

Fall 1977

The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment

James A. McKenna
Jenner & Block

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Constitutional Law Commons](#), and the [Evidence Commons](#)

Recommended Citation

McKenna, James A. (1977) "The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment," *Indiana Law Journal*: Vol. 53 : Iss. 1 , Article 3.

Available at: <http://www.repository.law.indiana.edu/ilj/vol53/iss1/3>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment

JAMES A. MCKENNA*

For nearly a century courts have attempted to define the constitutional limitations on the governmental power to obtain an individual's private papers.¹ At issue has been the scope of protection afforded to such papers by

*B.A. 1974, University of Dayton; J.D. 1977, Northwestern University. Associate, Jenner & Block, Chicago, Ill.

¹Although a precise definition of "private papers" is impossible, standards are not altogether lacking. Those papers having a close relationship to an individual's personality, especially to the private aspects of personality, are clearly "private." See Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 988 (1977) [hereinafter cited as HARVARD Note]. Thus, personal letters and diaries fall within this conception, see *Fisher v. United States*, 425 U.S. 391, 427 (1976) (Brennan, J., concurring); *Couch v. United States*, 409 U.S. 322, 350 (1973) (Marshall, J., dissenting); Comment, *The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations*, 6 LOY. L.A.L. REV. 274, 302-03 (1973) [hereinafter cited as LOYOLA Comment]; Comment, *Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis*, 69 NW. U.L. REV. 626, 648 (1975) [hereinafter cited as NORTHWESTERN Comment], while most business records do not. See HARVARD Note, *supra*, at 988-89 (public purpose of business partnership places partnership records outside of fourth and fifth amendment right of privacy). The business records of a sole proprietor or practitioner, however, may have a claim to "private papers" status. See *Fisher v. United States*, 425 U.S. 391, 426-27 (1976) (Brennan, J., concurring) (such records "are at least an extension of an aspect of a person's activities . . ."). Examples of papers which are clearly not "private" are those created or authenticated by the government, such as automobile registration certificates and draft cards. See, e.g., *id.* at 426 (such records "hardly reflect an extension of the person"). A substantial gray area exists for nonbusiness economic records, such as cancelled checks and tax records. Justice Brennan, concurring in *Fisher*, thought such records to be protected by the privilege because they may provide "clear insights into a person's total lifestyle." 425 U.S. at 426-27.

Regardless of where the line between "private" and "nonprivate" papers is drawn, it is clear that some papers are more private than others. In a close case, other factors may be considered by the court to determine if the papers in question are sufficiently "private." Among these are the steps taken by the owner to insure their privacy, see *Couch v. United States*, 409 U.S. 322, 351 (1973) (Marshall, J., dissenting); the extent to which the enforcement of a particular law requires the acquisition of the papers, see LOYOLA Comment, *supra*, at 306-07; and the relationship of the papers to "private, individual rights or interests recognized by the Court to be 'fundamental,'" see HARVARD Note, *supra*, at 988. As one commentator noted, the extent of the privacy intrusion which accompanies the governmental acquisition of papers depends upon more than the nature of the papers. Under this analysis, a seizure of all of an individual's cancelled checks is quite intrusive, although the seizure of only one would not be. See LOYOLA Comment, *supra*, at 302. *But cf.* *United States v. Miller*, 425 U.S. 435 (1976) (defendant had no fourth amendment interest in his bank records which were in the possession of a bank).

Although the governmental procurement of any type of evidence must comply with fourth amendment requirements, the case for a higher standard of protection under a hierarchical theory of the fourth amendment becomes more compelling for more "private" papers. For example, this paper will propose that a more stringent standard of probable cause be required in the issuance of search warrants where the objects of the search are private papers than where other

the fourth² and fifth³ amendments. Recent cases have significantly narrowed the private papers doctrine which had once appeared nearly absolute.⁴ In *Fisher v. United States*, the Court upheld a governmental subpoena directing a taxpayer to produce accountants' workpapers and other tax records, suggesting in dictum that the fifth amendment no longer protects private papers.⁵ In *Andresen v. Maryland*, the Court held that obtaining such papers through an otherwise valid search and seizure does not implicate the fifth amendment whatsoever.⁶

The *Fisher* and *Andresen* decisions, and their clear implications, have framed the issue with an unprecedented certainty and urgency: the sole source of constitutional protection for private papers now appears to be the fourth amendment. A rigorous analysis of fourth amendment protection, heretofore largely unnecessary, is now crucial.⁷ Following an analysis of these decisions and their effect on the fifth amendment protection of private papers, this paper will attempt to delineate the scope of the fourth amendment's protective ambit. Given the central purpose of the fourth amendment to limit governmental invasions of privacy,⁸ and the uniquely private nature of private papers, a more stringent standard of protection should be accorded to such papers. Such a hierarchical view of the fourth amendment is well established in other contexts, and its extension to private papers is fully justified.⁹

PRELUDE: THE *Boyd* DECISION

The watershed for any study of private papers and the Constitution is the 1886 opinion of the Supreme Court in *Boyd v. United States*,¹⁰ a decision

types of evidence are sought. See notes 90-102 *infra* & text accompanying. Obviously, the less "private" are the papers involved, the less cogent such a contention becomes.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

²The portion of the fifth amendment relevant to private papers is the self-incrimination clause: "nor shall any person . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

⁴See *Fisher v. United States*, 425 U.S. 391 (1976); *Andresen v. Maryland*, 427 U.S. 463 (1976).

⁵425 U.S. 391, 409-13 (1976). See notes 44-54 *infra* & text accompanying.

⁶427 U.S. 463, 473-74, 477 (1976).

⁷The commentary regarding the constitutional protection of private papers has been dominated by fifth amendment analysis. This continues to be the case even in the wake of *Fisher* and *Andresen*. See, e.g., Comment, *A Paper Chase: The Search and Seizure of Personal Business Records*, 43 BROOKLYN L. REV. 489 (1977).

⁸See notes 57-69 *infra* & text accompanying.

⁹See notes 61-82, 90-103, 113-116 *infra* & text accompanying.

¹⁰116 U.S. 616 (1886). At issue in *Boyd* was the constitutional validity of a court order directing the defendants in a federal forfeiture proceeding to produce a business invoice for

characterized both as "among the greatest constitutional decisions of this Court",¹¹ and as sowing "the seeds of a dangerous heresy."¹² The trial court ordered the production of an invoice pursuant to its authority under an 1874 statute.¹³ Confronted with this statute and the specific court order issued under its authority, the *Boyd* Court declared both unconstitutional, reversed the judgment and remanded for a new trial, holding that the compulsory production of the invoice violated both the fourth and fifth amendments.¹⁴ Interpreting broadly the phrase "search and seizure" in the fourth amendment, the Court employed a test of characterization based on the functional equivalence of compulsory production and search and seizure. The characteristics of an *actual* search and seizure—the "forcible entry into a man's house and searching amongst his papers"—were deemed merely "aggravating incidents" the absence of which was insufficient to exclude fourth amendment considerations.¹⁵ The Court also looked beyond form to articulate an expansive view of the fifth amendment's constitutional protection, holding that the

twenty-nine cases of plate glass previously imported into the country. The government had charged the defendants with importing an additional quantity of glass in violation of the revenue laws, and it was necessary to establish the existence and circumstances of the previous importation. For this purpose the court directed production of the invoice. The defendants complied under protest and the jury found for the government. *Id.* at 618.

¹¹*Schmerber v. California*, 384 U.S. 757, 776 (1966) (Black, J., dissenting).

¹²8 J. WIGMORE, EVIDENCE § 2264, at 367 (3d ed. 1940).

¹³Act of June 22, 1874, ch. 391, 18 Stat. 186 (codified at 19 U.S.C. § 535 (1970)). Section 5 of the Act allowed the government, in a non-criminal revenue proceeding, to move for the production of any record of the defendant which would "tend to prove any allegation made by the United States." Moreover, if the motion for production were granted, the defendant's failure to comply would result in the government's allegations being taken as confessed.

In fairness to the constitutional sensitivity of the act's drafters, it should be noted that the statute contained two provisions somewhat alleviating its otherwise draconian nature. First, the record sought to be produced had to be particularly described; second, the "confession of judgment" effect in the event of a failure to comply with the order was not automatic if the failure could "be explained to the satisfaction of the court."

¹⁴Over and above *Boyd's* landmark status in the area of private papers, the decision's additional significance lies in its novel result. The court ordered a new trial, holding that the admission into evidence of the invoice was erroneous and unconstitutional. *Boyd* in effect, therefore, applied a constitutional exclusionary rule twenty-eight years before the rule was expressly mandated for federal courts in *Weeks v. United States*, 232 U.S. 383 (1914). See J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 62-66 (1966) [hereinafter cited as LANDYNSKI].

In addition to its holding, the *Boyd* decision is significant for the mode of constitutional interpretation it employed and advocated. "A close and literal construction" of constitutional protections, warned the Court, "deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance." 116 U.S. at 635. The modern interpretation of fourth and fifth amendment protection of private papers has indeed become "close and literal," to the point of the nearly total erosion of *Boyd*. See generally HARVARD Note, *supra* note 1.

¹⁵116 U.S. at 622. The Court summarized its initial holding:

It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.

Id.

forfeiture action, although technically a civil proceeding, was "in substance and effect a criminal one."¹⁶

Having thus resolved the issue of applicability, the issue composing the bulk of the Court's opinion was whether the compulsory production of the invoice constituted an unreasonable search and seizure violative of the fourth amendment. The Court's affirmative answer to this question rested on two bases. First, the Court employed a property interest test that limited the *types* of property seizable—differentiated from the *manner* in which property is seized—to those in which the government has a possessory interest.¹⁷ Although this rationale, under the *Boyd* Court's analysis, was independently sufficient to find a fourth amendment violation, the Court supplied a second basis for the decision which gave consideration to the incriminating nature of the invoice. On this point, *Boyd's* holding is clear. Because the fourth and fifth amendments "run almost into each other,"¹⁸ the compulsory self-incrimination of an individual through governmental acquisition of private papers constitutes an unreasonable search and seizure prohibited by the fourth amendment.¹⁹

¹⁶*Id.* at 634. *Boyd's* application of the fifth amendment privilege, by its terms applicable only "in any criminal case," to a technically noncriminal proceeding was merely the beginning of an expansive doctrine. The current law has gone much further: "the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In re Gault*, 387 U.S. 1, 49 (1967). Fifth amendment protection thus depends upon the possible use to which the self-incriminating evidence may be put, rather than the nature of the proceeding for which it is produced. See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 94 (1964) (White, J., concurring).

¹⁷Illustrating this principle is the Court's explanation of why stolen goods and contraband could be lawfully seized while private books and papers could not: "[I]n the one case, the government is entitled to the possession of the property; in the other it is not." 116 U.S. at 623.

¹⁸*Id.* at 630.

¹⁹To support this reasoning the Court looked to the historical context of the fourth amendment. Much of this discussion concerned the past abuses conducted pursuant to general search warrants and writs of assistance and the historical importance of property concepts in determining the legality of searches. In addition, however, the Court quoted language from the landmark English case of *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765) reprinted in 19 How. St. Trials 1029 (1816), in which a publisher recovered damages for the search and seizure of his private papers, to the effect that a search for evidence is not allowed because it is within the principle prohibiting the state from "compelling self-accusation" from an individual. 116 U.S. at 629. Later in the opinion, the Court summarized this newly-born doctrine:

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.

116 U.S. at 633.

In contrast to its fourth amendment analysis, the *Boyd* Court's discussion of the fifth amendment was rather perfunctory. The Court held that any compulsory production of private books and papers in a "criminal" setting was "contrary to the principles of a free government" and incapable of surviving "the pure atmosphere of political liberty and personal freedom."²⁰ On this basis, the court-ordered production of the invoice compelled each defendant "to be a witness against himself" within the meaning of the fifth amendment.²¹

THE FIFTH AMENDMENT AND PRIVATE PAPERS

Search and Seizure and the Fifth Amendment: The End of the Road

When private papers are seized by governmental agents rather than produced in response to a subpoena, the threshold question to determine fifth amendment applicability is whether the seizure compels one to be a witness against himself.²² In *Boyd* the Court held that for purposes of the fourth amendment, although not technically a search and seizure, a compulsory production of papers had the same purpose as a search and seizure and was therefore within the protection of the fourth amendment.²³ It is not wholly illogical to conclude the converse, that the procurement of papers through a search and seizure is constitutionally equivalent to their compulsory production through a subpoena for purposes of the fifth amendment. In 1921 the Supreme Court accepted this proposition²⁴ but it was not until 1966 in *Schmerber v. California* that the Court first dealt with whether fifth amendment compulsion is present in the context of a search and seizure.²⁵ There

²⁰116 U.S. at 631-32.

²¹*Id.* at 634-35.

²²In holding that the fifth amendment privilege against self-incrimination was violated by the court order directing production of the defendants' invoice, the Court in *Boyd* failed to provide a reasoned basis for the position, merely stating in conclusory fashion that such compulsory production of private papers was "contrary to the principles of a free government." 116 U.S. at 632. Earlier in the opinion, in discussing both the fourth and fifth amendments, the Court had suggested another rationale: protection against governmental invasions "of the sanctity of a man's home and the privacies of life." *Id.* at 630. These policies of the self-incrimination privilege, however readily stated, have been forced to yield to an increasingly literal interpretation of the fifth amendment. To invoke the privilege, the compulsory production or seizure of private papers must compel an individual "to be a witness against himself": the fifth amendment cannot be cut "completely loose from the moorings of its language." *Fisher v. United States*, 425 U.S. 391, 401 (1976).

