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Seizure of Incriminating Documents--Fifth Amendment: Andresen v. Maryland, 96 S.Ct. 2737 (1976)

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FIFTH AMENDMENT—SEIZURE OF INCRIMINATING DOCUMENTS

Andresen v. Maryland, 96 S.Ct. 2737 (1976)

On June 29, 1976 the Supreme Court in *Andresen v. Maryland*[1] held that a warrant-authorized search of an individual's offices for personal records, the subsequent seizure of such records and their admission into evidence at trial did not offend the fifth amendment proscription against compulsory self-incrimination.[2]

The petitioner, David C. Andresen, acted as attorney for a real estate settlement in two suburban Maryland counties. The settlement was managed by a development corporation of which Andresen was the sole principal. Early in 1972, an investigation was initiated to determine if Andresen had misrepresented the quality of title that was to be conveyed with the land.[3] A search warrant was issued upon a finding of probable cause by a judge of the Sixth Judicial Circuit of Montgomery County, Maryland, to search both of Andresen's offices.[4] On appeal to the Court of Special Appeals of Maryland, Andresen was to challenge the specificity of each warrant, but that court would hold the warrants to be sufficiently specific.[5] The searches were executed during the day of October 31, 1972. Andresen, and later his counsel, was present during the search of his law office. A simultaneous search at Andresen's Mount Vernon Development Corporation was conducted in his absence. The search resulted in the seizure of 3% of his law office files and 5% of the development corporation files.[6]

It is established in case law that a corporate entity may not invoke the privilege against self-incrimination.[7] But despite the circumstances in which Andresen's papers were seized, the Supreme Court noted that there had been no finding that any of the papers were corporate papers.[8] For private papers, a privilege against self-incrimination exists and has been successfully invoked.[9] After a full suppression hearing by the trial court, the net result (after many of the files had been voluntarily returned by the State's Attorney) was the retention of only one development corporation file. Seven of the twenty-eight law office files were returned to Andresen, and four additional files were suppressed for lack of relevancy to the offense. The remaining items were admitted into evidence over the objection that such admission was violative of the fourth and fifth amendments.[10]

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[1] 96 S.Ct. 2737 (1976).

[2] U. S. CONST. amend. V:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . . ; nor shall private property be taken for public use, without just compensation.

[3] The investigation was conducted by a "Bi-County Fraud Unit," acting under the jurisdiction of the State's Attorney's offices for both Montgomery and Prince George's Counties, Maryland. The Fraud Unit's investigation "included interviews with the purchaser, mortgageholder, and other lien-holders of Lot 13T, as well as an examination of County land records." 96 S.Ct. at 2741.

[4] Petitioner maintained both a law office and a separate office housing the Mount Vernon Development Corporation. Andresen was incorporator, sole shareholder, resident agent and director of this corporate entity.

[5] 24 Md. App. 128, 331 A. 2d 78 (1975). The warrants requested a long list of specific documents. All the items pertained to Lot 13T. The basis for Andresen's specificity challenge arose out of the inclusion at the end of each warrant of the following language:

> . . . together with other fruits, instrumentalities, and evidence of crime at this time unknown.

96 S.Ct. at 2748–49 n.10. The Court of Special Appeals of Maryland found that this language was to be taken in the context of the preceding list of items sought in relation to 13T, and authorized a search and seizure of unknown evidence only as to the crime of false pretenses concerning that lot. 24 Md. App. at 167, 331 A. 2d at 103 (1975).

[6] 96 S.Ct. at 2741–42.

[7] Bellis v. United States, 417 U.S. 85, 88–89 (1974); Grant v. United States, 227 U.S. 74 (1913); Hale v. Henkel, 201 U.S. 43, 70 (1906).

[8] 96 S.Ct. at 2742 n.2. It is interesting to note that the determination of the Court that the papers seized were of a personal and not corporate nature was placed in a footnote to the decision, despite its clear relevance to the fifth amendment question.

[9] Gouled v. United States, 255 U.S. 298, 306 (1921); Hale v. Henkel, 201 U.S 43, 76 (1906). In both *Gouled* and *Hale,* petitioners sought to have private papers protected by the Court. In *Gouled,* petitioner successfully challenged his fraud conviction; in *Hale,* petitioner succeeded in his habeas corpus petition after incarceration for failure to produce subpoenaed documents.

