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Self-Incrimination: Introduction of an Individual's Business Records into Evidence

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SELF-INCRIMINATION: INTRODUCTION OF AN INDIVIDUAL'S BUSINESS RECORDS INTO EVIDENCE—*Andresen v. Maryland*, 96 S.Ct. 2737 (1976).

I. INTRODUCTION

The fifth amendment guarantees that "[n]o person . . . shall be compelled in a criminal case to be a witness against himself,"[1] and as early as 1886 the United States Supreme Court held that the prohibition against self-incrimination applies not only to admissions forced from the lips of the accused, but also to the seizure of his personal papers and books. In *Boyd v. United States*,[2] the Court stated: "[W]e 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." Thus, there is little doubt that purely personal papers, such as diaries and letters, are protected by the fifth amendment, but to the question of whether an individual's business records are given the same protection, the Court in *Andresen v. Maryland*[3] answered with a resounding "no."

II. FACTS

Peter C. Andresen was a lawyer who specialized in real estate settlements in Montgomery County, Maryland. He was also the incorporator, sole shareholder, resident agent, and director of Mount Vernon Development Corporation. In 1972, a Bi-County Fraud Unit began an investigation of real estate settlement activities in the area. Andresen's activities came under scrutiny, particularly in connection with a transaction involving "Lot 13T" in the Potomac Woods Subdivision of Montgomery County. The investigators obtained warrants to search Andresen's law office and the office of Mount Vernon Development Corporation for specified documents pertaining to the sale and conveyance of Lot 13T. The searches of the two offices were conducted simutaneously, and Andresen was present during the search of his law office. Between two and three percent of the files in this office were seized. A single investigator, in the presence of a police officer, conducted a four hour search of the corporation's office which resulted in the seizure of five percent of the corporation's files.[4]

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1. U.S. CONST. amend. V. The fifth amendment was made applicable to the states by the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1 (1964).

2. 116 U.S. 616, 633 (1886).

3. 96 S.Ct. 2737 (1976).

4. Andresen alleged that the five percent seized amounted to literally thousands of

The investigation revealed that Andresen had defrauded Standard-Young Associates, the purchaser of Lot 13T, by representing that the property was free of liens and that, accordingly, no title insurance was necessary, when in fact he knew that there were two outstanding liens on the property. Further, the lienholders threatened to foreclose their liens and thereby forced a halt to Standard-Young's construction on the property. When Standard-Young confronted Andresen, he issued, as an agent of a title insurance company, a title policy guaranteeing clear title to the property. Through this action Andresen defrauded the insurance company by requiring it to pay the outstanding liens.

Andresen was charged with the crime of false pretenses, based on misrepresentations and fraudulent appropriation by a fiduciary. Before trial he moved to suppress the seized documents; as a result of the subsequent suppression hearing, several documents were returned—only one of the corporation's files was not returned, and eleven of the 28 items seized from the law offices were returned.

After a jury trial, Andresen was found guilty upon five counts of false pretenses and three counts of fraudulent misappropriation by a fiduciary and was sentenced to eight concurrent two year prison terms. The Maryland Court of Special Appeals reversed four of five false pretenses counts, but affirmed the remaining convictions.[5]

The United States Supreme Court granted certiorari.[6]

III. Decision of the Court

Andresen based his appeal on the grounds that the warrants violated his fourth amendment rights by authorizing a general search, and that the introduction into evidence of his business records violated his fifth amendment privilege against self-incrimination. The Supreme Court disagreed with Andresen, and in a seven-to-two decision held that the search of Andresen's offices and seizure of his records violated neither the fourth[7] nor the fifth amendment.

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papers which later filled several file cabinet drawers in the office of the state's attorney. Brief for Petitioner at 19, Andresen v. Maryland, 96 S.Ct. 2737 (1976).

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

6. 96 S.Ct. 36 (1975).

7. The warrants included an exhaustive list of particularly described documents, but also included the phrase "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." 96 S.Ct. at 2748. Andresen contended that the inclusion of this phrase made the warrants so general as to render them impermissibly broad and thereby violative of his fourth amendment rights.

