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Reading Tea Leaves: The Fifth Amendment and Tax Records

James G. Starkey*

INTRODUCTION

Radical changes have occurred in recent times concerning the judicial construction of the fifth amendment privilege against self-incrimination as applied to subpoenaed tax records and other documents. These developments have created a degree of confusion, causing one judge to describe the role of the lower federal courts in discerning the present state of the law as that of a tea leaves reader.¹ This article reviews the early construction of the privilege, its refinement and its more recent changes. The article also examines the effect of this evolution on the protection afforded documentary evidence, especially tax records.

BACKGROUND

The constitutional right against self-incrimination is based on the fifth amendment, which reads in relevant part: “[N]o person . . . shall be compelled in any criminal case to be a witness against himself . . . .”² The origin of the right can be traced to twelfth century England and popular resistance to procedures in the ecclesiastical courts, which procedures were calculated to force a suspect to confess his own guilt.³ Subsequently, the right against self-incrimination was incorporated into the common law and became firmly imbedded there.⁴ It was then brought to this country as part of the legal heritage of the early colonists and added to the Constitution as part of the Bill of Rights.⁵

It has long been the rule that the fifth amendment must be liber-
ally construed in favor of the right it was designed to protect.\(^6\) Accordingly, the Supreme Court has held that a witness in a criminal proceeding is entitled to invoke his right against self-incrimination as to any question the answer to which might provide merely a "link in the chain" of evidence required to convict.\(^7\) Further, in addition to the exercise of this right in criminal proceedings, invocation of the fifth amendment has been held to be permissible in any proceeding if answers given by a person could be used against him in a subsequent criminal prosecution.\(^8\)

The right is limited in that it is personal, extending only to natural individuals;\(^9\) it cannot be invoked by collective entities such as corporations,\(^10\) labor unions,\(^11\) associations\(^12\) or partnerships.\(^13\) Moreover, since compulsion must be present to trigger fifth amendment protections,\(^14\) voluntary admissions are not protected, even for individuals. And only those compelled responses which are "of a testimonial or communicative nature" qualify for fifth amendment protection.\(^15\)

The Supreme Court first considered whether the fifth amendment protects documents in *Boyd v. United States*.\(^16\) There, the government brought a forfeiture action against thirty-five cases of glass imported by a partnership allegedly without payment of the required duty.\(^17\) Pursuant to authority granted by the customs revenue laws, the government attempted to subpoena an invoice reflecting the prior receipt of twenty-nine cases duty-free\(^18\) as evidence that the partnership already had exhausted its duty-free

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\(^6\) Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).
\(^7\) Hoffman v. United States, 341 U.S. 479, 486 (1951).
\(^10\) Wilson v. United States, 221 U.S. 361, 382 (1911).
\(^12\) Rogers v. United States, 340 U.S. 367, 371-72 (1951).
\(^15\) Schmerber v. California, 384 U.S. 757, 761 (1966) (suspect compelled to give blood sample; evidence held nontestimonial and unprotected by fifth amendment); see also United States v. Wade, 388 U.S. 218, 222 (1967) (compelled participation in lineup unprotected by fifth amendment); Gilbert v. California, 388 U.S. 263, 266-67 (1967) (suspect compelled to give handwriting sample; evidence held nontestimonial and unprotected by fifth amendment).
\(^16\) 116 U.S. 616 (1886).
\(^17\) *Id.* at 617.
\(^18\) *Id.* at 617-18.
The import statute under which the government brought its action provided for substantial fines, imprisonment, or both, in cases where an individual fraudulently altered or omitted critical information from any document and thus deprived the United States of import duties. Significantly, the statute also provided that failure to comply with a subpoena of documents in a customs case would result in a confession of the government’s allegations.

Relying upon *Entick v. Carrington*, an English case in which the court reasoned that since “the law obligeth no man to accuse himself . . . [the] search [of his private property] for evidence [to be used against him] is disallowed,” the Court held that “any forcible and compulsory extortion of a man’s . . . private papers to be used as evidence to convict him of crime” was impermissible as a violation of both the fourth and fifth amendments. The Court reasoned that the “forcible and compulsory extortion” of a person’s private papers constituted an unreasonable seizure under the fourth amendment and, concomitantly, that since the papers were testimonial in nature, the compulsion involved in acquiring them violated the fifth amendment right against self-incrimination. In so holding, the Supreme Court—like the court in *Entick*—placed great emphasis on the owner’s rights in the property sought. The property-right rationale of *Boyd* became known as the “mere evidence rule,” which provided that the government had a superior property right to the fruits or instrumentalities of a crime

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19. *Id.* at 618.
20. *Id.* at 617.
21. *Id.* at 621.
25. *Id.* at 635.
26. *Id.* Regarding the interrelationship of fourth and fifth amendment rights in this context, the *Boyd* Court stated:

We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the “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. We think it is within the clear intent and meaning of those terms.

*Id.* at 633.
and to contraband, but not to “mere evidence.”

Logically, the reasoning of Boyd seemed to call for the protection of documents owned by corporations as well as natural persons. However, since such an interpretation would seriously have affected law enforcement in connection with corporate misconduct, the Supreme Court in Hale v. Henkel held that the fourth and fifth amendment protections outlined in Boyd do not apply to corporations. The Court reasoned that the corporation was a creature of the state and that the legislature accordingly had reserved the right to inspect the corporation’s property and records. Subsequently, in Wilson v. United States, the Court, ruling that neither the corporation nor one possessing corporate records in a representative capacity had a privilege as to such records, held that the president of a corporation could not invoke the fifth amendment right against self-incrimination with respect to subpoenaed corporate records created by him and in his possession.

