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Privilege against Self-Incrimination Does Not Bar Seizure of Personal Papers

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Privilege against Self-Incrimination Does Not Bar Seizure of Personal Papers

In *Andresen v. Maryland,*[1] the U.S. Supreme Court held that the Fifth Amendment privilege against self-incrimination does not apply to the forcible seizure, with valid search warrants, of an attorney's incriminatory personal business records from his office.[2] Petitioner Andresen, a sole practitioner specializing in real estate settlements, came under the scrutiny of a Bi-County Fraud Unit investigating real estate settlement activities in the Washington, D.C., area. The investigation revealed that Andresen, while acting as settlement attorney, had defrauded the purchaser by knowingly concealing two existing liens on the property. The investigators concluded that there was probable cause to believe the petitioner had committed the state crime of false pretenses[3] and were issued search warrants permitting them to search for specified documents relating to the sale and conveyance of the purchaser's property. The law-enforcement officers seized 80 documentary items from the petitioner's office and corporation files pertaining to the real estate transaction under investigation.

At a full suppression hearing prior to trial, the trial court suppressed 62 of the seized items. The trial court ruled that admitting into evidence the documents that were not suppressed would not violate the Fifth Amendment. The court reasoned that the search and seizure did not force Andresen to be a witness against himself, since he had neither been required to produce the seized documents nor been compelled to authenticate them.[4] The Court of Special Appeals of Maryland, affirming in part the false-pretenses conviction, concluded that the search had not violated Andresen's Fifth-Amendment rights because he had not been compelled to incriminate himself.[5] The U.S. Supreme Court granted certiorari and affirmed the judgment of the Maryland appellate court.

One who is accused of a crime is privileged from compelled self-incrimination under the Fifth and Fourteenth Amendments to the federal Constitution.[6] The "historic function" of the constitutional privilege

1. ___ U.S. ___, 96 S. Ct. 2737 (1976).

2. In addition, the Court held that the warrants authorizing the search satisfied Fourth-Amendment standards of specificity despite their closing reference to "other fruits, instrumentalities and evidence of crime at this [time] unknown." *Id.* at 2739, 2748-2749.

3. MD. ANN. CODE art. 27, §140 (1976).

4. At trial, the prosecution introduced into evidence eight documents related to the purchaser's property, one of which contained memoranda and drafts written in the petitioner's handwriting. The authentication of the documents was made by a witness for the prosecution. 96 S. Ct. at 2742-2745.

5. 24 Md. App. 128, 331 A.2d 78 (1975).

6. *See* 21 AM. JUR. 2D Criminal Law §349 (1965), Malloy v. Hogan, 378 U.S. 1, 8 (1964).

against self-incrimination has been to protect a "natural individual from compulsory incrimination through his own testimony or his own personal records."[7] Recent decisions, however, have eroded the protection by using the Fourth Amendment as a limitation on the scope of the Fifth.[8] After *Andresen*, the privilege protects, in effect, only oral testimony.

In *Boyd v. United States*,[9] the Supreme Court invalidated, on Fourth and Fifth Amendment grounds, an order from a district judge demanding that defendant Boyd produce an invoice allegedly in violation of an import-duty statute. The Court found that a mandatory production of the defendant's private records to be used in evidence against him in effect compelled the defendant to incriminate himself.[10] The Court in *Boyd* recognized the intimate relation between the Fourth and Fifth Amendments; it said that the Fifth-Amendment privilege against self-incrimination placed limitations on the items of evidence subject to compulsory production under the Fourth Amendment.[11] The Court's emphasis on protection of private papers from governmental intrusion was based on the substantial Fourth Amendment privacy interest that inspired a new "zone of privacy that [could] not be invaded by the police through raids, by the legislators through laws, or by magistrates through the issuance of warrants."[12] The Court in *Andresen* held that the Fifth Amendment does not protect against the valid seizure of personally incriminating business records, and thus it severely limited *Boyd*.

