Volume 19 | Issue 1 Article 6

1973

Constitutional Law - Privilege against Self-Incrimination - Compulsory Production of Taxpayer's Business Records in Third Party Possession Held Not Violative of the Fourth and Fifth Amendments

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ments. Such conduct is certainly not entitled to first amendment protection, and its prohibition would not raise overbreadth problems.[58]

It is submitted, however, that the Court's analysis is predicated upon pragmatic considerations. Confronted with a problem uniquely local in nature, the Court demonstrated its deference to local interests by effectively placing the task of defining what sexual performances will be allowed in bars and nightclubs in the hands of local and state authorities.[59] Yet significantly it has not closed the door to judicial review, and its caveat clearly indicates that such state regulation is subject to scrutiny, at least to the extent that it clearly abuses first amendment rights.

E. R. Harding

CONSTITUTIONAL LAW — PRIVILEGE AGAINST SELF-INCRIMINATION — COMPULSORY PRODUCTION OF TAXPAYER'S BUSINESS RECORDS IN THIRD PARTY POSSESSION HELD NOT VIOLATIVE OF THE FOURTH AND FIFTH AMENDMENTS.

Couch v. United States (U.S. 1973)

Petitioner Couch challenged the enforcement of an Internal Revenue Service summons[1] issued to her accountant[2] pursuant to an investigation

58. For example, oral copulation in public clearly lacks the sufficient communicative element necessary for conduct to be entitled to first amendment protection under the *O'Brien* rationale. *See* notes 12–14 and accompanying text *supra*. *Cf.* Hearn v. Short, 327 F. Supp. 33, 35 (S.D. Tex. 1971) (Bue, J., concurring).

59. Subsequently, the Court has indicated that more discretion shall also be afforded local authorities in the regulation of obscene materials. *See* Miller v. California, 93 S. Ct. 2607 (1973); Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628 (1973). In the latter case, the Court stated:

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

Id. at 2638.

1. The summons was issued pursuant to § 7602 of the INT. REV. CODE OF 1954, § 7602 which provides in pertinent part:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . the Secretary or his delegate is authorized—
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> 1) To examine any books, papers, records or other data which may be relevant or material to such inquiry;
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> 2) To summon the person liable for tax . . . or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . . .

Id.

2. Couch v. United States, 409 U.S. 322, 323 (1973). Although the summons was issued to petitioner's accountant, the internal revenue agent learned, on the return

of her tax liability. She urged that production of records in her accountant's possession[3] was prohibited by both the fifth amendment privilege against self-incrimination and the confidential nature of the accountant-client relationship as protected by the fourth and fifth amendments. The United States District Court for the Western District of Virginia[4] upheld the summons, finding that the fifth amendment privilege was no bar to its enforcement since the taxpayer was not in possession of the materials described therein.[5] The United States Court of Appeals for the Fourth Circuit affirmed,[6] and the petitioner sought further review.

The United States Supreme Court affirmed, *holding* that the fifth amendment did not prohibit the production of petitioner taxpayer's business records by her accountant and that she had no reasonable expectation of privacy which would bar production under either the fourth or fifth amendment. *Couch v. United States,* 409 U.S. 322 (U.S. 1973).

The origins of the privilege against compulsory self-incrimination date as far back as William the Conqueror,[7] and even today the privilege, embodied in our fifth amendment, raises "questions which go to the roots of our concepts of American criminal jurisprudence."[8] The policies behind the privilege were succinctly stated by Mr. Justice Goldberg in *Murphy v. Waterfront Commission*:[9]

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date of the summons, that the accountant, at petitioner's request, had delivered the subpoenaed materials to petitioner's attorney. *Id.* at 325. The Government then filed a petition to enforce the summons pursuant to INT. REV. CODE OF 1954, § 7402 which provides in part:

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

Id. § 7402(b).

It was in this setting that petitioner intervened, asserting her fourth and fifth amendment claims. 409 U.S. at 325 (1973).

3. More specifically, the petitioner argued that ownership of the subpoenaed records supported a fifth amendment privilege to bar production by compulsory process. Even though her records were in the possession of her accountant, the petitioner maintained they were still her testimony and that if the privilege were denied in these circumstances, the fifth amendment would have no meaning. Brief for Petitioner at 12–13, Couch v. United States, 409 U.S. 322 (1973).