²³*Boyd v. United States*, 116 U.S. 616, 622 (1886).

²⁴*Gouled v. United States*, 255 U.S. 298, 306 (1921). The Court's analysis of the applicability of the fifth amendment to search and seizure consisted of one paragraph.

²⁵384 U.S. 757 (1966). In *Schmerber*, the defendant was hospitalized following an automobile accident which he was suspected of having caused by driving while intoxicated. A police officer placed *Schmerber* under arrest and directed a physician to take a blood sample from him. The defendant, on the advice of counsel, refused to consent to the procedure. One of

appears to be no principled distinction between the finding of fifth amendment compulsion in *Schmerber* and in a search and seizure of private papers since in both cases the individual is "compelled . . . to submit to an attempt to discover evidence that might be used to prosecute him" through the governmental power of search and seizure.²⁶ Although lower federal courts had been divided on the issues of whether the seizure of private papers implicated the fifth amendment,²⁷ the Supreme Court appears to have decided the question. In *Andresen v. Maryland*, the Court held that the seizure of documents from the defendant's offices and their admission in evidence did not violate the fifth amendment because the required compulsion was not present in a situation involving search and seizure.²⁸ The clear import of this

the issues before the Court was whether the withdrawal of blood and the admission in evidence of the blood analysis report violated Schmerber's privilege against self-incrimination. The Court analyzed this issue in a two-step procedure, asking (1) whether there was "compulsion" within the meaning of the fifth amendment, and (2) if so, whether this procedure compelled the defendant "to be a witness against himself." *Id.* at 761. The significance of *Schmerber* for the present discussion lies in the fact that the Court clearly held that a search and seizure (the extraction of blood) can constitute "compulsion" so as to make applicable the fifth amendment self-incrimination privilege. In the words of the Court:

It could not be denied that in requiring petitioner to submit to the withdrawal and chemical analysis of his blood the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purposes of the privilege.

Id. at 761 (emphasis supplied).

²⁶See HARVARD Note, *supra* note 1, at 974 n.176. It may be argued that the intrusion involved in *Schmerber* was much greater than that involved in a routine search for papers. Although the degree of intrusiveness of a given search and seizure is relevant to the determination of reasonableness under the fourth amendment, *see* notes 90-103, 113-116, 142-147 *infra* & text accompanying, it does not go to the question of fifth amendment compulsion. *See* *Baxter v. Palmigiano*, 425 U.S. 308, 333 (1976) (Brennan, J., dissenting) ("the Fifth Amendment does not distinguish among types or degrees of compulsion"). A homeowner is no more free to prevent a search of his papers than was Mr. Schmerber free to forbid the seizure of his blood. *See* *Andresen v. Maryland*, 427 U.S. 463, 486-87 (1976) (Brennan, J., dissenting). The fact that non-physical custodial interrogation of an accused is less "intrusive" than interrogation employing "third degree" tactics does not preclude a finding of compulsion in the former instance. *See* *Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁷For the two leading cases, *compare* *Hill v. Philpott*, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), *with* *United States v. Bennett*, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 402 U.S. 984 (1971). For extended treatments of the lower court case law, *see* LOYOLA Comment, *supra* note 1; NORTHWESTERN Comment, *supra* note 1.

²⁸427 U.S. 463 (1976). The Court's interpretation of the compulsion requirement was exactly narrow:

[P]etitioner was not asked to say or to do anything. The records seized contained statements that petitioner had voluntarily committed to writing. The search for and seizure of these records were conducted by law enforcement personnel. Finally, when these records were introduced at trial, they were authenticated by a handwriting expert, not by petitioner. Any compulsion of petitioner to speak, other than the inherent psychological pressure to respond at trial to unfavorable evidence, was not present.

Id. at 473.

analysis is that the self-incrimination privilege is unavailable in situations where papers are obtained through governmental search and seizure.²⁹

The principal shortcoming of *Andresen* is its failure to consider the holding in *Schmerber* that a search and seizure can constitute compulsion sufficient to support a fifth amendment claim.³⁰ The self-incrimination claim in *Schmerber* was rejected because the blood test evidence was held to be merely "physical" evidence and not "communicative" or "testimonial" in nature.³¹ Had the evidence in *Schmerber* been testimonial, as that in *Andresen* concededly was, a fifth amendment violation would have occurred and the *Andresen* Court would have been unable to avoid even mentioning it. Today, however, the results in each case are perfectly compatible despite rationales that squarely conflict. The underlying basis for this conflict, and for that between the *Andresen* majority and dissent, goes to a difference in the mode of constitutional interpretation employed by each side. The *Andresen*

²⁹The *Andresen* Court's process of reasoning is perhaps as significant as the holding it reached. The Court's decision, although justifiable, see Friendly, *The Fifth Amendment Tomorrow: The Case For Constitutional Change*, 37 U. CIN. L. REV. 671, 701-03 (1968) [hereinafter cited as Friendly], is characterized by misuse of precedent and misleading argumentation. After noting that the records seized were incriminating and that at least some contained statements made by the defendant, 427 U.S. at 471, and thus arguably within the protection of the fifth amendment, the Court cited two cases—*Fisher v. United States*, 425 U.S. 391 (1976), and *Couch v. United States*, 409 U.S. 322 (1973)—for the proposition that the compulsion required by the fifth amendment must operate directly on the accused. Both cases, however, involved situations where the legal process was directed to a person other than the accused for records not in the possession of the accused. *Couch*, in fact, emphasized that fifth amendment protection of papers had usually been limited to "instances where possession and ownership conjoined." 409 U.S. at 330. *Andresen* is thus easily distinguishable, for the search warrants in that case were directed to the defendant's personal offices and sought records clearly within the defendant's possession. The *Andresen* Court then attempted to distinguish earlier cases in which a search and seizure did give rise to a fifth amendment violation. In those cases, according to the Court, the search and seizure also violated the fourth amendment, and it was this unlawfulness which supplied the element of compulsion and served as the "legal predicate" for the fifth amendment violation. 427 U.S. at 472. As a matter of law and logic, however, the Court is plainly wrong. It was never held that fourth amendment illegality was required to sustain a fifth amendment claim: the fourth amendment violation in earlier cases was merely coincidental, not "predicate." *Id.* at 489 (Brennan, J., dissenting). Moreover, there is no logical reason why the legality of the search should determine the presence of fifth amendment compulsion, for the effect on the accused is identical in either case. The distinction drawn by the Court would render the fifth amendment applicable only in situations where its protection is unnecessary.

³⁰384 U.S. 757, 761 (1966). See note 25 *supra*. The holding of *Andresen* is directly opposite: fifth amendment compulsion is nonexistent in the context of a search and seizure. 427 U.S. at 473-74. It could be argued that in *Schmerber* there was some level of cooperation by the defendant not present in *Andresen*. However, an interpretation of compulsion which depends upon the necessity of a search victim's cooperation is neither logical nor practical. Under this theory, compulsion would have been lacking in *Schmerber* had the defendant been unconscious and would have been present in *Andresen* had it been necessary for the defendant to open a safe or unlock a file cabinet.

³¹384 U.S. at 765. The Court stated: "Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on [fifth amendment] privilege grounds." *Id.*

majority employed an ordinary meaning analysis of "compulsion"—because the defendant "was not asked to say or do anything," how could he be said to have been "compelled" for purposes of self-incrimination?³² Justice Brennan urged in dissent that the issue not be resolved through the use of a "simplistic notion of compulsion."³³ In this way, Brennan's opinion, and his mode of constitutional interpretation, hark back to the Court's opinion in the *Boyd* case where a "close and literal construction" of constitutional protections was eschewed.³⁴ It was this mode of interpretation that the *Andresen* Court declined to follow.³⁵

*Compulsory Process and the Fifth Amendment:
The Fisher Decision*

Until recently, it had been firmly established that the fifth amendment privilege may excuse an individual from compliance with a subpoena directing him to produce personal papers.³⁶ With the decision in *Fisher v. United States*,³⁷ however, the analytic basis of the principle has been severely, if not totally, undermined, to the point where it may no longer be viable. In *Fisher*, the IRS served summonses on attorneys, ordering them to produce certain documents, primarily accountants' workpapers.³⁸ In the proceedings to enforce the summonses, the issues were two-fold: Were the taxpayers protected from the summonses directed to the attorneys by (1) the fifth amendment, or (2) the attorney-client privilege?

³²427 U.S. at 473.

³³427 U.S. at 486. For Brennan, compulsion was clearly present: "Search and seizure is as rife with elements of compulsion as subpoena. The intrusion occurs under the lawful process of the State. The individual is not free to resist that authority." *Id.* at 486-87.

³⁴*Boyd v. United States*, 116 U.S. 616, 635 (1886). See note 14 *supra*.

³⁵For a general discussion of the fifth amendment compulsion issue, detailing the "close and literal construction" given to the self-incrimination privilege in *Andresen* and other recent cases, see Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383 (1977).

³⁶*Boyd v. United States*, 116 U.S. 616 (1886). Dean Wigmore, who was extremely critical of the fourth amendment basis of *Boyd*, accepted the fifth amendment holding of the case, stating that the availability of the privilege to subpoenas directing the production of incriminating documents was "universally conceded." 8 J. WIGMORE, EVIDENCE § 2264, at 363 (3d ed. 1940). See C. MCCORMICK HANDBOOK OF THE LAW OF EVIDENCE § 126 (2d ed. E. Cleary, 1972); Comment, *The Fourth and Fifth Amendments—Dimensions of an "Intimate Relationship"*, 13 U.C.L.A. L. REV. 857, 868 (1966). Moreover, the proposition has been continually affirmed by the Supreme Court in dicta, invariably with a citation to *Boyd*. See, e.g., *Bellis v. United States*, 417 U.S. 85, 87-88 (1974), where the Court stated: "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."

³⁷425 U.S. 391 (1976).

³⁸*Id.* at 394. Prior to the issuance of the summonses, IRS agents had interviewed two taxpayers concerning possible tax liability on their parts. Shortly after the interviews, the taxpayers obtained from their accountants documents relating to their tax return preparation and then transferred them to attorneys they had retained to assist them in connection with the investigation.

The Court easily disposed of the first question, holding that the enforcement of the summons against the attorneys would not violate the fifth amendment because the necessary element of compulsion was absent.³⁹ Against the argument that the privilege should not be lost simply because of the transfer to an attorney to obtain legal advice, the Court reiterated its commitment to a narrow interpretation of the compulsion requirement by emphasizing the strictly personal nature of the privilege.⁴⁰ Thus, its conclusion was reached through the following progression: no possession, no compulsion, no fifth amendment privilege. This analysis would be unavailable, however, if the taxpayers were in actual possession of the papers. Because the Court held that if a client is privileged under the fifth amendment from producing papers in his possession, the attorney invoking the attorney-client privilege may also refuse to comply with a subpoena for their production if the papers were transferred to him for the purpose of obtaining legal advice,⁴¹ the Court was forced to consider whether compulsion would occur if the taxpayer had possession of the papers. Having established this analytical framework,⁴² the Court crystallized the issue "to the question of what, if any, incriminating testimony within the fifth amendment's protection, is compelled by a documentary summons."⁴³ The potential sources of compelled testimony are

³⁹"The taxpayer's privilege under this Amendment is not violated by enforcement of the summonses involved in these cases 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." *Id.* at 397.

⁴⁰One factor necessary for a finding of compulsion is that the person asserting the privilege be in possession, actual or constructive, of the paper involved. Mere ownership is insufficient, as demonstrated by *Couch v. United States*, 409 U.S. 322 (1973). *Couch* involved an Internal Revenue Service summons in connection with a tax investigation of the petitioner, a sole proprietor of a restaurant. The issue presented was whether Ms. Couch could invoke the self-incrimination privilege to prevent the production of her records in the possession of her accountant. Stating that the privilege is a personal one, the Court held that because the summons was directed only to the accountant, "the ingredient of personal compulsion against an accused is lacking." *Id.* at 329. Later in the opinion, the Court noted the possibility of "constructive possession" in cases where the relinquishment of actual possession was very temporary and insignificant. Such constructive possession would be sufficient to support a finding of fifth amendment compulsion. *Id.* at 333.

⁴¹425 U.S. at 404-05.

⁴²The legal matrix which the *Fisher* Court has established at this point in the opinion can be summarized in the following manner. If *A* has no fifth amendment privilege with respect to certain papers, a transfer of them to his attorney, *B*, will give *B* no privilege against their compulsory production. 425 U.S. at 403-04. If on the other hand *A* is privileged, under the fifth amendment, from producing the papers and transfers them to *B* to obtain legal advice, *B* will also be privileged from producing them. The source of *B*'s privilege, however, is not the fifth amendment—that was the first holding in *Fisher*—but the attorney-client privilege.

⁴³425 U.S. at 409. The Court began its analysis with an extended discussion of the *Boyd* decision, and thus appeared ready to confront that case directly and perhaps to reconsider it. Much of *Boyd*, the Court noted, had not "stood the test of time." *Id.* at 407. The chief limitation on *Boyd*'s expansive interpretation of the fifth amendment, according to the Court, was the development of the principle that the self-incrimination privilege does not "proscribe the compelled production of every sort of incriminating evidence." Rather, the fifth amendment "applies only when the accused is compelled to make a *testimonial* communication that is incriminating."

two-fold: the testimonial compulsion may be found in the act of complying with the subpoena or in the contents of the papers themselves.