The Court held that this phrase was not fatal to the warrants because the phrase was not a separate sentence and must be read in conjunction with the list:

Andresen's contentions concerning his fifth amendment rights can be separated into two theories: first, that the fifth amendment prohibitions against compulsory self-incrimination apply to the production of business records as well as personal papers; and second, that the self-incrimination clause prohibits the seizure of personal business records by *warrant* in the same manner that it prohibits the production of the same papers by means of a *subpoena*.

Andresen based his first contention on the principle set forth in *Boyd v. United States*[8] that the seizure of a man's private books and papers to be used in evidence against him is no different than compelling him to be a witness against himself. The Court held that this contention was based upon dicta and implication, and that the *Boyd* decision did not compel suppression of Andresen's business records.[9] As further support for its conclusion, the Court cited its decision in *Fisher v. United States*[10] which held that the production by an attorney of his client's tax records did not violate the fifth amendment. Andresen, like the client in *Fisher*, was not required to say or do anything. The search was conducted by law enforcement personnel, and the documents were authenticated at trial by a handwriting expert, not by Andresen. "Any compulsion of the

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[W]e agree . . . that the challenged phrase must be read as authorizing only the search for and seizure of evidence relating to "the crime of false pretenses with respect to Lot 13T." . . . The challenged phrase is not a separate sentence. Instead, it appears in each warrant at the end of a sentence containing a lengthy list of specified and particular items to be seized, all pertaining to Lot 13T. We think it clear from the context that the term "crime" in the warrants refers only to the crime of false pretenses with respect to Lot 13T . . . . The warrants . . . did not authorize the executing officers to conduct a search for evidence of other crimes but only to search for and seize evidence relevant to the crime of false pretenses and Lot 13T. *Id.* at 2748-49 (citations and footnotes omitted).

Justices Brennan and Marshall submitted separate dissents stating that the business records should have been suppressed because they were seized pursuant to impermissibly general warrants. Justice Brennan felt that the warrants were general because, although the majority construed the questioned clause as being limited to evidence pertaining to the crime of false pretenses in the sale of Lot 13T, the Court's construction of the warrants was not available to the investigators at the time they executed the warrants. Therefore the rule that "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant," *Id.* at 2754, *quoting* Stanford v. Texas, 379 U.S. 476, 485 (1965), was violated:

> The question is not how those warrants are to be viewed in hindsight, but how they were in fact viewed by those executing them. The overwhelming quantity of seized material that was either suppressed or returned to petitioner is irrefutable testimony to the unlawful generality of the warrants. *Id.*

Justice Marshall agreed that the records were seized pursuant to an impermissibly general warrant and therefore should have been suppressed. Accordingly, he would not consider Andresen's allegations of violations of his fifth amendment privilege.

8. 116 U.S. 616 (1886).
9. 96 S. Ct. at 2744.
10. 96 S.Ct. 1569 (1976).

petitioner to speak, other than the inherent psychological pressure to respond at trial to unfavorable evidence, was not present."[11] Therefore, the Court reasoned, Andresen was not compelled to be a witness against himself.

Andresen's second theory was based on the reasoning of the Seventh Circuit Court of Appeals in *Hill v. Philpott*,[12] which held that the introduction into evidence of a taxpayer's personal books and records should be disallowed on self-incrimination grounds, even though this evidence had been seized pursuant to a valid search warrant. The *Hill* rationale was that the taxpayer could have asserted his fifth amendment rights had the same evidence been produced by means of a subpoena. The Seventh Circuit stated that in practice the result to the accused is the same, whether he be forced to supply the evidence himself via a subpoena or whether the evidence be the product of a search pursuant to a warrant, because in either case the accused is the unwilling source of the evidence, which is a violation of the fifth amendment prohibition that an accused shall not be compelled to be a witness against himself.[13] The Court, however, noted that *Hill* is the minority position and relied instead upon the reasoning of the Sixth Circuit Court of Appeals in *United States v. Blank*.[14] The *Blank* court stated that there was a valid distinction between records sought by subpoena and records sought by a warrant; the difference between the two methods of obtaining evidence was one of compulsion. Compulsion is present in the case of subpoenas because the person receiving the subpoena must, by his own response, identify the documents delivered to the court as the ones described in the subpoena. The search warrant involves no such element of compulsion because the accused is not required to do anything.[15]