4. The findings of the district court are unreported but are printed in an appendix submitted to the Court. Appendix at 6, Couch v. United States, 409 U.S. 322 (1973).

5. The district court did not consider the fourth amendment issues raised by petitioner since there was no search and seizure involved in the instant case. *Id.* at 11. Apparently, the issue of petitioner's right to a confidential accountant-client relationship and any reasonable expectation of privacy deriving therefrom was not fully developed until the case reached the Supreme Court for the issue was only briefly mentioned in the opinion of the court of appeals. United States v. Couch, 449 F.2d 141, 143 (4th Cir. 1971), *aff'd,* 409 U.S. 322 (1973).

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

7. 8 J. WIGMORE, EVIDENCE § 2250, at 268 (McNaughton rev. 1961) [hereinafter cited as WIGMORE]. *See generally* E. GRISWOLD, FIFTH AMENDMENT TODAY (1955); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U. CIN. L. REV. 671 (1968).

8. Miranda v. Arizona, 384 U.S. 436, 439 (1966).

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

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice . . . our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" . . . our respect for the right of each individual "to a private enclave where he may lead a private life . . ."[10]

The Supreme Court extended the privilege against self-incrimination to include a prohibition against the compulsory production of written materials in addition to the traditional proscription against the eliciting of oral testimony from an accused in *Boyd v. United States*.[11] The claimant in *Boyd* was subpoenaed to produce relevant documents under threat of prejudicial findings of fact.[12] In upholding his objections, the Court held that any forced production of books and papers compelled the owner to be a witness against himself within the meaning of the fifth amendment.[13]

Despite the broad language of *Boyd,* the fifth amendment has not been uniformly applied as a complete bar to the forced production of written materials. Generally, the courts have tested the applicability of the privilege by analyzing the proprietary relationship between the person asserting it and materials sought to be produced.[14] While it is fairly settled that one holding papers for a corporation or unincorporated association cannot invoke the fifth amendment,[15] the picture is less clear in

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10. *Id.* at 55 (citations omitted).

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

12. *Id.* at 617-18. The case involved the forfeiture of a quantity of glass alleged to have been illegally imported. The claimants were ordered, pursuant to a federal statute, to produce an invoice for a prior shipment of glass. *Id.*

13. *Id.* at 634–35. *Boyd* also discussed the fourth amendment implications arising from the forced production of books and records, and the "intimate relationship" between the fourth and fifth amendments. Mr. Justice Bradley noted:

> [T]he "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which . . . is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself" . . . throws light on the question as to what is an "unreasonable search and seizure."

Id. at 633. *See* Comment, *The Fourth and Fifth Amendments — Dimensions of an "Intimate Relationship,"* 13 U.C.L.A.L. REV. 857 (1966). This language was the genesis of the since discarded prohibition against the search and seizure of "mere" evidence. *See* note 57 and accompanying text *infra.*

14. *See* Couch v. United States, 409 U.S. 322, 330–32 (1973).

15. *See, e.g.,* Wilson v. United States, 221 U.S. 361, 382–85 (1911) (corporate officer may not assert the privilege against self-incrimination to prevent production of corporate books in his possession); Hale v. Henkel, 201 U.S. 43, 74 (1906) (corporation cannot bar production of its records on fifth amendment grounds). The reasoning behind these decisions is that the privilege against self-incrimination is personal in nature and therefore cannot be utilized by or on behalf of an organization. United States v. White, 322 U.S. 694, 699 (1944). The *White* Court provided a test to determine the distinction between organizational records held in a representative capacity as opposed to purely personal records. Records are held representatively if one can say, considering all the circumstances:

> [T]hat a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or

the case of individuals.[16] For example, the fifth amendment has been held to protect the rights of a non-owner possessor of documents,[17] whereas the decisions have been mixed in the case of an owner asserting the privilege to bar production of papers in third party possession.[18]

Also pertinent in considering governmental access to papers in third party possession is the nature of the accountant-client relationship.[19] While there was no accountant-client privilege at common law,[20] 14 states presently recognize the right to a confidential relationship between an accountant and his client.[21] However, the privilege has not been recognized by the federal courts.[22] Prior to the instant case, the Supreme Court had no occasion to examine either the element of possession of written materials as a requisite for an individual's assertion of a fifth amendment claim for privilege or the status of the accountant-client relationship.

