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Constitutional Law -- Privilege Against Self-Incrimination in Tax Liability Investigations -- Tax Records in Possession of Third Party -- Couch v. United States

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V. CONCLUSION

The distinction drawn by the *GTE Services Corp.* court between the permissible and impermissible regulations seems to be essentially correct. If the FCC were allowed to extend its jurisdiction over the data processing industry in this case, then by analogous extensions the scope of FCC authority would be enlarged clearly beyond legislative intentions. The significance of *GTE Service Corp.* is that in this case the court held that the FCC's stated intent to regulate only the common carriers provided insufficient grounds for rules which imposed de facto regulation on the data processing industry which itself is not subject to FCC control.

In addition to discussion of the court's view of the legality of the rules, this note has dealt with certain aspects of the wisdom of the rules. The SRI report and Chairman Burch's dissent, as well as the cited history of FCC action regarding prior technological developments, seem to indicate that the Commission may not have given adequate consideration to its option not to apply the regulations in question, particularly Rules (c)(4) and (5). In the factual context of the communications industry, the possibility of large scale monopoly over the data processing industry exists only for the Bell system companies which even without these rules are constrained from entering the field.[145] Whatever possibility of derogation of the carriers' statutory obligations exists is certainly lessened by the disability of the Bell companies, and this fact should have been weighed by the Commission in considering the wisdom of promulgating the rules. At least, the possibility of cross-subsidization between telephone companies other than Bell companies and the data processing entities would not appear to be such a significant threat in derogation of statutory obligations so as to require the degree of regulation imposed by the Commission. In this respect the *GTE Service Corp.* decision to invalidate at least a portion of the rules is a move in the right direction.

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Constitutional Law—Privilege Against Self-Incrimination in Tax Liability Investigations—Tax Records in Possession of Third Party—*Couch v. United States.*[1]—In 1969 the Internal Revenue Service (IRS) commenced an investigation of the business tax returns of petitioner, Mrs. Lillian V. Couch, the sole proprietress of a restaurant.[2] Pursuant to this investigation IRS agents began exam-

[145] See note 33 supra.

[1] 409 U.S. 322 (1973).

[2] The IRS investigation of petitioner was initiated in order to determine her tax liability for the years 1964-1968. Id. at 323. The investigative powers of the IRS are appraised in Miller, Administrative Agency Intelligence-Gathering: An Appraisal of the Investigative Powers of the Internal Revenue Service, 6 B.C. Ind. Com. L. Rev. 657 (1965).

ining petitioner Couch's business records in the office of her accountant. Petitioner had given her business records to the accountant, an independent contractor, for the purpose of preparing petitioner's tax returns during the period 1955 to 1968.[3] Upon examination of Mrs. Couch's business records the investigating IRS agents found indications of considerable understatement of gross income in petitioner's tax returns. The case was thereupon reported to the Intelligence Division of the IRS which conducts investigations of suspected criminal tax evasion.[4] The IRS Intelligence Division then commenced a detailed investigation of petitioner Couch's financial records in order to determine: (1) petitioner's correct tax liability; (2) the possibility of income tax fraud and the imposition of civil tax fraud penalties; and (3) the "possibility of a recommendation of a criminal tax violation."[5]

The IRS issued a summons directing petitioner's accountant to produce petitioner's business records pursuant to section 7602 of the Internal Revenue Code.[6] Instead of complying with the summons, the accountant, at Mrs. Couch's request, delivered the records to petitioner's attorney.[7] Thereupon the IRS petitioned the United States District Court for the Western District of Virginia to enforce the summons.[8] Petitioner Couch intervened in that action, asserting that her Fifth Amendment privilege against compelled self-incrimination should bar production of the records.[9] The district

[3] The accountant was an independent contractor, and not a personal employee of petitioner. His practice included numerous other clients who compensated him on a piecework basis. 409 U.S. at 324.

[4] It was customary procedure in 1969 for the IRS to have a special agent brought into the investigation of a suspected crime. Upon his arrival the special agent gave Mrs. Couch her *Miranda* warnings. United States v. Couch, 449 F.2d 141, 142 (4th Cir. 1971). See Miranda v. Arizona, 384 U.S. 436 (1966).

[5] 409 U.S. at 324. For a criticism of criminal tax sanctions and a discussion of procedural complexities in tax evasion prosecutions, see Duke, Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid, 76 Yale L.J. 1 (1966).

[6] Int. Rev. Code of 1954, § 7602, in pertinent part, authorizes the IRS to examine books, papers, records and other data in order to determine an individual's tax liability. The IRS may summon the person liable for the tax to produce the records in question, or may require an officer or employee of the person liable, or any person having possession, custody or care of those records, to produce them for investigation.

The summons was directed to petitioner's accountant. It required him to produce "[a]ll books, records, bank statements, cancelled checks, deposit ticket copies, workpapers and all other pertinent documents" which pertained to the tax liability of the petitioner. 409 U.S. at 323.

[7] Technically, the order to produce the records was then directed at petitioner's attorney, since, after the summons was served upon the accountant, he ignored it and surrendered the records to the attorney. However, as the Court stated, "constitutional rights obviously cannot be enlarged by this kind of action. The rights and obligations of the parties became fixed when the summons was served and the transfer did not alter them." 409 U.S. at 329 n.9. See United States v. Lyons, 442 F.2d 1144 (1st Cir. 1971); United States v. Zackutansky, 401 F.2d 58, 72 (7th Cir. 1968), cert. denied, 393 U.S. 1021 (1969).

[8] The opinion of the District Court for the Western District of Virginia was not reported. 409 U.S. at 324 n.3.

[9] Id. at 325. Apparently, petitioner also claimed that enforcement of the summons would be violative of her Fourth Amendment rights. Neither the district court, nor the circuit court,

court held the privilege unavailable to Mrs. Couch, since at the time the summons was served she was not in possession of the records described in the summons.[10] Petitioner's accountant was ordered to produce the records required by the IRS summons.

An appeal was taken thereafter to the United States Court of Appeals for the Fourth Circuit.[11] There intervenor-appellant Couch again attempted to assert her constitutional privilege against self-incrimination to protect the records in question from IRS investigation.[12] The Fourth Circuit held that, because intervenor Couch had voluntarily relinquished her possession of the records, she could not avail herself of the Fifth Amendment privilege to prevent their production.[13]

The Supreme Court granted certiorari,[14] affirmed and HELD: When petitioner-taxpayer gives her accountant continuous possession of her business records, petitioner divests herself of possession of the records, and therefore, there is no personal compulsion upon petitioner to produce the records. Hence, petitioner is unable to avail herself of the Fifth Amendment privilege against compelled self-incrimination.[15] The Court further held that petitioner has no legitimate expectation of privacy under either the Fourth or Fifth Amendments, as much of the information sought in the course of the IRS investigation has to be disclosed in her tax returns as a matter of course.[16]

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nor the Supreme Court discussed this claim independently of petitioner's other constitutional claims. The Supreme Court agreed with the government that "this claim is not further articulated and does not appear to be independent of her Fifth Amendment argument." Id. at 325 n.6.

[10] Id. at 324 n.3.

[11] United States v. Couch, 449 F.2d 141 (4th Cir. 1971).

[12] Id. at 143.

[13] Id. The Fourth Circuit held specifically:

> The answer to [petitioner's self-incrimination contention] lies in the fact that the records were not in the intervenor's possession but were in the custody of her accountant. She had voluntarily relinquished her control of the records. They had passed from the sphere of privilege surrounding her, for there was no accountant-client privilege.

