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CONSTITUTIONAL LAW - Now It's Personal: Withdrawing the Fifth Amendment's Content- Based Protection for All Private Papers in *United States v. Doe*

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NOW IT'S PERSONAL: WITHDRAWING
THE FIFTH AMENDMENT'S CONTENT-BASED
PROTECTION FOR ALL PRIVATE PAPERS IN
*UNITED STATES v. DOE**

INTRODUCTION

For the past twenty years fifth amendment jurisprudence has been in a continual state of uncertainty regarding the circumstances that compel an individual to bear witness against herself.¹ Jurists and legal scholars historically have interpreted the Fifth Amendment, which states in part that no person "shall be compelled in any criminal case to be a witness against himself,"² as prohibiting the government from compelling an individual to surrender his or her private papers, regardless of whether such papers are business-related or personal. This interpretation of a privilege based solely on document content ("content-based" privilege) is rooted in the vigorously held belief that an individual's private papers are an extension of that person's mind and thoughts.³ Thus, because

* 1 F.3d 87 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994) [hereinafter *Doe III*]. This Comment discusses three cases entitled *United States v. Doe*. In an effort to avoid confusion, the 1984 Supreme Court case is referred to as *Doe I*, the 1988 Supreme Court case as *Doe II*, and the principle case, the Second Circuit case, as *Doe III*.

¹ Since 1976, when the Supreme Court held that private business papers were no longer entitled to fifth amendment protection based on their content, *Fisher v. United States*, 425 U.S. 391 (1976), lower courts have been unsure about how to treat private non-business documents. See *infra* notes 22-25 and accompanying text for a discussion of *Fisher* and its impact on fifth amendment law.

² U.S. CONST. amend. V.

³ *Boyd v. United States*, 116 U.S. 616, 627-30 (1886) (private papers are one's "dearest property" and forcible extortion of them is an invasion of one's "indefeasible right of personal security, personal liberty, and private property") (quoting *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765)); see also *In re Grand Jury Subpoena Duces Tecum*, 741 F. Supp. 1059, 1068 (S.D.N.Y. 1990) (*Boyd* implies that "one's papers can be an extension of oneself"); Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 39 (1986) (*Boyd* probably survived for so long because it was premised upon a "kernel of truth [c]ertain intimate personal documents—a diary is the best example—are like an extension of the individual's mind. . . . Forcing an individual to give up

of their nature, such papers carry with them an inherent and sacred privacy right.⁴ Allowing the government to forcibly gain access to such documents would violate a fundamental purpose of the Constitution: to protect the individual from the abuse of power by the State.⁵ When the Framers drafted the Fifth Amendment, they were acutely aware that without effective restraint governments tend to intrude upon the private domain of their citizens.⁶

Recently, the Supreme Court has reconsidered its interpretation of fifth amendment protections. Claiming that the Fifth Amendment neither explicitly nor implicitly guarantees any privacy right, and that voluntarily created business documents are not by their nature "compelled," the Supreme Court in-

possession of these intimate writings may be psychologically comparable to prying words from his lips."); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 986 (1977) (a person's recordings of his intimate feelings tend to be extremely revealing of his personality).

⁴ See *Fisher v. United States*, 425 U.S. 391, 399 (1976) ("the privilege truly serves privacy interests"); *Bellis v. United States*, 417 U.S. 85, 91-92 (1974) (the Fifth Amendment respects an "inner sanctum which necessarily includes an individual's papers"); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (the fifth amendment privilege evolved from the right of each individual "to a private enclave where he may lead a private life") (quoting *United States v. Grunewald*, 233 F.2d 556, 581-82 (1956) (dissenting opinion)); see also Arthur Y.D. Ong, Note, *Fifth Amendment Privilege and Compelled Production of Corporate Papers After Fisher and Doe*, 54 FORDHAM L. REV. 935, 940 (1986) (according to *Boyd* a primary purpose of the Fifth Amendment was to protect individual privacy). See generally, Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683 (1982) [hereinafter *Aftermath of Fisher*]; Note, *supra* note 3.

⁵ Note, *supra* note 3, at 971-72 (traditionally, the Fifth Amendment has been interpreted as protecting the "privacy, dignity, and autonomy of the individual against the overbearing intrusion of the government").

⁶ Discussing the development of the fifth amendment privilege in the American colonies, one author wrote:

The colonists' experiences with England's oppressive government left them in fear of the potential abuses of the common law By this time, resistance to the oath of inquiry had become prevalent and the right to remain silent was addressed in almost every state constitution . . . [d]espite differences in the wording . . . of the . . . various constitutions, they were all nevertheless directed at one primary purpose: prohibiting the compelled extraction of incriminating statements from the accused.

Lisa Tarallo, Note, *The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to Put an End to Its Silence On the Rationale Behind the Contemporary Application of the Privilege*, 27 NEW ENG. L. REV. 137, 141 (1992).

creasingly has limited the application of the Fifth Amendment to an "act-of-production" privilege. This theory protects personal papers only when the compelled act of producing the document itself might constitute incriminating testimony.⁷ Despite the Court's recent emphasis on this "act-of-production" privilege and its de-emphasis of content-based privileges, the status of voluntarily created non-business documents remains unclear. Although the Court recently has had an opportunity to address this issue, it has declined to formulate a holding that explicitly addresses treatment of personal documents. As a result, lower courts have only dicta to guide them in this area.

The Second Circuit is one of the many courts that have struggled to formulate a more definitive interpretation of the Fifth Amendment. In *United States v. Doe*,⁸ the Second Circuit extended the Supreme Court's denial of content-based protection for voluntarily created *business* documents and applied it to non-business personal papers. The Second Circuit's decision relied largely on dicta from contemporary Supreme Court cases to effectively overrule nearly 100 years of precedent. In the past, even the Supreme Court had been reluctant to espouse such a narrow view of the fifth amendment protection offered to private papers. The extreme view expressed by the Second Circuit in *United States v. Doe* has serious implications both for defendants in criminal cases and for society at large.

This Comment first provides an overview of the line of Supreme Court cases that has eroded the broad protective power previously attributed to the Fifth Amendment, but that nonetheless has explicitly refused to dispense entirely with tradition. Next, this Comment discusses *United States v. Doe* and analyzes the Second Circuit's decision in light of the recent succession of opinions that perch cautiously atop a rickety fence, balanced only by conflicting dicta on either side. In addition, this Comment compares *United States v. Doe* with decisions from other circuit courts. As these lower courts struggle to align themselves with what is at best a confusing Supreme Court interpretation of the Fifth Amendment, they arrive at

⁷ *Fisher v. United States*, 425 U.S. 391 (1976). For a more detailed discussion of *Fisher* and a further explanation of the act-of-production privilege, see *infra* text accompanying notes 20-25.

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

one of three conclusions: 1) the Supreme Court has not dispensed with protection of the contents of private papers; 2) the Court has eliminated such protection (as the Second Circuit has concluded); or 3) it is best to avoid confronting the issue altogether, since the Supreme Court itself has not addressed it.

This Comment concludes that based on the nature of their content, personal papers should be protected from forced disclosure. Prior to 1976, the Supreme Court had accepted the view that the Fifth Amendment protected highly private documents. Thus, precedent supports the argument that protection based on the content of personal papers historically was at the heart of the Fifth Amendment and remains so today.⁹ Finally, this Comment suggests a narrow exception for retaining a content-based privilege for purely personal papers, with the hope that the courts will adopt a uniform view of the Fifth Amendment, true to the privacy interests that form its core.

I. BACKGROUND

A. *The Setting of Boyd v. United States*

The Supreme Court has been chipping away at the very foundations of the Fifth Amendment since *Fisher v. United States*,¹⁰ where it shifted the focus of fifth amendment interpretation from one of shielding from production certain documents with private content into an inquiry as to whether the actual act of producing such documents could constitute incriminating testimony in itself. The Court justified this diminution of the amendment's language, thereby furthering a policy of efficient investigation of crime.¹¹ Given this reasoning, some courts have dismissed as irrelevant nearly one hundred years of precedent.

Fifth amendment jurisprudence began with the landmark case of *Boyd v. United States*, which itself relied on principles

⁹ See *supra* note 4.

¹⁰ 425 U.S. 391 (1976).

