

1975

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Minn. L. Rev. Editorial Board

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Recommended Citation

Editorial Board, Minn. L. Rev., "Constitutional Law: Privilege against Self-Incrimination Denied as to Documents Recovered by Taxpayer from His Accountant and Transferred to His Attorney" (1975). *Minnesota Law Review*. 3067.
<https://scholarship.law.umn.edu/mlr/3067>

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Case Comments

Constitutional Law: Privilege Against Self-Incrimination Denied as to Documents Recovered by Taxpayer from His Accountant and Transferred to His Attorney

A special agent of the Internal Revenue Service (IRS) made an appointment with taxpayers to discuss their tax liability for the two previous years. The taxpayers retained an attorney who informed the IRS that they would not keep the appointment. Shortly thereafter, the taxpayers obtained from their accountant all the tax records in his possession, primarily work papers which he had compiled. These records were transferred within two weeks to the taxpayers' attorney. Approximately five months after this transfer, the IRS summoned the attorney to produce the documents for use in the pending investigation.¹ When the attorney refused, the IRS commenced an enforcement action, in which the district court ordered the documents produced.² The Court of Appeals for the Third Circuit affirmed, *holding* that the fifth amendment privilege against self-incrimination³ does not protect an accountant's work papers possessed briefly by tax-

1. The summons was issued under the authority of INT. REV. CODE OF 1954, § 7602, which provides:

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry; [and]

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry

2. *United States v. Fisher*, 352 F. Supp. 731 (E.D. Pa. 1972).

3. Although the explicit language of the fifth amendment is limited to "any criminal case," it is well established that the privilege against self-incrimination applies alike to civil and criminal proceedings wherever the evidence sought might result in criminal responsibility. *See, e.g., McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924).

payers and then delivered to their attorney.⁴ *United States v. Fisher*, 500 F.2d 683 (3d Cir. 1974) (en banc), cert. granted, 43 U.S.L.W. 3412 (U.S. Jan. 28, 1975) (No. 18).

When the IRS commences an investigation, a taxpayer may discover that many pertinent tax records are in the hands of his accountant. The taxpayer or his attorney may need these records in the preparation of a defense, while the IRS may seek to use them in its investigation. In the recent case of *Couch v. United States*,⁵ the Supreme Court addressed the question whether a taxpayer must own such records and documents in order to successfully assert a fifth amendment privilege. The Court suggested that a taxpayer need only be in rightful possession of such papers.⁶ *Fisher* is significant as the first lower court decision to apply that standard of rightful possession. The significance of the *Fisher* holding was underscored within a matter of weeks by a decision in the Fifth Circuit on nearly identical facts. Despite the precedent of *Fisher*, the taxpayer's fifth amendment claim was allowed to prevail in *United States v. Kashmir*.⁷

The fifth amendment privilege against self-incrimination is inherently personal. It protects persons, not property.⁸ This

4. It had also been argued that the summons was unenforceable because it had been issued in aid of a *criminal* investigation, rather than for any of the valid "civil" purposes specified in section 7602. The validity of such a defense had been recognized by the Supreme Court in *Donaldson v. United States*, 400 U.S. 517, 526 (1971), and *Reisman v. Caplin*, 375 U.S. 440, 449 (1964). The court had no trouble disposing of this claim on the basis of the holding in *Donaldson* that "an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." 400 U.S. at 536. In *Fisher*, findings as to each criterion were made adversely to the taxpayers by the district court. 352 F. Supp. at 733. Without extended discussion, the court of appeals rejected the argument that, because no agents from the Audit Division had been taking part in the investigation at the time the summons was issued, the finding of good faith by the district court was clearly erroneous. The burden of proof was on the taxpayer and was not met merely by a showing of the Audit Division's non-involvement. 500 F.2d at 687-88.

5. 409 U.S. 322 (1973). In *Couch*, an IRS special agent issued a summons to an accountant seeking work papers relating to his client's tax liability. The Supreme Court upheld the summons, despite the fact that the accountant had transferred the work papers to the taxpayer, because the transfer had occurred after service of the summons. In response to taxpayer's fifth amendment claim, based on her *ownership* of the records, the Court held that the privilege could not prevail, because the taxpayer had not been in *possession* of the disputed documents when the summons was served.