Id.

[14] 405 U.S. 1038 (1972).

[15] 409 U.S. at 329.

[16] Id. at 335. Petitioner also asserted that the confidential nature of the accountant-client relationship and her resulting expectation of privacy in delivering the records protected her, under the Fourth and Fifth Amendments, from their production. However, the Court did not find that petitioner had a constitutionally cognizable right based upon this asserted expectation of privacy. Id.

Mrs. Couch also asserted in the Supreme Court that the statutory authorization for the IRS summons was limited to civil suits, and that therefore its use in that case was improper because she was potentially criminally liable. The Court declined to follow this view, and rather summarily dismissed the problem presented by the joint civil and criminal investigatory purposes of the IRS investigation. Relying on Donaldson v. United States, 400 U.S. 517 (1971), the Court found that it is "undisputed that a special agent is authorized, pursuant to 26 U.S.C. § 7602, to issue an Internal Revenue summons in aid of a tax investigation with civil and possible criminal consequences." 409 U.S. at 326.

Taxpayers may be allowed to prevent production of records if they are sought for the

The Supreme Court's decision in *Couch* represents an effort by the Court to provide IRS tax investigators with greater access to financial records which have been voluntarily transferred by a taxpayer to a third party. In order to do this the Court had to balance the constitutional rights and evidentiary privileges of the taxpayer against the "legitimate interest of society in enforcement of its laws and the collection of revenues."[17] Specifically, the Court had to weigh the conflicting values represented by the traditional rights of citizens not to disclose certain information—as embodied in the privilege against self-incrimination—against the necessity of disclosure in a tax system dependent upon honest self-reporting. The Court reaffirmed its position that generally an individual may not assert a Fifth Amendment privilege over records not in his possession,[18] and

improper purpose of obtaining evidence for use in a criminal prosecution. This doctrine was enunciated by the Supreme Court in Reisman v. Caplin, 375 U.S. 440, 449 (1964). However, this so-called "improper purpose doctrine" has apparently been limited to circumstances where the sole, or at least the overriding, purpose of the investigation is to obtain evidence for criminal prosecution. In cases where the purpose is a mixture of civil and criminal liability, the improper purpose doctrine has not been used to protect the taxpayer. See Howfield, Inc. v. United States, 409 F.2d 694, 697 (9th Cir. 1969). For example, in United States v. Hayes, 408 F.2d 932 (7th Cir.), cert. denied, 396 U.S. 835 (1969), the Seventh Circuit held: "The fact that an investigation for the purpose of determining tax liability is deemed likely to produce evidence warranting criminal prosecution does not make the use of [the IRS] summons an improper use." 408 F.2d at 936. The Court in *Couch* relied on *Donaldson*, which had adopted the approach of *Hayes* and several other circuit court opinions. See, e.g., *Howfield, Inc.*, supra at 697; United States v. Roundtree, 420 F.2d 845, 885 (5th Cir. 1969). This position means that a summons may be issued and enforced if it is "issued in good faith and prior to a recommendation for criminal prosecution." *Donaldson*, 400 U.S. at 536. Since in *Couch* there was only the "possibility" of such a criminal recommendation, *Donaldson* was controlling, and the summons could be upheld as a valid exercise of the IRS's authority.

The emasculation of the improper purpose doctrine in *Donaldson* has been reaffirmed by *Couch*. The taxpayer is at a distinct disadvantage since the IRS can always claim that the evidence to be produced will be used in a civil suit, and merely withhold the actual recommendation of criminal prosecution until after the damaging evidence has been produced for purposes of the civil suit. It is the probability of civil action, rather than the possibility of criminal prosecution, that appears to be controlling in determining "improper purposes." This position may be seen as a strained interpretation of the intent of the congressional grant of power to the IRS to issue summonses. Int. Rev. Code of 1954, § 7602, the section which authorizes the IRS to issue summonses, refers only to the ascertainment of civil tax liability. Criminal investigations are the province of special agents, whose statutory powers do not include the specific power to issue summonses, which suggests that Congress did not intend IRS administrative subpoenas to be used to gather evidence of criminality. See Comment, The Relationship Between Civil and Criminal Tax Fraud and Its Effect on the Taxpayer's Constitutional Rights, 12 B.C. Ind. & Com. L. Rev. 1176, 1193-94 (1971). It has been suggested that the use of IRS summonses to procure evidence for use in criminal prosecutions exceeds statutory authority and that therefore evidence so obtained be barred from use in criminal prosecutions. Id. at 1194. This would be similar to the exclusionary rules in criminal cases generally. As Justice Frankfurter stated in Watts v. Indiana, 388 U.S. 49, 54 (1949):

> Ours is the accusatorial as opposed to the inquisitorial system. . . . Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case . . . by evidence independently secured through skillful investigation.

[17] 409 U.S. at 336.

[18] Perlman v. United States, 247 U.S. 7, 15 (1918); Ex parte Fuller, 262 U.S. 91, 93-94

more specifically, a taxpayer may not avail himself of the privilege in the situation where he has voluntarily transferred his financial records to his accountant.

This note will examine the Court's refusal to extend the privilege against compelled self-incrimination to an individual who has voluntarily transferred his business records to a third party. The majority's test will be criticized for its lack of clarity and a new test based on Justice Brennan's concurring opinion will be offered. The implications of *Couch* will then be assessed in order to determine their immediate and prospective effects upon the exercise of Fifth Amendment rights, and upon the expectation of privacy which an individual taxpayer may have when compiling business records for the purpose of filing his income tax returns. Finally, the secondary issue of the Court's apparent rejection of an evidentiary accountant-client privilege will be analyzed.

The *Couch* decision attempted to effectuate the traditional policy rationales which support the privilege against self-incrimination.[19] Underlying the Fifth Amendment privilege is the concept that it is unjust to coerce a person to provide evidence that would tend to prove him guilty of a crime.[20] There are many justifications for the existence of the privilege against compelled self-incrimination.[21] Perhaps the most important is that the privilege serves the function of assuring that "even guilty individuals are treated in a manner consistent with human dignity."[22] Reciprocally, by requiring the courts to so respect the rights of an accused individual the privilege fosters public respect for the judicial process.[23]

The Court has articulated the purpose and policy of the Fifth Amendment privilege as founded upon

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice . . . our respect for the inviolability of the human personality and of the right of each

(1923); Dier v. Benton, 262 U.S. 147, 149-50 (1923); Burdeau v. McDowell, 256 U.S. 465, 476 (1921); United States v. Cohen, 388 F.2d 464 (9th Cir. 1967).

[19] See generally 8 J. Wigmore, Evidence § 2251 (J. McNaughton rev. 1961); C. McCormick, Evidence § 118 (2d ed. 1972).

[20] See United States v. White, 322 U.S. 694, 698 (1944).

[21] The privilege discourages the use of physical torture as a means of compelling responses to general inquiries. As recently as 1967 the Supreme Court was confronted with a case wherein the defendant was threatened by the police with firearms in an effort to secure a confession. Beecher v. Alabama, 389 U.S. 35 (1967). The privilege discourages brow-beating the accused and is therefore thought necessary by the Court to prevent "recurrence of the Inquisition and Star Chamber, even if not in their stark brutality." Ullmann v. United States, 350 U.S. 422, 428 (1956). The privilege protects the innocent from unjustified conviction. C. McCormick, supra note 19, § 118, at 252. The privilege forces the prosecution to establish its case on the basis of more reliable evidence. Id. See generally 8 J. Wigmore, supra note 19, at 225.