The petitioner in *Couch* argued that ownership of materials was sufficient to invoke the fifth amendment privilege against self-incrimination since the documents represented her testimony regardless of who held them at the time they were subpoenaed.[23] Petitioner relied on the *Boyd* reasoning that personal records of an individual are his testimony, and the fact that the *Boyd* Court did not condition the application of the

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represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only.

Id. at 701. *See* Lyon, *Government Power And Citizen Rights In A Tax Investigation,* 25 TAX LAW. 79, 89 (1971), Note, *Civil Versus Criminal: Taxpayer's Rights Under The Fourth and Fifth Amendments,* 38 BROOKLYN L. REV. 130, 136 (1971).

16. *See Citizens Rights, supra* note 15, at 88.

17. *See* United States v. Cohen, 388 F.2d 464, 468 (9th Cir. 1967).

18. The claim for privilege was upheld in Stuart v. United States, 416 F.2d 459, 463 (5th Cir. 1969). *Contra,* Johnson v. United States, 228 U.S. 457, 458 (1913); Dorfman v. Rombs, 218 F. Supp. 905, 906 (N.D. Ill. 1963).

As recently as 1971, two cases involving the production of records in a tax investigation reached different results on similar facts. *Compare* United States v. Schoeberlein, 335 F. Supp. 1048, 1055 (D. Md. 1971) (person whose personal records are in third party possession may not ordinarily bar production by invoking the fifth amendment) *with* United States v. Tsukuno, 341 F. Supp. 839, 842 (N.D. Ill. 1971) (fifth amendment rights do not disappear if taxpayer's records are temporarily out of his possession).

19. Clearly, the relationship is most relevant in the context of the tax investigation. In the tax area, the accountant has been analogized to an interpreter of a foreign language. *See* United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961).

20. WIGMORE § 2286, at 530.

21. ARIZ. REV. STAT. ANN. § 32-743 (1956); COLO. REV. STAT. ANN. § 154-1-7(7) (1963); FLA. STAT. ANN. § 473.15 (1965); GA. CODE ANN. § 84-216 (1970); ILL. ANN. STAT. ch. 110½ § 51 (Smith-Hurd 1966); IOWA CODE ANN. § 116.15 (1946); KY. REV. STAT. ANN. § 325.440 (1972); LA. REV. STAT. ANN. § 37:85 (1964); MICH. COMP. LAWS ANN. § 338.523 (1957); NEV. REV. STAT. § 49.185 (1971); N.M. STAT. ANN. § 67-23-26 (1953); PA. STAT. ANN. tit. 63, § 9.11a (1968); TENN. CODE ANN. § 62-114 (1955).

The typical statute provides:

> A certified public accountant or public accountant shall not be required by any court to divulge information or evidence which has been obtained by him in his confidential capacity as such.

KY. REV. STAT. ANN. § 325.440 (1972).

22. *See, e.g.,* Falsone v. United States, 205 F.2d 734, 739-42 (5th Cir.), *cert. denied,* 346 U.S. 864 (1953), Gariepy v. United States, 189 F.2d 459, 463-64 (6th Cir. 1951). *See generally* WIGMORE § 2286, at 530 n.13; Annot., 38 A.L.R.2d 670 (1954).

23. Brief for Petitioner at 12-13, Couch v. United States, 409 U.S. 322 (1973).

fifth amendment on actual location.[24] The *Couch* Court had no difficulty distinguishing *Boyd,*[25] observing that *Boyd* did not deal with a factual setting in which ownership did not coincide with possession, and pointing to lower court decisions which considered the importance of possession in analyzing a fifth amendment claim.[26] The Court also relied upon its rationale in *United States v. White,*[27] wherein it upheld the contempt conviction of a union officer for failing to produce union records subpoenaed in the course of a grand jury investigation.[28] In answer to the argument that a union officer had a valid fifth amendment privilege to bar the enforcement of a subpoena of union records that would tend to incriminate him,[29] the *White* Court stated that the privilege was designed to prevent legal process from compelling oral testimony from an accused or from forcing *him* to produce any potentially incriminating personal documents.[30] The *Couch* majority extended *White* to the instant situation where no corporation or unincorporated association was involved and emphasized the personal nature of the privilege. The Court concluded that possession would best serve as the boundary for the privilege since that factor best relates to the presence of the personal compulsion abhorred by the fifth amendment.[31] Although Mr. Justice Powell, writing for the Court, never stated precisely how possession "best relates" to the element of compulsion, he seemed to reason that it is the person to whom a subpoena is directed who will be subject to the choice of producing documents and being incriminated, or refusing and being subject to contempt. Thus, the Court adhered to Mr. Justice Holmes' maxim that "[a] party is privileged from producing the evidence but not from its production."[32]

