court’s pronouncement concerning personal papers was dicta. Therefore, it was not controlling with respect to personal papers. In addition, the Second Circuit stated that after Fisher and Doe, any existence of a contents-based privilege had disap-

79 See United States v. Doe, 1 F.3d 87, 93 (2d Cir. 1993) (holding that contents of voluntarily prepared documents not privileged, although act of production could be incriminating).

80 Doe, 1 F.3d at 88-89. Doe was subpoenaed to produce the original version of a pocket calendar-appointment book in connection with a SEC investigation of violations of the federal securities laws. Id. at 88. Doe, relying on Boyd, argued that the contents of the document should prevent disclosure. Id. at 90-92. However, the Second Circuit ruled that the Fifth Amendment did not protect the contents of voluntarily prepared non-business documents such as Doe’s calendar. Id. at 92.

81 Id. at 93; see In re Proceeding Before the Grand Jury, 767 F.2d 39, 41 (2d Cir. 1985). This issue was not previously resolved by the Second Circuit. Id. “We do not reach the question, left open in Fisher, of whether the Fifth Amendment protects the contents of private papers that are not business documents.” Id.; see also In re Grand Jury Subpoenas Duces Tecum, 722 F.2d 981, 986 (2d Cir. 1983). Since Fisher and Doe’s shift toward the act of production privilege, no case involving purely personal papers before the court. Id. “Thus, whatever the current scope of Body’s protection—a question we do not reach today—these papers do not come within its purview.” Id.; United States v. Fox, 721 F.2d 32, 36 n.5 (2d Cir. 1983). The Second Circuit could decide the cases based on the act of production privilege without having to reach the question of Boyd’s validity. Id. “Because we hold today that Fisher prohibits compelled production of the records if the act of production would be incriminatory, we need not address the argument” that the subpoenaed records are private papers and therefore privileged. Id.

82 Doe, 1 F.3d at 88-89.

83 See id. at 92 (stating contents-based privilege for personal papers was dicta in Boyd).

84 United States v. Doe, 1 F.3d 87, 92 (2d Cir. 1993). “Boyd concerned business documents, and therefore its declarations regarding the Fifth Amendment’s protection of non-business documents were dicta.” Id.; see Melilli, supra note 74, at 238. “The reliance upon Boyd for a distinction governing the contents of private papers is questionable, for the document at issue in Boyd was an invoice for shipped merchandise, which was hardly a private paper.” Id. Boyd’s pronouncement regarding the protection of private papers, however, has been repeated by the Supreme Court numerous times. See Doe, 1 F.3d at 95 (Altimari, J., dissenting). Two years before Fisher, the Supreme Court stated: “It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony.” See Bellis v. United States, 417 U.S. 85, 87-88 (1974).
According to the court, the focus in *Fisher* and *Doe* was on whether the act of producing the documents in question was compelled testimonial communication, rather than on the nature of the document.66 Lastly, the Second Circuit relied on the basis that three other circuits had rejected the contents-based privilege.67

Although this argument seems persuasive, it fails. For ninety years, a contents-based privilege has been upheld.88 Even though *Boyd*’s pronouncement protecting the contents of personal documents was dicta, it has been followed by the Supreme Court in numerous opinions.89

The Second Circuit disregarded the contents-based privilege because it was dicta,90 and advanced the position that the act of production analysis applied to all self-incrimination cases.91 However, this position was also dicta because *Fisher* and *Doe* dealt with business documents. In effect, the Second Circuit chose to substitute the dicta of one case for that of another.

The Second Circuit also rejected the contents-based privilege because three other circuits abandoned that analysis.92 However, this “follow the leader” argument is not as sound as the Second Circuit believes it to be. The Supreme Court enunciated the con-

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85 See *Doe*, 1 F.3d at 93. “The Court no longer views the Fifth Amendment as a general protector of privacy or private information, but leaves that role to the Fourth Amendment.” *Id.*

86 *Id.* at 91-92.

87 *Id.* at 93; see also *supra* notes 73-95 and accompanying text (discussing circuits that do not follow content-based privilege). While three other circuits have rejected the personal document privilege, the Third and Fifth Circuits still hold that the Fifth Amendment protects personal papers. *See infra* notes 96-116 and accompanying text (discussing circuits which adhere to content-based privilege). Other circuits that have not yet decided the issue have “made statements that leave room for some kind of exception for personal papers.” *See Doe*, 1 F.3d at 95 (Altimari, J., dissenting); see also *infra* notes 117-126 and accompanying text (discussing circuits which reserved judgment).

