10-1975

Fisher v. United States

Lewis F. Powell Jr.

Grant
CA3 & CA5 are in direct conflict.
Hold 74-611 U.S. v. Kasmir

Petrs were under investigation by IRS.
Petrs obtained from their accountant his work papers on Petrs tax returns. Petrs then delivered the papers to their lawyer.
IRS summoned lawyer & papers.
CA3 held for IRS - ~~fuling~~ agreeing with DC that papers belonged to accountant - not taxpayers. (Couch)

Discuss -
Possible grant to resolve conflict with Kasmir, No. 74-611

PRELIMINARY MEMORANDUM

January 24, 1975 Conference
RC List 1, Sheet 1

No. 74-18 CFX

FISHER, ET AL.

V.

UNITED STATES

Cert to CA 3 (en banc)
(Seitz, C.J., Van Dusen, Aldisert, Rosenn, Weis, Garth; Gibbons-- concurring; Hunter-- concurring & dissenting)

Federal/Civil Timely

1. SUMMARY. The issue in this case is whether the Fifth Amendment privilege against self-incrimination may be invoked by a taxpayer to prevent the production of income tax workpapers prepared by his accountant where the documents are in his attorney's possession. An apparently conflicting decision of the CA 8 in United States v. Kamisar, No. 74-611 is on this Conference List and is discussed in a separate memorandum.

2. FACTS. The taxpayers learned that their tax liability was under investigation for certain years when Agent Feldman

of the IRS called in July, 1971 to arrange an appointment. They retained an attorney, petr Fisher, who called Feldman to advise him that petr Goldsmith would not appear for the appointment. In early August (Goldsmith could not remember the exact date but estimated it to be the 4th or 5th of August), the taxpayers obtained from the accountant certain records consisting primarily of "analyses of receipts and disbursements," which were essentially lists of income and expenses compiled by the accountant from cancelled checks and deposit receipts. On October 22, 1971, Feldman served a summons on the accountant, who reported that he no longer had the documents. On December 1, 1971, the summons at issue here was served on Fisher. When Fisher refused to comply, the government sought enforcement. The USDC found that the summons was issued in good faith, and that the records in question were owned by the accountant. It ordered production.

In affirming, the CA 3 held that petrs had no Fifth Amendment right against enforcement of the summons. It rejected the reasoning of the USDC that lack of ownership defeated the Fifth Amendment claim. Its own reasoning, though difficult to summarize, apparently relied on three factors: first, petrs' actual possession of the documents was not "extended" but only "fleeting and transitory." Second, their possession was for the "limited purpose" of turning them over to the attorney. Third, the documents were not prepared for "some personal, private and confidential purpose [involving] disclosure to the taxpayers'

attorney only." Thus petrs enjoyed no constructive possession of the documents, and enforcement of the summons involved no personal compulsion.

Judge Hunter concurred with the part of the opinion holding that enforcement would not contravene Donaldson v. United States, 400 U.S. 517 (1971), but dissented from the rest of the decision. He argued that the brevity of petrs' possession was irrelevant under Couch v. United States, 409 U.S. 322 (1973). What mattered was whether possession had been "rightful." If possession had been in fact "rightful," petrs' Fifth Amendment claim was not defeated by their temporary relinquishment of physical possession for the limited purpose of securing legal advice with respect to a pending tax investigation. Judge Hunter thus would have remanded to the USDC for additional findings of fact and conclusions of law as to whether possession had been "rightful."

3. CONTENTIONS. Petrs argue that their possession of the documents was not in fact "fleeting or transitory." Actual possession lasted for two weeks. The government conceded that petrs could have validly claimed a Fifth Amendment right against enforcement if they had retained the documents. Therefore, the only question here, according to petrs, is whether that right was lost when they transferred the documents to their attorney. If the attorney-client relationship has any meaning, petrs contend, clients must be deemed to have constructive possession of documents delivered to attorneys solely for legal repre-

sentation and advice. This case is distinguishable from Couch on the grounds that there was a reasonable expectation of privacy here arising out of the attorney-client relationship. There is no policy justification for the CA 3's holding, and there is a conflict between this decision and that of the CA 8 in United States v. Kamisar, No. 74-611.

Resp contends that the decision below was correct, since the summoned workpapers were not the private papers of the taxpayers, but rather originated with and belonged to the accountant. If anyone remained in constructive possession it was the accountant. Resp does not oppose granting cert, however, in light of the square conflict between this case and Kamisar.

4. DISCUSSION. In view of the conflict between this case and Kamisar, and the importance of the issue to tax investigations, one of them would appear to be a grant. The issue was left open in Couch, where the Court noted that "situations may arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused [resulting from enforcement] substantially intact." 409 U.S., at 333. Apart from the question of whether the CA 3's result is correct, its reasoning would appear to have some weaknesses: neither the length of time nor the purpose of the period of actual possession would seem relevant, much less dispositive, under

Couch if petrs' possession was rightful. The transfer of the documents to petrs' attorney did not serve any purpose of concealment because the claim against enforcement would have been equally strong (indeed, stronger) if petrs had retained them.

The presence here of some question as to rightfulness of possession may not be a signficant disadvantage if the case may be remanded for a determination of this issue in accordance with Judge Hunter's approach. Nonetheless, the Court may wish to consider the Fifth Amendment claim in Kamisar, where the accountant formally acknowledged relinquishment of possession. Kamisar, of course, also presents a standing question, which need not be reached if the Court grants cert in Fisher and holds Kamisar. While there is conflict on the standing issue, compare United States v. Judson, 322 F.2d 460, 463-65 (CA 9 1963); Colton v. United States, 306 F.2d 633, 639 (CA 2), cert denied, 371 U.S. 951 (1963), with Bouschor v. United States, 316 F.2d 451, 458-59 (CA 8 1963), and resp in Kamisar is incorrect in the contention that Bouschor has no continuing force, compare United States v. Merrell, 303 F.Supp. 490, 493 (N.D. N.Y. 1969) with United States v. Riland, 364 F.Supp. 120, 121 (S.D. N.Y. 1973), the need for resolving this question may not be as great as petr contends, since Bouschor has not been followed by other courts of appeals.

There is a response.

1/14/75 Blumenthal CA opn in petn

Conference 1-24-75

Court CA - 3 | Voted on ....., 19... | No. 74-18

Argued ....., 19... | Assigned ....., 19...

Submitted ....., 19... | Announced ....., 19...

SOLOMON FISHER, ET AL., Petitioners

vs.

UNITED STATES, ET AL.

7/26/74 Cert. filed.

Grant
&
Consolidate
with 74-611

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
Rehnquist, J.		Grant 74-611												
Powell, J.		Grant & Consolidate with 74-611												
Blackmun, J.			"	74-611										
Marshall, J.			"	& Consolidate with 74-611										
White, J.			"	"		"								
Stewart, J.		Grant 74-611												
Brennan, J.		Grant & Consolidate with												
Douglas, J.														
Burger, Ch. J.		Grant & Consolidate with												

LFP/vsl
July 23, 1975

No. 74-18, Fisher and Goldsmith v. United States (CA3)

No. 74-611, United States v. Kasmir and Candy

The purpose of this memo, dictated during the summer, is to aid my memory as to the issues presented, and to record my quite tentative reaction after a preliminary reading of the opinions and briefs.

* * * * * *

These cases, consolidated for argument, present the identical question whether a taxpayer may invoke the Fifth Amendment with respect to his accountant's workpapers where, after an IRS investigation has commenced, the accountant delivered the workpapers to the taxpayer.

Case No. 74-612 presents a further question, which we do not reach if the Court decides for the government on the issue stated above. In No. 74-611 the taxpayer, after obtaining the workpapers from his accountant, delivered them to his attorney. When served with process, the attorney attempted to invoke his client's privilege. CA5 held that he was entitled to do so.

As I dictate this memorandum, I have access only to the

appendix and briefs in No. 74-18. The Solicitor General's brief addresses both cases, and therefore discusses the privilege asserted by the attorney as well as the principal issue. CA5 and CA3 reached opposite results on the right of a taxpayer to claim the Fifth Amendment privilege by virtue of taking possession of his accountant's records.