The Court also relied upon the principle of *Johnson v. United States*[16] that a party is privileged from producing evidence but not from its production. This premise is the basis of the distinction between the fifth amendment protection against production of documents by subpoena, and the lack of such protection against the same documents being seized by warrant; that is, although the fifth amendment may protect an individual from complying with a subpoena for personal documents in his possession because the very act

11. 96 S.Ct. 2737, 2745.
12. 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).
13. 445 F.2d at 149, *quoting* Gouled v. United States, 255 U.S. 298, 306 (1921).
14. 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972).
15. *Id.* at 385.
16. 228 U.S. 457 (1913).

of production may constitute a compulsory authentication of incriminating evidence, a seizure of the same evidence by law enforcement officers using warrants does not require the accused to aid in the discovery, production, or authentication of incriminating evidence.

Justice Brennan disagreed with the majority's holding on the self-incrimination issue, citing his concurring opinion in *Fisher* to the effect that the fifth amendment forbids the government to compel testimonial matter "that might tend to incriminate him, provided it is a matter that comes within the zone of privacy recognized by the Amendment to secure to the individual 'a private inner sanctum of individual feeling and thought.'"[17] Therefore, evidence within this zone of privacy cannot be compelled by warrant *or* subpoena. "I can perceive no distinction of meaningful substance between compelling production of such records through subpoena and seizing such records against the will of the petitioner."[18]

IV. ANALYSIS

A. *Historical Background—Boyd and Its Progeny: Destruction of the Convergence Theory*

At first blush it appears that the Court's decisions in *Andresen* and *Fisher* leave little of the *Boyd* ruling alive; therefore, a closer inspection of the *Boyd* decision and the following cases concerning the *Boyd* rule is in order at this point.

The government believed that Boyd, with the intent to defraud the government, had imported thirty-five cases of polished glass into the United States without paying the duty thereon. The District Court for the Southern District of New York issued a production order for Boyd to bring forth an invoice for twenty-nine cases of glass, in order to show the quantity and quality of the glass previously imported. Boyd objected to the validity of the order but nevertheless produced the invoice. After an unfavorable judgment, he brought a fifth amendment self-incrimination challenge to the production of the invoice. The Supreme Court agreed with Boyd's contention, holding that a compulsory production of private books and papers is compelling the owner of such to be a witness against himself within the meaning of the fifth amendment, and is the equivalent of an unreasonable search and seizure within the bounds

17. 96 S.Ct. at 2750, *quoting* Couch v. United States, 409 U.S. 322, 327 (1973).
18. 96 S.Ct. at 2750.

of the fourth amendment.[19] The Court's reasoning was based upon the interrelation between the fourth and fifth amendments:

> We have . . . noticed the intimate relation between the two Amendments. They throw 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.[20]

The *Boyd* decision established two important principles. First, there should be no distinction between evidence obtained by search warrant and evidence obtained by subpoena. On this point the Court stated:

> [I]n regard to the Fourth Amendment, it is contended that . . . the order in the present case . . . is free from constitutional objection because it does not authorize the search and seizure of books and papers, but only requires the defendant . . . to produce them . . . . It is true that certain aggravating incidents of actual search and seizure, such as a forcible entry into a man's house and searching amongst his papers, are wanting . . . ; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself . . . . [T]herefore, . . . 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 . . . 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.[21]

Secondly, *Boyd* established what could and could not be seized within the bounds of the fourth amendment. Contraband and stolen goods could be seized, but private books and papers could not. Contraband and stolen goods could be seized because the government, not the individual, was entitled to possession of these items; the government was not entitled to possession of a man's private books and papers. The *Boyd* Court felt that the members of Congress did not regard the seizure of stolen goods as unreasonable; therefore, searches for and seizures of contraband and stolen goods are not "embraced within the prohibition of the amendment."[22]

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19. 116 U.S. at 634-35.
20. *Id.* at 633.
21. *Id.* at 621-22.
22. *Id.* at 623.