88 See *Doe*, 1 F.3d at 95 (Altimari, J., dissenting) (stating that *Boyd*’s content-based privilege has been followed in numerous opinions); see also *supra* note 9 and accompanying text (discussing Supreme Court decisions following *Boyd*).

89 See *supra* note 9 and accompanying text (discussing Supreme Court decisions following *Boyd*).

90 United States v. *Doe*, 1 F.3d 87, 92 (2d Cir. 1993) (stating that *Boyd*’s pronouncement regarding personal papers was dicta).

91 *Id.* at 93 (holding that contents of voluntarily prepared documents were not privileged, although act of production analysis may apply).

92 See *id.* (stating that three circuits held that Fifth Amendment does not protect contents of any papers); see also *supra* notes 73-79 and accompanying text (discussing circuits that abandoned contents-based privilege).
tents-based privilege and never overruled it. The fact that three circuits believe the Supreme Court has overruled such an analysis should not be dispositive and should not be the impetus for other circuits to follow such an approach. This argument also neglects to consider that the Third and Fifth Circuits continue to follow the dicta in Boyd. Lastly, the Second Circuit chose not to address that some Supreme Court Justices believe the contents-based privilege is still the law.

B. The Circuits Which Recognize a Contents-Based Privilege

The Third and Fifth Circuits have not strayed from the contents-based privilege formulated in Boyd. In United States v. Davis and United States v. Van Artsdalen, the Fifth and Third Circuits, respectively, relied on a historical analysis of privacy interests to support the application of a contents-based privi-

93 See Doe, 1 F.3d at 95 (Altimari, J., dissenting) (stating that contents-based privilege had not been expressly overruled nor had Supreme Court indicated to do so).

94 See infra notes 96-116 and accompanying text (discussing circuits that follow contents-based approach).

95 See Doe, 1 F.3d at 95 (Altimari, J., dissenting) (stating that two Justices in Fisher opined that Fifth Amendment protects contents of personal papers); see also Fisher v. United States, 425 U.S. 391, 414-30 (1976) (Brennan, J., concurring) (arguing that history favors privacy rationale of contents-based privilege); Fisher, 425 U.S. at 431-32 (Marshall, J., concurring) (stating that some documents should be protected from compulsion).

96 See In re Grand Jury, 680 F.2d 327, 333 (3d Cir. 1982) (private papers are privileged because a purpose of Fifth Amendment is to ensure an individual's right to privacy); United States v. Van Artsdalen, 632 F.2d 1033, 1042 (3rd Cir. 1980) (Fifth Amendment protects accused from government-compelled disclosure of self-incriminating private papers, such as purely personal date books).

97 United States v. Davis, 636 F.2d 1028, 1042 (5th Cir.), cert. denied, 454 U.S. 862 (1981). "The Fifth Amendment creates a zone of privacy which absolutely protects documents in the hands of the owner." Id.; In re Grand Jury Proceedings, 601 F.2d 162, 167 (5th Cir. 1979). "Compelling production of an individual's books and papers to be used against him in legal proceedings violates . . . the Fifth Amendment." Id.

98 See In re Grand Jury, 680 F.2d at 333 (relying on Boyd and its progeny to determine that one's right to privacy was purpose of Fifth Amendment protection); Davis, 636 F.2d at 1042. "[Boyd's zone of privacy was] the fountainhead of modern analysis of the self-incrimination clause." Id. "This court, however, has already rejected interpretations of Fisher and Andresen that would either limit the Boyd principle to non-business records or abolish it altogether." Id.


100 632 F.2d 1033 (3d Cir. 1980).
These courts noted that privacy interests played an important role in protecting personal papers.\(^{101}\)

*United States v. Van Artsdalen* involved a subpoena for the defendant's appointment book.\(^{103}\) The Third Circuit found the appointment book to be the defendant's personal papers, and thus, privileged from disclosure.\(^{104}\) Relying on the *Fisher* Court's explicit efforts to distinguish *Fisher* from *Boyd*,\(^{105}\) the Third Circuit concluded that the contents-based privilege for private papers did not lose its validity.\(^{106}\) The court also reasoned that the Fifth Amendment protects privacy interests, and therefore, the defendant had a right to expect privacy in regard to these documents.\(^{107}\) The court feared that allowing disclosure of an individual's personal papers would prevent the writing of one's thought and ideas,\(^{108}\) and ruled that an intrusion into the fundamental right to express oneself would not be tolerated.\(^{109}\)

In *United States v. Davis*, an attorney was subpoenaed to produce records relating to his client's tax liability.\(^{110}\) The Fifth Circuit held that many of the documents, including the client's will, were protected under the attorney-client privilege.\(^{111}\) To invoke the attorney-client privilege, the documents in question must have been privileged "in the hands of the client."\(^{112}\) Pursuant to a contents-based analysis, the Fifth Circuit found these documents

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\(^{101}\) *See id.* at 1042. The Third Circuit noted that the contents-based privilege is not novel. *Id.* "It is a firmly embedded tenet of American constitutional law that the Fifth Amendment absolutely protects an accused from having to produce, under government compulsion, self-incriminating private papers." *Id.*; *see also supra* notes 18-29 and accompanying text (discussing history of Fifth Amendment and development of contents-based privilege).