It seems clear that the Court's major concern in *Couch* was with the ability of Internal Revenue agents to effectively investigate possible

24. *Id. See* Boyd v. United States, 116 U.S. 616, 661 (1886). *See also* notes 11–13 and accompanying text *supra.*

25. 409 U.S. at 330. The *Couch* majority, in rejecting petitioner's interpretation of *Boyd,* seemed to impliedly accept Dean Wigmore's theory that when a person produces potentially incriminating evidence in response to a subpoena, the evidence brought forth is in reality the evidence demanded and therein lies the self-incrimination. Hence, the only possible asserter of the privilege is the one to whom the subpoena is directed. *See* WIGMORE § 2264, at 384–85. *See also* note 66 and accompanying text *infra.*

26. 409 U.S. at 330. *See, e.g.,* United States v. Cohen, 388 F.2d 464 (9th Cir. 1967); United States v. Judson, 322 F.2d 460 (9th Cir. 1963).

27. 322 U.S. 694 (1944). *See* note 15 *supra.*

28. 322 U.S. at 704.

29. *Id.* at 698.

30. *Id.*

31. 409 U.S. at 331. The Court emphasized the fact that the privilege against self-incrimination attaches to the person and not to the potentially incriminating information sought; therefore, the owner of the subpoenaed materials may not, as in this case, be compelled to do anything. The Court noted the person to whom the subpoena was issued — petitioner's accountant — asserted no fifth amendment claim. *Id.* at 328–29.

32. Johnson v. United States, 228 U.S. 457, 458 (1913). Here the Court held that a bankrupt's books and records, which were in the possession of a trustee in bankruptcy, could be entered into evidence against the bankrupt in a subsequent criminal prosecution. *Id.* The case is distinguishable from *Couch* because the trustee had *both* title and possession, but the Court in the instant case interpreted the crucial aspect in the transfer in *Johnson* to be the removal of the element of personal compulsion as it applies to the privilege against self-incrimination. 409 U.S. at 322 n.14.

violations of the tax laws.[33] Petitioner sought to have the privilege against self-incrimination available to any owner of books and records, regardless of *who* was compelled to produce them.[34] The *Couch* majority rejected this argument, stating that the fifth amendment protects against certain methods of obtaining incriminating information as well as protecting the person from whom it is obtained.[35] However, while recognizing that divulgence of the instant records might have incriminated the petitioner, the Court reasoned that "such divulgence, where it did not coerce the accused herself, is a necessary part of the process of law enforcement and tax investigation."[36] Thus, the Court characterized petitioner's argument as tending to extend constitutional protections "in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive."[37]

Despite those policy considerations, the import of the Court's position, that possession of papers is a fifth amendment requisite, may not be confined to tax investigations; one's personal records may commonly be in possession of such other parties as bankers, employers, trustees, and attorneys.[38] Since the Court attached "constitutional importance to possession . . . because of its close relationship to those personal compulsions and intrusions which the Fifth Amendment forbids,"[39] such papers in the hands of any third party may now be beyond the pale of fifth amendment protection. However, Mr. Justice Powell expressly stated that the instant decision did not establish a per se constitutional rule.[40] He indicated that a factual setting may arise in which clear constructive possession or temporary loss of possession may leave intact the element of compulsion on the accused owner of the subpoenaed materials.[41]

33. 409 U.S. at 329, 336. The Court has recently expanded the summons power of the Internal Revenue Service in two notable cases. In United States v. Powell, 379 U.S. 48 (1964), the Court held there need be no showing of probable cause to authorize enforcement of an Internal Revenue summons. *Id.* at 51. However, it was also noted that the Commissioner must be able to demonstrate that the investigation was instituted pursuant to a proper purpose. *Id.* at 57–58. The scope of issuance for a "proper" purpose was liberally construed to be issuance in good faith prior to a recommendation for criminal prosecution. Donaldson v. United States, 400 U.S. 517, 536 (1971). *See generally* Citizen Rights, *supra* note 15.

34. 409 U.S. at 331.

35. *Id.* at 328.

36. *Id.* at 329.