[10] U. S. CONST. amend IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

At trial, the State relied only to a small extent on the challenged evidence, turning instead to the testimony and documents of the various victims and to public records. Three development corporation documents and five documents from Andresen's law office were ultimately admitted into evidence. Of these eight documents, some were in Andresen's own handwriting.[11] Petitioner was convicted in a trial by jury of five counts of false pretenses and three counts of fraudulent misappropriation by a fiduciary. He was sentenced to eight concurrent two-year terms in the state penitentiary.[12]

The Court of Special Appeals of Maryland subsequently reversed on four of the five counts of false pretenses, holding that the State's Attorney had failed to allege the requisite intent to defraud. The court sustained the conviction on the other counts, however, rejecting Andresen's claim that admission of the documents seized in the searches of his two offices had violated his fifth amendment privilege against self-incrimination. The court held that since the State had seized the documents, authenticating them by other means, it had compelled nothing of Andresen and so no fifth amendment claim could be sustained.[13] Essential to this reasoning was the distinction drawn between a search warrant and a subpoena. The former is a method of obtaining evidence by the actions of State agents. The application for a warrant is a one-party proceeding. The search itself is carried out by State agents, often in the absence of other parties. A subpoena, on the other hand, is a court order directing an individual to himself bring evidence forward to the court. It was on this distinction that Andresen's fifth amendment claim was rejected, and on this ruling that Andresen applied for certiorari. Certiorari was granted limited to the fourth and fifth amendment issues involved.[14]

Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

For text of U.S. CONST. amend. V, *see* note 2 *supra*.

[11]The documents seized from the Mount Vernon Development Corp. were prepared by a clerk who did title searches for petitioner. The documents concerned deeds of trust impacting on parts of the housing subdivision Andresen was overseeing. Of the law office documents seized, most dealt with lot 13T. Only one was in the handwriting of Andresen himself. 96 S.Ct. at 2742.

[12]The three counts of fraudulent misappropriation by a fiduciary arose out of the transfer of funds to Andresen by three purchasers. The transfer was made so that Andresen would obtain clear title to the land, and he received the funds on his assurance that he would do so.

[13]24 Md. App. 128, 331 A.2d 78 (1975).

[14]423 U.S. 822 (1975).

The Fifth Amendment Claim

The substance of the Supreme Court's reasoning was in agreement with the Court of Special Appeals of Maryland. In deciding whether the petitioner had a legitimate fifth amendment claim, the focus of the Court was on the method of producing the evidence. Since the State had produced the evidence itself, the petitioner had not been compelled to do anything, and thus deserved no fifth amendment privilege.[15]

The construction the Court placed on the fifth amendment was clearly a limited one in that the word "compelled" was taken in a narrow sense. In attempting to put the fifth amendment in historical perspective, the Court began by tracing the privilege back to inquisitorial systems of investigation and the English Star Chamber. In the majority's view, the fifth amendment was a response on the part of the Framers to oppressive governments which "placed a premium on compelling subjects of the investigation to admit guilt from their own lips."[16]

Mr. Justice Brennan dissented in *Andresen*, noting that the verb compel can mean much more:

> The matter cannot be resolved on any simplistic notion of compulsion. Search and seizure is as rife with elements of compulsion as subpoena. The intrusion occurs under the lawful process of the State. The individual is not free to resist that authority.[17]

It is clear that the evidence seized from Andresen was both communicative and testimonial, and thus

[15]In discussing why the fifth amendment did not apply in the instant case, the Court drew an analogy to a second recent case in this area. Couch v. United States, 409 U.S. 322 (1973), involved a subpoena directed at petitioner's accountant to obtain tax records. The *Couch* Court felt that there was no action called for on the part of petitioner and so the privilige against self-incrimination was inappropriate. After citing *Couch*, the *Andresen* Court reasoned as follows:

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

96 S.Ct. at 2745.

[16]96 S.Ct. at 2743, *quoting* Michigan v. Tucker, 417 U.S. 433, 440 (1974).