In Wilson, the president of United Wireless Telegraph Corporation was served with a subpoena duces tecum commanding him to produce certain corporate records in connection with a grand jury investigation. The grand jury was convened to investigate charges of mail fraud which implicated both the corporation and Wilson individually as its president. Wilson refused to surrender the documents, claiming that certain incriminating personal records were included in the subpoenaed documents. The district court rejected Wilson’s assertion of his fifth amendment privilege, holding that the privilege was inapplicable where corporate records were the subject of a subpoena. Wilson therefore was held in contempt for failure to comply with the subpoena.

27. During an otherwise lawful search, therefore, the fourth amendment was held to authorize seizure of the former, but not the latter. See Gouled v. United States, 255 U.S. 298, 309-10 (1921); see also United States v. Lefkowitz, 285 U.S. 452, 464-65 (1932) (papers held to be “mere evidence”); Marron v. United States, 275 U.S. 192, 199 (1927) (ledgers and bills ruled instrumentalities). The rule was abolished in Warden v. Hayden, 387 U.S. 294 (1967), which authorized seizure of “mere evidence” by substituting a privacy rationale for the property-right basis upon which courts had previously relied. Id. at 310.
28. 201 U.S. 43 (1906).
29. Id. at 74-75.
30. Id.
31. 221 U.S. 361 (1911).
32. Id. at 383-84.
33. Id. at 367-68.
34. Id. at 369.
35. Id. at 371.
On appeal, the Supreme Court upheld the contempt citation. The Court ruled that a subpoena of corporate documents kept in the normal course of business did not implicate Wilson's personal right against self-incrimination. The Court, distinguishing the facts from those of Boyd, noted that the subpoena did not demand production of personal records, but only those records created by the president in his official capacity. Further, the Court observed, the corporation itself, by its board of directors, had ordered Wilson to comply with the subpoena. Thus, the corporate entity upon which the documents had been served had voluntarily agreed to surrender the documents, thereby negating the element of compulsion necessary to a claim of privilege under the fifth amendment. Only Wilson's unauthorized actions as president and custodian of the records stood in the way of compliance with the subpoena.

The Wilson case also contained the first reference to what became known as the "required records" doctrine when the Court suggested that the fifth amendment right against self-incrimination does not apply to records required by law to be kept. Subsequently, in Shapiro v. United States the Court made it clear that the required records doctrine outlined in Wilson applies to natural individuals as well as corporations and other entities. The premise underlying the doctrine is that the privilege does not apply "to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established."

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36. Id. at 386.
37. Id. at 377-78.
38. Id.
39. Id. at 376. The Court reasoned that:

[T]he physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. This was clearly implied in the Boyd case where the fact that the papers involved were the private papers of the claimant was constantly emphasized.

Id. at 380.
40. Id. at 376; see also Davis v. United States, 328 U.S. 582, 593-94 (1946).
41. Wilson, 221 U.S. at 380.
42. 335 U.S. 1 (1948).
43. Id. at 16-20.
44. Wilson, 221 U.S. at 380; see also Davis v. United States, 328 U.S. 582, 591-94 (1946).
In *Shapiro*, the Court allowed the government to compel production, by subpoena, of records the defendant had been required to keep pursuant to price control legislation. Sidestepping the question of ownership, the majority held that the government interest in the records, illustrated by the statute requiring that they be kept, endowed the records with sufficient "public aspects" to justify requiring their production.

Justice Frankfurter, dissenting, strongly criticized the majority's rationale that records of an undoubtably private organization become public simply by virtue of a congressional mandate that the records be kept. Taking the majority's reasoning to its logical conclusion, the dissent maintained, would strip a private organization of its private status because any document could become a required record following passage of the appropriate legislation. "If Congress by the easy device of requiring a man to keep the private papers that he has customarily kept can render such papers 'public' and non-privileged, there is little left of either the right of privacy or the constitutional privilege."

The rationale of *Boyd* was further refined in *Perlman v. United States*. There the Court stated that natural persons must possess documents, as well as own them, in order to invoke fifth amend-

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46. *Id.* at 34.
47. *Id.* at 32-35.
48. *Id.* at 56 (Frankfurter, J., dissenting).
49. *Id.* at 64-65.
50. *Id.* at 70. The trend away from protection continued in *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964), in spite of Justice Goldberg's comments outlining the purposes of the privilege:

[The privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,"...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"...our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

51. 247 U.S. 7 (1918).
ment protection. In *Perlman*, the owner voluntarily delivered documents to the government and then attempted, by invoking the fifth amendment, to prevent their use against him. The *Perlman* Court held that the principle of *Boyd* protects an owner from the compelled submission of his property, but does not apply if the owner voluntarily surrenders the documents.

In *Schmerber v. California*, the rationale of *Boyd* was further undermined. In *Schmerber*, the defendant claimed that the government, by compelling him to submit a blood sample for use against him in a prosecution for driving while intoxicated, had violated his right against self-incrimination. The Supreme Court upheld the conviction, relying on a line of cases which stood for the proposition that the fifth amendment is a prohibition of “the use of . . . compulsion to extort communications from [a suspect], not an exclusion of his body as evidence when it may be material.”

The Court noted that lower courts also had held that the fifth amendment did not prohibit “compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.”

