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Constitutional Law -- Taxpayer's Fifth Amendments Privilege Against Self-Incrimination -- Fisher v. United States

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Vaughan v. Southern Railway Co. chose to adopt the new *Miller* rule holding that the citizenship of the beneficiary would be controlling for purposes of diversity jurisdiction. In this process the *Vaughan* court so distorted the section 1359 standard of review as defined by the Fourth Circuit's trilogy of diversity jurisdiction decisions that the application of the "stake" and "motive" elements of the standard was rendered largely unrecognizable. This application, in effect, served only to justify an essentially bare application of the *Miller* rule itself. Therefore, the Fourth Circuit's application of the *Miller* rule was built upon a questionable foundation. In addition, the rule itself, in light of its own inherent weaknesses and in comparison to the preferred reform proposal, possesses dubious future utility. Thus, in its barest elements the *Vaughan* decision represents the Fourth Circuit's indulgence in the final statges of a process of judicial rule-making. However, this process and the search for an alternate rule of decision in the jurisdictional controversy must be said to have ultimately foundered.

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Constitutional Law—Taxpayer's Fifth Amendment Privilege Against Self-Incrimination—*Fisher v. United States.*[1] In the consolidated case of *Fisher v. United States,*[2] the Supreme Court addressed the question of whether a taxpayer's fifth amendment privilege prevents enforcement of a documentary summons directed toward his attorney for the production of his accountant's workpapers which had been transferred to the attorney by the taxpayer.[3] Faced with an investigation by the Internal Revenue Service (I.R.S.) for possible civil and criminal tax liability, the taxpayers in *United States v. Fisher*[4] and *United States v. Kasmir*[5] obtained certain documents from their accountants and transferred them to their attorneys.[6] Shortly after the transfer, the I.R.S. served a summons on each of the attorneys to compel their production of the transferred documents.[7] When the attorneys re-

[1] 425 U.S. 391 (1976). Two cases, Fisher v. United States, 500 F.2d 683 (3rd Cir. 1974), and United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974), were consolidated because of the identity of issues and the conflict between the courts of appeals' decisions.

[2] 425 U.S. 391 (1976).

[3] *Id.* at 394.

[4] 352 F. Supp. 731 (E.D. Pa. 1972), *aff'd,* 500 F.2d 683 (3rd Cir. 1974), *aff'd, sub nom.* Fisher v. United States, 425 U.S. 391 (1976).

[5] 499 F.2d 444 (5th Cir. 1974), *rev'd* 425 U.S. 391 (1976). The district court opinion is unpublished.

[6] 425 U.S. at 394. The documents transferred in *Kasmir* consisted of the accountant's workpapers, copies of correspondence between the accountant and the taxpayer, and copies of the taxpayer's tax returns for three years. In *Fisher,* the taxpayers transferred their accountant's analyses of their income and expenses, based upon information copied from the taxpayer's checks and deposit receipts. *Id.*

[7] 26 U.S.C. § 7602 (1970) provides authority to summon books and records in the following language:

> For the purpose of ascertaining the correctness of any return, mak-

fused to produce them, the I.R.S., acting pursuant to its statutory authority, instituted enforcement proceedings.[8] In both cases, the attorneys claimed that the documents were privileged under the fourth[9] and fifth[10] amendments as well as under the attorney-client privilege.[11]

The United States District Court for the Eastern District of Pennsylvania ordered the summons enforced in *Fisher* because the papers were owned by the accountant and the taxpayer's possession did not give rise to a fifth amendment privilege.[12] In *Kasmir*, the United States District Court for the Northern District of Texas also upheld the summons on the ground that the documents were owned by the accounting firm and in the possession of the attorney at the time of the summons.[13] In both cases, however, the courts stayed the summonses pending appeal.[14] On appeal, the United States Court of Appeals for the Third Circuit affirmed in *Fisher*, holding that since the records had been prepared and maintained by the accountant, the taxpayers' temporary possession did not give rise to a fifth amendment privilege.[15] In contrast, however, the United States Court of Appeals for the Fifth Circuit reversed in *Kasmir*, reasoning that when

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ing 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 . . . .

[8] *Id.* 26 U.S.C. § 7402(b) (1970) provides in relevant part:

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

26 U.S.C. § 7604 (1970) provides jurisdiction for enforcement by the same means in substantially the same language.

[9] U.S. CONST. amend. IV. This amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[10] U.S. CONST. amend. V. This amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

[11] 425 U.S. at 395. A confidential communication between an individual and his attorney is privileged if made in the course of seeking legal advice or otherwise elicited in a transaction having its basis in the attorney-client relationship. 8 WIGMORE, EVIDENCE § 2292 at 554 (McNaughton rev. 1961); Alexander v. United States, 138 U.S. 353, 358 (1891). The privilege exists to ensure freedom of consultation of an individual with his attorney in order to ascertain his legal rights and responsibilities. *See* 8 WIGMORE, EVIDENCE § 2291 at 545 (McNaughton rev. 1961).

[12] 352 F. Supp. at 734.

[13] 499 F.2d at 447.

[14] 425 U.S. at 395.

[15] 500 F.2d at 692.

the taxpayer obtained actual possession of the accountants' papers he gained the right under the fifth amendment to refuse to produce the documents and that that right was not lost by transfer of the documents to his attorney.[16]

Affirming *Fisher* and reversing *Kasmir*, the Supreme Court HELD: Accountant's workpapers are not privileged under the fifth amendment in the hands of either the taxpayer or his attorney when the act of producing the papers in response to a summons involves no compelled testimonial self-incrimination of the taxpayer.[17] The Court reasoned that because a documentary summons directed to a taxpayer's attorney involves no "physical or moral compulsion" against the taxpayer himself, his fifth amendment privilege does not immunize the documents from production by the attorney.[18] The Court also determined that the taxpayers themselves were unable to assert a fifth amendment privilege since, under the particular facts of *Fisher*, their production of their accountants' documents would not constitute a testimonial statement as to the truth of the contents of the papers.[19] Thus, the taxpayers' production of the documents would not result in testimonial self-incrimination and hence could not qualify for fifth amendment protection.[20] As to the taxpayers' fourth amendment claim, the Court concluded that the means used to obtain the documents did not unconstitutionally intrude into an area in which the taxpayer had a reasonable expectation of privacy.[21] Therefore, no violation of the fourth amendment could be shown.[22]

