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CONSTITUTIONAL LAW: INVOKING THE FIFTH AMENDMENT TO AVOID THE SUMMONS—POSSESSION OF TAX RECORDS IS THE TEST

Couch v. United States, 409 U.S. 322 (1973)

Respondent Internal Revenue agents requested federal district court enforcement¹ of a section 7602 summons² ordering petitioner's accountant to produce tax records in his possession. Petitioner intervened,³ alleging that enforcement of the order would violate her fifth amendment privilege against compulsory self-incrimination.⁴ The Court of Appeals for the Fourth Circuit affirmed⁵ the district court order enforcing the summons.⁶ On certiorari, the Supreme Court of the United States affirmed and HELD, petitioner's proprietary interest in records submitted to and retained by her accountant was insufficient to invoke the privilege.⁷

Originally intended to prevent the acquisition of confessions by torture,⁸ the fifth amendment privilege against compulsory self-incrimination insures that persons whose statements may subject them to criminal prosecution will not be compelled to testify.⁹ Noting the similarity between parole testimony and private records, the Supreme Court in *Boyd v. United States*¹⁰ held that

1. INT. REV. CODE of 1954, §7402(b) provides in part: "If any person is summoned under the internal revenue laws . . . to produce books, papers or other data, the district court of the United States for the district in which such person resides . . . shall have jurisdiction by appropriate process to compel such . . . production" See INT. REV. CODE of 1954, §7604(a).

2. INT. REV. CODE of 1954, §7602 provides in part: "For the purpose of ascertaining the correctness of any return . . . 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; (2) To summon the person liable for tax . . . or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . or any other person . . . to produce such books, papers, records, or other data."

3. See FED. R. CIV. P. 24(a)(2). To intervene in enforcement proceedings, a taxpayer must show he has a "protectable interest" in the records sought. *Donaldson v. United States*, 400 U.S. 517 (1971). See generally Note, *Is the Odd Man Out: The Taxpayer's Right To Intervene in Judicial Enforcement of a Summons Directed Against a Third Party*, 1971 UTAH L. REV. 561.

4. See U.S. CONST. amend. V, providing in part: "No person . . . shall be compelled in any criminal case to be a witness against himself."

5. *United States v. Couch*, 449 F.2d 141 (4th Cir. 1971).

6. The district court (W.D. Va.) opinion is not reported, 409 U.S. 322, 324 n.3 (1973).

7. 409 U.S. 322 (1973) (Brennan, J., concurring separately; Douglas & Marshall, JJ., dissenting).

8. See, e.g., 8 J. WIGMORE, EVIDENCE §2263 (McNaughton rev. 1961).

9. See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964). The fifth amendment guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Id.* at 8. *Accord*, *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

10. 116 U.S. 616 (1886). The *Boyd* defendants owned and possessed invoices that evidenced their fraudulent import activities. During forfeiture proceedings, the Government,

"any forcible and compulsory extortion of a man's own . . . private papers to be used as evidence to convict him of crime" violates the fifth amendment.¹¹ With minor exceptions,¹² subsequent cases have continued to apply the *Boyd* protection to private records¹³ held in a personal capacity.¹⁴

During taxpayer examinations¹⁵ Internal Revenue agents are empowered to subpoena records used in preparation of tax returns by issuing a section

citing an 1874 revenue act, argued that if the defendant did not produce the incriminatory documents, the allegations against them should be deemed admitted.

11. *Id.* at 630. The Court also held that the invoices were protected by the fourth amendment because "[t]he compulsory production of a man's private papers to establish a criminal charge against him . . . effects the sole object and purpose of search and seizure." *Id.* at 622. A search for and seizure of the invoices, as "mere evidence," would have been unreasonable because the Government was not entitled to possession of the documents. *Id.* at 623. The mere evidence rule was negated by the Court in *Warden v. Hayden*, 387 U.S. 294 (1967), with the as yet untested exception that there are "items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." *Id.* at 303. See 409 U.S. 343 n.5 (Douglas, J., dissenting opinion).

12. The fifth amendment privilege does not extend to documents subject to inspection as "required records." This doctrine is traced to *Shapiro v. United States*, 335 U.S. 1 (1948), where the Court sanctioned compulsory production of an individual's private records that were required under the Price Control Act. Although some courts have employed the doctrine to hold that tax records will not be protected, e.g., *United States v. Willis*, 145 F. Supp. 365, 369 (M.D. Ga. 1955), the Supreme Court has not ruled on the doctrine's application to tax records and the Internal Revenue Service apparently does not rely on the doctrine in tax cases. See *Stuart v. United States*, 416 F.2d 459, 462 n.2 (5th Cir. 1969). See also Lipton, *Constitutional Protection for Books and Records in Tax Fraud Investigations*, 1 N.Y.U. 29TH INST. ON FED. TAX, 945, 954 (1971); Weiss, *Do Taxpayers Have Constitutional Rights?*, 46 TAXES 494, 495 (1968).