37. *Id.* at 335.

38. Although a valid claim to the attorney-client privilege may be asserted, the taxpayer's books and records may not constitute a privileged communication if they fall within the "pre-existing document" exception to the attorney-client privilege which excludes documents created prior to the attorney-client relationship. *See* Note, *The Attorney and His Client's Privileges,* 74 YALE L.J. 539, 546–50 (1965). *Cf.* Falsone v. United States, 205 F.2d 734, 738–39 (5th Cir.), *cert. denied,* 346 U.S. 864 (1953).

39. 409 U.S. at 336 n.20. Although the *Couch* decision rested in part on the policy of effective tax investigations, the Supreme Court has recently stressed the necessity for wide-ranging grand jury investigations to uphold the interest in effective enforcement of our criminal laws. *See* Branzburg v. Hayes, 408 U.S. 665, 690 (1972).

40. 409 U.S. at 333, 336 n.20.

41. *Id.* at 333.

In *United States v. Guterma,*[42] the Second Circuit upheld a taxpayer's assertion of the fifth amendment privilege against production of personal records stored in a corporate office. The fact that the records were kept in a safe to which the taxpayer alone had access was crucial to the court's conclusion that, even though the subpoena was directed to the corporation's trustee, the factual setting so clearly resembled service upon the taxpayer himself to produce records in his own possession that to deny him his privilege against self-incrimination would be honoring form over substance.[43] Petitioner urged *Guterma* as supporting her position that ownership should mark the border for fifth amendment invocations to prevent the production of records in third party possession.[44] The government responded by asserting that *Guterma* was distinguishable from the instant factual setting as involving custodial safekeeping of records as opposed to a transfer of possession for the purpose of disclosing information to the third party.[45] The Court rejected the former argument[46] and refused to assess the merits of the latter,[47] thus regrettably setting no discernible standards to limit the application of its decision. Justice Brennan, concurring,[48] noted this lack of precision by the majority and opined that the privilege should be available (1) to one who turns records over to a third party for custodial safekeeping,[49] (2) to one who turns records over to a third party at the government's inducement,[50] or (3) in any case where reasonable steps have been taken to insure the confidentiality of the records.[51]

Despite the Court's vague attempt to limit its holding, the impact of *Couch* will be widespread in the tax area alone. The petitioner stressed that the increasing complexity of the tax laws dictated that taxpayers seek the professional help of accountants in preparing returns,[52] and

42. 272 F.2d 344 (2d Cir. 1959).

43. *Id.* at 346. *See also* Schwimmer v. United States, 232 F.2d 855, 860–61 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956).

44. Brief for Petitioner at 15–16, Couch v. United States, 409 U.S. 322 (1973).

45. Brief for Respondent at 21, Couch v. United States, 409 U.S. 322 (1973).

46. *See* notes 25–32 and accompanying text *supra.*

47. 409 U.S. at 334 n.16.

48. *Id.* at 337 (Brennan, J., concurring).

49. *Id. See* note 44 and accompanying text *supra.*

50. 409 U.S. at 337 (Brennan, J., concurring). *See, e.g.,* Stuart v. United States, 416 F.2d 459 (5th Cir. 1969). In *Stuart,* a summons was issued to an accountant ordering him to produce appellant-taxpayer's records in his possession. Appellant usually kept the records at her place of business but she had transferred them to her accountant to facilitate a revenue agent's civil investigation of her return. After indications of possible fraud were discovered, a special agent entered the case, gave appellant her *Miranda* warnings, and served a summons upon appellant's accountant who refused to comply. *Id.* at 460–61. In upholding appellant's claim that the fifth amendment barred production of her records, the court noted the relevancy of how the records came into the accountant's hands, and considered the "critical fact" to be that the records were placed in the accountant's custody primarily for the investigating agent's convenience. *Id.* at 462–63.