I will comment on this issue in light of the facts as found by the district court in Fisher v. United States (74-18).

Facts in 74-18

The taxpayers were the Goldsmiths, the accountant was Berson, and the lawyer who had possession of the records was Fisher.

In late July 1971, an IRS agent made an appointment with Goldsmith to discuss his tax liability for 1969-70. On August 3rd, Goldsmith retained Fisher as counsel, who advised Goldsmith not to keep his appointment with the agent. On August 4, Goldsmith obtained certain records and papers from his accountant. As the nature and ownership of these records is important, I turn to the opinion of the DC who found in substance as follows: the accountant, who had prepared the Goldsmith tax returns for a number of years, made "an analysis of disbursements and receipts,"

and ran trial balances to determine profits. With respect to Mr. Goldsmith, the accountant would "take a summary of his receipts and disbursements to obtain the income and expenses" of the taxpayer. A complete ledger was maintained by the accountant for Mrs. Goldsmith.

The facts as to these records were amplified in the SG's brief:

> these records . . . included lists of income and expenses compiled by the accountant from canceled checks and deposit receipts supplied by the Goldsmiths. They did not, however, include the checks and deposit records themselves.

Although apparently the accountant and the taxpayers asserted that these records belonged to the taxpayers (see petitioner's brief p. 9), the district court expressly held that he was not bound by this testimony of the taxpayer and the accountant. The district court, viewing all of the facts, found that "the workpapers were the property of the accountant."

Petitioners do not rest their case, however, on the issue of ownership. They argue that the records "concern solely the personal financial affairs of the taxpayers," and point out that it was the practice of the accountant to give these summaries to the taxpayers "within three or four years of the time they were prepared."

Position of the SG

The SG argues that "only personal records" in possession of a taxpayer are protected by the Fifth Amendment. In Bellis v. United States, 417 U.S. 85, where a member of a dissolved partnership held partnership records in his possession, the Court held that the records were "partnership records" and that the former partner was holding them in a representative rather than in a private capacity. The SG relies on this case, and on the general position that the Fifth Amendment protects only records that are personal to the individual and in his custody. As the SG notes:

> if the privilege could become available by means of such a simple expedient [the transfer by the accountant of his records to the taxpayer], the distinction developed by the Court between the third party records and private papers would be rendered meaningless.

Position of Petitioners

Petitioners make at least two arguments, as I understand their brief. They contest, essentially, the holding of the DC that the records were the property of the accountant. The argument is not so much one of technical title and it is of substance. Petitioners argue that the records were mere summaries

of the taxpayers' personal records (e.g., listing of checks and deposit receipts from the taxpayers' books), and that therefore they were the equivalent of personal records.

Petitioners also note that they retrieved these records from the accountant "seven weeks" before the summons was served on the accountant, and cite cases (including Couch) to the effect that the rights of a taxpayer in an enforcement case become fixed when the summons is served.

Petitioners' somewhat broader position is that the government cannot compel a citizen to produce private papers which may incriminate him. See Boyd v. United States, 116 U.S. 616. They emphasize that these records were not held in any representative capacity, and that they concerned the taxpayers' private financial affairs and were derived solely from the records made available to the accountant.

Our Decision in Couch v. United States, 409 U.S. 322

As I wrote Couch, and as both parties rely on it in this case, I must have it in mind. In that case the accountant was in possession of bank statements, payroll records and reports of sales and expenditures of the taxpayer. These records had been delivered by taxpayer to the accountant for the purpose of preparing

their income tax returns. The accountant was an independent contractor, not an employee. It was conceded that these business records were owned by the taxpayer. In distinguishing Boyd, the Court emphasized that "the privilege is an intimate and personal one", and that "extortion of information from the accused himself" offends the Fifth Amendment. We said that "the ingredient of personal compulsion against an accused" was lacking where the summons was directed against the accountant; where he, not the taxpayer, was the only one compelled to do anything; where he also had an interest in view of his duty to prepare income tax returns accurately from records made available to him.

We further said:

> the criterion for Fifth Amendment immunity remains not the ownership of property but the 'physical or moral compulsion' exerted. (409 U.S. at 336.)

Although the emphasis in Couch was on the absence of possession, footnote 20 contains the following caveat:

> we do indeed attach constitutional importance to possession, but only because of its close relationship to those personal compulsions and intrusions which the Fifth Amendment forbids. Yet, contrary to any intimation in the dissent (by Justice Marshall), we do not adopt any per se rule. We also decline to conjecture broadly on the significance of possession in cases and circumstances not before this Court.

Comment

This is a close case for me. I would not decide it on the basis of a "bright line" between ownership and possession of papers that fairly could be called "private." Where the taxpayer does have possession (certainly, where possession exists prior to the summons), the issue turns on the nature of the records. If, for example, the only records here involved were the checkbooks (check stubs and cancelled checks) of the taxpayers, and these had been returned by the accountant, these private papers clearly would be protected. But here the accountant had taken information from taxpayers' records. Although the substance of the information may well have been the same as taxpayers' records, its form was different. In a sense (at least) it was the work product of the accountant, and evidently was deemed necessary for his use in preparing the tax returns.

The books are full of cases in this twilight area of Fifth Amendment rights, and even the Supreme Court cases leave me in doubt as to the application of the general principles summarized by me in Couch and repeated in Bellis. At least one can say that Boyd (where the taxpayer had both possession and ownership of papers said to be private) is no longer the controlling authority.

It seems safe to say that the privilege is not available unless the documents sought are both (i) private papers of the party asserting the privilege, and (ii) are in his possession (actual or constructive). In Couch the papers were admittedly private and were owned by the party asserting the privilege; possession of these papers voluntarily -- and for an indefinite time -- had been relinquished to a third party. Since the DC found that the papers (the records) here involved belonged to (were owned by) the accountant, the answer to the case would be clear if any papers owned were also per se private. But an answer on this basis would be too formalistic. In my view, the legal or technical ownership of papers does not necessarily determine whether they are personal or private in the Fifth Amendment sense even when they are in the possession of the party asserting the privilege.

If my view is correct, the first question in this case is whether these records -- conceded to be owned by the accountant -- were nevertheless personal and private to the Goldsmiths. Certainly, a strong argument can be made that they were as apparently the data was merely copied by hand from taxpayers' records. Suppose they were Xerox copies given to the accountant?

If, after further study and enlightenment from my

clerks, I reach this conclusion, the additional question would remain whether relinquishment of possession to counsel altered the situation. I am inclined to think not, but again I need further reflection and assistance from my clerks.

This is quite an important case for the government, and the administration of our tax laws. It also presents an important Fifth Amendment question.

cs/ss 10/25/75

Reviewed 10/26/75

BOBTAIL MEMORANDUM

TO: Mr. Justice Powell DATE: October 25, 1975

FROM: Carl Schenker

Re: No. 74-18 Fisher v. United States
No. 74-611 United States v. Kasmir

May a taxpayer invoke the Fifth to prevent production of his accountant's workpapers when such papers have been transferred to him and subsequently to an attorney? I agree with your tentative "yes". Your aid-to-memory, however, terms this a close case. Having had the benefit of respondent Kasmir's brief (which you did not), I find the case rather easy.*

I take as needing no real consideration the point that any privilege survives the transfer of the workpapers to the taxpayer's attorney. The government concedes this point, and with good reason. Couch recognized that a clear constructive possession on behalf of a taxpayer would allow invocation of the privilege; it is hard to imagine a clearer constructive possession than that involved in the attorney-client relationship.

*I don't want to sound intemperate, but the SG's brief is a scandal. Over and over again he correctly says the crucial issue is whether the workpapers were the taxpayer's "private papers." But he never analyzes that question. Instead - out of stupidity or the hope that the Court is stupid - he tries to make it appear that such "institutional papers" cases as Bellis answer that question. Although Kasmir's brief incorporates much that is irrelevant, it does not grapple with the crucial issue.

The question then becomes whether the material sought here falls within the ambit of the Fifth's protection. The Government suggests two reasons why the Fifth does not apply. (1) The papers, produced by an accountant, are not "private papers," and (2) the compelled production of papers which only the accountant can authenticate is not "testimonial compulsion".