To that extent *Schmerber* did not signal a major change. But Justice Brennan, writing for the majority, went further. The critical inquiry, he stated, turned on whether the blood sample was of a testimonial or communicative nature, so as to compel the petitioner “to be a witness against himself.” Thus, Justice Brennan noted, “[T]he privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature. . . .” a formulation which excluded real or physical evidence from the protection of the fifth amendment and which, taken to its logical

52. Id. at 15.
53. Id. at 13.
54. Id. at 15.
56. Id. at 760.
57. Id. at 763 (quoting Holt v. United States, 218 U.S. 245 (1910)). In *Holt*, the Court held that the privilege against self-incrimination was inapplicable when a suspect had been compelled, prior to trial, to put on a blouse that fit him and evidence of that fact had been received at trial. *Holt*, 218 U.S. at 252-53.
59. Id. at 761. The Court noted that some state constitutions had phrased the privilege in terms of compelling a suspect to give “evidence” against himself. Id. at 761-62 n.6. The Court, however, was not persuaded that the Framers’ use of the word “witness” required literal interpretation. Id.
60. Id. at 761.
extreme, would also exclude documents. But the Court—inconsis-
tently, it could be argued, and temporarily, as it turned out—drew back from the final step and, citing Boyd, reaffirmed that the protection of the privilege reaches the contents of subpoenaed documents.\textsuperscript{61} Plainly, however, the suggestion that the privilege extends only to oral testimony or acts of a testimonial character seriously undermined the property-rights rationale of the Boyd case and left unclear the scope of fifth amendment protection of the contents of documents.

The Supreme Court considered the relationship between the fifth amendment and tax records in \textit{Couch v. United States},\textsuperscript{62} in which a taxpayer challenged a summons, issued to her accountant, which demanded production of the taxpayer's records. The taxpayer had given the documents to the accountant for use in preparing tax returns.\textsuperscript{63} Since the taxpayer did not possess the records, she was not compelled to produce anything, and was therefore in a difficult position for one attempting to invoke the fifth amendment privilege against self-incrimination.\textsuperscript{64} The Court considered the various policies underlying the privilege, particularly emphasizing the right of privacy,\textsuperscript{65} and held that as “an intimate and personal” privilege,\textsuperscript{66} fifth amendment protection was unavailable to a taxpayer in circumstances demonstrating “no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused.”\textsuperscript{67}

The trend away from fifth amendment protection of the contents of documents approached a climax in \textit{Fisher v. United States}.\textsuperscript{68} In that case, a taxpayer attempted to invoke the privilege against self-incrimination to avoid having to produce summaries prepared by

\textsuperscript{61} Id. at 764. The Court expressly considered and refused to adopt the position that the privilege " 'was directed at the employment of legal process to extract from the person's own lips an admission of guilt, which would thus take the place of other evidence.' " \textit{Id.} at 763 n.7 (quoting 8 J. \textit{Wigmore}, \textit{Evidence} \textsection 2263 (McNaughton rev. ed. 1961)) (emphasis added by the Court).

\textsuperscript{62} 409 U.S. 322 (1973).

\textsuperscript{63} \textit{Id.} at 324.

\textsuperscript{64} \textit{Id.} at 329; \textit{see also} Perlman \textit{v. United States}, 247 U.S. 7 (1918) (fifth amendment held unavailable to protect documents which had been voluntarily surrendered).

\textsuperscript{65} \textit{Couch}, 409 U.S. at 327-35.

\textsuperscript{66} \textit{Id.} at 327.

\textsuperscript{67} \textit{Id.} at 326. The Court noted that there can be little expectation of privacy “where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return.” \textit{Id.} at 335; \textit{see also In re Grand Jury Proceedings (Manges)}, 745 F.2d 1250 (9th Cir. 1984) (privilege held unavailable to sole proprietor when subpoena duces tecum was served on bookkeeper in possession of records).

\textsuperscript{68} 425 U.S. 391 (1976).
an accountant from the taxpayer’s financial records.\textsuperscript{69} The summons was directed to the taxpayer’s attorney, who possessed the records.\textsuperscript{70} Justice White, writing for the majority, rejected both the notion that the fifth amendment served as a general protector of privacy\textsuperscript{71} and the property-right based rationale of \textit{Boyd}, noting that with the elimination of the mere evidence doctrine,\textsuperscript{72} “the foundations for the rule have been washed away.”\textsuperscript{73} Applying the rule of the \textit{Schmerber} case, the majority held that the summaries were not privileged because even if the documents had been held by the taxpayer, compelled production would not have required the accused to make a “testimonial communication.”\textsuperscript{74} The Court further ruled that insofar as the contents of the summaries were “testimonial,” they were neither testimony of the taxpayer, who

\textsuperscript{69} \textit{Id.} at 394-95.

\textsuperscript{70} \textit{Id.} at 395-96. Since the attorney had the summaries, the Court concluded that if an attorney-client relationship existed, and if the client himself could have withheld the records by invoking his privilege against self-incrimination, the attorney could invoke the fifth amendment right of his client and avoid production of the summaries. The Court thus reached the issue of whether the summaries would have been privileged in the hands of the taxpayer. \textit{Id.} at 403-05.

\textsuperscript{71} \textit{Id.} at 400. The Court stated:

\texttt{We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against “compelled self-incrimination, not [the disclosure of] private information.”}

\textit{Insofar as private information not obtained through compelled self-incriminating testimony is legally protected, its protection stems from other sources.}

\textit{Id.} at 401 (quoting United States v. Nobles, 422 U.S. 225, 233 n.7 (1975)); see also Couch v. United States, 409 U.S. 322 (1973), in which the Court held that “[n]o Fourth or Fifth Amendment claim can prevail where . . . there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused.” \textit{Id.} at 336. See \textit{supra} notes 62-67 and accompanying text.

\textsuperscript{72} See \textit{supra} note 27 and accompanying text.

\textsuperscript{73} \textit{Fisher}, 425 U.S. at 407-09. The Court observed that recent decisions also had permitted the seizure and use of “testimonial” evidence, citing \textit{Katz} v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); and Osborn v. United States, 385 U.S. 323 (1966). \textit{Fisher}, 425 U.S. at 410 n.11. As a result of these events, Justice White noted, “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.” \textit{Id.} at 409. The Court further reasoned that even if the papers were facially incriminating, they would not qualify for fifth amendment protection, “for the privilege protects a person only against being incriminated by his own compelled testimonial communications.” \textit{Id.}

had not prepared them, nor compelled, since the contents had been voluntarily created. *Fisher*, therefore, signaled that documents are the equivalent of any other tangible property when creation of the contents has not been compelled by the government.