The recent decision in *Couch v. United States*[13] redefined the principles articulated in *Boyd*. There, the defendant contested an Internal Revenue summons, directed to her accountant, to produce business documents that she had given the accountant over a period of more than 14 years and that the accountant had used in preparing her income-tax returns.[14] When the

7. United States v. White, 322 U.S. 694, 701 (1944). *See also* Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949).

8. In United States v. White, 322 U.S. 694 (1944), the Court refused to allow the privilege to be applied to corporate records. Similarly, in Bellis v. United States, 417 U.S. 85 (1974), records from a law practice were held to fall outside the area of protection afforded by the Fifth Amendment. *See also* Couch v. United States, 409 U.S. 322 (1973); Fisher v. United States, 96 S. Ct. 1569 (1976).

9. 116 U.S. 616 (1886).

10. *Id.* at 634-635.

11. "[T]he 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.* at 633.

12. Warden v. Hayden, 387 U.S. 294, 313 (1967) (Douglas, J., dissenting).

13. 409 U.S. 322 (1973).

14. *Id.* at 324.

accountant complied with the summons, the defendant asserted that her Fifth-Amendment rights had been violated.[15] While she conceded that the accountant possessed the documents, she contended that a summons by the government would require the "forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime,"[16] a concept also condemned by *Boyd*. The Court held that the Fifth Amendment did not prohibit the production of the defendant taxpayer's business records in her accountant's, not her own, possession and that she had no reasonable expectation of privacy that would bar production under either the Fourth Amendment or the Fifth.[17] The *Couch* decision, then, says that the Fifth Amendment bars the compelled production by subpoena of property within the possession of the accused.[18] It does not, however, address the search-and-seizure problem as applied to the Fifth Amendment.

In holding that the Fifth-Amendment privilege against self-incrimination did not apply to the seizure, pursuant to lawful search warrants, of the petitioner's incriminatory business records, the Court in *Andresen* relied most heavily on the recent decision of *Fisher v. United States*.[19] The Court held in *Fisher* that an attorney's production, pursuant to a lawful summons, of a client's tax records in his control did not violate the Fifth-Amendment privilege of the taxpayer "because enforcement against a taxpayer's lawyer would not 'compel' the taxpayer to do anything, and certainly would not compel him to be a 'witness' against himself."[20] While the *Andresen* Court did recognize the incriminating effect of the seized documents, it chose to follow the frequently quoted remark of Justice Holmes: "A party is privileged from producing the evidence, but not from its production."[21] To support its position, the Court drew a distinction between the methods used to discover evidence; the Fifth Amendment privilege covered production of evidence compelled by subpoena, the Court said, but not procurement by seizure.[22] The majority said a contrary

15. Id. at 324-25.

16. *Id.* at 330, *citing* Boyd v. United States, 116 U.S. 616, 630 (1886).

17. 409 U.S. at 327-336.

18. "[I]t is clear that Couch only addresses itself to the accountant-client privilege in a limited context. Couch holds that the Fifth Amendment right not to incriminate oneself through the production of personal records extends only to a person who is himself in possession of such records." Comment, *Couch v. United States: The Supreme Court Takes A Fresh Look At The Attorney-Client Privilege — Or Does It?*, 62 KY. L.J. 263, 264 (1973-74).

19. 96 S. Ct. 1569 (1976).

20. *Id.* at 1571.

21. Johnson v. United States, 228 U.S. 457, 458 (1913). The majority also observed that the Fifth-Amendment privilege against self-incrimination "adheres basically to the person, not to information that may incriminate him." 96 S. Ct. at 2745, *citing* Couch v. United States, 409 U.S. at 328.