At the outset, the *Fisher* Court recognized that the compulsory production of evidence "has communicative aspects of its own." By complying with a subpoena, the party producing the evidence tacitly communicates that the papers demanded do exist in his possession or control and that he believes the papers produced are those demanded.⁴⁴ As to the existence of the papers and their possession by an individual, the Court found it "doubtful" that implicitly admitting these facts "rises to the level of testimony within the protection of the fifth amendment,"⁴⁵ because the existence and location of the papers are a "foregone conclusion." Tacitly conceding their existence and possession therefore is not "testimony" since the tacit concession does not tell the government anything it does not know already.⁴⁶

Id. at 408. To the extent that *Boyd* stood for a broader interpretation of the fifth amendment, the Court characterized the decision as "a rule searching for a rationale." *Id.* at 409.

⁴⁴*Id.* at 410.

⁴⁵*Id.* at 411. Alternatively, the Court held that neither the existence nor location of the papers "poses any realistic threat of incrimination of the taxpayer," even assuming production had some "minimal testimonial significance." *Id.* at 412.

⁴⁶The reach of this analysis is unclear, because it is not difficult to conceive of situations where the existence of papers is not a "foregone conclusion." In such a situation, would production of the papers then be sufficiently testimonial to invoke the fifth amendment? Justice Marshall, concurring in *Fisher*, thought so and contended that the majority's theory would "afford almost complete protection against compulsory production of our most private papers." 425 U.S. at 432. There are at least three reasons, however, gravitating against this interpretation of the Court's opinion. First, the majority's suggestion that compulsory production of items may involve a testimonial concession as to their existence is a truly novel one, as Marshall himself recognized. *Id.* at 430. The traditional rationale for holding that compliance with a subpoena constitutes testimonial communication is the notion of "implicit authentication." See *id.* at 412 n.12 and authorities cited therein. It seems more likely that, having arguably undermined any content-oriented fifth amendment basis for the protection of private papers, see notes 50-54 *infra* & accompanying text, the Court was merely being thorough in disposing of all potential fifth amendment issues rather than fashioning a broad new rule for invoking the self-incrimination privilege. Such was the interpretation of Justice Brennan, who viewed the Court's opinion as making severe if not total inroads on the fifth amendment privilege for private papers. The probable result of *Fisher*, he thought, was that "once again the Court is laying the groundwork for future decisions that will tell us that the question here formally reserved was actually answered against the availability of the privilege." 425 U.S. at 415 (concurring opinion).

Second, the analysis suggested by the Court, in addition to being novel, is also of broad applicability. The analysis would extend beyond private papers to cover all types of evidence, *id.* at 430 n.1 (Marshall, J., concurring), and it is doubtful that the Court intended its opinion to so expand the fifth amendment.

Finally, Marshall's interpretation of the Court's language would restrict the scope of the subpoena power much more than courts in recent years have shown any inclination to do. By allowing a fifth amendment defense to the production of evidence whose existence—in the government's knowledge—has not met some minimum level of probability, Marshall's theory would in effect impose something akin to a "probable cause" requirement for the issuance and enforcement of subpoena. Although this paper argues that a proper interpretation of the fourth amendment may require a preliminary showing of some type of "reasonable probability" to justify a subpoena directed to private papers, see notes 170-85 *infra* & text accompanying, it is suggested here merely that the *Fisher* Court did not intend to establish such a standard under its interpretation of the fifth amendment. Such an interpretation would constitute a major inroad

The potential testimonial nature of the implicit indication by the party that the papers produced are those described in the subpoena was also readily discarded.⁴⁷ Even where the papers produced are the taxpayer's own, which was not the situation in *Fisher*, the Court's rationale has provided a basis for denying application of the fifth amendment privilege. In the same way that implicitly admitting the existence of subpoenaed papers does not constitute fifth amendment "testimony"—because the government is in no way relying on the party's "truth-telling" to prove their existence⁴⁸—so also may the testimonial nature of any implicit authentication be denied if the government does not rely on the act of producing the papers to establish their authenticity.⁴⁹ Once again, the clear implication of the *Fisher* Court's rationale is that the act of complying with a subpoena for the production of papers lacks a sufficient testimonial character to invoke the self-incrimination privilege.

Finding that the act of producing papers in response to a subpoena does not implicate the fifth amendment does not foreclose a successful invocation of the privilege on the theory that the contents of the papers themselves constitute self-incriminating testimony. The basis of this theory is that protection for an individual's private thoughts should not be lost simply because they have been reduced to writing.⁵⁰ Under this view, espoused by Justice Brennan in his *Fisher* concurrence, the compulsory production of private papers is the constitutional equivalent of compulsory extraction of private thoughts. If the latter is within fifth amendment protection, as it undeniably is, then the

on the subpoena power, and once again one must be dubious of the likelihood of the Burger Court espousing such a doctrinal innovation.

Moreover, it is not clear that the evidence sought in *Fisher* would meet such a standard. One of the summonses sought copies of "reports and other correspondence" between the taxpayer and the accounting firm. 425 U.S. at 394. There is nothing in the opinion to indicate a likelihood that "other correspondence" existed or what the nature of such correspondence was. In short, it appears that under the proper reading of *Fisher*, there will be few if any situations where the implicit concession of existence and possession will constitute "testimony" for fifth amendment purposes.

⁴⁷The risk of such "implicit authentication" was lacking in this case, where the papers involved were those of the accountants: "The taxpayer would be no more competent to so authenticate the accountant's workpapers or reports by producing them than he would be to authenticate them if testifying orally." 425 U.S. at 413. Thus, the Court was not confronted with a situation in which an individual would be competent to authenticate the papers produced; that is, where the papers are his own.

⁴⁸*Id.* at 411.

⁴⁹Judge Friendly, arguing against application of the fifth amendment to the production of documents, had earlier anticipated this line of analysis. The argument that compulsory production involves an implicit testimonial authentication, Friendly said, "reeks of the oil lamp." This "assumed authentication" of the documents need not be present because the government "will find its own ways for authenticating them." Friendly, *supra* note 29, at 702. This analysis has not yet been applied to the compulsory production of private papers. See C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 126 at n.73 (2d ed. E. Cleary 1972) (allowing use of compelled evidence without disclosing its source "seems not to have been considered as a possible means of avoiding the self-incrimination problem").

⁵⁰*Fisher v. United States*, 425 U.S. 391, 420 (Brennan, J., concurring).

former must also be protected.⁵¹ The logical appeal alone of this theory is, of course, insufficient to bring private papers within the protection of the fifth amendment. Rather, if the production of private papers is to constitute compulsory self-incrimination, it must be because such production compels an individual "to be a witness against himself."⁵²

The majority's response to Justice Brennan's theory is straightforward: Because the recording of an individual's thoughts is not compelled by the government but voluntarily undertaken by the person, the privilege does not apply. The Court would recognize the equivalence of private thoughts and private writings for fifth amendment purposes only to the extent that the amendment prohibits the government from compelling an individual to prepare the paper in the first instance⁵³ or to respond to governmental in-

⁵¹I perceive no principle which does not permit compelling one to disclose the contents of one's mind but does permit compelling the disclosure of the contents of that scrap of paper by compelling its production. Under a contrary view, the constitutional protection would turn on fortuity, and persons would, at their peril, record their thoughts and the events of their lives. The ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or the events of those memories would become the subjects of criminal sanctions however invalidly imposed.

Id.

⁵²Under the language of the fifth amendment, three requirements must be present to assert the privilege: (1) the papers sought must be incriminating; (2) the incriminating papers must constitute testimony; and (3) the incriminating testimony must be compelled by the subpoena. The present discussion concerns the obtaining of private papers only by subpoena and not by search and seizure. After the holding in *Andresen v. Maryland*, 427 U.S. 463 (1976), see notes 28-35 *supra* & text accompanying, that the seizure of private papers does not constitute compulsion for fifth amendment purposes, the issue of whether the contents of private papers may give rise to testimonial self-incrimination need never be reached.

The issue of what incriminating testimony within the papers themselves, if any at all, is compelled by a subpoena was dealt with in *Fisher* in a single paragraph. The incriminatory nature of the contents of the papers was alone insufficient, for the self-incrimination privilege "protects a person only against being incriminated by his own compelled testimonial communications." 425 U.S. at 409. On the issue of whether the necessary testimony was present, the facts of *Fisher* made the resolution simple: the workpapers involved belonged to the accountants, not the taxpayers, and thus contained no testimonial declarations by the taxpayers seeking to invoke the privilege. *Id.* Given this narrow holding, the Court had no need to consider a situation involving a documentary subpoena for private papers; however, in dictum of far-reaching potential the Court appeared to decide that more difficult case as well. The Court suggested that where the original writing or making of the papers was voluntary, a subpoena directed to the papers would not constitute testimonial compulsion as to their contents. In the words of the Court: "Furthermore, as far as this record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayer or of anyone else." 425 U.S. at 409-10. In a footnote, the Court elaborated on this rationale, explicitly stating that the fact that the papers were written by the person asserting the fifth amendment "is insufficient to trigger the privilege . . . unless the Government has compelled the subpoenaed person to write the document." The only thing compelled by a documentary subpoena, stated the Court, is the act of producing the document. *Id.* at 410 n.11. Therefore, so long as papers, no matter how private or incriminating, are not originally prepared pursuant to government compulsion, their subsequent compulsory production does not rise to the level of fifth amendment self-incrimination on the basis of their testimonial contents.

⁵³See, e.g., *Marchetti v. United States*, 390 U.S. 39 (1968). A well established exception is the "required records" doctrine. See *Shapiro v. United States*, 335 U.S. 1 (1948).

quiry in written form.⁵⁴ Under Brennan's view, the compulsory production of private papers is prohibited despite the voluntariness of their creation on the theory that the required testimony and compulsion are present in the *overall* process: testimony in the contents of the papers, compulsion in their production. In contrast, the *Fisher* majority interpreted the fifth amendment to require testimony and compulsion at each stage. In so bifurcating its analysis, the Court was able to deny fifth amendment protection due to a lack of compulsion at the time of creation and a lack of testimony in the act of production.

THE FOURTH AMENDMENT PROTECTION OF PRIVATE PAPERS

A proper reading of the *Andresen* and *Fisher* decisions leads to the conclusion that the fifth amendment no longer protects private papers from governmental procurement. Indeed, a recent commentary has concluded, on the basis of these cases, that "the procedural protections of the fourth amendment warrant clause have become the exclusive means of protecting personal privacy."⁵⁵ The focus of this paper will therefore turn to a consideration of the fourth amendment, pursuing three overlapping lines of analysis. The starting point for analysis will be a consideration of the fourth amendment's central purpose to protect individual privacy and the very strong privacy interests inherent in private papers. Second, the procedural requirements of the fourth amendment, and the privacy protections they provide, will be discussed. Given the fourth amendment's privacy rationale, its procedural requirements should be more stringently applied where the objects of a governmental search are private papers. Finally, the "reasonableness" requirement of the fourth amendment, it will be demonstrated, retains vitality and should not be summarily disregarded in the calculus of fourth amendment protection of private papers.

Rationale of the Protection: Toward a Hierarchical Fourth Amendment Right of Privacy

The fourth amendment, in its broad mandate that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," clearly establishes a right of privacy against certain governmental intrusions. The first major Supreme Court articulation of this right was found in the *Boyd* decision.⁵⁶ There the Court stated that the principles underlying the fourth amendment

⁵⁴For example, there is no doubt that obtaining a handwritten confession from a criminal accused would implicate the fifth amendment.

⁵⁵HARVARD Note, *supra* note 1, at 979.

⁵⁶See notes 10-21 *supra* & text accompanying.

apply to all governmental invasions affecting "the sanctity of a man's home and the privacies of life."⁵⁷ That the fourth amendment's virtual *raison d'être* is the protection of privacy has been resoundingly echoed by courts⁵⁸ and commentators.⁵⁹ And protection of an individual's private papers goes to the very core of the fourth amendment right of privacy.⁶⁰

There are three considerations which support the conclusion that private papers are central to the concerns of the fourth amendment and which suggest that, in accord with the amendment's privacy rationale, private papers should occupy a type of preferred position. The first consideration is the very personal, private nature of such papers. This rationale has been cogently articulated on a number of occasions. Private papers have been said to be "lit-

⁵⁷*Boyd v. United States*, 116 U.S. 616, 630 (1886). Expanding on *Boyd*, Justice Brandeis, himself no insignificant authority on the right of privacy, see Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), expressed the fundamental purpose of the fourth amendment most eloquently:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the fourth amendment.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion). The holding in *Olmstead* was that wiretapping was not a search within the meaning of the fourth amendment. Brandeis, relying heavily on *Boyd*, refused to shackle the amendment with the majority's "unduly literal construction." *Id.* at 476. The Brandeis position was ultimately vindicated in *Katz v. United States*, 389 U.S. 347 (1967), which overruled *Olmstead*.

⁵⁸See, e.g., *Warden v. Hayden*, 387 U.S. 294, 304 (1967) ("the principle object of the Fourth Amendment is the protection of privacy rather than property"); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police . . . is at the core of the Fourth Amendment"). See generally *Katz v. United States*, 389 U.S. 347 (1967).

