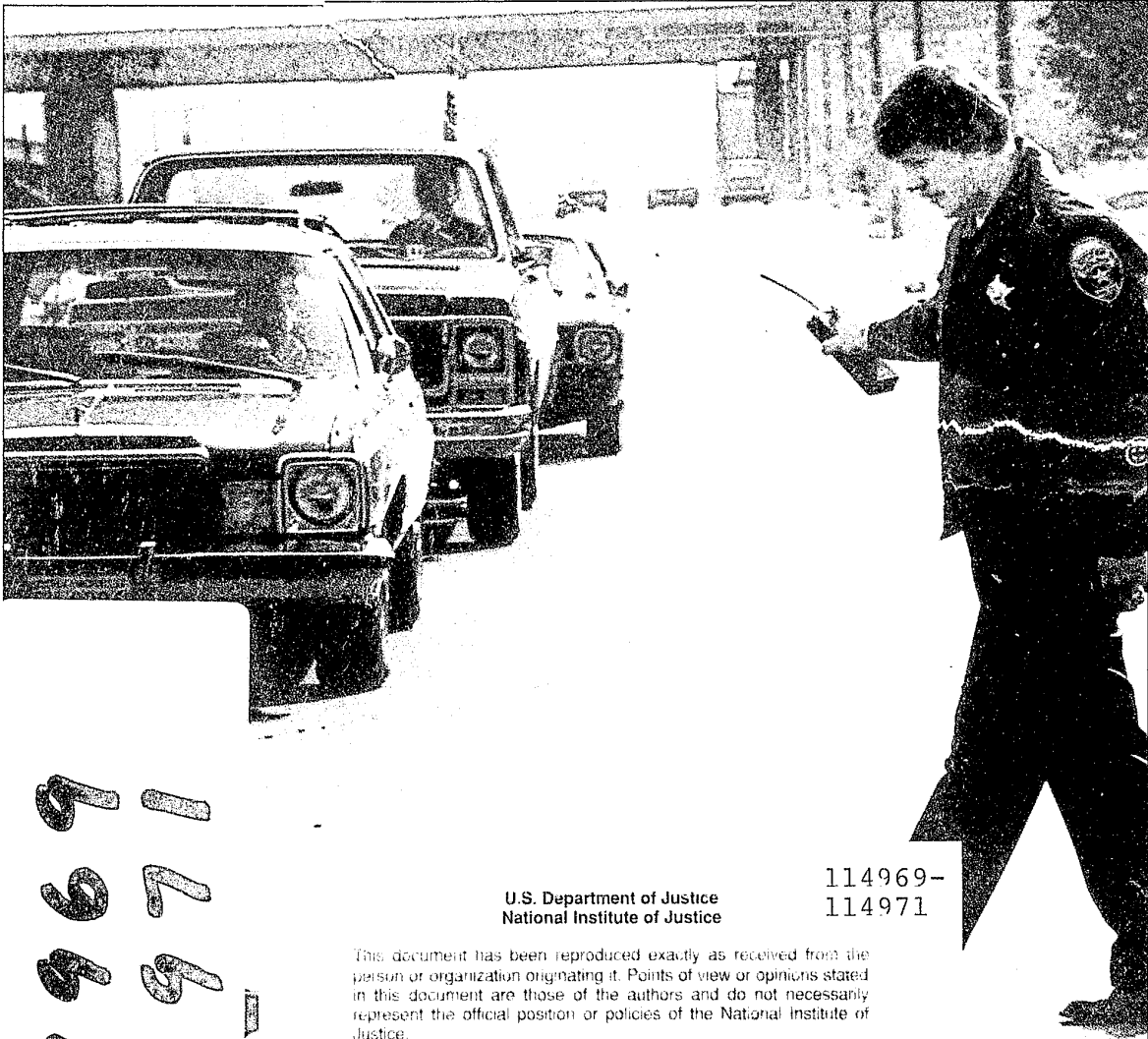




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Law Enforcement Bulletin

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The protection of the law extends to pedestrians of all types. Photo courtesy of Terry Herbig.

