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Incriminatory Effects of Compliance with IRS Subpoenas for Personal Documents: An Analysis of Current Approaches

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INCRIMINATORY EFFECTS OF COMPLIANCE WITH IRS SUBPOENAS FOR PERSONAL DOCUMENTS: AN ANALYSIS OF CURRENT APPROACHES

This Note argues that creating a tax-crime exception to the privilege against self-incrimination countervenes both the language and the spirit of the Fifth Amendment. This Note further argues that the Ninth Circuit's creation of a tax crime-exception stemmed from a misinterpretation of precedent.

This Note describes the tax system and structure of the Internal Revenue Service (IRS), including its investigatory powers. The relationship between the IRS and the Department of Justice is discussed to ascertain the incriminatory effects of taxpayers' disclosures. A Ninth Circuit district court case, United States v. Troescher, *is used as a framework for analyzing the Ninth Circuit's distinction between tax and nontax crimes. The development of the nontax-crime exception by the Ninth Circuit is also discussed. Additionally, this Note examines the history of the privilege against self-incrimination and the different tests employed by the Supreme Court to determine its applicability. This Note concludes by arguing that the current approach of the Ninth Circuit is inconsistent with the underlying purposes of the Fifth Amendment.*

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The Fifth Amendment provides several protections for rights of individuals. One of these protections is the privilege against self-incrimination, which is implicated when evidence sought from an individual potentially will subject that individual to criminal liability.[1] The scope of the privilege against self-incrimination encompasses not only oral testimony but also documents.[2]

Tensions exist between the rights protected by the Fifth Amendment[3] and the government's interest in obtaining information and evidence neces-

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[1] U.S. CONST. amend. V; *see, e.g.*, Maness v. Meyers, 419 U.S. 449 (1975); Kastigar v. United States, 406 U.S. 441, 444-45 (1972) (involving individual investigated under registration statutes for federal wagering tax). According to the Internal Revenue Service, the privilege applies to "*any* criminal offense." 6 Internal Revenue Manual: Administration (CCH), at 28,679-4 (Oct. 19, 1992) [hereinafter IRM: Admin.]. Originally, it applied whenever testimony forced from a witness would result in "penalties affixed to the criminal acts." Ullmann v. United States, 350 U.S. 422, 438-39 (1956).

[2] Boyd v. United States, 116 U.S. 616 (1886). In *Boyd*, the Court extended this Fifth Amendment privilege to documents: "[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." *Id.* at 633.

[3] *See infra* Part III.

sary to law enforcement.[4] The government generally has a right to every citizen's testimony.[5] Accordingly, compulsion of testimony[6] in a noncriminal proceeding is not uniformly prohibited by the Fifth Amendment.[7] Because the privilege only protects individuals from incrimination for criminal matters, an individual generally can be forced to testify against his interests in noncriminal investigations and proceedings.[8] The privilege can be asserted in noncriminal proceedings if the testimony or other evidence could be used later against the individual in a criminal matter.[9]

The Internal Revenue Service (IRS) has significant latitude in its investigative proceedings. The Supreme Court traditionally has granted federal regulatory agencies wide discretion to ensure compliance within their area of jurisdiction.[10] Additionally, the Internal Revenue Code grants the IRS broad

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[4] *See generally* Fisher v. United States, 425 U.S. 391, 399 (1976) (describing the need to balance the state's interest in obtaining incriminating evidence against individuals with the individual's interest in protecting his privacy). The Supreme Court has long recognized the right of the government to obtain evidence to enforce its laws and noted in *Kastigar* that "[a]mong the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies." *Kastigar*, 406 U.S. at 444.

[5] Mason v. United States, 244 U.S. 362, 364-65 (1917).

[6] "Compulsion is present whenever there is a demand by a governmental officer, agent, or tribunal for testimony or documents. The compulsion may take the form of an administrative summons pursuant to § 7602, a grand jury subpoena, or any other official demand for records." *Compelled Production of Documents and Testimony in Tax Examinations*, Tax Mgmt. (BNA) No. 123-4th, at A-33 (Mar. 17, 1997) [hereinafter *Compelled Production*].

[7] Garner v. United States, 424 U.S. 648 (1976).

[8] *Id.* at 652 (suggesting that the Internal Revenue Code encourages taxpayers to reveal privileged information through their tax returns).

[9] *Kastigar*, 406 U.S. at 444-45 (stating that the privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory"); SEC v. Graystone Nash, Inc., 25 F.3d 187, 190 (3d Cir. 1994) (finding that the Fifth Amendment privilege can be raised during discovery). Assertion of the Fifth Amendment privilege in civil proceedings is not without drawbacks, however, as adverse inferences may be drawn from such an invocation. *Id.* at 190-93. Adverse inferences are not allowed in criminal proceedings because in those cases the government, not a private party, is seeking the information. Commissioner of Revenue v. Fort, 479 N.W.2d 43 (Minn. 1992).

[10] Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943) (specifying broad standards for enforcement of administrative agencies' subpoenas). The Court first established the standard for the scope of discovery of tax documents in *United States v. Powell*, 379 U.S. 48 (1964). In *Commodity Futures Trading Comm'n v. Collins*, 997 F.2d 1230 (7th Cir. 1993), the Seventh Circuit limited the traditional deference slightly and stated that an agency that sought to subpoena tax documents in the course of an investigation must demonstrate a specific need before the request will be enforced. *Id.* at 1233-34. The Supreme Court has not addressed this issue. For a discussion of this

subpoena powers.[11] At the grand jury stage of an investigation, a taxpayer's compliance with IRS subpoenas for documents can waive the Fifth Amendment privilege.[12] IRS investigations and subpoenas usually focus on tax returns and various financial documents.[13] Because such documents might be used later against taxpayers in criminal proceedings, those subject to IRS investigations are entitled to claim the privilege against self-incrimination to resist the subpoena.[14] The current test of whether this claim is valid and will protect the taxpayer from producing such evidence is whether the individual has a real and substantial fear of criminal prosecution.[15] The Ninth Circuit, however, has created a tax-crime exception to the Fifth Amendment and requires an individual asserting the privilege in response to an IRS subpoena to show fear of prosecution for a nontax

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case, see Sean Doherty, Comment, Commodity Futures Trading Commission v. Collins: *Is the Rationale Sound for Establishing an Exception to Subpoena Law for Tax Returns?*, 7 DEPAUL BUS. L.J. 365 (1995).

[11] *See* I.R.C. § 7602 (1994) (authorizing the IRS to issue summonses for purposes of assuring the accuracy of a return, for investigating whether a return should have been filed, and for determining an individual's tax liability); *id.* § 7604 (granting district courts the power to enforce summonses issued under § 7602).

[12] United States v. Penrod, 609 F.2d 1092 (4th Cir. 1979).

[13] Precedent exists for applying the Fifth Amendment to financial documents. In *Ballmann v. Fagin*, 200 U.S. 186 (1906), a taxpayer was protected by the Fifth Amendment from relinquishing his personal checkbook which contained incriminating evidence. In a later case, the Supreme Court declared that criminal tax evasion could be proved by

> conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

Spies v. United States, 317 U.S. 492, 499 (1943).

[14] *Compelled Production*, *supra* note 6, at A-32 (Oct. 14, 1996). One commentator described the potentially incriminating situations facing a taxpayer:

> On April fifteenth of each year, a taxpayer who has violated a criminal law during the preceding year is placed in a difficult situation. If the taxpayer reports information required on a federal income tax return, any incriminating information reported is admissible to prosecute the taxpayer. If the taxpayer attempts to avoid self-incrimination by providing false answers on a return, the taxpayer commits perjury. Finally, if the taxpayer fails to file any return at all, the taxpayer may commit a tax crime. The taxpayer thus faces a trilemma.

Richard B. Stanley, Comment, *Conflict Between the Internal Revenue Code and the Fifth Amendment Privilege Against Self-Incrimination*, 15 U. BALT. L. REV. 527, 527 (1986). It is widely accepted that the Fifth Amendment does not provide a blanket protection for taxpayers who refuse to provide any income or expense information. *See, e.g.*, United States v. Daly, 481 F.2d 28 (8th Cir.), *cert. denied*, 414 U.S. 1064 (1973).

[15] United States v. Doe, 465 U.S. 605 (1984); Fisher v. United States, 425 U.S. 391 (1976); United States v. Neff, 615 F.2d 1235, 1239-40 (9th Cir. 1980).

crime.[16]

The IRS shares information with other government agencies, including the Department of Justice (DOJ).[17] This information can include both the tax return itself as well as other information obtained during investigations.[18] Because of the relationship between the IRS and the DOJ, a taxpayer subject to an IRS subpoena must consider the potentially incriminating effects of information that the documents would reveal in determining whether asserting the Fifth Amendment privilege is appropriate.

Policy considerations play a large role in resolving this issue. If taxpayers are granted broad discretion to invoke the Fifth Amendment privilege to argue that the IRS should have no access to any of their documents, the system of voluntary reporting upon which our tax system is based would be undermined. Accordingly, taxpayers faced with incriminating themselves for tax evasion[19] are restricted from liberally invoking the Fifth Amendment as a blanket protection.[20] Taxpayers faced with IRS investigations for other tax crimes,[21] however, should not be automatically prohibited from claiming the Fifth Amendment privilege, for the governmental interest—preservation of an effective system of taxation—is not nearly as substantial in those situations. Quite often, a taxpayer subject to an IRS investigation might fear incriminating himself for both tax and nontax crimes because these crimes frequently are intertwined.

This Note argues that creating a tax-crime exception to the privilege against self-incrimination countervenes both the language and the spirit of the Fifth Amendment. This Note further argues that the Ninth Circuit's creation of a tax-crime exception stemmed from a misinterpretation of precedent.

Part I of this Note describes the tax system and structure of the IRS, including its investigatory powers. The relationship between the IRS and the DOJ is discussed to ascertain the incriminatory effects of taxpayers' disclosures. Part II uses a Ninth Circuit district court case, *United States v. Troescher*,[22] as a framework for analyzing the Ninth Circuit's distinction between tax and nontax crimes. Part II also describes the development of the nontax-crime exception by the Ninth Circuit. Part III examines the history of the privilege against self-incrimination and the different tests employed by the Supreme Court to determine its applicability. This Note concludes by

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[16] *See* Fuller v. United States, 786 F.2d 1437 (9th Cir. 1986).

[17] DEPARTMENT OF JUSTICE TAX DIVISION, 1 CRIMINAL TAX MANUAL 2-10 to 2-12 (1994) [hereinafter CRIMINAL TAX MANUAL].

[18] *Id.*

[19] I.R.C. § 7203 (1994).

[20] *See infra* Part III.B.

[21] *See, e.g.*, I.R.C. § 7203 (willful failure to file); § 7201 (attempt to evade taxes).

[22] No. CV 93-5736 SVW (SHX), 1995 WL 478941 (C.D. Cal. Mar. 20, 1995), *vacated*, 99 F.3d 933 (9th Cir. 1996).

arguing that the current approach of the Ninth Circuit is inconsistent with the underlying purposes of the Fifth Amendment.