Thirty-five years later, the *Boyd* rule was modified by *Gouled v. United States*.[23] While the *Boyd* decision held that private books and papers were absolutely protected by the fourth and fifth amendments, the Court in *Gouled* maintained that private books and papers deserved no more protection than other forms of property and that there is no special sanctity in papers which would render them immune from search and seizure if the requisites of a warrant are met.[24] The Court in *Gouled* established the "mere evidence" rule; that is, search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding . . . ."[25] Thus, the papers which could not have been seized under the *Boyd* rationale would also be protected under the *Gouled* rule if they were seized merely for evidentiary purposes. Articles seized merely for evidentiary purposes and introduced at trial would, therefore, violate both the fourth and fifth amendments.

The *Boyd* and *Gouled* decisions can be summed up as ascribing to the same basic theorem:

> Although the emphasis on the importance of "papers" changed, *Gouled* maintained *Boyd's* central proposition: the private liberty of an individual is so important that it outweighs the claimed necessities of law enforcement in seizing papers or other property for the sole purpose of using them in evidence against him. *Boyd* and *Gouled* thus guaranteed a zone of privacy which the government could not breach to discover items of mere evidentiary value.[26]

Six years after the *Gouled* decision, the Court in *Marron v. United States*[27] expanded the scope of the types of items which could permissibly be seized. The *Marron* Court permitted warrantless seizure of a ledger and bills of account used in an unlawful liquor business. The ledger and bills were held to be permissibly seized because they were "part of the outfit or equipment actually used to commit the crime," and they were in the arrestee's "immediate possession and control."[28]

Thus, after the *Marron* decision, the items which could be permissibly seized, given probable cause, were: (1) fruits of crime, (2)

23. 255 U.S. 298 (1921).
24. *Id.* at 309.
25. *Id.*
26. *The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations*, 6 LOY. L.A.L. REV. 274, 280 (1973).
27. 275 U.S. 192 (1927).
28. *Id.* at 199.

contraband, (3) instruments, outfit, or equipment used to commit a crime. The fourth amendment, however, was still considered as prohibiting the search for and seizure of "mere evidence."

The mere evidence rule was abolished by the Court in *Warden v. Hayden*.[29] The Court in *Warden* held that it is lawful to seize mere evidence; as long as the items seized are evidence of a crime, there need be no concern as to whether it falls into one of the above three classes because there is no language in the fourth amendment to support the distinction between mere evidence and instrumentalities, fruits of crime or contraband. The fourth amendment assures the "right of the people to be secure in their persons, houses, papers, and effects,"[30] and this provision applies without regard to the use to which any of these things are put. The *Warden* Court held that this "right of the people" is certainly not related to the mere evidence limitation:

> Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact. Moreover, nothing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the opposite may be true. Indeed the distinction is wholly irrational, since, depending on the circumstances, the same "papers and effects" may be "mere evidence" in one case and "instrumentality" in another.[31]

Thus, after the *Warden* decision, even mere evidence could be seized, but the *Warden* decision did not permit carte blanche seizure of any and every type of evidence. Rather, the *Warden* Court recognized that there may still be a valid self-incrimination claim regarding the seizure of testimonial evidence:

> The items of clothing involved in this case are not "testimonial" or "communicative" in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment . . . . This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.[32]

The earlier cases show a strong interrelation between the fourth

29. 387 U.S. 294 (1967).
30. U.S. CONST. amend. IV.
31. *Id.* at 301-02.
32. *Id.* at 302-03.

and fifth amendments, and, while a violation of one was not necessarily considered an automatic violation of the other, this implication was present. Thus, the *Boyd* Court stated that seizing evidence or compelling the production of evidence which forced the owner to be a witness against himself in violation of the fifth amendment would constitute an unreasonable search and seizure in violation of the fourth amendment. The *Marron* Court stated that it has been a long-standing rule that the fifth amendment protects everyone against incrimination by the use of evidence obtained via a search or seizure which is violative of his fourth amendment rights.[33]

The *Andresen* Court held that this "convergence theory" had been discredited by later opinions, citing *Fisher v. United States*,[34] and further held, in effect, that the fourth and fifth amendments were separate and distinct amendments which offer separate and distinct protections. The Court stated that in the earlier cases, the basis for the inadmissibility of the evidence seized was a violation of the fourth amendment. The unlawfulness of the search and seizure supplied the compulsion of the accused which was a prerequisite to the invocation of his fifth amendment rights.[35] The Court held that there was no such compulsion against Andresen because he was not asked to say or do anything, the records seized contained statements that he had voluntarily comitted to writing, the records were authenticated at trial by a handwriting expert—not by Andresen; therefore, the Court reasoned, the only compulsion upon Andresen to speak was the "inherent psychological pressure to respond at trial to unfavorable evidence . . . ."[36] Therefore, since there was no compulsion, there was no violation of Andresen's fifth amendment rights, regardless of Andresen's claim of violations of his fourth amendment rights.

