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FOURTH AND FIFTH AMENDMENTS— COMPELLED PRODUCTION OF DOCUMENTS

Fisher v. United States, 425 U.S. 391 (1976)
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During its last session the Supreme Court ruled on three cases involving challenges to court ordered summonses for the production of documents in criminal investigations. In two of the cases the petitioners argued that the compulsion to produce the summoned documents would violate their fifth amendment privilege against compelled self-incrimination. In the third case the Court addressed the issue of whether the respondent had a sufficient fourth amendment interest in the summoned documents to challenge the validity of a subpoena duces tecum. While the two former cases raise a different constitutional question from the latter, all three cases serve to definitively outline the limits of future challenges to the compelled production of documents in criminal investigations.

In *Fisher v. United States*[1] and its companion case, *United States v. Kasmir,* the Court ruled that a summons directing an attorney to produce documents delivered to the attorney by his client is enforceable over claims that compliance with the summons would create a violation of both the client's fifth amendment privilege against compelled self-incrimination and his right to communicate in confidence with his attorney.

In *Fisher,* a Special Agent of the Internal Revenue Service was assigned to investigate the tax liability of husband and wife taxpayers. When the taxpayers learned that the Agent wished to interview them concerning possible civil or criminal liability under the federal income tax laws they retained Fisher, an attorney, to represent them. Soon thereafter the taxpayers obtained from their accountant documents pertaining to their income tax returns. A few weeks after receipt of the records the taxpayers turned them over to Fisher for the purpose of obtaining legal advice and for Fisher's use in representing them. Approximately three and one half months later the Internal Revenue Service served a subpoena duces tecum[2] on Fisher directing him to give testimony relating to the tax liability of the respondents and to bring the respondents' tax records with him. Fisher appeared with the records, in response to the summons, but he refused to allow their inspection by the Internal Revenue Service. An enforcement action was commenced by the government[3] and the taxpayer respondents were permitted to intervene.[4] Together with Fisher they contended that since the production of the documents would violate the taxpayers' fifth amendment right against compelled self-incrimination, counsel for the taxpayers could decline to disclose the summoned materials on the basis of the attorney-client privilege.

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[1]425 U.S. 391 (1976).

[2]The Internal Revenue Service is empowered to issue subpoenas duces tecum by federal statute. The Internal Revenue Code provides:

> 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 or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
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> (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 required to perform the act, 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 required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons 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; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

INT. REV. CODE OF 1954 § 7602.

[3]The Internal Revenue Service can enforce a summons by filing a motion for enforcement in the United States district court. INT. REV. CODE of 1954 § 7604(a).

[4]The taxpayers were permitted to intervene in the enforcement action pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.

The district court ordered the summons to be enforced[5] on the ground that the documents were owned by the accountant, but it stayed the order pending appeal. The court reasoned that since the summoned documents were the work papers of the accountant they were his property; if the papers had remained in the accountant's possession he could have been required to produce the papers pursuant to a subpoena duces tecum.[6] On the other hand, the taxpayers could successfully assert their fifth amendment privilege only if they either owned or rightfully possessed the papers. The court concluded that since the taxpayers had obtained the papers and transferred them to their attorney to thwart the government investigation, the taxpayers failed to establish the requisite possessory interest to withhold production of the papers on the basis of the fifth amendment privilege.[7] The Third Circuit Court of Appeals[8] affirmed the enforcement order, agreeing that the taxpayers had never acquired the requisite possessory interest in the documents and that the records, whether they were in the taxpayers' or the lawyer's custody, were not protected by the fifth amendment.[9]

[5]United States v. Fisher, 352 F. Supp. 731 (E.D. Pa. 1972).

[6]The district court wrote:

> The facts in the instant case . . . demonstrate that the papers were and are the property of the accountant. They only left his possession after the taxpayer learned of the investigation. The transfer of the papers seems to indicate that this was an attempt to thwart the government's investigation. Of course, there is no attorney-client privilege which could be claimed since the accountant's transfer of the nonprivileged papers to the client would not create a privilege when the client turned the papers over to his attorney.

Id. at 734–35.

[7]The district court's emphasis on the respondent's attempt to thwart the government investigation was not discussed in the court of appeals' opinion. One reason for this may be that there is no legal precedent for analyzing the application of the fifth amendment privilege in terms of what the respondent's intentions were at the time he took possession of allegedly private papers. Further, it is worth noting that three and one half months passed between the time the taxpayer obtained the records from his accountant and the date the subpoena duces tecum was served on the taxpayers' attorney. It could be argued that the taxpayer, in transferring the records to his attorney in order to obtain legal advice, could not have been trying to thwart the government investigation when apparently even the Internal Revenue Service did not know that it wanted those documents until well over four months after the initial interview with the respondent; *see* United States v. Kasmir, 499 F.2d 444, 451 (5th Cir. 1974).

[8]United States v. Fisher, 500 F.2d 683 (3d Cir. 1974).

[9]The court of appeals in *Fisher* evaluated the taxpayers' possessory interest in the summoned documents to determine whether the records could be considered within the taxpayers' legitimate expectation of privacy. The court adopted this standard from Couch v. United States, 409 U.S. 322 (1973), where the Supreme Court held that a fifth amendment claim could not prevail unless the respondent had a legitimate expectation of privacy in the summoned documents. The court of appeals concluded, "We detect . . . [a] 'shift in emphasis from property to privacy' in the Court's treatment of the Fifth Amendment in compelled production of documents." 500 F.2d at 690. Indeed, the court found *Couch* as providing formal recognition for the privacy principle as the touchstone for evaluating fifth amendment claims against the compelled production of documents.

The facts of *Fisher* closely resemble those in *United States v. Kasmir,* where the taxpayer was informed by Special Agents of the Internal Revenue Service that his tax returns for the past three years were under investigation. Like the taxpayers in *Fisher,* the respondent taxpayer in *Kasmir* retained counsel to represent him in the investigation and obtained from his accountant documents concerning his tax returns. The taxpayer then immediately transferred these documents to his attorney, Kasmir. A subpoena duces tecum was served on the taxpayer's accountant and attorney, ordering the attorney to relinquish the documents and the accountant to give testimony concerning them. Both appellants refused to comply with the summons on the ground that possession of the records by the taxpayer's attorney constituted constructive possession by the taxpayer and enforcement of the summons would violate the taxpayer's privilege against compelled self-incrimination and his right to communicate in confidence with his attorney. The government then petitioned the district court for enforcement of the subpoena duces tecum.

The district court granted the government's petition on the grounds that the documents belonged to the accountant and that, at the time the summonses were served, the taxpayer lacked a possessory interest in the records sufficient to invoke the fifth amendment privilege. The district court stayed its order pending appeal. The Fifth Circuit Court of Appeals[10] removed the stay and reversed the enforcement order on the basis that since the taxpayer could have successfully asserted his fifth amendment privilege if the summons had been served on him during the time he was in actual possession of the documents, and in light of the confidential nature of the attorney-client privilege, his protection against compelled self-incrimination was not vitiated by the transfer of the documents to his attorney. The court

[10]United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974).

reasoned that since the taxpayer retained a "legitimate expectation of privacy" in the tax records when he transferred them to his attorney, he retained "constructive possession" [11] of the evidence and he retained his fifth amendment protections. [12]

The facts in both *Fisher* and *Kasmir* required the courts to determine whether a subpoena duces tecum, directing an attorney to produce documents delivered to him by a client relying on the attorney-client privilege, was enforceable over claims that the documents were constitutionally protected from summonses while in the hands of either the client or his attorney. Since the Third Circuit and Fifth Circuit decisions created a conflict in the law, the Supreme Court granted certiorari to resolve the inconsistency. [13]

On appeal to the Supreme Court the respondents in each case argued that enforcement of the subpoena duces tecum would involve compulsory self-incrimination by the taxpayers in violation of their fifth amendment privilege. Further, the enforcement of the summonses would constitute a seizure of papers in violation of fourth amendnent rights and would violate the taxpayers' right to communicate in confidence with their attorney. [14]

In a six-to-two decision the Supreme Court affirmed *Fisher* and reversed *Kasmir,* with Mr. Justice White speaking for the majority in a consolidated opinion. [15] The Court ruled that the taxpayers' fifth amendment privilege could not be invoked to excuse their respective attorneys from producing the taxpayers' records. Following a literal interpretation of the fifth amendment privilege against compulsory self-incrimination, [16] the Court stated that "the Fifth Amendment is limited to prohibiting the use of 'physical and moral compulsion' on the person asserting the privilege." [17] While in both cases the taxpayers were the accused, no information was compelled from them by the court. Therefore the fifth amendment privilege could not be extended to their circumstance.