¹¹ *Fisher*, 425 U.S. at 400. In particular, the Court has noted the importance of aiding law enforcement in its effective prosecution of white collar crime. See *United States v. Braswell*, 487 U.S. 99, 100 (1988) (expressing reluctance to recognize a fifth amendment privilege when it would have a "detrimental impact on the Government's efforts to prosecute 'white collar crime'").

first evoked by the drafters of the Constitution.¹² In *Boyd*, the defendants were convicted of fraudulently importing cases of plate glass in violation of customs law.¹³ The conviction resulted largely because the defendants had been forced to produce an incriminating invoice that pertained to a separate group of cases that appellants had imported earlier.¹⁴ The Supreme Court reversed the lower court's judgment and remanded the case, finding that forced production of the invoice violated fifth amendment protections.¹⁵

According to the *Boyd* Court, there was no difference between seizing a person's private documents for use as evidence against him and "compelling him to be a witness against himself."¹⁶ The Court explained that the policy protecting an individual from being forced to testify against herself had originally developed out of a fear that the means used to compel such testimony would fall upon "the innocent as well as the guilty" and "would be both cruel and unjust."¹⁷ At the time of the Fifth Amendment's drafting, the use of violent means by a government to procure testimony had been accepted practice since the thirteenth century, when the ecclesiastical courts of England conducted torture sessions to elicit confessions.¹⁸ The *Boyd* Court stated that the Fifth Amendment had been designed specifically to prohibit this sort of behavior.¹⁹

¹² 116 U.S. 616 (1886).

¹³ *United States v. Boyd*, 24 F. 692 (C.C.S.D.N.Y. 1885)

¹⁴ *Boyd*, 116 U.S. at 618. For an in-depth treatment of the background of *Boyd*, see Alito, Jr., *supra* note 3, at 31-33. The stage was set for *Boyd* by a controversial statute, passed during the Civil War, which "authorized the issuance of warrants to search for and seize 'invoices, books or papers' relating to the importation of goods without payment of proper duties." *Id.* at 31. In 1874, the statute was modified to authorize courts to order persons under investigation to produce such documents for inspection.

¹⁵ *Boyd*, 116 U.S. at 618.

¹⁶ *Id.* at 633.

¹⁷ *Id.* at 629 (quoting *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765)).

¹⁸ Torallo, *supra* note 6, at 139-140. During a procedure known as the "oath ex officio," the accused was forced, often by torture, to give an oath "pledging to give truthful answers to whatever questions may be asked by the court." *Id.* at 139. Thus, the oath ex officio was a "compulsory interrogatory practice," designed to ensure that the officials would obtain a confession. *Id.*

¹⁹ *Boyd*, 116 U.S. at 630. The Court went on to say that the compulsory production of private papers is not only "contrary to the principles of a free government," but is "abhorrent to the instincts of an American," and "cannot abide the pure atmosphere of political liberty and personal freedom." *Id.* at 632.

The Court explained further that the privilege against compelled confessions contributes to "the very essence of constitutional liberty and security" and that it applies "to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life."²⁰ As a result of the Court's concerns, it developed the idea that the judiciary should construe the Fifth Amendment liberally to provide for the "security of person and property." This liberal interpretation has remained undisturbed for nearly 100 years.²¹

B. Fisher's *Shift of Emphasis*

Starting in 1976, the Supreme Court altered its interpretation of the Fifth Amendment. The Court in *Fisher v. United States*, held that an accountant had to produce subpoenaed tax records held on behalf of a client who was under investigation for tax fraud.²² The Court reasoned that such records were not protected from disclosure by the Fifth Amendment because they were not prepared by the client and, therefore, he was not in a position to attest to their authenticity.²³ Furthermore, Justice White's majority opinion stated that the Fifth Amendment was never intended to protect the contents of voluntarily created documents²⁴ if there was no compulsion involved in creating them.²⁵ Thus, the Court held that the Fifth Amend-

²⁰ *Id.* at 630.

²¹ *Id.* at 635. Because the text of the Fifth Amendment is ambiguous on its face and fails to define the parameters of what it means to be a "witness" or what sort of testimony is considered to be "compelled," the liberal construction assumes that one can be compelled to be a witness against oneself via oral or written testimony at any point during a criminal investigation. A strict constructionist might however, argue that the amendment only refers to oral testimony, taken on the stand during a criminal trial or hearing.

²² 425 U.S. 391 (1976).

²³ *Id.* at 413.

²⁴ *Id.* at 401 ("We adhere to the view that the Fifth Amendment protects against 'compelled self-incrimination, not the [disclosure of] private information.'") (quoting *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975)).

²⁵ *Id.* at 409-10. As Justice White emphasized, "The preparation of all the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else." *Id.* In his concurrence, however, Justice Brennan made the important point that the compulsion element in the Fifth Amendment does not really relate to the creation of the document (i.e., whether it was voluntarily created) but to the act of produc-

ment only affords protection where the act of producing certain documents is compelled, testimonial in nature, and incriminating.²⁶ Specifically, an individual may assert the fifth amendment act-of-production privilege, only if producing certain subpoenaed documents would prove to the prosecution that the documents exist, are in his possession, or are authentic, and that proof of such possession, existence or authenticity would enable the prosecution to convict the individual.²⁷

The first case to apply and extend the *Fisher* analysis was *United States v. Doe*²⁸ ("Doe I"). *Doe I* involved several grand jury subpoenas that ordered respondent, a sole proprietor of a number of businesses, to produce extensive business records from several of his companies.²⁹ The Supreme Court, relying on its *Fisher* analysis, found that the contents of business records usually are created voluntarily and therefore lack the requisite element of compulsion that would permit a content-based privilege.³⁰ The Court ignored the Third Circuit's efforts to equate a sole proprietor's business records with an individual's personal records;³¹ rather, throughout its opinion, the Supreme Court referred to the subpoenaed records exclusively as "business documents."

After holding that the contents were not privileged, the

ing the document. In his words, "it is the compelled *production* of testimonial evidence, not just the compelled creation of such evidence, against which the privilege protects." *Id.* at 423 (Brennan, J., concurring). Justice Brennan's understanding of the Fifth Amendment is practical but has been largely ignored in favor of the unusual reading encouraged by the *Fisher* Court—that any document voluntarily created cannot be considered compelled. However, one might justifiably question, as Justice Brennan would, what the creation of a document (unless the creation was forced) has to do with whether or not the document's creator is being compelled to reveal its contents? The *Fisher* Court's reading is a strained effort to eliminate any privilege based on a content-privacy argument since virtually all documents, especially those with personal content, are created voluntarily.

²⁶ 425 U.S. at 410 (defining the scope and application of the act of production privilege). See also Kenneth J. Melilli, *Act-of-Production Immunity*, 52 OHIO ST. L.J. 223 (1991), for a detailed dissection and discussion of the act-of-production privilege as set forth in the *Fisher* analysis.

²⁷ Melilli, *supra* note 24, at 236.

²⁸ 465 U.S. 605 (1984) [hereinafter *Doe I*].

²⁹ *Id.* at 606-07.

³⁰ *Id.* at 611-12. Note that the Court's words, "the contents of business records *ordinarily* are not privileged because they are created voluntarily and without compulsion," would imply that there are situations in which the contents, even of business documents, are protected. *Id.* at 609 (emphasis added).

³¹ *In re Grand Jury Empaneled Mar. 19, 1980*, 680 F.2d 327 (3d Cir. 1982).

Court contemplated whether the act of producing the documents could be considered privileged. Based on the district court's factual finding, the Supreme Court concluded that not only would production of these records be compelled by the subpoena but, unlike in *Fisher*, the act of production would involve testimonial self-incrimination.³² In *Doe I*, because respondent voluntarily created the documents at issue, producing them not only would be "tacitly [admitting] their existence and his possession,"³³ but also would be authenticating the documents to the government's benefit.³⁴

To avoid an in-depth analysis of the case, the Court reasoned that cases like *Doe I* are inherently fact-specific.³⁵ The Court, however, chose to extend *Fisher* by holding that the contents of an individual's *business* records, even when in his possession, are not protected by the Fifth Amendment.³⁶ The Court then stated that, absent evidence to the contrary, in future cases it would defer to a district court's finding on whether or not production would violate the Fifth Amendment.³⁷ Significantly, although the Court accepted the argument that a sole proprietor was not protected from having to produce voluntarily prepared business records based on their content, once again it declined to address the issue of voluntarily prepared personal papers.

Unlike the majority, Justice O'Connor directly confronted the destiny of voluntarily prepared personal papers in her brief, but dramatic, concurring opinion. According to Justice

³² 465 U.S. at 613-14. Document production is considered to be "testimonial" when it is, in effect, a *communication* by the accused that admits to the "existence, possession or control, and the authentication of the subpoenaed documents." Torallo, *supra* note 6, at 150. *But see* Schmerber v. California, 384 U.S. 757, 764 (1966) (holding that a compelled act that merely makes the "suspect or accused the source of 'real or physical' evidence", such as being compelled to furnish a blood sample, is not testimonial.)

³³ *Doe I*, 465 U.S. at 614 n.13.

³⁴ *Id.* In other words, had the Court upheld the government's right to implement a subpoena *duces tecum*, the government would have been able to prove the existence of the documents, that the defendant had possession of them, and their authority in one step.

³⁵ *Id.* at 613-14.

³⁶ *Id.* at 612. Not surprisingly, the Second Circuit based its decision largely on a case that also avoided discussion of the contents of an individual's personal records.

³⁷ *Id.* at 613-14.