[17]96 S.Ct. at 2751. Justice Brennan saw no distinction between search and subpoena as regards damage to the defendant.

potentially protected by the fifth amendment. That is, the evidence was obtained for its testimonial content, rather than any physical characteristics it might possess. In this respect it is distinguishable from the evidence seized in *Warden v. Hayden,*[18] an opinion authored by Mr. Justice Brennan only nine years before his dissent in *Andresen.* In *Hayden,* the Court considered both a fourth and a fifth amendment claim concerning the admissibility of clothing seized by police while in hot pursuit of an armed robber. There the Court rejected the fifth amendment's application because the evidence seized was merely physical evidence.[19]

Part of the justification for the result in *Andresen* was the Court's concern that a contrary result would undermine the holding in *United States v. Marron.*[20] This concern seems unfounded when considered in light of the completely different focus of the law of search and seizure in *Marron,* a pre-*Hayden* decision decided under the mere evidence rule,[21] which had controlled the law of search warrants under the Federal Rules of Criminal Procedure.[22] Factually, *Marron* is similar to *Andresen* on its face, each involving the seizure of private papers. However, in *Marron* the papers seized were the ledger, receipts, and accounts receivable of an illegal speakeasy, seized to aid a prosecution under the eighteenth amendment.[23] These papers were held to be instrumentalities of crime, and as such the legitimate object of a search under the fourth amendment.[24] While this conclusion may be questioned, it served as the articulated basis for sustaining Marron's conviction, and no similar characterization was made by the *Andresen* Court so as to call the *Marron* decision into question.

While the *Marron* Court allowed the admissibility of papers perhaps conceptually similar to the papers *Andresen* possessed, it did so for reasons entirely unrelated to the reasons articulated in *Andresen.* Marron had no possessory interest in the papers since they had been deemed by the Court to be instrumentalities of the crime and so fit the category of something superior to "mere evidence". The *Andresen* Court had no such convenient category for Andresen's papers.

The *Andresen* opinion confusingly cites *Abel v. United States*[25] as supporting its conclusion. In *Abel,* as in *Marron,* the facts are somewhat analagous, but the law is clearly not. Here petitioner had attempted to discard a cipher notebook and microfilm during his arrest by federal agents. After he had checked out of his room with the arresting officers, the items were seized by government agents as abandoned property. As such, they could not support a fourth or fifth amendment challenge to their admissibility. As to the question of private papers generally, the *Abel* Court noted:

> We have held in this regard that not every item may be seized which is properly inspectible by the Government in the course of a valid search; for example, private papers desired by the government merely for use as evidence may not be seized, no matter how lawful the search which discovers them.[26]

Additionally, the cipher book and microfilm would both have qualified as fruits or instrumentalities of the crime had they not been abandoned.

The *Andresen* Court expressed the fear that to

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[18] 387 U.S. 294 (1967).

[19] *Id.* at 300-01.

[20] 275 U.S. 192 (1927). The *Marron* Court concerned itself not with the manner of production, as in *Andresen,* but with the nature of the evidence sought, as the mere evidence rule commanded.

[21] The *Hayden* Court overturned the mere evidence rule when it felt a contrary course would compel them to reverse Hayden's conviction under the rule, set out in note 27, *infra.*

[22] FED. R. CRIM. P. 41(b):

> Grounds for issuance. A Warrant may be issued under the rule to search for and seize any property
> (1) stolen or embezzled in violation of the laws of the United States; or
> (2) designed or intended for use or which is or has been used as the means of committing a criminal offense; or
> (3) possessed, controlled or designed or intended for use or which is or has been used in violation of 18 U.S.C. § 957 (Dec. 27, 1948).

18 U.S.C. § 957, entitled "Possession of property in aid of a foreign government," had no bearing on any of the cases cited herein except Abel v. United States, 362 U.S. 717 (1960).

[23] U.S. CONST. amend. XVIII.

> After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

[24] The Court stated:

> The closet in which the liquor and the ledger were found was used as a part of the saloon . And if the ledger were not as essential to the maintenance of the establishment as were bottles, liquor, and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense.

275 U.S. at 199.

[25] 362 U.S. 217 (1960).