⁵⁹See, e.g., Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 A.B.F. RES. J. 1193, 1205-06 (1976) ("the framers of the Fourth Amendment were concerned, first and foremost, with the preservation of personal privacy"); Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974) [hereinafter cited as Weinreb]; Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212. See also Note, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J.L. REF. 154 (1972).

⁶⁰See, e.g., *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 529 & n.27 (1977) (Burger, C.J., dissenting). The *Nixon* case involved a challenge to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 (1974), on a number of grounds, including the right of privacy under the first, fourth and fifth amendments. 433 U.S. at 455-65. Although Nixon's privacy claim was rejected, the several opinions in the case all display a substantial concern for appellant's privacy interests in his personal communications. This solicitude for privacy interests—fully consistent with the hierarchical theory of the fourth amendment advocated herein—is somewhat surprising coming from a Court that one year previous had taken an extremely narrow view of the privacy protections for personal papers and business records. See *Andresen v. Maryland*, 427 U.S. 463 (1976); *United States v. Miller*, 425 U.S. 435 (1976); *Fisher v. United States*, 425 U.S. 391 (1976).

tle more than an extension of [the owner's] person,"⁶¹ their seizure "a particularly abrasive infringement of privacy,"⁶² and their protection "impelled by the moral and symbolic need to recognize and defend the private aspect of personality."⁶³ In this sense, every governmental procurement of private papers, regardless of how it is accomplished, is uniquely intrusive.⁶⁴ In addition to the nature of the papers themselves, a second reason for according them strict protection concerns the nature of the search for private papers. The fundamental evil at which the fourth amendment was directed was the sweeping, exploratory search conducted pursuant to a general warrant.⁶⁵ A search involving private papers, it has been noted, invariably partakes of a similar generality, for "even a search for a specific, identified paper may involve the same rude intrusion [of an exploratory search] if the quest for it leads to an examination of all of a man's private papers."⁶⁶ Thus, both their contents and the inherently intrusive nature of a search for them militates toward the position that private papers are deserving of the fullest possible fourth amendment protection. Finally, not only is a search involving private papers highly intrusive in fourth amendment terms, but the nature of the papers themselves may implicate the policies of other constitutional protections. In addition to the "intimate" relation with fifth amendment values,⁶⁷ the obtaining of private papers by the government touches upon the first amendment⁶⁸ and the generalized right of privacy.⁶⁹

⁶¹*Fisher v. United States*, 425 U.S. 391, 420 (Brennan, J., concurring). See also *State v. Bisaccia*, 45 N.J. 504, 515, 213 A.2d 185, 191 (1965) ("private papers are almost inseparable from the privacy and security of the individual").

⁶²ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 210.3, at 505, Commentary (1975).

⁶³See HARVARD Note, *supra* note 1, at 985.

⁶⁴*But see* *Gould v. United States*, 255 U.S. 298, 309 (1921) ("There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure . . .") (dictum).

⁶⁵See *Warden v. Hayden*, 387 U.S. 294, 301 & n.9 (1967), and authorities cited therein. See also T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969).

⁶⁶*State v. Bisaccia*, 45 N.J. 504, 515-16, 213 A.2d 185, 191 (1965). See also *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). This argument, that a search involving private papers is inherently intrusive due to the usual necessity of reading even wholly innocent papers, is, it should be noted, inapplicable where documents are obtained through means of a subpoena. See notes 171-72 *infra* & text accompanying.

⁶⁷See *Boyd v. United States*, 116 U.S. 616, 630, 633 (1886). Until the decision in *Andresen v. Maryland*, 427 U.S. 463 (1976), it was an open question as to whether a search and seizure of private papers could constitute a violation of the fifth amendment privilege against self-incrimination. See notes 28-35 *supra* & text accompanying. Because, at the very least, a seizure of private papers implicates the policies of the fifth amendment, see 427 U.S. at 484-92 (Brennan, J., dissenting), it is arguable that more stringent fourth amendment protection should be given such papers.

⁶⁸*Cf.* *NAACP v. Alabama*, 357 U.S. 449 (1958) (membership lists immune from governmental procurement); *Friendly*, *supra* note 29, at 696-97, 703 (constitutional protection of personal papers, where necessary, should come from first amendment instead of fifth amendment).

⁶⁹See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 455-65 (1977). *Cf.* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). This constitutional interplay is illustrated by *Stanley v. Georgia* 394 U.S. 557 (1969). In *Stanley*, police officers searched the defendant's home, pursuant to a valid warrant, for evidence of gambling operations. In the course of the search, the officers

On the basis of the foregoing analysis, private papers should be accorded special solicitude in fourth amendment protection. This position rests on both notions of common sense and established fourth amendment doctrine. Intuitively, it seems almost obvious that there should be "a marked difference between private papers and other objects in terms of the underlying value the fourth amendment seeks to protect;"⁷⁰ moreover, this protection extends to "papers" by the language of the fourth amendment itself. Finally, there are few if any situations to which the "reasonable expectation of privacy" rationale of *Katz v. United States*⁷¹ is more appropriate than it is in the context of private papers.⁷² The major corollaries implicit in the recognition that private papers occupy a preferred position in fourth amendment jurisprudence are two. First, it follows that the fourth amendment must to some extent embody a hierarchy of values and that its protection cannot be confined to all or none.⁷³ Second, if such a hierarchy does exist, with private papers

found three reels of film and viewed them using Stanley's own projector. Concluding the films were obscene, the officers seized them and arrested Stanley for possession of obscene matter, for which he was convicted. A unanimous Court reversed the conviction, with the five-man majority holding that the state's power to regulate obscenity cannot, consistent with the first amendment, "extend to mere possession by the individual in the privacy of his own home." *Id.* at 568. However, because obscenity is not protected by the first amendment, *Roth v. United States*, 354 U.S. 476 (1957), and because the material in *Stanley* was assumed to be obscene, 394 U.S. at 559 n.2, the Court's holding cannot rest on first amendment grounds alone; rather, the Court was forced to recognize the "added dimension" present in *Stanley*—the "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." 394 U.S. at 564.

Not only did the right of privacy loom large in *Stanley*, but so also did the fourth amendment. Justice Stewart, concurring in the result, chastized the majority for "overlook[ing] the serious inroads upon fourth amendment guarantees countenanced in this case by the Georgia courts." 394 U.S. at 569. Although the search warrant was clearly valid, it did not authorize the seizure of films. Moreover, Stewart could not justify the seizure under the "plain view" doctrine, which permits the seizure of evidence discovered in the course of an otherwise valid search, subject to certain limitations. *See Coolidge v. New Hampshire*, 403 U.S. 443, 464-71 (1971). *See generally* J. HADDAD, *ARREST, SEARCH AND SEIZURE* §§ 10.1-10.32 (Ill. Inst. for CLE 1976). This conclusion rested solely on the ground that "the contents of the films could not be determined by mere inspection," 394 U.S. at 571—had heroin or other contraband been involved, the "plain view" doctrine would have justified the seizure. Because the contents were ascertainable only after a fifty minute exhibition, according to Stewart, the search was fatally general. *Id.* at 571-72. Thus, from the two major opinions in *Stanley* emerged two potentially significant rationales: first, the right of privacy in "a person's own home" salvaged an otherwise losing first amendment claim; second, the *content* of criminal evidence, through its effect on the *manner* of the search, rendered the search and seizure unreasonable.

⁷⁰*State v. Bisaccia*, 45 N.J. 504, 515, 213 A.2d 185, 191 (1965).

⁷¹389 U.S. 347 (1967). The actual phrase, "reasonable expectation of privacy," comes from the concurring opinion of Justice Harlan. *See id.* at 360.

⁷²*Cf. Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457-59, 465 (1977).

⁷³Professor Amsterdam, for example, suggests that fourth amendment restraints upon searches and seizures may well be graduated, at least in theory, "in proportion to their intrusiveness and to the sanctity of the interests they invade." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 390 (1974) [hereinafter cited as Amsterdam]. This analysis is dealt with in greater detail in connection with the fourth amendment procedural requirements of probable cause and specificity. *See* notes 86-127 *infra* & text accompanying.

near the top, it must follow that fourth amendment protection is to some extent based on the content of the objects sought by the government.

Pursuing the latter contention for the present, it is clear that a content-based standard requiring more stringent fourth amendment protection does exist where first amendment interests are implicated.⁷⁴ In *Roaden v. Kentucky*,⁷⁵ a sheriff attended a drive-in movie, concluded it was obscene, went to the projection booth and arrested the theatre manager on the ground of showing an obscene film. Pursuant to the arrest, the officer seized one copy of the film; the defendant was thereafter convicted. Because the issue of obscenity was conceded by the defendant, the Supreme Court's reversal of the conviction rested on fourth amendment grounds. Noting that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material"⁷⁶ and reiterating the significance of "the nature of the materials seized" in determining fourth amendment reasonableness,⁷⁷ the Court articulated a content-based, hierarchical conception of the fourth amendment. Under the fourth amendment, according to the Court, the presence of first amendment interests "calls for a higher hurdle in the evaluation of reasonableness."⁷⁸ In short, the content of the seized evidence determined the constitutionality of the seizure.⁷⁹

⁷⁴Numerous cases have held that the First Amendment 'modifies' the Fourth Amendment to the extent that extra protections may be required when First Amendment interests are involved." *Stanford Daily v. Zurcher*, 353 F. Supp. 124, 134 (N.D. Cal. 1972), *aff'd and adopted as the opinion of the court*, 550 F.2d 464 (9th Cir. 1977). In *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), the Court held that a seizure of all the copies of 31 obscene books was procedurally unconstitutional. Mere probable cause of their obscenity was insufficient, for without an adversary judicial determination of obscenity, first amendment interests would be unduly infringed. *Id.* at 208, 213. This holding was narrowed, however, in *Heller v. New York*, 413 U.S. 483 (1973), where the Court held that a prior adversary determination of obscenity was not required where only one copy of an allegedly obscene film was seized. *A Quantity of Books* was distinguished on the grounds that there a large quantity of books were seized "for the sole purpose of their destruction." *Id.* at 491. The *Heller* Court, however, did recognize that first amendment considerations modify the usual law of search and seizure and thus required a prompt adversary determination of obscenity after seizure and an opportunity for a theatre owner to copy the seized film. *Id.* at 492-93. See also *Stanford v. Texas*, 379 U.S. 476 (1965); *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

⁷⁵413 U.S. 496 (1973).

⁷⁶*Id.* at 501.

⁷⁷*Id.* at 503.

⁷⁸*Id.* at 504.

⁷⁹It could be contended that the *Roaden* rationale is applicable only where first amendment considerations are present. Although this is certainly a fair reading of the case, its holding does indeed recognize a fourth amendment content-based hierarchy, even if a limited one. Moreover, the same hierarchical analysis should apply to private papers. First, there is certainly an overlap of interests protected by the first and fourth amendments—the communication and expression inherent in private papers is not totally without first amendment implications. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 455-68 (1977). Second, to the extent that other constitutional rights are likewise implicated in private papers, notably the fifth amendment and the general right of privacy, see notes 70-72 *supra* & text accompanying, the *Roaden* rationale applies with similar force. *Cf. Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?").

It has been forcefully contended that a content-based constitutional protection for private papers does not exist under current doctrine and that the procedural requirements of the fourth amendment—probable cause and specificity—are “the exclusive means of protecting personal privacy.”⁸⁰ To the extent that the authors contend that all content-based considerations are irrelevant to fourth amendment protection, *Roaden* and other cases⁸¹ demonstrate that this position is at least somewhat overstated. More fundamentally, however, the position impliedly erects a much too rigid content-manner dichotomy. Justice Stewart’s analysis in his concurring opinion in *Stanley v. Georgia* furnishes an illustration of the interplay between the content of the evidence and the manner in which it is seized: the nature of the evidence rendered it incapable of a “plain view” seizure, because a characterization of the film as “obscene” could not be accomplished without actually viewing it.⁸² Moreover, the absence of an absolute content-based protection of private papers does not compel the conclusion that content considerations are therefore irrelevant. For even given the primacy of the fourth amendment’s procedural requirements, the interpretation of those requirements may properly take into account the content of the evidence sought to be obtained and the resulting invasion of privacy. Under a hierarchical view of the fourth amendment, the uniquely private nature of private papers justifies a higher standard of fourth amendment protection. In the absence of absolute protection, this higher standard of protection can be obtained through a more stringent application of the fourth amendment’s procedural requirements.

Fourth Amendment Protection: Search and Seizure

THE WARRANT REQUIREMENT

The fourth amendment consists of a general proscription against “unreasonable searches and seizures” followed by the more specific directive of the warrant clause: “and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Although the Supreme Court has never thoroughly addressed the relationship between the two clauses of the fourth amendment,⁸³ it is generally assumed that where the express requirements of the warrant clause are satisfied, the search will be held reasonable.⁸⁴ The protections afforded to private papers by the warrant

⁸⁰HARVARD Note, *supra* note 1, at 979.

⁸¹See note 74 *supra*.

⁸²See note 69 *supra*. The Stewart analysis applies just as strongly to a seizure of private papers, whose evidentiary value could be ascertained only after reading them.

⁸³See Weinreb, *supra* note 59, at 47-50. In *United States v. Chadwick*, 433 U.S. 1 (1977), the Court merely mentioned the “strong historical connection” between the two clauses. *Id.* at 8.