The Court analogized the fact situations in *Fisher* and *Kasmir* to those in another recent Supreme Court case, *Couch v. United States.* [18] In *Couch,* an Internal Revenue Service summons was directed to a taxpayer's accountant for the production of business and tax records belonging to the taxpayer but in the possession of the accountant. The taxpayer argued that enforcement of the summons would violate her fifth amendment privilege against compulsory self-incriminaion. The Court ruled that where a taxpayer had surrendered possession of her records to her accountant for preparation of her tax returns there was no *personal* compulsion against the taxpayer when the accountant complied with the summons. After all, the accountant, not the taxpayer, was the party compelled to produce the documents. Similarly, in *Fisher* and *Kasmir,* the taxpayers' attorneys, not the taxpayers themselves, were compelled by the subpoena duces tecum to produce the tax records. Because the taxpayers themselves were not compelled to produce anything, the Court found that they could not call upon the fifth amendment privilege. The Court could find no difference between the summons of an accountant's work papers delivered to the taxpayers' attorney and the summons of an accountant's work papers from the accountant himself, since in both instances the records were pre-

[11] The Court in Couch v. United States, 409 U.S. 322 (1973) outlined the limits of constructive possession in fifth amendment inquiries. The Court wrote:

> [A]ctual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime. 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.

Id. at 333. The court of appeals in *United States v. Kasmir,* following the precedent of *Couch,* phrased the issue before it in terms of "whether the taxpayer has a sufficient legitimate expectation of privacy in the summoned records to warrant the label of constructive possession." 499 F.2d at 452.

[12] 499 F.2d at 453.

[13] Fisher v. United States, 420 U.S. 906 (1975).

[14] Wigmore explains:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser. . . .

8 J. WIGMORE, EVIDENCE § 2292 (McNaughton rev. 1940).

[15] White, J., delivered the opinion of the Court, in which Burger, C.J., and Stewart, Blackmun, Powell, and Rehnquist, JJ., joined. Brennan and Marshall, JJ., filed opinions concurring in the judgment. Stevens, J., took no part in the consideration or decision of the cases.

[16] This is contrasted with the Court's warning in 1886, in Boyd v. United States, 116 U.S. 616, 635 (1886), that:

> [C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constituional rights of the citizen, and against any stealthy encroachment thereon.

Accord, Spevak v. Klein, 385 U.S. 511, 515 (1967); Gouled v. United States, 255 U.S. 298, 304 (1921).

[17] 425 U.S. at 397.

[18] 409 U.S. 322 (1973).

pared by and belonged to the accountant, not the taxpayer.[19]

The respondents in *Fisher* and *Kasmir* argued that *Couch* had carved out an exception to the requirement that an accused have actual possession[20] of documents to invoke his fifth amendment privilege. *Couch* suggested that situations might arise where the transfer of documents by the accused to a third party might be done in such strict confidence or be so temporary that the documents would still be in the accused's "constructive possession"[21] and the *personal* compulsion upon him would remain substantially intact. The *Couch* Court left unclear the standards for "constructive possession,"[22] only finding that in this case the taxpayer had given her records regularly to her accountant for the past fourteen years with no legitimate expectation that they would be privileged. The Court concluded that where no "legitimate expectation of privacy" could be demonstrated, a fifth amendment claim could not prevail.[23]

Using the Supreme Court's analysis in *Couch* as a touchstone for their argument, the attorneys in *Fisher* and *Kasmir* contended that even though the transfer of documents to an accountant may not preserve the requisite possessory interest in the records, the same is not true of transfer to an attorney. Since a taxpayer has a sufficient "legitimate expectation of privacy" in documents he transfers to his attorney for the purpose of obtaining legal advice, "constructive possession" is established and the fifth amendment privilege should be available. The Third Circuit Court of Appeals, in upholding the respondent's fifth amendment privilege in *Kasmir,* agreed with this analysis and distinguished the facts of *Kasmir* from those in *Couch* by suggesting that while an accountant has a "legal duty to disclose," an attorney has an "ethical obligation to prevent disdisclosure."[24] In essence, the court found that the attorney-client relationship provided the requisite "expectation of privacy" to warrant con-

[19]In United States v. Kovel, 296 F.2d 918 (2d Cir. 1961), the court, in evaluating the scope of the attorney-client privilege when a third party accountant was involved, drew a distinction between those instances when an accountant could invoke the attorney-client privilege to protect information disclosed to him by the taxpayer, and those cases where the privilege was unavailable to the accountant.

In *Kovel,* an accountant appealed from a sentence for criminal contempt for refusing to answer questions asked by an investigating grand jury concerning one of the accountant's taxpayer clients. The court held that an accountant, employed to facilitate communications between an attorney and his client, could refuse to disclose the contents of confidential communications on the ground that they were protected by the attorney-client privilege.

[20]Couch v. United States, 409 U.S. 322 (1973), found that the governmental compulsion upon an accused was greatest when that individual was forced to produce documents that were in his actual possession. 409 U.S. at 333. Yet, actual possession alone does not establish the basis for invoking the fifth amendment privilege. Courts have traditionally looked to the nature and character of the documents to determine if the fifth amendment privilege can be invoked by the individual in possession of the documents.

In Wilson v. United States, 221 U.S. 361 (1911), the issue facing the Court was whether an officer of a corporation could refuse to produce corporate documents, held in his possession and required by a subpoena duces tecum, on the ground that they tended to incriminate him. The Court held that the privilege against compelled self-incrimination did not extend to corporate documents held by an officer of the corporation even if he himself wrote them.

Similarly, in Bellis v. United States, 417 U.S. 85 (1974), the Court held that a member of a dissolved law partnership, who had been subpoenaed by a grand jury to produce the partnership's financial records, did not have access to the fifth amendment privilege against self-incrimination since the partnership had an institutional identity and the petitioner held the records in a representative, not a personal capacity. *Accord,* United States v. White, 322 U.S. 694 (1944).

[21]*See* note 11 *supra.*

[22]An example of the confusion created by the ruling in *Couch* that there may be situations "where constructive possession is so clear or the relinquishment of possession is temporary and insignificant," 409 U.S. at 333, that the fifth amendment privilege would still apply, can be found in In re Horowitz, 482 F.2d 72 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973). In *Horowitz* an accountant appealed an order refusing to quash a subpoena duces tecum requiring the accountant to bring before a grand jury documents belonging to a client but to which he had access. The government found "*Couch* a ringing affirmation that the privilege [against self-incrimination] exists only when compulsion to produce testimony is exerted directly upon an accused." 482 F.2d at 83. The accountant, on the other hand, argued that *Couch* stood for the proposition that a client who had temporarily left documents with his accountant, with the expectation that the records would be kept confidential, still had constructive possession of those documents. The court, however, held that ordering the accountant to produce documents belonging to a client did not violate the client's fifth amendment privilege.