Justices Brennan and Marshall concurred in the *Fisher* judgment, but expressed reservations about its implications with respect to the protection of the privacy of documents.[23] Justice Brennan regarded the papers as having a "wholly business rather than personal nature."[24] The documents therefore could not be privileged under the fifth amendment's protection of private books and papers. His fear, however, was that the impact of the Court's opinion on protection was "but another step in the denigration of privacy principles."[25] Justice Marshall, too, expressed concern over the failure of the Court to include in its mode of analysis some consideration of the documents' contents.[26] Because the Court's analysis focused on technical aspects of production rather than on the contents of the documents themselves, Justice Marshall apparently viewed the Court's opinion as demonstrating less concern for protecting sensitive material than for procedural

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[16] 499 F.2d at 452.
[17] 425 U.S. at 414.
[18] *Id.* at 397, *quoting* Perlman v. United States, 247 U.S. 7, 15 (1918).
[19] 425 U.S. at 413.
[20] *See id.*
[21] *See id.* at 401 n.7, 414.
[22] *See id.*
[23] *Id.* at 414 (Brennan, J., concurring); *id.* at 430 (Marshall, J., concurring).
[24] *Id.* at 414 (Brennan, J., concurring).
[25] *Id.* (Brennan, J., concurring).
[26] *Id.* at 432 (Marshall, J., concurring).

safeguards.[27] He was confident, however, that future applications of the Court's mode of analysis would continue to protect the privacy of documents because, although technically the act of production will be the factor considered in determining fifth amendment protection, in practice, privacy will continue to be an important consideration.[28]

The primary significance of the Supreme Court's decision in *Fisher* lies in its establishment of a three-pronged test for determining the applicability of the fifth amendment privilege against compelled testimonial self-incrimination.[29] This test serves to supply a rationale for immunizing an individual from producing incriminating documents,[30] and replaces an older policy of attempting to immunize documents based on an *ad hoc* consideration of the private character of their contents.[31] The policy of immunity for private papers was first articulated by the Court in *Boyd v. United States*,[32] which broadly held that the compelled production of an individual's books and papers to be used against him in legal proceedings violates both the fourth and fifth amendments.[33] More recently, however, the Court has limited *Boyd's* holding. Introduction of purely evidentiary but non-testimonial evidence has been held not violative of the fifth amendment[34] and seizure of testimonial evidence which is not the result of compulsion has been held not to violate the fourth amendment.[35] Given these inroads into *Boyd's* policy of immunity, *Fisher* represents an attempt by the Court to supply a consistent rationale for establishing when the fifth amendment protects documents from summons.

This note will initially examine the Court's reasoning in reaching the conclusion that the attorney-client privilege immunizes an attorney from producing accountant's workpapers transferred to him by his taxpayer-client only if the documents would have been privileged in the hands of the taxpayer. Next, it will set forth the reasons why the taxpayers themselves in *Fisher* were not allowed to invoke a fifth amendment defense. It will then analyze the Court's application of its three-pronged compelled testimonial incrimination test to the particular facts of *Fisher*. Drawing on this analysis, an attempt will be made to define each of the three elements of the test. This note will also address Justice Brennan's fear that under the Court's three-pronged test private papers do not receive adequate protection against documentary summons. Additionally, protection of privacy will be discussed with a view toward determining whether the fifth amendment affords a "safe harbor" for documents of a private or confidential na-

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[27] *See id.* at 430-34 (Marshall, J., concurring).

[28] *Id.* at 433 (Marshall, J., concurring).

[29] 425 U.S. at 399. See text at notes 67-117 *infra*.

[30] 425 U.S. at 409.

[31] *Id.* at 431, 434 (Marshall, J., concurring).

[32] 116 U.S. 616 (1886). See discussion of *Boyd* at notes 58-62 *infra*.

[33] *Id.* at 634-35.

[34] Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 302-03 (1967); Schmerber v. California, 384 U.S. 757, 763-65 (1966).

[35] *See* Katz v. United States, 389 U.S. 347 (1967).

ture. Finally, an examination will be made of whether, under the three-pronged test, personal records maintained for the purpose of filing tax returns are immune from compelled production.

I. PROTECTION OF A TAXPAYER'S RECORDS IN THE HANDS OF HIS ATTORNEY

In reaching its decision in *Fisher*, the Court first addressed the question of whether the taxpayers' fifth amendment privilege excused their attorneys from producing the documents demanded either on the basis of the attorney-client privilege[36] or on the theory of the principal-agent relationship.[37] The Court noted that it had repeatedly held that the fifth amendment protects only against the use of "physical or moral compulsion" against the accused himself and accordingly may not be invoked on another person's behalf.[38] Since the only compulsion involved in *Fisher* was brought to bear on the attorneys and not on the taxpayers, the Court concluded that the taxpayers' fifth amendment privilege did not immunize their attorneys from produc-

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[36] 425 U.S. at 396. The fifth amendment provides a privilege protecting an individual from being forced to be a witness against himself in a criminal prosecution. U.S. CONST. amend. V. That privilege extends beyond the courtroom to prevent any use of "physical or moral compulsion" brought to bear against an accused to compel him to divulge or relinquish evidence to be used against him. *See* Perlman v. United States, 247 U.S. 7, 15 (1918). Additionally, the privilege protects against compelled production of pre-existing documents when their use as evidence would tend to incriminate the producer. Boyd v. United States, 116 U.S. 616 (1886). *But see* Wilson v. United States, 221 U.S. 361 (1911) (corporate documents are not protected by the privilege).

[37] 425 U.S. at 397-98.

[38] *Id. See* Hale v. Henkel, 201 U.S. 43 (1906), holding that the privilege may only be invoked for the protection of the witness and not to protect another party. *Id.* at 74. The *Hale* Court based its conclusion upon the rationale that

> [t]he right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person.

Id. at 69-70. The Court therefore held that a witness may not invoke the privilege to prevent the incrimination of a corporation of which he is an agent. The Court further developed this line of reasoning in Couch v. United States, 409 U.S. 322 (1973), in refuting the contention that an accountant could claim a fifth amendment privilege from producing his client's tax records. The Court reasoned that the summons directed against the accountant was enforceable because

> [h]e, not the taxpayer, is the only one compelled to do anything. And the accountant makes no claim that he may tend to be incriminated by the production. Inquisitorial pressure or coercion against a potentially accused person, compelling him, against his will, to utter self-condemning words or produce incriminating documents is absent.