6. *Id.* at 331.

7. 499 F.2d 444 (5th Cir. 1974), cert. granted, 43 U.S.L.W. 3412 (U.S. Jan. 28, 1975) (No. 611).

8. Discussing the application of the fifth amendment privilege

fact was made evident in *Murphy v. Waterfront Commission*,⁹ where the Court enumerated the policies underlying the privilege:

[The privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States v. Grunewald*, 233 F.2d 556, 581-82 [2d Cir. 1956] (Frank, J., dissenting), rev'd 353 U.S. 391 [1957]; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn v. United States*, 349 U.S. 155, 162 [1955].¹⁰

A taxpayer's claim that the policies enumerated in *Murphy* should protect accountant work papers can arise in four different factual situations: (1) the taxpayer both owns and possesses the papers at the time he is served with a summons; (2) the taxpayer possesses documents owned by his accountant when the summons is served; (3) the taxpayer neither owns nor possesses the papers when the summons is served, but the papers have been in his possession at one time; and (4) the taxpayer does not own the papers and has never been in actual possession of them.

The validity of the fifth amendment claim in the first factual situation, when ownership and possession converge in the taxpayer, has not been in doubt since *Boyd v. United States*¹¹ was decided in 1886. The Supreme Court's rationale in *Boyd*, which involved the compulsory production of private books and papers for use in a forfeiture proceeding, was that the privilege against self-incrimination, although historically associated with oral testimony, was never intended to be limited to oral declarations. The Court found no meaningful distinction between compelling a man to give oral testimony against himself and seizing his pri-

specifically to books and records, Justice Holmes once stated that "a party is privileged from producing the evidence but not from its production." *Johnson v. United States*, 228 U.S. 457, 458 (1913).

9. 378 U.S. 52 (1964).

10. *Id.* at 55.

11. 116 U.S. 616 (1886).

vate books and papers to use as evidence against him.¹²

The fifth amendment issue in the second factual situation, when the taxpayer possesses but does not own disputed documents, was decided by the Court of Appeals for the Ninth Circuit in *United States v. Cohen*.¹³ In *Cohen*, work papers owned by the taxpayer's accountant were transferred to the taxpayer after the initiation of an IRS investigation. When the taxpayer refused to produce the papers in response to an IRS summons, the court upheld his fifth amendment claim. In accordance with the historic characterization of the privilege as personal, the court stated:

[I]t is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit. The "cruel trilemma" of perjury, contempt, or self-incrimination, of which the Court spoke in *Murphy v. Waterfront Comm'n*, faces the individual whenever the government seeks to compel him to produce papers in his possession, for he must then either falsify, accept punishment for contempt, or yield. Lack of title does not free him from this choice.¹⁴

The position taken in *Cohen* was expressly approved by the Supreme Court in *Couch v. United States*.¹⁵ The Court stated that "possession [not ownership] bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment."¹⁶ In reaching this conclusion the Court emphasized notions both of personal compulsion and of the taxpayer's legitimate expectations of privacy.¹⁷ The clear implication of this reasoning is that a taxpayer should be afforded fifth amendment protection whenever he is in possession of disputed papers, regardless of who owns the papers.

This general principle does not apply, however, when the court finds that the taxpayer's possession is wrongful or that the

12. *Id.* at 633. The *Boyd* opinion has been severely criticized for its misplaced reliance on the fourth amendment protection against unreasonable searches and seizures. See, e.g., Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 282-85 n.97 (1974). *Boyd*, like *Couch* and *Fisher*, involved the failure to respond to compulsory process: there was neither a search nor a seizure in any ordinary sense of those terms. Despite the ambivalence of the opinion, however, the holding of *Boyd* clearly should be applicable in any pure fifth amendment context. See *Couch v. United States*, 409 U.S. 322, 330 (1973); *Boyd v. United States*, 116 U.S. 616, 638-41 (1886) (Miller, J., concurring on the basis of the fifth amendment alone).

13. 388 F.2d 464 (9th Cir. 1967).

14. *Id.* at 468.

15. 409 U.S. 322, 330 n.12 (1973).