[23]Couch v. United States 409 U.S. 322, 330 (1974).

[24]United States v. Kasmir, 499 F.2d at 453. The American Bar Association Canon of Ethics provides:

> (B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

ABA CANONS OF PROFESSIONAL ETHICS DR 4-101(B).

structive possession by the taxpayer of the documents in the attorney's custody.

The Supreme Court, in *Fisher,* rejected this analysis, stating that the fact situations in *Fisher* and *Kasmir* were not "one of those situations" which the Court had in mind when it carved out the exception to the "actual possession" requirement in *Couch.*[25] The Court claimed that the taxpayers in *Fisher* and *Kasmir* were compelled to do no more than was the taxpayer in *Couch.* In each case the taxpayer's rights were the focal point of inquiry and in each case nothing was personally compelled from the taxpayer himself.[26] Rather, it was the accountant in *Couch* and the attorneys in *Fisher* and *Kasmir* who were required to produce the documents needed for the government's investigation of the accused.

The Court agreed that the fifth amendment privilege against compelled self-incrimination may serve to protect personal privacy, but the Court went on to make clear that the fifth amendment privilege was never meant to be applied, even on the ground of personal privacy, unless the acquisition of the evidence "compelled testimonial self-incrimination."[27] The Court explained:

> The Framers addressed the subject of personal privacy directly in the Fourth Amendment. They struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of pricacy becomes justified and a warrant to search and seize will issue. They did not seek in still another Amendment—the Fifth—to adhere a general protection of privacy but to deal with the more specific issue of compelled self-incrimination.[28]

Having ruled that a taxpayer's fifth amendment privilege is not violated when his attorney is compelled to produce the taxpayer's records, the Court in *Fisher* addressed the issue of whether the attorney-client privilege could operate to extend the fifth amendment privilege to documents in the hands of a taxpayer's attorney which would have been privileged in the hands of the client. The Court utilizes a two-part analysis to resolve this issue.

First, the Court concedes that where documents would have been privileged from production in the hands of the client and the transfer to an attorney is for the purpose of obtaining legal advice, the attorney-client privilege extends the client's fifth amendment privilege to the documents while they are in the attorney's custody. But, the argument continues, if the documents are not privileged while in the hands of the client, then the transfer to an attorney will not establish a fifth amendment protection for the documents. After all, if an accused is not in a position to invoke the protection of the fifth amendment while the summoned evidence is in his hands,[29] the privilege cannot somehow be created when the evidence is transferred into the custody of his attorney.

Having established this groundwork, the Court then addresses the issue of whether the documents could have been obtained by summonses addressed to the taxpayer while the documents were in his possession. In answering this question the Court adopts a technical approach to the application of the fifth amendment privilege against compelled self-incrimination. The Court's focus is on whether the accused is compelled to give *testimony* that *incriminates* him. The Court declares that the fifth amend-

[25] 425 U.S. at 398.

[26] In both *Couch* and *Fisher* the Supreme Court reminds the petitioners of Mr. Justice Holmes' maxim, "A party is privileged from producing the evidence but not from its production." Johnson v. United States, 228 U.S. 457, 458 (1913). In *Couch* the Court further explained:

> It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him.

Couch v. United States, 409 U.S. 322, 328 (1973) (emphasis in original).

[27] 425 U.S. at 399. In so ruling, the Court followed a long history of precedent. As examples, Perlman v. United States, 247 U.S. 7 (1918), held that a petitioner could not raise a fifth amendment challenge to enjoin the United States Attorney from taking into his possession certain exhibits for use in prosecution for alleged perjuries committed by the petitioner when the petitioner himself had originally produced the documents as evidence in an earlier infringement suit. Schmerber v. California, 384 U.S. 757 (1966), held that the taking of a blood sample from an allegedly drunk driver, at the hospital after an accident, and the admission into evidence at petitioner's trial of the chemical analysis indicating intoxication did not violate petitioner's fifth amendment privilege against compelled self-incrimination.

[28] 425 U.S. at 400. The Court further emphasized the limits of privacy interests in the application of the fifth amendment when it wrote:

> [T]he Court has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.

Id. at 399.

[29] *See* note 20 *supra.*

ment does not protect against the compelled production of every sort of incriminating evidence, but rather applies "only when the accused is compelled to make a *testimonial* communication that is incriminating."[30] Precedent for this standard is found in past decisions that refused to extend the protection of the fifth amendment privilege to the admission into evidence of blood samples,[31] handwriting samples,[32] voice exemplars,[33] and the modeling of a shirt by a defendant.[34] While such evidence as blood samples or handwriting exemplars are incriminating products of compulsion, the fifth amendment privilege is unavailable to the accused since the evidence is neither the respondent's testimony nor his personal communicative writing. Similarly, the summoned records in *Fisher* and *Kasmir* are the accountant's work papers, not the taxpayers' communicative writings, and as such contain no testimonial declarations by the taxpayer. In addition, since the summoned papers were prepared voluntarily, they cannot be said to contain compelled[35] testimonial evidence.

Finding no compelled testimonial communications in the summoned papers, the Court inquires into what, if any, incriminating documents may be compelled from a taxpayer by a subpoena duces tecum. The Court suggests that if the taxpayer himself is not compelled to give testimony concerning the compelled records there can be no self-incrimination. The Court concedes that by complying with a subpoena duces tecum the taxpayer is compelled tacitly to aver that the records exist, that they are in his possession, and that they are the ones requested by the court. But the Court concludes that a subpoena duces tecum, served on a taxpayer in possession of tax records prepared by his accountant, merely compels the taxpayer to produce work papers that belong to his accountant. This emphasis on the technical distinction between testimonial declarations and the surrender of documents in the taxpayer's possession, but owned by a third party,[36] leads the Court to write:

> [H]owever incriminating the contents of the accountant's work papers might be, the act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination.[37]

Mr. Justice Brennan wrote a separate concurring opinion, agreeing with the majority that the taxpayer respondents in the *Fisher* and *Kasmir* cases could not invoke the fifth amendment privilege against the compelled production of the summoned documents. But, unlike the majority, Justice Brennan reaches this conclusion by focusing his inquiry on "the scope of privacy that is sheltered by the [fifth amendment] privilege."[38] In essence, Justice Brennan sees the Court's decision as a "serious crippling of the protection secured by the privilege against compelled production of one's private books and papers."[39] It is Brennan's position that ever since the 1886 case of *Boyd v. United States*[40] the protection of personal

[30] 425 U.S. at 408. (emphasis in original).

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

[32] Gilbert v. California, 388 U.S. 263 (1967).

[33] United States v. Wade, 388 U.S. 263 (1967).

[34] Holt v. United States, 218 U.S. 245 (1910).

[35] The Court's distinction between compelled testimony and the compelled production of information voluntarily given is best exemplified in its decisions involving the authorized use of electronic listening devices to record suspect's conversations. The Court has consistently held that if appropriate safeguards are adhered to, private incriminating statements of an accused may be overheard and used in evidence if they are not compelled at the time they were uttered. Katz v. United States, 389 U.S. 347 (1967); Berger v. United States, 388 U.S. 41 (1967); Osborn v. United States, 385 U.S. 323 (1966).