But in closing one door to the privilege against self-incrimination, *Fisher* opened another. The Court noted that the act of document production itself has communicative aspects because compliance with a subpoena concedes the existence of the papers, their possession or control by the taxpayer, and the taxpayer’s belief that they are the papers demanded. Further, the Court suggested that in some circumstances such “tacit agreements” may be sufficiently “testimonial” and “incriminating” to trigger the protection of the fifth amendment.

A scenario left open in *Fisher*—whether a taxpayer could invoke his fifth amendment right against self-incrimination to prevent the compulsory production of records where such records are in his possession—was presented eight years later in *United States v. Doe*. In *Doe*, the issue was whether, and to what extent, the privilege protects the business records of a sole proprietor. As to the contents of such records, the answer, predictably, was no fifth amendment protection. Justice Powell, writing for the majority,

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75. *Fisher*, 425 U.S. at 409. In his concurring opinion, Justice Brennan strenuously objected to the majority’s departure from the rationale of *Boyd* and its progeny. *Id.* at 414-17 (Brennan, J., concurring).
77. *Id.* at 410 n.11. As to the relationship between the fifth amendment and the protection of privacy, the majority sharply limited the language found in earlier cases, stating that while privacy might be guarded incidentally by the prevention of compelled self-incrimination, protecting privacy was not a purpose of the privilege. *Id.* at 400-01.
78. *Id.* at 409-10.
79. *Id.* at 410; see 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2263-64 (McNaughton rev. ed. 1961). The Court held, however, that the rule to which it referred could not benefit the taxpayer before the Court because existence and possession were a “foregone conclusion” and the taxpayer could not authenticate the accountant’s summaries. *Fisher*, 425 U.S. at 411-13; see also In re Grand Jury Subpoena Duces Tecum (Roberts and Ruck), 754 F.2d 918 (11th Cir. 1985) (production of financial records pursuant to subpoena duces tecum directed to attorneys held not to compel testimonial incrimination of clients).
81. 104 S. Ct. 1237 (1984). In *Doe*, the government served a grand jury subpoena on the proprietor of several sole proprietorships, demanding production of business records in conjunction with an investigation of corruption in awarding of local government contracts. *Id.* at 1238.
82. *Id.* at 1245. Justice O'Connor asserted what she considered implicit in the majority opinion: “the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind.” *Id.* (O’Connor, J., concurring). Justices Marshall and Brennan dissented as to this point because of their concern about the possible unprotected
reaffirmed that the privilege applies only to compelled self-incrimination and that when records are voluntarily prepared, no compulsion exists as to their content. The Supreme Court reversed the court of appeals on this point since the lower court had erroneously held that fifth amendment protection existed with respect to the contents of the documents.

But regarding the act of production, the Supreme Court agreed with the district court and court of appeals that the act of producing the documents involved testimonial self-incrimination. The Court noted that the respondent had not conceded that the records existed or were in his possession and that production by the respondent would relieve the government of the need for authentication. The government had not been precluded from demonstrating that possession, existence, and authentication were "foregone conclusions," the Court observed, but no such showing had been made.

The final issue presented was whether, if production was protected by the fifth amendment, the government could obtain documents without a formal grant of immunity pursuant to 18 USC §§ 6002 and 6003. The Court held that a formal grant of immu-
nity was necessary, rejecting the government’s argument that the courts could prohibit incriminatory use of production without resort to the statutory procedures.\(^\text{91}\) At the same time, however, the Court also rejected the respondent’s argument that a grant of use immunity must cover the contents of the documents as well as the act of production. Since only the act of production is protected by the privilege, the Court ruled, only the self-incrimination that might accompany production must be immunized.\(^\text{92}\)

**THE FISHER AND DOE CASES: IMPLICATIONS**

**A. Contents of Documents and the Boyd Rationale**

As Justice O'Connor observed in the concurrence to *United

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\(^{91}\) a court or grand jury of the United States,

\(^{92}\) an agency of the United States, or

\(^{93}\) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.


Section 6003 provides:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.


\(^{91}\) *Doe*, 104 S. Ct. at 1244. The result in *Doe* has moved one court to conclude that so-called “pocket immunity” (by use of “letters of assurance”) is not only a “damnable practice,” but also “clearly illegal.” United States v. Kilpatrick, 594 F. Supp. 1324, 1336 n.13 (D. Colo. 1984).

\(^{92}\) *Doe*, 104 S. Ct. at 1244-45.
States v. Doe, the relentless, inescapable logic of Fisher "sounded the death knell for Boyd." Yet, defying all logic, the corpse keeps sitting up. While Justice O'Connor's conclusion logically flowed from the Court's prior decisions, Justices Marshall and Brennan strenuously disputed her conclusion insofar as it included items such as personal diaries. Indeed, since Doe, several lower courts have determinately reaffirmed the validity of the Boyd rationale insofar as it relates to documents of a peculiarly personal nature. The Court of Appeals for the Fourth Circuit even held that the doctrine of Boyd still protects documents such as "[p]rivate financial and commercial records." Some writers have also expressed the hope or expectation that the government still will be prevented from examining "intimate private documents free of constitutional restriction." In this light it seems fair to say, at least, that reports of the total demise of the Boyd rule have been exaggerated. How grossly exaggerated remains to be seen.

B. Fifth Amendment Protection Against Act of Production Self-Incrimination

The apparent almost total elimination of fifth amendment protection of the contents of tax records and other documents has caused considerable consternation in some legal and tax circles.