[26] *Id.* at 234-35.

hold Andresen's papers inadmissible by way of the fifth amendment would exclude evidence "traditionally" admissible; for example, ransom notes or bookie sheets.[27] This suggestion is difficult to fathom. Would this evidence have been traditionally admissible under the mere evidence rule? Perhaps the Court meant only evidence "traditionally" admissible since the 1967 *Hayden* decision. In any event, if, according to the *Andresen* decision, the fourth amendment reasonableness of a search and seizure is not based on any hard and fast rule, but rather on a case by case analysis, with a consideration of the private nature of the items to be seized, it would seem that a contrary result in *Andresen* need not lead to the exclusion of such evidence as a ransom note or a bookie sheet. Assuming *arguendo* that ransom notes, bookie sheets, and Andresen's personal memoranda and documents are all one conceptually, still the manner of seizure varies widely. Ransom notes are normally turned over to the authorities by the relatives or other parties close to the victim. This is hardly fertile ground for a fifth amendment challenge. Bookie sheets are normally incidental targets of a search and seizure, discovered in the pursuit of some contraband, such as policy slips. In *Andresen,* the papers and documents were the only target of the authorities. Nor is it a foregone conclusion that the three types of evidence above are totally similar. In representing the thoughts of petitioner rather than serving a mere bookkeeping function, it could be argued that Andresen's papers are conceptually different from a ledger or bookie sheet. The point is simply that a principled distinction could have been drawn had the Court been so inclined.

Andresen has clearly simplified the law of search and seizure as well as the doctrine of self-incrimination. Absent compulsion in the most simplistic sense, no evidence can be challenged as self-incriminatory, regardless of its content and author. There can be no claim of self-incrimination on the basis of items seized from third parties.[28] Nor can the privilege be invoked if the items are seized rather than obtained by process of *subpoena duces tecum.* The result, as Justice Brennan noted in his dissent, will be to encourage the government to obtain a warrant for documents which could not be obtained by other process, and to render the fifth amendment impotent in such instances:

> I can perceive no distinction of meaningful substance between compelling the production of such records through subpoena and seizing such records against the will of the petitioner.[29]

Unreasonable Search Under the Mere Evidence Rule

While *Andresen* comports with the most recent decisions in this area, the earlier decisions on the interplay of the self-incrimination privilege and what constituted a "reasonable" search and seizure were of a distinctly different flavor. A pre-constitutional example is found in the case of *Entick v. Carrington.*[30] The opinion dealt with search and seizure of private papers under a general warrant. In condemning the seizure of private papers, Lord Camden[31] spoke of their special significance:

> Papers are the owner's goods and chattel; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass.[32]

The case law as it developed in this century gave no automatic privilege to the private papers of an individual. Rather, it allowed search and seizure of items in a private office or residence only where the State or a third party had a property claim superior to that of the suspect in possession. Thus in *Boyd v. United States,*[33] a statute[34] was held to be unconstitutional which offered a choice between production of subpoenaed documents and a confession to the charges. *Boyd* is clearly distinguishable from *Andresen* in that a subpoena had been employed, thereby forcing Boyd to bring forward the evidence himself. But the distinction which was seized upon by the *Andresen* Court, that between a subpoena, where the defendant is compelled to bring the documents into court, and a search warrant, where the target of the search merely must passively submit, was not recognized by the *Boyd* Court. *Boyd* contained some broad

[27] 96 S.Ct. at 2745–46.

[28] Fisher v. United States, 425 U.S. 391 (1976); United States v. Miller, 425 U.S. 435 (1976); Couch v. United States, 409 U.S. 322 (1973).

[29] 96 S.Ct. at 2750.

[30] 19 How. St. Tr. 1029 (1765).

[31] Lord Camden (1713–94) was Chief Justice of the Court of Common Pleas.

[32] *Quoted in* Boyd v. United States, 116 U.S. 616, 628–9 (1886).

[33] *Id.*

[34] Act of June 22, 1874.

dictum concerning the scope of the fourth and fifth amendments and what the court viewed as an insignificant distinction between the two methods of obtaining evidence:

> [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.[35]

Both *Boyd* and the earlier *Entick* decision were concerned with coercive governmental measures and seemed to foreshadow the contemporary right to privacy. The Court in *Andresen* acknowledged that there may be some overlap of the fifth amendment and a right of privacy, but denied that the right of privacy absent governmental compulsion is sufficient to invoke the privilege against self-incrimination.[36] *Hale v. Henkel*[37] involved a habeas corpus proceeding to challenge a contempt order issued for refusal to obey a subpoena duces tecum. The *Hale* Court, following *Boyd,* stated that it saw no real difference between compulsion by subpoena and a forcible search and seizure by the state, suggesting that any forced production of books and papers may constitute an "unreasonable" search and seizure.[38] In *Abel v. United States,*[39] the Court noted that the rule still operated in controlling search and seizure:

> [P]rivate papers desired by the Government merely for use as evidence may not be seized no matter how lawful the search which discovers them.[40]

The mere evidence rule, allowing only fruits and instrumentalities but not "mere evidence" of crime to be acceptable objects of a search, was the controlling theme in judging the reasonableness of search and seizure. It was adopted by Congress into the Federal Rules of Criminal Procedure.[41] *Boyd* had clearly placed emphasis on the nature of the evidence sought, not the manner of its production. The requisite superior property claim of the government could be found in contraband, in the instrumentalities or the fruits of the crime, but not in "mere evidence." The mere evidence rule operated apart from the direct influence of the fifth amendment. Despite uncertainties in application, the rule served to protect citizens from "fishing" expeditions, or from the prosecutor's too great reliance on search and seizure to obtain damning evidence. While the mere evidence rule seemed like an arbitrary line to many, it nontheless provided some restraint on law enforcement personnel. The distinction which the rule reinforced was that of property rights,[42] and while this perhaps reflected the Framer's view of the role of the fourth amendment, it served in more recent times to force courts either to expand the interpretation of fruits and instrumentalities or to deny evidence to finders of fact. It provided a zone of privacy into which officers armed with a warrant could not venture. The mere evidence rule protected a citizen's rights under both the fourth and fifth amendments, deeming unreasonable a search and seizure of personal effects and papers without a legitimate property right.

The mere evidence rule was abandoned in *Warden v. Hayden,*[43] where the Court declined to apply the rule to exclude clothing of the defendant seized by officers in hot pursuit after an armed robbery.[44] The majority opinion was written by Mr. Justice Brennan, a dissenter in *Andresen.* In *Hayden* the Court recognized the expansion of the scope of search warrants that the decision might provoke, but felt that supervision by a magistrate would provide adequate safeguards during the determination of probable cause. Since the magistrate is in a good position to judge the specificity of the warrant on a case by case basis, the artificial distinction drawn by the mere evidence rule could safely be dispensed

[35] 116 U.S. at 633.
[36] 96 S.Ct. at 2747.
[37] 201 U.S. 43 (1906).
[38] In part the *Hale* Court stated:
> We are also of the opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd* case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum,* against which the person . . . is entitled to protection.

201 U.S. at 76.
[39] 362 U.S. 217 (1960).
[40] *Id.* at 234–35.
[41] *See* note 27 *supra.*
[42] The mere evidence rule viewed the fourth amendment reasonableness of a search as hinging on whether the State had a superior property interest in the subject of the search and seizure. Thus fruits or instrumentalities of crime either belonged to the State as contraband or to a third party whose property had been purloined, and for whom the State could intervene.
[43] 387 U.S. 294 (1967).
[44] *Id.* at 301–02.

with. The *Hayden* Court denied that its holding would encroach on a right to privacy:

> Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. A magistrate can intervene in both situations, and the requirement of probable cause and specificity can be preserved intact.[45]

There seems to be no question that the *Andresen* decision is in agreement with the earlier *Hayden* decision. Whether mere evidence had originally been recognized as the interplay of the fourth and fifth amendments, a privacy right, or simply a fluke of American law, the *Hayden* decision created a new basis for granting a search warrant: probable cause to believe that evidence of a crime would be found.

Unreasonable Seizure Due to the Nature of the Evidence

Andresen also addressed a question which the *Hayden* Court had explicitly left open. Following the rejection of the mere evidence rule as the operative test of "reasonableness," the *Hayden* Court noted that the right of privacy might provide an ultimate check on the scope of evidence which is reasonably seizable:

> This case does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.[46]

Comparing its holding with earlier case law, epitomized by *Gouled v. United States,*[47] the *Hayden* Court felt that modern search and seizure was far more concerned with privacy than property rights.[48] The fact situation in *Hayden* did not provide an adequate test ground for the right of privacy, and the *Hayden* opinion accordingly left open the possibility of a later distinction based on the nature of the evidence sought.