[36] *See* note 20 *supra*. The Court made especially clear, in United States v. White, 322 U.S. 694 (1944), the importance of the compelled evidence being of a personal nature for the fifth amendment privilege to attach. In *White* the Court held that a union official could not refuse to produce union records demanded in a subpoena duces tecum even though the documents might tend to incriminate himself both individually and as an officer of the union. The Court wrote:

> Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation . . . Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity.

Id. at 699.

[37] 425 U.S. at 410–11.

[38] *Id.* at 417 (Brennan, J., concurring). *See* note 56 *infra*.

[39] *Id.* at 414 (Brennan, J., concurring).

[40] 116 U.S. 616 (1886). *Boyd* involved a civil forfeiture proceeding brought by the government against two business partners for fraudulently attempting to import thirty-five cases of foreign glass, needed in the construction of a government building, without paying the prescribed duty. At the trial, the government introduced into evidence an invoice of a prior shipment of glass the partnership had received, establishing that the partners were fraudulently claiming a greater exemption from import duties than they were entitled to under their contract. The defendants objected on the ground that the use of the invoice violated their rights under the fourth and fifth amendments since the invoice was a "private paper" secured by a subpoena duces tecum. The Supreme Court ruled that the invoice was inadmissable because a defendant could not be forced to produce evidentiary items without violating the fourth as well as the fifth amendment.

privacy has been a central purpose of the fifth amendment privilege against compelled self-incrimination. Further, the privacy interests protected by the fifth amendment privilege extend not only to a person's oral declarations but also to one's testimonial materials in the forms of books and papers.[41] While the majority rules that incriminating papers voluntarily prepared are not compelled testimonial communinations for the purpose of invoking the fifth amendment privilege, Justice Brennan argues that voluntary preparation does not necessarily exclude the availability of the fifth amendment privilege. As Justice Brennan underscores, the fifth amendment privilege is designed to protect "the compelled *production* of testimonial evidence, not just the compelled creation of such evidence."[42]

Justice Brennan finds in the Court's recent decision of *Couch v. United States*[43] recognition for the "zone of privacy"[44] as a criterion for invoking the fifth amendment privilege against compelled production of documents. In *Couch* the Court expressly held that the fifth amendment privilege could be invoked in connection with a subpoena duces tecum only if the individual resisting production had a "legitimate expectation of privacy"[45] with regard to the summoned evidence. By focusing on whether the accused is compelled to make a testimonial declaration,[46] the *Fisher* majority ignores any privacy interests the taxpayers may have had in the summoned documents, and although Justice Brennan agrees with the majority that the fifth amendment privilege is not available merely because the subpoena compels a taxpayer to produce writing, books, or papers, he insists that the threshold inquiry must still be whether the taxpayer is compelled to produce documents in which he had a reasonable expectation of privacy.

Justice Brennan suggests one criterion by which the Court could evaluate whether the compelled evidence is within the zone of privacy recognized by the fifth amendment. In *Couch* the Court held that the fifth amendment's protection was not available to an individual who had for a number of years disclosed information to her accountant, since there could be no reasonable expectation of privacy in documents left for so long a period of time with the third party. Using this finding as a guide for recognizing privacy interests in subpoenaed documents, Justice Brennan finds that a relevant consideration in determining whether an individual's documents are within the zone of privacy is the "degree to which the paper holder has sought to keep private the contents of the papers he desires not to produce."[47] Given the facts that each accountant in *Fisher* and *Kasmir* had full access to the taxpayers' records, and the documents were wholly of a business character,[48] Justice Bren-

[41] 425 U.S. at 418 (Brennan, J., concurring). The Court has historically extended the fifth amendment privilege to protect an accused from compelled self-incrimination through either testimony or his personal records. In Ballman v. Fagan, 200 U.S. 186 (1906), the Court refused to enforce a subpoena, served on a defendant in an alleged gambling scheme, requesting that the defendant appear before the grand jury with all the books and records alleged to have been used in the gambling scheme. The Court ruled that a person against whom criminal proceedings are brought is no more bound to produce records of the crime "than to give testimony to the facts which they disclose." *Id.* at 195.

In contrast, in United States v. White, 322 U.S. 694, 700-01 (1944), the Court refused to extend the protection of the fifth amendment privilege to a union official ordered to produce documents pertaining to union management.

[42] 425 U.S. at 423 (Brennan, J., concurring [emphasis in original]).

[43] 409 U.S. 322 (1973).

[44] *See* note 9 *supra*. Although the Court, in *Couch*, linked the application of the fifth amendment privilege to whether the accused had privacy interests in the summoned materials, it also insisted that there be some "semblance of governmental compulsion against the person of the accused." 409 U.S. at 336.

[45] *See* note 11 *supra*.

[46] The Court writes:

> The taxpayer would be no more competent to authenticate their accountant's work papers or reports by producing them than they would be to authenticate them if testifying orally. The taxpayer did not prepare the papers and could not vouch for their accuracy.

425 U.S. at 413.

The Court recognizes that the "implicit authorization" rationale has historically been the justification for applying the fifth amendment's protection to documentary summonses. The rationale is that the person complying with the subpoena duces tecum implicity testifies that the documents he is producing are in fact the ones requested. Yet the Court leaves unclear whether it is accepting the "implicit authorization" rationale or now discarding it in *Fisher*. The Court agrees that the elements of compulsion are present in the *Fisher* case because

> compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena.

Id. at 410. Yet the Court implies that this apparently implicit authorization does not itself establish the testimonial self-incrimination required for proper application of the fifth amendment.

[47] *Id.* at 411 (Brennan, J., concurring).

[48] In *Fisher* the husband taxpayer's checks and deposit receipts related to his textile waste business. The wife's receipts related to her women's wear shop. In *Kasmir* the books and records requested by the documentary summons concerned the taxpayer's large medical practice.

nan concurs with the majority's enforcement of the subpoenas because the documents failed to come within the zone of privacy recognized by the fifth amendment privilege against compulsory self-incrimination.

The majority justifies its departure from the *Boyd* privacy criterion by suggesting that the *Boyd* holding was founded on the premise that an accused could not be compelled to produce mere evidentiary[49] items without violating *both* the fifth amendment and the fourth amendment. The Court interprets *Boyd's* standard for invoking the fifth amendment privilege against compelled self-incrimination as hinged upon fourth amendment search and seizure violations. *Boyd* ruled that the government could not seize personal papers as evidence unless it could claim a possessory interest in the property superior to that of the person from whom the property was obtained. Further, a defendant could not be forced to produce purely evidentiary items because the seizure of purely evidentiary materials violated the fourth amendment, and the fifth amendment rendered these seized materials inadmissible. But the *Fisher* majority finds the *Boyd* criterion for invoking the fifth amendment privilege inconsistent with such recent search and seizure rulings as those permitting the seizure of purely evidentiary materials,[50] testimonial evidence, and conversations of criminal suspects.[51] To the extent that the *Boyd* rule against the compelled production of private papers rested on the proposition that the government seizure of mere evidence, including documents, violated both the fourth and fifth amendments, the Courts finds *Boyd* no longer relevant. The Court makes clear that the protection of personal privacy is a mere by-product of the fifth amendment privilege, not a test for invoking the privilege:

> [T]he Court has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.[52]

Respondents in *Fisher* argued that because an attorney is legally and ethically required to respect the confidences of his client, a taxpayer has a reasonable expectation of privacy in the records he transfers to his attorney in order to obtain legal advice. By transferring the records to his attorney he does not forfeit his fifth amendment privilege against compelled self-incrimination. The Court agrees with respondents that if the fifth amendment would excuse a taxpayer in possession of the accountant's papers from compliance with the subpoena, the taxpayer's privilege would extend to the attorney to whom the records were delivered for the purpose of obtaining legal advice. But, at the same time, if the documents could have been summoned from the taxpayer himself while he was in possession of them, then they can also be summoned from the attorney following the transfer by the client in order to obtain legal advice.[53] The Court's focus remains on the taxpayer, not on the attorney and not on any rights or privileges that allegedly arose out of the transfer of records to an attorney. Since "enforcement against

[49] Prior to Warden v. Hayden, 387 U.S. 294 (1967), the Supreme Court held that the fourth amendment prohibited the seizure of "mere evidence," that is, items that are neither contraband, fruits or instrumentalities of the crime, or weapons which the suspect might use to make an escape. *See* note 50 *infra*. This limitation upon the seizure power rested upon the assumption that the right to search for and seize property depended upon the state's assertion of a claim to possession of the property superior to that of the accused. The Court held that the state's interest in using the seized property to secure a conviction of the accused was not an interest superior to the accused's ownership or possessory rights. Gouled v. United States, 255 U.S. 298 (1921).