O'Connor, *Fisher* "had sounded the death-knell for *Boyd*," and "the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind."³⁸ Although undeveloped and conclusory, Justice O'Connor's "death-knell" argument is important because it has become a convenient device that lower courts use when they justify withdrawing fifth amendment protection from the contents of personal papers. The Second Circuit, in *Doe III*, is an example of one court that has relied heavily on Justice O'Connor's concurrence to justify such withdrawal.³⁹ This Comment will address the *Doe III* court's reliance on Justice O'Connor's opinion later in the text.⁴⁰

After *Doe I*, the next Supreme Court case that narrowed the Fifth Amendment's protection was *Doe v. United States*.⁴¹ ("*Doe II*"). In *Doe II*, the Court held that compelling an individual to sign a consent form directing foreign banks to release account information to the government did not violate the fifth amendment privilege.⁴² The Court reasoned that the directive in question could not be considered testimonial because it did not actually acknowledge that an account in a foreign financial institution existed or that such an account was controlled by petitioner.⁴³ Furthermore, the consent was not testimonial because it did not explicitly or implicitly relate a factual assertion or disclose information. The directive did not state that Doe had "consented" to the release of the records but rather that his signature should be construed as consent.⁴⁴ Thus, the Court concluded that such an authorization, drafted in hypothetical terms so as not to refer to any specific account, was

³⁸ *Doe I*, 465 U.S. at 618 (O'Connor, J., concurring).

³⁹ See, e.g., *United States v. Doe (In re Grand Jury 89-4 Subpoena Duces Tecum)*, 727 F. Supp. 265, 269 (1989) (*Boyd's* protection of private papers is no longer authoritative); *In re Trader Roe*, 720 F. Supp. 645, 647 (1989) ("the Fifth Amendment does not protect the contents of voluntarily prepared papers, regardless of their nature"); *Paramount Pictures v. Miskinis*, 344 N.W.2d 788, 812 (1984) ("a majority of the Supreme Court seems to have gone out of its way in *Doe* to hold that the content of a document is irrelevant if the compelled act of production, does not itself incriminate the individual").

⁴⁰ See *infra* text accompanying notes 72-85, for a discussion of the *Doe III* majority opinion.

⁴¹ 487 U.S. 201 (1988) [hereinafter *Doe II*].

⁴² *Id.* at 214-19.

⁴³ *Id.* at 215.

⁴⁴ *Id.* at 216.

merely a "nonfactual statement that facilitates the production of evidence by someone else" and, therefore, did not offend the privilege.⁴⁵ The Court rejected Doe's argument that execution of the forms and the ensuing disclosure of information by the banks had "independent testimonial significance" that would incriminate him,⁴⁶ and emphasized that compelled execution of the directive did not reveal Doe's actual intent or state of mind.⁴⁷

Finally, the most recent case in this line is *Baltimore City Department of Social Services v. Bouknight*, decided in 1990.⁴⁸ This case involved unusual facts in that respondent sought to suppress the production of her child, not records or documents.⁴⁹ Based on substantial evidence indicating that Bouknight was an abusive mother, a juvenile court had declared her infant son to be a "'child in need of assistance'."⁵⁰ Bouknight therefore had to comply with an extensive order granting the Baltimore City Department of Social Services ("BCDSS") supervisory authority over her. After Bouknight violated virtually every condition of the order and then failed to turn her son over for placement in foster care, BCDSS petitioned the court for his removal from her care. Despite numerous court orders, Bouknight repeatedly failed to produce the child and, subsequently, the court jailed her for contempt.⁵¹ The Maryland Court of Appeals vacated the contempt order, finding that it "unconstitutionally compelled Bouknight to admit through the act of production 'a measure of continuing control and dominion over [her son's] person' in circumstances in which 'Bouknight has a reasonable apprehension that she will be prosecuted.'"⁵² After granting certiorari, the Supreme Court reversed the court of appeals.

The Court paraphrased Justice O'Connor's concurring opinion in *Doe I* to support its argument that the Fifth Amendment does not protect the individual from incrimination that

⁴⁵ *Id.* at 213.

⁴⁶ *Doe II*, 487 U.S. at 207.

⁴⁷ *Id.* at 216.

⁴⁸ 493 U.S. 549 (1990).

⁴⁹ *Id.*

⁵⁰ *Id.* at 552 (quoting the Juvenile Court).

⁵¹ *Id.* at 553.

⁵² *Id.* at 554 (quoting *In re Maurice M.*, 550 A.2d 1135, 1141 (Md. 1988)).

may result from the contents or nature of the object demanded. *Bouknight* equated the production of the child with the production of a document.⁵³ Although the Supreme Court agreed with the lower court, that production of the child could be a form of compelled, incriminating testimony, it stressed that the privilege does not apply in non-criminal cases.⁵⁴

II. *UNITED STATES V. DOE*⁵⁵

A. *Facts*

In 1989, the Securities and Exchange Commission ("SEC") was investigating Doe for possible violations of federal securities laws.⁵⁶ Part of the investigation focused on the trading Doe had done for his personal brokerage accounts. To help further this investigation, the SEC served Doe with a subpoena that demanded that he appear before the SEC and produce certain documents. One of the documents listed for production was his pocket appointment book for the previous year.⁵⁷ Doe used this book, a daily planner, to "record appointments, social engagements, chores, phone numbers, and other reminders."⁵⁸ Doe appeared before the SEC and, upon the advice of his counsel, asserted his fifth amendment privilege against self-incrimination. Later, however, based upon the advice of new counsel, he withdrew his earlier invocation of the Fifth Amendment and complied with the SEC's requests. In exchange for his

⁵³ *Bouknight*, 493 U.S. at 555.

⁵⁴ *Id.* at 556.

⁵⁵ 1 F.3d 87 (2d Cir. 1993).

⁵⁶ *Id.* at 88.

⁵⁷ The semantics used to describe such an appointment book are important. The defense, lower court and dissent in *Doe III* all referred to it as a "diary," which connotes an intimate document. The *Doe III* majority, however, characterized the book as a "calendar," which has more utilitarian, and less personal, connotations. For consistency, this Comment will refer to the book as a "daily planner"—a term that is more neutral.

Regardless of whether one deems the appointment book to be a "calendar," "planner" or "diary," it is still a vital question of fact how the recorder uses the book. The trier of fact must determine whether what the book is called on its cover is consistent with its contents. In *Doe III*, the Second Circuit accepted the lower court's finding that the planner was private. See *infra* notes 158-59. Although this Comment has adopted the term "daily planner," it is with an awareness that there are various potential uses, business and/or personal, of such a tool.

⁵⁸ *Doe III*, 1 F.3d at 88.

cooperation, the SEC agreed to withdraw the original subpoena, defer decisions about the timing and scope of future document requests to Doe, and grant Doe a time extension to respond to any recommendations for enforcement action against him.⁵⁹

After Doe testified before the SEC regarding the trading of securities in his personal brokerage accounts, the SEC requested that he produce his desk calendars, diaries and appointment books, among other things.⁶⁰ Doe complied with the request and, along with other documents, submitted a photocopy of the pocket calendar. A cover letter submitted by Doe's counsel asserted that "all copies of documents produced in connection with the Staff's investigation, including this letter, will be kept in a non-public file and that access to them by any third party not a member of the Commission or its Staff will be denied."⁶¹

Doe testified before the SEC for a second time the following year.⁶² The Commission was concerned particularly about calendar entries for March 7, 1988, an important date in its investigation. At the conclusion of its investigation the SEC sued Doe, alleging that he had participated in insider trading.⁶³

During the pendency of the SEC's investigation of Doe, the U.S. Attorney's office for the Southern District of New York had requested and was granted access to documents produced by Doe.⁶⁴ After receipt and examination of a copy of the desk calendar, the government suspected that Doe had used correction fluid to "white-out" certain entries in the original version prior to copying and producing the documents to the SEC.⁶⁵ In October, 1990, based on such suspicions, the grand jury that had been investigating perjury and obstruction of justice charges against Doe, issued a subpoena commanding him to produce the original version of the calendar.⁶⁶ Doe,

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 89.

⁶² *Id.*

⁶³ *Doe III*, 1 F.3d at 89.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

however, asserted his fifth amendment privilege against self-incrimination and refused to comply.

The government informed the court, during a conference, that it suspected that Doe had altered the calendar. The government argued that it needed the original calendar to perform physical tests to reveal whether any entries had been covered with correction fluid. In response, Doe claimed that the subpoena was unenforceable because the Fifth Amendment protected both the calendar's contents and the act of producing it, and that by providing a copy of the calendar to the U.S. Attorney's office, the SEC had breached a confidentiality agreement with him.⁶⁷ After presenting this argument, Doe's counsel permitted the government to examine the calendar in its original form. That examination confirmed the government's suspicion that Doe had expunged many entries, including critical ones for the date of March 7, 1988.⁶⁸

At a hearing, the district court denied the government's motion to compel production of the diary and concluded that the Fifth Amendment protected the entire, original version of the diary even if Doe had altered parts of it. The judge reasoned that such protection was necessary because the diary was intimate and personal, no part of the original version had been published, and Doe had not voluntarily disclosed its contents to the SEC or the Assistant U.S. Attorney.⁶⁹

B. *The Court of Appeals' Decision*

The Second Circuit Court of Appeals, in a decision written by Judge Lumbard, reversed the district court's decision and denied Doe the act-of-production privilege.⁷⁰ The court reasoned that compliance with the subpoena in this case would entail merely "surrender" of the calendar and not "testimony." Furthermore, the court held that fifth amendment protection

⁶⁷ *Id.* at 89. Doe alleged that the government had promised him immunity ("use immunity") if he turned over his diary to them, and then violated that promise. *Id.* at 88-89.