I. THE POTENTIAL FOR SELF-INCRIMINATION IN IRS INVESTIGATIONS

The United States' tax system is one of voluntary compliance, reliant upon taxpayers' honesty in reporting their income.[23] Many taxpayers are not willing to assist the IRS; an IRS survey indicated that one-fifth of taxpayers cheat on their tax returns.[24] Although voluntary, the tax system provides substantial penalties for noncompliance.[25] IRS audit investigations of taxpayers are directed at discovering both civil and criminal violations of tax laws.[26]

A. *The Internal Revenue Service*

The mission of the IRS is "to collect the proper amount of tax revenues at the least cost to the public, and in a manner that warrants the highest degree of public confidence in the IRS's integrity, efficiency, and fairness."[27] In attaining that goal, the IRS relies on voluntary compliance with the tax laws and regulations.[28] Because of the "tax gap," which rose to more than one hundred billion dollars in 1992,[29] the IRS also must force the compliance of some taxpayers through audits.

Courts give considerable deference to the IRS.[30] In a proceeding for the enforcement of an IRS summons, the government must pass the four-prong test established in *United States v. Powell*.[31] This requirement developed out of an unwillingness to give the government unlimited enforcement powers. Although the Supreme Court recognized the congressional intent of curbing "investigating powers of low-echelon revenue agents,"[32] the Court

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[23] *See* Couch v. United States, 409 U.S. 322, 335 (1973) (holding that a taxpayer could not invoke the Fifth Amendment privilege when she voluntarily had given her tax records to her accountant); Rotolo v. Merit Sys. Protection Bd., 636 F.2d 6, 8 (1st Cir. 1980) (holding that dismissing an IRS employee who had cheated on her taxes was within the IRS's discretion).

[24] I.R.S. News Release IR-84-123 (Nov. 30, 1984).

[25] *See infra* notes 279-84 and accompanying text.

[26] *See infra* notes 34-36 and accompanying text.

[27] 26 C.F.R. § 601.107 (1977).

[28] *Id.*

[29] U.S. GENERAL ACCOUNTING OFFICE, *Reducing the Tax Gap—Results of a GAO-Sponsored Symposium*, 1995 WL 418278 (F.D.C.H) (June 2, 1995).

[30] *See* United States v. Powell, 379 U.S. 48 (1964); United States v. Kis, 658 F.2d 526 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

[31] 379 U.S. at 57-58.

[32] *Id.* at 55.

in *Powell* rejected imposing a probable cause standard for enforcement of IRS subpoenas, a stance it had adopted with respect to other administrative agencies.[33] The *Powell* requirements are that the Commissioner of Revenue "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed."[34] These requirements were intended to protect taxpayers from IRS agents seeking to use the audit process to gather information about criminal activities of the taxpayers.[35] That an agent might have mixed motives does not prevent the enforcement of the summons.[36] Guilty taxpayers, however, ultimately will find little protection in the *Powell* requirements. The mandatory reporting requirement between the IRS and the DOJ when an IRS tax investigation reveals indications of criminal activity suggests that the *Powell* requirements merely delay the inevitable.

Even evidence with only "potential relevance" to an investigation is within the scope of the government's demand, and the "applicable standard is whether the information sought 'might throw light upon the correctness of the [tax] return.'"[37] The Internal Revenue Code requires all individuals liable for any federal tax to maintain records and make returns in compliance with the Code.[38] Accordingly, the IRS is entitled to request such records as part of its investigations.[39] One estimate projects that eighty-five percent of IRS audits result in an assessment of money owed to the government.[40] An audit commences with an initial notice from an IRS agent specifying the item(s) that are the subject of the audit and requesting that the taxpayer schedule an appointment. At this initial meeting, the taxpayer usually will be requested to show documentation of income and expenses and to respond to the auditor's questions. The agent will then issue a finding, which a taxpayer has thirty days to appeal. If an appeal does not result in an outcome de-

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[33] *See* United States v. Morton Salt Co., 338 U.S. 632 (1950) (rejecting imposing a probable cause standard on the Federal Trade Commission); Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186 (1946).

[34] *Powell*, 379 U.S. at 57-58.

[35] *See* United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978).

[36] Donaldson v. United States, 400 U.S. 517 (1971).

[37] United States v. Raniere, 895 F. Supp. 699, 703 (D.N.J. 1995) (quoting United States v. Rockwell Int'l, 897 F.2d 1255, 1263 (3d Cir. 1990)).

[38] I.R.C. § 6001 (1994). This section provides that "[e]very person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe." *Id.*

[39] *Id.* § 7602.

[40] Nancy D. Holt, *Solos, High-Income Lawyers Tweak the IRS' Audit Instincts*, CHI. LAW.,Feb. 1992, at 57.

sirable to the taxpayer, he has ninety days to appeal to the United States Tax Court.[41]

As part of its enforcement of the tax laws, the IRS has broad subpoena and summons powers.[42] The scope of the IRS's powers was described as "similar to the inquisitorial power of a grand jury."[43] The logical focus of such investigations is on financial documents, including checks and deposit slips. The Fifth Amendment privilege can be implicated in such investigations because various financial documents also are admissible in criminal proceedings.[44] For example, an individual's business records are admissible under Federal Rule of Evidence 806(6).[45] Statements made by authorized persons could be admissible under Rule 802(d)(2)(c).[46] Checks, deposit slips, invoices, and receipts are admissible because they can show conduct such as making false entries, concealing assets, and other activities suggestive of an intent to mislead or conceal.[47] Accordingly, the relationship between the IRS and agencies that can instigate criminal proceedings is relevant to an analysis of the applicability of the Fifth Amendment in an IRS investigation.

Investigations by the IRS can result in both civil and criminal penalties.[48] In addition to liability for unpaid taxes, punishment for violations of the Code includes fines and imprisonment.[49] IRS agents assist U.S. attorneys in the processing of cases, including case preparation and trials.[50]

B. *The Department of Justice Tax Division*

The IRS and the DOJ share information.[51] During audits, IRS agents

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[41] *Id.*

[42] I.R.C. §§ 7602, 7604.

[43] United States v. Kis, 658 F.2d 526, 537 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *see* United States v. Joyce, 498 F.2d 592, 594 (7th Cir. 1974); United States v. Turner, 480 F.2d 272, 278-79 (7th Cir. 1973).

[44] Couch v. United States, 409 U.S. 322 (1973); Mathis v. United States, 391 U.S. 1 (1968); *see* 3 CRIMINAL TAX MANUAL, *supra* note 17, at 60-58.

[45] FED. R. EVID. 806(6).

[46] 3 CRIMINAL TAX MANUAL, *supra* note 17, at 60-58.

[47] *Id.* at 60-65; *see* Spies v. United States, 317 U.S. 492 (1943); United States v. Little, 567 F.2d 346, 349 (8th Cir. 1977).

[48] *See* I.R.C. § 7203 (1994). One of the seven divisions of the Internal Revenue Service is the Criminal Investigation Division, which is responsible for detecting and preventing criminal and civil violations of federal tax laws. INTERNAL REVENUE SERVICE, IRS CRIMINAL INVESTIGATION IN ACTION (1992).

[49] *See generally* I.R.C. § 7203 (1994).

[50] IRS CRIMINAL INVESTIGATION IN ACTION, *supra* note 48.

[51] *See generally* 1 CRIMINAL TAX MANUAL, *supra* note 17, at 2-3 to 2-32. One reason for allowing referral between these agencies is the need for speedy resolution of matters amounting to an "imminent drain on the U.S. Treasury." *Id.* at 2-21.

are instructed to look for indications of fraud.[52] If the agents find such indications, they must refer the case to the DOJ.[53] The procedures for this exchange of information and evidence therefore must be considered in assessing the potential for incrimination. Either the IRS or the Tax Division of the DOJ can refer matters for prosecution to U.S. attorneys for the purpose of conducting Title 26 grand jury investigations.[54] The Tax Division also can participate in joint tax and nontax investigations with the IRS; the Division has authority to approve requests seeking to broaden the scope of grand jury investigations of a nontax matter to include possible federal tax violations.[55] Other ways of instigating criminal investigations include referrals from other government agencies or from private citizens.[56]

Statistics for 1991 indicate that two-thirds of criminal investigations were recommended for prosecution.[57] Eighty-five percent of those prosecuted were convicted, and seventy percent of those convicted received jail sentences.[58]

C. *The Government's Use of Tax Returns*

Section 6103 of the Internal Revenue Code addresses permissible uses of tax returns by the government. Agents may disclose returns to federal officials for federal criminal investigations and to state officials for tax crime investigations.[59] Because disclosures to federal agents are allowed for both tax and nontax crimes, distinguishing the applicability of the Fifth Amendment on the basis of whether the individual fears incriminating himself for a tax or nontax crime appears arbitrary at best because individuals potentially receive the same type of punishment—fines or imprisonment—for both types of crimes.

D. *The Governmental Interest*

Before delving too deeply into an analysis of the Ninth Circuit's current approach, one additional factor must be considered: the governmental inter-

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[52] 1 Internal Revenue Manual: Audit (CCH), at 7247-27 (Apr. 23, 1981) [hereinafter IRM: Audit].

[53] *Id.* at § 4231, ¶ 901.

[54] 1 CRIMINAL TAX MANUAL, *supra* note 17, at 2-10. Matters that the IRS can directly refer to U.S. attorneys for prosecution include excise taxes, multiple filings of false and fictitious returns claiming refunds, and trust funds. *Id.* at 2-21 to 2-22.

[55] *Id.* at 2-10.

[56] John Tigue, Jr. & Bryan Skarlatos, *Tax Litigation Issues: Federal Prosecutions*, N.Y. LAW J., Mar. 30, 1993, at 3.

[57] *Id.*

[58] *Id.*

[59] I.R.C. §§ 6103(d), (i) (1994).

est at stake. One justification for limiting the scope of the privilege is to promote an "efficient investigation of crime," and particularly of white collar crime.[60]

The U.S. system of taxation relies on self-reporting taxpayers' honesty in preparing tax returns.[61] The revenue received from taxation is critical to maintain the government's operations. The gap between taxes paid and those that would be paid with a one hundred percent compliance rate is estimated at one hundred billion dollars per year.[62] For the government to operate properly, taxpayers must believe that they are being treated in a fair, even-handed manner.

Challenges to the tax system's validity are serious affronts. The government is intolerant of tax protesters and of the various methods they employ to avoid taxes.[63] Refusal to complete tax returns is a commonly used tool for tax protestors desiring to deceive the IRS.[64] The Internal Revenue Manual states that such "frivolous 'taxpayer protestor'" claims are not considered by the IRS to be valid defenses[65] and that such cases should be re-

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[60] Suzanne Rosenthal Brackley, *Now It's Personal: Withdrawing the Fifth Amendment's Content-Based Protection for All Private Papers in* United States v. Doe, 60 BROOK. L. REV. 553, 556 (1994); *see* Braswell v. United States, 487 U.S. 99, 100 (1988) (weighing the privilege's negative effect on the government's ability to prosecute white collar crime).