In Boyd v. United States, 116 U.S. 616 (1886), the government brought an action against two partners for fraudently attempting to import glass without paying the prescribed duty. The government obtained a summons directing the partners to produce an invoice the partnership had received concerning a prior glass shipment. This invoice was admitted at trial to establish that the partners had fraudulently claimed a greater duty exemption than they were entitled to. The Supreme Court reversed the judgment in favor of the government on the ground that the government could not seize an accused's documents or other property as evidence unless it could claim a proprietary interest in the property superior to that of the person from whom the property is obtained. 116 U.S. at 622.

[50] In Warden v. Hayden, 387 U.S. 294 (1967), the Court rejected the distinction prohibiting the seizure of merely evidential materials seized either under the authority of a search warrant or during the course of a search incident to an arrest, and allowing for the seizure of instrumentalities and fruits of a crime and contraband. In *Warden* the Court permitted the government to enter into evidence clothing belonging to the accused that had been seized by police during a search incident to arrest.

[51] *See* note 35 *supra*.

[52] 425 U.S. at 399; *see* also *In re* Horowitz, 482 F.2d 72, 85 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973).

[53] 425 U.S. at 397.

a taxpayer's lawyer would not 'compel' the *taxpayer* to do anything—and certainly could not compel him to be a 'witness' against himself," [54] the fifth amendment privilege will not attach, regardless of the privacy expectations the taxpayer may have had when he turned the records over to his attorney.

By so holding the Court leaves in doubt the role of privacy interests in future fifth amendment considerations and firmly establishes the technical criteria for invoking the privilege against compelled self-incrimination. While Justice Brennan contends that privacy considerations provide the touchstone against which to judge the availability of the fifth amendment privilege, the majority suggests that the proper method of judging whether an accused is compelled to give incriminating testimony rests on previous rulings that the privilege is not available simply because the evidence which the accused is required to produce contains incriminating writing. [55] However, the Court's analysis of the role of privacy interests in the application of the fifth amendment can be criticized for being inconsistent with recent Supreme Court decisions that have involved privacy principles arising under the fifth amendment. [56]

The *Fisher* Court's focus on the testimonial elements of production rather than on the nature and content of the compelled evidence leaves unsettled the question of whether the fifth amendment privilege can ever be invoked to suppress private papers seized by the government pursuant to a valid subpoena duces tecum and offered into evidence at trial.

It is important to the majority's position in *Fisher* that the summoned documents are the accountant's work papers and, though prepared from information supplied by the taxpayer, they nevertheless belong to the accountant. [57] One can ask, however, whether the fifth amendment would shield the taxpayer from compulsion to produce his own tax records in his

[54] *Id.* (emphasis added).

[55] Johnson v. United States, 228 U.S. 457 (1913). *See* note 26 *supra.*

[56] To better understand the origins of the role of privacy interests as a criterion for invoking the fifth amendment privilege one must first turn to Boyd v. United States, 116 U.S. 616 (1886). The Court in *Fisher* appears to be correct in saying that *Boyd's* holding (that the seizure of a man's private books and papers to be used in evidence against him violates his fifth amendment right against compelled self-incrimination) relies on the initial finding that the search and seizure in that case was an unreasonable one in violation of the fourth amendment.

But the Court inaccurately implies that fifth amendment privacy principles, recognized by *Boyd* and its progeny in prohibiting the compelled production of private papers, must rely on a fourth amendment violation as well in order to be involved. In 1944, fifty-eight years after *Boyd* was decided, the Court referred to privacy principles protected by the fifth amendment in Feldman v. United States, 322 U.S. 487 (1944). In *Feldman* the Court held that the fifth amendment does not forbid the use against a defendant in a criminal case being heard in federal court evidence of self-incriminating testimony previously compelled under a state immunity statute in a state court. The Court wrote:

> We are immediately concerned with the Fourth and Fifth Amendment, intertwined as they are, and expressing as they do supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy.

Id. at 489–90.

In 1964, in Murphy v. Waterfront Comm., 378 U.S. 52 (1964), the Court admitted that one of the basic values reflected in the fifth amendment is a respect for every individual's right "to a private enclave where he may lead a personal life." 378 U.S. at 55. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court found that a state statute making it a crime for any person to use contraceptives violated the rights of marital privacy found within the penumbra of specific guarantees of the Bill of Rights. The Court stated that:

> Various [constitutional] guarantees create zones of privacy... The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.

Id. at 484.

Just two years ago the Supreme Court, in Bellis v. United States, 417 U.S. 85 (1974), while recognizing that the protection of individual privacy was the major theme running through the Court's decision in *Boyd,* held that the fifth amendment privilege was not available to a member of a dissolved law partnership who had been subpoenaed by a grand jury to produced the partnership's financial records since the lawyer held the records in a representative, not a personal capacity. In *Bellis* the Court discussed the principles of *Boyd* entirely in terms of the protections the fifth amendment provides against the compelled production of one's personal papers. The Court had no problem interpreting *Boyd* as holding that

> any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime would violate the Fifth Amendment privilege.

Id. at 87. Indeed, the Court, in *Bellis,* unlike the Court in *Fisher,* did not distinguish *Boyd* on the ground that the privacy principles protected by the fifth amendment are tied up in the fourth amendment search and seizure violations that occurred in *Boyd.* Rather, the *Bellis* Court distinguished *Boyd* on the basis of the fact that the lawyer seeking to invoke his fifth amendment privilege in order to quash the subpoena duces tecum lacked the requisite "personal" interest in the partnership's books. *Id.* at 88.

[57] These same considerations were important to the Court's analysis in Couch v. United States, 409 U.S. 322 (1973). Justice Brennan, on the other hand, contends in his concurring opinion in *Fisher* that "[w]here one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person." 425 U.S. at 428 (Brennan, J., concurring).

possession. The Court expressly reserves this question for a case involving the private records of a taxpayer,[58] yet it leaves clues throughout the *Fisher* opinion that the impact of the *Fisher* ruling is not to be restricted to documents prepared by a third party accountant:

> The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege. . . . And, unless the Government has compelled the subpoenaed person to write the document . . . the fact that it was written by him is not controlling with respect to the Fifth Amendment issues.[59]

The Court's analysis seems to limit the scope of the fifth amendment privilege to situations where the government either compels the subpoenaed defendant to give incriminating oral testimony or compels him to write incriminating testimonial declarations.[60] In essence, any voluntary preparation of papers and records, whether prepared by the defendant himself or by a third party, can be summoned without violating the defendant's fifth amendment right against compulsory self-incrimination. The logic of the majority opinion demands this conclusion because there can be no rational basis for distinguishing between defendants who have a third party prepare such papers for them and those defendants who prepare the same records and fill out the same forms themselves.