⁶⁸ *Doe III*, 1 F.3d at 89.

⁶⁹ *Id.* Judge Pollack stated that the copy of the diary and the original version were different documents and that "the disclosure of a purported copy to the SEC was not a publication of the original."

⁷⁰ *Id.* at 88.

does not extend to the contents of *any* voluntarily prepared documents—whether business or personal.⁷¹

1. The Majority Opinion

After brief reference to *Fisher*, Judge Lumbard turned to *Doe I* and discussed the Supreme Court's ruling that the Fifth Amendment does not protect the contents of business records in an individual's own possession.⁷² Although Judge Lumbard recognized that the Supreme Court majority in *Doe I* had addressed only business documents, the court chose to emphasize Justice O'Connor's separate concurrence concerning private papers.⁷³ Notwithstanding its reliance on the concurrence, the Second Circuit explicitly acknowledged that not only had no other justice joined O'Connor's opinion, but that *Boyd* had never been expressly overruled.⁷⁴

Justice Lumbard next turned to the more recent Supreme Court decision, *Baltimore City Department of Social Services v. Bouknight*.⁷⁵ Like the Supreme Court in *Bouknight*, Judge Lumbard emphasized O'Connor's concurrence in *Doe I* and held that incrimination resulting from the nature or content of a document is irrelevant and, therefore, "[w]hen the government demands that an item be produced, 'the only thing compelled is the act of producing the [item].'"⁷⁶ The Second Circuit then dismissed *Boyd*'s extensive discussion of the Fifth Amendment's protection of private documents, calling it dicta, and emphasized that the invoices at issue in *Boyd* were business documents.⁷⁷ The Second Circuit Court reiterated its contention that the Supreme Court was eroding the foundations of *Boyd* and that "[s]elf-incrimination analysis now focuses on whether the creation of the thing demanded was compelled and, if not, whether the act of producing it would constitute

⁷¹ *Id.* at 93.

⁷² 465 U.S. 605 (1984).

⁷³ See *supra* notes 38-40 text accompanying text.

⁷⁴ *Doe III*, 1 F.3d at 92 (noting that Justice O'Connor was alone in her opinion but that the decision in *Baltimore City Dep't of Soc. Servs. v. Bouknight* in 1990 suggests that the majority would now agree with her).

⁷⁵ 493 U.S. 549 (1990). See *supra* notes 48-54 and accompanying text.

⁷⁶ *Id.* at 554-55 (citing *United States v. Doe*, 445 U.S. 605, 612 (1984)).

⁷⁷ *Doe III*, 1 F.3d at 92.

compelled testimonial communication."⁷⁸

The Second Circuit, relying on other appellate courts that had considered similar questions,⁷⁹ declared that the Fifth Amendment should not shield the contents of voluntarily prepared documents, whether business or personal.⁸⁰ Although the Second Circuit conceded that the diary was a highly private document, it nonetheless refused to apply a content-based analysis on the ground that such an analysis was no longer relevant.⁸¹ Thus, without any content-based privilege, the Fifth Amendment could not shelter the daily planner from the government's scrutiny.

Finally, the court confronted the issue of whether the compelled act of producing the diary should be viewed as testimonial and self-incriminating.⁸² It found that Doe had no act-of-production privilege because he had already produced a copy of the diary for the SEC and had testified about his use and possession of it. Therefore, the court reasoned, the diary's existence was a "foregone conclusion,"⁸³ and production of the original would not add anything to the government's information.⁸⁴ In essence, production of the document meant Doe was merely surrendering it because the government already knew of the calendar's existence and of its location. Furthermore, the court found that Doe's compliance with the subpoena could not be said to "implicitly authenticate" the calendar since the government could authenticate the document itself, by first estab-

⁷⁸ *Id.*

⁷⁹ See, e.g., *United States v. Stone*, 976 F.2d 909 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1843 (1993); *United States v. Wujkowski*, 929 F.2d 981, 983, 985 (4th Cir. 1991) (contents of appointment books and records relating to vacation home not privileged under Fifth Amendment); *In re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989) (privilege "does not cover the contents of any voluntarily prepared records, including personal ones"), *cert. denied*, 493 U.S. 1044 (1990); *In re Grand Jury Proceedings*, 759 F.2d 1418, 1419 (9th Cir. 1985) (contents of business and personal documents are not privileged "in the absence of some showing that creation of the documents was the product of compulsion"). Despite the Second Circuit's interpretation, the Fourth Circuit, in *Wujkowski*, explicitly declined to decide whether the documents in question were business or personal. 929 F.2d at 986.

⁸⁰ *Doe III*, 1 F.3d at 93 ("the contents of voluntarily prepared documents are not privileged").

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 93 (citing *Fisher v. United States*, 425 U.S. 391, 411 (1976)).

lishing to the grand jury or trial jury that Doe had already produced a copy to the SEC, and then by allowing the jury to compare the copy with the original.⁸⁵ Thus, according to the government, the production of the diary would not be a form of testimony and would not be entitled to shelter under the increasingly smaller umbrella of the fifth amendment privilege against self-incrimination.

2. The Dissent

Judge Altimari issued a scathing dissent,⁸⁶ strongly attacking the majority's position that document content could no longer be the basis for invoking the fifth amendment privilege.⁸⁷ Emphasizing that Justice O'Connor stood alone in her interpretation of *Boyd*, and that the case had not been overruled in nearly a century, the dissent championed *Boyd's* current validity, especially its pronouncement that "compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment."⁸⁸ Judge Altimari further chastised the Second Circuit for its cramped interpretation of the Fifth Amendment, finding that the majority's reading violated the very principles upon which the Amendment was founded:

To hold that a person must divulge self-incriminating statements merely because she chose to write them down rather than keep them sealed in her head, is to strip the fifth amendment privilege of its intended power. Prying open a personal diary and forcing its writer to reveal her innermost thoughts, however incriminating they may be, would no doubt be as reprehensible to our forefathers as prying open a person's lips to extract a confession.⁸⁹

Lest his argument be dismissed as an emotional appeal to the

⁸⁵ *Doe III*, 1 F.3d at 93.

⁸⁶ *Id.* at 95-96 (Altimari, J., dissenting).

⁸⁷ Judge Altimari argued that the Court's analysis in *Fisher* left open whether it would "apply the voluntariness analysis to personal papers," and emphasized that although aspects of *Boyd* have recently come into question, *Boyd's* "pronouncement that personal papers are protected by the Fifth Amendment has never been expressly overruled. Its reasoning should therefore continue to be applied until the Supreme Court directs us to do otherwise."). *Id.*

⁸⁸ *Id.* at 95 (quoting *Boyd*, 116 U.S. at 634-35).

⁸⁹ *Id.* at 96.

sanctity of history, Altimari stressed that a number of circuits either had not yet spoken about the status of personal documents or seemed to favor privileged status for those documents.⁹⁰

Judge Altimari also distinguished the Supreme Court cases relied upon by the majority. First, he noted that the *Fisher* Court had explicitly stated that it would not venture near the question of whether private papers could be compelled because the facts of the case before it did not involve personal documents. Similarly, *Doe I* also had involved only business documents. Furthermore, in *Doe I*, Justices Marshall and Brennan wrote separate opinions stressing their understanding that "the Fifth Amendment still protects the contents of certain personal documents."⁹¹ Finally, because *Bouknicht* involved the production of a child and not personal papers, the dissent considered the two cases to be "incomparable."⁹² In summary, although he recognized the development of a narrower reading of the Fifth Amendment, Judge Altimari urged the courts to leave room for an exception for personal papers.⁹³

III. ANALYSIS

The Second Circuit's decision in *Doe III* differs considerably from the Supreme Court majority opinions in *Fisher*, *Doe I*, *Doe II*, and *Bouknicht* in that the Second Circuit chose to read the Fifth Amendment even more narrowly than the Supreme Court. In the Supreme Court cases, the dissenting opinions of Justices Marshall, Stevens and Brennan offer a persuasive argument for retaining a liberal reading of the Fifth Amendment that closely links privacy rights with the content of personal papers. As a result of the Supreme Court's failure to clarify its view of the Fifth Amendment regarding the content of personal papers, the holdings in various circuit court

⁹⁰ 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. 1989); *In re Steinberg*, 837 F.2d 527, 530 (1st Cir. 1988); *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir. 1985); *In re Grand Jury Proceedings*, 632 F.2d 1033, 1042 (3d Cir. 1980).