[22] C. McCormick, supra note 19, § 118, at 252.

[23] See id.

> individual "to a private enclave where he may lead a private life."[24]

The privilege against self-incrimination is much discussed but little understood.[25] The words of the Fifth Amendment contain no criteria upon which to define accurately the scope of the protection of the privilege against self-incrimination. The Court has derived its standards for application of the privilege chiefly from consideration of two factors: (1) the history and purpose of the privilege; and (2) the character and urgency of the other public interests involved.[26] These criteria imply that at some point the policies of the privilege against self-incrimination must be subordinated to the requirements placed upon law enforcement agencies to satisfy societal needs for order.[27] The privilege is not, therefore, all-encompassing, and the United States Supreme Court has accordingly placed limitations on its use.[28] For the purposes of this discussion three of these limitations are especially important. In the first place, the exercise of the privilege has been limited to "natural persons,"[29] and thus has been held unavailable to corporations,[30] labor unions[31] and partnerships.[32] This limitation flows from the concept that the Fifth Amendment privilege is a personal privilege which seeks to ensure that the judicial process will respect the human dignity of the accused.[33] Such considerations are not controlling in situations where the defendant is a business entity. Secondly, the privilege applies only when the compelled disclosure is of a testimonial or communicative nature.[34] Thus, self-incriminatory evidence disclosed by an accused under compulsion may not violate the Fifth Amendment, if it is neither disclosed through the accused's testimony nor through evidence relating to some communicative act of

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[24] Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964), cited in *Couch*, 409 U.S. at 328.

[25] See McKay, Self-Incrimination and the New Privacy, 1967 S. Ct. Rev. 193 (1967).

[26] See Justice Harlan's concurring opinion in California v. Byers, 402 U.S. 424, 449 (1971).

[27] See, e.g., California v. Byers, 402 U.S. 424 (1971) (statute ordering automobile drivers to stop and give their names and addresses at scene of automobile accident was not impermissible violation of the Fifth Amendment). In *Couch* the majority stated:

> [I]t is important, in applying constitutional principles, to interpret them in the light of the fundamental interests of personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws and the collection of the revenues.

409 U.S. at 366.

[28] See notes 29-31 infra.

[29] United States v. White, 322 U.S. 694, 698 (1944).

[30] Wilson v. United States, 221 U.S. 361, 382 (1911); Hale v. Henkel, 201 U.S. 43, 74 (1906).

[31] United States v. White, 322 U.S. 694, 704 (1944).

[32] United States v. Silverstein, 314 F.2d 789, 791-92 (2d Cir. 1963).

[33] United States v. White, 322 U.S. 694, 698 (1944).

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

the accused. For example, the Court in *Schmerber v. California*[35] upheld the introduction at trial of a blood sample which had been taken from an individual, over his Fifth Amendment objections, because, in the Court's opinion, the extracted blood was not evidence of a communicative nature. Finally, even when the information sought by the government is of a testimonial nature, and such information concerns a natural person, the privilege protects only that information which would have to be compelled from the accused person himself.[36] This limitation focuses upon the question of coercion of the accused person, through his compelled testimony or through the compelled production of documents in his control, rather than upon the incriminatory nature of the evidence itself.[37] Stated in other terms, this means that the Fifth Amendment protects an individual from self-incrimination, not from incrimination. Justice Holmes stated this position clearly when he said: "[A] party is privileged from producing evidence but not from its production."[38] Thus, for example, an accused person may not prevent the elicitation of incriminating testimony from a person who has overheard the self-incriminatory statements of the accused.[39]

The *Couch* decision illustrates the application of these principles. The privilege would have been available to Mrs. Couch, because the business records of a sole proprietorship, unlike a corporation or partnership, are the records of the proprietor, who is a natural person.[40] Furthermore, evidence contained in financial records is of a testimonial or communicative nature, and therefore such records are within the ambit of the Fifth Amendment's protections.[41] Despite these considerations, however, Mrs. Couch could not invoke the privilege because her rights were barred by the third limitation. She had not been compelled to give self-damaging testimony, nor had she been compelled to produce incriminating documents within her possession.[42] The documents which were the subject of the IRS summons were not within her possession but instead were in the hands of her accountant. Therefore, it was the Court's conclusion that petitioner Couch could not avail herself of the protection of the Fifth Amendment because "in the case before

[35] Id.

[36] Johnson v. United States, 228 U.S. 457, 458 (1913).

[37] 409 U.S. at 328-29.

[38] Id. at 328, citing Johnson v. United States, 228 U.S. 457, 458 (1913).

[39] See, e.g., Hoffa v. United States, 385 U.S. 293, 303-04 (1966). In United States v. White, 401 U.S. 745 (1971), the Court stated that it had not indicated in any way "that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police," id. at 749, or, presumably, to the courts.

[40] See United States v. White, 322 U.S. 694, 701 (1944). The test set forth in *White* is whether the business entity represents group or personal interests.

[41] Documents may be considered an extention of testimonial capacity. See Boyd v. United States, 116 U.S. 616, 633 (1886). See also Albertson v. Subversive Activities Control Board, 382 U.S. 70, 78 (1965).

[42] 409 U.S. at 328-29.

us the ingredient of personal compulsion is lacking. The summons and the order . . . enforcing it are directed against the accountant. He, not the taxpayer, is the only one compelled to do anything."[43]

Despite the fact that Mrs. Couch had not been in possession of her records, and had not been personally subpoenaed to produce them, petitioner asserted that she had been compelled to incriminate herself when her incriminating personal records were made available to IRS investigators.[44] Thus, the Court in *Couch* was confronted with the difficult question of determining the scope of the Fifth Amendment privilege as regards documents which petitioner claimed to "own" but which were not in the physical possession of the petitioner.[45]

In order to understand *Couch* and the difficulties of interpretation engendered by the decision, it is necessary to understand the specific terminology employed by the Court. The Court attempted to define the scope of the Fifth Amendment privilege by utilizing the concepts of "compulsion" and of physical "possession."[46] Initially, the Court contrasted physical possession of documents with ownership of documents. This same possession/ownership analysis had previously been used by the Court in the 1918 decision of *Perlman v. United States*.[47] In that case the party claiming to be the owner of evidence and seeking to assert a Fifth Amendment privilege over evidence in a patent infringement case had voluntarily surrendered it to a third party, and had consequently been barred from asserting his privilege against self-incrimination over this evidence. The Court in *Perlman* indicated that ownership was not determinative of the issue as to whether the privilege may be invoked.[48]

Couch reaffirmed the position taken by the Court in *Perlman*. Ownership, the Court concluded, has little relevance to the personal compulsion which is the touchstone of the Fifth Amendment privilege.[49] The majority in *Couch* stated that "to tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line."[50] This would be so, the Court asserted, because the owner of property would always claim to be in "constructive possession" of potentially incriminating evidence, wherever it might be. This would in turn create a "kind of asylum of constitutional privilege" which would be intolerably broad.[51] The Court contended that the criterion for immunity based on the privilege against self-incrimination is not ownership of property, but rather