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Documents and Compulsory Self-Incrimination

Fifth Amendment Considerations

“... the fifth amendment privilege against compelled self-incrimination protects the contents of documents from disclosure only in extremely limited circumstances.”

In an 1886 decision, *Boyd v. United States*,¹ the U.S. Supreme Court held that a court order directed to the owners of property which was the subject of a forfeiture action, commanding them to produce an invoice that was to be used as evidence against them, violated their fifth amendment right not to be compelled to be witness against themselves. The Court stated, “. . . any compulsory discovery by . . . compelling the production of [a defendant's] private books and papers, to convict him of crime or to forfeit his property is contrary to the principles of a free government.”² This broad statement was later interpreted by some courts to bar, on fifth amendment grounds, the government from introducing the *contents* of a defendant's documents against him in a criminal case.³ In other cases, the *Boyd* case was held to be a blanket prohibition of commanding a defendant, by subpoena or court order, to *produce* documents to be used against him in a criminal prosecution.⁴ Recent Supreme

Court decisions have made clear that neither of these interpretations is entirely correct.

The fifth amendment serves as a bar to the introduction into evidence of the contents of a defendant's documents only in extremely limited circumstances. A defendant's fifth amendment right not to be compelled to produce a document is also quite narrow. This article will examine cases of the U.S. Supreme Court restricting the reach of fifth amendment protection for defendants challenging the admission into evidence of the *contents* of their documents. It will also discuss the circumstances under which a defendant may successfully challenge a court order to *produce* documents that are in his possession.

Circumscription of Fifth Amendment Privilege Relating to Contents of Documents

In the *Boyd* decision, the U.S. Supreme Court relied upon the fifth

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.



Special Agent Sauls

amendment provision commanding that "... no person ... shall be compelled in any criminal case to be a witness against himself ..." as grounds to bar the use of the documents in question against the Boyds. In subsequent cases, the Court proceeded to limit in three significant ways this use of the fifth amendment privilege to prevent the admission of documents into evidence. First, the application of the privilege was restricted to the documents of natural persons, thus denying the privilege to the records of collective entities such as corporations. Second, the privilege applicable to the contents of documents was limited to records the *creation* of which had been compelled, thus denying privilege where documents were voluntarily prepared. Third, in the narrow remaining area of privilege where the preparation of documents of natural persons had been compelled by the government, the application of the privilege was restricted to documents the contents of which were testimonial, thus allowing a person to be compelled to prepare a document not containing testimonial statements. Each of these limitations on the application of the privilege will be considered in turn.

Denial of Fifth Amendment Privilege to Collective Entities

In many criminal prosecutions using documentary evidence, the documents are those of collective entities such as corporations rather than the documents of individuals. The U.S. Supreme Court has restricted fifth amendment protections to persons, and thereby significantly circumscribed the sweep of the *Boyd* decision. In *United States v. White*,⁵ the Court stated that the "constitutional privilege against

self-incrimination is essentially a personal one, applying only to natural individuals."⁶ In *White*, the Court relied on a previous decision, *Wilson v. United States*,⁷ which held that the records of a corporation were beyond the scope of any fifth amendment privilege. This rule applied regardless of whether it was the corporation or its officers that were the intended target of the prosecution.⁸ This denial of a fifth amendment privilege to corporations is apparently absolute, applying to the records of extremely small corporations,⁹ as well as the records of corporations that have been dissolved.¹⁰

The Supreme Court has also ruled that unincorporated associations and organizations possess no fifth amendment privilege against compelled self-incrimination.¹¹ Noting that extension of fifth amendment protection to organizations would "... largely frustrate legitimate governmental regulation of such organizations,"¹² the Court stressed the importance of such regulation as follows:

"... [the] scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal

“ . . . the ‘constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals.’ ”

records and documents, effective enforcement of many federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations.”¹³