13. Unless records are testimonial or communicative in nature the protections of the fifth amendment will not apply. *Schmerber v. California*, 384 U.S. 757 (1966). In the tax area, journals, ledgers, check stubs, cancelled checks, and copies of bills and invoices may be privileged records. See Lipton, *supra* note 12, at 949.

14. See, e.g., *Gilbert v. California*, 388 U.S. 263, 267 (1967) (although ruling that a handwriting exemplar would not be protected by the fifth amendment, the Court upheld the extension of the privilege to private papers). Whereas the privilege is available to natural persons, it will be denied to large, impersonal organizations including, for example, corporations, large partnerships, and labor unions. *United States v. White*, 322 U.S. 694 (1944); *United States v. Wilson*, 221 U.S. 361 (1911). Reasonably sized general partnerships have been allowed the protection. *United States v. Lawn*, 115 F. Supp. 674 (S.D.N.Y. 1953). In addition, records kept by an individual in a capacity as representative of an "impersonal organization," rather than in a personal capacity cannot be the subject of the privilege. *Rogers v. United States*, 340 U.S. 367, 372 (1951). See generally Lipton & Petrie, *Constitutional Safeguards and Corporate Records*, 1 N.Y.U. 23D INST. ON FED. TAX. 1315 (1965); Ritholz, *The Commissioner's Inquisitorial Powers*, 45 TAXES 782 (1967).

15. In IRS validation of income tax returns, an Audit Division agent examines the return to determine its accuracy. If evidence of a criminal tax violation is found, an Intelligence Division agent also investigates the return. See B. GEORGE, *DEFENDING TAX FRAUD PROSECUTIONS* 27-55 (1970). When a deficiency is found the agents recommend assessment of the deficit with either a civil or criminal penalty or both. See generally Duke, *Prosecutions for Attempts To Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1 (1966).

7602 summons.¹⁶ The fifth amendment may be available as a defense¹⁷ to the mandatory production of these documents, since they are possible sources of evidence in a criminal tax fraud prosecution.¹⁸ Successful invocation of the privilege in any given case is dependent upon the relationship between the taxpayer and the records. In an analysis of that relationship, authorship, ownership, and possession are important factors.¹⁹

It is clear that tax records prepared by, owned by, and in the undisputed possession of an individual taxpayer are protected by the *Boyd* extension of the fifth amendment.²⁰ On the other hand, records incriminatory to the taxpayer but neither owned by him nor in his possession have not been protected by the privilege.²¹ Since the taxpayer has no degree of control over such records, no compulsion is exerted on him when another is forced to surrender the documents.²²

16. See note 2 *supra*. See also Burroughs, *The Use of the Administrative Summons in Federal Tax Investigations*, 9 VILL. L. REV. 371 (1964).

17. See generally Note, *Criminal Tax Fraud Investigations: Limitations on the Scope of the Section 7602 Summons*, 25 U. FLA. L. REV. 114, 127-34 (1972). A taxpayer who decides to challenge the validity of a summons must appear at the time and place designated on the summons and state his good faith objections. *Id.* at 116-18. Enforcement of a challenged summons must be sought in a federal district court. INT. REV. CODE of 1954, §§7402(h), 7604(a). See note 1 *supra*. The enforcement proceeding provides the taxpayer with an appealable judicial determination of the summons' validity.

18. In tax fraud prosecutions the Government must show a substantial deficiency in payment of taxes due and a willful attempt to conceal the deficit. INT. REV. CODE of 1954, §7201. If the Government can prove the return was false, the willfulness requirement will be inferred from the nature of the tax understatement, the taxpayer's experience in tax matters, his signature on the return, and the submission of the return to the IRS. Thus, once the Government can use a taxpayer's records to prove a deficiency exists, a *prima facie* case is established. See Duke, *supra* note 15, at 8-9.