16. *Id.* at 331.

17. *Id.* at 336.

transfer of records from his accountant has been effected in bad faith. For example, it is well established that if, before a summons is issued, a taxpayer owes a duty to his accountant to return papers, his "wrongful possession" is not protected by the fifth amendment.¹⁸ Similarly, when a taxpayer attempts to thwart a subpoena by a "midnight hour" recovery of work papers from his accountant, it has been held that his fifth amendment rights are outweighed by the government's need to conduct an investigation in good faith.¹⁹ Such exceptions reaffirm rather than reject the rightful possession test advanced by *Cohen* and *Couch*.²⁰

In the third factual situation, the taxpayer, at the time of service, has neither ownership nor possession of disputed papers, although he has possessed them at one time. It might appear that the traditional rationales of the fifth amendment privilege do not apply to such a case, because the taxpayer himself is not the focus of "governmental compulsion"²¹ in the quest for evidence. Such reasoning, however, fails to recognize that governmental compulsion exerted against a taxpayer's attorney could be equivalent to compulsion against the taxpayer himself. For example, in *United States v. Judson*,²² where a taxpayer's attorney possessed records in order to represent his client in a pending investigation, the attorney successfully asserted the fifth amendment privilege on the taxpayer's behalf. The Court of Appeals for the Ninth Circuit stated that "[n]o other 'third party,'

18. Such a situation has arisen when, prior to the issuance of a summons to the taxpayer, the accountant has requested the return of the papers. See *Deck v. United States*, 339 F.2d 739 (D.C. Cir. 1964); *United States v. Riland*, 364 F. Supp. 120 (S.D.N.Y. 1973); *United States v. Pizzo*, 260 F. Supp. 216 (S.D.N.Y. 1966). But see *United States v. Cohen*, 388 F.2d 464, 469-70 (9th Cir. 1967), where the court noted that, in light of the rationale preferring mere possession to ownership, wrongful possession might be enough to support the privilege.

19. In *United States v. Zakutansky*, 401 F.2d 68 (7th Cir. 1968), the court upheld a summons seeking accountant work papers in the possession of a taxpayer. Critical to the court's decision was the fact that two prior subpoenas seeking the same papers had been unsuccessfully issued to the taxpayer's accountant. In response to the first subpoena, the accountant's attorney requested time in which to determine his client's responsibilities and the papers were not surrendered. A second subpoena was then issued, but it also was not complied with on the ground that it was erroneously dated one month in advance. On these facts, the court held that, because the transfer from the accountant had been effected in bad faith, the taxpayer was illegally thwarting a government investigation by withholding the papers.

20. See text accompanying notes 6 and 14 *supra*.

21. See text accompanying note 14 *supra*.

22. 322 F.2d 460 (9th Cir. 1963).

nor 'agent,' nor 'representative' stands in such a unique relationship between the accused and the judicial process as does his attorney."²³ Apparently bringing sixth amendment considerations to bear on the fifth amendment issue, the court noted that "[t]he very nature of the tax laws requires taxpayers to rely upon attorneys, and requires attorneys to rely, in turn, upon documentary indicia of their clients' financial affairs."²⁴ In *In re House*,²⁵ on facts nearly identical to those in *Judson*, the taxpayer's attorney was allowed to assert the taxpayer's privilege in the latter's absence. The court observed that the burdens of time and expense that would have been involved in attending hearings and investigations virtually prohibited the taxpayer from asserting the fifth amendment privilege himself.²⁶

The result in *Judson* and *House* was reinforced by the reasoning of the Supreme Court in *Couch*.²⁷ The Court stated:

We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime. Yet situations may well arise where constructive possession is so clear . . . as to leave the personal compulsions upon the accused substantially intact.²⁸

Fisher and *United States v. Kasmir*²⁹ involved examples of the third factual situation. In both cases the taxpayer transferred tax records to his attorney after having been in possession of them only briefly. In both cases the attorney subsequently asserted a fifth amendment privilege on behalf of his client—successfully in *Kasmir*, unsuccessfully in *Fisher*. This conflict between the circuits³⁰ is aggravated by the fact that the tax-

23. *Id.* at 467. The court added that "[t]he attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry." *Id.*

24. *Id.* at 468.