\(^{102}\) *See Couch v. United States*, 409 U.S. 322, 327 (1973) (privilege "respects a private inner sanctum of individual feeling and thought"); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) ("right of each individual to a private enclave where he may lead a private life"); *see also supra* notes 37-47 and accompanying text (discussing privacy and Fifth Amendment).

\(^{103}\) *See Van Artsdalen*, 632 F.2d at 1036-37.

\(^{104}\) *Id.* at 1044.

\(^{105}\) *See id.* at 1043 (discussing *Fisher* Court's leaving question of protection of personal papers open); *see also* *Fisher v. United States*, 425 U.S. 391, 414 (1976) (stating papers in question were personal, therefore no ruling made on personal documents).

\(^{106}\) *See Van Artsdalen*, 632 F.2d at 1043 (concluding that *Fisher*’s act of production analysis does not apply to private papers).

\(^{107}\) *United States v. Van Artsdalen*, 632 F.2d 1033, 1043-44.

\(^{108}\) *Id.* at 1043.

\(^{109}\) *See id.* at 1044 (suggested that *Boyd* stands for rights of accused).

\(^{110}\) *United States v. Davis*, 636 F.2d 1028, 1032-34 (5th Cir. 1981).

\(^{111}\) *Id.* at 1044.

\(^{112}\) *Id.* at 1040-41.
to be protected because of the personal nature of the records.\textsuperscript{113} The court also noted that the act of production approach and the contents-based analysis could coexist because the Supreme Court in \textit{Fisher} did not suggest otherwise.\textsuperscript{114}

Recognition of \textit{Fisher}'s act of production approach does not preclude acceptance of a contents-based privilege. These two approaches are compatible. If the document in question is personal, then its contents would prevent disclosure.\textsuperscript{115} However, if the document is business-related, then the act of production analysis would apply.\textsuperscript{116} This allows for the protection of privacy, which is inherent in personal papers, while also adhering to the act of production approach for business documents.

\section{C. The Circuits Which Have Reserved Judgment}

The First,\textsuperscript{117} Sixth,\textsuperscript{118} Eighth,\textsuperscript{119} and Eleventh\textsuperscript{120} Circuits have not decided whether the Fifth Amendment protects the contents of personal papers.\textsuperscript{121} These courts suggest that in some instances personal papers may be privileged.\textsuperscript{122} For example, the contents of

\begin{itemize}
\item \textsuperscript{113} \textit{Id.} at 1043.
\item \textsuperscript{114} \textit{See Davis}, 636 F.2d at 1042. The Fifth Circuit has applied both the contents-based privilege and the act of production privilege. \textit{Id.} The court stated: "[t]hese two branches of Fifth Amendment analysis are not logically exclusive of each other. Nothing in \textit{Fisher} suggests otherwise . . . ." \textit{Id.; see also Davis, supra note 4, at 130-31 (suggesting contents-based privilege and act of production privilege co-exist).}
\item \textsuperscript{115} \textit{See Davis, supra note 4, at 130 (suggesting that courts apply \textit{Boyd}'s content-based approach to private papers); see also supra notes 96-114 and accompanying text (discussing compatibility of two approaches).}
\item \textsuperscript{116} \textit{See Davis, supra note 4, at 131 (suggesting that courts follow act of production analysis for business documents).}
\item \textsuperscript{117} \textit{See In re Steinberg}, 837 F.2d 527, 530 (1st Cir. 1988) (notebooks subpoenaed in connection with investigation of fraud during fund-raising activities were not intimate personal papers); \textit{In re Grand Jury Proceeding}, 626 F.2d 1051, 1055 n.2 (1st Cir. 1980) (doctor's appointment books no more personal than business records).
\item \textsuperscript{118} \textit{See Butcher v. Bailey}, 753 F.2d 465, 469 (6th Cir.) (contents of debtor's records relating to bankrupt estate were not intimately personal to require invoking Fifth Amendment privilege, although act of production privilege could be utilized), \textit{cert. dismissed}, 473 U.S. 925 (1985); United States v. Schiansky, 709 F.2d 1079, 1083 (6th Cir. 1983) (taxpayer's accounting workpapers do not have same degree of privacy as personal diary), \textit{cert. denied}, 465 U.S. 1099 (1984).
\item \textsuperscript{119} \textit{See United States v. Mason}, 869 F.2d 414, 416 (8th Cir.) (subpoena of pocket calendars not personal papers), \textit{cert. denied}, 492 U.S. 907 (1989).
\item \textsuperscript{120} \textit{See In re Grand Jury Investigation}, 921 F.2d 1184, 1186-87 (11th Cir. 1991) (subpoena of attorney's papers included both personal and business finances).
\item \textsuperscript{121} \textit{See id.} at 1187 n.6 (Eleventh Circuit left open issue of validity of contents-based privilege without some ruling by Supreme Court); \textit{Grand Jury Proceeding}, 626 F.2d at 1054 n.2 (since documents in question were business records, First Circuit did not have to rule on validity of \textit{Boyd}).
\item \textsuperscript{122} \textit{See United States v. Doe}, 1 F.3d 87, 96 (2d Cir. 1993) (Altimari, J., dissenting). "[A]lthough refusing to decide the matter, [they] have made statements that leave room for
documents would be privileged where compelled disclosure would "break the heart of our sense of privacy." The indecisiveness of these circuits stemmed from the Supreme Court's failure to rule on the validity of Boyd. By rejecting the contents-based privilege in the context of business documents, these courts have reserved judgment until the Supreme Court mandates otherwise. In effect, these courts, by narrowly drawing their holdings to the context of business documents, have retained Boyd's contents-based privilege for personal documents.