Id. at 329. It was this pronouncement upon which the *Fisher* Court based its observation that an attorney could not claim the fifth amendment privilege of his client simply because he held documents which the client sought to protect from summons. That privilege could only be involved if the client could assert a valid fifth amendment claim which, by virtue of the attorney-client privilege, would lead to their protection in the attorney's hands. *See* 425 U.S. at 397-98, 402-05.

ing the accountants' workpapers.[39] The Court found particular support for this conclusion in its decision in *Couch v. United States*.[40] In *Couch* a subpoena was served upon a taxpayer's accountant directing him to deliver records pertaining to the taxpayer's tax liability.[41] The taxpayer intervened, asserting ownership of the documents and a fifth amendment privilege protecting them from production.[42] The Court, however, held that the taxpayer's fifth amendment privilege did not immunize his accountant from producing documents prepared by him and retained in his possession.[43] The Court reasoned that *Fisher* was similar to *Couch* because a subpoena directed to a third party, whether the taxpayer's accountant or his attorney, involves no compulsion upon the taxpayer himself, and therefore does not violate his fifth amendment privilege.[44]

In reaching its conclusion that the attorney's compelled production of documents does not violate the taxpayers' fifth amendment privilege, the Court considered and rejected several other defense contentions. The first of these was that the relinquishment of control of the accountant's workpapers by the taxpayer was temporary and constituted continuous constructive possession by the taxpayer.[45] In *Couch*, the Court had reasoned that a taxpayer's relinquishment of control of potentially incriminating documents could be so insignificant and impermanent as to leave the risk of personal compulsion on the taxpayer substantially intact.[46] No constructive possession was found in that case, however, because the length of time the documents were in the possession of the accountant was so significant as to leave no personal compulsion upon the taxpayer.[47] The Court found no material difference between the relinquishment of control of the documents to the attorney in *Fisher* and the relinquishment to the accountant in *Couch*.[48] Consequently, although constructive possession might be found in some circumstances, such a finding was not justified in *Fisher*.[49]

Again relying on the premise that the fifth amendment only protects a person from being compelled to be a witness against *himself*, the Court rejected a second defense contention. The defense argued that the fifth amendment privilege should not be forfeited because an individual has given documents to his lawyer in order to obtain legal advice.[50] This argument had provided the basis for the Fifth Circuit's

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[39] *Id.*
[40] 409 U.S. 322 (1973), *noted in* 15 B.C. IND. & COMM. L. REV. 185 (1973).
[41] *Id.* at 324-5.
[42] *Id.* at 325.
[43] *Id.* at 335.
[44] 425 U.S. at 397.
[45] 425 U.S. at 398.
[46] 409 U.S. at 333.
[47] *Id.* at 333-34.
[48] 425 U.S. at 398.
[49] *Id.*
[50] *Id.* at 399.

decision in *Kasmir* that the taxpayer's fifth amendment privilege was not lost when he transferred his accountant's workpapers to his attorney.[51] In reaching this decision, the Fifth Circuit had held that the taxpayer had a legitimate expectation of privacy in transferring the documents for the purpose of obtaining legal advice, and therefore did not forfeit his fifth amendment privilege by transferring them.[52] However, the Supreme Court determined that although the attorney had an obligation to respect the confidences of his client, protection of privacy is not within the scope of the fifth amendment but rather that of the fourth which directly addresses the issue of protection of privacy.[53] Accordingly, the *Fisher* Court concluded that any protection of privacy interests under the fifth amendment may be found only when the acquisition of private information involves compelled testimonial self-incrimination.[54] Since the transfer of the documents meant they could be subpoenaed from the attorneys without compulsion on the taxpayers, the attorneys could not claim the taxpayers' fifth amendment privilege to immunize the documents from production.[55]

II. THE TAXPAYERS' FIFTH AMENDMENT PRIVILEGE

Although the Court determined that the taxpayers' fifth amendment privilege did not excuse their attorneys from producing the accountants' workpapers, it agreed with both petitioners and respondents that if the papers were privileged by reason of the fifth amendment in the taxpayers' hands and were transferred to the attorneys for the purpose of obtaining legal advice, the attorney-client privilege would preclude their compelled production.[56] Since the taxpayers in *Fisher* had turned the documents over to their attorneys for such a purpose, the Court addressed itself to the question of whether the documents would have been obtainable by summons when they were in the taxpayer's possession.[57]

In determining whether or not the taxpayer had a fifth amendment privilege, the Court initially considered *Boyd v. United States*.[58] In *Boyd*, the government had obtained an order forcing two partners to

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[51] 499 F.2d at 452.

[52] *Id.* at 452-53. The "legitimate expectation of privacy" which the Fifth Circuit felt the taxpayer enjoyed derives from Couch v. United States, 409 U.S. 322 (1973). The Court held in *Couch* that "no Fourth or Fifth Amendment claims 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. The Court did not expound, however, upon what constitutes a "legitimate expectation of privacy;" the Fifth Circuit's attempt to define its own standards was overturned by the Supreme Court in *Fisher*. The *Fisher* Court did, however, make passing obeisance to the concept of privacy. See text at notes 125-45 *infra*.

[53] 425 U.S. at 400.

[54] *Id.*

[55] *See id.* at 402.

[56] *Id.* at 402-05.

[57] *Id.* at 405.

[58] 116 U.S. 616 (1886).

produce an incriminating invoice over their fifth amendment objections.[59] On these facts, the *Boyd* Court ruled that forcing an individual to produce his private books and papers to be used as evidence against him was a violation of both the fourth and fifth amendments.[60] *Boyd,* therefore, is the source of the proposition that compelled production of incriminating documents may be prevented by invoking the fifth amendment.[61] The Court noted, however, that a series of cases had limited *Boyd's* holding so that the fifth amendment privilege can now exist only when the compelled production of documents involves a testimonial communication that tends to incriminate the person attempting to assert the privilege.[62] The Court then looked to the facts in *Fisher* to determine whether the three prerequisites of a fifth amendment claim—compulsion, testimony and self-incrimination—were present.

The first prerequisite of a fifth amendment claim, compulsion, was found by the Court to be clearly present in the form of a subpoena.[63] Additionally, the Court implicitly assumed the existence of the third element, incrimination.[64] The fifth amendment does not protect against the compelled production of incriminating evidence without more, however.[65] It is only when that evidence is the result of a testimonial communication or act which links the incriminating evidence to the accused that the incrimination becomes self-incrimination.[66] Thus the key to fifth amendment protection, the element that transforms mere incriminating evidence into self-

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[59] *Id.* at 618.

[60] *Id.* at 634-35.

[61] 425 U.S. at 405.