(1) "Private papers." In Fisher the accountant's workpapers consisted of a list of disbursements and receipts that the taxpayer himself could have compiled. At oral argument you might ask exactly what the workpapers in Kasmir contained; the parties don't say. I'll assume that the Kasmir papers were also a product that the taxpayer himself could have turned out.

If the papers had been physically prepared by a taxpayer, they would be within the privilege. The issue is whether papers prepared by an accountant on the basis of information supplied by the taxpayer are insufficiently "private" to be shielded by the privilege. The "private papers" concept derives from the "institutional papers" cases like Bellis. It really has no relevance here. Who physically compiles documents dealing with the financial affairs of an individual should make no difference. As you said in Couch:

> [It would be meaningless to] hold here that the business records which petitioner actually owned would be protected in the hands of her accountant, while business information communicated to her

> accountant by letter and conversations in which the accountant took notes, in addition to the accountant's workpapers and photocopies of petitioner's records, would not be subject to a claim of privilege since title rested in the accountant. Such a holding would thus place unnecessary emphasis on the form of communication to an accountant and the accountant's own working methods, while diverting the inquiry from the basic purposes of the Fifth Amendment's protections. (409 U.S. at 332).

Thus, the workpapers are "personal" to the taxpayer and in his (constructive) possession. He should be able to invoke the Fifth against their compelled production. (The taxpayers are correct in contending that their ability to invoke the Fifth is not lost because the contents of the papers have previously been disclosed to the accountants or, in part, to the Government.)

(2) "Testimonial compulsion." This argument is just more drivel. The SG is right that the accountant would be the only one who could authenticate the papers. But the papers are relevant only insofar as they reflect what the taxpayer "said." It can't be thought that if the taxpayer himself wrote down the information he could be compelled to give it up simply because no one would be forcing him to "testify". The result shouldn't change just because the authenticating testimony in the two cases would come from different sources. In either case the taxpayer faces the "trilemma" of falsification, self-incrimination, or contempt.

As to the subsidiary question whether Kasmir's attorney has standing to assert the privilege - why not? If Hoffman

type testimony from the taxpayer is in order, it's no problem for the Government to get it.

C.S.

ss

74-18 FISHER v. U.S.
74-611 U.S. v. KASMIR

Argued 11/3/75

Q - May a taxpayer invoke 5th with respect to his accountants work papers based solely on data supplied by taxpayer, ~~—~~ where taxpayer retrieved papers from accountant & delivered them to his lawyer?

The records had been delivered to taxpayer seven weeks before summons was served on accountant.

DC found in 74-18 (+ possibly in 74-611 also) that the records were work-papers of accountant.

In Couch the records ~~—~~ - generally similar to those here - were in possession of accountant at time of service, + were customarily retained by accountant. We held there was no personal compulsion on taxpayer. Here (assuming possession of counsel - an agt - was possession by taxpayer) there would be "compulsion". Boyd supports taxpayer, although case is close — as a decision either way opens door to manipulation. ~~—~~

Wallace (SG)

If records had remained in possession of accountants, Court would control.

Q is whether the transfer to the taxpayer justifies invocation of 5th.

Refer to Reply Br. of SG (~~Columbia~~ ~~do not have~~) & ~~CA~~ CA 2 decision in Beatty cited therein.

Freedlis's opinion which is relevant

Two lines of cases:

1. Wilson, Grant, Bellis — words of 3rd party. These cases hold that 5th applies only to personal papers - not other papers. Even non-personal papers in possession of ~~the~~ claimant are not protected.

Wallace (cont.)

Accountant here could have demanded return of these records – but case should not be analyzed on this basis.

Q in whether papers are personal to taxpayer.

Important fact is that taxpayer had disclosed the information to a 3rd party. Accountant could testify as to what

2. Other line of case that support CA3 (en banc) & CA2:

Schaeuber & its progeny that limit use of 5th to "testimonial or communicative" evidence. (See SG's Brief – 34)

Taxpayer here was not compelled here to give these papers to his accountants.

Delivery to lawyer creates no additional immunity from legal process. Any disclosure by client would come within lawyer/client privilege – but these records were not a private disclosure

<u>Goodfriend</u> (for <u>Kasmir</u>)

"Ownership" is not controlling. Couch

"Possession" is important.

Attacks Friendly's op. in <u>Beattie</u>
(see appendix to SG Reply Br of Oct 28th)

<u>Bazelon</u> (for Fisher)

Summaries of checks & deposit receipts – just as a scrivener would transcribe information.

Tax laws make it necessary to use accountants.

lfp/ss 11/5/75

11/5/75

No. 74-611 U.S. v. Kasmir
No. 74-18 Fisher v. U.S.

Is Couch Controlling?

Both sides rely upon my opinion in Couch v. United States, 409 U.S. 322. The relevant facts may be summarized:

(i) The summons was directed to taxpayer's accountant.

(ii) It called for production of "all books, records, bank statements, cancelled checks, deposit ticket copies, workpapers [etc.] pertaining to the tax liability" of Mrs. Couch.

(iii) The accountant was "an independent contractor" - not an employee of Couch.

(iv) Although the accountant had possession Couch "retained title in herself".

(v) After service of the summons, the accountant delivered the records to petitioner's attorney.

The Question

Whether the "ownership" of these personal, business, records by Couch entitled her to invoke the privilege where the records were in the possession of her accountant?

Rationale of our Decision

The emphasis throughout the opinion was on the "personal" nature of the privilege. We said:

> "The ingredient of personal compulsion against an accused is lacking" where the records are in the possession of a third party. (329)
>
> "Possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment." (331)

In commenting on Perlman v. U.S., 247 U.S. 7, we said that the "expectation of privacy [in the documents] had been destroyed when [taxpayer] voluntarily surrendered" the documents. (332)

"We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsion . . . ." (333).

We did recognize that situations could arise where "constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantial intact". (333)

Finally, in the concluding paragraph, we said "There exists no legitimate expectation of privacy and no semblance of government compulsion" where, as in Couch the private papers had been delivered more or less permanently to a third party".

* * * *

Mr. Justice Brennan, concurring, said:

> "I join the opinion of the Court on the understanding that it does not establish a per se rule defeating a

claim of Fifth Amendment privilege whenever the documents in question are not in the possession of the person claiming the privilege. In my view, the privilege is available to one who turns records over to a third person for custodial safekeeping rather than disclosure of information. . . . The privilege cannot extend, however, to the protection of a taxpayer's records conveyed to a retained accountant for use in preparation of an income tax return, where the accountant is himself obligated to prepare a complete and lawful return."

L.F.P., Jr.

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ss

lfc/ss 11/5/75

11/5/75

No. 74-18 Fisher v. U.S.
No. 74-611 U.S. v. Kasmir

Judge Friendly's opinion in Beattie.

The most thoughtful opinion written recently in this opaque area is that of Judge Friendly in U.S. Beattie, decided by an unanimous panel of CA2 on August 18, 1975.

The Facts.

IRS informed Beattie on January 9, of its investigation of his taxes. On January 18, long before any summons was served, Beattie's accountant - at the request of Beattie's lawyers delivered to Beattie "various workpapers, trial balances and schedules" prepared by the accountant in connection with Beattie's tax returns.

On September 13, a summons was directed to Beattie to produce these papers, which he had retained in his possession. The papers or records - described as "accountant's workpapers" - were the accountant's property, not the taxpayer's.

Friendly's analysis.

Judge Friendly, starting with Boyd, emphasized that the privilege protects "an accused's communications" (Boyd, 384 U.S. at 763), and the subpoena in the case before CA2 was directed against the accountant's "communications", not Beattie's.

Compelling an accused to produce his own records is the equivalent of requiring him to take the stand and admit their genuineness. See Curcio v. U.S., 354 U.S. 118, 125. Judge Friendly noted:

> ". . . if an accused is forced to produce his own papers, with the consequence that the prosecutor can put them in evidence without further ado, he is in effect forced to take the stand if he wishes to dispute or explain them."