Thus, no fifth amendment privilege is available to “. . . an organization which is recognized as an independent entity apart from its individual members.”¹⁴ In applying this rule, the Court requires that the group in question “. . . be relatively well organized and structured, and not merely a loose, informal association of individuals. It must maintain a distinct set of organizational records, and recognize rights in its members of control and access to them.”¹⁵ The Court has applied this “collective entity rule” to unincorporated labor unions,¹⁶ political organizations,¹⁷ and partnerships,¹⁸ denying these organizations a fifth amendment privilege against compelled self-incrimination.

Denial of Fifth Amendment Privilege to the Contents of Documents Voluntarily Prepared

In *United States, v. Doe*,¹⁹ the U.S. Supreme Court asserted a second substantial limitation on the use of the fifth amendment privilege as a bar to the admission of documentary evidence. The Court held in *Doe* that a person’s right against being compelled to incriminate himself did not make privileged the contents of that person’s tax records that were in his possession. The Court

noted that the “. . . Fifth Amendment protects the person asserting the privilege only from *compelled* self incrimination. [citation omitted] Where the preparation of business records is voluntary, no compulsion is present.”²⁰ A logical extension of the Court’s reasoning eliminates the validity of any claim of fifth amendment protection for the contents of documents voluntarily prepared or created. Justice O’Connor, writing separately in *Doe*, addressed the issue as follows:

“. . . the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind. The notion that the Fifth Amendment protects the privacy of papers originated in *Boyd v. United States*, but our decision in *Fisher v. United States*, sounded the death knell for *Boyd*. ‘Several of *Boyd*’s express or implicit declarations [had] not stood the test of time,’ and its privacy of papers concept ‘ha[d] long been a rule searching for a rationale . . .’ Today’s decision puts a long overdue end to that fruitless search.”²¹ (citations omitted)

Consequently, the contents of a document would be protected only where an individual was compelled by the government to create the document.²²

Denial of Fifth Amendment Privilege to Contents of Documents Not Testimonial in Nature

In a 1988 case, *Doe v. United States* (*Doe II*),²³ the Supreme Court further circumscribed the fifth amendment privilege relating to the contents of documents. In this case, the target of a grand jury investigation was ordered to execute consent forms empowering foreign banks to disclose any account records relating to him they

might possess. The target asserted his fifth amendment privilege not to be compelled to incriminate himself and declined to comply. Consequently, he was held in contempt and appealed.

In *Doe II*, the Court conceded that the “. . . execution of the consent directive at issue in this case obviously would be compelled, and we may assume that its execution would have an incriminating effect.”²⁴ The Court observed, however, that the fifth amendment privilege against compelled self-incrimination applied only to testimonial communications, to “. . . acts that imply assertions of fact.”²⁵ Amplifying this requirement, the Court noted that “. . . in order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.”²⁶

The Court then examined the language of the consent directive in question and found it communicated no factual assertions. The consent did not acknowledge that an account in a foreign financial institution was in existence or that it was controlled by the signer of the consent, and also failed to indicate whether documents or other information relating to the signer were present in the foreign bank. It did not even identify the relevant bank. Though noting the existence of “. . . very few instances in which a verbal statement, either oral or written, will not convey information or assert facts,”²⁷ and thus be testimonial, the Court nonetheless held the consent directive in question non-testimonial and upheld the lower court’s sanction of contempt.

In summary, the fifth amendment privilege against compelled self-incrimination protects the contents of documents from disclosure only in extremely

“. . . a threshold requirement to successfully asserting a fifth amendment privilege claim is that the claimant of the privilege is being compelled to either act or speak.”

limited circumstances. First, the document in question must be the record of either an individual or his sole proprietorship. Second, the creation or preparation of the document must have been compelled by the government. Finally, the contents of the document must be testimonial in nature. It is therefore important for investigators to understand that once the government legally obtains a document, the fifth amendment privilege against compulsory self-incrimination will rarely impede the introduction into evidence of the *contents* of that document in a criminal prosecution. The next section will explore the extent to which a person can be compelled to *produce* that document.