[62] *Id.* at 407-09. See text at notes 34-35 *supra.* In Schmerber v. California, 384 U.S. 757, 765 (1966), the Court declined to extend fifth amendment protection to cover the withdrawal of incriminating blood samples from an individual since it was neither petitioner's testimony nor did it relate to any communicative act by him. Handwriting exemplars have also been held to fall outside fifth amendment protection, Gilbert v. California, 388 U.S. 263, 265-67 (1967), as has the act of donning a particular piece of clothing for purposes of identification in court. Holt v. United States, 218 U.S. 245 (1910). The privilege protecting an individual from producing incriminating documents does not cover the records of a corporation, Wilson v. United States, 221 U.S. 361, 382 (1910), of an unincorporated association, United States v. White, 322 U.S. 694 (1944), or of a partnership, Bellis v. United States, 417 U.S. 85, 95 (1974). The basis of the exclusion of artificial persons and organizations from fifth amendment protection is the intent to limit its protection "to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records." United States v. White, 322 U.S. 694, 701 (1944).

[63] 425 U.S. at 409.

[64] *See id.* at 410-11. "[H]owever incriminating the documents might be, the act of producing them . . . would not itself involve testimonial self-incrimination." The tendency in the federal courts is to allow a witness wide latitude in making a claim of fifth amendment privilege, lest the witness incriminate himself by revealing the nature of the evidence in the very attempt to establish the privilege. 8 WIGMORE, EVIDENCE § 2271 at 425 (McNaughton rev. 1961).

[65] *See* Johnson v. United States, 228 U.S. 457, 458 (1913): "A party is privileged from producing evidence but not from its production."

[66] Schmerber v. California, 384 U.S. 757, 761 (1966).

incrimination, is the testimonial aspect of its production by the accused.[67] The testimonial aspect of production was the most important element in *Fisher,* and would presumably be the most important element in most cases involving a fifth amendment privilege, since compulsion and incrimination usually will be easily discernible.

The question of whether or not a testimonial link existed between the incriminating evidence and the taxpayers was difficult to resolve in *Fisher.* As the Court indicated, the act of producing the documents did not involve testimony in the ordinary sense because there was no oral testimony. Thus the taxpayers were not required to "restate, repeat or affirm the truth of the contents of the documents sought."[68] Because testimony in the ordinary sense of an oral statement by a witness was not present, the mere fact that the papers might incriminate the taxpayers was insufficient to give rise to a fifth amendment privilege. As the Court stated, "the privilege protects a person only against being incriminated by his own compelled testimonial communications."[69] Thus the Court's concern in *Fisher* was to find the testimonial link between the taxpayers and the potentially incriminating records, because if that testimonial link were found, the compelled production of the papers would be precluded by the fifth amendment.

Since in this instance the communications were not those of the taxpayers, but of the accountants, and since their preparation was wholly voluntary, the taxpayers' fifth amendment privilege did not necessarily apply even though the documents themselves potentially were incriminating.[70] Nevertheless, the Court found that the act of production itself could have communicative aspects: responding to the subpoena could be an implicit acknowledgement of the existence of the documents and their possession or control by the taxpayer.[71] Furthermore, producing the documents in response to a subpoena could "[rise] to the level of testimony" within the fifth amendment protection if it had the effect of implicitly authenticating them as those described in the subpoena.[72] The Court stated, however, that whether

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[67] 8 WIGMORE, EVIDENCE § 2265 at 386 (McNaughton rev. 1961) explains the concept of a "testimonial communication" in this way: "Unless some attempt is made to secure a communication — written, oral or otherwise — upon which reliance is to be placed as involving [the witness'] consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one."

[68] 425 U.S. at 409.

[69] *Id.* Evidence which represents testimonial and incriminating communication but which was not compelled at the time of its utterance is not privileged from subpoena. Katz v. United States, 389 U.S. 347, 354 (1967). Nor does the fifth amendment protect incriminating evidence which is the product of compulsion but which is of a non-testimonial or non-communicative nature. Schmerber v. California, 384 U.S. 757, 765 (1966).

[70] 425 U.S. at 409-10.

[71] *Id.* at 410.

[72] *Id.* at 411. The Court cited Curcio v. United States, 354 U.S. 118 (1957), for the proposition that producing documents in response to a subpoena can constitute implicit testimony. *Curcio* involved the contempt citation of a union leader who refused

such "tacit averments" would constitute testimonial incrimination depends on the facts and circumstances peculiar to each case.[73]

The Court then applied these concepts to the specific facts of *Fisher* and concluded that admitting the existence and possession of the papers did not constitute a testimonial admission.[74] The Court grounded its conclusion on two findings: first, production of the documents amounted to no more than turning over another's workpapers; and second, the whereabouts of those papers was already known.[75] Further, the taxpayers had not prepared the documents, were unable to vouch for their accuracy, and presumably had never even seen them before the I.R.S. investigation.[76] Because of their unfamiliarity with the accountants' papers, the Court observed that producing the potentially incriminating documents in response to a subpoena would neither authenticate them nor be an implicit voucher for their contents.[77] Rather, the act of production would indicate only that the taxpayers believed the papers to be the ones demanded.[78] Thus, the Court held that complying with the summons did not constitute testimonial incrimination and therefore did not fall within the protection of the fifth amendment.[79]

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either to produce union records in response to a grand jury subpoena or to testify as to their location. *Id.* at 119. The Court held that, although the witness could be compelled to produce the records, the fifth amendment prevented his being forced to testify as to their whereabouts. *Id.* at 123. In so holding, the Court observed that

> [t]he custodians' act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena. Requiring the custodian to identify or authenticate the documents for admission to evidence merely makes explicit what is implicit in the production itself.

Id. at 125. This view of the production of documents as a testimonial identification echoes the view of Wigmore, who finds production which is compelled by legal process to be equal to the producer's assurance of the authenticity of the documents. 8 WIGMORE EVIDENCE, § 2264 at 380 (McNaughton rev. 1961). See text at notes 106-13 *infra*.

[73] 425 U.S. at 410.

[74] *Id.* at 411.

[75] *Id.*

[76] *Id.* Indeed, one of the taxpayers turned his accountant's documents over to his attorney "within minutes" of receiving them from the accountant. 499 F.2d at 446.

[77] 425 U.S. at 412-13.

[78] *Id.*

[79] *Id.* at 414. In *Fisher* the taxpayers had put their tax affairs in the hands of their accountants, and had no more than a general knowledge of the contents of the documents subpoenaed. *Id.* at 413. In Couch v. United States, 409 U.S. 322 (1973), the taxpayer had also relinquished control of her tax records; it may be inferred that her personal knowledge of her accountant's records was no better than the taxpayers' in *Fisher*. *Id.* at 334. If, however, the taxpayer had worked with the accountant in preparing the documents, or at least had significant familiarity with their contents, those documents would presumably fall within the scope of fifth amendment protection; their compelled production by the taxpayer would necessarily involve the taxpayer's voucher for their accuracy or, in Wigmore's terms, the taxpayer's "assurances . . . that the documents produced are the ones demanded." *See* 8 WIGMORE, EVIDENCE § 2264 at 380 (McNaughton rev. 1961).