* * * * *

> "By responding to the summons in this case, the taxpayer would not be admitting the genuineness, correctness or reliability of the accountant's workpapers."

History and policy of the privilege.

Friendly started with the familiar quotation from Murphy v. Waterfront Comm., which identified seven "fundamental values" supporting the privilege. He dismissed, as irrelevant to this case, all of these except the Fifth, namely, "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'".

But Friendly could find no interest of privacy in the case before him. He noted that Beattie "had allowed the accountant to prepare the work papers and had permitted their retention by him for many years"; that the accountant could be subpoenaed and testify about the papers, which would be no greater invasion of Beattie's rights than

surrender of the papers themselves. At this point, Friendly quoted Couch:

> "By its very nature, the privilege is an intimate and personal one".

Distinguishing Couch

Beattie relied primarily on Couch, and Friendly went to great pains to distinguish it. He relies on language in Couch which emphasizes the personal nature of the privilege, and on the Court's position (as Judge Friendly perceives it) that "ownership unaccompanied by possession was insufficient to trigger the privilege".

It is obvious that the language in Couch is at least ambiguous, and footnote 12, as Friendly notes - can certainly be relied upon by the taxpayer. But Couch does not necessarily control the pending cases.

L.F.P., Jr.

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Friendly's analysis.

Judge Friendly, starting with Boyd, emphasized that the privilege protects "an accused's communications" (Boyd, 384 U.S. at 763), and the subpoena in the case before CA2 was directed against the accountant's "communications", not Beattie's.

Compelling an accused to produce his own records is the equivalent of requiring him to take the stand and admit their genuineness. See Curcio v. U.S., 354 U.S. 118, 125. Judge Friendly noted:

> ". . . if an accused is forced to produce his own papers, with the consequence that the prosecutor can put them in evidence without further ado, he is in effect forced to take the stand if he wishes to dispute or explain them."
>
> * * * * *
>
> "By responding to the summons in this case, the taxpayer would not be admitting the genuineness, correctness or reliability of the accountant's workpapers."

History and policy of the privilege.

Friendly started with the familiar quotation from Murphy v. Waterfront Comm., which identified seven "fundamental values" supporting the privilege. He dismissed, as irrelevant to this case, all of these except the Fifth, namely, "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'".

But Friendly could find no interest of privacy in the case before him. He noted that Beattie had allowed the accountant to prepare the work papers and had permitted their retention by him for many years"; that the accountant could be subpoenaed and testify about the papers, which would be no greater invasion of Beattie's rights than

surrender of the papers themselves. At this point, Friendly quoted Couch:

> "By its very nature, the privilege is an intimate and personal one".

Distinguishing Couch

Beattie relied primarily on Couch, and Friendly went to great pains to distinguish it. He relies on language in Couch which emphasizes the personal nature of the privilege, and on the Court's position (as Judge Friendly perceives it) that "ownership unaccompanied by possession was insufficient to trigger the privilege".

It is obvious that the language in Couch is at least ambiguous, and footnote 12, as Friendly notes - can certainly be relied upon by the taxpayer. But Couch does not necessarily control the pending cases.

L.F.P., Jr.

ss

lfp/ss 11/5/75

No. 74-18 Fisher v. U.S. (CA3)
No. 74-611 U.S. v. Kasmir (CA5)

11/5/75

The purpose of this memo is to summarize the facts in these cases primarily for the purpose of facilitating comparison with the facts in Couch:

Kasmir and Candy
(Respondents CA5)

The taxpayer in this case is Dr. Edward Mason. When IRS agents requested permission to examine Mason's books and records, he initially complied but on the same day - upon advice of his accountant (Candy) - Dr. Mason declined to allow further examination. Following Mason's telephone call, accountant Candy immediately called attorney Kasmir; the latter telephoned Mason, and advised him not to cooperate with the agents.

The next morning, the accountant Candy delivered to taxpayer Mason various documents pertaining to Mason's tax returns for 69-71. The documents included "workpapers of the accounting firm".

The next day (two days after the first interview) IRS summonses were served on accountant Candy and lawyer Kasmir. Kasmir was requested to produce the records thatthe accounting firm had turned over to Mason, who in turn has delivered them to the lawyer. The summons to accountant Candy sought only his personal testimony concerned these records. Candy and Kasmir both refused to comply.

Holding of CA5

1. Citing Couch CA5 held that Candy must comply with the summons, and give his testimony concerning the documents. This holding is not an issue.

As to lawyer Kasmir, CA5 held:

(i) The documents belonged to the accounting firm.

(ii) Mason, the taxpayer, had acquired rightful possession by virtue of the transfer prior to service.

(iii) The transfer by the taxpayer to his attorney, Kasmir, did not decrease the taxpayer's rights to claim the privilege. CA5 sustained the taxpayer's privilege, relying on Couch that lawful possession was the controlling fact.

* * * * *

Goldsmith's Case (Petitioners in 74-18)

The Facts

An agent of IRS visited Goldsmith in July 1971, advising that he was investigating his tax returns. Shortly thereafter, the Goldsmiths retained Fisher to represent them. On counsel's advice, Goldsmith requested his accountant, Berson, to deliver all records in the accountant's possession concerning the tax returns of the Goldsmiths. The accountant complied with

this request, and shortly thereafter the taxpayer delivered the accountant's records to attorney Berson.

Several weeks later, a summons was served on the accountant for the documents. Upon being advised that the accountant no longer had them, a summons was served on attorney Fisher, who declined to deliver the documents then in his possession.

The documents consisted of "listings" of cancelled checks and deposits, taken directly from the cancelled checks and deposit slips of the taxpayers. The accountant testified that this "listing" was bookkeeping work rather than an accounting function, and that he did not consider them to be accountant's workpapers. This function of addition and multiplication had been performed for these taxpayers for some 25 years by this accountant, who turned the summaries over to the taxpayers for their permanent possession - usually three or four years after preparation.

Holding of CA3

The District Court, after an evidentiary hearing, concluded that the records were "accountant's workpapers", were owned by accountant, and that ownership negated the taxpayer's Fifth Amendment claim.

CA3 en banc, with one dissent, affirmed the DC.

L.F.P., Jr.

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L.F.P., Jr.

ss

No. 74-18, FISHER v. U.S. Cont. 11/5/75

Affirmed 9-0

The Chief Justice Pass (on 1st Vote)

Douglas, J. Affirm

Brennan, J. Affirm

Stewart, J. Affirm

White, J.

Fisher

affirm

Marshall, J.

affirm

Blackmun, J. affirm

Powell, J. affirm

Rehnquist, J. affirm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 28, 1976

RE: Nos. 74-18 & 74-611 Fisher and Kasmir v. United States

Dear Byron:

I'll be writing a separate opinion in the above.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 29, 1976

Re: Nos. 74-18 and 74-611 - Fisher v. United States, et al.

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

Copies to the Conference

To: LFP

From: CRS

Re: Fisher v. United States, No. 74-18
United States v. Kasmir, No. 74-611

As you will see when you read this circulation, it is a widely sweeping opinion (reaching issues that may not be necessary to the disposition of the case). I am not prepared to give you any reliable help on your vote until I can study the case more closely. Accordingly I ask you to defer voting for the time being, for the reason to be stated.

The next argument calendar involves Andresen v. Maryland, No. 74-1646. I will be doing the bench memo in that case, where one of the issues is whether papers protected by the Fifth Amendment ruling of Boyd may be seized pursuant to search warrant. In connection with that bench memo I will have to read the cases that are relevant to Kasmir and Fisher. Thus, I will be in a position to give you a much more informed view on some of the difficult and subtle points presented in this case after I have read those cases. I propose to make that bench memo my next major order of business after redrafting Ristaino.

If you need my views sooner, please let me know.

Carl

P.S Brennan has already said that he'll be writing separately, so we're not holding anyone up.

To: LFP

From: CRS

Re: Fisher & Kasmir, Nos. 74-18 and 74-611

You can and should join this opinion. (Having been educated more fully in this area, I hereby recant at least some of my bobtail memorandum.) I have only two things to bring to your attention.