[61] *See supra* text accompanying notes 23-26.

[62] ABA Comm. on Taxpayer Compliance, *Report and Recommendations on Taxpayer Compliance*, 41 TAX LAW. 329, 330 (1987).

[63] A common tax protestor argument is as follows:

> Unless we are granted immunity in exchange for the information, it can be used by the Justice Department to prosecute us for a nontax crime; it can be presented to a Grand Jury or used as a lead to obtain evidence which can be presented to a Grand Jury, to help get us convicted and prosecuted; if we have given false financial information to any department or agency of state or federal government, the financial information which we are required to supply on a tax return could tend to incriminate us of a non-tax crime . . . .

Urban v. United States, No. 83-C8185, 1984 WL 2806, at *2 (N.D. Ill. Apr. 18, 1984).

[64] For cases involving tax protestors, see Conklin v. United States, 36 F.3d 1105, 1994 WL 504211, at **1 (10th Cir.), *cert. denied*, 115 S.Ct. 583 (1994) (involving individual who described himself as akin to "known tax protestor[s], like Jesus Christ, Thomas Jefferson, Benjamin Franklin, and George Washington"); National Commodity and Barter Ass'n v. Archer, 31 F.3d 1521, 1525 (10th Cir. 1994) (involving suit brought by tax protestor organization which "believe[s] in abolition of the Internal Revenue Service," against IRS officials); United States v. Walton, 989 F.2d 497, 1993 WL 78807, at **1 (4th Cir. 1993) (rejecting the argument that defendants were "citizens of the 'foreign state of North Carolina' and, hence, not under the jurisdiction of the United States"); United States v. Fox, 721 F.2d 32 (2d Cir. 1983) (holding that the Fifth Amendment privilege allowed a sole proprietor to shield his financial records from compelled disclosure).

[65] The Manual lists a variety of such defenses, including

ferred to the DOJ for enforcement. One policy argument supporting the IRS's position is that tax protestors should not be encouraged to use such arguments to circumvent the IRS.[66] Some circuits support the IRS's position on tax protestors' claims. In *United States v. Cheek*,[67] for example, the Seventh Circuit upheld jury instructions that a taxpayer's belief in the unconstitutionality or invalidity of the tax system is not a valid defense.[68]

Not all courts, however, agree with the IRS's position on this matter. Given the recognition of instances in which individuals validly can assert the Fifth Amendment privilege in tax investigations,[69] "the IRS is faced with the unfortunate reality that tax protestors, too, may assert their Fifth Amendment privilege against self-incrimination in response to questions and requests for documents, and that other methods of obtaining the information sought may have to be employed."[70]

This balancing of interests is not unanimously accepted. The dissent in the U.S. Supreme Court case *California v. Byers*[71] argued that "this balancing inevitably results in the dilution of constitutional guarantees" and that

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> that tax laws are unconstitutional because the Sixteenth Amendment was not properly ratified; . . . that the Federal Reserve System is unconstitutional; therefore, the Code is unconstitutional to the extent it taxes income represented by notes or checks which do not contain or are not redeemable in gold or silver; . . . that the requirement of bookkeeping, records maintenance, and employer withholding requirements is in reality "involuntary servitude" and, therefore, are unconstitutional; . . . that refus[ing] to pay income taxes, in whole or in part, on religious or moral grounds, contending that to do so would violate First Amendment rights; . . . that the graduated income tax scale and the fact that certain deductions or benefits allowed by the Internal Revenue Code are available to some and not to others deny those latter persons their [Fifth Amendment Due Process] Constitutional rights; . . . that filing of an income tax return violates the Fifth Amendment right against self-incrimination; . . . that Tax Court is illegally constituted, and there is a denial of a jury in tax litigation.

1 IRM: Audit, *supra* note 52, at 7249-21 to 7249-22 (Feb. 23, 1982); *see also* United States v. Gardiner, 531 F.2d 953 (9th Cir.), *cert. denied*, 429 U.S. 853 (1976) (rejecting defendant-appellant's argument that because he had not received certain money lawfully, he was not subject to the jurisdiction of the IRS).

[66] *See* United States v. Cheek, 931 F.2d 1206, 1208-09 (7th Cir. 1991).

[67] *Id.*

[68] *Id.* at 1207 n.1; *see also* United States v. Dack, 987 F.2d 1282 (7th Cir. 1993) (holding that failure to file a tax return cannot be justified by either the Fifth Amendment privilege or a disagreement with tax laws).

[69] *See, e.g.*, Fisher v. United States, 425 U.S. 391 (1976); Garner v. United States, 424 U.S. 648, 650 (1976) (stating that the privilege against self-incrimination can under some circumstances constitute a valid defense for criminal prosecution for failure to file a tax return); Mathis v. United States, 391 U.S. 1 (1968).

[70] United States v. Cates, 686 F. Supp. 1185, 1186 (D. Md. 1988).

[71] 402 U.S. 424 (1971).

"we should [not] depart in the slightest way from the Bill of Rights."[72] The mere identification of a taxpayer as a tax protestor should not invalidate automatically his claim against self-incrimination. Partly due to the referral and reporting process between the IRS and the DOJ, tax protestors legitimately might fear criminal prosecution. This fear of incrimination is conceptually the same as that of an individual charged with embezzlement, and this fear is similar to that of an individual accused of robbery who invokes the Fifth Amendment privilege.

II. THE TAX-CRIME EXCEPTION TO THE PRIVILEGE AGAINST SELF-INCRIMINATION

In *United States v. Troescher*,[73] the U.S. District Court for the Central District of California reluctantly enforced an IRS summons against a taxpayer for the production of documents.[74] The court enforced the summons because it was bound by precedent but disagreed with the controlling line of cases.[75] According to the court, creating a tax-crime exception to the Fifth Amendment was unfounded in either public policy or the law.[76]

A. *The Facts of* Troescher *and the District Court's Findings*

On March 9, 1993, the IRS served a summons on Loren Troescher to appear before an IRS agent, instructing him to bring all his documents and records that indicated his income for 1986 to 1992, excluding 1991.[77] Troescher did not obey this order, and the U.S. District Court for the Central District of California granted the government's motion for enforcement.[78] Troescher then appeared before an IRS agent, as ordered, but invoked his Fifth Amendment privilege against self-incrimination as grounds for refusing to answer the agent's questions as well as for his refusal to

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[72] *Id.* at 463 (Black, J., dissenting).

[73] No. CV 93-5736 SVW (SHX), 1995 WL 478941 (C.D. Cal. Mar. 20, 1995), *vacated*, 99 F.3d 933 (9th Cir. 1996). Subsequent to completion of this Note but prior to publication, the Ninth Circuit vacated and remanded the district court's holding largely for the reasons articulated in this Note.

[74] *Id.* at *3 (stating that precedent required enforcement of the subpoena).

[75] *Id.*

[76] *Id.* at *2-*3.

[77] *Id.* at *1. Such subpoenas are referred to as subpoena duces tecum, which describe in advance the material requested by the grand jury. HARRY I. SUBIN ET AL., FEDERAL CRIMINAL PRACTICE: PROSECUTION AND DEFENSE § 12.6(b) (1992). An individual complying with such a subpoena accordingly would forfeit the right to resist and therefore the individual may challenge such a subpoena before appearing by bringing a motion to quash the subpoena. FED. R. CRIM. P. 17(c).

[78] *See Troescher*, 1995 WL 478941, at *1.

produce any documents.[79] The defendant justified invoking the Fifth Amendment on the ground that the act of producing the documents would constitute potentially incriminating testimony.[80] In an opinion filed on August 4, 1994, the district court found Troescher's claim of the Fifth Amendment privilege an insufficient defense to the contempt charge against him. In reaching this conclusion, the court relied on the proposition from *Fisher v. United States*[81] that this privilege applies to documents if the act of producing them would tend to provide a link in the government's chain of evidence.[82]

After issuing the opinion in which it held that Troescher had not waived his Fifth Amendment privilege,[83] the district court determined whether Troescher had a valid Fifth Amendment claim.[84] The government argued that the Fifth Amendment did not apply to the respondent because his claim was based on prosecution for a tax crime rather than for a nontax crime.[85]

The court concluded that under current law in the Ninth Circuit, the government was "technically correct."[86] In reaching this conclusion, the court discussed the test used by federal courts to determine whether a taxpayer's assertion of the Fifth Amendment privilege can be used to avoid providing the IRS with tax information. The court explained that to "'claim the privilege validly a defendant must be faced with substantial hazards of self-incrimination that are real and appreciable and not merely imaginary and unsubstantial. Moreover, he must have reasonable cause to apprehend [such] danger from a direct answer to questions posed to him.'"[87]

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[79] *Id.*

[80] *Id.*

[81] 425 U.S. 391 (1976).

[82] United States v. Troescher, No. CV 93-5736 SVW (SHX), 1994 WL 547514, at *1 (C.D. Cal. Aug. 4, 1994) (citing Fisher v. United States, 425 U.S. 391 (1976)).

[83] *Id.*

[84] United States v. Troescher, No. CV 93-5736 SVW (SHX), 1995 WL 478941 (C.D. Cal. Mar. 20, 1995), *vacated*, 99 F.3d 933 (9th Cir. 1996).

[85] *Id.* at *1.

[86] *Id.*

[87] *Id.* at *2 (quoting *In re* Grand Jury Proceedings, 13 F.3d 1293, 1295 (9th Cir. 1994) (quoting United States v. Neff, 615 F.2d 1235, 1239 (9th Cir. 1980), *cert. denied*, 447 U.S. 925 (1981))); *see also* Hoffman v. United States, 341 U.S. 479 (1951) (holding that the Fifth Amendment privilege extends to answers that would furnish a link in the chain of evidence needed to prosecute the defendant); Estate of Fisher v. Commissioner, 905 F.2d 645, 648-49 (2nd Cir. 1990) (holding that the Fifth Amendment privilege is personal and cannot be asserted by a deceased's estate); Kranz v. Commissioner, 45 T.C.M. (CCH) 409, 410 (1982) (holding that the privilege cannot be invoked "where the possibility of criminal prosecution is remote or unlikely, and [that] remote or speculative possibilities of prosecution for unspecified crimes are not sufficient."). The U.S. Tax Court in *Kranz* further noted that the likelihood of self-incrimination for "a tax or nontax crime is so remote and so speculative that it cannot support a Fifth Amendment

The court in *Troescher* anticipated applying the above test. As the government argued, however, the Ninth Circuit adds an additional step in determining the validity of a taxpayer's assertion of the Fifth Amendment privilege to justify withholding financial information and documents from the IRS.[88] The Ninth Circuit first made this distinction in *Fuller*: "The fifth amendment's self-incrimination clause provides no right to taxpayers to refuse to provide the IRS with financial information unless they make some showing that there is an appreciable possibility of prosecution for a nontax crime."[89]

B. *Ninth Circuit Cases Distinguishing Between Tax and Nontax Crimes*

In reaching the conclusion that a taxpayer can only assert the Fifth Amendment privilege against self-incrimination when genuinely fearing prosecution for a nontax crime, the court in *Fuller* cited five cases.[90] At the time of *Fuller*, the most recent Supreme Court decisions on the issue were *Fisher v. United States*[91] and *United States v. Doe*,[92] both of which did not distinguish between fear of incrimination for tax crimes and for nontax crimes. In all five of the cases the Ninth Circuit cited, the taxpayers failed to make the requisite showing of more than a generalized fear of incrimination. This absence appeared to be the determinative factor in the decisions.[93] In *United States v. Neff*,[94] a Ninth Circuit case involving a tax protestor, the court focused on the fact that the taxpayer used the Fifth Amendment to protest taxes rather than because of a fear of criminal prosecution. In other words, Neff did not fear incrimination but was misusing the Fifth Amendment as a shield to prevent the government from prosecuting him for not filing a return. The Ninth Circuit stated that valid claims of the Fifth Amendment privilege must stem from "something peculiarly incriminating"[95] in an individual's circumstances, but it did not rule out the possibility that the "something particularly incriminating" could relate to a tax

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claim." *Id.* at 410.