III. ANALYSIS OF THE THREE PREREQUISITES OF A FIFTH AMENDMENT CLAIM

It is clear from the holding in *Fisher* that a document is immune from summons if the act of producing it results in compelled testimonial self-incrimination. The absence of any one of those three elements precludes fifth amendment protection.[80] In *Fisher* the Court readily found compulsion,[81] and assumed that the documents contained incriminating information,[82] but found the act of production to be non-testimonial.[83] Absent the element of testimony, there could be no protection under the fifth amendment.[84] Since the Court left the determination of the existence of the three elements open for a case-by-case consideration, it is necessary to examine the criteria used by the Court to reach its decision in *Fisher* to establish a framework of analysis for future cases. The three-pronged test must therefore be further examined.

The Court analyzed each of the three elements on an individual basis. The first, compulsion, was present in *Fisher* in the form of a subpoena.[85] The rationale of the fifth amendment is to prevent extortion of incriminating evidence from an individual.[86] Because the government is regarded as having resources vastly superior to those of the individual, historic concepts of fair play demand that the burden of proving guilt be put on the government, while at the same time denying it the ability to exert pressure on the individual to supply evidence against himself.[87] Pressure can be exerted effectively in many ways. The Court was satisfied that a subpoena directed against an individual "involves substantial compulsion."[88] The individual served must either comply or risk sanctions; his compliance is coerced and he is forced to supply, against his will, information he wishes withheld. Thus the extraction of evidence by use of a subpoena represents compulsion within the protection of the fifth amendment.

The second element of the test, testimony, may be less susceptible to identification. Although no oral statements or affirmations were required to be made by the taxpayers in *Fisher*, the Court reasoned that other, less obvious forms of testimonial communications could

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[80] 425 U.S. at 408.

[81] *Id.* at 409.

[82] *Id.* at 410-11. See notes 64 *supra.*

[83] 425 U.S. at 411.

[84] *Id.* at 408.

[85] *Id.* at 409.

[86] Murphy v. Waterfront Commission, 378 U.S. 52 (1964). *See also* In re Gault, 387 U.S. 1, 47 (1967):

> One of [the] purposes [of the privilege against self-incrimination] is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of a person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.

[87] *See* In re Gault 387 U.S. 1, 55 (1967).

[88] 425 U.S. at 409.

arise from the act of producing the documents itself.[89] Under some circumstances producing documents could amount to a showing both that the papers existed and that they were in the possession of the producer, thus supplying an important testimonial link in the chain of evidence to which the government would not otherwise have access.[90] The Court apparently found the production of the documents in *Fisher* to be non-testimonial because it would not indicate either the existence or the location of the documents.[91] Since there was no question as to their whereabouts, production could add little or nothing to the government's case.[92] Because the government gained no information from the act of production itself, the Court treated it as strictly non-communicative and therefore non-testimonial. In this regard it is important to distinguish testimonial evidence from real or circumstantial evidence. The latter involve the introduction into evidence of an object or set of facts from which the trier of fact may decide, either directly or by inference, the truth or falsity of the proposition asserted.[93] Testimonial evidence, on the other hand, is an assertion by an individual of the truth or falsity of the fact; from that assertion the trier of fact may draw his own conclusions.[94] It is only testimonial evidence which finds protection under the fifth amendment. Accordingly, the extraction of a blood sample has been held, in *Schmerber v. California*,[95] to be beyond the scope of the fifth amendment since a blood sample, "although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner."[96] It was found that evidence is inadmissible only when it requires an individual "to be a witness against himself."[97] To do so he must in some way make a testimonial or communicative assertion.[98] An individual submitting to the taking of a blood sample makes no testimonial assertion other than that he has blood in his veins. Since that is a foregone conclusion, it is not relevant testimony. Similarly, the taxpayer in *Fisher*, by producing the workpapers, would admit that they existed and were in his possession.[99] Yet, since neither fact was in question[100] the Court viewed those admissions as non-testimonial.[101] It would appear then that whenever the production of incriminating evidence does not involve the producer's express or implied voucher for its truth, its existence,

[89] *Id.* at 410.
[90] *Id.*
[91] *Id.* at 411-12.
[92] *Id.* at 411.
[93] *See* 1 WIGMORE, EVIDENCE §§ 24, 25 at 396-401 (3d ed. 1940).
[94] *Id.* § 24 at 398.
[95] 384 U.S. 757 (1966).
[96] *Id.* at 765.
[97] *Id.* at 761.
[98] *Id.* at 764.
[99] 425 U.S. at 411-12.
[100] *Id.*
[101] *Id.*

its whereabouts, or for conclusions derived from it, no testimonial assertion exists.[102] Only when the government gains information through the actions of the accused can there be a testimonial communication. Since the government knows that an individual must have blood, forcing the accused to submit to the taking of a sample forces him to admit nothing; the conclusions the government can draw from that sample are non-testimonial. In contrast, if the government had no knowledge of whether or not a certain document exists or whether an individual possessed it, compulsion exerted against the individual to produce the document would constitute a testimonial admission of both facts.

The third element of the *Fisher* test, self-incrimination, may be found when the individual's testimonial communications tend to implicate him in the commission of the act with which he is charged. Although the withdrawal of blood from a person, for example, may well lead to incriminating findings, those findings are not assertions of the individual. Lacking that testimonial link between the evidence and the individual's testimonial assertions, the evidence is not self-incriminating as to him. The fact that an individual may be compelled to submit to a potentially incriminating blood sample or to produce potentially incriminating documents does not necessarily lead to self-incrimination. Thus, in such a situation the privilege is not available "for [it] protects a person only against being incriminated by his own compelled testimonial communications."[103]

Of great significance to the *Fisher* holding as well as to the future of the fifth amendment is the Court's examination of the potential for testimonial incrimination represented by the act of producing documents. In reaching its result in *Fisher*, the Court examined the act of production to determine if it involved implicit authentication.[104] It reasoned that production could be self-incriminating if, by producing the documents in response to a subpoena, the taxpayers thereby implicitly identified them as the papers described therein.[105] If so, the act of production would constitute a testimonial link in the chain of evidence against them. Wigmore refers to this sort of authentication as "witness' assurance, compelled as an incident of the process, that

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[102] *See* State v. Pike, 306 A.2d 145 (Me. 1973). Testimonial evidence "consists of the testimonial assertions of a competent witness of his perceptional awarenesses of matters constituting an element of the offense charged and which operate as 'proof' of such element if believed by the factfinder." *Id.* at 150, *citing* Commonwealth v. Webster, 59 Mass. 295 (5 Cush.) (1850). A fact is established by testimonial evidence when "it has been testified to by witnesses as having come under the cognizance of their senses, and of [its] truth there seems to be no reasonable doubt or question." State v. Carter, 6 Del. (1 Houst.) 402, 410 (1873). Wigmore refers to testimonial evidence and the inferences drawn from it as "the assertions of human beings regarded as the basis of inference to the propositions asserted by them." 1 WIGMORE EVIDENCE § 25 at 398 (3d ed. 1940).