⁹¹ *Doe III*, 1 F.3d at 95.

⁹² *Id.*

⁹³ *Id.*

decisions lack uniformity, and even conflict with one another. The diverse approaches of these other circuit courts suggest alternatives to the Second Circuit's drastic measures. Because of their sensitive nature and underlying purposes, private papers have a special need for fifth amendment protection based on content alone.

A. Opposing Views of Privacy: The Supreme Court and the Second Circuit

To better understand and counter the Second Circuit's rationale, it is necessary first to examine closely the Supreme Court's internal debate over the Fifth Amendment. Perhaps the most important aspect of the Supreme Court majority opinions in *Fisher*, *Doe I*, *Doe II*, and *Bouknight* is the Court's failure to recognize directly the private nature of voluntarily prepared personal documents.

The Court has criticized the protection of private papers yet has been unwilling to reject the privilege entirely. For example, in *Fisher*, Justice White stated that "the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him."⁹⁴ Nonetheless, he concluded that the Court need not address the issue of whether the fifth amendment privilege would shield taxpayers from having to produce personal, self-created documents in their possession since *Fisher* dealt exclusively with non-private papers.⁹⁵

Even the *Fisher* Court acknowledged that protection of personal privacy, although not absolute, is an important purpose "served by the constitutional privilege against compelled testimonial self-incrimination."⁹⁶ After all, according to the majority, if private papers are not either self-incriminating or testimonial based on their content alone, there is no need to invoke the Fifth Amendment.⁹⁷ Additionally, the Court recog-

⁹⁴ *Fisher v. United States*, 425 U.S. 391, 409 (1976).

⁹⁵ *Id.* at 414.

⁹⁶ *Id.* at 399.

⁹⁷ *Id.* at 409 (explaining that preparation of taxpayers' papers was "wholly voluntary," therefore such papers cannot be said to contain "compelled testimonial

nized that an act-of-production privilege would serve to protect privacy interests as effectively as a privilege based solely on content.⁹⁸ According to the Court, even if private papers may be unprotected from production solely based on their private nature, they still will be protected if the act of producing them would verify that they existed and were in the producer's possession.⁹⁹ Or, as Justice Marshall explained in his concurring opinion, because "there is little reason to assume the present existence and possession of one's most private papers," such intensely personal documents will tend to retain fifth amendment protection.¹⁰⁰

In dicta, the *Fisher* Court apparently was struggling to merge the "naturalist view" of the *Boyd* Court—that privacy is one of the "inalienable rights which antedated the creation of the state and which were absolutely beyond its control"¹⁰¹—with the modern "legal-realist" view—that "all individual claims to right are relative to other societal interests."¹⁰² Such a convergence of two extremes cannot result in a logical outcome. The Court's attempt to do so, however, emphasizes the powerful pull of the naturalist perspective. Despite the Court's perception that the Fifth Amendment cannot be construed as a "general protector of privacy"—because "privacy" is not a word mentioned in its text and is "a concept directly addressed by the Fourth Amendment,"—the Fifth Amendment does protect important privacy interests. For example, Americans, in particular, have viewed the uniqueness of the individual as an inherent aspect of being human and, therefore, view the legal protection of this uniqueness as a moral imperative.¹⁰³ To preserve this uniqueness, the State must protect and encourage the "private aspects" of one's personality. If certain documents, diaries and journals, for example, are not accorded this content-based privilege, creative output could be chilled as people might become afraid to record intimate thoughts and ideas that may be unpopular or viewed

evidence").

⁹⁸ *Id.*

⁹⁹ *Fisher*, 425 U.S. at 409.

¹⁰⁰ *Id.* at 432 (Marshall, J., concurring).

¹⁰¹ Note, *supra* note 3, at 949.

¹⁰² Note, *supra* note 3, at 985.

¹⁰³ *Id.*

askance.¹⁰⁴ In the American political system, the right to privacy is "close[ly] connect[ed] with the uniqueness of the person and human dignity" and, unless the Fifth Amendment "can be read as putting a premium on the value of personal privacy in the face of government encroachment, it is difficult to imagine" what the Fifth Amendment means.¹⁰⁵ It follows, therefore, that the content of personal documents has a sacred tinge, that the individual has a right of privacy regarding such contents, and that this right is as vital a concept today as it was over 100 years ago.

The *Doe II* Court lent further support to this rationale. In its analysis the majority specifically emphasized that compelled execution of a consent directive did not force the petitioner to reveal his or her inner thoughts.¹⁰⁶ Thus, in large part, there was no fifth amendment violation because Doe's consciousness was not invaded.¹⁰⁷ With this in mind, it is reasonable to suggest that the *Doe II* Court deemed the disclosure to be viable largely because the sacred realm of Doe's private thoughts was not violated—as the situation would have been if production of personal papers had been compelled.

Unlike the Supreme Court, the Second Circuit in *Doe III* did not acknowledge the inherent tension that results when two very different, but equally compelling, philosophical views clash. Instead, with a few broad strokes, it dismissed all the tenets of *Boyd* as obsolete. Adopting a strict constructionist reading, the Second Circuit insisted that because the word "privacy" is not written explicitly in the text of the Fifth Amendment, there is no reason to suggest that any privacy

¹⁰⁴ Such a "chilling effect" has been claimed as the basis for extending first amendment protections. See, e.g., *Aftermath of Fisher*, *supra* note 4, at 683 (despite the narrowing of protection offered by the Fifth Amendment, which has resulted from the focus on compulsion, the First and Fourth Amendments "safeguard values formerly encompassed by the self-incrimination clause"). *Id.* While "the Fifth Amendment protects only the communications of those who can claim self-incrimination," *id.* at 701, and the Fourth Amendment "prohibits authorities from the wholesale rummaging through a citizen's papers," *id.* at 702, reliance on a penumbra of protections offered by other amendments only becomes necessary if one accepts the premise that the Fifth Amendment's privilege has become so weak that it offers no privacy protection.

¹⁰⁵ Note, *supra* note 3, at 987.

¹⁰⁶ See *supra* note 45 and accompanying text. But see *infra* note 133 and accompanying text for Justice Stevens's dissent.

¹⁰⁷ *Doe II*, 487 U.S. at 210.

interest underlies the Amendment.¹⁰⁸ The circuit court majority failed to rebut a century of precedent that consistently has supported an implicit privacy interest in the Fifth Amendment. Instead, the court merely insisted that such a perspective is no longer relevant. With apparent indifference to the active debate in the Supreme Court, the Second Circuit relied upon Justice O'Connor's concurrence in *Doe I* as its primary support.

Although Justice O'Connor's one-paragraph concurrence emphasized that "the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind" and insisted that *Fisher* "sounded the death-knell for *Boyd*,"¹⁰⁹ she stands alone in this assertion. Her sweeping conclusion, that *Doe I* put an end to the "fruitless search" for a rationale to justify *Boyd's* privacy of papers doctrine, is inappropriate.¹¹⁰

Equally inappropriate is the Second Circuit's reliance on *Bouknight* to further support its assertion that a majority of the Supreme Court now agrees with Justice O'Connor's concurring opinion in *Doe I*. It arrived at this assumption by focusing on dicta in *Bouknight* that seems to support O'Connor's concurrence.¹¹¹ *Bouknight*, however, is a noncriminal case with an unusual set of facts: close parallels between *Bouknight* and *Doe III* cannot be adequately drawn. Thus, to make its point, the Second Circuit depended on extraneous commentary from a case that centered around an act-of-production problem, not around the status of voluntarily created non-business docu-

¹⁰⁸ *Doe III*, 1 F.3d at 91.

¹⁰⁹ *United States v. Doe*, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring).

¹¹⁰ *Id.* As Justice Marshall rebutted in his partial dissent:

This case presented nothing remotely close to the question 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 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. at 619 (Marshall, J., concurring in part and dissenting in part).

¹¹¹ *Baltimore City Dep't Soc. Servs. v. Bouknight*, 439 U.S. 549, 555 (1990). In dicta, the *Bouknight* Court cited Justice O'Connor's *Doe I* concurrence and stated that "a person may not claim the [Fifth] Amendment's protection based upon the incrimination that may result from the contents or nature of the thing demanded." *Id.* at 555.

ments.¹¹² Furthermore, *Bouknight* did not involve production of a private document, like a diary. Rather, the case involved the production of a human being—a separate entity hardly the equivalent of the contents of one's mind.¹¹³

B. *Dissension in the Supreme Court: Affirming an Inviolable Fifth Amendment Right to Privacy*

1. The *Fisher* Concurrences

In contrast to the Second Circuit's opinion in *Doe III*, Justice Brennan's limited concurrence in *Fisher* revealed his acute awareness of the need to employ the Fifth Amendment to protect an inner sanctum of privacy.¹¹⁴ He agreed with the majority that the tax records in this case were not protected by an act-of-production privilege, but emphasized that he would not agree if they were of a personal, instead of a business nature.¹¹⁵ Furthermore, Justice Brennan viewed the majority's

¹¹² *Doe III*, 1 F.3d at 96.