[43] Id. at 329.
[44] Id. at 333.
[45] Id. at 331.
[46] Id. at 336 n.20.
[47] 247 U.S. 7, 15 (1918). See also Ex parte Fuller, 262 U.S. 91, 93-94 (1923); Dier v. Banton, 262 U.S. 147, 149-50 (1923).
[48] 247 U.S. at 15.
[49] 409 U.S. at 333, citing Perlman v. United States, 247 U.S. 7, 15 (1918).
[50] 409 U.S. at 331.
[51] Id. at 332, citing *Perlman*, 247 U.S. at 15.

the "physical or moral compulsion" exerted upon criminal defendants by investigative authorities.[52] The majority concluded that physical possession would be sufficient to invoke the privilege, because in order to obtain information in the physical possession of the accused, physical or moral compulsion would have to be exerted.[53] It would therefore appear that possession, according to the majority's analysis, was subsumed under the category of physical or moral compulsion, whereas ownership was not so related. If petitioner Couch had been in possession of the records, producing the result that the IRS summons would have been directed toward her personally, the element of personal compulsion would have been present, and she would have been able to assert her Fifth Amendment privilege over the document. However, because petitioner could not assert possession of the documents, but only ownership of them, the factor of personal compulsion was not present.[54]

It appeared that the majority in *Couch* had established physical possession as the crucial factor in determining whether the Fifth Amendment could be successfully asserted by an accused over documents sought in an IRS investigation. Possession, however, was not considered by the Court to be co-extensive with the scope of the Fifth Amendment privilege. For when petitioner argued that if the IRS could reach her records the moment they left her physical possession and were deposited with an accountant, the basic protection of the privilege against self-incrimination necessarily would be lost, the majority insisted that this was not the import of their decision. The Court stated that although actual, physical possession of the documents bears "the most significant relationship to Fifth Amendment protection . . . situations may well arise where constructive possession is so temporary and insignificant as to leave personal compulsions upon the accused substantially intact."[55] In so stating, the Court established an exception to its possession formulation and termed this exception "constructive possession." The Court cited *Schwimmer v. United States*[56] and *United States v. Guterma*[57]

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[52] 409 U.S. at 336.

[53] Id. at 333. There the Court stated: "We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against state compulsions upon the individual accused of a crime." Id.

[54] Id.

[55] Id.

[56] 232 F.2d 855 (8th Cir. 1956). In *Schwimmer* a third party bailee of an attorney's documents was served with a subpoena duces tecum. The attorney sought to quash the subpoena on Fourth Amendment grounds. The court found that retention of the papers was so temporary as to be merely custodial, that the attorney had constructive possession of the records sought, and that he could therefore assert his constitutional rights over the records.

[57] 272 F.2d 344 (2d Cir. 1959). *Guterma* concerned the storage of a taxpayer's personal records in a safe in the offices of a corporation of which the taxpayer had been Chairman of the Board. Only the taxpayer and his co-defendant had access to the records. The Second Circuit upheld the taxpayer's assertion of Fourth and Fifth Amendment privileges as to his personal records where the grand jury subpoena was directed at the corporation. Id. at 346.

Justice Harlan, concurring in California v. Byers, 402 U.S. 424, 453-54 (1971), stated:

as examples of situations where an accused individual could assert his constitutional privilege over records, which, while not in his physical possession, were, in the Court's determination, in his constructive possession. The Court, however, did not further define the concept of constructive possession. Both *Schwimmer* and *Guterma* provided examples of situations in which the relinquishment was *very* temporary and thus defined only one boundary of a spectrum extending from actual possession to a mere non-possessory ownership.

The facts of *Couch* appear to define the other extreme of the continuum. In *Couch* the taxpayer could not have reasonably asserted constructive possession of the records; she could only have asserted ownership. In *Couch* the accountant had been regularly taking possession of the records for the purpose of preparing Mrs. Couch's tax returns for the years 1955 through 1968.[58] Furthermore, the accountant was an independent contractor and not an employee of the petitioner.[59] The length of the accountant's possession and his independent status confirmed the Court's belief that "petitioner's divestment [of possession] was of such a character as to disqualify her entirely as an object of any impermissible Fifth Amendment compulsion."[60] It is submitted that the Court, by establishing the constructive possession exception, and by failing to define adequately its extent, has in effect blurred its own definition of "possession."[61] It will be difficult to determine, in factual situations falling between the extremes of *Couch* and *Schwimmer*, whether the Court will find that constructive possession is present. For example, it is not clear whether the Court would find constructive possession in situations in which the accountant is an employee of the taxpayer, or in which the accountant has had possession of financial records for only a few days or hours. By focusing solely upon the concept of possession, with the attendant confusion inherent in the constructive possession exception, the Court has taken a position which is rather

> The sweep of modern governmental regulation—and the dynamic growth of techniques for gathering and using information—could of course be thought to present a significant threat to the values considered to underpin the Fifth Amendment. . . . As uncertain as the constitutional mandate derived from this portion of the Bill of Rights may be, it is the task of this Court continually to seek that line of accommodation which will render this provision relevant to contemporary conditions.

[58] 409 U.S. at 334.

[59] Id.

[60] Id. at 334-35.

[61] Justice Marshall, dissenting in *Couch*, specifically criticized the majority for this lack of clarity, stating:

> The majority seems to create a bright-line rule that no constitutional right of petitioner is violated by enforcing a summons of papers not in her possession. . . . I could not accept such a rule. However, the majority blurs the line by suggesting that temporary relinquishment of possession presents a different case . . . . The Court expressly disclaims the proposition that possession alone is determinative of the availability of constitutional protection for petitioner's papers. . . . But . . . the Court . . . [does not supply] a clearly articulated constitutional basis for the rule adopted.

Id. at 344 (dissenting opinion).

rigid, and which fails to establish a clearly articulated analysis of the factors determinative of the self-incrimination issue. It is submitted, therefore, that the majority's position lacks clarity and that the use of an analysis based upon possession, ownership and constructive possession, concepts which were taken from the law of property, creates confusion when they are used to determine the extent of Fifth Amendment rights.

A clearer analysis of the self-incrimination issue was set forth in Justice Brennan's concurring opinion in *Couch*. Justice Brennan stated

> 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 the records over to a third person for custodial safekeeping rather than for disclosure of information.[62]

Thus for Brennan the significant factor in a Fifth Amendment analysis is the intent of the taxpayer to protect his records from investigative scrutiny, rather than the possession of documents, which was the crucial factor in the majority's analysis. Brennan would hold the Fifth Amendment privilege available to one who took reasonable steps to safeguard the confidentiality of the contents of records, such as by placing them in a safe-deposit box.[63] Apparently, under Brennan's analysis, the privilege against self-incrimination would also be available to a taxpayer who voluntarily relinquished records to a third person for the purpose of safekeeping them.

Brennan's analysis did not rest solely upon the subjective intent of the taxpayer. The taxpayer's subjective desire for privacy, would only be given effect when, from an objective viewpoint, it was reasonable for the taxpayer to expect privacy. Following this analysis in *Couch*, Brennan determined that the taxpayer could not avail herself of a Fifth Amendment privilege, because her action in giving her records to her accountant in order that he might disclose financial information on her tax return did not conform to any reasonable intent on her part to keep the records private and confidential.[64]

By way of analogy, Justice Harlan's analysis of the expectation of privacy issue in his concurring opinion in *Katz v. United States*[65] may provide some insight into Brennan's analysis of an expectation of confidentiality in *Couch*. Justice Harlan perceived a two-fold requirement inherent in the Court's recognition of privacy: (1) an

[62] Id. at 337.
[63] Id.
[64] Id. at 337-38.
[65] 389 U.S. 347 (1967).

actual (subjective) expectation of privacy; and (2) an additional requirement that the expectation is one that society is prepared to recognize as "reasonable."[66] So too, Justice Brennan's test in *Couch* may be benefited by explicating a two-fold analysis in regard to the taxpayer's intent: (1) the subjective intent of the taxpayer to maintain the confidentiality of his records; and (2) the "reasonableness" of this intent in light of the taxpayer's actions, and in light of societal needs for effective taxation procedures.