19. See generally Barney, *The Protection of Documents in Criminal Tax Fraud Cases*, 44 TAXES 626 (1966).

20. See, e.g., *Blumberg v. United States*, 222 F.2d 496 (5th Cir. 1955) (compulsory production of taxpayer's books and records for use in criminal prosecution held violative of privilege against self-incrimination). *Accord*, *United States v. Zakutansky*, 401 F.2d 68 (7th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969); *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967).

21. See *United States v. White*, 322 U.S. 694 (1944) (privilege not applicable where subpoena directed to labor union for union records); *United States v. Bank of Commerce*, 405 F.2d 931 (3d Cir. 1969) (bank records of taxpayer's deposits and withdrawals not protected). Work papers and other accountant-owned documents used in preparation of tax returns are not protected by a taxpayer's fifth amendment rights. *Sale v. United States*, 228 F.2d 682 (8th Cir.), *cert. denied*, 350 U.S. 1006 (1956). See generally Cohen, *Accountants' Workpapers in Federal Tax Investigations*, 21 TAX L. REV. 183 (1966); Fahey, *Testimonial Privilege of Accountant in Federal Tax Fraud Investigations*, 17 TAX L. REV. 491 (1962).

22. *Burdeau v. McDowell*, 256 U.S. 465 (1921) (records permitted to be subpoenaed from person who stole them from the accused without government knowledge or complicity); *Johnson v. United States*, 228 U.S. 457 (1913) (books and records of bankrupt defendant, which had been transferred to a trustee, were allowed as evidence in defendant's prosecution for concealing funds). If the fifth amendment were used to protect documents that were incriminatory to any person, regardless of whether there was a relationship between the records and the claimant, the privilege "might be used to put a stop to the examination of

The dissociation of ownership and possession that accompanies the transfer of taxpayers' records to attorneys or accountants has created special problems due to privileges between clients and professionals. When a taxpayer transfers his private records to an attorney pursuant to a legitimate request for legal advice, the attorney-client privilege generally prevents enforcement of a section 7602 summons addressed to the attorney.²³ Such is not the situation when the taxpayer transfers the same records to an accountant, since no accountant-client privilege existed at common law.²⁴ Even state enactments of such privileges²⁵ have been disregarded by federal courts in tax prosecutions.²⁶

In light of the apparent vulnerability of records in the possession of an accountant, it became common practice for a taxpayer under investigation to have any records in the accountant's possession transferred to himself or his attorney after service of the summons.²⁷ This avoidance scheme was effectively negated by a line of cases beginning with *United States v. Zakutansky*²⁸ where such a transfer was labeled "a mere attempt to thwart the government investigation."²⁹ After *Zakutansky*, documents not protected when the summons was served cannot become privileged by a subsequent transfer.³⁰

Nevertheless, *Zakutansky* failed to determine whether a taxpayer's private records, that would be protected if in his possession, remain privileged when transferred to an accountant. Where the records were only briefly out of the taxpayer's possession some courts have employed a constructive possession theory to uphold the taxpayer's fifth amendment privilege. For example, in *Stuart v. United States*³¹ the taxpayer permitted temporary transfer of her records to her accountant's office for an Internal Revenue audit. During the

every witness." *Hale v. Henkel*, 201 U.S. 43, 48 (1906).

23. *In re Fahey*, 300 F.2d 383 (6th Cir. 1961). Nevertheless, it has been held that the privilege is not available when the attorney acts as an accountant or employs an accountant on his client's behalf. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961); *Himmelfarb v. United States*, 175 F.2d 924 (9th Cir.), *cert. denied*, 388 U.S. 860 (1949). The same result has been reached when the records in the attorney's possession are the accountant's workpapers. *United States v. White*, 477 F.2d 757 (5th Cir. 1973); *Bouschor v. United States*, 316 F.2d 451 (6th Cir. 1961). See note 21 *supra*. See generally Hochman & Salkin, *Attorney-Client Privilege in Criminal Tax Cases*, 43 TAXES 182 (1965).

24. See, e.g., *Brown v. United States*, 224 F.2d 845 (6th Cir.), *cert. denied*, 348 U.S. 905 (1955); *Garipey v. United States*, 189 F.2d 459 (6th Cir. 1951). See generally Comment, *Confidential Communications Between Accountant and Client*, 6 DRAKE L. REV. 92 (1957).

25. See Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1247 n.140 (1962).

26. *United States v. Balistrieri*, 403 F.2d 472, 481 (7th Cir. 1968), *vacated on other grounds*, 395 U.S. 710 (1969); *Falsone v. United States*, 205 F.2d 734 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953).