B. Warrants Versus Subpoenas

Prior to the *Andresen* decision there was a divergence among the federal courts of appeals over whether the fourth amendment prohibits the seizure by warrant of documentary evidence which could not be constitutionally compelled by means of a subpoena. The distinct minority position was that evidence which could not be compelled by subpoena could not be seized by means of a war-

33. 275 U.S. at 194.
34. 96 S.Ct. 1569 (1976).
35. 96 S.Ct. at 2744.
36. *Id.* at 2745.

rant.[37] The reasoning of the minority was that although it makes no difference how the evidence got to the courthouse, it was still attributed to the defendant because "the jury knows the books and records belong to the defendant and the entries he has made therein speak against him as clearly as his own voice."[38] The minority felt that compulsion against the accused was present in the case of either subpoena or warrant, and this reasoning was aptly stated by J. Seth in his dissenting opinion in *Shaffer v. Wilson*:

> The difference [is] between a prospective defendant standing at the door watching the agents haul out eighteen cartons of records (there he is "passive" because the warrant says he must be), as compared to response to a subpoena where he hauls the eighteen cartons out the door himself. The "compulsion" is present in both cases. In one case the "defendant" interprets the words in the subpoena; in the other the agent interprets the words in the warrant. This should not lead to the great difference in constitutional protection which the Government urges here . . . .[39]

The overwhelming majority of federal courts of appeals held that there was a distinction between seizing evidence by a warrant and compelling the production of evidence by a subpoena:[40] there was compulsion and self-incrimination in the case of a subpoena, but no such constitutional violations in the case of a warrant. The subpoena requires the accused to identify the documents and personally bring them before the court, and these acts may constitute acts of self-incrimination; whereas a warrant requires the accused to do nothing which might incriminate him.

The *Andresen* decision adopted the view of the majority of federal courts of appeals and settled the conflict among the circuits. Once the convergence theory was abolished, it follows that the distinction between evidence seized by a warrant and compelled by a subpoena would be upheld, because the fourth amendment protection is against unreasonable searches and seizures, while compulsion and self-incrimination are the evils protected against by the fifth amendment. "Compulsion upon the person asserting the fifth amendment privilege is an important element of the privilege, and 'prohibition of compelling a man . . . to be a witness against him-

37. Vonder Ahe v. Howland, 508 F.2d 364 (9th Cir. 1975); Hill v. Philpott, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

38. Hill v. Philpott, 445 F.2d at 149.

39. Shaffer v. Wilson, 523 F.2d 175, 184 (10th Cir. 1975) (Seth, J., dissenting).

40. Shaffer v. Wilson, 523 F.2d 175 (10th Cir. 1975); United States v. Blank, 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972); Taylor v. Minnesota, 466 F.2d 1119 (8th Cir. 1972); United States v. Scharfman, 448 F.2d 1352 (2d Cir. 1971).

self is a prohibition of the use of physical or moral compulsion to extort communications from him' . . . ."[41]

In *United States v. White*,[42] the Court stressed that the purpose of the fifth amendment privilege was to prevent compulsion against the accused, and that the privilege is essentially a personal one, designed to prevent the use of legal process to force incriminating evidence from the lips of the accused or to force him to produce and authenticate any incriminating personal documents.[43]

While there must be some compulsion against the accused before his fifth amendment privilege attaches, there was no such compulsion against Andresen. The search was pursuant to a valid warrant and the evidence, which was no doubt incriminating, was seized by law enforcement personnel—no evidence was forced from the lips of Andresen, nor was he required to produce and authenticate any documents which might incriminate him. Since there was no compulsion present, the *Andresen* case truly does "fall within the principle stated by Mr. Justice Holmes: 'a party is privileged from producing the evidence but not from its production.' "[44]

C. *Personal Papers Versus Business Records: The Right to Privacy*

From the above rationale, the logical opposing argument would be that to seize any documents or books, one need only to obtain a warrant. The *Andresen* decision, however, does not go that far.