[88] *Troescher*, 1995 WL 478941, at *2.

[89] 786 F.2d 1437, 1439 (9th Cir. 1986).

[90] *Id. at* 1439 (citing Hudson v. United States, 766 F.2d 1288, 1291 (9th Cir. 1985); Boday v. United States, 759 F.2d 1472, 1474 (9th Cir. 1985); McCoy v. Commissioner, 696 F.2d 1234, 1236 (9th Cir. 1983); Edwards v. Commissioner, 680 F.2d 1268, 1270 (9th Cir. 1982); United States v. Neff, 615 F.2d 1235, 1238-40 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980)).

[91] 425 U.S. 391 (1975).

[92] 465 U.S. 605 (1984).

[93] *See Fuller*, 786 F.2d at 1439.

[94] 615 F.2d 1235.

[95] *Id.* at 1239.

crime.[96]

The Court in *Fuller* also cited its decision in *Edwards v. Commissioner*,[97] in which it held that valid assertions of the Fifth Amendment privilege must stem from fear of criminal investigation for specific matters rather than for a generalized fear of prosecution for tax evasion.[98] Nevertheless, individuals might have real and substantial fears of prosecution for tax evasion which would reasonably be increased if the IRS begins investigating them. The taxpayers in *Edwards* stated that no particularly incriminating activity and no criminal investigation was pending against them.[99] The court in *Edwards* also did not explicitly distinguish between tax and nontax crimes. Similarly, in *McCoy v. Commissioner*,[100] the Ninth Circuit did not distinguish between tax and nontax crimes.[101] This case involved taxpayers refusing to cooperate with an IRS subpoena based on the constitutional protections of the First, Fourth, Fifth, and Thirteenth Amendments.[102] The taxpayers refused to explain the basis for their fear of incrimination.[103] The fourth case cited in *Fuller, Boday v. United States*,[104] similarly contained no distinction between tax and nontax crimes and involved largely the same scenario as in *McCoy*.[105] The appellants' tax returns in *Boday* contained no financial information, and the appellants claimed the Fifth Amendment privilege as a blanket protection.[106] The grounds for the court's decision to enforce the IRS subpoena was that the appellants did not demonstrate more than a general fear of prosecution.[107]

The final case cited in *Fuller*, *Hudson v. United States*,[108] specifically mentioned fear of incrimination for a nontax crime, but this was raised by the taxpayer in his claim, not by the court in assessing the claim's validity. On his tax return, Hudson stated, in response to most of the questions, that he objected on the grounds that his answers would "'have a tendency to incriminate me of any ambiguous and false nontax related crime.'"[109]

Thus, in creating a tax-crime exception to the use of the Fifth Amend-

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[96] *Id.*

[97] 680 F.2d 1268 (9th Cir. 1982).

[98] *Id.* at 1270.

[99] *Id.*

[100] 696 F.2d 1234 (9th Cir. 1983).

[101] *McCoy* involved taxpayers asserting the privilege but refusing to explain the basis for their fear of prosecution. *Id.*

[102] *Id.* at 1236.

[103] *Id.*

[104] 759 F.2d 1472 (9th Cir. 1985).

[105] *McCoy*, 696 F.2d at 1234.

[106] *Boday*, 759 F.2d at 1474.

[107] *Id.* at 1474-75.

[108] 766 F.2d 1288 (9th Cir. 1985).

[109] *Id.* at 1291 (quoting Hudson's tax return).

ment privilege in tax investigations, the Ninth Circuit's reliance on the five cases cited in *Fuller* appears misplaced. The likelihood of having "penalties affixed to criminal acts," not the fact that the activity was a nontax crime, is what the courts deemed insufficient to give rise to a Fifth Amendment claim.

The Ninth Circuit's exception to the use of the privilege appears to be an anomaly. According to the district court in *Troescher*, "no other circuit has distinguished between tax crimes and nontax crimes for Fifth Amendment purposes, . . . [and] no other treatise has even mentioned these unusual Ninth Circuit opinions."[110]

The taxpayer in *United States v. Carlson*[111] asserted the Fifth Amendment privilege in arguing that he could not file a tax return without incriminating himself for filing false withholding forms.[112] The Ninth Circuit denied this claim, stating that to give credence to Carlson's claim "would license a form of conduct that would undermine the entire system of personal income tax collection."[113] The court discussed two competing interests present in tax investigations: the privilege against self-incrimination and the "need for public revenue collection by a process necessarily reliant on self-reporting."[114] The court recognized that fundamental constitutional protections, including the privilege against self-incrimination, "may be limited only for the most substantial of reasons."[115] The court stated that in balancing the two interests involved, "the history and purposes of the privilege, and the character and urgency of the countervailing public interest" should be considered.[116] The court looked at the base of the taxpayer's claim, however, and concluded that his invocation of the Fifth Amendment privilege was not made in good faith because he had claimed ninety-nine withholding exemptions although he was single with no children.[117]

Noting that Carlson was using the Fifth Amendment to avoid filing a return at all is critical. The Fifth Amendment does not protect an individual from filing a return.[118] In *Carlson*, the governmental interest of protecting

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[110] No. CV 93-5736 SVW (SHX), 1995 WL 478941, at *3 (C.D. Cal. Mar. 20, 1995), *vacated*, 99 F.3d 933 (9th Cir. 1996).

[111] 617 F.2d 518 (9th Cir. 1980).

[112] *Id.* Carlson was a tax protestor who claimed 99 exemptions on his withholding form. *Id.* at 520. The court held that the Fifth Amendment privilege does not protect disclosure of evidence if the privilege is claimed to protest the tax system rather than to prevent self-incrimination. *Id.* at 523.

[113] *Id.* at 520.

[114] *Id.* at 521.

[115] *Id.*

[116] *Id.* at 522 (citing California v. Byers, 402 U.S. 424, 449 (1971) (Harlan, J., concurring)).

[117] *Carlson*, 617 F.2d at 524.

[118] *See, e.g.*, United States v. Doe, 465 U.S. 605 (1984).

the tax system was clearly relevant and sharply at stake. In later cases, the Ninth Circuit has relied on the governmental interests described in *Carlson*[119] and has broadened significantly the scope of *Carlson*'s holding. In *Edwards*, for example, the court refused to recognize the taxpayer's Fifth Amendment claim "because the fifth amendment privilege may not itself be used as a method of evading payment of lawful taxes."[120] Because a fundamental right is at stake, however, this extension of *Carlson*'s holding merits close scrutiny.

In non-section 7203 investigations, taxpayers usually have filed some form of a return. To an extent, therefore, these taxpayers already have complied voluntarily. Because this information is not available solely through the taxpayer's records, abridging the protections of the Fifth Amendment is not justified in these situations.

In *Carlson*, the Ninth Circuit balanced the taxpayer's constitutional right against self-incrimination with the government's reliance on voluntary compliance and self-reporting.[121] The incriminating nature of the disclosures sought by the government was not determinative of the applicability of the privilege; instead, the court focused on the government's purpose of collecting money.[122] Furthermore, the government normally has access to a significant amount of information.[123] The fact that the district court in *Carlson* had "failed to explain why the government's need to collect revenue is greater in tax crime situations than in nontax crime situations"[124] is also bothersome. Because of the various means by which it can obtain information about taxes and the financial situation of citizens,[125] the government could be said to have less of an interest if a tax crime is involved. Properly determining whether the privilege against self-incrimination applies requires balancing the governmental interest in collecting revenue with the individual's fundamental rights.[126] In cases subsequent to *Carlson*, the Ninth Circuit apparently has abandoned this determination.

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[119] *See supra* text accompanying note 114.

[120] Edwards v. Commissioner, 680 F.2d 1268, 1270 (1982).

[121] *Carlson*, 617 F.2d at 521.

[122] *Id.* at 523-24.

[123] *See supra* notes 10-11.

[124] Stanley, *supra* note 14, at 541.

[125] "A taxpayer's employer reports each employee's withholding tax and taxable income to the IRS. A failure to pay any income tax is obvious from the face of a tax return when combined with an employer's report indicating that income tax was not withheld." *Id.* at 541-42.

[126] *Id.* at 539.

III. HISTORICAL OVERVIEW OF SUPREME COURT'S APPROACHES TO THE PRIVILEGE AGAINST SELF-INCRIMINATION

Protections against self-incrimination predate the birth of this country. The protections grew out of opposition to the procedure of English ecclesiastical courts whereby an individual, with no pending charge against him, was forced, usually by torture, to respond to broad questions and to incriminate himself.[127] In Colonial America, writs of assistance were issued to revenue officers that gave them nearly unlimited discretion to search suspected places for smuggled goods and that placed the "liberty of every man in the hands of every petty officer."[128] Resentment of such government actions led the Founding Fathers to create the Fifth Amendment protection.[129]

Prior to the enactment of the United States Constitution, this common law privilege was sufficiently broad to encompass the production of personal documents that might be incriminating.[130] The Fifth Amendment codified the privilege against self-incrimination.[131] The power of courts to require citizens to produce documents originally paralleled the power of the Court of Chancery in Great Britain:

> [O]ne cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of a crime, or to forfeit his property, is contrary to the principles of a free government.[132]

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[127] LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 29-36 (1968); *see* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1079 (1986).

[128] 2 LEGAL PAPERS OF JOHN ADAMS 142 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

[129] *See* United States v. Carlson, 617 F.2d 518, 522 (9th Cir. 1980); Levy, *supra* note 127, at 405-32.

[130] *See* Fisher v. United States, 425 U.S. 391, 418 (1976) (Brennan, J., concurring) (describing the original protection as a "right of silence" meaning that the "legal process could not force incriminating statements from the defendant's own lips").