Justice Brennan's intent test seems to be a more cogent analysis of self-incrimination issues than the majority's ownership-possession-constructive possession formulation. Doubtless, in most situations the result would be the same under Brennan's test or under that of the majority. Supporting this statement is the fact that Brennan concurred in the result in *Couch*. However, although the final results under either formulation would be similar, Brennan's test would allow a clearer analysis of the issues involved in making a determination as to whether the privilege could be asserted. In situations such as that involved in *Schwimmer*,[67] for example, while Brennan would allow the accused to assert a Fifth Amendment privilege over documents relinquished to another for safekeeping, he would do so without resort to the imprecise fiction of constructive possession.

However, even Brennan's analysis was not entirely satisfactory. His position, specifically in regard to tax cases, apparently adopted the basic premise that the issue of the reasonableness of the taxpayer's intent and actions was already decided against the taxpayer because of the existing requirements of disclosure inherent in a self-reporting tax system.[68] It would appear, therefore, that once a taxpayer had given his records to a tax-preparer in order to file his return, the obligations of disclosure inherent in the tax system made it untenable for the taxpayer to assert that he reasonably anticipated confidentiality in regard to his financial records. This position would place the taxpayer in the sometimes problematical situation of either (1) safeguarding the confidentiality of his records but giving up the needed opportunity to consult with a tax expert; or (2) consulting with a tax expert, to whom he gives his financial records, but thereby giving up any Fifth Amendment rights or other rights predicated upon an expectation of confidentiality. Thus, neither the

[66] Id. at 361.

[67] Schwimmer v. United States, 232 F.2d 885 (8th Cir. 1956). See note 56 supra.

[68] Int. Rev. Code of 1954, § 6011 states in pertinent part that "[e]very person required to make a return or statement shall include therein the information required by such forms or regulations." Int. Rev. Code 1954, § 6677 imposes a penalty fee upon any taxpayer who fails to provide the information requested. Int. Rev. Code of 1954, § 7203 provides that any taxpayer who willfully fails to keep records, make a return or supply requested information is guilty of a misdemeanor imposing a fine of up to $10,000 or imprisonment up to a year or both. If the failure to provide requested information is construed as willful tax evasion, Int. Rev. Code of 1954, § 7201 provides that tax evasion is a felony subject to a fine of up to $10,000 or five years imprisonment or both.

majority's nor Brennan's analyses confronted this one basic reality implicit in the tax area. Justice Douglas, in his dissent, put it succinctly:

> The decision may have . . . [an] immediate impact which the majority does not consider. Our tax laws have become so complex that very few taxpayers can afford the luxury of completing their own returns without professional assistance. If a taxpayer now wants to ensure the confidentiality and privacy of his records, however, he must forego such assistance. To my mind, the majority thus attaches a penalty to the exercise of the privilege against self-incrimination.[69]

Indeed, many taxpayers customarily give their records to accountants or tax preparers.[70] The waiver of Fifth Amendment rights by so ordinary and customary an act as giving financial records to an accountant seems rather drastic.[71] As the Supreme Court noted in *Gardner v. Broderick*,[72] "[t]he [Fifth Amendment] privilege may be waived in appropriate circumstances if the waiver is *knowingly* and voluntarily made." It is difficult to assert that taxpayers who turn their records over to tax-preparers as a matter of course have knowingly waived their Fifth Amendment rights.

Justice Douglas' criticism of the impact of the majority's position on the rights of taxpayers points to the dilemma faced by the Court in attempting to balance the rights of individuals not to reveal information to the government, as against the necessity for disclosure of financial information by taxpayers in a tax system which depends on honest self-reporting. On the one hand "it must be conceded that an adequate source of revenue is the *sine qua non* of effective governmental operation of a modern society; of this there can be no serious dispute."[73] The IRS has been delegated the monumental task of collecting approximately 260 billion dollars from about 80 million individual and corporate taxpayers annually.[74] Since these taxes provide the budgets for all other federal governmental programs, the IRS has been considered by some as the "keystone of the federal government."[75] The American tax system rests upon the belief that each individual will voluntarily and honestly evaluate his tax liability. However, it would be naive to believe that every taxpayer is, in fact, truthful. The investigative

[69] 409 U.S. at 342.

[70] See Auditing the IRS, Business Week, Sept. 1, 1971, at 66: "At least half of all taxpayers must pay for professional help. . . ."

[71] See Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 580 (1967); Gardner v. Broderick, 392 U.S. 273, 276 (1967).

[72] 392 U.S. 273, 276 (1967) (emphasis supplied).

[73] Miller, Administrative Agency Intelligence-Gathering: An Appraisal of the Investigative Powers of the Internal Revenue Service, 6 B.C. Ind. & Com. L. Rev. 657, 663 (1965).

[74] See Auditing the IRS, supra note 70, at 64.

[75] Id.

powers granted to the IRS by Congress serve not only to discover tax evaders, but also to deter many taxpayers from filing fraudulent returns or from engaging in transactions solely designed to avoid taxes. The knowledge that the IRS can audit, investigate and recommend punishment, if appropriate, is a powerful incentive to the taxpayer to disclose his financial dealings fully and honestly. Thus, it should be noted that the self-assessment system of taxation might founder if adequate means of investigation were not provided for the IRS.[76] On the other hand, the interests of taxpayers in maintaining their personal privacy and security must be given weight in determining the scope of the investigatory powers of the IRS. The investigatory power of the IRS is extremely broad in scope, since every taxpayer is a possible target of an IRS investigation. This makes the IRS a potentially potent political weapon.[77] Commentators have expressed apprehension over the threat presented to civil liberties by an agency, such as the IRS, which possesses both extensive investigatory capabilities and the facilities to centralize such information and make it available to other governmental agencies.[78]

It was this threat to civil liberties which caused Justice Douglas to dissent in *Couch*.[79] He criticized the majority for focusing solely on the traditional personal compulsion aspects of the privilege against self-incrimination, insofar as it placed undue emphasis on physical possession. The emphasis, in his opinion, should have been to focus upon the needs of individual taxpayers to be secure from overbroad IRS investigation.[80] In his words *Couch* represented a further inroad into individual privacy: "[T]he Constitutional fences of law are being broken down by an ever-increasingly powerful Government that seeks to reduce every person to a digit."[81] In defense of the taxpayer's privacy, Douglas apparently contemplated the establishment of a "sphere of privacy" founded upon the fundamental values protected by both the Fourth and Fifth Amendments.[82] Specifically, he would include within this sphere of privacy the financial records of an individual who asserted his ownership of those records.[83] Thus, in factual situations similar to *Couch,* the IRS summons should, in Douglas' view, be successfully defeated by the assertion of a taxpayer-owner's privilege against self-incrimination, and by this right of privacy.

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[76] Miller, supra note 73, at 663.

[77] Id. at 666. See also Auditing the IRS, supra note 70, at 64.