[103] 425 U.S. at 409.

[104] *Id.* at 412-14.

[105] *Id.* at 410.

the articles produced are the ones demanded."[106] Inasmuch as the individual vouches for the genuineness of the article produced, his production is a testimonial identification.[107] That testimonial identification of incriminating documents is self-incrimination within the protection of the fifth amendment.[108] Applying that same rationale to the facts in *Fisher* led the Court to conclude that production would result in no implicit authentication.[109] The taxpayers, because of their unfamiliarity with their accountants' workpapers and the preparation thereof, were in no postion to authenticate the documents orally or implicitly.[110] Therefore, the taxpayers' response to the subpoena could not serve to authenticate them or be a voucher for their genuineness. Consequently, there could be no testimonial incrimination through the implicit identification of the papers.

An individual's ability to authenticate thus appears to be a function of his familiarity with the subpoenaed document. The *Fisher* Court noted that the taxpayers "did not produce the documents and could not vouch for their accuracy."[111] It can be inferred from this statement that the taxpayers, or any individual, could only authenticate documents with which they were familiar, since one having no knowledge or understanding of a document is presumably incapable of vouching for its authenticity, either explicitly or implicitly. Since familiarity apparently is a key aspect of authentication, it would seem that if the author of a document were compelled to produce that document, the act of production would implicitly authenticate it as the one demanded. Unlike the taxpayers, the accountants in *Fisher*, as the authors of the papers, were clearly the persons most capable of identifying them and vouching for their contents. An author's authentication is no less significant simply because the documents may be authenticated by another for purposes of introduction into evidence.[112] Therefore, if a person may not be required orally to authenticate his own work, he should also not be required to do so implicitly through the act of production. Under the reasoning of *Fisher*, then, no document may be summoned for use against its author because his act of production would result in compelled testimonial incrimination. Its immunity stems not from its contents' potentially incriminating nature, but rather from the author's implicit verification of that incriminating material.

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[106] 8 WIGMORE, EVIDENCE § 2264 at 380 (McNaughton rev. 1961).

[107] *Id.*

[108] *See* United States v. Beattie, 522 F.2d 267, 270 (2d Cir. 1975) (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."); People v. Defore, 242 N.Y. 13, 27, 150 N.E. 585, 590 (1926) (Cardozo, 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.' ").

[109] 425 U.S. at 414.

[110] *Id.* at 413.

[111] *Id.*

[112] *See id.* at 429 (Brennan, J., concurring).

IV. PROTECTION OF PRIVATE PAPERS UNDER THE THREE-PRONGED TEST

In holding that the production of the documents in *Fisher* involved no compelled testimonial self-incrimination on the part of the taxpayers, the Court specifically refrained from reaching the question of whether an individual's own tax records in his possession would be privileged documents.[113] Citing *Boyd*, the Court noted that the papers demanded in *Fisher* were not "private papers."[114]It would appear from the Court's earlier discussion of *Boyd*, however, that protection of documents under the fifth amendment no longer depends on their private nature but rather on whether their production involves compelled testimonial self-incrimination.[115] This limitation on the protection afforded "private papers" is the basis for Justice Brennan's fear that the *Fisher* opinion constitutes a "serious crippling" of the protection of private papers.[116] Justice Marshall echoed that fear in noting that the Court's examination left no room for recognition of the private nature of documents.[117] Justice Marshall also amplified Justice Brennan's suggestion that a diary should always be accorded some form of protection:[118] "[W]hile it may not be criminal to keep a diary, or write letters or checks, the admission that one does and that those documents are still available may quickly—or simultaneously—lead to incriminating evidence."[119]

Despite the fact that the private nature of a document is not the central consideration in determining fifth amendment protection,[120] it is likely that the production of a personal diary will inevitably result in compelled testimonial self-incrimination on the part of the author and therefore will be privileged under *Fisher*. The issues raised by the subpoena of a personal document such as a diary would raise issues similar to those mentioned by the Court in *Fisher*: the document's existence, its whereabouts and the possibility of its implicit authentication incident to production. Unlike the tax documents in *Fisher*, however, the existence and whereabouts of a personal diary would by no means be foregone conclusions, but rather would be questions of fact which the author would be most competent to answer. His production would constitute testimonial evidence not substantially different from "requiring him to take the stand and admit [its] genuineness."[121] Clearly

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[113] *Id.* at 414.

[114] *Id.*

[115] See text at notes 58-62 *supra.*

[116] 425 U.S. at 414 (Brennan, J., concurring).

[117] *Id.* at 432 (Marshall, J., concurring).

[118] *Id.* at 427 (Brennan, J., concurring). The private character of letters "would seem to render them within the scope of the [fifth amendment] privilege. Papers in the nature of a personal diary are *a fortiori* protected under the privilege." *Id.*

[119] *Id.* at 433 (Marshall, J., concurring).

[120] *Id.* at 401.

[121] *See* United States v. Beattie, 522 F.2d 267, 270 (2d Cir. 1975), in which the Court of Appeals for the Second Circuit, in an opinion by Judge Friendly, held that a taxpayer could not claim a privilege for tax records maintained by his accountant, even

the author would thereby authenticate it as his own diary, in effect vouching for its contents.[122] To require an individual to produce his own records under such circumstances would in effect be "to subject those accused of crime to the cruel trilemma of self-accusation, perjury or contempt."[123] Therefore, it would appear that the fifth amendment's protection would cover the attempted summons of any document for use against its author. Thus, the fears of Justices Brennan and Marshall are unwarranted because logically the production of an individual author's private papers could rarely be compelled without the risk of testimonial incrimination.