These courts should follow the Fifth Circuit's approach, which allows for the mutual existence of the act of production privilege and the contents-based privilege. The Fisher Court did not expressly state that the contents-based privilege was no longer valid, rather the Justices explicitly stated that Fisher was not to

"With respect to these less private papers [like a taxpayer's records] a majority of the Supreme Court appears to agree that the Fifth Amendment does not absolutely bar their compelled production." However, it is suggested that "the 'privacies of life' which are beyond the pale of legitimate government intrusion" are still protected. Id.; see also Schlansky, 709 F.2d at 1083.

"We recognize that Andresen and later cases represent a shift in Fifth Amendment jurisprudence from privacy based rationale of Boyd, to the idea that records voluntarily committed... to writing are not compelled testimony. However, although a few circuits have held that even personal papers are subject to this new rationale, this circuit has not yet addressed the remaining vitality of Boyd with regard to personal documents. The Supreme Court's own reluctance to overrule Boyd and the government's failure to press this point here counsel in favor of continuing to leave this question open in this circuit.

Id.

See supra notes 117-24 and accompanying text (discussing circuits which have reserved judgment). In Fisher, the Supreme Court refused to extend the contents-based privilege to the contents of an accountant's workpapers. See Fisher v. United States, 425 U.S. 391, 414 (1976). In Doe, the Court held that the contents of business records of a sole proprietor were not protected. See United States v. Doe, 465 U.S. 605, 617 (1984). Although, these cases have "striped the content of business records of any Fifth Amendment protection," they have not ruled on the application to personal papers. See In re Grand Jury Proceedings, 626 F.2d 1051, 1055 (1st Cir. 1980). The First Circuit stated: "We wish to emphasize that this case does not involve subpoena of papers more intimate or personal than business records. The applicability of Fisher v. United States to non-business, intimate personal papers such as private diaries or drafts of letters or essays is an open question." Id. at 1054 n.2.
be interpreted as overruling Boyd. The Supreme Court merely articulated an alternative analysis for Fifth Amendment protection which was entirely consistent with the contents-based privilege. Therefore to apply the act of production analysis to all situations would be inconsistent with current Supreme Court precedence.

IV. THE NEW YORK APPROACH

New York courts recognize both the contents-based privilege and the act of production privilege. The New York Court of Appeals, in In re Vanderbilt, found that a tape cassette containing a suicide message was privileged based on the nature of the evidence, and because the act of producing the tape was a testimonial communication. New York courts are aware of the distinction between personal papers and business documents, and therefore, utilize different approaches depending on the nature of the document. If the document is personal, it is protected from disclosure under the contents-based approach. By contrast, if the