27. See, e.g., *Barnett, Procedures in Tax Fraud Investigations*, 47 TAXES 807, 817 (1969).

28. 401 F.2d 68 (7th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969); *accord*, *United States v. Widelski*, 452 F.2d 1 (6th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972); *United States v. Lyons*, 442 F.2d 1144 (1st Cir. 1971); *United States v. Cote*, 326 F. Supp. 444 (D. Minn. 1971), *aff'd*, 456 F.2d 142 (8th Cir. 1972).

29. *United States v. Zakutansky*, 401 F.2d 68, 72 (7th Cir. 1968).

30. 409 U.S. at 329 n.9.

31. 416 F.2d 459 (5th Cir. 1969).

review the agent found indications of tax fraud and issued a section 7602 summons to the accountant. The court found the accountant was a mere "custodial bailee" and the taxpayer was in constructive possession of the documents. Hence, the subpoena was quashed by the court.³²

In cases in which taxpayers' records have been used by an accountant over a considerable period of time, courts have reached conflicting results. In *United States v. Merrell*³³ the taxpayer's records in the possession of his accountant were not protected from a section 7602 summons directed to the accountant. The court reasoned the accountant was the only person compelled to produce the documents, since as sole addressee of the summons he was the only person threatened by contempt proceedings. Because the taxpayer was under no compulsion he could not invoke the privilege. Conversely, in *United States v. Tsukuno*³⁴ the taxpayer was allowed to invoke the privilege to prevent acquisition of his personal books and records even though the records were in the possession of the accountant for preparation of the taxpayer's tax return. The *Tsukuno* court noted "a person's Fifth Amendment rights are not so lacking in substance that they disappear if a government agency can locate and subject to process records temporarily out of his immediate possession."³⁵

Resolving this controversy, the Court in the instant case ruled that petitioner could not invoke the fifth amendment because she had divested herself of possession of the documents.³⁶ Since the summons was addressed to her accountant, petitioner was not personally subject to the compulsion of contempt proceedings.³⁷ Acknowledging the validity of constructive possession but finding it absent in the instant facts,³⁸ the Court stated "actual possession of documents bears the most significant relationship to Fifth Amendment protections" ³⁹ *Boyd* was distinguished on grounds that the person asserting fifth amendment rights in that case, unlike the instant petitioner, possessed as well as owned the documents.⁴⁰

Aside from the emphasis on possession as the determinative factor in enforcing the summons, the instant Court balanced petitioner's reasonable expectation of privacy in the records with "the legitimate interest of society in

32. *Id.* at 462-63. See also *Schwimmer v. United States*, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956) (the taxpayer's records had been stored in boxes in the warehouse of the addressee of the summons, and the Court held that, since the addressee was merely a "naked possessor," the constructive possession of the taxpayer was sufficient to invoke the privilege).

33. 303 F. Supp. 490 (N.D.N.Y. 1969).

34. 341 F. Supp. 839 (N.D. Ill. 1972).

35. *Id.* at 842.

36. 409 U.S. at 333-35.

37. The fifth amendment privilege was not available to the accountant because, although he was compelled to produce the records, he was not personally incriminated by them. See note 22 *supra*.

38. The Court looked to the accountant's length of possession of the petitioner's records and his "independent status" to confirm the denial of constructive possession. 409 U.S. at 334-35.

39. *Id.* at 333.

40. *Id.* at 330.

enforcement of its laws and collection of the revenues."⁴¹ It concluded that petitioner could not have expected the information given to her accountant for inclusion in a tax return to remain confidential.⁴²

Although the Court disclaimed any intention to frame a per se rule,⁴³ the import of the decision will be to establish possession as the test for fifth amendment protection of personal records.⁴⁴ Such a rule could result in more successful prosecution of tax violations, since acquisition of records in the possession of accountants will lessen government difficulty in proving tax evasions.⁴⁵ Nevertheless, the "possession" rule is not so easily applied. For example, in *Stuart* the summoned records were in the possession of the accountant, yet the court upheld the taxpayer's privilege because the accountant's possession was so transient that he was merely a "custodial bailee."⁴⁶ Although recognizing that a taxpayer may constructively possess records outside his immediate control,⁴⁷ the instant Court specifically refused to define "rightful possession."⁴⁸ To allow a privilege as essential as that secured by the fifth amendment to be determined solely by a term as anomalous as "possession" is an unworkable solution. The cumulative effect of heavy tax fraud penalties⁴⁹ and the uncertain distinction between actual and constructive possession may cause taxpayers desiring to keep records confidential to forego assistance of accountants in preparation of income tax returns.⁵⁰

An examination of a taxpayer's reasonable expectation of privacy rather than a determination of possession should be the standard employed by courts in section 7602 enforcement proceedings.⁵¹ As the instant case indicates, relinquishment of possession of summoned records to an independent accountant for long periods is evidence that the taxpayer no longer expects confidentiality in those records;⁵² however, such relinquishment should be only one of several

41. *Id.* at 336.