Fifth Amendment Privilege Against Compulsion to Produce Documents

As judicial decisions limited fifth amendment protection for the contents of documents, courts began to explore what protection the fifth amendment might provide to persons against being compelled by the government to bring forward or *produce* documents in their possession. In *Fisher v. United States*,²⁸ the U.S. Supreme Court observed that the act of handing over documents in response to a subpoena or summons might constitute a testimonial communication in and of itself privileged under the fifth amendment. The Court stated that 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. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or con-

trol by [the recipient of the subpoena]. It would also indicate the [recipient's] belief that the papers are those described in the subpoena.”²⁹ Consequently, under certain circumstances, a person may successfully resist *producing* documents in his possession based upon the fifth amendment privilege against compulsory self-incrimination.³⁰

Since the *Fisher* decision, the Court has marked the boundaries of this use of the privilege. In order for such a fifth amendment objection to be valid, three requirements must be satisfied. First, the person objecting must be the one under subpoena or court order to act. Second, the action being compelled must be testimonial in nature. Finally, the person being compelled must be acting in a personal rather than representational capacity.

Person Claiming Privilege Must Be Placed Under Compulsion to Act

In *Andresen v. Maryland*,³¹ the U.S. Supreme Court noted that a threshold requirement to successfully asserting a fifth amendment privilege claim is that the claimant of the privilege is being compelled to either act or speak. In *Andresen*, a search warrant was executed on the defendant's business premises, and documents were seized as evidence. The Court rejected a claim of fifth amendment privilege, stating that Andresen “. . . was not asked to say or do anything. The records seized contained statements that [Andresen] had voluntarily committed to writing. The search for and seizure of these records were conducted by law enforcement personnel.”³² Thus, where a search warrant is used, freeing the defendant of compulsion to do anything

but step aside, no fifth amendment privilege is violated.

Claims of fifth amendment privilege have likewise been rejected where subpoenas or summonses were employed in instances when the persons directed to act were someone other than the defendant.³³ For example, in *Couch v. United States*,³⁴ an Internal Revenue summons was directed to the defendant's accountant, directing him to produce records of the defendant in the accountant's possession. Enforcement of the summons was approved, since the summons did not require the defendant, the person claiming privilege, to do anything.

A similar result was reached in *Fisher*, where a summons was served on Fisher's attorney directing him to produce Fisher's records that were in the attorney's possession. Because the attorney, not Fisher, was being compelled to act, Fisher was held to have no valid fifth amendment objection to enforcement of the summons. It should be noted that some other sort of privilege might apply in some circumstances, such as the attorney-client privilege. A discussion of such privileges is beyond the scope of this article.

The Compelled Act of Production Must Be Testimonial

A subpoena for documents is a court order directing a specific person to bring before a court or other forum certain specified documents. The Supreme Court requires that in order for a communication to be privileged under the fifth amendment, it must be testimonial. Thus, if a recipient of a subpoena for documents is to successfully assert a fifth amendment privilege, it

must be shown that his act of delivery is a testimonial communication, that the delivery will "explicitly or implicitly, relate a factual assertion or disclose information."³⁵

As the Supreme Court noted in *Fisher*, the act of delivering documents in response to a subpoena can have certain testimonial aspects even where the subject of the subpoena gives no testimony;³⁶ through the act of production, the subject of the subpoena indicates a belief that the documents delivered are those specified in the subpoena. Delivery is also indicative of the fact that the documents were in the control of the person delivering them. Such implied assertions often constitute evidence of critical importance to a criminal prosecution and will likely be assumed by courts to be incriminating in fifth amendment terms.³⁷ It is, therefore, important for investigators to understand that where a subpoena for documents is directed to a suspect or defendant, that person will likely be able to successfully claim that the act of handing over the documents constitutes compelled self-incrimination. To overcome this potential fifth amendment objection, investigators should consider the feasibility of obtaining a search warrant to seize such documents, as occurred in *Andresen*.

