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## Criminal Procedure--Private Documents and the Fifth Amendment

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# NOTES on SELF-INCRIMINATION

## CRIMINAL PROCEDURE—PRIVATE DOCUMENTS AND THE FIFTH AMENDMENT

The privilege against self-incrimination has been under sporadic criticism<sup>1</sup> almost from the time that it became imbedded in the English law. However during the last two decades the criticism has reached a veritable crescendo. The criticism has not been confined to the staid legal periodicals.<sup>2</sup> Nor has it been confined to any single political party.<sup>3</sup> In short, the policy of the privilege is undergoing a most thorough re-examination.

It is not the purpose of this paper to go into an extended dissertation on the merits of this dispute. This paper will attempt to consider only the questions involved whenever the use of personal<sup>4</sup> documents as evidence is assailed as being in contravention of the privilege against self-incrimination. Since the discussion is primarily about documents, and not about the privilege against self-incrimination per se, other aspects of the document problem will be discussed, particularly the applicability of the Fourth Amendment, the "unreasonable searches and seizures" section of the United States Constitution.<sup>5</sup> At first glance it might appear that bringing the *Fourth* Amendment problems within the ambit of this discussion is making an unwarranted extension of the subject matter of the paper which, of course, centers around the *Fifth* Amendment. But it will be seen that the courts have occasionally done the same thing and have even regarded the two Amendments as

<sup>1</sup> For example, the privilege was vigorously attacked by Jeremy Bentham and the British utilitarians during the 19th Century. 7 BENTHAM, WORKS 445-472 (Bowring's Ed. 1843).

<sup>2</sup> For example, see *American Mercury* 79:111-114 (July 1954); *Commonweal* 61:508-509 (Feb. 11, 1955).

<sup>3</sup> Today it is the so-called liberals who defend the privilege against those who see in it a refuge for Communists. During the 30's, these same liberals assailed it as a sanctuary for businessmen who were being investigated for violations of the anti-trust laws, the income tax laws and the like.

<sup>4</sup> There is considerable difference in result when *corporate* documents and not *private* documents are sought by the state. It is well settled that the self-incrimination clause of the Fifth Amendment does not apply to corporations. *Wilson v. U.S.*, 221 U.S. 361 (1911); *Hale v. Hinkle*, 201 U.S. 43 (1906). Nor to unincorporated associations. *U.S. v. White*, 322 U.S. 694 (1944). The discussion here is limited to personal documents.

<sup>5</sup> The corresponding state constitutional provisions will be involved here also. No special effort will be made to differentiate between the scope of the Federal Constitutional provisions and the corresponding state provisions. Essentially they are the same.

overlapping. Therefore, the Fourth Amendment aspects of the document problems are well within the scope of our discussion. It will also be noted that this paper will not attempt to deal with many other aspects involved in using documents as evidence, for example, the problem of the hearsay rule. Our examination will, in general, center around the role the privilege against self-incrimination plays in using documents as evidence.

Throughout this note, it will be assumed that the privilege in its narrower sense will be recognized: the privilege of a witness to refuse to testify *orally* at any official proceeding when to do so might tend to incriminate him.<sup>6</sup> It will also be assumed that the privilege does not protect the accused from having incriminating objects removed from his person, from giving blood samples, from being fingerprinted, from submitting to physical examinations, and from performing certain actions in order to aid in his identification.<sup>7</sup> It is within these limits that the writer will discuss the privilege as it applies to documents.

By their very nature, documents are somewhere in between the above two categories. In one sense a document is words; in another sense it is a *physical object*. Words cannot ordinarily be extracted from an unwilling defendant in order to convict him; but *things*, for example, blood or a murder weapon, can. In which category will documents be placed?

*It is believed that documents should be, and are, treated as articles or things, and not as words.* Most of the constitutional protections hedging about the use of documents as evidence are believed to be consistent with this position.

The leading case on the subject is *Boyd v. United States*.<sup>8</sup> In that case, the Supreme Court held unconstitutional a statute requiring the defendant in a forfeiture proceeding either to produce certain relevant documents, or to have the facts alleged by the prosecution taken to be true. The court held that such a law in effect required the defendant to be a witness against himself since it required him to furnish by his own actions the evidence against himself.

In so doing, the court did not apply to documents a rule different

<sup>6</sup> The writer is firmly convinced that this doctrine should remain in the law. However, even if the writer were of the opposite opinion, it is still believed that any profitable discussion of the broader ramifications of the privilege would necessarily have to be developed within a framework recognizing the privilege. The possibility of destroying the privilege by Constitutional amendment is too remote to be worthy of consideration.