⁸⁴Weinreb, *supra* note 59, at 69-71. However, this is not invariably true. See notes 143-47 *infra* & text accompanying.

requirement are therefore of central importance. The warrant clause contains both substantive and procedural protections of privacy. A search warrant may be obtained only upon a showing of "probable cause" and must "specifically describe" the place to be searched and items to be seized. Moreover, in the usual case, a warrant may be issued only by a neutral judicial officer on the basis of sworn testimony.⁸⁵

Probable Cause

The first requirement of the issuance of a search warrant is the existence of probable cause—reasonable grounds to believe "that criminally related objects are in the place which the warrant authorizes to be searched, at the time when the search is authorized to be conducted."⁸⁶ In the context of private papers, the protection afforded by the probable cause requirement is potentially substantial. Before such a search may be undertaken pursuant to a warrant, the probable cause standard must be met by a demonstration that the papers sought do or probably do exist and will be or probably will be of evidentiary value in connection with a particular crime.⁸⁷ Adherence to this standard will result in a significant degree of protection for private papers,

⁸⁵See generally Amsterdam, *supra* note 73, at 358 & 444 nn. 90-95. The source of the neutrality requirement, whether it be the reasonableness clause or the warrant clause, is of no significance to this analysis.

⁸⁶*Id.* at 358 (citations omitted). Within this calculus is the requirement that there exist probable cause to believe that a crime has been committed. See *Berger v. New York*, 388 U.S. 41, 55 (1967). The same standard of probable cause applies to searches made *without* a warrant. See *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) (probable cause is "a minimum requirement for a reasonable search"); *Brinegar v. United States*, 338 U.S. 160 (1949). For a general discussion of probable cause, see Armentano, *The Standards for Probable Cause Under the Fourth Amendment*, 44 CONN. B.J. 137 (1970); Note, *Probable Cause: The Federal Standard*, 25 OHIO ST. L.J. 502 (1964).

⁸⁷See *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967) (search for evidentiary items of crime reasonable "only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling"). *But see* *People ex rel. Carey v. Covelli*, 61 Ill.2d 394, 336 N.E.2d 759 (1975). In *Carey*, the Illinois Supreme Court, through Justice Schaefer, upheld the validity of a search warrant directed to the unknown contents of a desk, a safe, and a locked filing cabinet belonging to a deceased underworld figure, Sam Giancana. On the issue of probable cause, the court stated that the determination of probable cause "begins with a consideration of the nature of the proceeding for which the evidence is sought." *Id.* at 403, 336 N.E.2d at 765. Despite the lack of knowledge as to exactly what evidence was being sought and despite the absence of any pending criminal action, the probable cause standard was held to be satisfied. *Id.*

Although the court's rationale was not clearly articulated, three factors were deemed ultimately persuasive. First, the existence of the desk, safe and cabinet was not in doubt. Second, Giancana had been murdered in the basement of his home in circumstances indicating that the killer had himself been looking for particular items which were likely to be found in the desk, safe or cabinet. Finally, the court emphasized that an investigation for *murder* was involved. Not only is the gravity of the offense an important factor in determining reasonableness, see LOYOLA Comment, *supra* note 1, at 304-05, but the unavailability of the deceased would make a more precise determination of probable cause difficult indeed. The *Carey* court's reliance on factors of probability and practicality serves to emphasize that "[p]robable cause is a flexible concept which does not lend itself to precise definition." LANDYNSKI, *supra* note 14, at 46.

especially those of an intrapersonal nature. Requiring a showing of probable cause as to the existence of the papers and their evidentiary relationship with a crime would seem to provide almost complete protection against the seizure of those papers that "constitute an integral aspect of a person's private enclave."⁸⁸

Moreover, a significant line of authority exists that is consistent with a hierarchical view of the fourth amendment⁸⁹ and that justifies the application of a more stringent standard of probable cause where the objects of the search are private papers. It is now well established that the degree of intrusiveness of governmental conduct is a primary factor to be considered in determining the validity of the conduct under the fourth amendment. In *Camara v. Municipal Court*,⁹⁰ the Court recognized that a so-called "administrative search" is less intrusive than a typical search for evidence.⁹¹ And although the Court held that a warrant must be obtained before such "searches" may be undertaken, they were permitted upon a showing of less-than-traditional probable cause.⁹² The significance of this holding has been noted by Professor LaFave:

Most important, it seems, is the fact that the Court has taken the view that the evidentiary requirement of the Fourth Amendment is not a rigid standard, requiring precisely the same quantum of evidence in all cases, but instead is a flexible standard, permitting consideration of the public and individual interests as they are reflected in the facts of a particular case.⁹³

This interpretation of the fourth amendment was affirmed in *Terry v. Ohio*,⁹⁴ where the Court held that a "stop and frisk," although constituting a

⁸⁸*Fisher v. United States*, 425 U.S. 391, 427 (Brennan, J., concurring). Cf. *id.* at 432 (Marshall, J., concurring) ("there is little reason to assume the present existence and possession of most private papers").

⁸⁹See notes 60-82 *supra* & text accompanying.

⁹⁰387 U.S. 523 (1967).

⁹¹*Id.* at 530 ("a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime"); *id.* at 537 ("because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy").

⁹²In the context of housing code enforcement, the Court permitted "area inspections" if conducted pursuant to a warrant. The probable cause standard articulated by the Court was very general: "[I]t is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Id.* at 538. Even more broadly phrased was a later statement: "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539. See also *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) (because detentions for sole purpose of fingerprinting "may constitute a much less serious intrusion upon personal security" than other types of searches, they may "under narrowly defined circumstances" comply with the fourth amendment "even though there is no probable cause in the traditional sense") (dictum).

⁹³LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1, 20.

⁹⁴392 U.S. 1 (1968).

"search and seizure" within the meaning of the fourth amendment, could be conducted on less than the traditional standard of probable cause. The fourth amendment, according to the Court, applies to *all* governmental intrusions upon personal security; however, "the scope of the particular intrusion, in light of all the exigencies of the case" is to serve as a "central element" in judging the constitutionality of the intrusion.⁹⁵

If searches involving a comparatively low degree of intrusion can be conducted pursuant to warrants issued on something less than probable cause, there is no logical impediment to requiring a higher standard of probable cause to justify a search of a highly intrusive character. Indeed, this analytic framework was suggested in *Schmerber v. California*,⁹⁶ which recognized that in the past the power of police to search a suspect incident to a lawful arrest was generally "unrestricted."⁹⁷ On the facts before it, however, the Court was clear in stating that "the mere fact of a lawful arrest"⁹⁸ does not end our inquiry."⁹⁹ Whatever the validity of the considerations supporting the broad power of a search incident to arrest in most cases,

they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a *clear indication that in fact such evidence will be found*, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.¹⁰⁰

This language of *Schmerber* supports the proposition that a highly intrusive search may require a greater justification in terms of probable cause than does an ordinary search and seizure:¹⁰¹ because a "search" within the body

⁹⁵*Id.* at 18 n.15. As in *Camara*, the standard of probable cause set down by the *Terry* Court was a general one:

And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. . . . And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of seizure or search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Id. at 21-22 (footnotes and citations omitted).

⁹⁶See note 25 *supra*.

⁹⁷384 U.S. 757, 769 (1966).

⁹⁸The Court found that "there was plainly probable cause" for the arrest. *Id.* at 768.

⁹⁹*Id.* at 769.

¹⁰⁰*Id.* at 769-70 (emphasis supplied).

¹⁰¹Amsterdam, *supra* note 73, at 390, 463 n.393. A similar position was taken by Justice Stewart, concurring in *Berger v. New York*, 388 U.S. 41, 68-70 (1967). At issue in *Berger* was the constitutionality of the New York eavesdropping statute, which permitted the issuance of a warrant upon oath that "there is reasonable ground to believe that evidence of crime may be thus obtained." *Id.* at 43 n.1. Although the Court noted that this provision "raises a serious probable-cause question under the Fourth Amendment," *id.* at 54-55, its holding rested on the ground of impermissible generality. See notes 109-111 *infra* & text accompanying Stewart,

itself is such a serious intrusion on personal security, the Court seemed to suggest that something more than traditional probable cause—a “clear indication”—be shown to justify the search. Professor Amsterdam has recognized this position, noting that: “Together, *Terry* and *Schmerber* might support a general fourth amendment theory that increasing degrees of intrusiveness require increasing degrees of justification and increasingly stringent procedures for the establishment of that justification.”¹⁰²

In this sense, a hierarchical view of the fourth amendment has persuasive authority and its extension to private papers is eminently logical. The unique fourth amendment privacy interests inherent in private papers¹⁰³ justify the more stringent probable cause protection suggested in *Schmerber*. If Courts are to consider the degree of intrusiveness of a search in analyzing the procedural requirements of the fourth amendment, it is only sensible to take into account content considerations. In this way, the probable cause requirement can furnish a significant amount of protection for private papers.

Specificity

The second substantive protection afforded by the warrant clause is the specificity requirement. Only warrants “particularly describing the place to be searched, and the persons or things to be seized” are lawful under the fourth amendment.¹⁰⁴ It is this requirement that most directly protects against the evils of the general warrant, under which indiscriminate and unrestrained searches were conducted as a matter of course.¹⁰⁵ In *Stanford v. Texas*,¹⁰⁶ this policy against general warrants was applied to invalidate a search conducted pursuant to a Texas statute which outlawed the Communist Party and authorized the issuance of warrants for the seizure of books, records or “any

however, concurred only in the result, believing that the affidavits in support of the warrant did not constitute a showing of probable cause. After stating that “[t]he standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion,” *id.* at 69, Stewart noted that the affidavits contained only bare references to evidence in the government’s possession. He then concluded: “[t]his might be enough to satisfy the standards of the Fourth Amendment for a conventional search or arrest. But I think it was constitutionally insufficient to constitute probable cause to justify an intrusion of the scope and duration that was permitted in this case.” *Id.* at 70 (citation omitted).

¹⁰²Amsterdam, *supra* note 73, at 390.

¹⁰³See notes 61-72 *supra* & text accompanying.

¹⁰⁴U.S. CONST. amend. IV. See generally Mascolo, *Specificity Requirements For Warrants under the Fourth Amendment: Defining the Zone of Privacy*, 73 DICK. L. REV. 1 (1968).

¹⁰⁵See *Stanford v. Texas*, 379 U.S. 476 (1965); LANDYNSKI, *supra* note 14, at 45-46. The function of the specificity requirement was described by the Supreme Court fifty years ago:

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Marron v. United States, 275 U.S. 192, 196 (1927).

¹⁰⁶379 U.S. 476 (1965).

written instruments" that evidenced a violation of the Act.¹⁰⁷ To a large degree, the holding of *Stanford* rests on the presence of first amendment considerations. The specificity requirement, according to the Court, "is to be accorded the most scrupulous exactitude when the 'things' [to be seized] are books, and the basis for their seizure is the ideas which they contain."¹⁰⁸ No such considerations, however, were present in *Berger v. New York*,¹⁰⁹ where the Court invalidated the New York eavesdropping statute. The statute authorized the issuance of a court order upon the showing of a "reasonable ground" to believe that criminal evidence would be obtained and required a particular description of the person or persons whose conversations were to be overheard "and the purpose thereof."¹¹⁰ This standard was insufficient under the fourth amendment's specificity requirement: "the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations. . . . As with general warrants this leaves too much to the discretion of the officer executing the order."¹¹¹ However, the Court's specificity objections do not seem insurmountable. Its analysis on this point is sketchy, largely because the deficiency of the New York statute was egregious. The Court hinted that a warrant describing the type of conversation sought and the crime suspected would be sufficiently particular.¹¹²

Dictum in *Berger*, however, suggests that the required showing of specificity may vary with the extent of the intrusion worked by a given search and seizure, for the Court noted that "[t]he need for particularity . . . is especially great in the case of eavesdropping" because of the nature of the in-

¹⁰⁷*Id.* at 477. After obtaining such a warrant, Texas police went to defendant's home and conducted a five-hour search, seizing 2000 books, pamphlets and papers. *Id.* The Supreme Court vacated the Texas court's denial of defendant's motion to annul the warrants holding that it constituted a general warrant prohibited by the fourth amendment. In full, the warrant authorized the seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas." *Id.* at 486. According to the Court: "The indiscriminate sweep of that language is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history." *Id.*

¹⁰⁸*Id.* at 485 (footnote omitted). In fact, the Court made it clear that it was not deciding "whether the description of the things to be seized would have been too generalized to pass constitutional muster, had the things been weapons, narcotics or 'cases of whiskey.'" *Id.* at 486.

¹⁰⁹388 U.S. 41 (1967).

¹¹⁰*Id.* at 43 n.1.

¹¹¹*Id.* at 59. See also *id.* at 55-56. The precedential value of *Berger*, however, may be limited. In the first place, the precise holding of the decision is unclear because the Court found many deficiencies in the New York statute apart from the lack of a specificity requirement. These included the overly-long, two-month authorization period (characterized as "the equivalent of a series of intrusions . . . pursuant to a single showing of probable cause"), the ease with which extensions of this period could be authorized, and the lack of a termination date once the conversation sought is seized. *Id.* at 58-60. The Court summarized its objections in very general terms: "In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." *Id.* at 60. See 81 HARV. L. REV. 69, 188-90 (1967).