93. Id. at 1245 (O'Connor, J., concurring).
94. Id.
95. Id.
96. Id. at 1245-46 (Marshall, J., concurring in part, dissenting in part).
98. United States v. (Under Seal), 745 F.2d 834, 840 n.12 (4th Cir. 1984), vacated as moot, 105 S. Ct. 1861 (1985). The court interpreted the Doe case as merely adding sole proprietorships to the list of artificial entities, like corporations and partnerships, denied the fifth amendment privilege. Id. at 839. As to the government's argument that the fifth amendment did not protect the contents of preexisting documents, the court conceded that the Supreme Court had said as much, but took the view that the Supreme Court had not so held. "The government here relies on dicta in several recent decisions of the Court to support its view. The dicta are assuredly there, but none of these decisions has overruled Boyd." Id.
and understandably so. Act of production protection seems a poor and uncertain substitute for the content protection of *Boyd*. Furthermore, the grounds on which the *Fisher* Court denied fifth amendment protection are arguably at variance with established fifth amendment principles. For example, the *Fisher* Court denied fifth amendment protection if “existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government’s information by conceding that he in fact has the papers.”  

That is, since the implied admissions of existence and possession which attend production were unimportant to the government's case, the *Fisher* Court could conclude that compelling production “would not itself involve testimonial self-incrimination.”  

Justice Brennan and some commentators found this test of what is “sufficiently testimonial” to be novel and even unnerving.  

A second ground for denying fifth amendment protection in *Fisher* was that production would not “appear to represent a substantial threat of self-incrimination” since production by the taxpayer would not impliedly authenticate the documents. At least one writer has construed this as requiring that the implied admissions be incriminating on their face and as suggesting that evidence can be insufficiently incriminating as a matter of degree. Both of these propositions, espoused in *Fisher* as bases for denial of fifth amendment protection, run contrary to a substantial body of fifth amendment law which holds that “the privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.”

102. Id.  
103. Id.  
104. “I know of no Fifth Amendment principle which makes the testimonial nature of evidence and, therefore, one's protection against incriminating himself, turn on the strength of the Government's case against him.” Id. at 429 (Brennan, J., concurring); see also In re Grand Jury Subpoenas Served Feb. 27, 1984, 599 F. Supp. 1006, 1016-17 (E.D. Wash. 1984); Glekel & Sagor, supra note 99, at 2.  
105. United States v. Fisher, 425 U.S. 391, 413; see also United States v. Reis, 765 F.2d 1094, 1096 (11th Cir. 1985) (summons for tax records enforced; claim of fifth amendment privilege not sustained because taxpayer did not show “substantial and real hazards of self-incrimination”).  
107. Miranda v. Arizona, 384 U.S. 436, 476 (1966); see also Hoffman v. United States, 341 U.S. 479, 486-88 (1951); In re Portell, 245 F.2d 183, 186 (7th Cir. 1957); United States v. Coffey, 198 F.2d 438, 440 (3d Cir. 1952). The rule embodied in these cases is that the invocation of the privilege should be upheld if the claimant can sketch a
Reading Tea Leaves

Even more disconcerting was the notion expressed in Fisher that by the simple expedient of granting use immunity—immunity which would cover only the admissions of existence, possession or authentication implied in the act of production—the government could lay bare and unprotected the incriminating contents of virtually any tax record or other document. Even before the Doe case was decided, the vulnerability of business tax documents moved one writer to suggest a planned, timed destruction of tax records not covered by a legal requirement of continued maintenance.

The practical effect of the rule announced in Fisher, however, has yet to fulfill the dire prophecies of the pessimists. While the rule has generated substantial confusion in the lower courts, a high percentage of individuals invoking the fifth amendment with respect to records in their possession have succeeded when urging the act of production privilege. This trend was reinforced by the scenario whereby a seemingly harmless admission could provide even a link in the chain of evidence necessary to prosecute.

108. See, e.g., Comiskey & Comiskey, supra note 100, at 66, 69; Note, supra note 99, at 1037. Concern presumably increased when some courts took the reasoning of Schmerber, Gilbert and Fisher to (or beyond) its logical extreme and compelled a taxpayer to sign a consent authorizing an off-shore bank to produce any records relating to accounts of the taxpayer. See In re Grand Jury Proceedings (Thier), 767 F.2d 1133 (5th Cir. 1985); In re United States Grand Jury Proceedings, W. Dist. of La. (Cid), 767 F.2d 1131 (5th Cir. 1985); United States v. Davis, 767 F.2d 1025 (2d Cir. 1985); United States v. Ghidoni, 732 F.2d 814 (11th Cir. 1984), cert. denied, 105 S. Ct. 328 (1984). But see In re Grand Jury Investigation (Doe), 599 F. Supp. 746 (S.D. Tex. 1984) (holding that consent forms constituted incriminating testimony and that production of records by the bank would constitute an implied admission of depositor's control). See also Ghidoni, 732 F.2d at 819 (Clark, J., dissenting) (compelling taxpayer to sign compels testimony: "I consent . . . ."").