51. 409 U.S. at 337 (Brennan, J., concurring). Justice Brennan provided the example of the Government issuing a subpoena for records which an individual placed in a safety deposit box. *Id.*

52. Brief for Petitioner at 21–22, Couch v. United States, 409 U.S. 322 (1973). Justice Douglas, dissenting, viewed this point as crucial. He reasoned that, if foregoing his right to the assistance of an accountant in preparing a tax return is

argued that the confidential nature of the accountant-client relationship, with its resulting expectation of privacy in the transferred records, prohibited their production under the fourth and fifth amendments.[53] Justice Douglas agreed, asserting that the *Boyd* Court, in deciding that the fifth amendment applied to the forcible production of private papers,[54] laid down substantial fourth amendment proscriptions as well, effectively combining the fourth and fifth amendments to create a "sphere of privacy" which must be protected against governmental intrusion.[55] The majority, however, distinguished *Boyd* as a pre-income tax case, and disposed of the privacy issue in nearly summary fashion, reasoning that there can be little expectation of privacy where records are transferred to an accountant with the knowledge that much of the information is required to be disclosed by the income tax laws.[56]

It is now clear that when papers held in third party possession are records to be utilized in a tax return, the owner cannot avail himself of fourth amendment protection against disclosure of their contents. The Court took a "realistic" view of petitioner's fourth amendment argument, preferring to focus on the implications of petitioner's privacy argument to the income tax system rather than on the *private* relationship between a taxpayer and his accountant. The majority felt that the governmental interest in effective enforcement of the tax laws outweighed any incidental infringement on the privacy of the accountant or client. It is submitted that the Court's reasoning is sound in the tax records context; the acknowledgement of a right to privacy between the accountant and his client could create a constitutionally protected haven for tax evaders.[57]

the only way to protect his records from the subpoena power, a taxpayer would be unconstitutionally penalized for exercising his fourth and fifth amendment rights. 409 U.S. at 342 (Douglas, J., dissenting). The *Couch* majority ignored this point. Regardless of the validity of Douglas's analysis, the Court seemed unconcerned with the impact of its decision on such a widespread practice. The Court's attitude reflected its strong feelings toward effective enforcement of the tax laws. *See* note 56 and accompanying text *infra.*

53. 409 U.S. at 335.

54. *See* text accompanying note 13 *supra.*

55. 409 U.S. at 339–40 (Douglas, J., dissenting). *See* note 13 *supra.*

56. 409 U.S. at 335. The Court's conclusion that there can be no reasonable expectation of privacy is based upon its analysis of the accountant-client relationship. The Court viewed as significant the fact that petitioner realized that much of the information in the transferred records was required to be disclosed in his tax return and that the accountant would disclose in *his* discretion. *Id.* Justice Douglas viewed the relationship differently, reasoning that an accountant is an agent for one special purpose, bearing fiduciary responsibilities to the taxpayer, including the duty to refrain from using the records transferred for any purpose other than completion of the tax return. Douglas thus concluded that a transfer of records to an accountant does not commit them to the public domain. 409 U.S. at 340. Although there is no accountant-client privilege at federal law, *see* note 22 and accompanying text *supra,* Justice Douglas would have protected the business records in the instant case on general fourth amendment privacy grounds which provide that an individual would have freedom in selecting the circumstances under which he will share secrets with others. 409 U.S. at 340–43. *See* Warden v. Hayden, 387 U.S. 294, 323 (1967) (Douglas, J., dissenting).

Douglas' view of privacy rights was not discussed by the *Couch* majority. Rather than focusing on the relationship of two people, the Court viewed those two people only as they interacted with the income tax system.

57. It is not contended that the existence of an accountant-client privilege would make it impossible for the government to prove fraud in a given case, but that proof

Hopefully, however, the Court's light treatment of the "reasonable expectation of privacy" concept and its failure to use well defined standards in its application will not be extended to other written materials.[58] Fortunately, *Couch* seems confined to its facts due to the Court's treatment of the fourth amendment ramifications of the accountant-client relationship. It is apparent that the Court did not intend to lay down a rule that an owner of materials transferred to a third party can *never* have a reasonable expectation of privacy in their contents.[59]

Couch may shed some light on the currently contested question of the constitutional limitations upon the use of a *search warrant* to seize books and records in the *taxpayer's* possession.[60] An outgrowth of *Boyd* was the recently repudiated rule that a search, reasonable by fourth amendment standards, could not extend to the seizure of "mere evidence" but was limited to the "fruits" or "instrumentalities" of a crime.[61] This doctrine was abandoned in *Warden v. Hayden,*[62] where the Supreme Court held that an authorized search and seizure could include items usable as evidence against the accused.[63] *Warden,* however, specifically left open the question of whether the seizure of an item which was "testimonial or communicative" in character was protected by the fifth amendment from an otherwise reasonable search.[64]

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of tax evasion would be considerably more difficult than in the absence of such a privilege. For example, a taxpayer and his accountant conspiring to evade the tax laws create two sets of records. One, a falsified set, would remain in the taxpayer's possession. The other, an accurate set, would be retained by the accountant. Upon any investigation into the taxpayer's possible tax fraud, only the falsified records would be readily available to the investigating agents by a search warrant. Any papers held by the accountant would be privileged. Of course, the accountant-client privilege would not extend so far as to cover a conspiracy between the parties, but the government would first have to show some tangible evidence of conspiracy before the privilege could be pierced.