It must be stressed that the evidence sought in *Andresen* was business records, not personal papers dealing with the intimate and private life of the accused. Business records could hardly be categorized as an element of an individual's "private inner sanctum of individual feeling and thought"[45] which is protected by the self-incrimination privilege. Purely personal papers, such as diaries and letters which fall within that sanctum, are still protected by the fifth amendment. *Andresen*, in dealing with business records only, does not open wide the door to governmental seizure of private books and papers; on the contrary, the *Andresen* Court limited its decision to discussion of the seizure of business records:

> [P]ermitting the admission of the records in question does not convert our accusatorial system of justice into an inquisitorial system. "The requirement of specific charges, their proof beyond a reasonable

41. Couch v. United States, 409 U.S. 322, 328 (1973) (citation omitted).
42. 322 U.S. 694 (1944).
43. *Id.* at 698.
44. 96 S.Ct. at 2745, *quoting* Johnson v. United States, 228 U.S. 457, 458 (1913).
45. Couch v. United States, 409 U.S. at 327.

> doubt, the protection of the acused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when the circumstances make it necessary, the duty to advise the accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands." *Watts v. Indiana*, 338 U.S. 49, 54 (1949). None of the attributes is endangered by the introduction of *business records* "independently secured through skillful investigation." *Ibid.* Further, the search for and seizure of *business records* pose no danger greater than that inherent in every search that evidence will be elicited by inhumane treatment and abuses.[46]

The distinction between permitting the seizure of business records and not permitting the seizure of personal papers can be based upon the accused's expectation of privacy as to those papers. The accused has a much greater expectation of privacy in his personal correspondence than he would in his business records, which may be kept by him simply because the law requires that he keep such records. The fifth amendment protects the right to privacy, and the Supreme Court in *Couch v. United States*[47] defined this right to privacy: "By its very nature, the privilege [against self-incrimination] is an intimate and private one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-incrimination."[48] The *Andresen* decision recognized that the fifth amendment protects privacy "to some extent,"[49] but felt that this protection is not all-encompassing:

> [T]he Court has never suggested that every invasion of privacy violates the privilege. Indeed, . . . unless the incriminating testimony is "compelled", any invasion of privacy is outside the scope of the Fifth Amendment's protection . . . .[50]

Thus it appears that the *Andresen* decision retreats somewhat from the broader privacy protection espoused in *Couch*, but the fifth amendment right to privacy is nevertheless still recognized and protected.

V. CONCLUSION

There are three important results of the *Andresen* decision, the

46. 96 S.Ct. at 2746 (emphasis added).
47. 409 U.S. 322 (1973).
48. *Id.* at 327.
49. 96 S.Ct. at 2747.
50. *Id.*, *quoting* Fisher v. United States, 96 S.Ct. 1569, 1575 (1976).

first of which is the abolition of the convergence theory of the fourth and fifth amendments. The Court held that the two amendments are separate and distinct, and there does not have to be a violation of one in order to find a violation of the other.

Secondly, the Court settled the controversy among the federal courts of appeals as to whether there is to be a distinction made between evidence compelled by a subpoena which forces the accused by his own acts to present incriminatory evidence and evidence seized by a valid warrant which has no such element of compulsion.

Thirdly, the Court retreated from a broad fifth amendment protection of privacy but still recognized that such a right to privacy does exist.

The *Andresen* decision is limited to business records and is consistent with the theory that there must be some form of compulsion before the fifth amendment self-incrimination privilege applies; the Court recognized that the self-incrimination privilege adheres to the *person*, not to the *evidence*. The entire concept of the fifth amendment self-incrimination privilege was aptly stated by Justice Powell:

> It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him . . . . The Constitution explicitly prohibits an accused to bear witness "against himself"; it necessarily does not proscribe incriminating statements elicited from another.[51]

The *Andresen* case was therefore correctly decided, and the retreat in constitutional protections is not in the area of the self-incrimination privilege, but rather in the fifth amendment right to privacy.

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51. Couch v. United States, 409 U.S. at 328.