¹¹³ *Id.* at 95 (Altamari, J., dissenting) ("*Bouknight* . . . involved the compelled production of a child, not the production of personal papers."). Judge Altamari found the two cases "incomparable" because:

The compelled production of a diary, an unpublished, written expression of one's innermost thoughts, forces the involuntary disclosure of the contents of one's mind. The compelled production of a child, on the other hand, is in no way its equivalent. A child, although the result of a private experience, is produced precisely to take his or her place in the world. Therefore, although the Court found that the privilege against testimonial self-incrimination cannot be invoked to prevent the compelled presence of another person, it can still be invoked to prevent the compelled production of a personal diary.

Id.

¹¹⁴ In *Fisher*, Justices Brennan and Marshall each concurred with the judgment. 425 U.S. 391, 414 (1976) (Brennan, J., concurring); *id.* at 430 (Marshall, J., concurring). Their separately written concurrences, however, were extremely limited and more closely resembled carefully worded dissents. Although they agreed with the majority that in this instance, based on the specific facts of the case, the documents in question did not warrant fifth amendment protection, such agreement was based on the finding that the documents were not personal in nature. Both justices expressed detailed, lengthy reservations to the majority's sweeping inference that purely personal papers might be cast into an entirely unprotected realm.

¹¹⁵ In his words, "I do not join the Court's opinion, however, because of the portent of much of what is said of a serious crippling of the protection secured by the privilege against compelled production of one's private books and papers." *Id.* at 414.

decision as an erosion of important privacy principles that *Boyd v. United States* had settled nearly a century ago.¹¹⁶

Justice Brennan noted that the Court had established the protection of personal privacy as one of the main purposes of the privilege against self-incrimination in countless opinions.¹¹⁷ Justice Brennan also recognized a "private inner sanctum of individual feeling and thought" which proscribes "state intrusion to extract self-condemnation."¹¹⁸ He emphasized his belief that protection of personal privacy should not be viewed as a mere by-product of the Fifth Amendment, but as a vital consideration when determining the breadth of the privilege's protection. Finally, finding little difference between intruding upon one's personal thoughts and one's personal writing, Justice Brennan warned that individuals will hesitate to transcribe their thoughts or memories on paper if there is reason to fear that their personal expressions may be subject to criminal inquiry.¹¹⁹ It is this inviolate privacy right, as well as the dangers that ensue from violation of it, that Judge Altamari embraces in his dissent in the Second Circuit case, *United States v. Doe*. It is this same discussion that the *United States v. Doe* majority conspicuously ignores, focusing instead on Justice O'Connor's brief, one-paragraph, concurring opinion in *Doe I*.

In a separate concurrence in *Fisher*, Justice Marshall tentatively agreed with Justice White that there does not appear to be a significant difference between protecting the act of

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 416 ("Expressions are legion in opinions of this Court that the protection of privacy is a central purpose of the privilege against compelled self-incrimination.") (Brennan, J., concurring).

¹¹⁸ *Fisher*, 425 U.S. at 416 ("The privilege reflects 'our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'." (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964)); *Couch v. United States*, 409 U.S. 322, 328 (1973) (The privilege "respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation."); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (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.").

¹¹⁹ As Justice Brennan wrote, "The ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or events of those memories would become the subjects of criminal sanctions however invalidly imposed." *Fisher*, 425 U.S. at 420.

production rather than the contents of documents themselves.¹²⁰ According to Justice Marshall, even without content protection, in most instances the very same documents will be allowed production protection—resulting in the same outcome.¹²¹ However, Justice Marshall was only slightly less worried by the seeming abandonment of content-based protection of private documents than was Justice Brennan. Justice Marshall cautiously hoped that the application of the new act-of-production theory would result in the same degree of protection as the Court's traditional focus on document content.¹²²

Ironically, the Second Circuit's recent analysis in *Doe III* proves Justice Marshall's caution to be well-founded. The Second Circuit's decision, forcing Doe to turn over his daily diary, has significantly decreased protection for personal documents.¹²³ For example, Doe had not relinquished the original version of his diary to the Government; rather, it remained solely and exclusively in his possession. This is important because the information the Government suspected was damaging to Doe lay *beneath* areas covered with correction fluid. Thus, this information was previously inaccessible to the government since it had possessed only those copies provided by Doe. Yet the Second Circuit still maintained that production of the diary would not have involved a testimonial communication and, as such, the diary was not entitled to act-of-production protection. According to the Second Circuit, the government's knowledge of both the existence and location of the diary were "foregone conclusions," and production of the daily planner would add "little or nothing to the sum total of the government's information."¹²⁴ This conclusion is curious. The government sought the original daily planner so it could

¹²⁰ *Id.* at 431 (Marshall, J., concurring).

¹²¹ *Id.* at 432. See *supra* text accompanying note 100.

¹²² *Fisher*, 425 U.S. at 432 (Marshall, J., concurring).

¹²³ Note, *supra* note 3, at 976. Although the act-of-production rationale was originally viewed by its supporters as "requiring an absolute bar against subpoenas for private papers," the *Fisher* Court "decided that application of the privilege against self-incrimination depended on the 'facts and circumstances of particular cases or classes thereof' and held that the acts of producing the accountants' workpapers were neither sufficiently testimonial nor sufficiently incriminating to allow its invocation." *Id.* (quoting *Fisher*, 425 U.S. at 410) (footnotes omitted).

¹²⁴ *United States v. Doe*, 1 F.3d 87, 93 (2d Cir. 1993) (citing *Fisher*, 425 U.S. 391, 411 (1976)).

scrape off the white-out and read information underneath, yet the court did not find that any additional information gleaned therefrom might add to the government's investigation or possibly provide new factual information. Far from providing no new information, the planner provided the government with crucial evidence.

2. Justice Stevens's Dissent In *Doe II*: Protecting the Contents of the Mind

Justice Stevens reinforced the view that a vital purpose of the Fifth Amendment is to protect the contents of an individual's mind from the prying eyes of the government. In his dissent in *Doe II*, Justice Stevens argued that forcing Doe to execute the directive, which released his account information to the government, created "new facts and new evidence" that the prosecution could then use against him.¹²⁵ In addition, by executing the document, Doe would be forced to admit to having a state of mind and therefore "speak" against his will.¹²⁶ As Justice Stevens explained, by signing the consent form Doe would be forced to answer "yes" to the government's question: "Do you consent to the release of the document?"¹²⁷ Thus, Doe's compelled signature would result in an obvious intrusion into the contents of his mind, forcing him to speak against his will and to be a witness against himself.¹²⁸

Justice Stevens likened the forced signing of the directive to the Star Chamber's inquisitorial treatment of the accused—a treatment that directly contradicts our accusatorial system of justice.¹²⁹ The American accusatorial system developed out of

¹²⁵ 487 U.S. 201, 221 n.2. See *supra* text accompanying notes 42-47; see also, United States v. Frederick P. Hafetz & Roger Parloff, Document Subpoenas and Fifth Amendment Privilege (PLI Litig. & Admin. Practice Course Handbook Series No. C4-4169, 1985). The authors theorize that the act of production privilege actually protects the same types of documents that were protected under *Boyd* because the act-of-production protection focuses on "those materials prepared by the witness himself or under his direct supervision, since such production may constitute incriminating authentication." *Id.* at 22.

¹²⁶ 487 U.S. at 219 n.1 (Stevens, J., dissenting).

¹²⁷ *Id.*

¹²⁸ *Id.* at 220.

¹²⁹ *Id.* "Star Chamber" is defined as:

A court which originally had jurisdiction in cases where the ordinary course of justice was so much obstructed by one party . . . that no inferi-

a deep respect for the uniqueness of the individual and from the belief that the natural person had an inviolable right to the protection of the realm of his or her thoughts and expressions.¹³⁰ Although not explicitly stated, Justice Stevens's opinion implies a great concern with the majority's apparent indifference to such individual rights and their disregard for the accusatorial system. In his dissent in the Second Circuit case, Justice Altimari echoed Justice Stevens's concern when he wrote that forcing a person to reveal the contents of her diary is the same as prying open her lips to force them to confess.¹³¹

C. *The Circuit Court Cases: Products of Uncertainty*

A brief survey of other circuit court opinions indicates the uncertainty left by the Supreme Court in the area of fifth amendment protections. For example, the Eleventh Circuit, in a case that recognized the shift of focus from a content-based privilege to an act-of-production privilege, refused to address whether personal papers are subject to the rationale that "records 'voluntarily committed . . . to writing' are not compelled testimony."¹³² The court stated that "this circuit has not yet addressed the remaining vitality of *Boyd* with regard to personal documents."¹³³ Emphasizing the void left by the Supreme Court, the Eleventh Circuit explained that because the Supreme Court itself was reluctant to overrule *Boyd*, it would leave the issue open.¹³⁴

Similarly, the First Circuit acknowledged the erosion of *Boyd*'s principles but stressed that in *Doe I* only Justice

or court would find its process obeyed. . . . In the reign of Henry VIII and his successors, the jurisdiction of the court was illegally extended to such a degree (especially in punishing disobedience to the king's arbitrary proclamations) that it became odious to the nation, and was abolished.