58. The concept of a "reasonable expectation of privacy" in determining fourth amendments rights was established in Katz v. United States, 389 U.S. 347, 360 (1967). Justice Harlan's concurring opinion enumerated factors to consider in assessing the reasonableness of one's subjective expectation of privacy. 389 U.S. at 361 (Harlan, J., concurring). Adapting these factors to judge one's expectation of privacy in respect to written records, the criteria would seem to be: (1) the nature of the writing — whether a person generally would regard it to be private; (2) whether the owner has allowed others to view the contents; and (3) the precautions taken by the owner to protect the privacy of the papers. *See* Comment, *Protection of the Right of Privacy in One's Personal Papers,* 1970 L. & SOC. ORDER 269, 275–76 (1970); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection,* 43 N.Y.U.L. REV. 968, 982–86 (1968).

Mr. Justice Marshall criticized the majority in the instant case for not developing standards to aid in the determination of what is a reasonable expectation of privacy when one transfers records to a third party. 409 U.S. at 344–45 (Marshall, J., dissenting).

59. 409 U.S. at 335–36.

60. *See* Citizen Rights, *supra* note 15, at 96.

61. The *Boyd* Court instituted the consideration of property concepts in analyzing whether or not a search and seizure was reasonable. 116 U.S. at 623. *See* notes 11–13 and accompanying text *supra.* In Gouled v. United States, 255 U.S. 298 (1921), where it formally established the "mere evidence" rule, the Court interpreted *Boyd* as standing for the proposition that a search warrant may be used only when the public or complainant has a superior property right in the seized materials — that is when the property is the instrumentality or fruit of a crime. *Id.* at 309.

62. 387 U.S. 294 (1967).

63. *Id.* at 310.

64. *Id.* at 302–03.

In *United States v. Blank*,[65] the Sixth Circuit upheld the use of a search warrant to seize books and records, distinguishing the use of a subpoena for the same purpose in that the latter contains an element of compulsion, while the owner is required to do nothing incriminating in the former procedure.[66] The *Blank* court accepted the view that, after *Warden*, the limits on the use of the search warrants will be judged by focusing on the invasion of an individual's privacy rather than the nature of the items seized.[67] The opposite result, however, was reached by the Seventh Circuit in *Hill v. Philpott*[68] where the court suppressed books and records seized under an otherwise valid search warrant. *Warden* was interpreted as not diminishing "fifth amendment characteristics which might attach to certain items of property."[69] The court rejected Dean Wigmore's theory that the fifth amendment does not apply to the use of a search warrant because, unlike the subpoena, the element of compulsion is lacking where it is not the accused's oath which must prove the authenticity of the materials seized.[70] Regardless of where proof of authenticity is derived, the jury would realize that the records belong to the accused and his entries would "speak against him as clearly as his own voice."[71]

Implicit in *Couch's* conclusion that compulsion is lacking when records are *subpoenaed* from *third party possession* is a rejection of the Seventh Circuit's reasoning that the *contents* of the records speak against the accused. Indeed, the instant petitioner argued that precise point.[72] Emanating from the Court's opinion in *Couch* is the necessity, in a valid fifth amendment claim, for compulsion in a physical sense — the self-production of the records which subjects the accused to the "cruel-trilemma" of self-accusation, perjury, and contempt.[73] It would seem to follow from *Couch's* analysis that this crucial element of compulsion would be lacking in the search warrant procedure where the accused must merely watch as a search is being conducted.[74] Thus, while the use

65. 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972).

66. *Id.* at 385. *See* Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1, 46–47 (1966).

67. 459 F.2d at 385. This analysis was articulated by the Second Circuit in a prosecution for conspiracy to import narcotics illegally. The court upheld the seizure of an incriminating letter written by one of the defendants, but noted that the fifth amendment would have prohibited the use of a subpoena to produce the same information in the letter because of its testimonial nature. United States v. Bennet, 409 F.2d 888, 896 (2d Cir. 1969).