<sup>7</sup> 8 WIGMORE, EVIDENCE 362 (3rd Ed., 1940); McCORMICK, EVIDENCE 264 (1954); ● Ky. L.J. ● (1955).

<sup>8</sup> 116 U.S. 616 (1886).

from that which would have been applied to chattels.<sup>9</sup> The government should not be able to force the defendant to actually give up any evidence he holds; the government must procure its own evidence. Attempts to extract such evidence from the defendant by the use of a subpoena duces tecum as well as by attempts to employ a "presumption" (as in the *Boyd* case) should be equally deplored. There are several reasons for this.

The first is purely historical: such things have never been permitted by Anglo-Saxon law. The second is that to do so would convert our essentially accusatorial criminal system into an inquisitorial one. The Common Law assumes that proceedings will be adversary and that each side will present to the fact-finders its own position in the best light and in so doing will procure its own witnesses and its own evidence. This too is essentially only a matter of past practice. Either, of course, can be changed if no practical basis for it exists.

However, it is believed that strong policy considerations do exist for the privilege, especially when such evidence is sought by a subpoena. The reason usually given for the existence of the privilege to refuse to answer such a subpoena is that to answer it would require that the presenter of evidence vouch for its authenticity.<sup>10</sup> This would force the defendant to testify and would therefore be a violation of his privilege to refuse to testify at his own trial. It is believed, however, that this argument is defective. It does not necessarily follow that the producing witness will have to testify to the authenticity of the evidence produced. Once the evidence was in the possession of the police, little or no corroboration would be necessary in most cases. If needed, outside witnesses could usually be found to supply it. However there are other less technical justifications for the existence of the privilege.

The refusal of a person to produce documents demanded by a subpoena duces tecum can subject him to punishment for contempt if the court feels that his refusal is unjustified. In many cases the accused will maintain that he is physically unable to produce any evidence, since he does not have it in his possession. The court may not believe the defendant and may order him to produce it anyway, or stand guilty of contempt. If the defendant's refusal is necessitated

<sup>9</sup> WIGMORE, *op. cit. supra* note 7, 363; *Evans v. State*, 106 Ga. 519, 32 S.E. 659 (1899) (Defendant can't be forced to hand over a weapon.); Lord Mansfield, in *Roe v. Harvey*, 4 Burr. 2484, at 2489 (1769) ". . . [I]n a criminal or penal cause the defendant is never forced to produce any evidence; even though he should hold it in his hands, in court."; MCCORMICK, *op. cit. supra* note 7, 264.

<sup>10</sup> See, for example, the discussion of Professor Wigmore. 8 WIGMORE, *op. cit. supra* note 7, 364.

because he actually does not have the evidence, his punishment for contempt is obviously unjust. Even if he does have it and is in fact guilty, punishing him in this manner smacks of a violation of his right to a jury trial. For even if such compulsory production of evidence were strictly limited to cases which it was certain that the defendant actually could produce the evidence, it would still permit a determination by a judge and not by a jury as to the existence of what might be a material ingredient of a crime. Furthermore, once the doctrine that a person could be forced to furnish evidence against himself was firmly established in the law, other abuses might easily follow. It is a narrow line between forcing a man to do something by imprisonment for contempt and forcing him to do the same thing by cruder but much more effective means—torture.

Merely requiring an accused to furnish evidence on pain of having the fact admitted against him would present fewer difficulties than arise when the subpoena method is used, but it is believed that essentially the policy considerations listed above would still apply. An innocent person who was actually unable to produce the evidence could be convicted. At best, such a rule operates to shift the burden of proof to the accused, and conflicts strongly with the Common Law tradition that a person is innocent until proved guilty. At any rate, the doctrine that a person cannot be forced to actually produce chattels or documents as evidence against himself is well established in the law.<sup>11</sup>

However, the Supreme Court in the *Boyd* case was unwilling to rest its opinion on this basis alone. The court proceeded to state that evidence consisting of documents could not be obtained even under a valid search warrant. The theory was that the Fourth Amendment, prohibiting unreasonable searches and seizures, and the Fifth Amendment were so closely related as to overlap in this case, and that both afforded protection. Professor Wigmore has rejected this reasoning of the Court.<sup>12</sup> Wigmore says that to treat the Fourth and the Fifth Amendments as overlapping, is to ignore the different historical backgrounds and the different purposes of the two doctrines. However, the Federal courts have continued to hold that in some cases the privileges run concurrently.<sup>13</sup> While there is some merit to the *Boyd* position that the two privileges overlap, it is believed that the prin-

<sup>11</sup> 8 WIGMORE, *op. cit. supra* note 7, 363. McCORMICK, *op. cit. supra* note 7, 264. In fact, the principle seems so universally accepted that there are very few cases on the point.