But if tax records prepared by a taxpayer himself are not protected by the fifth amendment because the actual writing of the papers is not compelled by the government, then one must wonder what protections are left for such personal effects as one's private correspondences and diary.[61] They too have not been compelled by the government to be written. They too require the defendant to do no more than "surrender" them pursuant to a subpoena duces tecum. The *Fisher* Court's rejection of privacy principles as a criterion for evaluating the scope of the fifth amendment privilege surely suggests that letters and diaries are not protected by the fifth amendment privilege.

It is possible that the above extension of the *Fisher* decision goes too far. The Court may have meant to limit the scope of its decision by suggesting that a taxpayer might be complled to incriminate himself if he had to authenticate the summoned papers, that is "to restate, repeat or affirm the truth of the contents of the documents sought."[62] In *Fisher,* since the summoned papers belonged to the accountant, only the accountant could testify to the authenticity of the records and other documents. The taxpayers "did not prepare the papers and could not vouch for their accuracy."[63]

In *United States v. Miller*[64] the Supreme Court again reviewed privacy interests arising under a challenge to a subpoena duces tecum. But in *Miller* the Court discussed privacy interests arising under a fourth amendment challenge to the court summons.

In *Miller* the Court ruled that a defendant in a criminal hearing had no protectable fourth amendment interest to suppress bank records maintained pursuant to the Bank Secrecy Act of 1970.[65] Respondent was charged with conspiracy to defraud

[58] 425 U.S. at 414.

[59] *Id.* at 410 n.11; *see also* Wilson v. United States, 221 U.S. 361 (1911); *cf.* Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968).

[60] The Court writes that

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

425 U.S. at 411.

[61] The Court has recently suggested that there may be limits to the government's power to compel the production of private papers by a documentary summons. In Andresen v. Maryland, 96 S.Ct. 2737 (1976), the Supreme Court addressed the issue of whether the introduction into evidence of a defendant's business records, seized pursuant to a warrant during a search of his office, violates the fifth amendment. The Court found that since the records were voluntarily prepared without governmental compulsion, and since the petitioner did not have to authenticate the records (a handwriting expert authenticated the records) the petitioner was not forced to testimonially incriminate himself in violation of the fifth amendment.

The Court, however, was careful to distinguish between searches for records pursuant to a warrant or incident to an arrest, and the compelled production of documents from an individual in compliance with a documentary summons.

[62] *Id.* at 409; *accord,* United States v. White, 322 U.S. 694, 698 (1944).

[63] 425 U.S. at 413. *See* note 46 *supra.*

[64] 425 U.S. 435 (1976).

[65] Section 1839b (d) of the Bank Secrecy Act of 1970 provides:

> Reproduction of checks, drafts, and other instruments; record of transactions; identity of party
>
> (d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—
>
> (1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and
>
> (2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a

the government of tax revenues by the manufacture and possession of distilled spirits without proper registration or licensing. Prior to trial the respondent moved to suppress copies of bank records that had been obtained by means of an allegedly defective subpoena duces tecum[66] served upon two banks where the respondent had accounts. The records had been maintained by the banks in compliance with the requirements of the Bank Secrecy Act of 1970. The subpoenas required the bank presidents to produce all of the respondent's bank records. Neither bank informed the respondent that the subpoena had been served and in each case the bank made the respondent's relevant bank records available to the investigating agents.

The respondent contended that the bank records were illegally seized because the subpoenas duces tecum were defective. The district court overruled the respondent's motion to suppress and the bank records were admitted into evidence at the trial. The Fifth Circuit Court of Appeals[67] reversed on the ground that bank records obtained by means of a defective subpoena constituted an unlawful invasion of a bank customer's privacy, in violation of his fourth amendment right to be free from unreasonable searches and seizures. On appeal to the Supreme Court, the government contended that the court of appeals had erred in finding that the respondent had the requisite fourth amendment interest in the records to challenge the validity of the subpoena duces tecum.[68]

In *California Bankers Association v. Schultz*[69] the Court held that the recordkeeping requirements of the Bank Secrecy Act were constitutional on their face and that the mere maintenance of records pursuant to the Bank Secrecy Act did not violate depositors' fourth amendment rights, since neither the Act itself nor its implementing regulations required that any of the information contained in the bank records be disclosed to the government. Government access to the depositors' bank records was "controlled by existing legal process."[70] The respondent in *Miller*, however, contended that while a depositor may have no fourth amendment interest in the bank records so long as they are merely retained in compliance with the Bank Secrecy Act, once the government issues a subpoena duces tecum to obtain the bank depositor's records a fourth amendment interest is created. This interest arises as a result of the bank depositor's legitimate expectation of privacy[71] in the bank records, in that the rec-

record of the party's identity pursuant to subsection (c) of this section.

12 U.S.C. § 1829b(d) (1970).

[66]The petitioner argued that the subpoenas were defective because they were "issued by the United States Attorney rather than by the court, because no return was made upon the subpoenas to the court, and because the subpoenas were issued for a date when the grand jury was not in session." United States v. Miller, 500 F.2d 751, 756 (5th Cir. 1974).

[67]United States v. Miller, 500 F.2d 751 (5th Cir. 1974).

[68]The government also contended that the court of appeals erred in holding that the subpoenas were defective and in determining that suppression of the evidence was the appropriate remedy if a constitutional violation did take place. Since the Supreme Court held that the respondent had no protectable fourth amendment interest to challenge the subpoena in the first place, it did not reach the government's two latter contentions.

[69]416 U.S. 21 (1974).

[70]California Bankers Ass'n v. Schultz, 416 U.S. 21, 52 (1974). Although the Court in *California Bankers* never defined the term "existing legal process," at least one court assumed that "legal process" referred to valid subpoenas issued either by a court or an investigating grand jury. In United States v. Sahley, 526 F.2d 913 (5th Cir. 1976), the defendant was tried and convicted of the charge that he had made a material false financial statement to a federally insured bank for the purpose of influencing the bank to approve a loan submitted by him. The defendant, appealing on the ground that the grand jury subpoena for his financial statement was issued without probable cause, relied on the court of appeals' decision in *Miller*. The court in *Sahley*, however, distinguished *Miller* on the basis that *Miller* stood for the proposition that a grand jury subpoena issued by a United States Attorney for a date when the grand jury was not in session did not constitute "legal process" within the meaning of *California Bankers*. In contrast, the court found that since the defendant's bank records in *Sahley* were subpoenaed by a grand jury in session they were obtained by the government "by way of *bona fide* 'existing legal process.'" *Id.* at 916.

[71]The Court relied on Hoffa v. United States, 385 U.S. 293 (1966), to support its use of the "zone of privacy" test. In *Hoffa* the defendant made incriminating statements to a paid informer that Hoffa had invited into his hotel room. The Court found that the accused's fourth amendment rights were not violated by admitting the informer's testimony into evidence since the defendant had not relied on the privacy of his hotel room in speaking with the informer. Rather, he had relied on the misplaced confidence that the informer would not reveal the defendant's wrongdoing. *See also* United States v. White, 401 U.S. 745 (1971), wherein the Court expressed the view that:

> Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. . . . Our problem . . . is what expectations of privacy are constitutionally "justifiable"—what expectations the Fourth Amendment will protect in the absence of a warrant.

Id. at 751–52.

Some courts, in analyzing a defendant's privacy interests,

ords kept by the bank are merely copies of the respondent's personal records and they are made available to the bank for the limited purpose of conducting financial transactions. The respondent argued that to permit the government to obtain these records by way of a defective subpoena duces tecum circumvents the depositor's fourth amendment rights by allowing the government to seize the depositor's bank records without complying with the legal process that the government would have had to invoke if it had proceeded directly against the depositor.