The facts of *Hayden* provided a wide range of potential distinctions. For one, the search and seizure took place while in hot pursuit after an armed robbery. As such it constituted an exigency search without the benefit of prior judicial scrutiny. The primary target of the search, the gun and money, were both illegally held by the defendant and so not the legitimate basis of a privacy claim. The real controversy in *Hayden* cantered around clothing seized from a washing machine. It is well established that such evidence is not entitled to fifth amendment protection, since clothing is neither communicative nor testimonial.[49] Nor could the clothes fall under some special protection through the sanctity of the home.[50] Such evidence could even be subpoenaed without offending the fifth amendment.[51]

Andresen, on the other hand, involved testimonial and communicative evidence whose seizure had been previously approved by a judge. As private papers and documents, the fact situation in *Andresen* promised to shape the ultimate answer to the question left open in *Hayden.* Given probable cause, and absent any compulsion to bring forward evidence by subpoena or summons that would conflict with the fifth amendment, is there any category of items whose very nature would preclude a "reasonable" search and seizure within the dictate of the fourth amendment? The Court avoided the question in *United*

[45] *Id.*

[46] *Id.* at 303.

[47] 255 U.S. 298 (1921). *Gouled* involved the obtaining of a search warrant to investigate a suspected fraud ring. The Court disallowed the admission of seized documents on the ground that the object of the search did not justify the warrant, being "mere evidence". The Court viewed the problem as follows:

> [S]earch warrants...may not be used as a means of gaining access to a man's house and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding.

255 U.S. at 309.

[48] 387 U.S. at 304.

[49] *See* Schmerber v. California, 384 U.S. 757 (1966). This decision held that a forced blood test administered to a driver involved in a collision to determine intoxication did not offend the fifth amendment privilege against self-incrimination since the evidence sought was merely physical and not communicative or testimonial.

[50] *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965). The *Griswold* Court felt that a Connecticut statute limiting the use of contraceptives encroached on a fundamental right of privacy.

[51] *See* United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973).

Dionisio was a putative defendant subpoenaed by a grand jury to provide a voice exemplar. Dionisio successfully invoked the fifth amendment on appeal, but the Supreme Court reversed, holding that the voice exemplar was to be used for identification purposes only, and not for communicative or testimonal content.

Mara was in a similar situation, except here a handwriting sample had been requested. In holding against Mara, the Court spoke of privacy:

> [H]andwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of this voice.

Id. at 21.

States v. Miller,[52] decided two months before *Andresen,* by relying upon the property distinction:

> On their face the documents subpoenaed here are not respondent's "private papers." Unlike the claimant in *Boyd,* respondent can assert neither ownership nor possession.[53]

Here, authorized by the Bank Secrecy Act,[54] a subpoena had issued for bank records which concerned Miller.

Fisher v. United States[55] avoided a fifth amendment claim provoked by a subpoena of petitioner's tax records. Here the subpoena had been directed to Mr. Fisher's attorney, who was holding the records. Focusing on the fact that Fisher himself had not been subpoenaed, the Court rejected any notion of a transitive fifth amendment privilege invoked through a third party, even through the attorney-client privilege:

> The taxpayer's Fifth Amendment privilege is therefore not violated by enforcement of the summonses directed toward their attorneys. This is true whether or not the Amendment would have barred a subpoena directing the taxpayer to produce the documents while they were in his hands.[56]

In *Fisher,* as in *Miller,* the Court spoke of a privacy interest served by the fifth amendment, but only within the narrow confines of the literal wording of that amendment. Contrary to earlier dicta,[57] the *Fisher* Court found that the fifth amendment did not accentuate the more general right of privacy protected by the fourth amendment.[58]

Andresen addressed the questions left open in *Hayden,* and put aside in both *Fisher* and *Miller:* Does the fifth amendment require exclusion of evidence obtained by search and seizure which the government could not properly have obtained by subpoena? In considering the question, the Circuit Courts of Appeal had generally come down on the side of admissibility,[59] with at least one notable exception.[60] The *Andresen* Court, per Mr. Justice Blackmun, agreed with the majority view among the circuits that no fifth amendment claim could bar the admissibility of evidence seized pursuant to a valid search warrant. None of the circuit court holdings treated the *Hayden* question concerning items whose very nature might make a search and seizure unreasonable. If the case-by-case restraint the *Hayden* Court foresaw as replacing a strict exclusion of mere evidence exists at all, it has failed explictly to surface thus far.