<sup>12</sup> 8 WIGMORE, *op. cit. supra* note 7, 366-369.

<sup>13</sup> *Davis v. U.S.*, 328 U.S. 582; 594 (1946); *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928).

principles involved can be more precisely analyzed if the two are regarded as separate, and the Wigmore position is to be preferred.

In addition to attacking the reason of the court, Professor Wigmore has also attacked the idea that documents cannot be seized even under a valid search-warrant; Wigmore feels that in the *Boyd* case the "seeds of a dangerous heresy were sown."<sup>14</sup> Wigmore insists that such is not the law and cites numerous federal cases which he regards as amounting to a repudiation of this part of the *Boyd* rule.<sup>15</sup> The notion that documents are completely immune from search and seizure is gone. But it still appears to be the federal rule that documents and chattels, if of a purely evidentiary nature, cannot be seized under a valid search warrant.<sup>16</sup> Such articles may be seized only when they are contraband, or when they are themselves criminal, or when they are instrumentalities of crime.<sup>17</sup> A discussion of this limitation on the power to search appears in order.

It is possible that this limitation on the power to search is restricted to searches under warrants, or searches of the surrounding premises made incident to an arrest. If the *person* is legally searched, and merely evidentiary documents are found, the evidence obtained may be used, at least according to some authority.<sup>18</sup> Purely evidentiary documents may be used if they come into the government's hands without a search.<sup>19</sup> Ordinary documents do not therefore appear to be incompetent as evidence. They just can't be searched for, under ordinary circumstances.

The rule that purely evidentiary documents cannot be sought even under a valid search warrant is based partially on statute at the present time.<sup>20</sup> However, the Supreme Court has indicated that search warrant law could not constitutionally be altered to permit such action.<sup>21</sup> In so doing, the court, it is submitted, is freezing the search warrant into its Eighteenth Century form, a practice which the writer feels should

<sup>14</sup> 8 WIGMORE, *op. cit. supra* note 7, 367.

<sup>15</sup> *Id.* at 370.

<sup>16</sup> *U.S. v. Lefkowitz*, 285 U.S. 452 (1932); *Gouled v. U.S.*, 255 U.S. 298 (1921); also, of course, *Boyd v. U.S.*, *supra* note 7; 47 AM. JUR. 534 (1943); Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 IOWA L. REV. 472, 488 (1948).

<sup>17</sup> Fraenkel, *supra* note 16, at 487; *Gouled v. U.S.*, *supra* note 16. See Fed. R. Crim. P. 41(b). 41(b) also permits the seizure of property when it is being used by the agent of a foreign government to violate the laws of the United States. This provision is of slight concern to us here though. There is also authorization for search warrants in other sections of the Statutes, but they are no broader in scope than the provisions here.

<sup>18</sup> See *U.S. v. Krischenblatt*, 16 F. 2d 202 (2d Cir. 1926); 32 A.L.R. 680, 689 (1924).

<sup>19</sup> *Stroud v. U.S.*, 251 U.S. 15 (1919).

<sup>20</sup> Fed. R. Crim. P. 41(b).

<sup>21</sup> For example, *Boyd v. U.S.*, *supra* note 8, at 630.

be deplored. The Fourth Amendment prohibits *unreasonable* searches and seizures. It is not believed that it is unreasonable per se to let officers search for something which they could use in evidence if it came into their possession in some other fashion. In other words, a search for articles purely for their evidential value should not be automatically prohibited.

It might appear to the reader that the writer is advocating a rule which would permit illegally obtained evidence to be used if the same evidence would have been admissible if legally obtained. But this is not the case. The writer's thesis is that there should be provided some legal way of obtaining these documents. Such a rule is in no way incompatible with the so-called "exclusionary" rule, which prohibits using as evidence the fruits of an illegal search.