A similar analysis may be applied to the summons of any document in the hands of one intimately familiar with its contents, whether or not he is actually the author. A document in one's guarded possession, the contents of which one attempts to maintain in confidence, is likely to be implicitly authenticated through the act of compelled production. Compelled production would often result in implicit authentication because one intimately familiar with the contents of a given document is usually capable of vouching for its genuineness. While this might not hold true in every instance there would seem to be a valid, though rebuttable presumption that one who maintains personal records for his own use is usually sufficiently familiar with them to authenticate them, whether or not they were actually authored by him. His voucher would appear more persuasive the greater his familiarity with the document and the more carefully guarded the information therein, since it is likely that an individual is most capable of vouching for documents over which he maintains personal and private control, whether they are the products of his own hand or were authored by another. Thus the fears of Justices Brennan and Marshall that *Fisher* represents an erosion of protection of privacy probably are not justified. Although the Court emphasized the testimonial aspects of production rather than the private nature of the documents, it would appear that "private papers" would, in most if not all cases, continue to be protected by the fifth amendment under *Fisher*, because any "private paper" held in the private possession of an individual would be so well-known to him that his release of the information demanded would serve as a testimonial authentication of the document.

V. PRIVACY PROTECTION UNDER THE FOURTH AMENDMENT

Notwithstanding the fact that the production of an individual's

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though the taxpayer had taken actual possession of or acquired title to the papers. *Id.* at 278. The court noted, however, that production of records in response to a summons in some circumstances could constitute implicit testimonial authentication of the records. *Beattie* seems to be consistent with *Fisher* since the taxpayer apparently had no greater familiarity with the documents of his accountant than did the taxpayer in *Fisher*. Given his unfamiliarity with the documents the risk of his authenticating or verifying them is not significant. *See also* 8 WIGMORE, EVIDENCE § 2264 at 380 (McNaughton rev. 1961).

[122] See text at notes 112-13 *supra*.

[123] Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

private papers would in most circumstances involve compelled testimonial self-incrimination, it appears that even if private papers were not immune under the fifth amendment they might find protection under the fourth.[124] The Court left that possibility open in *Fisher*, declining to consider the issue because there was no privacy interest at stake.[125] The majority found it unnecessary to consider the issue of privacy because the papers demanded were not the taxpayers' "private papers."[126] The Court noted that the fourth amendment did not prevent the seizure of the workpapers in *Fisher* because the summonses were quite specific and sought only unquestionably relevant material.[127] Because no "[s]pecial problems of privacy which might be presented by subpoena of a personal diary" were present, no fourth amendment arguments could be successfully raised.[128] Therefore the Court was able to deal with *Fisher* solely on fifth amendment grounds by applying the test of compelled testimonial self-incrimination without looking into issues of privacy.

Although the Court found no privacy issues in *Fisher*, it noted that privacy might be a relevant consideration in the subpoena of certain documents.[129] Reference was made to *United States v. Bennett*,[130] in which Judge Friendly intimated that the seizure of a diary would be offensive because of its infringement on basic concepts of privacy protected by the fourth amendment.[131] It can be inferred from the Court's comment as well as from the view it takes of protection of privacy that if "special problems of privacy" were involved in the production of a document, it would be immune from a summons under the fourth amendment regardless of whether it might be protected by the fifth. Judge Friendly noted in *Bennett* that ' "the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him.' "[132] It is the spectre of unlimited access to an individual's personal effects which is offensive and against which the fourth amendment protects. The "special problems of privacy" to which the *Fisher* Court referred would seem to arise whenever the government attempts to gain access to personal material meant only for the eyes of the possessor. The dictum in *Bennett* indicates that the fourth amendment allows an individual to carve out a private niche of existence into which the government may not venture regardless of

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[124] As the Court pointed out, the fifth amendment protects against compelled self-incrimination while protection of privacy is more properly a fourth amendment consideration. *See* 425 U.S. at 400, 401 n.6.

[125] *Id.* at 401 n.7, 414.

[126] *Id.* at 414.

[127] *Id.* at 401 n.7.

[128] *Id.*

[129] *Id.*

[130] 409 F.2d 888 (2d Cir. 1969).

[131] *Id.* at 897.

[132] 409 F.2d at 897, *quoting* United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930) (Hand, J.).

how great the likelihood of discovering incriminating information.

Further, the Court has hinted broadly that the fourth amendment might indeed protect evidence of a personal nature from production. In *Warden, Maryland Penitentiary v. Hayden*,[133] the issue of whether or not the fourth amendment provides an absolute privilege to certain items of evidence having a confidential or private nature was mentioned but not decided.[134] Although that case involved protection of evidentiary items having no testimonial significance, its reasoning concerning the protection of privacy would seem to apply to items of testimonial value as well. In *Hayden*, the Court intimated that privacy interests might in some circumstances provide complete protection of evidence, by declining to decide "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."[135] Although the Court decided the case without reaching the question, Judge Friendly seized upon this caveat to remark, in *Bennett*, that fourth amendment protection should be geared toward protection of privacy, leaving the fifth amendment to protect against compulsory production of incriminating evidence.[136] That interpretation squares with the holding in *Fisher*, which regarded the purpose of the fourth amendment as protecting privacy, while the fifth prevents an individual from being forced to be a witness against himself.[137]

The proposition that the fourth amendment might immunize private documents draws further support from the Supreme Court's decision in *Couch*. The Court held therein 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."[138] No such legitimate expectation of privacy was found either in *Bennett* or in *Couch*. In *Bennett* the evidence involved was a letter, found in the course of a legal search,[139] containing incriminating but non-personal information.[140] In *Couch* the Court held that there could be no legitimate expectation of privacy when tax documents had been handed over to an accountant with full knowledge that much of the information would later be disclosed.[141] The Court therefore held that the taxpayer in *Couch* had no reasonable expectation of privacy.[142] It seems apparent, however, that such an expectation does exist in the case of a document in the nature of a personal diary. This is apparently the view of Justice Mar-

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[133] 387 U.S. 294 (1967).
[134] *Id.* at 302-03.
[135] *Id.* at 303.
[136] 409 F.2d at 896-97.
[137] 425 U.S. at 400-01.
[138] 409 U.S. at 336 (emphasis added).
[139] 409 F.2d at 897.
[140] *Id.* at 896. The letter implicated the defendant in a conspiracy to distribute heroin. *Id.*
[141] 409 U.S. at 335.
[142] *Id.* at 335-36.

shall, who expressed concern in *Couch* that the Court, in allowing the seizure of documents, failed properly to address the issue of privacy.[143] His dissent lends support to the proposition that fourth amendment immunity should protect certain documents of a private nature: "When this Court repudiated the 'mere evidence' rule, it suggested that the Fourth Amendment limitations might be devised precisely in terms of the interest in privacy, prohibiting the seizure of 'items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.' "[144] Justice Marshall's language indicates that he is in agreement with the intimations of the Court in *Warden* and *Couch* as well as *Fisher* that certain types of evidence carry a legitimate expectation of privacy. Evidence of that sort could never be the object of a reasonable search and seizure under that line of reasoning, even if it were relevant to the investigation and, like the documents in *Fisher,* the object of a narrowly drawn subpoena. Hence, the protection of the privacy of documents which Justice Brennan and Justice Marshall fear may be undermined by *Fisher* probably continues to exist, although its basis might now be the fourth rather than the fifth amendment.