42. *Id.* at 335-36.

43. *Id.* at 336 n.20.

44. *See, e.g.,* *United States v. White*, 477 F.2d 757 (5th Cir. 1973), in which it was stated "[t]he lesson to be drawn from *Couch* . . . is that unless the taxpayer is actually in possession of documents sought by the government—or clearly has constructive possession . . . the fifth amendment will not be available. *Id.* at 763.

45. *See, e.g.,* Note, *supra* note 25, at 1249.

46. 416 F.2d 459, 462 (5th Cir. 1969). *Accord*, *Schwimmer v. United States*, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956). *See* text accompanying notes 31, 32 *supra*.

47. "Yet situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." 409 U.S. at 333.

48. *Id.* at 330 n.12.

49. INT. REV. CODE OF 1954, §7201 provides in part: "Any person who willfully attempts . . . to evade or defeat any tax . . . shall . . . be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both . . ." *See also* Duke, *supra* note 15, at 3-7.

50. *See* 409 U.S. at 342 (Douglas, J., dissenting opinion).

51. A reasonable expectation of privacy test would be based on a combination of the fourth and fifth amendments. *See* 409 U.S. at 348-49 (Marshall, J., dissenting opinion).

52. "It is not impossible that petitioner had indeed abandoned her claim to privacy in the papers sought by summons in this case." *Id.* at 351.

factors. As suggested by dissenting Justice Marshall, an analysis of whether an expectation of privacy is justified should include certain specific criteria,⁵³ such as: the nature of the summoned documents, the status of the party to whom they are transferred and his relationship to the accused, the purpose of the transfer, and the procedures taken by the accused to insure the confidentiality of the records.

Although such an analysis may result in increased challenges to section 7602 summons, the adverse effect upon the tax system would not be great. The Internal Revenue Service frequently uses evidence other than taxpayers records to ascertain tax violations.⁵⁴ Even if courts were to adopt an expectation of privacy balancing test, the stigma many citizens attach to invoking fifth amendment rights,⁵⁵ coupled with the large number of taxpayers who voluntarily relinquish their records,⁵⁶ suggests that the courts would not be deluged with challenges to section 7602 summons. Furthermore, since only a small percentage of tax returns audited annually result in criminal tax investigations,⁵⁷ the over-all effect on collection of revenues would appear to be negligible.

The emphasis in *Boyd* was properly on protection of a man's private papers, upon "his indefeasible right of . . . private property" rather than "the breaking of his doors, and the rummaging of his drawers."⁵⁸ The instant Court's strict construction of the fifth amendment and advocacy of the anomalous possession test could lead "to gradual depreciation of the right, as if it consisted more in sound than in substance."⁵⁹ A summons to acquire a taxpayer's records from an accountant should not be enforced absent an analysis of the reasonable expectation of privacy of the taxpayer in those records.

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53. *Id.* at 350-51.

54. Agents use records and testimony of third persons to gather evidence such as increases in a taxpayer's net worth, in the amount spent on non-deductibles, or in bank deposits to prove tax evasion. See generally Barnett, *supra* note 27, at 808-09; Duke, *supra* note 15, at 10-15.

55. "It is often difficult to convince taxpayers . . . that much can be gained by denying the revenue agents' request for access to books and records and refusing to give testimony under oath. Some believe that making a clean breast of things will save them. Others think that antagonizing agents will foredoom them. Some, despite assurances of their counsel, mistakenly believe no other course is open to them. Refusing to cooperate often means invoking the taxpayer's constitutional rights, and many taxpayers share the common feeling of opprobrium that attaches to those seeking the shelter of the Fifth Amendment's privilege against self-incrimination." Fahey, *supra* note 21, at 492.

56. *Id.*

57. In 1968, out of the more than 107 million tax returns filed, the Intelligence Division of the IRS evaluated 123,000 information items, conducted 10,000 preliminary investigations, and made 2,900 full-scale investigations. Only 1,021 cases were finally recommended for prosecution. B. GEORGE, *supra* note 15, at 30.

58. 116 U.S. at 630.

59. *Id.* at 635.