It is this point which is most elusive in the *Andresen* decision. The opinion fails to give any guidelines as to what objects might not be properly subject to a search and seizure even without a fifth amendment claim to bar the evidence. The Court does not here expand upon *Griswold v. Connecticut.,*[61] and *Stanley v. Georgia,*[62] which found the home (and more specifically the bedroom) a special zone or privacy, protecting from governmental seizure even material which is contraband. It is certain that the home, as opposed to an office, has greater protection than a business office, but the *Andresen* decision never discussed this distinction. Instead, the Court adopted the view that the method of obtaining the evidence, by search warrant instead of subpoena, was the critical distinction in denying Andresen's claim.

The uncertainty left by *Hayden* concerning possible protection for certain types of evidence has served to increase the scope of potentially seizable evidence and, consequently, to reduce a "zone" of privacy for citizens. Prior to *Hayden,* the mere evidence rule served to put an absolute limit on the type of evidence that could be so obtained. It offered an effective, if

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[52]425 U.S. 435 (1976).

[53]*Id.* at 440.

[54]12 U.S.C. § 1892b(d) (1970).

[55]425 U.S. at 391.

[56]*Id.* at 397. It is interesting to note that the court is still trying to distinguish *Boyd. See also* Couch v. United States, 409 U.S. 322 (1973).

[57]In respect to earlier pronouncements of a substantial overlap between the fourth and fifth amendments, *see* Schmerber v. California, 384 U.S. at 767; Boyd v. United States, 116 U.S. 616, 633 (1886).

[58]425 U.S. at 399.

[59]Shaffer v. Wilson, 523 F.2d 175 (10th Cir. 1975); United States v. Murray, 492 F.2d 178 (9th Cir. 1973); Taylor v. Minnesota, 466 F.2d 1119 (8th Cir. 1972), *cert. denied,* 410 U.S. 956 (1973); United States v. Blank, 459 F.2d 383 (6th Cir.), *cert. denied,* 409 U.S. 887 (1972); United States v. Sharfman, 448 F.2d 1352 (2d Cir. 1971), *cert. denied* 405 U.S. 919 (1972).

[60]Hill v. Philpott, 455 F.2d 144 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971).

[61]Griswold v. Connecticut, 381 U.S. 479 (1965). The *Griswold* decision is significant in that it recognized the privacy and autonomy of the marital relationship as barring a possible search of the bedroom in order to enforce a ban on contraceptives. It is precisely this notion of an object whose intimate nature precludes it from being the target of a "reasonable" search and seizure which *Hayden* suggested.

[62]Stanley v. Georgia, 394 U.S. 557 (1969). Here the Court found improper the application of a pornography statute to materials found in petitioner's bedroom after discovery by means of a search warrant.

imperfect, barrier to oppressive governmental techniques of investigation. Search and seizure is an invasion of privacy in the common sense of the word, if not always in the legal sense. The cases following *Hayden* have failed to point to any specific examples of unseizable items and have given no direction to magistrates issuing warrants, no doubt leading to an expanding use of the warrant. Warrant applications are one party proceedings, the only advocate being the prosecutor. The judge is therefore likely to err on the part of the State. The failure of the *Andresen* Court to articulate guidelines for a principled consideration of the reasonableness of a search and seizure of particular items impinges on the right to privacy.

Conclusion

Andresen v. Maryland represents the current Supreme Court stance on search and seizure and the scope of the fifth amendment in that area. Insisting on a strict definition of the fifth amendment, the Court has erected a very strong distinction between subpoena and search and seizure where formerly there had been little or none. The holding was based on the notion that since the defendant has not physically brought the evidence forward by court order, as opposed to seizure by the State, there has been no compulsion in the fifth amendment sense. In so holding the Court has probably encouraged the use of the search warrant for investigation of white collar crimes, including Internal Revenue Service investigations. While the Court has attempted to reconcile the instant decision with earlier case law, it has met with limited success. The reason is simply that such case law was based on the mere evidence rule, focusing on the nature of the property interest in the evidence sought, rather than on the individual's right of privacy.

Andresen leaves open the perplexing question of whether there is any kind of evidence which, because of its intimate nature, would be immune from search and seizure, regardless of its location. It is likely that further attempts to put some limits on the permissible target of a search warrant will center around what the Court has deemed the right of privacy. *Andresen,* having involved an office rather than a home, and business papers rather than some more intimate possession, does leave some room for the Court to maneuver. It appears, however, that *Andresen* has contracted the area of potential protection from search and seizure.