(1) AT p. 9 the circulation says that "private information" derives whatever protection it has from sources other than the 5th amendment--specifying the fourth amendment, and the first amendment, and evidentiary privileges. I mention this because you may or may not think that there are other sources for the protection of private information. Specifically, your concurring statement in California Bankers, 416 U.S., does not make clear what you perceive as the sources of privacy. I take it from the general tenor of the statement that you principally had first and fourth amendment notions in mind. If so, Justice White's formulation guards your concerns.

(2) At pp. 8, 15-16, p. 28 n.11, Justice White relies upon Katz et al for the proposition that oral communications may be seized and introduced without violation of the Fifth Amendment, thus substantiating the proposition that written documents may also be. The trouble is that the Court has never so held (despite his use of the word "holdings" on p. 8). This matter is discussed in my bench memo on Andresen. The Andresen case does squarely present the issue of whether communications may be seized consistently with the Fifth Amendment if Fourth amendment safeguards are met. It might be a good idea to make these companion cases in order to have

real holdings for the XXXXXXX Fourth-Fifth Amendment discussion.

On the other hand, the result in Andresen appears to me to be a foregone conclusion, so perhaps this does no harm. Unless the conference vote in Andresen is inconsistent with Justice White's reliance on Katz, the statements made are in themselves good predictions of the proper Fifth Amendment XXXXX analysis of the seizure of communications.

Yes

Carl

P.S. I have one minor technical reservation. The statement of what was sought in No. 74-611 is set out at p.2. It includes XXXXXXXXX "retained copies" of correspondence. The latter part of the opinion presumes that none of the documents sought were written by the taxpayers and relies heavily on that notion. It should therefore be made clear that the subpoena is construed to not to include letters from the taxpayer to the accountant. I mentioned this to John Nields and he agrees XX that it should be noted. He will bring that to Justice White's attention.

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 6, 7, 9, 10-13, 17, 21, 22

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 2-4-76

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Rehnquist

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Jones

SUPREME COURT OF THE UNITED STATES

Nos. 74–18 AND 74–611

Solomon Fisher et al., Petitioners, 74–18 v. United States et al. — On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

United States et al., Petitioners, 74–611 v. C. D. Kasmir and Jerry A. Candy. — On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1976]

MR. JUSTICE WHITE delivered the opinion of the Court.

In these two cases we are called upon to decide whether a summons directing an attorney to produce documents delivered to him by his client in connection with the attorney-client relationship is enforceable over claims that the documents were constitutionally immune from summons in the hands of the clients and retained that immunity in the hands of the attorneys.

I

In each case, an Internal Revenue agent visited the taxpayer or taxpayers[1] and interviewed them in connection with an investigation of possible civil or criminal liability under the federal income tax laws. Shortly

[1] In No. 74–18, the taxpayers are husband and wife who filed a joint return. In No. 74–611, the taxpayer filed an individual return.

after the interviews—one day later in No. 74–611 and a week or two later in No. 74–18—the taxpayers obtained from their respective accountants certain documents relating to the preparation by the accountant of their tax returns. Shortly after obtaining the documents—later the same day in No. 74–611 and a few weeks later in No. 74–18—the taxpayers transferred the documents to their lawyers—respondent Kasmir and petitioner Fisher, respectively—each of whom was retained to assist the taxpayer in connection with the investigation. Upon learning of the whereabouts of the documents, the Internal Revenue Service served summonses on the attorneys directing them to produce documents listed therein. In No. 74–611, the documents were described as "the following records of Tannebaum Bindler & Lewis [the accounting firm]:

> "1. Accountant's workpapers pertaining to Dr. E. J. Mason's books and records of 1969, 1970 and 1971.[2]
>
> "2. Retained copies of E. J. Mason's income tax returns for 1969, 1970 and 1971.
>
> "3. Retained copies of reports and other correspondence between Tannebaum Bindler & Lewis and Dr. E. J. Mason during 1969, 1970 and 1971."

In No. 74–18, the documents demanded were analyses by the accountant of the taxpayers' income and expenses which had been copied by the accountant from the taxpayers' cancelled checks and deposit receipts.[3] In No. 74–611, a summons was also served on the accountant directing him to appear and testify concerning the docu-

[2] The "books and records" concerned taxpayer's large medical practice.

[3] The husband taxpayer's checks and deposit receipts related to his textile waste business. The wife's related to her women's wear shop.

ments to be produced by the lawyer. In each case, the lawyer declined to comply with the summons directing production of the documents, and enforcement actions were commenced by the Government under 26 U. S. C. §§ 7402 (b) and 7604 (a). In No. 74–611, the attorney raised in defense of the enforcement action the taxpayer's accountant-client privilege, his attorney-client privilege, and his Fourth and Fifth Amendment rights. In No. 74–18, the attorney claimed that enforcement would involve compulsory self-incrimination of the taxpayers in violation of their Fifth Amendment privilege, would involve a seizure of the papers without necessary compliance with the Fourth Amendment, and would violate the taxpayers' right to communicate in confidence with their attorney. In No. 74–18 the taxpayers intervened and made similar claims.

In each case the summons was ordered enforced by the District Court and its order was stayed pending appeal. In No. 74–18, *Fisher* v *United States,* —— F. 2d —— (1974), petitioners' appeal raised, in terms, only their Fifth Amendment claim, but they argued in connection with that claim that enforcement of the summons would involve a violation of the taxpayers' reasonable expection of privacy and particularly so in light of the confidential relationship of attorney to client. The Court of Appeals for the Third Circuit after reargument en banc affirmed the enforcement order, holding that the taxpayers had never acquired a possessory interest in the documents and that the papers were not immune in the hands of the attorney. In No. 74–611, a divided panel of the Court of Appeals for the Fifth Circuit reversed the enforcement order, *Kasmir* v. *United States,* —— F. 2d —— (1974). The court reasoned that by virtue of the Fifth Amendment the documents would have been privileged from production pursuant to sum-

mons directed to the taxpayer had he retained possession and, in light of the confidential nature of the attorney-client relationship, the taxpayer retained, after the transfer to his attorney, "a legitimate expectation of privacy with regard to the materials be placed in his attorney's custody, that he retained constructive possession of the evidence and thus retained Fifth Amendment protection."[4] We granted certiorari to resolve the conflict created. —— U. S. ——. Because in our view the documents were not privileged either in the hands of the lawyers or of their clients, we affirm the judgment of the Third Circuit in No. 74–18 and reverse the judgment of the Fifth Circuit in No. 74–611.

II

All of the parties in this case and the Court of Appeals for the Fifth Circuit have concurred in the proposition that if the Fifth Amendment would have excused a taxpayer from turning over the accountant's papers had he possessed them, the attorney to whom they are delivered for the purpose of obtaining legal advice should also be immune from subpoena. Assuming for the moment the validity of this proposition, we are convinced that, under our decision in *Couch* v. *United States*, 409 U. S. 322 (1973), it is not the taxpayer's Fifth Amendment privilege that would excuse the attorney from production.

The relevant part of that Amendment provides:

> "No person . . . . shall be *compelled* in any criminal case to be a *witness against himself.*" (Emphasis added.)

The taxpayer's privilege under this Amendment is not

[4] The respondent in No. 74–611 did not, in terms, rely on the attorney-client privilege or the Fourth Amendment before the Court of Appeals.

violated by enforcement of the summonses involved in these cases because enforcement against a taxpayer's lawyer would not "compel" the taxpayer to do anything—and certainly would not compel him to be a "witness" against himself. The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of "physical or moral compulsion" exerted on the person asserting the privilege, *Perlman* v. *United States,* 247 U. S. 7, 15 (1918); *United States* v. *Johnson,* 228 U. S. 457, 458 (1913); *Couch* v. *United States,* 410 U. S. 322, 328–329, 336 (1973). See also *Holt* v. *United States,* 218 U. S. 245, 252 (1910); *United States* v. *Dionisio,* 410 U. S. 1 (1973); *Schmerber* v. *California,* 384 U. S. 757, 765 (1966); *Burdeau* v. *McDowell,* 256 U. S. 465, 476 (1921); *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 55 (1974). In *Couch* v. *United States, supra,* we recently ruled that the Fifth Amendment rights of a taxpayer were not violated by the enforcement of a documentary summons directed to her accountant and requiring production of the taxpayer's own records in the possession of the accountant. We did so on the ground that in such a case "the ingredient of personal compulsion against an accused is lacking." *Id.,* at 329.