110. See, e.g., In re Kave, 760 F.2d 343 (1st Cir. 1985) (invocation of privilege by attorney upheld when production would identify and authenticate records); United States v. Fox, 721 F.2d 32 (2d Cir. 1983) (invocation of privilege by doctor upheld when existence of records not "foregone conclusion"); In re Grand Jury Proceedings (Martinez), 626 F.2d 1051 (1st Cir. 1980) (invocation of privilege by doctor upheld when production would authenticate records); In re Grand Jury Investigation (Doe), 599 F. Supp. 746 (S.D. Tex. 1984) (invocation of privilege upheld when depositor resisted signing consent that bank produce records of accounts); In re Heuwetter, 584 F. Supp. 119 (S.D.N.Y. 1984) (invocation of privilege upheld when existence of records in doubt); see also Butcher v. Bailey, 753 F.2d 465 (6th Cir. 1985); United States v. Malis, 737 F.2d 1511 (9th Cir. 1984); In re Katz, 623 F.2d 122 (2d Cir. 1980); In re Grand Jury Subpoena Duces Tecum (Doe), 605 F. Supp. 174 (E.D.N.Y. 1985) (hearing ordered in each case concerning whether act of production privilege applicable). But see United States v. Colletta, 602 F. Supp. 1322 (E.D. Pa. 1985), wherein the fifth amendment privilege was ruled unavailable to a defendant who had helped a federal agent locate certain files during a search of defendant's office. The court held that even if the assistance had been compelled, the privilege would apply only to the authentication of the records inferable from
Doe Court’s deference to the claim of the privilege as to the act of production\textsuperscript{111} and that Court’s insistence that the government observe all formalities when it seeks to compel production by granting use immunity.\textsuperscript{112}

The requirement that the government obtain a formal grant of immunity will complicate matters considerably for the government. As knowledgeable commentators have observed, the government had a large stake in the argument that informal grants of immunity are sufficient to compel the act of production; compliance with the requirements of the immunity statutes requires approval by high level Justice Department officials and can entail substantial and time-consuming administrative burdens.\textsuperscript{113} Moreover, when a grant of immunity is at issue, the government’s administrative burden will frequently be compounded by another, more delicate problem: the requirement that the government be able to establish both that no testimony or information obtained from a person pursuant to an immunity grant was used against him, and that no information “directly or indirectly derived from such [immunized] testimony or information”\textsuperscript{114} was used against him. Thus, the government’s burden in this context is twofold: first, it must refrain from exploiting any leads obtained from immunized evidence, and second, it must be able to prove that it so refrained.\textsuperscript{115} Since the contents of the documents are not privileged and, therefore, not the subject of an immunity grant,\textsuperscript{116} the government will frequently have little difficulty carrying its burden of proof as to authentication. For example, the contents of the documents often will connect the documents to the one who produced them.\textsuperscript{117} The burden also will be easy to satisfy when the

defendant’s conduct, not to the contents, and noted that at trial the assistance given was brought out by the defendant, not the government. \textit{Id.} at 1327.

\textsuperscript{111} The \textit{Fisher} case can be read to suggest that this was by no means inevitable. There, the Court appeared to imply that the act of production would rarely be testimonial or incriminating enough to trigger fifth amendment protection. \textit{See} Fisher v. United States, 425 U.S. 391, 410-13 (1976); \textit{see also In re Grand Jury Proceedings (Vargas), 727 F.2d 941, 943-44 (10th Cir.), cert. denied, 105 S. Ct. 90 (1984).}

\textsuperscript{112} \textit{See supra} notes 90-91 and accompanying text.

\textsuperscript{113} \textit{See} Glekel & Sagor, \textit{supra} note 99, at 1, 2; \textit{United States Attorney’s Manual}, Title I, chapter 11 (1977).

\textsuperscript{114} 18 U.S.C. § 6002 (1982).

\textsuperscript{115} “One raising a claim under [18 U.S.C. § 6002] need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.” \textit{Kastigar v. United States}, 406 U.S. 441, 461-62 (1972).


\textsuperscript{117} \textit{See, e.g., In re Proceedings Before the Aug. 6, 1984 Grand Jury, 767 F.2d 39 (2d Cir. 1985)} (order holding appellant in contempt affirmed; appellant had refused to pro-
government already has independent evidence from another source (e.g., a bookkeeper) that the records exist and are the records of the party producing them.

But when non-self-authenticating documents are produced pursuant to a grant of immunity, and there is no independent source to establish existence and authenticity, the government's burden becomes much heavier. This is evident from the fact that the government's position—as it conceded in Doe—must be no better than it would have been had the documents been found in the street or had they arrived anonymously in the mail.\(^{118}\) In such a case there would be no occasion, apart from the act of production, for the government to focus on a witness capable of either connecting the records to the producer or authenticating them.\(^{119}\) It is easy to envision a situation where the government cannot carry its heavy burden of establishing that there was no exploitation (derivative use) of immunized information. Indeed, as the Supreme Court noted in Doe,\(^{120}\) the logical extreme of such a scenario could jeopardize not only the admissibility of documentary evidence, but an entire prosecution.\(^{121}\)


\(^{119}\) A scenario which has been suggested along these lines is the production under an immunity grant of incriminating handwritten business records which do not reveal their identity on their face and concerning which the government did not in advance have independent evidence spelling out their existence and identity. In such circumstances resort to a third party witness or a handwriting expert to connect the handwriting to the producer, it is argued, would constitute a clear case of evidence "indirectly derived" from immunized information since there would be no reason to even attempt to connect the records to the target if the records had been found on the street instead of having been produced by him. The same reasoning, it is said, would apply in the case of immunized production of a gun which led to ballistics evidence connecting the producer to a crime. See Glekel & Sagor, supra note 99, at 1,2. Contrast the scenario of a gun that has a serial number—unprivileged "contents"—which enables the authorities to connect it to the producer through the vendor. See Comiskey & Comiskey, supra note 100, at 96 n.32. The same writers suggest that the government could connect unauthenticated documents to the producer by means of handwriting exemplars, but the analysis—which apparently assumes no independent evidence of existence and authenticity—seems to overlook the doctrine of derivative use discussed above. See supra note 114 and accompanying text.

\(^{120}\) "The decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation." United States v. Doe, 104 S. Ct. 1237, 1244 (1984).