An incidental, but not inconsequential, advantage of making all documents susceptible to seizure<sup>22</sup> is that it would no longer be necessary to show that a seized document is criminal in itself, or that it was rightfully the property of the government, or that it was an instrumentality of crime. In some cases, it is almost impossible to determine whether a particular document is in one of these categories or is merely "evidence."<sup>23</sup>

Thus it is felt that the federal rule as to when documents may be searched for and seized is the same as that used when chattels and not documents are involved. Exactly the same "exceptions" are recognized; chattels may not be sought under a search warrant unless they are criminal in themselves, rightfully the property of the government, or instrumentalities of crime.<sup>24</sup>

It seems to the writer that the limitations just examined are purely Fourth Amendment limitations. The evidence cannot be obtained under a search warrant because the search warrant, in the historical sense (and, therefore, so runs the argument, in the constitutional sense) is not this broad. Assuming that the Fourth and Fifth Amendments "overlap" and that the Fifth can be called to the aid of the Fourth in this type of case, it is still felt that nothing will be changed. For the Fifth Amendment is just not applicable here.

To be sure, the admission of such evidence would convict a de-

<sup>22</sup> If, of course, all other requirements of the law of Search and Seizure are met.

<sup>23</sup> Compare the *Lefkowitz* case, *supra* note 16 and *Marron v. U.S.*, 275 U.S. 192 (1927). See *Zap v. U.S.*, 328 U.S. 624 (1946) where the Supreme Court apparently split on whether a forged check was an "instrumentality" of a crime (page 629) or "evidence" of a crime. (page 632); *U.S. v. Brengle*, 29 F. Supp. 190 (W.D. Va. 1939).

<sup>24</sup> Fed. R. Crim. P. 41(g) clearly shows that documents and chattels are treated alike.

fendant by his own words. But this can be done. Statements a defendant made to a third party are, in certain cases, admissible as evidence against him, for example, statements which constitute an admission of guilt.<sup>25</sup> There seems to be no self-incrimination involved in admitting as evidence such statements if made orally to others. It is difficult to see how the fact that they were in writing could make any difference, in so far as the privilege against self-incrimination is concerned.

It might be argued that the fact that such statements are uncommunicated to another person makes a difference. Convicting a person from his own mind has an ominous ring in the light of our recent "brain-washing" experience. But incriminating statements, which in contemplation of law were uncommunicated, since made under some privileged relationship, can be used as evidence if overheard by a third party, even though an eavesdropper.<sup>26</sup>

It has been suggested that if merely evidentiary documents can be used as evidence, prosecutions based on mere opinion can be initiated.<sup>27</sup> However, if the ordinary rules on using opinions as evidence are followed, it is difficult to see how prosecutions could result. There seem to be no valid Fifth Amendment objections to using documents as evidence and in fact, that amendment is usually regarded as inapplicable in this situation.<sup>28</sup> Is there, then, any good reason for the present law which does not permit purely evidential document to be sought for evidence?

The only policy objection to admitting writings as evidence is a Fourth Amendment objection: To seize a person's documents and then use them as evidence against him is a violation of that person's privacy. This argument is based on the idea that if documents could be seized and used as evidence, all sorts of prying into a man's personal papers and effects would inevitably result. This does not follow. The same requisites for getting a search warrant would still exist. Unless there were probable cause and an adequate description of the articles to be seized, no warrant could issue.<sup>29</sup> No blanket searches of a man's effects would be permitted.

It is submitted that the Fourth Amendment was not intended to prohibit all searches for purely evidentiary material. It is the writer's

<sup>25</sup> Students of Evidence will recall that such statements constitute "admissions of party-opponent" and as such are regarded as an exception to the hearsay rule. McCORMICK, *op. cit. supra* note 7, 502-504. Some states also regard them as "declarations against interest." McCORMICK, *id.* at 549-551.

<sup>26</sup> *Id.* at 162; 50 AM. JUR. 216 (1948).

<sup>27</sup> Fraenkel, *supra* note 16, 488.

<sup>28</sup> 58 AM. JUR. 46, n. 2 (1948).