¹¹²See 388 U.S. at 56-57; 81 HARV. L. REV. at 189.

trusion.¹¹³ The same idea was expressed in the *Stanford* case, where the Court stated that the specificity requirement was "to be accorded the most scrupulous exactitude" when first amendment interests were implicated in the search.¹¹⁴ As with the variable standard of probable cause enunciated in *Camara, Terry* and *Schmerber*,¹¹⁵ language in *Berger* and *Stanford* suggests that a higher standard of specificity will be required for more intrusive searches.¹¹⁶ The intrusive nature of a search for private papers¹¹⁷ justifies a similarly stringent standard of specificity. At the least, where private papers are involved, courts should take care to ensure that the specificity requirement is accorded more than lip service.

Potentially, the fourth amendment requirement of particularity in the description of things to be seized provides a significant degree of protection to private papers. In simplistic terms, if personal papers sought by the government can be particularly described, they may well not be "private." Conversely, truly private papers may be incapable of sufficiently particular description to justify their seizure pursuant to a search warrant. In practical effect, however, the protection of the specificity requirement is much more limited. Courts seem to follow a general rule which requires only that the description of items sought be "as specific as the circumstances of the particular case permit,"¹¹⁸ so that the protection afforded by the specificity requirement may be more apparent than real.¹¹⁹ A similar conclusion may be drawn from the

¹¹³388 U.S. at 56. Because of the intrusive nature of an eavesdropping "search," implicating the policies underlying the fourth and fifth amendments, the Court stated that governmental use of eavesdropping devices "imposes 'a heavier responsibility on this Court in its supervision of the fairness of procedures.'" *Id.*, quoting *Osborn v. United States*, 385 U.S. 323 (1966).

¹¹⁴*Stanford v. Texas*, 379 U.S. 476, 485 (1965). Although *Stanford* is distinguishable on the basis of the first amendment considerations involved there, it nevertheless suggests that the requirements of the fourth amendment's specificity provision may be more stringent for more intrusive searches. What made the search in *Stanford* highly intrusive was the fact that it impinged on first amendment interests.

¹¹⁵See notes 90-102 *supra* & text accompanying.

¹¹⁶The Court's statement in *Berger* was based on its view of the intrusive nature of electronic eavesdropping: "By its very nature eavesdropping involves an intrusion on privacy that is broad in scope." 388 U.S. 41, 56 (1967). See note 113 *supra*. Likewise in *Stanford*, the search was highly intrusive because it touched upon first amendment interests. See text accompanying note 108 *supra*. Thus, "[t]he general requirement of particularity in warrants is more strictly applied in situations involving the seizure of materials which arguably fall within the First Amendment's protection of free expression." *United States v. Manarite*, 314 F. Supp. 607, 610 (S.D.N.Y. 1970) (footnote omitted).

¹¹⁷See notes 61-72 *supra* & text accompanying.

¹¹⁸*United States v. Robinson*, 287 F. Supp. 245, 256 (N.D. Ind. 1968).

¹¹⁹An extreme example of how little particularity may be held sufficient to support a warrant is presented in *People ex rel. Carey v. Covelli*, 61 Ill. 2d 394, 336 N.E.2d 759 (1975). At issue in *Carey* was the validity of a search warrant directed to the unknown contents of a desk, a safe, and a locked filing cabinet belonging to Sam Giancana, a leading underworld figure who had been murdered in his home. On the theory that their contents would aid in discovery of the killer's identity, the State's Attorney obtained a warrant to search the desk, safe and cabinet. In sustaining the search, the court was forced to concede, by way of an understatement, that the objects of the search were "not described with particularity" in the warrant. *Id.* at 404, 336 N.E.2d at 765. This defect, however, was not fatal under the court's decidedly pragmatic ap-

Supreme Court's decision in *Andresen v. Maryland*.¹²⁰ *Andresen* involved a real estate fraud investigation which culminated in the conviction of the defendant on counts of false pretenses and misappropriation of a fiduciary in connection with his settlement activities relating to certain realty. The government investigators obtained warrants to search Andresen's law office and the separate office of a real estate corporation of which he was sole shareholder. Each warrant named a long list of items "pertaining to sale, purchase, settlement and conveyance" of Lot 13-T and concluded with the phrase "together with other fruits, instrumentalities and evidence of crime at this (time) unknown."¹²¹ The defendant challenged the searches of his offices on the ground that they were conducted pursuant to general warrants, contending that the concluding phrase in the warrants rendered them "fatally general."¹²² The Court, however, narrowly construed the phrase as limited to evidence relating to the crime of false pretenses with respect to Lot 13-T. With this limiting construction, the Court concluded that the warrants "did not authorize the executing officers to conduct a search for evidence of other crimes,"¹²³ and that they were therefore not violative of the fourth amendment's specificity requirement.

The Court's analysis suffers from two defects. First, its limiting construction of the warrants is necessarily *post facto*.¹²⁴ An even more significant shortcoming, however, is the failure to consider the extent of the searches conducted under the warrants. The search in *Andresen* resulted in the seizure of 80 items, of which 62 were either returned by the government or suppressed

proach. The legality of the search and the sufficiency of the warrant were to be determined not by whether there was compliance with the express requirements of the warrant clause, but rather were to be judged under the broad rubric of reasonableness. *Id.* The use of a reasonableness standard necessarily involves some type of interest balancing. The state's interest in solving the murder of Giancana was clear. The countervailing interest was a concern for the privacy of the deceased's daughters. The balance was struck by permitting the search, but providing for an *in camera* examination of the seized contents, at which time questions of relevance and privilege could be resolved. Under the analysis, the *Carey* court effectively read out of the fourth amendment any specificity requirement whatsoever.

¹²⁰427 U.S. 463 (1976).

¹²¹*Id.* at 480-81 n.10.

¹²²The defendant also argued that the list of items contained in the warrants was so inclusive as to constitute a general warrant. The Court rejected this position in a footnote, emphasizing the complexity of the crime involved and the clear showing of probable cause made by the government. *Id. Berger v. New York* was distinguished on the basis of the complete lack of particularity in the warrants at issue in that case.

¹²³427 U.S. at 481-82.

¹²⁴Nowhere in its discussion does the Court consider how the warrants were interpreted by the investigators at the time of execution, nor does the Court come to grips with the nature and extent of the searches conducted pursuant to the warrants. As Justice Brennan's terse dissent points out, the Court's limiting construction of the warrants was not available to those executing the warrants. According to Brennan, the test for determining whether the warrants were sufficiently particular is not one of hindsight, "but how they were in fact viewed by those executing them." 427 U.S. at 493. On this point there was testimony in the record indicating that many of Andresen's papers were seized indiscriminately. *Id.* at 493 n.8.

by the trial court for lack of relevancy to the crime charged.¹²⁵ When 75% of the items seized pursuant to a warrant are irrelevant to the prosecution's case, that warrant can hardly be said to leave no discretion to the person executing it.¹²⁶ Nor should such a warrant be held, under the fourth amendment, to particularly describe the evidence it purports to have seized. On the facts of *Andresen*, Justice Brennan seems correct in his view that "[t]he overwhelming quantity of seized material that was either suppressed or returned to petitioner is irrefutable testimony to the unlawful generality of the warrants."¹²⁷ The *Andresen* Court's lack of sensitivity to the generality of the search greatly reduces the protection afforded private papers by the fourth amendment's specificity requirement.

Institutional Aspects of the Warrant Requirement

A final protection afforded by the warrant clause to private papers—which may be termed an institutional one—is not easily measured without venturing into the realm of social psychology. Although it may be "notoriously easy for prosecutors to obtain search warrants,"¹²⁸ it is still likely that adherence to the warrant requirement is not without a protective effect. Recognizing that judicial approval through the warrant procedure often partakes of the "rubberstamp," one commentator nevertheless concluded:

Just the same, adherence to the procedure obliges the police to deliberate before making a search, to determine in advance how wide the search will be, and to articulate the reason for the search with some specificity. The police might be required also, on a nonconstitutional basis, to state in advance their conclusion that the need to search outweighs the intrusion, and to give reasons for the conclusion if they are not obvious. No doubt such statements would often be boilerplate. But sometimes they would not; how seriously the police responded to such a requirement would depend on how seriously we took their responses. In any event, even boilerplate offers some protection.¹²⁹

¹²⁵*Id.* at 467.

¹²⁶At the outset of its discussion of the issue, the Court routinely expressed the standard that under a properly specific search warrant, "nothing is left to the discretion of the officer executing the warrant." *Id.* at 480, quoting *Marron v. United States*, 275 U.S. 192, 196 (1927). See note 105 *supra*.

¹²⁷427 U.S. at 493. Apart from the specificity issue, the facts of *Andresen* illustrate another potential fourth amendment problem with the search and seizure of private papers. Such searches are inherently intrusive because they almost necessarily possess an exploratory character: in the usual case, all of an individual's papers will need to be examined in order to determine which ones are within the warrant description. This is true no matter how particularly the papers sought under the warrant are described. The issue therefore goes to the broader standard of reasonableness under the fourth amendment rather than to compliance with warrant clause requirements. See notes 148-149 *infra* & text accompanying.

¹²⁸Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169, 190-91 (1969).

¹²⁹Weinreb, *supra* note 59, at 72.

In short, the mere fact that an officer or agent is required to go before a magistrate and ask permission to conduct a search, and in the course of the request to justify and describe the search he desires to undertake, is beneficial to privacy concerns.¹³⁰

THE REQUIREMENT OF REASONABLENESS

Under the fourth amendment's first clause, all "unreasonable searches and seizures" are forbidden. The primary focus of judicial concern under this clause arises in the context of warrantless searches in which a court must determine whether to uphold a given search and seizure on the ground of reasonableness. Generally, there is something akin to a presumption of unreasonableness for searches conducted without a warrant. At the least, such searches are definitely disfavored;¹³¹ however, where a warrant has been obtained, the search will most often be held reasonable.¹³² In short, the warrant requirement is generally viewed as a sufficient but not a necessary condition to satisfy the fourth amendment's reasonableness standard.

This conclusion is by no means compelled by the language or history of the fourth amendment. The two clauses of the fourth amendment are grammatically independent and there is no conceptual obstacle to a holding that the reasonableness requirement "transcends the procedural safeguards of particularity and probability in the second clause."¹³³ Moreover, the position that the reasonableness requirement has operational significance apart from the warrant clause is supported by the history and policies of the fourth amendment. As Professor Amsterdam points out, the warrant clause alone is clearly sufficient to combat the evils of the general warrant;¹³⁴ and because "the framers were disposed to generalize to some extent beyond the evils of the immediate past,"¹³⁵ the conclusion that the fourth amendment's proscription against unreasonable searches and seizures imposes limitations on governmen-

¹³⁰The salutary effects of the warrant requirement were recently noted by the Supreme Court:

Once a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization "particularly describing the place to be searched and the persons or things to be seized." Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.

United States v. Chadwick, 433 U.S. 1, 9 (1977) (citation omitted).

¹³¹See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (quoting earlier cases for the proposition that the warrant requirement is "subject only to a few specifically established and well-delineated exceptions"); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 358 (1977).

¹³²Weinreb, *supra* note 59, at 69-70.

¹³³T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 67 (1969).

¹³⁴Amsterdam, *supra* note 73, at 399.

¹³⁵*Id.* See *United States v. Chadwick*, 433 U.S. 1, 9 (1977) ("the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth").

tal activity beyond those of the warrant clause is a proper one. The protection afforded by the reasonableness clause may be based on either the nature of the evidence sought or the manner in which it is obtained. Once again, however, it must be emphasized that the content-manner dichotomy is not a rigid one.

Historically, the position that the reasonableness requirement of the fourth amendment prohibits the seizure of certain evidence based solely upon its nature or content is a very familiar one; but with the rejection of the mere evidence rule¹³⁶ in *Warden v. Hayden*,¹³⁷ the availability of an absolute content-based protection was called into question. In essence, characterizing the seizure of certain private papers as unreasonable per se would recognize a private inner sanctum into which government may not intrude. By clear implication, however, the *Andresen* decision has rejected such a construction of the reasonableness clause.¹³⁸ Indeed, commentators treat the issue as unequivocally settled that in terms of the content of the evidence seized, the reasonableness clause adds nothing whatsoever to the protection of the warrant clause.¹³⁹ Arguments for a contrary interpretation, espousing an absolute protection for certain types of private papers, are better made to legislatures¹⁴⁰ and state courts.¹⁴¹

In the absence of an absolute content-based protection under the reasonableness clause, courts have focused their inquiry primarily upon the manner in which a search is undertaken and conducted. It does not follow

¹³⁶Under the mere evidence rule, items which were neither contraband nor fruits or instrumentalities of a crime, items of purely evidentiary value, were not seizable under the fourth amendment. See generally Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593 (1966). Because private papers were seldom within the categories of contraband, fruits or instrumentalities, the mere evidence rule served as an independent basis for constitutional protection.

¹³⁷387 U.S. 294 (1967). *Hayden*, anticipating the private papers issue, expressly reserved the question of "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." *Id.* at 303.

¹³⁸*Andresen v. Maryland*, 427 U.S. 463 (1976). The significance of *Andresen* in this regard lies in the fact that although the evidence was treated as incriminating and testimonial in the fifth amendment sense, none of the three opinions in the case so much as adverted to the possibility that the reasonableness requirement had an independent significance.