25. 144 F. Supp. 95 (N.D. Cal. 1956).

26. For an alternative approach to the third factual situation, based on the confidentiality of the attorney-client relationship, see Petersen, *Attorney-Client Privilege in Internal Revenue Service Investigations*, 54 MINN. L. REV. 67, 84-91 (1969).

27. Concerned with the less intimate relationship between the taxpayer and his accountant, the *Couch* Court based its rejection of constructive possession on the accountant's independent status and his continuous possession of the records over a period of 14 years. 409 U.S. at 334-35.

28. *Id.* at 333.

29. 499 F.2d 444 (5th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3412 (U.S. Jan. 28, 1975) (No. 611).

30. Presumably in recognition of this conflict in the courts of appeals, the Supreme Court has consolidated *Fisher* and *Kasmir* in granting certiorari. 43 U.S.L.W. 3412 (U.S. Jan. 28, 1975) (Nos. 18 & 611).

payers in *Fisher* had retained the documents for nearly two weeks, whereas the taxpayer's period of actual possession in *Kasmir* had been only a matter of minutes.

In the fourth factual situation, the taxpayer neither owns the disputed papers when the summons is served nor has ever had actual possession of them. The logic of *Judson* and *House*³¹ demands that in this situation the result be no different from that where the taxpayer has had brief possession.³² Otherwise, constitutional protection would be relegated to the level of ritual—afforded where the taxpayer obtains actual possession even for a matter of moments before passing documents to his attorney, but denied where the formality of such a two-step transfer is omitted. Nevertheless, in *United States v. White*,³³ where tax records had been transferred by the taxpayer's accountant directly to the attorney, the taxpayer's claim of privilege was denied by the Court of Appeals for the Fifth Circuit.³⁴ Thus, in the Fifth Circuit, the privilege against self-incrimination is recognized when a taxpayer obtains brief actual possession of records, as in *Kasmir*, but not when actual possession is wholly lacking, as in *White*.

Drawing the line still more harshly, the Court of Appeals for the Third Circuit has refused in *Fisher* to extend fifth amendment protection even to a taxpayer whose attorney possesses records for him after a brief possession in the taxpayer himself. In *Fisher*, the court initially stated:

To be successful . . . appellants must convince us of the validity of two propositions: First, if the [taxpayers] had not given the "analyses" to [their attorney], they could have successfully resisted the summons because the documents sought would have been in a rightful personally privileged possession, and, second, the [taxpayers] should not be held to have lost their privilege solely because they surrendered actual possession to [their attorney] for the purpose of obtaining legal advice in connection with the investigation.³⁵

The first proposition, the question of "rightful personally privileged possession," should have posed no difficulty. Actual possession for nearly two weeks was undisputed. The second proposition should have raised the precise issue whether, after the trans-

31. See notes 22-26 *supra* and accompanying text.

32. Indeed, the facts of both *Judson* and *House* are properly classified within the fourth factual situation. In each case the requested documents had been given directly to the taxpayer's attorney.

33. 477 F.2d 757 (5th Cir.), *aff'd on rehearing*, 487 F.2d 1335 (1973).

34. The court stated that it did not find the "necessary ingredient of personal compulsion" required by *Couch*. 477 F.2d at 763.

35. 500 F.2d at 689.

fer to the taxpayers' attorney, the taxpayers remained in constructive possession of the documents. According to *Judson* and *House*, the unique relationship between an attorney and his client requires that constructive possession be recognized upon such a transfer to an attorney. Nevertheless, the *Fisher* court abandoned the two-part analysis it had initially invoked and proceeded along quite different lines:

[I]f the taxpayers are to succeed in their effort, they must prove that their brief experience of actual possession for a limited purpose *coupled with* turning their accountant's records over to their attorney has the legal capacity to generate a subsequent right of constructive possession of sufficient intensity to elevate those records into the required category of their "private books and papers." We are unwilling to attribute a Fifth Amendment protection to the accountant's work based on such a limited possession by his client.³⁶