Here, the taxpayers are compelled to do no more than was the taxpayer in *Couch.* The taxpayers' 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.

The fact that the attorneys are agents of the taxpayers does not change this result. *Couch* held as much, since the accountant there was also the taxpayer's agent, and in this respect reflected a longstanding view. In

Hale v. *Henkel*, 201 U. S. 43, 69–70 (1906), the Court said that the privilege "was never intended to permit [a person] to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person . . . the amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*." (Emphasis in original.) "It is extortion of information from the accused which offends our sense of justice." *United States* v. *Couch*, *supra*, at 328. Agent or no, the lawyer is not the taxpayer. The taxpayer is the "accused," and nothing is being extorted from him.

Nor is this one of those situations, which *Couch* suggested might exist, where constructive possession is so clear or relinquishment of possession so temporary and insignificant as to leave the personal compulsion upon the taxpayer substantially intact. *United States* v. *Couch*, *supra*, at 333. In this respect we see no difference between the delivery to the attorneys in these cases and delivery to the accountant in the *Couch* case. As was true in *Couch*, the documents sought were obtainable without personal compulsion on the accused.

Respondents' argue, and the Fifth Circuit Court of Appeals apparently agreed, that if the summons was enforced, the taxpayers' Fifth Amendment privilege would be, but should not be, lost solely because they gave their documents to their lawyers in order to obtain legal advice. But this misconceives the nature of the constitutional privilege. The amendment protects a person from being compelled to be a witness against himself. Here, taxpayers retained any privilege they ever had not to be compelled to testify against themselves and not to be compelled themselves to produce private papers in their possession. *This* personal privilege was in no way decreased by the transfer. It is simply that by

reason of the transfer of the documents to the attorneys, those papers may be subpoenaed without compulsion on the taxpayer. The protection of the Fifth Amendment is therefore not available. "A party is privileged from producing evidence but not from its production." *Johnson* v. *United States, supra,* at 458.

The Court of Appeals for the Fifth Circuit suggested that because legally and ethically the attorney was required to respect the confidences of his client, the latter had a reasonable expectation of privacy for the records in the hands of the attorney and therefore did not forfeit his Fifth Amendment privilege with respect to the records by transferring them in order to obtain legal advice. It is true that the Court has often stated that one of the several purposes served by the constitutional privilege against compelled testimonial self-incrimination is that of protecting personal privacy. See, for example, *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55 (1964); *Couch* v. *United States,* 409 U. S. 322, 332, 335–336 (1973); *Tehan* v. *Shott,* 382 U. S. 406, 416 (1966); *Davis* v. *United States,* 328 U. S. 582, 587 (1946). But the Court has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.[5]

[5] There is a line of cases in which the Court stated that the Fifth Amendment was offended by the use in evidence of documents or property seized in violation of the Fourth Amendment. *Gouled* v. *United States,* 255 U. S. 298, 306 (1921); *Agnello* v. *United States,* 269 U. S. 20, 33–34 (1925); *United States* v. *Lefkowitz,* 285 U. S. 452, 467 (1932); *Mapp* v. *Ohio,* 367 U. S. 643, 661 (1961) (con-

The proposition that the Fifth Amendment protects private information obtained without compelling self-incriminating testimony is contrary to the clear holdings 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 were uttered, *Katz* v. *United States,* 389 U. S. 347, 354 (1967); *Osborn* v. *United States,* 385 U. S. 323, 329–330 (1966), and *Berger* v. *New York,* 388 U. S. 41, 57 (1967), cf. *Hoffa* v. *United States,* 385 U. S. 293, 304 (1966), and that disclosure of private information may be compelled if immunity removes the risk of incrimination. *Kastigar* v. *United States,* 406 U. S. 441 (1972). If the Fifth Amendment protected generally against the obtaining of private information from a man's mouth or pen or house, its protections would presumably not be lifted by probable cause and a warrant or by immunity. The privacy invasion is not mitigated by immunity; and the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness. The Framers addressed the subject of personal privacy directly in the Fourth Amendment. They 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

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curring opinion of Black, J.). But the Court purported to find elements of compulsion in such situations. "In either case he is the unwilling source of the evidence, and the 5th Amendment forbids that he shall be compelled to be a witness against himself in a criminal case." *Gouled* v. *United States, supra,* at 306. In any event the predicate for those cases, lacking here, was a violation of the Fourth Amendment.

We cannot cut the Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against "compelled testimony not [the disclosure of] private information." *United States* v. *Nobles,* 422 U. S. 225, 233 n. 7 (1975).

Insofar as private information not obtained through compelled self-incriminating testimony is legally protected, its protection stems from other sources [6]—the Fourth Amendment's protection against seizures without warrant or probable cause and against subpoenas which suffer from "too much indefiniteness or breadth in the things required to be 'particularly described,' " *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 202 (1946); *In re Horowitz,* 482 F. 2d 72, 75–80 (CA2 1975) (Friendly, J.); the First Amendment, see *NAACP* v. *Alabama,* 357 U. S. 449, 462 (1958); or evidentiary privileges such as the attorney-client privilege.[7]

---

[6] In *Couch* v. *United States, supra,* on which taxpayers rely for their claim that the Fifth Amendment protects their "legitimate expectation of privacy," the Court differentiated between the things protected by the Fourth and Fifth Amendments. "We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused." *Id.,* at 336.

[7] The taxpayers have not raised arguments of a Fourth Amendment nature before this Court and could not be successful if they had. The summonses are narrowly drawn and seek only documents of unquestionable relevance to the tax investigation. Special problems of privacy which might be presented by subpoena of a personal diary, *United States* v. *Bennett,* 409 F. 2d 888, 897 (CA2 1969), Friendly, J., are not involved here.

First Amendment values are also plainly not implicated in this case.

III

Our above holding is that compelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the taxpayer might have enjoyed from being himself compelled to produce them. The taxpayers in these cases, however, have from the outset consistently urged that they should not be forced to expose otherwise protected documents to summons simply because they have sought legal advice and turned the papers over to their attorneys. The government appears to agree unqualifiedly. The difficulty is that taxpayers have erroneously relied on the Fifth Amendment without urging the attorney-client privilege in so many words. They have nevertheless invoked the relevant body of law and policies that govern the attorney-client privilege. In this posture of the case, we feel obliged to inquire whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment.[8]

[8] Fed. Rules Evid. Rule 501, 28 U. S. C. A., effective January 2, 1975, provides that with respect to privileges the United States District Courts "shall be governed by the principles of the common law interpreted . . . in the light of reason and experience." Thus, whether or not Rule 501 applies to this case, the attorney-client privilege issue is governed by the principles and authorities discussed and cited *infra*. Fed. Rules Crim. Proc. 26.

In No. 74-611, the taxpayers did not intervene, and their rights have been asserted only through their lawyers. The parties disagree on the question whether an attorney may claim the Fifth Amendment privilege of his client. We need not resolve this question. The only privilege of the taxpayers involved here is the attorney-client privilege and it is universally accepted that the attorney-client privilege may be raised by the attorney, McCormick, *supra*, § 92, at 193, § 94, at 197; *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F. 2d 551 (CA2 1967); *Bouschor* v. *United States*, 316 F. 2d 451 (CA8 1963); *Colton* v. *United States*, 306 F. 2d 633 (CA2 1962); *Schwimmer* v.

Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. 8 Wigmore, Evidence, § 2292, *supra;* McCormick, Evidence, § 87, *et seq.* The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. 8 Wigmore, Evidence, § 2291, and § 2306, at 590, *supra;* McCormick, Evidence, § 87, p. 175, § 92, p. 192; *Baird* v. *Koerner,* 279 F. 2d 623 (CA9 1960); *Modern Woodmen of America* v. *Watkins,* 132 F. 2d 352 (CA5 1943); *Prichard* v. *United States,* 181 F. 2d 326 (CA6) aff'd, 339 U. S. 974; *Schwimmer* v. *United States,* 232 F. 2d 855 (CA8 1956); *Goldfarb* v. *United States,* 328 F. 2d 280 (CA6 1964). As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. However, since the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege. *In re Horowitz,* 482 F. 2d 72, 81 (CA2 1973), Friendly, J.; *United States* v. *Goldfarb,* 328 F. 2d 280 (CA6 1964); 8 Wigmore, *supra,* § 2291, at 554; McCormick, *supra,* § 89, at 185. This Court and the lower courts have thus uniformly held that pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice. *Grant* v. *United States,* 227 U. S.

United States, 232 F. 2d 855 (CA8 1956); cert. denied, 353 U. S. 833; *Baldwin* v. *United States,* 125 F. 2d 812 (CA9 1942).

74, 79–80 (1913), 8 Wigmore, Evidence, § 2307 (McNaughton Rev. 1961), and cases there cited; McCormick, Evidence, § 90, p. 185 (2d ed. 1972); *Falsone* v. *United States,* 205 F. 2d 734 (CA5 1953); *Sovereign Camp* v. *Reid,* 208 Ala. 457; *Andrews* v. *Railway Co.,* 14 Ind. 169; *Palatini* v. *Sarrian,* 15 N. J. Super. 34; *Pearson* v. *Yoder,* 39 Okla. 105; *State* v. *Olwell,* 64 Wash. 2d 828. The purpose of the privilege requires no broader rule. Preexisting documents obtainable from the client are not appreciably easier to obtain from the attorney after transfer to him. Thus, even absent the attorney-client privilege, clients will not be discouraged from disclosing the documents to the attorney and their ability to obtain informed legal advice will remain unfettered. It is otherwise if the documents are not obtainable by subpoena *duces tecum* or summons while in the exclusive possession of the client, for the client will then be reluctant to transfer possession to the lawyer unless the documents are also privileged in the latter's hands. Where the transfer is made for the purpose of obtaining legal advice, the purposes of the attorney-client privilege would be defeated unless the privilege ~~was~~ is applicable. "It follows, then, that *when the client himself would be privileged* from production of the document either as a praty at common law . . . or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce." 8 Wigmore, *supra,* § 2307, at 592. Lower courts have so held. 8 Wigmore, Evidence, § 2307, p. 592 n. 1, and cases there cited; *United States* v. *Judson,* 322 F. 2d 460, 466 (CA9 1963); *Colton* v. *United States,* 306 F. 2d 633, 639 (CA2 1962); contra *Bouschor* v. *United States,* 316 F. 2d 451 (CA8 1963). This proposition was accepted by the Fifth Circuit Court of Appeals below, is asserted by petitioner in No. 74–18 and respondent in No. 74–611, and was conceded by the Government in its

brief and at oral argument. Where the transfer to the attorney is for the purpose of obtaining legal advice, we agree with it.

Since each taxpayer transferred possession of the documents in question from himself to his attorney, in order to obtain legal assistance in the tax investigations in question, the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege. We accordingly proceed to the question whether the documents could have been obtained by summons addressed to the taxpayer while the documents were in his possession. The only bar to enforcement of such summons asserted by the parties or the courts below is the Fifth Amendment's privilege against self-incrimination. On this question the Court of Appeals for the Fifth Circuit in this case is at odds with the Court of Appeals for the Second Circuit. *United States* v *Beattie,* —— F. 2d —— (1975).

III

The proposition that the Fifth Amendment prevents compelled production of documents over objection that such production might incriminate stems from *Boyd* v. *United States,* 116 U. S. 616 (1886). *Boyd* involved a civil forfeiture proceeding brought by the Government against two partners for fraudulently attempting to import 35 cases of glass without paying the prescribed duty. The partnership had contracted with the Government to furnish the glass needed in the construction of a government building. The glass specified was foreign glass, it being understood that if part or all of the glass was furnished from the partnership's existing duty-paid inventory, it could be replaced by duty-free imports. Pursuant to this arrangement, 29 cases of glass were imported by the partnership duty free. The partners then

represented that they were entitled to duty-free entry of an additional 35 cases which were soon to arrive. The forfeiture action concerned these 35 cases. The government's position was that the partnership had replaced all of the glass used in construction of the government building when it imported the 29 cases. At trial, the government obtained a court order directing the partners to produce an invoice the partnership had received from the shipper covering the previous 29-case shipment. The invoice was disclosed, offered in evidence and used, over the Fifth Amendment objection of the partners, to establish that the partners were fraudulently claiming a greater exemption from duty than they were entitled to under the contract. This Court held that the invoice was inadmissible and reversed the judgment in favor of the Government. The Court ruled that the Fourth Amendment applied to court orders in the nature of subpoenas *duces tecum* in the same manner in which it applies to search warrants, *id.*, at 622; and that the Government may not, consistent with the Fourth Amendment, seize a person's documents or other property as evidence unless it can claim a proprietary interest in the property superior to that of the person from whom the property is obtained. *Id.*, at 623–624. The invoice in question was thus held to have been obtained in violation of the Fourth Amendment. The Court went on to hold that the accused in a criminal case or the defendant in a forfeiture action could not be forced to produce evidentiary items without violating the Fifth Amendment as well as the Fourth. More specifically, the Court declared, "a compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution." *Id.*, at 634–635. Admitting the partner-

ship invoice into evidence had violated both the Fifth and Fourth Amendments.

Among its several pronouncements, *Boyd* was understood to declare that the seizure, under warrant or otherwise, of any purely evidentiary materials violated the Fourth Amendment and that the Fifth Amendment rendered these seized materials inadmissible. *Gouled* v. *United States,* 255 U. S. 298 (1921); *Agnello* v. *United States,* 269 U. S. 20 (1925); *United States* v. *Lefkowitz,* 285 U. S. 452 (1932). That rule applied to documents as well as to other evidentiary items—"[t]here is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, . . . *Gouled* v. *United States, supra,* at 309. Private papers taken from the taxpayer, like other "mere evidence," could not be used against the accused over his Fourth and Fifth Amendment objections.

Several of Boyd's express or implicit declarations have not stood the test of time. The application of the Fourth Amendment to subpoenas was limited by *Hale* v. *Henkel,* 201 U. S. 43 (1906), and more recent cases. See, for example, *Oklahoma Press Publishing Co.* v. *Walling,* 329 U. S. 186 (1946). Purely evidentiary (but "nontestimonial")[9] materials, as well as contraband and fruits and instrumentalies of crime, may now be searched for and seized under proper circumstances, *Warden* v. *Hayden,* 387 U. S. 294 (1967). Also, any notion that "testimonial" evidence may never be seized and used in

[9] Citing to *Schmerber* v. *California,* 384 U. S. 757 (1966), the *Warden* v. *Hayden* opinion, 387 U. S., at 302–303, reserved the question "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."

evidence is inconsistent with *Katz* v. *United States, supra; Osborn* v. *United States, supra;* and *Berger* v. *New York, supra,* approving the seizure under appropriate circumstances of conversations of a person suspected of crime.

It is also clear that the 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. We have, accordingly, declined to extend the protection of the privilege to the giving of blood samples, *Schmerber, supra,* at 763–764; [10] to the giving of handwriting exemplars, *Gilbert* v. *California,* 388 U. S. 263, 265–267 (1967); voice exemplars, *United States* v. *Wade,* 388 U. S. 263, 265–267 (1967), or the donning of a blouse worn by the perpetrator, *Holt* v. *United States,* 218 U. S. 245 (1910). Furthermore, despite *Boyd,* neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds. *Bellis* v. *United States,* 417 U. S. 85 (1974). It would appear that under that case the precise claim sustained in *Boyd* would now be rejected for reasons not there considered.

The pronouncement in *Boyd* that a person may not be forced to produce his private papers has nonetheless often appeared as dictum in later opinions of this Court. See, *e. g., Wilson* v. *United States,* 221 U. S. 361, 377 (1911); *Wheeler* v. *United States,* 226 U. S. 478, 489 (1913); *United States* v. *White,* 322 U. S. 694, 698–699

[10] The Court's holding was: "Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by petitioner, it was not inadmissible on privilege grounds." 384 U. S., at 765.