¹³⁹See, e.g., Weinreb, *supra* note 59, at 69-70; HARVARD Note, *supra* note 1, at 979.

¹⁴⁰The ALI has recognized a class of documents which, under its model code, are immune from governmental seizure:

Documents Not Subject to Seizure. With the exception of handwriting samples, and other writings or recordings of evidentiary value for reasons other than their testimonial content, things subject to seizure under Subsection (1)(a) shall not include personal diaries, letters, or other writings or recordings, made solely for private use or communication to an individual occupying a family, personal or other confidential relation, other than a relation in criminal enterprise, unless such things have served or are serving a substantial purpose in furtherance of a criminal enterprise.

ALI MODEL CODE OF PRE-ARREST PROCEDURE § 210.3(2) (1975).

¹⁴¹State constitutional guarantees are being invoked by criminal defendants and relied upon by state courts with increasing frequency. For a discussion, see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977), and authorities cited therein.

from this, however, that content-based considerations are irrelevant. Indeed, this paper has advocated that such considerations, because they are relevant in determining the intrusiveness of a search, should influence the application of the fourth amendment's procedural safeguards.¹⁴² Moreover, a court's constitutional inquiry cannot end when it is satisfied that the procedural requirements of the warrant clause have been complied with. There are many examples of searches which have been held unreasonable under the fourth amendment despite compliance with the requirements of probable cause and specificity.¹⁴³ In *Stanford Daily v. Zurcher*,¹⁴⁴ for example, a search was declared unreasonable on the ground that there existed less intrusive means by which to obtain the evidence sought.¹⁴⁵ In addition, the manner in which a search is executed is relevant to a determination of its reasonableness: a search subsequent to an illegal entry, otherwise valid, will be held unlawful.¹⁴⁶ Finally, there are certain searches and seizures which because of their intrusive nature are almost unreasonable per se, despite the existence of probable cause.¹⁴⁷

Logically, these cases establish that the reasonableness clause has significance independent of the warrant clause on issues relating to the manner in which a search and seizure is executed. From this premise, the proposition can be advanced that the manner in which a search of private papers is usually conducted provides a conceptual basis for declaring such searches unreasonable. A search involving private papers is uniquely intrusive. Because the search for private papers, even if particularly described in the warrant, invariably necessitates the perusal of other wholly innocent papers,¹⁴⁸ such a search partakes of the same generality characteristic of the sweeping exploratory searches at which the fourth amendment was directed.¹⁴⁹ Therefore,

¹⁴²See notes 90-102, 113-17 *supra* & text accompanying.

¹⁴³Perhaps the most familiar example of this situation is a search which, although valid at its inception, is held unreasonable due to the manner in which it is thereafter conducted. See *Terry v. Ohio*, 392 U.S. 1, 17-18 (1968).

¹⁴⁴353 F. Supp. 124 (N.D. Cal. 1972), *aff'd and adopted as the opinion of the court*, 550 F.2d 464 (9th Cir. 1977).

¹⁴⁵*Id.* at 127-30. See LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 158-60.

¹⁴⁶See *Ker v. California*, 374 U.S. 23, 38 (1963) ("the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the legality of an accompanying search"); *People v. Stephens*, 18 Ill. App. 3d 817, 310 N.E.2d 755 (1974). See also *United States v. Prudden*, 424 F.2d 1021, 1032 (5th Cir. 1970) ("fraud, deceit or trickery in obtaining access to incriminating evidence can make an otherwise lawful search unreasonable").

¹⁴⁷In *Adams v. State*, 260 Ind. 663, 299 N.E.2d 834 (1973), a court-ordered surgical operation to remove a bullet from the body of a suspect was declared unconstitutional as an unreasonable search and seizure. See also *United States v. Willis*, 85 F. Supp. 745 (S.D. Cal. 1949) (stomach pumping constitutes unreasonable search and seizure).

¹⁴⁸*Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976).

¹⁴⁹*State v. Bisaccia*, 45 N.J. 504, 515-16, 213 A.2d 185, 191 (1965). See *United States v. Zive*, 299 F. Supp. 1273 (S.D.N.Y. 1969). Cf. *United States v. Beck*, 511 F.2d 997, 1003 (6th Cir. 1975) (seizure of one page of spiral notebook reasonable, the court noting that "there was not extensive rummaging").

the position that the search and seizure of private papers is unreasonable under the fourth amendment is conceptually consistent even with the modern emphasis on the manner of the search rather than on the content of the evidence.

The *Andresen* Court recognized the intrusive nature of a search involving personal papers, noting that there are "grave dangers" in such a search due to the fact that many innocent papers will have to be examined in the course of the search.¹⁵⁰ Having stated the problem, however, the Court went no further with it, content with a meaningless admonishment to "responsible officials" to behave "in a manner that minimizes unwarranted intrusions upon privacy."¹⁵¹ The implication of *Andresen* is that the intrusive nature of a search for private papers, although regrettable, is not of constitutional significance.¹⁵²

Fourth Amendment Protection: Compulsory Process

In the *Boyd* case, it will be recalled, a court order directing the production of a partnership invoice was held to constitute an unreasonable search and seizure in violation of the fourth amendment.¹⁵³ The rule of almost *per se* unreasonableness enunciated there was soon greatly modified by limiting fourth amendment objections to subpoenas primarily to claims of relevancy and overbreadth.¹⁵⁴ Later decisions evidence a similar very high degree of judicial deference toward the investigative powers of administrative bodies and grand juries. As recently as 1946, in the major case of *Oklahoma Press Publishing Co. v. Walling*,¹⁵⁵ the Court expressed doubt as to whether the

¹⁵⁰427 U.S. at 482 n.11.

¹⁵¹*Id.* The Court's language, hopefully inadvertent, is very interesting. One would assume that "unwarranted" intrusions upon privacy are "unreasonable" under the fourth amendment. Literally, that is not what the Court tells us. Rather, such "unwarranted" intrusions need not be forbidden, but merely "minimized."

¹⁵²This implication pervades the *Andresen* majority opinion; however, such a conclusion must be tempered in light of the concern for privacy expressed in *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977). Under the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 (1974), 42 million pages of documents and 880 tape recordings relating to Nixon's term in office were to be scrutinized by government archivists. It was not disputed that some of the papers and tapes, albeit a very small percentage, 433 U.S. at 454-56, contained very personal and wholly private matters.

The several opinions that discuss Nixon's privacy claim all evince a concern for privacy markedly stronger than its perfunctory treatment in *Andresen*. See *id.* at 487-91 (White, J., concurring); *id.* at 525-36 (Burger, C.J., dissenting). The Court's opinion rejected the claim, *id.* at 455-65, but only after thorough consideration and a careful balancing of interests.

¹⁵³*Boyd v. United States*, 116 U.S. 616 (1886). See notes 17-19 *supra* & text accompanying.

¹⁵⁴See *Hale v. Henkel*, 201 U.S. 43 (1906). The subpoena in *Hale* was not enforced because it was held to be "far too sweeping in its terms." *Id.* at 76.

¹⁵⁵327 U.S. 186 (1946). *Oklahoma Press* involved subpoenas duces tecum issued by the Wage and Hour Administrator in the course of investigations under the Fair Labor Standards Act. The Supreme Court affirmed the court of appeals' enforcement of the subpoenas.

fourth amendment imposed *any* limitations on the subpoena process.¹⁵⁶ The analysis in most court decisions discussing the application of the fourth amendment to documentary subpoenas is inaccurate and incomplete. First, the Court's statement in *Oklahoma Press* that the enforcement of a subpoena presents "no question of actual search and seizure"¹⁵⁷ fundamentally misconceives the scope of the fourth amendment's protection. Second, most decisions fail to subject fully the subpoena process to the requirement of reasonableness. Moreover, the privacy interests in private papers under a hierarchical theory of the fourth amendment require a higher substantive standard of reasonableness than has traditionally been applied to the subpoena process.

THE APPLICABILITY OF THE FOURTH AMENDMENT

At the outset, it should no longer be controverted that an order for the production of papers constitutes a search and seizure within the meaning of the fourth amendment. The *Boyd* Court's holding that a documentary subpoena, because it "effects the sole object and purpose of search and seizure," is fully within the scope of the fourth amendment,¹⁵⁸ remains persuasive. A contrary conclusion must be based solely on a literal interpretation of the fourth amendment's language. Such a literal reading of search and seizure is exactly the "close construction" of constitutional guarantees that *Boyd* cautioned against.¹⁵⁹

The Court in *Oklahoma Press* was quite clear that a "basic distinction" existed between *actual* and *figurative* searches and seizures, although no rationale was offered to support this distinction.¹⁶⁰ This view of the fourth

¹⁵⁶See 327 U.S. at 195 (enforcement of subpoenas presents "no question of actual search and seizure"); *id.* at 208 (the fourth amendment, *if applicable*, of limited scope). And, assuming applicability, the role of the amendment was held to be an extremely limited one:

[The fourth amendment] at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

Id. at 208. See also *id.* at 209: "It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." See generally 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3.01-3.12 (1958) [hereinafter cited as DAVIS]. These same standards apply to grand jury subpoenas. See *United States v. Morton Salt Co.*, 338 U.S. 632, 632-43 (1950); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 209 (1946); *In re Horowitz*, 482 F.2d 72, 79 (2d Cir. 1973).

¹⁵⁷327 U.S. at 195.

¹⁵⁸116 U.S. at 622.

¹⁵⁹*Id.* at 635.

¹⁶⁰See 327 U.S. at 202, 204. The Court's analysis assumed its conclusion: "Only in this analogical sense can any question related to search and seizure be thought to arise in situations which, like the present ones, involve only the validity of authorized judicial orders." *Id.* at 202. The fact that a great deal of constitutional decision making is founded on an "analogical sense," *Boyd* being a quintessential example, was ignored. *Boyd* itself was distinguished in one sentence,

amendment was quite consistent with the prevailing mode of interpretation expressed in *Olmstead v. United States*.¹⁶¹ *Olmstead* held that wiretapping was wholly outside the fourth amendment because it did not constitute a search and seizure. Under the Court's literalistic analysis, the fourth amendment protected only "persons, houses, papers, and effects," and therefore did not apply to a "search" of an intangible conversation.¹⁶² Neither was wiretapping held to constitute a fourth amendment "seizure": there was no trespass involved and evidence was obtained solely through the sense of hearing.¹⁶³ Although the *Olmstead* decision was not cited in *Oklahoma Press*, the later opinion, in expressing doubt as to the applicability of the fourth amendment to the subpoena process, exhibited a similar rigidity of interpretation.

Olmstead's narrow reading of the fourth amendment was finally overruled in *Katz v. United States*.¹⁶⁴ *Katz* rejected a literal interpretation of search and seizure, holding that "the reach of [the fourth amendment] cannot turn upon the presence or absence of a physical intrusion into any given enclosure."¹⁶⁵ This broader interpretation of the scope of the fourth amendment¹⁶⁶ has been reinforced by other decisions¹⁶⁷ and now seems firmly established. Under this interpretation, a documentary subpoena, because it constitutes a governmental invasion of an individual's security and privacy, is within the scope of the fourth amendment even though the actual physical intrusion of the classic search and seizure is lacking. This result, in fact, has been reiterated by the Supreme Court on a number of occasions.¹⁶⁸

In short, because a subpoena ordering the production of private papers is a form of governmental intrusion into an individual's privacy and security and because it is functionally equivalent in purpose to an *actual* search and

on the ground that the statute involved provided "a drastically incriminating method of enforcement." *Id.* at 208. This "distinction," although proper for fifth amendment purposes, does not go to the question of fourth amendment applicability to subpoenas.

¹⁶¹277 U.S. 438 (1928).

¹⁶²*Id.* at 464.

¹⁶³*Id.* at 464-66.

¹⁶⁴389 U.S. 347 (1967).

¹⁶⁵*Id.* at 353.

¹⁶⁶"The vision of the Fourth Amendment that emerges from [*Katz*] is that any effort by a government agent to obtain information falls within the ban of the Fourth Amendment if it intrudes upon a citizen's security." Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 134.

¹⁶⁷*See, e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968). One issue in *Terry* was whether a stop and frisk constituted a search and seizure within the fourth amendment. The Court held that it did and stated that previous distinctions between a mere *stop* and a full *arrest* were to be discarded for purposes of deciding the fourth amendment's applicability. Search and seizure are not talismans, said the Court, and the previous distinctions merely "serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Id.* at 19. A documentary subpoena should be viewed in the same way—as a "governmental invasion of a citizen's personal security"—and thus within the fourth amendment.