[78] See generally McKay, Self-Incrimination and the New Privacy, 1967 S. Ct. Rev. 193; Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 S. Ct. Rev. 103.

[79] 409 U.S. at 338.

[80] Id.

[81] Id. at 344. Justice Douglas is not alone in his belief that individual liberties are paramount. See generally McKay, supra note 78; Kalvan, The Problems of Privacy in the Year 2000, 96 Daedalus 876 (1967).

[82] 409 U.S. at 339.

[83] Id. at 344.

It is submitted that Douglas' analysis approaches the issues involved in *Couch* from the proper perspective. The broad investigatory powers of the IRS need to be counterbalanced by constitutional limits protecting individuals from far-reaching governmental investigation.[84] Douglas, however, failed to delineate the scope of the constitutional interests which he would include within this sphere of privacy. This lack of definition clouds the issue as to the scope of investigatory authority Douglas would allow the IRS. Thus, while Douglas did determine that a right of privacy exists which would provide taxpayers broad protection from IRS investigation, he has failed to limit the scope of the right in such a way as to accommodate the apparently legitimate investigatory requirements of the IRS.

It is submitted, however, that Douglas' failure to explicate further his position does not emasculate his position, and does not make the majority's approach more convincing. While the majority has taken into account the investigatory requirements of the IRS, it has failed to provide adequate safeguards for individual civil liberties. The majority asserted in this regard that the tax system created "the very situation where obligations of disclosure exist" and accordingly held that "petitioner here cannot reasonably claim, either for Fourth or Fifth Amendment purposes, an expectation of protected privacy or confidentiality."[85]

Furthermore, the implications of the majority's position may extend beyond the facts of third-party possession present in *Couch*. The language employed by the majority in *Couch* regarding petitioner's lack of expectation of privacy concerning business records—specifically "information therein is required in an income tax return"[86] and "obligations of disclosure exist"[87]—may be significant in this regard. This particular language suggests that the Court might have been moving toward a recognition of the so-called "required records" doctrine in the tax area.[88] The required records doctrine asserts that records which are required to be kept as a result of certain governmental regulations are not susceptible to claims of privacy. The implications of this position would be that all financial records that bear on tax liability would be within the

[84] Justice Harlan, concurring in California v. Byers, 402 U.S. 424, 453 (1971), indicated that there must be a balance struck between taxpayer's constitutional rights and the investigatory powers of the IRS:

> [Although] compelled self-reporting is certainly essential to the taxing power . . . the Fifth Amendment requires some restriction on the efficacy with which the government may seek to maximize both non-criminal objectives through self-reporting schemes and enforcement of criminal sanctions.

[85] 409 U.S. at 335-36.

[86] Id. at 335.

[87] Id.

[88] See generally Edgar, Tax Records, The Fifth Amendment and the Required Records Doctrine, 9 St. Louis L.J. 502 (1965); Comment, 12 B.C. Ind. & Com. L. Rev. 1176 (1971); Comment, 65 Colum. L. Rev. 681 (1965); C. McCormick, Evidence § 142 (2d ed. 1972); 8 J. Wigmore, Evidence § 2259 (J. McNaughton rev. 1961).

public domain, and therefore the privilege against self-incrimination would be unavailable to taxpayers.[89] The leading case formulating the required records doctrine was *Shapiro v. United States*.[90] There the Supreme Court held that books and records required to be kept under the Emergency Price Control Act of 1942[91] became "public records," and were therefore subject to subpoenae, which could not be effectively challenged by assertions of self-incrimination.

The Supreme Court has not applied the required records *Shapiro* doctrine per se to tax cases.[92] However, a number of lower federal courts have extended the doctrine to tax cases.[93] Other lower federal courts and legal commentators have supported the proposition that the required records doctrine should not be utilized in this area.[94] There are several convincing reasons to support the contention that the *Shapiro* doctrine should not be applied in tax cases. In the first place, *Shapiro* involved an emergency measure and the national interest required strict enforcement. Secondly, notwithstanding emergency conditions, *Shapiro* was decided by a five to four vote. Thirdly, in *Shapiro* the Supreme Court did not cite the Internal Revenue Code among the twenty-six regulatory statutes to which the required records doctrine might apply.[95] Fourthly, the record-keeping requirements of the tax regulations are extremely broad and general.[96] Practically every record related to taxable income may be deemed a record required by the tax laws to be kept. Under the *Shapiro* doctrine taxpayers could be compelled to disclose the entire range of their financial affairs, regardless of the incriminatory nature of the item demanded.[97] This could potentially affect tens of millions of individual citizen taxpayers, for unlike the limited investigatory powers of many agencies which have less extensive jurisdiction, a majority of adult citizens are potential targets for IRS investigation. In order to justify applying the required records doctrine to the tax area the Court would have to determine

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[89] See Mansfield, supra note 78, at 148-49.

[90] 335 U.S. 1 (1948).

[91] 50 U.S.C. § 901 (1970)..

[92] See Comment, 12 B.C. Ind. & Com. L. Rev. 1176, 1197 (1971); Pemberton, Tax Fraud Investigations and the Required Records Doctrine, 46 Taxes 209, 211 (1968).

[93] See, e.g., United States v. Clancy, 276 F.2d 617 (7th Cir. 1960); Beard v. United States, 222 F.2d 84 (4th Cir. 1955); Falsone v. United States, 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S. 864 (1953).

[94] See, e.g., Blumberg v. United States, 222 F.2d 496 (5th Cir. 1955); United States v. Remolif, 227 F. Supp. 420 (D. Nev. 1964); In re Daniels, 140 F. Supp. 322 (S.D.N.Y. 1956). See also Lipton, Constitutional Rights in Criminal Tax Fraud Investigations, 45 F.R.D. 323 (1968); Comment, The Relationship Between Civil and Criminal Tax Fraud and Its Effect on the Taxpayer's Constitutional Rights, 12 B.C. Ind. & Com. L. Rev. 1176 (1971).

[95] See Comment, supra note 94, at 1197.

[96] Int. Rev. Code of 1954, § 6001 states in pertinent part:

> [The Secretary or his delegate] may require any person . . . to make such returns, render such statements, or keep such records as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title.

[97] Miller, supra note 73, at 694.

that the taxing power itself is sufficiently important to justify compelled self-incrimination.[98] Such a determination would have severe repercussions upon civil liberties. The notion that because disclosure is required by law the Fifth Amendment privilege does not apply, if extended to its full logical reach, is capable of entirely destroying the privilege. As one commentator stated, "[a] government that can roam at will through all records that it may demand to inspect because it may demand that they be kept is not a government that is bound to respect individual privacy."[99]

It is important to note that the Court in *Couch* did not explicitly refer to the required records doctrine. In the context of *Couch* this would not have been necessary since the immediate impact of that decision would only affect the constitutional rights of individuals who had voluntarily transferred incriminatory records to a third party. However, as many taxpayers ordinarily use tax preparers to aid them in the preparation of their tax returns, the result may be the substantial equivalent of a direct recognition of the required records doctrine.[100] The potential for an implicit recognition of the *Shapiro* required records doctrine, therefore, is present in *Couch*. A recognition of this doctrine in toto in the tax area would have the formidable effect of nullifying every taxpayer's expectation of privacy and Fifth Amendment privileges in IRS investigations.[101]

Petitioner placed heavy reliance on the landmark case of *Boyd v. United States*,[102] which held that compelling a defendant to produce invoices for goods improperly imported was a violation of the defendant's Fourth and Fifth Amendment rights. The language of the *Boyd* Court was very broad: "any forcible extortion of a man's own testimony or his private papers to be used as evidence to convict him of a crime" violated the Fourth Amendment's prohibition against unreasonable searches and seizures and the Fifth Amendment's privilege against self-incrimination.[103] On its face *Boyd* suggested a very broad restriction on the government's ability to compel disclosure of private records and papers.[104] Justice Douglas, dissenting in *Couch*, agreed with petitioner that the basic thrust of *Boyd*, the interplay of the Fourth and Fifth Amendments, delineated a sphere of privacy which must be protected against governmental intrusion and which should apply in the context of the facts in *Couch*.[105] Justice Marshall, also dissenting in *Couch*, as-

[98] See Justice Harlan's concurring opinion in California v. Byers, 402 U.S. 424, 440 (1971).