[131] The Fifth Amendment was intended to serve as a restraint against governments' tendency to interfere with its citizens private lives. *See* Brackley, *supra* note 60, at 553.

[132] Boyd v. United States, 116 U.S. 616, 631-32 (1886). The Court further noted that "[i]t is abhorrent to the instincts of a Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom." *Id.* at 632.

This original broad protection has been narrowed severely.[133]

The privilege was created by the Founding Fathers in recognition of the tendency of government, left unchecked, to disregard individual autonomy.[134] The protection addresses several main policies.[135] One commentator explained these policies by placing them in the following categories:

> the "foxhunter" policies of discouraging torture and browbeating and maintaining a fair state-individual balance of advantages in criminal proceedings, the "old woman's" policy of avoiding the cruel "trilemma" of self-accusation, perjury, or contempt, and the "hermit's" policy of preserving a private enclave where one may lead a private life.[136]

Professor Wigmore defined the terms of the privilege as an effort to "comply with the prevailing ethic that the individual is sovereign and that the proper rules of battle between government and individual require that the individual not be bothered for less than good reason and not be conscripted by his opponent to defeat himself."[137]

A. *The History of the Supreme Court's Interpretation of the Privilege Against Self-Incrimination*

The analysis used by the Supreme Court to determine the validity of Fifth Amendment claims has changed with time. A property-rights approach prevailed until midway through this century.[138] Under this approach, the private property of an individual was simply beyond the scope of the government's subpoena power.[139] The next type of analysis employed by the Supreme Court was a privacy approach, which was concerned with protecting an individual's expectations of privacy.[140] The Supreme Court then

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[133] *See infra* notes 138-220 and accompanying text.

[134] *See* Brackley, *supra* note 60, at 554.

[135] *See generally* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (holding that the privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law).

[136] Robert Heidt, *The Fifth Amendment Privilege and Documents—Cutting* Fisher's *Tangled Line*, 49 MO. L. REV. 439 (1984).

[137] 8 JOHN H. WIGMORE, EVIDENCE § 2251, at 318 (McNaughton rev. 1961).

[138] *See* Heidt, *supra* note 136, at 450-59.

[139] *See* Boyd v. United States, 116 U.S. 616 (1886).

[140] *See generally* Couch v. United States, 409 U.S. 322, 327 (1973) (holding that the privilege against self-incrimination "is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation").

adopted the implied-admissions test, through which the question of whether the act of producing evidence in compliance with a subpoena would constitute incriminating testimony became the determinative factor of the validity of a Fifth Amendment claim.[141]

The following discussion of these different approaches attempts to explain the extent of protection provided by the Fifth Amendment and to analyze whether the Ninth Circuit's approach is consistent or justifiable in light of these approaches.

1. *The Property-Rights Approach*

The property-rights approach to the Fifth Amendment privilege was set out in *Boyd v. United States.*[142] In this case, the Supreme Court first accepted application of the Fifth Amendment privilege to documents.[143] At the center of the case was a statute which compelled the production of business records.[144] The defendants in *Boyd* were accused of failing to pay taxes on imported glass.[145] The government, in requesting judicial enforcement of the order for production of the glass invoice, argued that forcing the invoice's production did not differ from seizing stolen goods.[146] The court rejected the government's argument:

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him . . . . In the one case, the government is entitled to the possession of the property; in the other it is not.[147]

In reaching its conclusions, the Court discussed at length Lord Camden's

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[141] *See* Fisher v. United States, 425 U.S. 391 (1976).

[142] 116 U.S. 616 (1886).

[143] Interestingly, the Court in *Boyd* viewed the sole proprietor's business papers as personal papers. *Id.* at 622-23, 637.

[144] *Id.* at 632. Under the statute, if a government attorney believes that "any business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States," the attorney may seek a subpoena by submitting "a written motion . . . setting forth the allegation which he expects to prove." *Id.* at 619-20.

[145] *Id.* at 618.

[146] *Id.* at 622.

[147] *Id.* at 623.

opinion in the English case of *Entick v. Carrington.*[148] According to the philosophy underlying that opinion, protection of property is the very reason that men enter into society.[149] Individuals' exclusive rights to their own property are "preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole."[150] Accordingly, property interests are tantamount to all others. The Court in *Boyd* embraced the idea expressed by Lord Camden that a subpoena for an individual's personal documents equals a trespass.[151]

The test originating in *Boyd* was a simple one: if an individual owned the document, he could resist the subpoena.[152] This approach resulted in difficulties for the Court, for proving crimes became considerably more difficult when an individual could conceal relevant evidence merely because he owned it.[153] An individual's private books can reveal criminal liability,[154] in the case of *Boyd* for duties,[155] but can also be suppressed to conceal and avoid such liability.[156] One writer, describing the scope of the Fifth Amendment in light of *Boyd*, stated that "[t]he Court soon found, however, that its broad interpretation of the privilege made grand jury investigations nearly impossible. This result was devastating . . . to [various] . . . forms of regulation and to criminal investigation in general."[157] This unsatisfactory situation contributed to the Supreme Court's movement away from the property-rights approach.[158]

The Court's transition to a privacy-rights approach is illustrated by the "required records" rule.[159] Under this rule, certain documents required by

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[148] *Id.* at 626-30 (quoting *Entick*, 95 Eng. Rep. 807 (1765)).

[149] *Id.* at 627.

[150] *Id.*

[151] *Id.* "By the laws of England, every invasion of private property, be it ever so minute, is a trespass." *Id.* (quoting *Entick*, 95 Eng. Rep. at 817).

[152] *See id.*

[153] *See* Heidt, *supra* note 136, at 449.

[154] One commentator discussed the ability of a sole proprietor to resist a subpoena: "[A] grand jury investigating price-fixing will routinely subpoena documents from several suspected competitors. All but the sole proprietorship must comply. This ability to suppress documents, which often supply crucial evidence in a price-fixing prosecution, may in practice virtually eliminate the sole proprietorship's antitrust exposure." Heidt, *supra* note 136, at 442.

[155] *Boyd,* 116 U.S. at 618.

[156] *Id.*

[157] R. Erik Lillquist, Note, *Constitutional Rights at the Junction: The Emergence of the Privilege Against Self-Incrimination and the Interstate Commerce Act,* 81 VA. L. REV. 1989, 1991 (1995).

[158] *See* Heidt, *supra* note 136, at 449-50. Accordingly, during the past century, the scope of the Fifth Amendment has been limited, so that fewer documents are protected. *Id.* at 450-72.

[159] This discussion of the required records doctrine is included to illustrate the change

the government to be maintained for regulatory purposes are considered public records.[160] As such, the government can compel their production, and the Fifth Amendment privilege cannot be validly asserted.[161] This rule applies even if the records are owned by the individual claiming the privilege.[162] Because required records are kept for government purposes and "promote a legitimate regulatory aim,"[163] the government has the ownership interest in the documents.[164] The required records rule is not inherently inconsistent with the property-rights approach, as the rule merely questions who has the ownership interest in the documents.[165] The Court's adoption of this rule demonstrated a growing willingness to enforce government demands for certain documents.

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in the Court's philosophy, not for purposes of analyzing the Fifth Amendment privilege's applicability in tax investigations. Although section 6103 of the Internal Revenue Code requires individuals to keep certain records and forbids the IRS from sharing these with other agencies, the IRS has not used this doctrine to support motions for enforcement of subpoenas. *See* Commodity Futures Trading Comm'n v. Collins, 997 F.2d 1230, 1233 (7th Cir. 1993) ("required-records doctrine is inapplicable to a case . . . in which the individual is not required to maintain a record but does so as a matter of convenience"); *In re* Subpoena Duces Tecum Issued to B.M., 335 N.W.2d 420 (Wis. Ct. App. 1983) (holding that because a copy of a tax return is not a return, section 6103 does not protect a taxpayer from responding to a subpoena for a tax return, but that act of production is protected by the Fifth Amendment because production would both admit the copies' existence and authenticate them); DEPARTMENT OF JUSTICE TAX DIVISION, MANUAL FOR CRIMINAL TAX TRIALS 103 (1973). But see cases interpreting tax returns as required records: Lowder v. All Star Mills, 273 S.E.2d 247, 264 (N.C. 1981); *In re* Grand Jury Empaneled Mar. 19, 1980, 541 F.Supp. 1 (D.N.J. 1981), *aff'd*, 680 F.2d 327 (3rd Cir. 1982).

[160] Public records include "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established." Wilson v. United States, 221 U.S. 361, 380 (1911).

[161] *See id.*; *see also* Shapiro v. United States, 335 U.S. 1 (1948) (holding that petitioner could not invoke the Fifth Amendment privilege to avoid disclosing documents he was required to keep under the Emergency Price Control Act).

[162] *Shapiro,* 335 U.S. at 16-20.

[163] Craib v. Bulmash, 777 P.2d 1120, 1122, 1126 (Cal. 1989) (applying the doctrine because the reporting requirement demanded "minimal disclosure of information of a kind customarily kept in the ordinary course of business" and because the type of records involved tended to have a "'diminished expectation of privacy'").

[164] *Id.* The Court in *Shapiro* stated that this principle applies "'to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'" *Shapiro*, 335 U.S. at 17 (emphasis omitted).

[165] The Court in *Wilson* explained, "[T]he physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held." *Wilson*, 221 U.S. at 380.

The applicability of the Fifth Amendment to corporate documents closely parallels the required records doctrine. In *Hale v. Henkel*,[166] the Court justified enforcement of government summons of corporate documents on the grounds that corporations are state-created entities and as such the state retains visitorial powers over certain aspects of them.[167] The distinction between corporate and personal documents then became privacy, and the privacy expectations associated with corporate documents were not treated the same as the privacy interest in personal papers.[168] This approach is longstanding, although private interest in personal papers is not currently relevant in the use of the Fifth Amendment.[169]

2. *The Privacy-Rights Approach*

The privacy-rights approach to the privilege against self-incrimination was based on the belief that the contents of one's private papers and documents are so personal in nature that permitting the government to "forcibly gain access to [them] would violate a fundamental purpose of the Constitution: to protect the individual from the abuse of power by the State."[170] This approach is consistent with that of *Boyd*; in that case, the Court considered government-forced production of private papers to be an impermissible invasion of personal security, liberty, and property.[171] One commentator described such documents as "an extension of the individual's mind" and characterized a forced taking of such writings as "psychologically comparable to prying words from his lips."[172]

The idea that one's writings embody one's self supports the argument that compelling submission of such writings constitutes compelling testimony against one's self. Justice Brennan described the similarities between forcing oral testimony and acquiring testimony through the contents of documents:

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[166] 201 U.S. 43 (1906).

[167] *Id.* at 74-75.