¹⁶⁸*See, e.g.*, *United States v. Calandra*, 414 U.S. 338, 346 (1974); *See v. City of Seattle*, 387 U.S. 541, 544 (1967).

seizure, such a subpoena must be held to be within the protective ambit of the fourth amendment. The constitutional literalism of the *Olmstead* decision has been rightfully rejected and should not be resurrected in this context.¹⁶⁹

REASONABLENESS AND SUBPOENAS

It is well established that the issuance of a governmental subpoena need not comply with the probable cause and specificity requirements of the fourth amendment.¹⁷⁰ As a general proposition, this is perfectly acceptable, for the ultimate standard by which to judge the validity of a fourth amendment intrusion is reasonableness and, other things being equal, obtaining evidence by a subpoena is less intrusive than the same acquisition accomplished pursuant to an actual search and seizure.¹⁷¹ It is this fact which provides the most cogent rationale for not subjecting subpoenas to the requirements of the warrant clause.¹⁷²

¹⁶⁹Nevertheless, it has been suggested, by respectable authority, that the constitutional protection against an overbroad documentary subpoena "rests not on the Fourth Amendment but on the less rigid requirements of the due process clause." *In re Horowitz*, 482 F.2d 72, 79 (2d Cir. 1973) (Friendly, J.). In addition to quoting language from *Oklahoma Press*, see note 156 *supra* & text accompanying, *Horowitz* placed reliance upon *United States v. Dionisio* 410 U.S. 1 (1973). In *Dionisio*, a grand jury investigation had obtained certain recordings and subpoenaed approximately twenty people to appear before the grand jury and give voice exemplars. Dionisio based his refusal to comply on fourth and fifth amendment grounds. The Court stated that the fourth amendment was relevant in two ways and then rejected each one. First, the Court held that a subpoena to appear before a grand jury does not constitute a "seizure" in the fourth amendment sense, based primarily on "the historically grounded obligation of every person to appear and give his evidence before the grand jury." *Id.* at 9-10. Second, the grand jury's directive to furnish the voice exemplar was held not to violate the fourth amendment because Dionisio could have no reasonable expectation of privacy in the physical characteristics of his voice. What a person "knowingly exposes to the public" is not protected by the fourth amendment. *Id.* at 14, quoting *Katz v. United States*, 389 U.S. 347, 351 (1967). This same rationale was relied upon in the companion case of *Dionisio*, *United States v. Mara*, 410 U.S. 19 (1973), a case involving a grand jury directive to produce a handwriting exemplar. See notes 175-178 *infra* & text accompanying.

In each part of its analysis, however, *Dionisio* is clearly distinguishable from the case of a subpoena directing the production of private papers. Even assuming that an order to appear before the grand jury does not constitute a fourth amendment seizure, a conclusion not free from dispute, see, e.g., 410 U.S. at 38-51 (Marshall, J., dissenting), *Dionisio* itself emphasized that a grand jury subpoena is not a "talismán that dissolves all constitutional protections." The Court explicitly noted that the grand jury's subpoena *duces tecum* power is limited by the fourth amendment. 410 U.S. at 11. The second holding of *Dionisio*, that the physical characteristics of a person's voice are not protected by the fourth amendment because they are knowingly exposed to the public, see *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 459 (1977) (citing *Dionisio* for this proposition), is of course inapplicable to a situation in which private papers are sought. Not only are such papers not exposed to the public, but they fall within the very core of the fourth amendment right of privacy.

¹⁷⁰See *United States v. Morton Salt Co.*, 338 U.S. 632, 652-54 (1950); DAVIS, *supra* note 156, § 3.12.

¹⁷¹*Stanford Daily v. Zurcher*, 353 F. Supp. 124, 130 (N.D. Cal. 1972), *aff'd and adopted as the opinion of the court*, 550 F.2d 464 (9th Cir. 1977).

¹⁷²A failure fully to appreciate this fact has led some authorities to the conclusion that subpoenas need not comply with the probable cause and specificity requirements because they are not within the scope of the fourth amendment. Professor Davis, for example, argued that the ra-

Therefore, to determine the fourth amendment validity of a documentary subpoena, some substantive content must be given to the general standard of reasonableness. As to corporate books and records, because true privacy interests are generally not implicated,¹⁷³ the reasonableness standard is easily satisfied.¹⁷⁴ Outside of the corporate context, where the production of papers by an individual is sought to be compelled, the proper standard is less certain. In *United States v. Mara*,¹⁷⁵ the Supreme Court held that a grand jury need not make a preliminary showing of reasonableness before issuing a subpoena directing production of handwriting and printing exemplars, reversing the court of appeals, which had imposed a minimal reasonableness requirement upon the subpoena process.¹⁷⁶ On the issue of the application of the fourth amendment to subpoenas, however, *Mara* is not dispositive, for its holding is quite narrow. Because an individual's handwriting is repeatedly

tionale of the *Boyd* case compelled the following syllogism: (1) compulsory production pursuant to a subpoena constitutes a search and seizure; (2) probable cause must be established to obtain a warrant authorizing a search and seizure; therefore, (3) probable cause is required for the compulsory production of records. DAVIS, *supra* note 156, § 3.12. Because the conclusion of this syllogism is contrary to settled law, a temptation exists to ascribe the error to the first premise. It should be clear, however, that this is not the case; rather, it is the intermediate premise that is faulty: probable cause is not required to justify every "search and seizure." Once it is recognized that the ultimate standard under the fourth amendment is reasonableness, the logical consistency of holding subpoenas within the scope of the fourth amendment yet not subject to the warrant clause requirements becomes apparent.

¹⁷³See *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (a business may be subject to "intrusions that would not be permissible in a purely private context").

¹⁷⁴See *See v. City of Seattle*, 387 U.S. 541 (1967). The Court stated: "It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive, so that compliance will not be unreasonably burdensome." *Id.* at 544. See also *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946), *supra* note 156.

¹⁷⁵410 U.S. 19 (1973).

¹⁷⁶*Mara* had been directed by the grand jury to furnish it with handwriting and printing exemplars and had refused. The district court, after considering *in camera* an affidavit submitted by an FBI agent, ordered *Mara* to comply. On appeal, the court held that the order was subject to the fourth amendment reasonableness requirement and proceeded to analyze that requirement. *In re* September 1971 Grand Jury (*Mara*), 454 F.2d 580, 582 (7th Cir. 1971). On the facts, the court of appeals fashioned a two-pronged standard of reasonableness. The first requirement was procedural: the government was required to present its affidavit in open court so that *Mara* could contest its sufficiency. *Id.* at 582-84. Second, the court imposed substantive requirements upon the government. Reasonableness, the court emphasized, was not synonymous with probable cause, but did require a showing that "the grand jury investigation was properly authorized, for a purpose Congress can order, that the information sought is relevant to the inquiry, and that the grand jury's request for exemplars is 'adequate, but not excessive, for the purposes of the relevant inquiry.'" *Id.* at 584-85, quoting *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 209 (1946). The "adequate, but not excessive" standard was interpreted to require an affirmative showing "that the grand jury process is not being abused." *Id.* at 585. The court presented two instances which it thought would constitute an abuse of the grand jury process. First, the government should not be permitted "to conduct a general fishing expedition under grand jury sponsorship with the mere explanation that the witnesses are potential defendants." *Id.* Second, the government must show why satisfactory exemplars "cannot be obtained from other sources without grand jury compulsion." *Id.* Because the government had failed to satisfy either the procedural or the substantive reasonableness standards prescribed by the court, *Mara* was granted a short-lived reversal.

shown to the public, the court reasoned, no protectable expectation of privacy exists therein and the grand jury directive violated no legitimate fourth amendment interest of Mara's; therefore, the Court held that the government was under no obligation to make a preliminary showing of reasonableness.¹⁷⁷ The Court's analysis was thus at an end upon resolution of the threshold question of fourth amendment applicability. Because that amendment provides no protection for physical characteristics that are knowingly exposed to the public, such as a person's voice or handwriting, a "seizure" of them need not be "reasonable," at least in terms of the fourth amendment. Were a subpoena directed to private papers, however, a determination of reasonableness would be necessary.¹⁷⁸ In this context, the reasonableness standard adopted by the court of appeals in *Mara* is not only justifiable, but provides insufficient fourth amendment protection to private papers.

The substantive standard of reasonableness propounded by the court of appeals in *Mara* is essentially the standard applicable to an administrative subpoena for corporate books and records.¹⁷⁹ Because the fourth amendment privacy interests in an individual's private papers are obviously greater than those in a corporation's business records, a hierarchical conception of the fourth amendment requires a higher standard of protection for the former than that provided by the *Mara* court. Indeed, the fourth amendment may well impose a showing approaching that of probable cause and specificity to justify the governmental procurement of private papers even pursuant to a subpoena. Militating against this position, however, are the following two factors: (1) the lesser degree of intrusion involved with a subpoena, and (2) the effect of more stringent fourth amendment requirements on the administrative or grand jury processes. Although these considerations do require that the fourth amendment reasonableness balance be struck in a different fashion where a subpoena rather than a search warrant is utilized, they do not justify the high degree of deference characteristic of the current state of the law.

A subpoena for the production of papers avoids much of the intrusiveness inherent in a search, which will often partake of a general rummaging. Nevertheless, the privacy interests in the papers themselves¹⁸⁰ are impinged upon equally through either a subpoena or a physical search. An absolute

¹⁷⁷410 U.S. at 21-22. The *Mara* decision was very brief because nearly identical issues had been presented in the companion case of *United States v. Dionisio*, 410 U.S. 1 (1973).

¹⁷⁸This conclusion, of course, is based on a very narrow reading of *Mara* and is contrary to established law which imposes no requirement of substantive reasonableness other than a very deferential standard. See *United States v. Calandra*, 414 U.S. 338, 343 (1974) (grand jury may compel production of evidence "as it considers appropriate").

¹⁷⁹The court of appeals, in formulating its reasonableness standard, borrowed heavily from the Supreme Court's permissive standard in *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208-09 (1946). See note 156 *supra*.

¹⁸⁰See notes 61-64, 67-72 *supra* & text accompanying.

content-based protection would therefore not distinguish between the two methods of procurement.¹⁸¹ In the absence of such an approach, however, the distinction must be recognized. The proper standard of fourth amendment reasonableness applicable to a subpoena of private papers reduces to a value judgment. Simply stated, the values implicit in a hierarchical theory of the fourth amendment dictate that the privacy interests in private papers be given more weight than they are given under present law.

In addition, the imposition of more stringent fourth amendment safeguards upon the issuance of documentary subpoenas would not unduly burden the investigative processes of the administrative body. In the context of the grand jury, the Supreme Court has spoken strongly against the imposition of procedural requirements that would hamper the functioning of that body: "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws."¹⁸² This language, however, should not be read too broadly in that the presence of any constitutional safeguards inherently "impedes" the process of investigation and the Court itself has recognized that "[t]he grand jury is also without power to invade a legitimate privacy interest protected by the fourth amendment."¹⁸³ Moreover, as a practical matter it is doubtful that requiring a more stringent justification for the issuance of a subpoena seeking private papers would seriously impede investigation by administrative bodies.¹⁸⁴

Requiring a showing closely approximating the probable cause and specificity standards of the warrant clause to justify the issuance of a subpoena for private papers appears to be unprecedented. However, such a result is theoretically justified by the privacy interests at the heart of the fourth amendment. Practically, this result may be necessary to prevent the circumvention of the warrant clause requirements by the government through resort to the subpoena process.¹⁸⁵

¹⁸¹See HARVARD Note, *supra* note 1, at 986.

¹⁸²United States v. Dionisio, 410 U.S. 1, 17 (1973).

¹⁸³United States v. Calandra, 414 U.S. 338, 346 (1974).

¹⁸⁴It should be emphasized that this proposed standard applies only to subpoenas directed toward private papers and not to other types of evidence such as corporate records. Given this limited focus, fears of undue interference with the administrative or grand jury process are not substantial. A possible qualification to this statement is suggested in the *Dionisio* opinion, where the Court criticized the court of appeals' decision in *Mara*. The *Mara* court had required the government to show in an adversary proceeding that its request for handwriting exemplars was reasonable. The significance of the lower court's holding was not the requirement of reasonableness, but the requirement of an adversary determination of that fact. Arguably, it is the adversarial requirement that would lead to the burdensome "minitrials" feared by the Court. See 410 U.S. at 17 n.16. This interpretation of the *Dionisio* dictum does not vitiate the analysis suggested here, for there is no reason why the showing of "reasonableness," whatever its substantive content, cannot be accomplished ex parte as it is in the issuance of a search warrant.

¹⁸⁵Justice Marshall, dissenting in *Dionisio* and *Mara*, expressed concern over the possibility of "prosecutorial exploitation of the grand jury process," fearing that law enforcement officials could accomplish indirectly what they could not do directly. See 410 U.S. at 47-51.

CONCLUSION

As the Supreme Court recognized last term,¹⁸⁶ substantial privacy interests exist in an individual's private papers. With the fifth amendment privilege rendered inapplicable, constitutional protection for private papers must come from the fourth amendment, the fundamental purpose of which is the protection of personal privacy against governmental intrusions. Given this basic purpose and the amendment's generalized standard of reasonableness, a hierarchical conception of fourth amendment protection should be recognized. Under a hierarchical theory, a higher standard of fourth amendment protection is afforded against more serious governmental invasions of privacy.

A limited fourth amendment hierarchy has been acknowledged in other contexts and its extension to private papers is fully justified by the private nature of the papers themselves, the inherently intrusive nature of a search through such papers, and the fact that private papers implicate several other constitutional guarantees. With private papers at or near the summit of such a hierarchy, the protection afforded to them is potentially very significant, even in the absence of an absolute content-based protection. Where private papers are sought pursuant to a search warrant, the fourth amendment procedural requirements of probable cause and specificity should be stringently applied and the amendment's reasonableness clause should be given independent substantive meaning. Where a subpoena directs the production of private papers, the privacy interests present in private papers should be held to require a fourth amendment reasonableness inquiry significantly greater than the current approach of near-total deference to the administrative and grand jury processes.

¹⁸⁶Nixon v. Administrator of Gen. Servs., 433 U.S. 425, (1977).