<sup>29</sup> U.S. CONSTITUTION, AMENDMENT IV.



belief that the Fourth Amendment was designed to prevent the use of general warrants and writs of assistance, both so odious to the American colonists. To infer from the words of the Fourth Amendment that the Founding Fathers intended to deny the government any power to search for ordinary documents is to read things into the text of the Amendment and to overlook the really important influence that the writs of assistance and general warrants had not only in causing the Revolution, but in causing a formulation of the idea of a limited government. In enacting the Fourth Amendment, the Founders struck at the really serious abuses with which they were familiar. It is highly unlikely that the "grievance" of searching for evidentiary documents was ever contemplated by any of the authors of the Bill of Rights.<sup>30</sup>

Up to this point the discussion has centered around the federal law on this subject. Just what it is, is not absolutely certain. It is to be expected then that the various state rules, which unlike the federal rule did not arise from one single source, will be in considerably more confusion. Apparently most states would permit searches for merely evidentiary documents, if such searches were otherwise legal.<sup>31</sup> There are few cases exactly in point; most of the alleged state rules are based on dicta. It is, of course, the universal rule that an individual in a criminal case may not be forced to produce document to be used against himself.<sup>32</sup>

In the final analysis policy and reason, not precedent, should determine the law. In this particular area where precedents are so confused, it is particularly important to weigh the underlying policy considerations. The writer therefore suggests that in the light of the discussion above, the law should include the following principles:

(1) No person should be compelled either by subpoena or by the use of "presumptions" to actually produce for the prosecution any evidence, whether documents or chattels, regardless of whether he can in fact do so. This is now the law.

(2) That no search shall be held illegal and the evidence obtained thereby inadmissible, merely because such evidence consists of ordinary documents, that is, documents not the property of the government, nor criminal in themselves nor instrumentalities of crime. Articles which are evidence of crime, including documents which are admissible in evidence under ordinary circumstances, should be subject to

<sup>30</sup> It is believed that Wigmore is essentially in accord with the writer. 8 WIGMORE, *op cit supra* note 7, 368.

<sup>31</sup> 47 AM. JUR. 534 (1943); 129 A.L.R. 1296 (1940).

<sup>32</sup> 8 WIGMORE, *op. cit. supra* note 7, 363-364; McCORMICK, *op. cit. supra* note 7, 264.

the state's power to search and seize under valid search warrants. This would be a change in the law, at least on the federal level.

It is believed that such a solution reaches a workable balance between the right of organized society to protect itself and the inherent rights of individuals so dear to a freedom-loving people.

TOM SOYARS

### CRIMINAL PROCEDURE—SELF-INCRIMINATION—SCIENTIFIC TESTS OF BODY SUBSTANCES AS EVIDENCE<sup>1</sup>

The Fifth Amendment to the Constitution of the United States provides that no person accused of crime shall be compelled to be a witness against himself. Most of the states,<sup>2</sup> in somewhat varying language within their constitutions,<sup>3</sup> also provide such protection against self-incrimination.<sup>4</sup> In recent years the courts throughout the United States have had to face the problem of whether this privilege against self-incrimination extends beyond the historic concept of testimonial compulsion and the compulsory production of papers in open court<sup>5</sup> to cover non-testimonial, physical evidence of crime. The specific types of non-testimonial, physical evidence selected for treatment herein<sup>6</sup> are the scientific tests of body substances, such as blood, urine and stomach contents. Since the very nature of these tests requires an invasion of the bodily security (extraction of body fluids), the privilege against self-incrimination usually appears appropriate to defense attorneys as the basis for an objection to the use of such tests.<sup>7</sup> The purpose of this note, therefore, will be to consider whether the use of evidence obtained by such procedure is prohibited by the privilege against self-incrimination.

<sup>1</sup> The validity and accuracy of such tests are not within the scope of this paper. See Gibson and Ladd, *Legal-Medical Aspects of Blood Tests To Determine Intoxication*, 29 VA. L. REV. 749 (1943).

<sup>2</sup> New Jersey and Iowa have no constitutional provisions pertaining to self-incrimination, but they do have statutory provisions which cover the "privilege". See 8 WIGMORE, EVIDENCE sec. 2252, p. 320 (3d ed. 1940).

<sup>3</sup> Typical of such language variation is Kentucky's Constitution which states, "In all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself. . . ." CONSTITUTION OF KENTUCKY, Sec. 11 (1893).

<sup>4</sup> Wigmore points out that the varying language is of no significance since all the phrases had a common conception in the common law. 8 WIGMORE, EVIDENCE 362 (3d ed. 1940).

<sup>5</sup> 8 WIGMORE, EVIDENCE 363 (3d ed. 1940).

<sup>6</sup> Other types of non-testimonial evidence will not be discussed, except as they incidentally involve body substance tests.

<sup>7</sup> Mamet, *Constitutionality of Compulsory Chemical Tests To Determine Alcoholic Intoxication*, 36 J. OF CRIM. LAW AND CRIMINOLOGY 132 (1945-46).