[168] *Id.*

[169] United States v. Doe, 465 U.S. 605 (1984). The Court in *Doe* also showed this willingness by the manner in which it chose to classify the documents at issue. The subject of the subpoena was a large number of records from several businesses of the sole proprietor. *Id.* at 606-07. The Third Circuit had analogized these records to an individual's personal papers, but the Court rejected that characterization in favor of classifying them as business records. *Id.*

[170] Brackley, *supra* note 60, at 554; *see* Fisher v. United States, 425 U.S. 391 (1976); Bellis v. United States, 417 U.S. 85 (1974); Boyd v. United States, 116 U.S. 616, 627-30 (1886).

[171] *Boyd*, 116 U.S. at 630.

[172] Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 39 (1986).

> [N]o 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 . . . . 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.[173]

The Court's most direct endorsement of the privacy approach was in *Couch v. United States*.[174] In that case, the Fifth Amendment was found inapplicable to protect an individual's documents that were in the possession of his accountant.[175] The rationale for this ruling was that because an accountant was inspecting documents for the purpose of required disclosures in compliance with the tax laws, the privacy expectation of the individual was diminished.[176] The Court in *Couch* made several references to *Boyd* but interpreted that case differently than it previously had.[177] The Court viewed the contents of the documents themselves, rather than who had the ownership interest, as determinative of the applicability of the Fifth Amendment.[178]

In *Bellis v. United States*,[179] the Court elaborated on its statement from *Couch* that "the ingredient of personal compulsion . . . is lacking" regarding documents held by an accountant.[180] The petitioner in *Bellis* was a corporate officer who, in a representational capacity, held documents that had the potential to incriminate him personally.[181] The Court ruled that because a privacy expectation is absent in documents held in a representational capacity, the Fifth Amendment privilege did not apply to the petitioner, and it could not be used to prevent the government from obtaining the docu-

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[173] *Fisher*, 425 U.S. at 420 (Brennan, J., concurring). The Supreme Court has not adopted the above reasoning and does not currently consider whether a document has a legitimate expectation of privacy surrounding it in determining whether government compelled production is forbidden by the Fifth Amendment. Heidt, *supra* note 136, at 450-68.

[174] 409 U.S. 322 (1973).

[175] *Id.*

[176] *Id.* at 335.

[177] *See* Heidt, *supra* note 136, at 457-58.

[178] *Couch*, 409 U.S. at 329-35; *see* Boyd v. United States, 116 U.S. 616, 619-39 (1886); Heidt, *supra* note 136, at 457-58.

[179] 417 U.S. 85 (1974).

[180] *Couch*, 409 U.S. at 329.

[181] *Bellis*, 417 U.S. at 88.

ments.[182]

3. *The Implied-Admissions Approach*

The privacy-rights approach soon was narrowed into the implied-admissions test set out in *United States v. Fisher.*[183] The Court noted that protecting privacy for privacy's sake was not the goal of the Fifth Amendment.[184] The Court held that private statements are admissible even if they incriminate, as long as they were not compelled when originally made.[185] All invasions of privacy do not implicate the privilege against self-incrimination. In order for a document to be protected from governmental compulsion, the *act* of producing the document must be incriminating.[186] The Court stated that constitutional protection of personal privacy was covered by, and limited in its scope to, the Fourth Amendment, not the Fifth.[187]

> The Framers . . . struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue. They did not seek in still another Amendment—the Fifth—to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination.[188]

In *Fisher,* the Court recognized that the act of producing evidence has "communicative aspects of its own, wholly aside from the contents of the papers produced."[189] The question then became whether the resulting com-

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[182] *Id.*

[183] 425 U.S. 391 (1976). The documents at issue in *Fisher* were an accountant's workpapers analyzing a taxpayer's checks and deposit slips for a determination of income. *Id.* at 393-94.

[184] *Id.* at 400.

> The proposition that the Fifth Amendment protects private information obtained without compelling self-incriminating testimony is contrary to the clear statements of this Court that under appropriate safeguards private incriminating statements of an accused may be overheard and used in evidence, if they are not compelled at the time they are uttered.

Id. This philosophy clearly underlies the Court's approach to voluntarily created documents, including diaries. *See infra* notes 221-25 and accompanying text. Justice Brennan, among others, has objected to such an approach. *See infra* notes 204-10 and accompanying text.

[185] *Fisher,* 425 U.S. at 400.

[186] *Id.*

[187] *Id.* at 400-01.

[188] *Id.* at 400.

[189] *Id.* at 410. The Court held that documents prepared by an accountant were not a

munication was both testimonial and incriminating.[190] If the act of production supplied only a minimal amount of evidence to the government's case then the communication was deemed not to be testimonial.[191] In order for evidence to be testimonial, it must "reveal the contents of one's mind."[192]

One test used by courts to determine whether the Fifth Amendment privilege should apply in a particular case is whether the production of the subpoena's requested subject matter would establish a link in the chain of the investigation that could create criminal liability.[193] The privilege may be asserted as to facially innocuous questions if an individual, by answering the question, might provide information that could be used to prosecute that individual.[194] In the context of IRS subpoenas, the inquiry is whether the taxpayer reasonably fears that providing information about his income or financial assets could "establish criminal failure to file."[195]

The communicative aspects of responding to a subpoena for documents include verifying both the existence of the documents and the taxpayer's possession of them as well as demonstrating the taxpayer's belief that the documents are those requested in the subpoena.[196] The existence of these communicative aspects is insufficient to allow an individual to resist a subpoena absent such a verification constituting testimonial and incriminating evidence.[197] The Court in *Fisher* applied this rule to the facts of the case and concluded that because the existence of the documents at is-

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testimonial communication by the taxpayer and that their production was not compelled because their preparation was voluntary. *Id.*

[190] *Id.* "[T]he Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Id.* at 408.

[191] *Id.*

[192] Nancy J. King, Note, *Fifth Amendment Privilege for Producing Corporate Documents,* 84 MICH. L. REV. 1544, 1550 (1986) (citing Schmerber v. California, 384 U.S. 757 (1966) (holding that evidence of analysis of blood taken from the defendant after his arrest for driving while intoxicated did not violate his Fifth Amendment privilege)).

[193] *See* Maness v. Meyers, 419 U.S. 449 (1975); *In re* Gault, 387 U.S. 1 (1967); Hoffman v. United States 341 U.S. 479 (1951).

[194] United States v. Coffey, 198 F.2d 438 (3rd Cir. 1952); *see* Senate Select Comm. on Secret Military Assistance v. Secord, 664 F. Supp. 562 (D.D.C. 1987). In *Coffey*, the Third Circuit stated the requirement:

> It is enough (1) that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime against the United States, and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case.

Coffey, 198 F.2d at 440.

[195] United States v. Bodwell, 66 F.3d 1000, 1001 (9th Cir. 1995).

[196] *Fisher*, 425 U.S. at 410.

[197] *Id.*

sue—accountant's workpapers—could be assumed because they were used by the accountant to compute the client's taxes, admitting the papers' existence would provide little additional evidence to the government.[198]

Fisher substantially deviated from the spirit, if not the actual language, of *Boyd*. The Court in *Boyd* held that "compulsory . . . production of his . . . private books and papers" compels an individual to be a witness against himself within the meaning of the Fifth Amendment.[199] The Court in *Fisher* stated that many of *Boyd*'s assertions have not "stood the test of time."[200] The Court recognized dicta from prior cases that referred to the notion that individuals cannot be required to produce private documents.[201] The Court went on to indicate, however, that the prior cases relied too heavily upon the intimate relationship between the Fourth and Fifth Amendments and to suggest that government-compelled production of private papers violated the Fourth Amendment and therefore automatically violated the Fifth Amendment.[202] The Court stated that

> the foundations for the rule have been washed away . . . . In consequence, the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give "testimony" that incriminates him.[203]

Justice Brennan's concurrence in *Fisher* cautioned against the majority's approach that production of voluntarily created documents cannot be considered compelled for purposes of asserting the Fifth Amendment.[204] Justice Brennan argued that the creation of documents does not determine the incriminatory effects on an individual.[205] One commentator stated that "one might justifiably question, as Justice Brennan would, what the creation of a document (unless the creation was forced) has to do with whether or not the document's creator is being compelled to reveal its contents."[206]

In *Fisher*, Brennan enumerated several specific objections to the

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[198] *Id.* at 411.

[199] Boyd v. United States, 116 U.S. 616, 630-31 (1886).

[200] *Fisher*, 425 U.S. at 407.

[201] *Id.* at 400-01 (citing Bellis v. United States, 417 U.S. 85 (1974); Couch v. United States, 409 U.S. 322 (1973); Schmerber v. California, 384 U.S. 757 (1966); Davis v. United States, 328 U.S. 582 (1946); Wilson v. United States, 221 U.S. 361 (1911)).

[202] *Id.*

[203] *Id.* at 409.

[204] *Id.* at 414-30 (Brennan, J., concurring).

[205] *Id.* at 427-28 (Brennan, J., concurring).

[206] Brackley, *supra* note 60, at 559 n.25.

majority's opinion.[207] First, he stated that because the Fifth Amendment protects against the compelled disclosure of the contents of one's mind, documents that act as an "extension of his person" should also be privileged from government compulsion.[208] Second, the majority's opinion could be interpreted as suggesting that a subpoena of an individual's diary containing confessions to a crime might not be protected by the privilege against self-incrimination.[209] Brennan's primary objection to the majority's reasoning was that it suggested that "protection of personal privacy is merely a by-product and not, as our precedents and history teach, a factor controlling . . . the scope of the privilege."[210]

Justice Marshall had similar difficulties with the majority's opinion. He cited a line of precedents protecting private papers[211] and stated that "they represent a deeply held belief on the part of the Members of this Court throughout its history that there are certain documents no person ought to be compelled to produce at the Government's request."[212]

In *United States v. Doe*,[213] the Court extended the implied-admissions doctrine.[214] *Doe* involved subpoenas for a sole proprietor's business records during an investigation of municipal corruption.[215] The Court concluded that the privilege against self-incrimination did not extend to voluntarily prepared business records because the act of producing such records would not entail testimonial self-incrimination but merely required the taxpayer to verify the existence, possession, and accuracy of the records.[216] The contents of the documents were deemed irrelevant in determining whether the act of production was incriminatory.[217]

Justice O'Connor authored a concurrence in *Doe* and summarized the effect of the majority's opinion: "the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind."[218] In *Balti-*

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[207] *Fisher*, 425 U.S. at 414.

[208] *Id.* at 420 (Brennan, J., concurring).

[209] *Id.* at 415 (Brennan, J., concurring).

[210] *Id.* at 416 (Brennan, J., concurring).

[211] *See, e.g.*, Bellis v. United States, 417 U.S. 85 (1974); Couch v. United States, 409 U.S. 322 (1973); Boyd v. United States, 116 U.S. 616 (1886).

[212] *Fisher*, 425 U.S. at 431-32 (Marshall, J., concurring).

[213] 465 U.S. 605 (1984).