[99] McKay, supra note 78, at 217.

[100] See Duke, Prosecutions for Attempts to Evade Tax: A Discordant View of a Procedural Hybrid, 76 Yale L.J. 1, 50-51 (1966): "[A] third party summons is . . . a potent device with which to circumvent the taxpayer's exercise of his Fifth Amendment rights."

[101] See generally Mansfield, supra note 78, at 145-51.

[102] 116 U.S. 616 (1886).

[103] Id. at 630.

[104] See Comment, 65 Colum. L. Rev. 681, 684 (1965).

[105] 409 U.S. at 338-39, 343.

serted that *Boyd* could be interpreted as holding that the Fifth Amendment prohibited the use of private papers in a criminal proceeding over the author's objection. He asserted that the language of the Fifth Amendment itself could be construed in that way.[106]

The majority refused to accept the sweeping language of *Boyd* as controlling in *Couch*.[107] *Boyd* has not been liberally applied by the Court.[108] A narrow reading of the case has been utilized by the Court to ensure that the government's hands are not tied in areas of governmental regulation. In distinguishing *Couch* from *Boyd* the Court stated that in *Boyd* the production order was directed at the accused himself, whereas in *Couch* the accused was attempting to assert the privilege over a third person.[109] Moreover, the majority stated that "court decisions applying *Boyd* have largely been in instances where possession and ownership cojoined."[110] Even in his dissent, Justice Douglas conceded that decisions subsequent to *Boyd* have "refused to apply the privilege to the introduction of 'testimonial' evidence where the author no longer has any property rights or a valid claim to confidentiality or privacy."[111] The majority's narrow interpretation of *Boyd* will render *Boyd* a rather weak precedent in the tax area, especially in those instances where the taxpayer has given his records to a third party.[112] It is submitted that while the language in *Boyd* might well be criticized for being too broad, *Boyd,* nevertheless, presents a potentially significant argument in favor of taxpayers' constitutional rights to which the majority's position does not give sufficient weight. For, as Douglas suggested, the concept set out in *Boyd* of a sphere of privacy subsuming documents which the taxpayer has authored may create a viable check on the possibly excessive investigatory powers of the IRS.

In addition to her assertion of the privilege against self-incrimination, Mrs. Couch attempted to argue that "the confidential

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[106] Id. at 345 (dissenting opinion). Justice Marshall stated: "The use of papers over objection 'compel[s] [the author] in [a] criminal case to be a witness against himself.' " Id. (dissenting opinion).

[107] Id. at 330-31.

[108] See Comment, 65 Colum. L. Rev. 681 (1965)..

[109] 409 U.S. at 330.

[110] Id. See, e.g., Hill v. Philpott, 455 F.2d 144 (7th Cir. 1971); United States v. Cohen, 388 F.2d 464 (9th Cir. 1967); United States v. Judson, 322 F.2d 460 (9th Cir. 1963).

[111] 409 U.S. at 340 n.2.

[112] It is submitted that instead of so restricting the scope of *Boyd,* the Court could have limited it in the manner suggested by Justice Marshall in his dissent. Marshall suggested that the broad language in *Boyd,* indicating that an owner of incriminating documents could rely in all cases upon the privilege against self-incrimination, could be limited, and a more sufficient analysis substituted. He suggested four criteria by which to determine if an assertion of ownership would be sufficient to enable an accused to assert the Fifth Amendment privilege over documents not within his possession. These criteria were: (1) the nature of the evidence; (2) the ordinary operations of the person to whom the records were given; (3) the purposes for which the records were transferred; and (4) the measures that the author took to insure the privacy of the records. Id. at 350-51 (dissenting opinion).

nature of the accountant-client relationship and her resulting expectation of privacy in delivering the records protected her, under the Fourth and Fifth Amendments, from their production."[113] The majority held that she could not assert this constitutional protection: "[T]here can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required on an income tax return."[114] The Court's discussion of petitioner's claim of expectation of privacy based upon the confidential nature of the accountant-client relationship was brief, indicating that the Court believed it had adequately dealt with the matter in its earlier analysis of the self-incrimination issue.

It is important to note that petitioner did not assert an evidentiary accountant-client privilege, but instead presented a claim of privacy based upon the confidential nature of an accountant-client relationship.[115] The two assertions are distinguishable. An evidentiary privilege is a privilege that is based upon the existence of a particular relationship (*e.g.*, husband-wife, attorney-client), and which comes into existence at such time as the requisite relationship is formed by the two parties. Its purpose is to protect certain interests or relationships which "are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice."[116] Petitioner's claim of an expectation of confidentiality stemming from the confidential nature of a relationship, on the other hand, was based upon the analysis of two factors: (1) the existence of an unprivileged relationship; and (2) the reasonableness of the parties' intent to ensure confidentiality in the particular situation. The Court, as previously stated, rejected petitioner's expectation of confidentiality claim, but the Court's apparent rejection of an evidentiary accountant-client privilege may be more significant.

In its discussion rejecting petitioner's claim of a protectable expectation of privacy based upon the nature of the accountant-client relationship, the Court stated: "Although not in itself controlling, we note that no confidential accountant-client privilege exists under federal law, and no state created privilege has been recognized in federal cases."[117] It is significant that the Supreme Court

[113] Id. at 335.

[114] Id.

[115] Justice Marshall's dissenting opinion is particularly helpful on this point. He stated:

> [W]e must consider the ordinary operations of the person to whom the records are given. A transfer to a lawyer is protected, not simply because there is a recognized attorney-client [evidentiary] privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given. . . . It would be relevant to a discussion about the expectation of privacy that an [evidentiary] accountant-client privilege existed under local law, but not determinative. Petitioner disclaimed reliance on such a[n] [evidentiary] privilege.

Id. at 350-51 (dissenting opinion).

[116] See C. McCormick, Evidence § 73 (2d ed. 1972).

[117] 409 U.S. at 335.

has adopted the position of the lower federal courts that no evidentiary accountant-client privilege will be recognized in federal courts.[118] This is apparently the first time the Supreme Court has indicated its adoption of this position.

The leading case formulating this policy of non-recognition in the federal courts was *Falsone v. United States*.[119] In *Falsone*, as in *Couch*, an IRS agent served a summons on an accountant to compel the accountant to testify and to bring records concerning a certain taxpayer's liability. The *Falsone* case arose in Florida, which, like several other states, recognized an evidentiary accountant-client privilege by statute.[120] The petitioner in *Falsone* sought to use the state-created privilege to bar production of the records from IRS investigation. The court held, on procedural grounds, that since the records were sought in the course of a federal administrative agency investigation, rather than in a civil case, the state's law of evidence was not controlling and that therefore the state-created privilege would not be recognized.