The Supreme Court, in seven-to-two decision[72] with Mr. Justice Powell writing for the majority, ruled that since the subpoenaed documents were not the respondent's private papers, but rather were the bank's records, the documents failed to fall within a constitutionally protected zone of privacy and the respondent lacked an interest protected by the fourth amendment. Consequently, the case was governed by the rule that the issuance of a subpoena to a third party to obtain documents belonging to that party does not violate the fourth amendment rights of the person under investigation.[73]

The Court recognized that *Boyd v. United States*[74] prohibits the "compulsory production of a man's private papers to establish a criminal charge against him." But the Court distinguished *Boyd* on the ground that the documents subpoenaed in *Miller* were not the respondent's private papers, but were the business records of the banks. The respondent neither owned nor possessed the bank records maintained pursuant to the Bank Secrecy Act. The Court found support for this proposition in *California Bankers,*[75] where bank depositors challenged the record keeping requirements of the Bank Secrecy Act on the ground that the Act allowed the government to preserve and collect evidence of criminal activities through an unconstitutional search and seizure. The Court decided, however, that the depositor's claim was premature because the Act merely required the bank to maintain records of financial transactions with customers, and any governmental access to the records was still be be controlled by existing legal process.[76] The Court rejected the argument that the bank, as a neutral party to the recording of financial transactions, was seizing records as an agent of the government, on the ground that the banks are parties that not only earn a portion of their income from conducting such transactions, but also have a substantial interest in the records' continued availability and use. The Court advised that "[c]laims of depositors against the compulsion by lawful process of bank records involving the depositors' own transactions must wait until such process issues."[77]

The *Miller* Court could have addressed the issue, left unresolved in *California Bankers,* of whether bank records seized by government investigators without a valid subpoena duces tecum could be

have tried to distinguish between the disclosure of such private transactions as those involving checks and drafts and disclosure of records maintained by banks for internal recordkeeping purposes. *See* United States v. Ginsburg, 376 F. Supp. 714 (D. Conn. 1974). In contrast, the dissenting opinion in the petition for rehearing on behalf of the government in United States v. Miller, 508 F.2d 588 (5th Cir. 1975), expressed the belief that the Bank Secrecy Act effectively decreased any reasonable expectation of privacy in the bank records

> because the records are now required to be maintained by statute, whereas prior to the passage of the Act microfilms were kept at the business discretion of banks, and customers were not informed of the practices of their own bank, or of other banks involved in the collecting process.

Id. at 591.

[72] Powell, J., delivered the opinion of the Court, in which Burger, C.J., and Stewart, White, Blackmun, Rehnquist, and Stevens, JJ., joined. Brennan and Marshall, JJ., filed separate dissenting opinions.

[73] In Donaldson v. United States, 400 U.S. 517 (1970), an Internal Revenue Service agent investigating the taxpayer petitioner's tax returns, issued summonses to the taxpayer's putative former employer and its accountant for the production of the employer's records of the taxpayer's employment and compensation during the years under investigation. When the taxpayer received a temporary restraining order from the district court, restraining the employer and its accountant from complying with the summons, the government filed petitions for enforcement of the summons pursuant to sections 7402(b) and 7604(a) of the Internal Revenue Code. *See* note 3 *supra.* The taxpayer filed a motion to intervene in the enforcement proceeding, relying on Rule 24 (a) of the Federal Rules of Civil Procedure. *See* note 4 *supra.* The district court denied the taxpayer's motion, with the court of appeals and the United States Supreme Court affirming the ruling. The Supreme Court ruled that an Internal Revenue Service summons could be used in connection with a tax investigation so long as the summons was issued in good faith and prior to a recommendation for prosecution. 400 U.S. at 536. In addition, the Court held that a party that had no proprietary interest in the summoned records had no protectable interest in the documents and consequently no absolute right under Rule 24 (a) of the Federal Rules of Civil Procedure to intervene in an Internal Revenue Service summons enforcement proceeding. 400 U.S. at 528.

[74] 116 U.S. 616 (1886). *See* note 39 *supra.*

[75] California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974).

[76] *Id.* at 52.

[77] *Id.* at 51–52.

suppressed at trial on the basis of a violation of the bank customer's fourth amendment rights. But the *Miller* Court, instead of analyzing the legal process invoked by the government to obtain the respondent's records, chose to rest on the notion that the banks are active and interested parties in the financial transactions carried on between them and their customers, and concluded that the subpoenaed materials were the business records of the banks, not the customer's private papers. Unable to assert either ownership or possession of the records, the respondent had no fourth amendment interest in the documents and thus he lacked standing to contest the validity of the government's subpoenas duces tecum to the banks.

The Court then addressed respondent's argument that the compulsion which required the production of his bank records itself creates a fourth amendment interest in the documents. To resolve this issue the Court directed its attention to the nature of the summoned documents, asking whether the respondent had a "legitimate expectation of privacy"[78] concerning their contents. The Court concluded that since all of the summoned documents either contained information voluntarily transferred to the banks and exposed to the bank employees during the ordinary course of business or were negotiable instruments expected to be used in commercial transactions, the respondent could have no legitimate expectation of privacy in their contents. The Court's decision makes clear that a bank depositor acts at his own risk in transacting financial affairs with a bank.[79] The fourth amendment cannot be used to prevent government authorities' use of information obtained from third parties, even if the information is revealed to the government on the assumption that it will be kept in strict confidence.[80] In summary, because the respondent could have no legitimate expectation of privacy in the bank records, he lacked the requisite fourth amendment interest in the documents to challenge the validity of the subpoenas duces tecum.

Mr. Justice Brennan, dissenting in *Miller,* also focuses on whether the respondent's right of privacy was invaded. But unlike the majority, Justice Brennan concludes that the respondent had privacy interests in the bank documents that satisfied the threshold requirements for invoking a fourth amendment claim. Justice Brennan adopts the language of a recent California Supreme Court case, decided on a factual situation similar to *Miller.* In *Burrows v. Superior Court,*[81] the California Supreme Court held that a bank customer had a legitimate expectation that, unless required by legal process, his bank records would be privately kept by the bank for internal purposes only.[82] Therefore, the acquisition of the bank records by investigating officers without utilization of proper legal process constituted an illegal search and seizure in violation of the fourth amendment.[83]

Justice Brennan, employing the words of California Supreme Court in *Burrows,* responds to the majority's assertion in *Miller* that the bank records of depositors are business records in which the bank holds an ownership interest. Justice Brennan attacks this notion by distinguishing between the role of the bank as a mere recordkeeper and its position when it becomes a victim of the depositor's criminal acts. He argues that so long as the bank remains a neutral party without a significant interest in the matter under investigation, the bank may not consent to an invasion of the depositor's right of privacy. Justice Brennan reminds the Court that it is, after all, the depositor's privacy interests that are at issue, not the bank's.[84] However, he continues, where the bank is no longer a neutral party to the matter under investigation, but is rather a victim of the depositor's wrongdoing, then the depositor's right of privacy

[78] *See* note 71 *supra.*

[79] It may be that even if the Court, in *Miller,* had decided that the respondent did have a legitimate expectation of privacy in his bank transactions, and that the proper legal process had not been adhered to, the bank customer still might not be able to protect his bank records from seizure by the government for purposes of an investigation. In United States v. Prevatt, 526 F.2d 400 (5th Cir. 1976), the same circuit court of appeals that ruled that legal process had been insufficient in United States v. Miller, 500 F.2d 751 (5th Cir. 1974), ruled that where a bank voluntarily turned its records over to the Internal Revenue Service the defendant could not maintain a motion to suppress those bank records from evidence at trial. The court ruled that "the bank's consent vitiates any requirement of compulsory legal process." 562 F.2d at 403. *Contra,* Burrows v. Superior Court, 13 Cal. 3d 238, 245, 529 P.2d 590, 594, 118 Cal. Rptr. 166, 170 (1974).