BLACK'S LAW DICTIONARY 1406 (6th ed. 1990).

¹³⁰ *Doe II*, 487 U.S. at 221 (Stevens, J., dissenting).

¹³¹ *United States v. Doe*, 1 F.3d 87, 96 (2d Cir. 1993) (Altimari, J., dissenting); see *supra* note 92 and accompanying text.

¹³² *In re Grand Jury Investigation*, 921 F.2d 1184 (11th Cir. 1991) (holding that the state could compel a legal secretary, acting as substitute custodian for an attorney, to produce the attorney's subpoenaed trust account records).

¹³³ *Id.* at 1187 n.6.

¹³⁴ *Id.*

O'Connor had found, at least expressly, that *Doe I* "sounded the death knell of *Boyd*."¹³⁵ In addition, the First Circuit mentioned that the *Fisher* court had refused to decide whether truly private papers should be protected based on their content.¹³⁶ Furthermore, the circuit court observed that in *Doe I* the Supreme Court had been careful to note that the business records at issue were not as personal as the documents in question in *Fisher*.¹³⁷ Finally, the First Circuit concluded that the documents involved in the case under review—notebooks kept as records of regularly conducted activity of Lyndon Larouche's security staff—were not intimate personal papers; therefore, like the *Fisher* Court, it refused to express an opinion as to whether the contents of personal papers are entitled to any protection.¹³⁸

The Sixth Circuit's decision in *Butcher v. Bailey*¹³⁹ is another example of the confusion engendered by the Supreme Court's opinions. In *Butcher*, a bankruptcy court order had allowed a debtor to withhold records because the contents might incriminate him. The Sixth Circuit reversed, however, stressing that the records in question were not personal because they related to property of the debtor's estate and such information is not intimate enough "to evoke serious concern over privacy interests."¹⁴⁰ Nonetheless, the Sixth Circuit did entertain the possibility that certain contents may still be protected, at least in rare situations "where compelled disclosure would break 'the heart of our sense of privacy.'"¹⁴¹

In contrast to the Eleventh, First and Sixth Circuits, other circuit courts have concluded that the Supreme Court has spoken quite clearly on the issue of whether the Fifth Amendment protects voluntarily created private documents. For example, the Fourth Circuit, in *United States v. Wujkowski*,¹⁴² allowed the subpoena of appointment books and beach-house

¹³⁵ *In re Steinberg*, 837 F.2d 527, 529 (1st Cir. 1988) (citing *Doe I*, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring)).

¹³⁶ *Id.* at 529, 530 n.4.

¹³⁷ *Id.* at 530 n.4.

¹³⁸ *Id.* at 530.

¹³⁹ 753 F.2d 465 (6th Cir. 1985).

¹⁴⁰ *Id.* at 469.

¹⁴¹ *Id.* (citing Justice Marshall's partial concurrence in *Doe I*, 465 U.S. 605, 618 (1984)).

¹⁴² 929 F.2d 981 (4th Cir. 1991).

records. The court stated that prior case law had made it clear that "[a] person may not claim the Amendment's protections based on the incrimination that may result from the contents or nature of the thing demanded."¹⁴³

The Ninth Circuit also has spoken against a content-based privilege. In *In re Grand Jury Proceeding*,¹⁴⁴ the court determined that the contents of subpoenaed documents were not protected by the fifth amendment privilege because defendant had not been compelled to create them.¹⁴⁵ Citing *Fisher* and *Doe I*, the Ninth Circuit wrote: "the Supreme Court has now made it clear that regardless of the precise characterization of the disputed papers, the contents of [personal business records] are not privileged under the Fifth Amendment in the absence of some showing that creation of the documents was the product of compulsion."¹⁴⁶

Significantly, although the Second Circuit cites this case as support for its holding that there is no longer any content-based protection, the Ninth Circuit specifically addresses only personal *business* documents. Furthermore, in *Wujkowski*, the Fourth Circuit had declined to comment on whether the documents in question were business or personal.

Finally, it is important to note that prior to its decision in *Doe III*, the Second Circuit had favored upholding *Boyd's* protection of private papers.¹⁴⁷ Indeed, several of its decisions recognized that the Supreme Court had not spoken decisively against *Boyd*. For example, when determining whether a diary was private or business-related, the court assumed that if the

¹⁴³ *Id.* at 983 (citing *Baltimore City Dep't Soc. Servs. v. Bouknight*, 493 U.S. 549 (1990)).

¹⁴⁴ 759 F.2d 1418 (9th Cir. 1985).

¹⁴⁵ *Id.* at 1420.

¹⁴⁶ *Id.* at 1419. Similar to the Fourth and Ninth Circuits, the Eighth Circuit has accepted a narrowed reading of *Boyd*, yet has not confronted a case involving personal, rather than purely business, documents. See *United States v. Mason*, 869 F.2d 414 (8th Cir. 1989) (if the Fifth Amendment protects the contents of private papers at all it is only in exceptional situations).

¹⁴⁷ See *In re Doe*, 711 F.2d 1187, 1196 (2d Cir. 1983) (Friendly, J., concurring in part and dissenting in part) (the Fifth Amendment still protects the individual from the production of documents deemed personal); *Grand Jury Subpoena Duces Tecum v. United States*, 657 F.2d 5, 8 n.1 (2d Cir. 1981) (same); *United States v. Beattie*, 541 F.2d 329, 331 (2d Cir. 1976) (post-*Fisher*, the Fifth Amendment still protects "against compulsory production of a paper written by an accused with respect to his own affairs").

diary were private it would automatically be shielded from compelled production.¹⁴⁸ Similarly, in 1985, the court noted that *Fisher* had not spoken on the issue of whether the Fifth Amendment still protects private, non-business documents.¹⁴⁹

In another case decided in 1985, the Second Circuit again recognized that the *Fisher* analysis should be limited to the production of business documents.¹⁵⁰ The Second Circuit refused to broach the question of whether the Fifth Amendment shields the contents of non-business related, private papers because the Supreme Court had not yet addressed that issue.¹⁵¹ As a final example, in *United States v. Beattie*, the Second Circuit emphasized that despite *Fisher*, the Fifth Amendment still protected the accused from being forced to produce private papers written by him and in his possession.¹⁵² Such precedent strongly conflicts with the Second Circuit's decision to extend the holding of *Fisher* so dramatically.

D. *The Second Circuit's Other Options*

As evidenced by the differing approaches among the circuit courts, the Second Circuit had a number of options instead of its extreme extension of *Fisher*. Although appellate courts usually defer to the factual conclusions of courts below them, the Second Circuit might have reviewed the lower court's conclusion that the daily planner in question was personal. Such daily planners often consist largely of business entries, with few personal notations, and thus are more "business" than personal.¹⁵³ In such a situation, any personal entries could be

¹⁴⁸ *In re Grand Jury Subpoena*, 657 F.2d at 7.

¹⁴⁹ *In re Proceedings Before Aug. 6, 1984 Grand Jury*, 767 F.2d 39, 41 (2d Cir. 1985).

¹⁵⁰ *United States v. Doe*, 767 F.2d 39 (2d Cir. 1985).

¹⁵¹ *Id.* at 41.

¹⁵² 541 F.2d 329 (2d Cir. 1976); see also Brief of Amicus Curiae at 4, *United States v. John Doe* (2d Cir. 1993) (No. 93-1070).

¹⁵³ See *In re Sealed Case*, 950 F.2d 736, 740-41 (D.C. Cir. 1991) Then-Chief Judge Ruth Bader Ginsburg discussed at length a functional test to determine whether a document is business or personal. This test, formulated in *Wilson v. United States*, postulates that the availability of the privilege depends more on the nature of the documents than the capacity in which they are held. 221 U.S. 361, 380 (1911). According to this view, a document that is mixed, containing both personal and corporate notations, may qualify as a corporate record. *Id.* However,

stricken.¹⁵⁴

If the Second Circuit had concluded that Doe's diary was actually of a business nature, it could have avoided making a sweeping statement that denied protection to all personal diaries and documents. Like the Ninth Circuit, the court could have categorized Doe's daily planner as a "personal business document" (as opposed to a purely personal document), which would not require content-based protection. Or, like the Fourth Circuit, it could have refused to comment on whether the planner was truly personal, and thereby avoid altogether the sensitive issue. Admittedly, a policy of avoidance is the least appealing alternative, but at least it would not result in a circuit court overstepping the bounds of Supreme Court precedent.¹⁵⁵ Finally, the Second Circuit simply could have conformed with its earlier decisions and accepted the premise that, based on their inherently private nature, the contents of diaries and similar personal writings are subject to the protection provided by privilege against self-incrimination.