[214] The I.R.S. Manual explains this rule by stating that "a summons only compels a witness to produce; and unless he has been compelled to write the document, there is no element of compulsion as to the documents themselves." 2 IRM: Admin., *supra* note 1, at 8002 (Jan. 14, 1987).

[215] *Doe*, 465 U.S. at 606.

[216] *Id.* at 612-13.

[217] *Id.*; *see also In re* Grand Jury Proceedings, Subpoenas for Documents, 41 F.3d 377, 380 (8th Cir. 1994) (finding that production of taxpayer's financial documents and personal papers would "implicitly vouch for the[ir] genuineness").

[218] *Doe*, 465 U.S. at 418 (O'Connor, J., concurring).

more Department of Social Services v. Bouknight,[219] the Court again rejected a content-based approach and refused to allow the Fifth Amendment to protect a mother from compliance with a court order to produce her infant son.[220]

B. *An Analysis of the Current State of Fifth Amendment Law*

One commentator has suggested that "the act of production analysis . . . serves to protect truly intimate and personal documents without providing a haven of protection for incriminating documents in which a privacy interest is lacking."[221] The accuracy of this statement, however, is questionable. For example, as part of its investigation into charges brought against Senator Robert Packwood, the Senate Select Committee on Ethics subpoenaed his diary.[222] The Senator was forced to turn over his entire diary, in which he clearly had a large privacy interest.[223] Senator Packwood's production of his diary was deemed non-incriminating because he had already attested to its existence and relevancy.[224]

The increased willingness of courts to enforce subpoenas of diaries and planners evinces an overall trend of courts to find individual's constitutional objections illegitimate.[225] Moreover, this area is reflective of the larger debate underlying courts' application of the Fifth Amendment: whether individual's privacy expectations are, or should be, protected by the Fifth Amendment.[226] "Prying open a personal diary and forcing its writer to re-

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[219] 493 U.S. 549 (1990).

[220] *Id.* at 555.

[221] Daniel E. Will, Note, *"Dear Diary—Can You Be Used Against Me?": The Fifth Amendment and Diaries*, 35 B.C. L. REV. 965, 969 (1994).

[222] Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319, 1319 (1994).

> In 1992, the Senate Select Committee on Ethics began an investigation of Senator Bob Packwood's alleged sexual misconduct, intimidation of victims and misuse of staff in efforts to intimidate and discredit the alleged victims. The Ethics Committee investigation ultimately included a subpoena for over eight thousand pages of a personal diary Senator Packwood maintained since 1969.

Will, *supra* note 221, at 965.

[223] Will, *supra* note 221, at 965.

[224] *Id.*

[225] *See, e.g.*, United States v. Doe, 1 F.3d 87 (2d Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994). One writer expressed concern engendered by this trend: "In a society that so values individual privacy and expression, it is vital that people not be reluctant to think through their pens, and not have to risk an invasion of their private thoughts merely because the fallibility of memory necessitates that they write things down." Brackley, *supra* note 60, at 584-85.

[226] For articles discussing this issue at greater length, see Brackley, *supra* note 60; Heidt, *supra* note 136. Brackley summed up the two sides of the issue:

> [T]he *Fisher* Court apparently was struggling to merge the "naturalistic view" of

veal her innermost thoughts, however incriminating they may be, would no doubt have been as reprehensible to our forefathers as prying open a person's lips to extract a confession."[227] Financial documents, although clearly different in nature from diaries, also can reveal private information about individuals, such as details about lifestyle.

In *United States v. Doe (Doe II)*,[228] as part of an investigation into violations of securities laws, the Securities and Exchange Commission (SEC) subpoenaed several documents, including the defendant's daily planner.[229] He used the planner to record both business and personal information[230] and previously had testified that he used and possessed it.[231] Declining to use a content-based approach to the applicability of the privilege against self-incrimination, the Second Circuit ruled that Doe's compliance with the subpoena would not equal testimony.[232] A commentator explained the court's holding: "Adopting a strict constructionist reading, the Second Circuit insisted that because the word 'privacy' is not written explicitly in the text of the Fifth Amendment, there is no reason to suggest that any privacy interest underlies the Amendment."[233] The Second Circuit's approach was inapposite to that of Justice Brennan, who noted that "[e]xpressions are legion in opinions of this Court that the protection of personal privacy is a central purpose of the privilege against compelled self-incrimination."[234] The dissent in *Doe II* lambasted the majority's holding, specifically on the distinction between personal and business documents.[235] Circuit Judge Altimari stated that the majority had recognized that the planner was a personal paper and concluded that "[t]o hold that a person must divulge self-

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> the *Boyd* Court—that privacy is one of the "inalienable rights which antedated the creation of the state and which were absolutely beyond its control"—with the modern "legal realist" view—that all "individual claims to right are relative to other societal interests."

Brackley, *supra* note 60, at 571 (footnotes omitted).

[227] *Doe*, 1 F.3d at 96 (Altimari, J., dissenting).

[228] *Id.*

[229] *Id.* at 88.

[230] *Id.* Doe used the planner to "record appointments, social engagements, chores, phone numbers, and other reminders." *Id.*

[231] *Id.* at 93.

[232] *Id.* at 92-94.

[233] Brackley, *supra* note 60, at 572-73 (footnote omitted).

[234] Fisher v. United States, 425 U.S. 391, 416 (1976) (Brennan, J., concurring); *see also* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that the Fifth Amendment allows a citizen "to create a zone of privacy which government may not force him to surrender to his detriment"). One commentator has argued against this interpretation of the Fifth Amendment: "An extension to personal documents of the penumbral right of privacy emanating from the Fifth and other amendments is inappropriate in both practice and policy." Will, *supra* note 221, at 969.

[235] *Doe*, 1 F.3d at 95 (Altimari, J., dissenting).

incriminating statements merely because she chose to write them down rather than keep them sealed in her head, is to strip the Fifth Amendment privilege of its intended power."[236] The previous discussion of pre-Colonial American origins of the Fifth Amendment, moreover, suggests that privacy concerns clearly underlay the creation of the protection.[237]

In *Doe II*, the Second Circuit held that the Fifth Amendment is as inapplicable to the contents of private papers as it is to business documents.[238] Several circuit courts follow this approach.[239] Other circuits leave some hope for the Fifth Amendment protection for private documents.[240] Nevertheless, these latter cases do not offer much solace when it is considered that

> [i]n this day of multidistrict investigations, it is precipitate to throw in the towel and voluntarily produce documents during an administrative investigation (or civil litigation) conducted in one venue, when a related criminal investigation may be conducted simultaneously, or subsequently, in another circuit which might be more receptive to claims of Fifth Amendment protection for subpoenaed private papers.[241]

Currently, the Fifth Amendment only shields an individual from producing certain documentary evidence if there is an element of personal compulsion present in obtaining a testimonial communication from the accused.[242] Accordingly, because individuals keep both business and personal records by choice and not by government compulsion, the Fifth Amendment offers no protection for these records. Compulsion enters the picture if the

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[236] *Id.* at 96.

[237] *See supra* notes 125-35 and accompanying text.

[238] *Doe*, 1 F.3d at 92-93.

[239] *See, e.g.*, United States v. Wujkowski, 929 F.2d 981, 983-84 (4th Cir. 1991), *aff'd after remand sub. nom.* United States v. Stone, 976 F.2d 909 (4th Cir. 1992), *cert. denied*, 507 U.S. 1029 (1993); *In re* Sealed Case, 837 F.2d 83, 84 (D.C. Cir. 1989), *cert. denied* 493 U.S. 1044 (1990); *In re* Grand Jury Proceedings, 759 F.2d 1418, 1419 (9th Cir. 1985).

[240] *See In re* Grand Jury Investigation, 921 F.2d 1184, 1187 n.6 (11th Cir. 1991); United States v. Mason, 869 F.2d 414, 416 (8th Cir. 1989); *In re* Steinberg, 837 F.2d 527, 530 (1st Cir. 1988); Butcher v. Bailey, 753 F.2d 465, 469 (6th Cir. 1985) (allowing that private papers might be protected where forcing their production would "break 'the heart of our sense of privacy'") (citations omitted); *In re* Grand Jury Proceedings, 632 F.2d 1033, 1042 (3rd Cir. 1980).

[241] Joel Cohen, *Are John Doe's Personal Papers Protected by the Fifth Amendment Anymore?* N.Y. L.J., Sept. 21, 1993, at 1.

[242] *See* Couch v. United States, 409 U.S. 322, 328 (1973).

act of producing the copies verifies and authenticates their existence.[243] The act of producing evidence pursuant to a subpoena may have the requisite aspects of compulsion because compliance would prove both the existence of the papers and the individual's possession of them.[244]

Disclosures in tax returns and in financial documents can reveal a significant amount of private information about an individual, some of which may be incriminating.[245] By answering the first several questions on his tax return, the taxpayer has identified his name, address, social security number, and number of children or other dependents; the next entries expose annual gross income.[246] Additionally, whereas Form W-2 provides vital facts about employment, Schedule A potentially can include information concerning the taxpayer's religious beliefs, source of borrowed money, union membership, medical condition of his family, political inclinations, and other personal facts.[247] Logically, private records would be afforded a greater degree of protection than would tax returns. As such, because tax returns themselves are offered a high degree a privacy,[248] taxpayers reasonably could presume that their personal documents would have even greater protections.

The close relationship between the IRS and the DOJ in tax investigations increases the chance of an individual incriminating himself. In numerous cases, the IRS has attempted to support enforcement of subpoenas on the grounds that the DOJ currently is not contemplating prosecution of the matter.[249] The IRS bases this argument on the requirements of section 7602(c) of the Internal Revenue Code which states that summonses cannot be issued if a DOJ referral is in effect.[250] This argument is not convincing,

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[243] Cohen, *supra* note 241, at 1.

[244] Fisher v. United States, 425 U.S. 391, 410 (1976).

[245] *See* Stanley, *supra* note 14, at 547-55. In *Garner v. United States*, on his tax return, the defendant listed his occupation as "professional gambler." 424 U.S. 648, 649-50 (1976). This disclosure was introduced in a nontax criminal trial to demonstrate his familiarity with gambling. *Id.* at 650. The Court did not permit Garner to claim the Fifth Amendment privilege during his trial because he simply could have claimed the Fifth Amendment on his tax return in response to questions regarding occupation. *Id.* at 656. The Court reasoned that the government had not compelled Garner to incriminate himself. *Id.* at 656-65.

[246] *See* William A. Edmundson, Note, *Discovery of Federal Income Tax Returns and the New "Qualified" Privileges*, 1984 DUKE L.J. 938, 939 n.2.

[247] *Id.*

[248] Government agencies, for example, are generally prohibited from access to IRS tax returns. I.R.C. § 6103 (1994). *See also* Commodity Futures Trading Comm'n v. Collins, 997 F.2d 1230, 1233 (7th Cir. 1993) (stating that "[i]ncome tax returns are highly sensitive documents").