\(^{121}\) See, e.g., United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973) (convictions vacated; proof of independent source of trial evidence not sufficient where prosecutor had requested and read the immunized testimony); see also United States v. Nemes, 555 F.2d 51 (2d Cir. 1977) (case remanded for further hearing; prosecutor's assertion that immu-
The most remarkable recent development concerning the privilege against self-incrimination is the incidence of cases which hold that representatives of entities, an important class of individuals not previously thought to be covered by *Boyd*, can invoke the act of production privilege as individuals. The act of production recognized testimony was not used held insufficient to prove independent source); United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976) (case remanded for further proceedings on the issue of independent source after trial court had held that government had failed to prove independent source).

Prior to *Fisher* it seemed settled that the privilege against self-incrimination did not apply to an entity such as a corporation or partnership, and that the fifth amendment could not be invoked by a person holding the records of an entity in a representative capacity, even if the person had prepared the records and was incriminated by them. See, e.g., *Bellis v. United States*, 417 U.S. 85, 88-89 (1974); *Wilson v. United States*, 221 U.S. 361, 374-75 (1911). Similarly, there was authority for the proposition that a representative could not invoke the privilege when required to authenticate the records. See United States v. Austin-Bagley Corp., 31 F.2d 229, 233-34 (2d Cir. 1929).

In *Fisher*, however, the Court seemed to suggest that when either existence or possession of subpoenaed documents is not a foregone conclusion and is sufficiently "in issue," the act of production privilege is available to representatives of entities who would be personally incriminated by production.

This Court has also time and again allowed subpoenas against the custodian of corporate documents... over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor... The existence and possession or control of the subpoenaed documents being no more in issue here than in the above cases, the summons is equally enforceable. *Fisher* v. United States, 425 U.S. 391, 411-12 (1976) (citations omitted).

As to the aspect of production of records (by the representative of an entity) that would imply a belief or representation that the papers produced are those demanded by the subpoena—"implicit authentication"—the Court seemingly reaffirmed the traditional rule.

Moreover, in [prior cases] the custodian of corporate, union or partnership books or those of a bankrupt business was ordered to respond to a subpoena for the business' books even though doing so involved a "representation that the documents produced are those demanded by the subpoena."

*Id.* at 413 (quoting *Curcio v. United States*, 354 U.S. 118, 125 (1957)). Further, the Court stated: "In these cases compliance with the subpoena is required even though the books have been kept by the person subpoenaed and his producing them would itself be sufficient authentication to permit their introduction against him." *Fisher*, 425 U.S. at 413 n.14.

123. See *In re Two Grand Jury Subpoena Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985) (court acknowledges right of corporate representative to invoke act of production privilege individually in a proper case; corporation required to produce records through agent who will not be incriminated); *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3rd Cir. 1985) (en banc) (order holding principal in corporation in contempt reversed absent district court finding that production and authentication of corporate records would not incriminate him personally); *In re Katz*, 623 F.2d 122, 126 (2d Cir. 1980) (holding that the act of production privilege may be available to principals of corporations when existence and location of corporate records not a foregone conclusion); see also *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143 (6th Cir. 1985) (en banc) (government precluded from using act of production by corporate representatives against the repre-
privilege has been ruled available to a former employee who holds corporate records in a representative capacity, and even to a former corporate officer who wrongfully misappropriated corporate records. Nevertheless the majority view, which arguably has greater historical support, is to the contrary.

sentatives as individuals after corporate records are produced pursuant to subpoena duces tecum); In re Grand Jury Subpoena (Lincoln), 767 F.2d 1130 (5th Cir. 1985) (act of production privilege ruled unavailable to representative of entity except when act of production would identify entity and admit control); In re Grand Jury Empanelled Mar. 8, 1983, 722 F.2d 294, 297 (6th Cir. 1983), cert. dismissed, 104 S. Ct. 1458 (1984) (government precluded from using act of production by corporate representatives against the representatives individually after corporate records are produced pursuant to subpoena duces tecum); In re Grand Jury 83-8 (MIA) Subpoena Duces Tecum (Martin and Hernandez), 611 F. Supp. 16 (S.D. Fla. 1985) (government precluded from using act of production by corporate representatives against the representatives individually after corporate records are produced pursuant to subpoena duces tecum); In re Heuwetter, 584 F. Supp. 119 (S.D.N.Y. 1984) (subpoena for corporate records modified because production would impliedly admit existence of corporations and documents).


125. In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983, 722 F.2d 981, 987 (2d Cir. 1983) (privilege held available to former president of corporation on basis that production would impliedly admit possession and misappropriation of records, tending to show knowledge of incriminating contents); see also United States v. Black, 767 F.2d 1334, 1341 (9th Cir. 1985) (government conceded that individual holding records in representative capacity can enjoy act of production privilege against self-incrimination after individual's relationship with entity has ended, but successfully urged that the privilege had been waived). Cf. Bellis v. United States, 417 U.S. 85 (1974) (privilege against self-incrimination held not available to former partner of dissolved firm because partnership ruled an independent entity, but case decided prior to the Fisher case, and act of production privilege apparently not squarely invoked or considered).