The apparent adoption of the *Falsone* position by the Court means that a taxpayer submitting his records to an accountant will not be protected from disclosure by the accountant-client relationship, but must instead assert his privilege against self-incrimination. It is submitted that this is the preferable approach to third party possession situations. The Court in *Falsone* did not enumerate the underlying policy considerations in favor of and opposing the recognition of an accountant-client privilege. However, legal commentators have sought to elucidate these policies. The policy in favor of an accountant-client privilege rests on the belief that such confidential communications should be free from judicial scrutiny, just as certain attorney-client communications are privileged.[121] The existence of an accountant-client privilege might encourage taxpayers to give all their documents to the accountant so that his work product would be more accurate.[122] In addition, growing concern in recent times with the increase of the government's scope of investi-

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[118] See, e.g., Sale v. United States, 228 F.2d 682 (8th Cir.), cert. denied, 350 U.S. 1006 (1956); Falsone v. United States, 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S. 864 (1953); Gariepy v. United States, 189 F.2d 459 (6th Cir. 1951). However, a kind of accountant-client privilege may exist where an accountant works for a law firm, but this is in reality an extension of the traditional attorney-client privilege. United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). On the other hand, an attorney-client privilege may not be available when an attorney is acting in the capacity of an accountant. In re Fish, 51 F.2d 424 (S.D.N.Y. 1931).

[119] 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S. 864 (1953).

[120] Fla. Stat. Ann. § 473.15 (1952). See generally 8 J. Wigmore, Evidence § 2286 (J. McNaughton rev. 1961), which contains a listing of state statutes pertaining to an accountant-client privilege.

[121] See generally Cohen, Accountant's Workpapers in Federal Tax Investigations, 21 Tax L. Rev. 183 (1966); Note, 66 Mich. L. Rev. 1264 (1966); Note, 46 N.C.L. Rev. 419 (1968); 8 J. Wigmore, supra note 120, § 2285.

[122] See Note, 66 Mich. L. Rev. 1264, 1271 (1966).

gation of citizens has no doubt supported the creation of an accountant-client privilege.[123] Recent alleged attempts by the administration to politicize the IRS and to use tax liability investigations for harassment of political opponents[124] might lend support to a recognition of an accountant-client privilege. The recognition of an accountant-client privilege would be of great benefit to taxpayers who wish to keep their records from IRS investigations. Documents transferred by a taxpayer to an accountant for purposes of tax preparation could not be subpoenaed simply because the taxpayer no longer had possession of the documents.

There has been much criticism adverse to the recognition of an accountant-client privilege.[125] For example, the report of the American Bar Association's Committee on the Improvement of the Law of Evidence states:

> Of recent years there have appeared on the statute books of several Legislatures certain novel privileges of secrecy. Their history has not been traced. . . . [T]he demand for these privileges seems to have been due in part to a pride in [accountants'] organizations and a desire to give [accounting] some mark of professional status and in part to a false analogy to the long established privilege for certain professional communications. . . . [T]he correct tendency would be to cut down on the scope of existing privileges instead of creating new ones. . . .[126]

The Model Code of Evidence, adopted in 1942 by the American Law Institute, the Uniform Rules of Evidence, approved in 1953 by the National Conference on Uniform State Laws, and the newly proposed Federal Rules of Evidence, introduced in 1973, exclude an accountant-client privilege.[127] The opponents of the privilege criticize it, because it inhibits the ability of the courts to have a complete hearing of all the facts in a particular investigation. In this view the necessity for completeness and candor are thought to outweigh the policy in favor of a confidential accountant-client privilege.[128] The *Couch* decision strongly reaffirms this policy position as the dominant consideration in regard to the accountant-client privilege. It is submitted that this is the correct determination. An evidentiary privilege would be, perhaps, too inflexible, and would provide too

[123] See C. McCormick, supra note 116, § 77.

[124] See Auditing the IRS, Business Week, Sept. 1, 1973, at 64.

[125] Id. See also 8 J. Wigmore, supra note 120, § 2287. Note, 66 Mich. L. Rev. 1264, 1265 (1966), states: "Because any communications privilege precludes judicial access to relevant information, courts and commentators generally do not receive them enthusiastically."

[126] See 8 J. Wigmore, supra note 120, § 2286.

[127] C. McCormick, supra note 116, § 77; Federal Rules of Evidence, 56 F.R.D. 183, 230-34 (1973).

[128] Id. See also Note, 66 Mich. L. Rev. 1264 (1966).

broad a limitation upon the investigatory powers of the IRS. The preferable approach would be to analyze each case upon self-incrimination and privacy grounds.[129]

In conclusion, the majority's reliance upon an analysis which focused upon the concepts of possession and constructive possession did not establish a clear test for determining the ability of an individual under IRS investigation to assert his privilege against self-incrimination. While Justice Brennan's opinion did present a clearer analysis, it, as well as the majority's opinion, did not give adequate weight to the taxpayer's needs for privacy in light of the extensive investigatory capabilities of the IRS. The thrust of the *Couch* opinion indicates that the Court may be moving toward the adoption of the required records doctrine. If this doctrine is accepted, it will mean that the constitutional right to privacy envisioned by Justice Douglas and by the 1886 *Boyd* decision will be destroyed, and the privilege against self-incrimination, at least in the tax area, will be devitalized. The Court's apparent rejection of an evidentiary accountant-client privilege, on the other hand, will allow a more flexible, case-by-case analysis of the important issue of individual privacy present in third party possession cases.

MARILYN B. CANE

Banks and Banking—Incidental Powers of National Banks Under the National Bank Act—Authority of National Banks to Operate Travel Agencies—Judicial Review of Administrative Regulations —*Arnold Tours, Inc. v. Camp.*[1]—Plaintiffs, Arnold Tours, Inc. and forty-one other independent travel agents of Massachusetts, brought a class action against defendants William B. Camp, Comptroller of

[129] C. McCormick, supra note 116, § 77. It may be interesting to note that in *Couch* petitioner-taxpayer had her accountant transfer her records to her attorney after the summons had been issued. Petitioner might then have claimed that an attorney-client privilege was the only evidentiary privilege asserted by petitioner. Although the Court did not go into depth on the issue of attorney-client privilege in the *Couch* situation, the concept is an intriguing and significant one. An attorney-client privilege may exist in tax cases where the nature of the material requested constitutes a privileged confidential communication. See, e.g., Boucher v. United States, 316 F.2d 451 (8th Cir. 1963); In re Fahey, 300 F.2d 383 (6th Cir. 1961); United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). However, the courts distinguish between books and records given to the attorney and workpapers made in confidence for the purpose of obtaining legal advice. See Note, The Attorney and His Client's Privileges, 71 Yale L.J. 539 (1965). The latter comes under the protection of the attorney-client privilege while the former fits into the "preexisting document rule." The "pre-existing document rule" is an exception to the attorney-client privilege which excludes from the privilege documents created prior to the establishment of the attorney-client relationship or those created during the attorney-client relationship but not intended to be confidential. See id. at 544. Since the records in question in the *Couch* case were created prior to the attorney-client relationship, they fell within the "pre-existing document rule" and as such were not privileged. Therefore Mrs. Couch's transfer of the records from her accountant to her attorney was futile if viewed as an attempt to utilize the attorney-client privilege.

[1] 472 F.2d 427 (1st Cir. 1972).