68. 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). *Hill* concerned a tax fraud investigation where the seizure included a "truckload" of the defendants' financial and business records. *Id.* at 145.

69. *Id.* at 148.

70. *Id.* Wigmore has concluded that:

> [P]roof of their [the seized materials'] authenticity, or other circumstances affecting them, may and must be made by the testimony of other persons, without any employment of the accused's oath or testimonial responsibility.

WIGMORE § 2264, at 380.

71. 445 F.2d at 149.

72. *See* Brief for Petitioner at 13–14, Couch v. United States, 409 U.S. 322 (1973).

73. *See* 378 U.S. at 55.

74. In a post-*Couch* decision, the Ninth Circuit suppressed the seizure of a defendant's books and records in a tax investigation strikingly similar to the facts

of search warrants in tax investigations has been rare because of the difficulty of showing probable cause,[75] the search warrant may become more common, after *Couch,* in obtaining books and records *in the possession* of the taxpayer which cannot be *subpoenaed* directly due to the privilege against self-incrimination.[76]

In the final analysis, *Couch* seems to reach the correct result on its facts.[77] It is submitted, however, that the Court was too brief in its examination of the constitutional claims before it, for its opinion ignored too many of the factors[78] which should have been considered in any analysis of constitutional issues of such widespread import. In upholding the interest of the Internal Revenue Service in obtaining wide investigatory powers for its agents, the *Couch* Court has demonstrated a lack of sensitivity toward the rights of the individual.

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in *Hill.* Vonder Ahe v. Howland, ____ F.2d ____ (9th Cir. 1973). The distinction between acquiring records via subpoena and search warrant was rejected as the court followed *Hill's* rationale. *Couch* was cited by the Ninth Circuit for the proposition that the "testimonial compulsion" against the defendant violated that " 'private inner sanctum of individual feeling and thought' which the Fifth Amendment seeks to protect." *Id.* at ____.

It is submitted that the Ninth Circuit's interpretation of *Couch* is faulty. In finding a fifth amendment violation, the *Vonder Ahe* opinion utilized the following language from *Hill:*

> The jury knows the books and records belong to the defendant and the entries he has made therein speak against him as clearly as his own voice. This seems particularly true in a prosecution for violation of the income tax laws.

____ F.2d at ____, *citing* Hill v. Philpott, 445 F.2d 144, (7th Cir. 1971). If the *Couch* Court accepted the notion that "the entries . . . speak against him as clearly as his own voice," then of what significance is possession of any written materials sought by subpoena as was the issue in *Couch?* It would seem that documents written by an accused which are produced by subpoena would speak against him in violation of the fifth amendment regardless of who possessed the writings.

As noted above, the court in *Vonder Ahe,* citing *Couch,* opined that the seizure of financial and business records violated that "private inner sanctum of individual feeling and thought." ____ F.2d at ____. It would be strange indeed if the Court could hold in *Couch* that business records in the accountant's hands yield no reasonable expectation of privacy (especially where disclosures of much of that information is mandated by the tax laws), and also find that where the same records are retained by the taxpayer, they are in the "private inner sanctum of individual feeling and thought." *See* Couch v. United States, 409 U.S. 322, 327, 335 (1973).

75. *See* Citizens Rights, *supra* note 15, at 96.

76. If *Couch* is in fact interpreted as to permit a search and seizure of one's tax records, it would seem that the use of a search warrant would be permissible to seize materials written by the accused in other areas of criminal activity. The focus would then be on whether the seized materials were so private in nature as to be precluded from a search on fourth amendment grounds. *See* notes 61 & 62 and accompanying text *supra.*

77. Petitioner in the instant case left her business records in her accountant's office for some 15 years and thereafter exercised little control over them. 409 U.S. at 334. This seems far from the case where the accountant had "naked" possession of the records.

78. *See* notes 46, 51 and 55–56 and accompanying text *supra.* Justice Douglas, in reflecting on this part of the opinion, stated:

> We are told that "situations may well arise where . . . the relinquishment of possession is too temporary and insignificant as to leave personal compulsions upon the accused substantially intact." I can see no basis in the majority opinion, however, for stopping short of condemning only those intrusions resting on compulsory process against the author of the thoughts or documents.

409 U.S. at 341 (Douglas, J., dissenting).