The Person Compelled Must Be Acting in a Personal Capacity

In *Braswell v. United States*,³⁸ the Supreme Court approved the compulsion of the president of a small corporation to produce corporate documents in his possession, even though his act of production would tend to personally incriminate him. The Court held that no fifth amendment privilege was applica-

ble because the president would be acting as a representative of the corporation, rather than in a personal capacity, when delivering the corporation's documents. As noted earlier in this article, the corporation could assert no fifth amendment privilege because of its status as a collective entity. Consequently, where a person holds records of a collective entity, he may be compelled by the government to produce them.

The Court in *Braswell* did provide something of a shield for the person compelled to act in a representative capacity by holding that the act in question shall be deemed to be the act of the collective entity rather than of the person.³⁹ In other words, the jury at the defendant's trial will not be told that the defendant produced the documents.⁴⁰

Conclusion

Where a subpoena or court order is used to direct a suspect or defendant in a criminal case to hand over documents in his possession, and the documents sought are not those of a collective entity, the suspect or defendant may successfully resist compliance with the order based upon his fifth amendment privilege against being compelled to be a witness against himself. When confronted with this prospect, an investigator may choose to use a search warrant, thereby circumventing a fifth amendment privilege claim.⁴¹ Where a search warrant is not a viable option, the Supreme Court has suggested that the use of a statutory grant of immunity to bar the government from presenting evidence that the defendant delivered the documents will eliminate the incriminating consequences of the

act of production.⁴² Although such a grant of immunity presents significant concerns for the prosecution, it is a means of acquiring the documents in question over a fifth amendment privilege claim.

The Supreme Court has recognized the importance of documentary evidence in criminal prosecutions. Its recent decisions regarding the fifth amendment privilege have made apparent the relatively few limits that privilege places on government efforts to gain custody of documents for use as evidence in a criminal prosecution.

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FOOTNOTES

- 1 116 U.S. 616 (1886).
- 2 *Id.* at 632.
- 3 See *Gouled v. United States*, 255 U.S. 298, 306 (1921).
- 4 See *Ballmann v. Fagin*, 200 U.S. 186 (1906).
- 5 322 U.S. 694 (1944).
- 6 *Id.* at 398.
- 7 221 U.S. 361 (1911).
- 8 *Id.*
- 9 *Braswell v. United States*, 108 S. Ct. 2284 (1988).
- 10 *Grant v. United States*, 227 U.S. 74 (1913).
- 11 *United States v. White*, *supra* note 5.
- 12 *Bellis v. United States*, 417 U.S. 85, 90 (1974).
- 13 *Supra* note 5, at 700.
- 14 *Supra* note 12, at 92.
- 15 *Id.* at 92, 93.
- 16 *Supra* note 5.
- 17 *Rogers v. United States*, 340 U.S. 367 (1951).
- 18 *Supra* note 12.
- 19 465 U.S. 605 (1984).
- 20 *Id.* at 610.
- 21 *Id.* at 618 (Justice O'Connor, concurring).
- 22 *Id.* It is noteworthy that a statute requiring the keeping of records or the filing of a form (a tax return for example) is not government compulsion to create the contents of the records or form. Consequently, to preserve one's fifth amendment privilege, a person must file the required form, omitting the contents of the form withheld based upon the privilege, and stating the fact that the contents have been withheld based upon the privilege. See *United States v. Sullivan*, 274 U.S. 259 (1927); *Garner v. United States*, 424 U.S. 648 (1976).
- 23 108 S. Ct. 2341 (1988).
- 24 *Id.* at 2346.
- 25 *Id.* at 2347.
- 26 *Id.*
- 27 *Id.* at 2349.
- 28 425 U.S. 391 (1976).
- 29 *Id.* at 410.