E. Private Papers' Special Need for Content-Based Protection

Ideally, the Supreme Court will formulate a policy that preserves the privacy rights of individuals but does not impede law enforcement agents from investigating criminal activities. These goals are possible to reconcile. Legitimate business-related documents do not require content-based protection since the act-of-production privilege provides sufficient protection for

a diary or calendar that contains an occasional notation of a corporate appointment or activity may remain essentially private and therefore shielded from compulsory production. *Id.* Finally, in the case of a mixed document "records should be culled so as to delete or excise purely private notations from a corporate record, or corporate materials mingled with private papers." *Id.*

¹⁵⁴ In fact, in its appellate brief, the government argued that Doe's diary was a *business*, not personal, document. The district court accepted the defendant's argument that it was a personal document. Because the district court's decision was based on a factual issue, the Court of Appeals deferred to the district court's finding. Brief for the United States of America at 6, *United States v. Doe* (2d Cir. 1993) (No. 93-1070).

¹⁵⁵ In *Salerno v. American League*, 429 F.2d 1003 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971), the Second Circuit stated that "the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." *Id.* at 1005.

documents that are not private in nature.¹⁵⁶ Intimate papers, however, must retain a content-based privilege.

Without content-based protection, the government may subpoena an individual's private, non-business related writings during a criminal investigation. In turn, that individual might assert the fifth amendment privilege against self-incrimination, hoping that an act-of-production analysis would shield his personal papers from governmental purview. Unfortunately, courts may accept the government's argument that the existence, authenticity and possession of the writings are foregone conclusions, as the Second Circuit did in *Doe III*. Without content-based protection, this most intimate of documents will be subject to scrutiny by the courts. If, after examining the diary, a court finds that it is not incriminating or even relevant to the investigation, then it has needlessly examined an individual's intensely personal papers.

It is possible, of course, to assert the first amendment right to privacy when an instrument such as one's diary is involved in a criminal investigation.¹⁵⁷ However, the First Amendment will not guarantee protection from a subpoena duces tecum, especially if the government has a legitimate reason to suspect that certain diary entries will confirm information of which it is already aware. Thus, without the additional protection of the Fifth Amendment, personal papers may become more vulnerable to the government's purview. Such an event may be extraordinary, but the mere possibility of such an intrusion is serious enough to merit attention. In fact, it occurred in *Doe III*. The Second Circuit, while deferring to the district court's finding that Doe's planner was an intensely private document, nonetheless *refused to protect it*.

Furthermore, the special nature of personal papers requires the retention of a content-based privilege because the possibility of a subpoena duces tecum may inhibit their creation. Such a subpoena will not necessarily restrain the cre-

¹⁵⁶ See *infra* note 162 and accompanying text.

¹⁵⁷ See *Aftermath of Fisher*, *supra* note 4, at 696-97. "Modern first amendment jurisprudence recognizes that free speech is an end in itself as well as a means to promote other goals . . . [p]ersonal papers, almost by definition, are used to express a writer's most intimate personal feelings . . . To subject personal papers . . . to government examination for purposes of criminal investigations would certainly discourage communications . . ." *Id.*

ation of business records because such records usually are necessary for the effective functioning of an organization. On the other hand, there is no similar obligation to create personal papers. Private papers therefore are "more likely not to be written if they may harm the author."¹⁵⁸ Likewise, there is a legitimate concern that without the assurance of content-based protection people may be deterred from voluntarily committing their ideas to paper.

Individuals write their thoughts on paper for a variety of reasons, including the fallibility of memory and the need to help develop and understand certain concepts. Whether or not these thoughts are incriminating, their recorders do not necessarily want to share them with anyone. Rather, they may want to remind themselves of daily tasks, record important events for memory's sake,¹⁵⁹ or further develop ideas through the process of writing. It follows then, that forcing Doe to disclose his daily planner, which functioned in large part as a memory aid, is an invasion of his thought processes and violates the Fifth Amendment.¹⁶⁰ In a society that so values individual

¹⁵⁸ *Id.* at 699 n.88. An example of the chilling effect of such subpoenas is seen in one senator's response to the Senate Ethics Committee's investigation of Senator Robert Packwood in response to allegations of sexual harassment. Threatened by the subpoena of Senator Packwood's diary and the lengthy litigation that was sure to follow, Senator Trent Lott of Mississippi told the press, "I don't keep a diary . . . I don't even keep telephone logs anymore; I've been advised not to keep them longer than a month. I'm going to start throwing away my scheduling logs. I mean, why take the risk?" Michael Wines, *The Packwood Papers: Senate Demands a Look at the Diaries*, N.Y. TIMES, Nov. 7, 1993, § 4 (Week in Review) at 2. Although the investigation of Senator Packwood is not a criminal investigation yet, the impact is relevant here.

Even more sobering is the evidence of how fearful government officials may be to record their private thoughts. "Been battling with the RTC/Madison. Wrote two pages about what's going on, suddenly realized that I could be subpoenaed like Packwood and the most innocuous comments could be taken out of context. So on that subject, nothing." William Safire, *On Keeping Diaries*, N.Y. TIMES, Aug. 18, 1994, at A23 (quoting diary entry of Joshua Steiner, a Treasury Department aide whose fears were realized when his diary was subpoenaed during the Whitewater investigation). As Safire writes, the Packwood case set a dangerous precedent that "has turned Washington into an open city for diary snoops." *Id.* And, "[u]nder the guise of enforcing ethics, well-meaning zealots have fixed their eyes on hitherto inviolate private diaries" thus undermining both fourth and fifth amendment rights. *Id.*

¹⁵⁹ See *In re Grand Jury Subpoena Duces Tecum*, 741 F. Supp. 1059, 1068 (S.D.N.Y. 1990) (personal documents, including a diary and appointment book, did not have to be produced, in part because they were necessary to offset the "limitations of one's faculties" as memory aids).

¹⁶⁰ One might argue that choosing to convey personal, incriminating information

privacy and expression, it is vital that people not be reluctant to think through their pens, and not have to risk an invasion of their private thoughts merely because the fallibility of memory necessitates that they write things down.¹⁶¹

CONCLUSION

Because an individual's inner thoughts become more vulnerable to governmental intrusion once they are conveyed to paper, there is a very real need to retain a content-based fifth amendment privilege for private papers. Without such protection for papers that are private in nature, creativity and personal expression may be chilled, as individuals may justly hesitate to record thoughts solely for their own benefit or pleasure.

As the Supreme Court has not overruled *Boyd*, but has instead acknowledged its powerful precedential value, the Second Circuit's conclusion that the Fifth Amendment offers no content-based protection for voluntarily prepared personal papers is flawed. The Second Circuit's decision has, in effect, made it acceptable for the government to compel potentially incriminating testimony by subpoenaing one's private papers. Such private papers may contain deeply personal confessions. Whether incriminating or "innocent," one's confessions in personal papers are the equivalent of private thoughts. The government should not have access to the same thoughts that it cannot force the individual to utter merely because those thoughts were recorded for personal use. The Fifth Amendment was designed to protect individuals from such invasions

to a piece of paper is equivalent to "choosing" to confide incriminating information to a third party (who may just happen to be an undercover agent), and therefore such confidences are equally admissible in court. Choosing to record a private thought or confession, however, is not comparable to choosing to share that same thought with another human being, as it is likely that a privately recorded thought is not intended for publication or anyone's purview but the writer's. Therefore, the introduction of a person's writings as evidence against him "is perilously close to forcing him to take the stand. In both cases, he is being done in against his will by his own words, words which he never chose to share with anyone else." Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 788 (1994) (emphasis added). Thus a recorder of thoughts, as opposed to a speaker, cannot be said to have assumed the risk of his expression.

¹⁶¹ See *supra* note 162 and accompanying text.

into their minds. To dispense with such protections, and allow the government to extract information more conveniently from criminal suspects, undermines the meaning and importance of this deeply ingrained law.

The Second Circuit's *Doe III* decision is merely one example of the type of inconsistency that results when the Supreme Court fails to set forth clear guidelines. To avoid decisions like *Doe*, which freely dispose of any privacy interests connected with the Fifth Amendment, the Court must speak decisively on this important constitutional issue. It should articulate a bright-line rule that once the trier of fact has determined that a document is personal, the document is entitled to content-based protection and may not be submitted as evidence against the defendant. The departure from offering such protection to purely business-related documents is not as urgent as the need to retain this protection for intimate papers. Business papers, although voluntarily created, do not require the same special protections as private papers because they will be created out of necessity. Therefore, content-based protection is not essential for ordinary business documents; act-of-production protection suffices in those cases. Content-based protection remains essential for private papers, however, and the Court should retain a narrow exception for truly intimate documents.

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