VI. PROTECTION OF TAX RECORDS UNDER THE THREE-PRONGED TEST

The fact that the Court specifically avoided deciding whether tax records in the possession of a taxpayer are privileged under the fifth amendment leaves room for speculation as to whether they would indeed be protected thereby. The taxpayer's interest in the privacy of his tax records differs substantially from his interest in the privacy of his letters, diary, or other personal documents. While the keeping of a diary is purely voluntary, the taxpayer is required by law to maintain tax records sufficient to enable him to file an accurate tax return.[145]

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[143] *See id.* at 350-51 (Marshall, J., dissenting).

[144] *Id.* at 349 (Marshall, J., dissenting). The "mere evidence" rule was first enunciated in Gouled v. United States, 255 U.S. 298 (1921), wherein the Court drew from *Boyd* the proposition that search warrants may be used to seize evidence

> only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.

Id. at 309. Thus items could not be seized for use as "mere evidence" against their possessor in a criminal or penal proceeding unless the state had a superior right of possession. This distinction was rejected by the Court in Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967), as an archaic concept, thereby making "mere evidence" a legitimate subject of seizure in the same manner as instrumentalities and fruits of crimes, and contraband. *Id.* at 300-01.

[145] 26 U.S.C. § 6001 (1970) provides in relevant part:

> Every person liable for any tax imposed by this title; or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe.

To the extent that record-keeping is mandatory the individual has no choice but to yield his interest in privacy to the government's interest in receiving correct tax information. Thus, tax returns are subject to judicial process under some circumstances.[146] If the information required by the government in returns is not privileged it would seem that no fourth amendment argument could be raised to protect the privacy of the records upon which those returns were based.

Although a fourth amendment defense would not likely succeed against a subpoena of tax records, in all likelihood their production in response to a summons would involve compelled testimonial self-incrimination. An individual who maintains his own tax records and makes his own calculations is as capable of authenticating those documents as were the accountants in *Fisher*. As the author of the documents, his production of them in response to a subpoena would vouch for their genuineness. His implicit authentication would thus constitute testimonial self-incrimination.

The protection of tax records under *Fisher* should not logically be affected by the fact that the taxpayer is under a statutory duty to keep such records. In this regard *Fisher* may be compared to *Shapiro v. United States*,[147] in which the Court held that certain records required by law are public records and not privileged under the fifth amendment when a subpoena of those records is authorized by law.[148] In reaching that decision the Court relied on *Wilson v. United States*[149] for the proposition that corporate documents are not privileged when they are required by law to be kept.[150] The court found the documents in *Shapiro* to be similar to those in *Wilson*, even though *Shapiro* involved a non-corporate sole proprietor.[151] The reasoning of the Court was that because the documents were required by law they had "public aspects" and were therefore not privileged under *Boyd's* protection of "private papers."[152] It would appear, however, that given *Fisher's* requirement that fifth amendment protection can exist

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[146] 26 U.S.C. § 7213 (1970) provides in relevant part:

> It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof . . . to be seen or examined by any person except as provided by law . . . .

Tax returns have been held to be subject to disclosure under court order. *See, e.g.*, St. Regis Paper Co. v. United States, 368 U.S. 208, 218-19 (1961) (dictum); United States v. Liebert, 519 F.2d 542, 546 (3rd Cir. 1975) (dictum); Heathman v. United States District Court, 503 F.2d 1032, 1035 (9th Cir. 1974); Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 615 (2d Cir. 1964). *In re* Berkovitz, 367 F. Supp. 1059, 1063 (E.D. Pa. 1059) (Grand Jury Subpoena).

[147] 335 U.S. 1 (1948).

[148] *Id.* at 34-35.

[149] 221 U.S. 361 (1911).

[150] 335 U.S. at 16.

[151] *Id.*

[152] *Id.* at 33.

whenever compelled testimonial self-incrimination can be shown, the important question is not whether a document is a "private paper" or has "public aspects" but rather whether it meets the requirements of the three-pronged test. Thus, the public/private distinctions of *Wilson* and *Shapiro* would appear to be superseded by the compelled testimonial self-incrimination requirement of *Fisher*.

The individual forced to produce his tax records from his own possession would seem to authenticate them as effectively as if he were producing a diary or other document of which he were the author. Although the existence and whereabouts of the records would rarely be in doubt because of their required maintenance, their implicit authentication through the act of production would represent testimonial self-incrimination. Therefore, the subpoena of tax records would appear to satisfy the *Fisher* test and would thus be barred by the fifth amendment.

CONCLUSION

After *Fisher* an individual may assert a fifth amendment defense to an order requiring production of papers or documents only when their production would involve compelled testimonial self-incrimination. Since those elements are not easily defined and may be manifested in actions involving no testimonial statements, courts are given wide latitude in applying the privilege. Although privacy was not a controlling issue in *Fisher,* omission of its discussion does not necessarily justify Justice Brennan's fears that Fisher represents "but another step in the denigration of privacy principles."[153] Rather, *Fisher* would seem to be an attempt by the Court to separate issues of privacy from those of self-incrimination without lessening the protection of either. Thus, while private documents may be privileged because their production would result in compelled testimonial self-incrimination, the *Fisher* holding seems to indicate the possibility that certain documents would also be immune from summons because of their private nature. Furthermore, the logical extension of *Fisher's* rationale would also seem to be that personal tax records, though analogous to public documents, would nevertheless result in compelled testimonial self-incrimination if their production were required. Therefore, though the Court did not reach the issue, its reasoning indicates that records prepared by a taxpayer and kept in his possession should be immune from process. In providing a new fifth amendment rationale for protecting papers, the *Fisher* holding essentially replaces *Boyd v. United States.* The Court's reasoning represents a new approach to the problem of protecting an individual from the compulsory production of incriminating documents; an approach which should nevertheless leave that protection basically unchanged.

S. LAMONT BOSSARD, JR.

[153] 425 U.S. at 414 (Brennan, J., concurring).