(1944); *Davis* v. *United States,* 328 U. S. 582 587–588 (1946); *Schmerber* v. *California,* 384 U. S. 757, 763–764 (1966); *Couch* v. *United States,* 409 U. S. 322, 330 (1973); *Bellis* v. *United States,* 417 U. S. 85, 87 (1974). To the extent, however, that the rule against compelling production of private papers rested on the proposition that seizures of or subpoenas for "mere evidence," including documents, violated the Fourth Amendment and therefore also transgressed the Fifth, *Gouled* v. *United States, supra,* 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. Accordingly, we turn to the question of what, if any, incriminating testimony within the Fifth Amendment's protection, is compelled by a documentary summons.

A subpoena served on a taxpayer requiring him to produce an accountant's work papers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications. *Schmerber* v. *California, supra; Wade* v. *United States, supra;* and *Gilbert* v. *California, supra.* The accountants' work papers are not the taxpayer's. They were not prepared by him, and they contain no testimonial declarations by him. Furthermore, as far as this record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary,

and they cannot be said to contain compelled testimonial evidence, either of the taxpayer or of anyone else.[11] The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.

The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. *Curcio* v. *United States,* 354 U. S. 118, 125 (1975). The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answer; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof. In light of the records now before

[11] The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege, *Wilson* v. *United States,* 221 U. S. 361, 378 (1911). And, unless the Government has compelled the subpoenaed person to write the document, cf. *Marchetti* v. *United States,* 390 U. S. 39 (1968); *Grosso* v. *United States,* 390 U. S. 62 (1968), the fact that it was written by him is not controlling with respect to the Fifth Amendment issue. Conversations may be seized and introduced in evidence under proper safeguards, *United States* v. *Katz, supra; United States* v. *Osborn, supra; Berger* v. *New York, supra; United States* v. *Bennett, supra,* at 897 n. 9, if not compelled. In the case of a documentary subpoena the only thing compelled is the act of producing the document and the compelled act is the same as the one performed when a chattel or document not authored by the producer is demanded. McCormick, *supra,* at 269.

us, we are confident that however incriminating the contents of the accountant's work papers might be, the act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination.

It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. The papers belong to the accountant, were prepared by him and are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the "truth telling" of the taxpayer to prove his access to the documents. 8 Wigmore, Evidence, *supra*, § 2264, at 380. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons "no constitutional rights are touched. The question is not of testimony but of surrender." *Matter of Harris*, 221 U. S. 274, 279 (1911).

When an accused is required to submit a handwriting exemplar he admits his ability to write and impliedly asserts that the exemplar is his writing. But in common experience, the first would be a near truism and the latter self-evident. In any event, although the exemplar may be incriminating to the accused and although he is compelled to furnish it, his Fifth Amendment privilege is not violated because nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege. This Court has also time and again allowed subpoenas against the custodian of corporate documents or those belonging to other collective entities such as unions and partnerships and those of bankrupt businesses over claims that the documents will incriminate the

custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor. *E. g., Wilson* v. *United States,* 221 U. S. 361 (1911); *Dreier* v. *United States,* 221 U. S. 394 (1911); *United States* v. *White,* 322 U. S. 694 (1944); *Bellis* v. *United States,* 417 U. S. 85 (1974); *Matter of Harris,* 221 U. S. 274 (1911). The existence and possession or control of the subpoenaed documents being no more in issue here than in the above cases, the summons is equally enforceable.

Moreover, assuming that these aspects of producing the accountants' papers have some minimal testimonial significance, surely it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare work papers and deliver them to the taxpayer. At this juncture, we are quite unprepared to hold that either the fact of existence of the papers or of their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer.

As for the possibility that responding to the subpoena would authenticate [12] the work papers, production would

[12] The "implicit authentication" rationale appears to be the prevailing justification for the Fifth Amendment's application to documentary subpoenas. *Schmerber* v. *California,* 384 U. S. 757, 763–764 (1966) (". . . [T]he privilege reaches . . . the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd* v. *United States,* 116 U. S. 616"; *Couch* v. *United States,* 409 U. S. 322, 344, 346–348 (1973) (dissenting opinion of MARSHALL, J.) (the person complying with the subpoena "implicitly testifies that the evidence he brings forth is in fact the evidence demanded."); *United States* v. *Beattie,* Docket No. 75–6041 (CA2 Aug. 18, 1975) per Friendly, J. ("a subpoena demanding that an accused produce his own records is . . . the equivalent of requiring him to take the stand and admit their genuineness"); 8 Wigmore, Evidence, *supra,* at 380 (the testimonial component involved in compliance with an order for production of documents or chattels "is the witness's assurance (compelled

express nothing more than the taxpayer's belief that the papers are those described in the subpoena. The taxpayers would be no more competent to authenticate their accountant's work papers or reports by producing them than they would be to authenticate them if testifying orally. They did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible in evidence against the taxpayers without authenticating testimony. Without more, responding to the subpoena in the circumstances before us would not appear to represent a substantial threat of self-incrimination. Moreover, *Wilson* v. *United States, supra; Dreier* v. *United States, supra; United States* v. *White, supra; Bellis* v. *United States, supra;* and *Matter of Harris, supra,* the custodian of a corporate, union or partnership books or those of a bankrupt business was ordered to respond to a subpoena for the business' books even though doing so involved a "representation that the documents produced are those demanded by the subpoena," *Curcio* v. *United States,* 354 U. S. 118, 125 (1957).[13]

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as an incident of the process) that the articles produced are the ones demanded)"; McCormick, Evidence, *supra,* § 126, p. 268 ("This rule [applying the Fifth Amendment privilege to documentary subpoenas] is defended on the theory that one who produces documents (or other matter) described in the subpoena *duces tecum* represents, by his production, that the documents produced are in fact the documents described in the subpoena."); *People* v. *Defore,* 242 N. Y. 13, 27, per Cardoza, J. ("A defendant is 'protected from producing his documents in response to a subpoena *duces tecum,* for his production of them in court would be his voucher of their genuineness.' There would then be testimonial compulsion").

[13] In these cases compliance with the subpoena is required even though the books have been kept by the person subpoenaed and his producing them would itself be sufficient authentication to permit their introduction against him.

Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his "private papers," see *Boyd* v. *United States, supra,* at ——. We do hold that compliance with a summons directing the taxpayer to produce the accountant's documents involved in this case would involve no incriminating testimony within the protection of the Fifth Amendment.

The judgment of the Court of Appeals for the Fifth Circuit in No. 74–611 is reversed. The judgment of the Court of Appeals for the Third Circuit in No. 74–18 is affirmed.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or disposition of this case.

February 17, 1976

No. 74-18 Fisher v. United States
No. 74-611 United States v. Kasmir

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 26, 1976

Re: No. 74-18 - Fisher v. United States
No. 74-611 - United States v. Kasmir

Dear Byron:

Please join me.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 14, 1976

Re: (74-18 - Fisher v. U. S.
(74-611 - U. S. v. Kasmir

Dear Byron:

I join your February 27 circulation.

Regards,

WEB

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 14, 1976

Re: (74-18 - Fisher v. U. S.
(74-611 - U. S. v. Kasmir

Dear Byron:

I join your February 27 circulation.

Regards,

WEB

Mr. Justice White

Copies to the Conference

Sadly - I've joined, haven't I ?

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 14, 1976

RE: Nos. 74-18 and 74-611, Fisher v. United States

Dear Byron,

I am glad to join your opinion for the Court in these cases.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
				11/18/75				
Join ~~[illegible]~~ BRW 4/14/76		will write separate opinion 1/29/76	Join BRW 4/14/76	1st draft 1/27/76	Concurring opinion 1st draft 4/6/76	join BRW 2/26/76	join BRW 2/17/76	Join BRW 1-29-76
		Concurring in the judgment 4/2/76		2nd draft 2/4/76 3rd draft 2/19/76				
		2nd draft 3rd draft 4/13/76		4th draft 2/27/76				

74-18 Fisher v. U.S.
74-611 U.S. v. Kasmir