22. The Court grasped a narrow thread when it maintained that "although the Fifth Amendment may protect an individual from complying with a *subpoena* for the production

determination would undermine earlier decisions and prohibit the admission of evidence traditionally admitted in criminal actions despite the Fifth-Amendment guarantees.[23] Indeed, in *Andresen* the Court maintained that the introduction of business records into evidence after their procurement by skillful investigation did not offend any of the policies underlying the Fifth-Amendment privileges, especially if the statements were voluntarily committed to paper before their seizure.[24]

Finally, the Court "recognize[d]" the protection of an individual's privacy afforded by the Fifth Amendment, but it explicitly restricted the extent of that privilege.[25] Referring once again to *Fisher*, the Court concluded:

> [U]nless incriminating testimony is "compelled," any invasion of privacy is outside the scope of the Fifth Amendment's protection, [because] "the Fifth Amendment protects against 'compelled self-incrimination not [the disclosure of] private information.' "[26]

In his dissenting opinion, Justice Brennan concluded that the admission into evidence of Andresen's business documents was a direct violation of his constitutionally protected "zone of privacy."[27] He perceived "no distinction of meaningful substance"[28] between production of evidence compelled by subpoena and production secured against the will of the petitioner through the use of a warrant. Justice Brennan maintained that the issue could not be resolved on any simplistic concept of compulsion and that the majority had misinterpreted the holding of *Couch*, in which the actual possession of the documents was decisive in determining whether there was an element of personal compulsion.[29] In a final reference to *Boyd*, Brennan reiterated the interplay between the Fourth and the Fifth Amendments in their protection against the invasion of an individual's right "of personal security, personal liberty and private property,"[30] and he noted the failure of the majority to give effect to that concept.

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of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information, see Fisher v. United States, supra, a *seizure* of the same materials by law enforcement officers differs in a crucial respect — the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence." 96 S. Ct. at 2745 (emphasis added).

23. *Id.* at 2745-2747.

24. *Id.* at 2747.

25. *Id.*

26. The Court reminded us again that Andresen was not compelled to testify in any manner; the Court cited Fisher v. United States, 96 S. Ct. at 1576.

27. 96 S. Ct. 2737, 2750-2751. The dissenting opinion quotes from Bellis v. United States, 417 U.S. 85, 87-88 (1974): "The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life."

28. 96 S. Ct. at 2750.

29. *Id.* at 2751-2752.

30. 116 U.S. 616, 630 (1886).

The Court in *Andresen* sanctioned its assault on the Fifth Amendment by refusing to find any suggestion of compulsion in the seizure of the petitioner's papers. The Court acknowledged that the evidence in question was incriminating and that the Fifth Amendment protects certain zones of privacy; it found neither consideration to be relevant if there was no compulsion.[31] The Court endeavored to justify its finding of no compulsion by distinguishing between production by subpoena and production by seizure; the authentication of documentary items obtained by subpoena may incriminate the holder, the Court said, but the risk of authentication would be absent if the items were seized pursuant to a valid search warrant. According to *Andresen*, then, an accused's privilege against compelled self-incrimination is confined to cases requiring oral authentication of documentary evidence, obtained either by subpoena or by valid search warrant, since compulsion now is applicable only to oral testimony — nothing else.

Andresen drove the Fourth and Fifth Amendments further apart. When the Court chose to rely primarily on the Fourth Amendment in its conclusion that a valid search and seizure precluded any element of personal compulsion, it severely restricted the petitioner's Fifth Amendment protection against self-incrimination. The Court used the Fourth Amendment as a justification to circumvent Fifth Amendment protections at the expense of the accused; incriminating documentary evidence may now be secured through the medium of a search warrant. The result is a hollow Fifth Amendment guarantee against the compelled production of incriminating documentary material and a substantial limitation of an individual's expectation of privacy.

Ross McCloy

31. The Court in *Couch* held that compulsion is evident when an accused is forced to authenticate documentary items, and *Fisher* further restricted the reach of the Fifth Amendment when the Court held that compulsion is evident when a testimonial communication is involved.