126. See, e.g., In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir. 1985) (en banc) (act of production privilege held unavailable to corporate representative when records subpoenaed by grand jury); In re Grand Jury Subpoena (Lincoln), 767 F.2d 1130 (5th Cir. 1985) (act of production privilege held unavailable to representative of collective entity when records subpoenaed by grand jury); United States v. G & G Advertising Co., 762 F.2d 632, 634 (8th Cir. 1985) (order enforcing IRS summons concerning corporate records affirmed; act of production privilege held unavailable to representative of corporation); United States v. Malis, 737 F.2d 1511, 1512 (9th Cir. 1984) (order enforcing summons for tax records reversed with instruction that "an individual may not assert the fifth amendment privilege to avoid producing the records of a collective organization where he possesses such records in a representative capacity"); In re Grand Jury Proceedings (Vargas), 727 F.2d 941, 944-45 (10th Cir.), cert. denied, 105 S. Ct. 90 (1984) (act of production privilege held inapplicable to attorney who held subpoenaed files in representative capacity for client); In re Grand Jury Empanelled Mar. 8, 1983, 722 F.2d 294, 296 (6th Cir. 1983), cert. dismissed, 104 S. Ct. 1458 (1984) (act of production privilege held unavailable to corporate representative when corporate records subpoenaed by grand jury); In re Grand Jury Proceedings (Martinez), 626 F.2d 1051, 1053 (1st Cir. 1980) (act of production privilege held available to doctor when appointment books subpoenaed, the court noting that privilege is not applicable to custodian or creator of corporate records); In re Grand Jury Subpoena Duces Tecum (Doe), 605 F. Supp. 174, 175 (E.D.N.Y. 1985) (act of production privilege stated to be unavailable to individuals pos-
C. Tax Records, the Fisher and Doe Cases and the Required Records Doctrine

For obvious reasons, tax lawyers over the years have regularly cast wary glances at the required records doctrine.\(^{127}\) As noted above, the seeds of the rule were planted in Wilson,\(^{128}\) and it sprouted into full bloom in Shapiro.\(^{129}\) Under this doctrine, when federal or state law requires that records be kept, the one required to keep them has no fifth amendment privilege when ordered to produce the records.\(^{130}\) The rule was further refined in Grosso v. United States,\(^{131}\) which set forth a three-pronged test which must be satisfied before documents will constitute "required records." First, the requirement that the documents be kept must be essentially regulatory, as opposed to punitive; second, the records must be of a kind customarily kept by the regulated party; and, third, the records themselves must have assumed "public aspects" which render them analogous to public documents.\(^{132}\) Despite the apparent vulnerability of tax records to the required records doctrine,\(^{133}\) the government, apparently as a matter of policy,\(^{134}\) did not urge the application of the rule in tax cases for many years after Shapiro had been decided.\(^{135}\) In recent years, however, there has been a...
discernible trend in the other direction. In one case a court held that not only a doctor's W-2 forms and prescription forms, but also his patient files, were required records. Overall, however, the results of government efforts to urge application of the required records doctrine to tax records have been spotty. Further, respected commentators have complained that the rule is unclear, and recently the Court of Appeals for the Second Circuit has called into question whether, since the shift away from the privacy rationale of Boyd, the rule has outlived its usefulness. Plainly the final words concerning the viability of the rule and its applicability to tax records have yet to be written.

CONCLUSION

Despite occasional twitches, fifth amendment protection of the contents of documents appears to be moribund. This seems especially true with respect to tax records which, in the usual case, would not qualify for the exception for peculiarly personal documents (diaries, etc.) urged by Justices Marshall and Brennan in Doe. The fifth amendment privilege against self-incrimination applies—if at all—only to the act of production, and only insofar as production impliedly admits the existence, possession or authentication of the records. However, because this newly developed fifth amendment rule is somewhat ambiguously stated, and is arguably at variance with some well-established fifth amendment

136. In the Doe case, the district court held that such tax records as tax returns and W-2 statements constituted required records. Matter of Grand Jury Empanelled Mar. 19, 1980, 541 F. Supp. 1, 3 (D.N.J. 1981), aff'd, 680 F.2d 327 (3d Cir. 1982), aff'd in part, rev'd in part, sub nom. United States v. Doe, 104 S. Ct. 1237 (1984). The taxpayer did not appeal the ruling, however, so the issue was not before either the court of appeals or the Supreme Court. See Doe, 104 S. Ct. at 1240 n.3; see also United States v. Porter, 711 F.2d 1397 (7th Cir. 1983) (government unsuccessfully urged that taxpayer's cancelled checks and deposit slips were "required records"); In re Grand Jury Subpoenas Served Feb. 27, 1984, 599 F. Supp. 1006, 1017 (E.D. Wash. 1984) (government urged that taxpayer's copies of tax returns were "required records," but issue was moot).

137. In re Doe, 711 F.2d 1187 (2d Cir. 1983). In his concurring opinion, Judge Friendly strenuously objected to the compelled production of the patient files. Id. at 1194 (Friendly, J., concurring in part, dissenting in part).

138. See supra note 135.

139. See In re Doe, 711 F.2d 1187, 1196 (2d Cir. 1983) (Friendly, J., concurring in part, dissenting in part) ("Thirty-five years after its pronouncement, the contours of the exception remain largely undefined.").

140. See United States v. Edgerton, 734 F.2d 913 (2d Cir. 1984). "There is precedent for holding that W-2's and forms 1099 are required records . . . . Whether the required records exception, which was a response to the Boyd privacy rationale, is still viable after the shift away from the privacy rationale, remains to be decided . . . ." Id. at 918 n.4.
substantial confusion has occurred and endures in the lower courts. This confusion has engendered lines of cases that go both ways on the question of whether representatives of entities, a class previously excluded from the privilege against self-incrimination, may personally invoke the act of production privilege as to records of the entity. The confusion has extended to the tax area, in which there has arisen a new government inclination to urge that the required records exception apply to tax records. In the tax area the parameters of the rule remain inexact, its interpretations are diverse, and the future is difficult to predict. But, regardless of the context, it is probable that any fifth amendment protection of the contents of personal documents which still exists soon will be gone.

141. As one writer has noted, the statement of the applicable principles also necessarily implies problems in administration of the rule. When the fifth amendment is invoked and documents withheld, the court must rule as to each document and determine (1) whether the admission of existence, possession and responsiveness of the document will incriminate to a sufficient extent, and (2) whether the admission will be important enough to the government's case. Each evaluation will be further complicated when an investigation is at an early stage. Heidt, supra note 106, at 481.