127 See Boyd v. United States, 116 U.S. 616, 634-35 (1886) (protected contents of individual's privately held papers).
128 See Fisher, 425 U.S. at 410 (act of producing subpoenaed documents may have incriminating testimonial communication).
130 Id. at 79, 439 N.E.2d at 385, 453 N.Y.S.2d at 670. "A tape cassette is clearly testimonial in that it is an aural record of the accused's communication; only live testimony could be any more personal. Moreover production of the tape ... would be testimonial by virtue of his authentication." Id.
131 See In re Grand Jury Subpoena Served Upon Bekins Record Storage Co., 62 N.Y.2d 324, 328, 465 N.E.2d 345, 347, 476 N.Y.S.2d 806, 808 (1984). "The Supreme Court has recently ruled that this right does not extend to the contents of business papers that were not created under government compulsion. Of course, we are bound by that interpretation and, hence, petitioners' Fifth Amendment claim must fail." Id. The New York Court of Appeals' opinion reflects the personal-business dichotomy. Id. Their discussion classified the documents as business. Id. Since these documents were not personal, there could be no contents-based privilege. Id. However, there could be an act of production privilege. Id.; see also People v. Doe, 90 A.D.2d 669, 455 N.Y.S.2d 866 (4th Dep't 1982) (contents of medical records in possession of doctors not privileged), aff'd, 59 N.Y.2d 655, 450 N.E.2d 211, 463 N.Y.S.2d 405 (1983).
132 See In re Grand Jury Subpoena Duces Tecum Served Upon John Doe, 126 Misc. 2d 1010, 1013, 484 N.Y.S.2d 759, 762 (Sup. Ct. Queens County 1984). The court viewed Fisher's shift toward the act of production privilege as applying to business records and not personal property. Id. The court stated: "in recent years, the protection of one's business papers has been interpreted to mean not a general protection of privacy." Id. Fisher's act of production analysis would apply for business documents while personal papers would be privileged because of their private content. Id.
133 See Doe, 90 A.D.2d at 669, 445 N.Y.S.2d at 866. "The papers and effects which the privilege protects, however, must be the private property of the person claiming the privi-
document is business-oriented, the act of production analysis is applied. Such an approach should be followed by all courts until the Supreme Court rules otherwise.

For example, in *In re Grand Jury Subpoena*, a sole proprietor of a consulting firm was subpoenaed to produce his company's business documents. The New York Supreme Court, Queens County, addressed the personal papers-business documents dichotomy. In dividing its discussion along these lines, the court stated that a person's private papers were protected because of their contents. However, the contents of voluntarily prepared business documents would not be privileged by the Fifth Amendment.

New York Courts have not viewed Fisher and Doe as overruling Boyd, but rather, viewed the contents-based privilege and the act of production privilege as mutually inclusive. The New York view, like the Fifth Circuit's, is the better approach. This approach examines the nature of the documents to determine which analysis, the act of production or contents-based, should apply. This rationale retains the privacy notions prevalent in American society, which have not been expressly undermined by the Supreme Court.

134 See *Grand Jury Subpoena Duces Tecum*, 126 Misc. 2d at 1012, 484 N.Y.S.2d at 762, 759 (Sup Ct. Queens County 1984). 135 See supra notes 127-39 and accompanying text (discussing New York's approach). 136 See Davis, supra note 4, at 131-32. "The Supreme Court's decision in *United States v. Doe* is better characterized as indecision. Disagreement between the Justices has led the Court to resort to a vagueness of language which perhaps quite intentionally permits a variety of interpretations of the law." Id.; see also supra notes 98-116 and accompanying text (discussing compatibility of two approaches). 137 Id. at 1010-11, 484 N.Y.S.2d at 761. 138 Id. at 1013, 484 N.Y.S.2d at 762. 139 Id. “Such [Fifth Amendment] protection has been extended to one’s own papers since these reflect a ‘private inner sanctum of individual feeling[s] and thought[s].’” Id. (quoting *Couch v. United States*, 409 U.S. 322, 327 (1973)). 140 See supra notes 127-39 and accompanying text (discussing New York's approach). 141 See Davis, supra note 4, at 131-32.
CONFUSION AMONG THE COURTS

Conclusion

Without the protection of personal documents provided by the Supreme Court in *Boyd*, individuals may be compelled to disclose the contents of private papers, such as diaries and letters. The innermost thoughts of a person, written on paper, should not be viewed as any less prejudicial than the oral testimony of the person on the witness stand. Some courts have interpreted recent Supreme Court decisions as rejecting a contents-based privilege. Nevertheless, the Supreme Court has not explicitly overruled the contents-based privilege. The circuits should apply both the contents-based approach and the act of production approach until the Supreme Court mandates otherwise. With the confusion among the lower courts, the Supreme Court must offer guidance by reaffirming the *Boyd* doctrine protecting private papers. The time has come for the Supreme Court to take an affirmative stance on this issue.

Anne Marie DeMarco & Elisa Scott