The court thus "coupled"—and thereby confused—the distinct issues of actual possession and constructive possession. This led the court to resist the clear implication of the taxpayer's *actual* possession, merely because it had been "brief" and "for a limited purpose." But according to *Couch*, a taxpayer need demonstrate only a bare act of actual possession. Nowhere in the *Couch* opinion is a taxpayer's possession required to be of substantial duration or for an unlimited purpose in order to constitute privileged *actual* possession. To be sure, *Couch* used the terms "temporary and insignificant,"³⁷ but it used them to describe a "relinquishment of possession"³⁸ so temporary and insignificant that *constructive* possession would be retained. The *Fisher* court seized the language but ignored the context, thereby reaching the curious conclusion that the taxpayers' possession for two weeks could not be privileged *actual* possession. It was then of course unnecessary for the court to inquire seriously whether the taxpayers' privilege would have survived the transfer to their attorney. And it was unnecessary to confront the implications of the unique attorney-client relationship, which had been crucial in *Judson* and *House*. Indeed the draftsman of the court's opinion betrayed his inattention to such implications when he referred to the taxpayers as "the accountant's . . . client," thereby obscuring their important status as the attorney's client.³⁹

36. *Id.* at 692 (emphasis added).

37. 409 U.S. at 333.

38. *Id.* (emphasis added).

39. Judge Hunter recognized this distortion of the issues in his thoughtful dissent. He asserted that:

As I read the majority, whether there was rightful possession in a purely personal capacity or whether the personal compulsions on the [taxpayers] were left intact notwithstanding

A better approach would have been to focus on the personal nature of the fifth amendment privilege heralded notably in *Murphy*,⁴⁰ the taxpayer's legitimate expectations of privacy emphasized in *Couch*,⁴¹ and the impact of the distinctive attorney-client relationship on that expectation of privacy. An analysis based on these factors would resolve the fifth amendment issue as applied to accountant work papers, regardless of whether the taxpayer or his attorney is in possession of the papers.

If the taxpayer has actual possession, a presumption should be raised that the privilege against self-incrimination inheres. Subject only to the exceptions for wrongful possession and "midnight hour" transfers,⁴² this presumption should not be rebuttable. Such a presumption is supported by both *Cohen*⁴³ and *Couch*.⁴⁴

If the attorney has possession, *Judson* and *House* dictate that a presumption should exist in favor of constructive possession.⁴⁵ The presumption should be independent of whether the taxpayer has ever obtained actual possession of the papers himself before passing them to his attorney. A constitutional right should not hinge on such matters of ritual when an attorney has possession of documents in order to better represent a taxpayer. This presumption should also be rebuttable only in the case of wrongful possession or a "midnight hour" transfer.

If this analysis had been employed, *Fisher* would have been decided differently. A presumption of constructive possession would have been raised, and since there was no showing of wrongful possession or a "midnight hour" transfer,⁴⁶ a fifth amendment privilege would have been recognized.⁴⁷ In refusing

the transference of the "analyses" are questions which need not be reached, if the documents possessed by the [taxpayers] did not "have the capacity of coming within the penumbra of the Boyd . . . rule." . . . If this is a statement of the holding in this case, I find it unhelpful and fear that it will create uncertainty for lower courts seeking to interpret it.

500 F.2d at 700.

40. 378 U.S. at 55. See text accompanying notes 9-10 *supra*.

41. 409 U.S. at 336.

42. See notes 18-19 *supra* and accompanying text.

43. 388 F.2d at 468.

44. 409 U.S. at 333.

45. See notes 22-26 *supra* and accompanying text.

46. The summons was served on the accountant *after* the transfer of the documents to the taxpayers. 500 F.2d at 685. See note 5 *supra* and notes 18-19 *supra* and accompanying text.

47. While *Kasmir* was correctly decided under this analysis, the law in the Fifth Circuit is tainted by the anomalous precedent of *White*, which recognizes ritual as dispositive. See notes 33-34 *supra* and accompanying text.

to reach the question of constructive possession, the *Fisher* court deviated from the analysis of *Couch*, upon which it had ostensibly based its decision. By this juristic sleight-of-hand, the court not only refused to help delineate the doctrine of constructive possession, but also distorted the one aspect of the problem previously settled to a point of comprehensibility, the principle that rightful actual possession is enough.