[249] *See, e.g.*, Estate of Fisher v. Commissioner, 905 F.2d 645, 649-50 (2d Cir. 1990); United States v. Berry, 807 F. Supp. 439 (W.D. Tenn. 1992).

[250] I.R.C. § 7602(c) (1994).

however, in light of the requirement that IRS agents refer matters to the DOJ upon a finding of evidence of fraud.[251] In *United States v. Sharp*,[252] the Fourth Circuit found that despite statements by the IRS of no current intention to prosecute a taxpayer, the privilege against self-incrimination applied in an investigation of civil tax liability.[253]

Estate of Fisher v. Commissioner[254] involves a motion filed in the U.S. Tax Court by the Commissioner of the IRS to require Fisher to respond to various discovery requests.[255] Attached to the motion was an affidavit claiming that Fisher was not the subject of a current IRS criminal investigation.[256] The Tax Court subsequently ruled against Fisher's estate on the grounds that Fisher could not assert validly the Fifth Amendment privilege because he did not have "reasonable cause to apprehend danger of a criminal prosecution."[257] The basis for the Tax Court's reasoning was the IRS's repeated assertions that Fisher was not subject to a criminal investigation.[258] On appeal, however, the Second Circuit concluded that "[r]eliance on statements made by the IRS's Criminal Investigation Division as to its current enforcement policies respecting taxpayer are misplaced."[259] In reaching this conclusion, the court followed its prior decision in *United States v. Edgerton*.[260] In *Edgerton*, the court rejected the reliance approach which focused on the government's intention to prosecute and instead adopted an approach that considered only the possible incrimination faced by a witness in answering the question.[261] The Supreme Court in

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[251] *See Berry*, 807 F. Supp. 441-42; *infra* notes 254-63 and accompanying text.

[252] 920 F.2d 1167, 1170 (4th Cir. 1990).

[253] *Id.; see Compelled Production*, *supra* note 6, at A-32 (Oct. 14, 1996). In *Mathis v. United States*, 391 U.S. 1 (1968), the Court found the petitioner guilty on the basis of information contained in oral testimony and documents acquired from the petitioner while in prison for unrelated crimes. The government argued that the information was obtained from questions asked as part of a routine tax investigation, in which no criminal charges had been brought. *Id.* at 4. The Court, in rejecting this argument, recognized that tax investigations often result in criminal prosecution. *Id.; see also* United States v. Harper, 397 F. Supp. 983 (E.D. Pa. 1975) (upholding invocation of the Fifth Amendment privilege to resist subpoena for information about assets and sources of income out of fear of incrimination for failure to file or pay taxes despite improbability of prosecution).

[254] 905 F.2d 645 (2d Cir. 1990).

[255] *Id.* at 648.

[256] *Id.*

[257] *Id.* Fisher died while the case was pending, and the trial court granted a motion to substitute Fisher's estate for the decedent. *Id.*

[258] *Id.*

[259] *Id.* at 649.

[260] 734 F.2d 913 (2d Cir. 1984).

[261] *Id.* at 921. In *Edgerton*, the court held that a witness is not required to exceed the minimal level showing of potential incrimination or establish that the government does

United States v. Wilson[262] used a similar analysis: "It is the incriminating tendency of the disclosure, and not the pendency of the prosecution against the witness, upon which the right depends."[263]

Other courts, however, have considered an IRS referral to the DOJ as creating such a significantly high potential for criminal prosecution that invocation of the privilege is justified.[264] The Seventh Circuit, for instance, has held that unless a formal referral was made from the IRS to the DOJ at the time of a court hearing for the enforcement of the summons, in order to resist the enforcement, the burden is on the taxpayer to show that no legitimate civil purpose will be served by enforcement of the summons.[265] This view directly conflicts with the Second Circuit, which has stated that "[r]eliance on statements made by the IRS's Criminal Investigation Division as to its current enforcement policies respecting taxpayer are misplaced . . . [and instead the focus should be on] whether answering the question would tend to incriminate the witness."[266]

In performing the implied-admissions test[267] when assessing the applicability of a Fifth Amendment privilege to a particular taxpayer, a court should assess the admissibility at a criminal trial of a disclosure made by the taxpayer. Using a Federal Rule of Evidence 402 analysis, the fact that an individual received income from an unknown source and for an unknown amount increases the likelihood that the individual is engaged in illegal activity.[268] Moreover, the implied-admissions test weighs against basing the determination of a taxpayer's claim of Fifth Amendment protection on the government's intention to prosecute.[269] In determining whether the evidence would provide a link in the chain of the government's case, the implied-admissions test avoids the issue of whether the government will in fact prosecute the taxpayer.

In *United States v. Cates*,[270] the District Court of Maryland recognized

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in fact intend to prosecute him in order to validly assert the privilege. *Id.* at 921. *See also* United States v. Jones, 703 F.2d 473, 477-78 (10th Cir. 1983); United States v. Miranti, 253 F.2d 135, 139 (2d Cir. 1958).

[262] 221 U.S. 361, 379 (1911) (citation omitted).

[263] *Id.; see also* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972); Counselman v. Hitchcock, 142 U.S. 547 (1892); United States v. O'Henry's Film Works, 598 F.2d 313, 317 (2d Cir. 1979) ("Even a routine tax investigation is a situation in which answers to questions by an IRS agent might tend to incriminate, and thus Fifth Amendment rights apply to such answers.").

[264] *See, e.g.*, United States v. Carr, 585 F. Supp. 863, 866 (E.D. La. 1984).

[265] United States v. Kis, 658 F.2d 526, 541 (7th Cir. 1981).

[266] Estate of Fisher v. Commissioner, 905 F.2d 645, 649 (2d Cir. 1990).

[267] *See supra* notes 251-63 and accompanying text.

[268] *See* FED. R. EVID. 402.

[269] *See supra* note 261 and accompanying text.

[270] 686 F. Supp. 1185 (D. Md. 1988).

that the contents of documents were not protected by the Fifth Amendment because they were prepared voluntarily, but the court held that the act of producing those documents was protected because of the testimonial effect of production.[271] The court elaborated on how the documents could tend to incriminate:

> The production of a copy of Cates' 1040 forms would, for example, be evidence that Cates possessed and failed to file a tax return for the years in question. Producing copies of W-2 forms would be evidence of evasion as he would be acknowledging the existence and possession of such information from which he should have determined his tax liability. Deposit slips may well be similarly incriminating. In other words, the compelled production of the documents sought would be evidence of Cates' knowledge of his income and failure to report and pay taxes on the same. Accordingly, the Fifth Amendment privilege was properly asserted by Cates in response to the document requests . . . .[272]

In *United States v. Wirenius*,[273] the taxpayer properly asserted the Fifth Amendment privilege to an IRS summons for all income records from 1988 to 1993.[274] The taxpayer was not required to provide specific grounds of fear of incrimination, but the court noted that one possible ground was willful failure to file.[275] Factors relevant to the court's determination that the taxpayer's fear of incrimination was legitimate included attempts to place the defendant under oath, the presence of a Criminal Investigation Division agent, and an absence of evidence that the defendant's motive in resisting was motivated politically.[276]

The difficulty in determining the types of documents that could, or should, be protected from IRS subpoenas is reflective of the vicissitudes of determining incriminatory aspects of other types of documents. In *United States v. Fox*,[277] the Second Circuit described a variety of ways in which the documents at which a subpoena was directed could incriminate:

> The IRS has no way of knowing from the face of Fox's return whether he has records to support all of his claimed

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[271] *Id.* at 1192-93.
[272] *Id.* at 1193.
[273] No. CV 93-6786 JGD, 1994 WL 142394 (C.D. Cal. Feb. 11, 1994).
[274] *Id.* at *1.
[275] *Id.*
[276] *Id.*
[277] 721 F.2d 32 (2d Cir. 1983).

> business deductions; whether he possesses records that reflect unreported taxable income; or whether he possesses records that evidence possible crimes committed in the course of his sole proprietorship.[278]

Tax protestors often have valid reasons to fear incrimination. Merely because these individuals are particularly bothersome to the IRS is not a valid reason to remove their fundamental Fifth Amendment right. Moreover, in certain cases, tax protestors are subject to a two-level sentencing increase.[279] The punishment for violation of tax crimes is not trivial. For example, taxpayer Joseph Klimek, after a conviction for failure to file a tax return, was sentenced to two one-year prison terms and five years of probation.[280]

Other tax crimes and their associated penalties include fraud by counterfeiting, altering, or removing stamps, with a fine of up to $10,000 and five years imprisonment;[281] willful failure to file, with a fine of up to $25,000 and a one-year prison sentence;[282] and attempt to evade taxes, with a fine of up to $100,000 and a five-year prison sentence.[283] Moreover, there is a high impetus for the DOJ and the IRS to punish tax offenders. For example, the government is not allowed to recommend a sentence in a tax fraud case of no period of imprisonment.[284] Allowing an individual to claim the privilege against self-incrimination when the feared prosecution is for a misdemeanor carrying a slight fine or jail term but not allowing it when faced with substantially greater penalties is inconsistent and illogical.

The policies served by the Fifth Amendment also support the argument that the current approach of the Ninth Circuit is unjustified. The Fifth Amendment was significantly narrowed by the Supreme Court in the current implied-admissions test, and few documents remain out of governmental reach. The Ninth Circuit's further narrowing of the protection erodes rather than protects a sense of fair play between the individual and the state. Indeed, the exception appears arbitrary and likely creates further hostility and distrust of the government. Furthermore, the "trilemma" of self-accusation, perjury, or contempt is perpetuated rather than avoided as an individual faced with an IRS subpoena for potentially incriminating personal documents is faced with three equally poor choices: commit perjury by stating that he does not have the documents, subject himself to a contempt charge by not complying, or accuse

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[278] *Id.* at 38.

[279] 1 CRIMINAL TAX MANUAL, *supra* note 17, at 5-40.

[280] United States v. Klimek, No. 91-4682, 1992 WL 99634 (E.D. Pa. Apr. 29, 1992).

[281] I.R.C. § 7208 (1994).

[282] *Id.* at § 7203.

[283] *Id.* at § 7201. For a more detailed discussion of tax crimes and their associated penalties, see P.L. WHITE & C.M. OHANESIAN, GUIDE TO TAX PENALTIES UNDER THE INTERNAL REVENUE CODE (1996-97 ed. 1996).

[284] 1 CRIMINAL TAX MANUAL, *supra* note 17, at 2-27.

himself of a crime. Finally, the third policy of protecting a private enclave, which was substantially weakened under the implied-admissions test, is further abridged by the tax-crime exception of the Ninth Circuit.

CONCLUSION

The current approach, both in the Ninth Circuit and in other circuits, fails to consider the importance and stature of the privilege against self-incrimination. Some cases make passing references to the importance of the government's interest but certainly do not balance the fundamental right involved with that interest. Because the privilege against self-incrimination is a fundamental right, the current approach by the Ninth Circuit is misguided, and it should demand a stronger, clearer compelling governmental interest before abridging an individual's rights.

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