[80] 425 U.S. at 443.

[81] 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974). In *Burrows* police contacted several banks at which the accused, an attorney suspected of having misappropriated funds belonging to a client, maintained accounts. Without a warrant or any court process copies of the accused's financial statements were obtained from at least one bank. The court held that the bank statements relating to the accused's bank accounts and obtained without the benefit of legal process were acquired as a result of an illegal search and seizure.

[82] *Id.* at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169.

[83] *Id.* at 245, 529 P.2d at 595, 118 Cal. Rptr. at 171.

[84] 425 U.S. at 450 (Brennan, J., dissenting).

cannot prevail.[85] In *Miller,* the bank was a neutral party. It had no knowledge of the respondent's allegedly illegal acivites and was not harmed thereby.

Justice Brennan suggests that the decision in *Miller* places individuals and businesses in an inescapable bind. For practical purposes they must maintain bank accounts in order to fully participate in the economic life of contemporary society. Yet in *Miller* a legislative scheme is affirmed whereby the government has been allowed to "circumvent the Fourth Amendment by first requiring banks to copy their depositors' checks and then calling upon the banks to allow inspection of those copies without appropriate legal process."[86]

Mr. Justice Marshall, also dissenting in *Miller,* laments the majority's two-step approach to the Bank Secrecy Act's recordkeeping requirements and the government's acquisition of records maintained pursuant to the Act. Justice Marshall points out that in *California Bankers* the Court held that the depositor plaintiffs in that case lacked standing to challenge the reporting regulations of the Bank Secrecy Act because they failed to allege a threatened or actual injury resulting from the reporting requirements. In *Miller,* the Court now suggests that once a bank has complied with the requirements of the Act the customer has no standing to invoke the fourth amendment when the government requests his records from the bank. The depositor's bank records belong to the bank the moment he undertakes a transaction with the bank, and he can have no legitimate expectation of privacy in them. There is a Catch-22 quality to the majority's holding that the respondent depositor's claim comes too late. Even though forced to let the bank make records of all of his transactions with it, the depositor still loses any protectable fourth amendment interest in those documents as soon as he turns them over to the bank. Justice Marshall writes:

> By accepting the Government's bifurcated approach to the record-keeping requirement and the acquisition of records, the majority engages in a hollow charade whereby Fourth Amendment claims are to be labeled premature until such time as they can be deemed too late.[87]

The Court's decision in *Miller* is a disturbing precedent in that it can be interpreted to sanction a governmental scheme for bypassing citizens' fourth amendment rights and protections by first requiring a third party bank to keep records of all of its customers' financial transactions and then, without invocation of the proper legal process, allowing the government to enter the bank to inspect and reproduce those records in the furtherance of a criminal investigation. The potential for abuse in such a scheme is particularly acute in light of the fact that *Miller* seems to permit access to the recorded information without invocation of the judicial process at all. Although *California Bankers* limited government access to records maintained by banks pursuant to the Bank Secrecy Act by requiring the invocation of existing legal process,[88] the Court's decision in *Miller* leaves unclear who, in anyone, can challenge the government's methods for seizing a depositor's bank records. As Justice Marshall points out in his dissentng opinion, while the depositor has no standing to challenge the maintenance of his bank records pursuant to the Bank Secrecy Act before the government subpoenas his records (because he could challenge no injury due to the mere recordkeeping requirements of the Act), once those records are maintained and subpoenaed, the depositor has no standing to challenge their production (because the records belong to the bank and the depositor lacks any fourth amendment privacy interests in them).

The Court, however, never does state who, then, can challenge the validity of a subpoena duces tecum issued to a bank for a depositer's bank records. The depositor, after *Miller,* is effectively precluded from ever challenging a summons for his bank records. By the Court's analysis, only the bank is the proper party to challenge the defectiveness of the summons. After all, according to the Court, the records belong to the bank and the bank is an interested party in those records. However, it would be a most rare bank that would attempt to interfere with a government investigation of a depositor by refusing to comply with an allegedly defective subpoena duces tecum. As Justice Brennan contended, unless a depositor perpetrates a wrongdoing against the bank itself, the bank remains a neutral party to the government

[85] An example of a factual situation in which the depositor's right of privacy could not prevail, using Justice Brennan's analysis, is United States v. Sahley, 526 F.2d 913 (5th Cir. 1976). In *Sahley* the defendant was charged with making a material false financial statement to a federally insured bank for the purpose of influencing the bank to approve a loan submitted by him. Although the court addressed the issue of whether the grand jury subpoena complied with legal process, Brennan's position in his dissent in *Miller* would suggest that the depositor's right to privacy would not have been violated even if the bank had merely volunteered the depositor's financial statement to the government authorities.

[86] 425 U.S. at 453 (Brennan, J., dissenting).

[87] 425 U.S. at 455 (Marshall, J., dissenting).

[88] 416 U.S. at 52.

investigation with no significant interest in the privacy rights of the depositor.[89] It is worth bearing in mind Justice Brennan's reminder that it is the privacy interests and rights of the depositer that are at stake, not those of the bank.

One can ask, then, just what does the Court mean in *California Bankers* when it refers to "existing legal process".[90] The *Bank Secrecy Act* provides no clues because it is noticeably silent on what legal process the Secretary of the Treasury must follow to obtain depositers' records from banks keeping the records in compliance with the Bank Secrecy Act. In *Stark v. Connally,*[91] the case that on appeal to the Supreme Court took on the title *California Bankers Association v. Schultz,* the District Court found that the Bank Secrecy Act

> makes no provision for any summons, either judicial or administrative, as the means whereby the Secretary can demand reports from banks and their customers concerning the details of their financial transactions. He is empowered to preemptorily require such reports routinely—automatically—from the banks and from all parties and participants in financial transactions without any procedure whereby either the bank or the customer may in advance test the reasonableness of the demand.[92]

The Bank Secrecy Act,[93] then, contains no judicial safeguards for the uncontrolled government intrusion into one's records kept by banks pursuant to the Bank Secrecy Act. After *California Bankers* one could have surmised that the existing legal process available to government investigators included the use of valid administrative summonses or judicial subpoenas with the ultimate enforcement of the summons judicially controlled by the bank or by the customer depositor acting as an intervening third party interest whose financial transaction are involved.[94]

Yet, by refusing to grant the depositor standing to challenge the subpoena duces tecum, the *Miller* Court denies the depositor the access to the very legal process it guaranteed in *California Bankers.* The Court reassures the depositer that his fourth amendment rights are going to be protected anyway because the government's power to obtain his records does not represent the kind of unreviewed executive discretion that necessarily interferes with one's personal affairs. The Court must realize, however, that it walks a thin line when it finds that the investigative needs of the government outweigh the privacy considerations of the bank customer because it vainly attempts to allay the fears and anxieties bound to be aroused by its decision when it rationalizes that the Bank Secrecy Act is nothing more than a means for implementing a longstanding law enforcement technique.[95]

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[89] *See* note 85 *supra.*

[90] 416 U.S. at 52.

[91] 347 F. Supp. 1242 (N.D. Cal. 1972), *aff'd in part, rev'd in part sub nom.* California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974). The court phrased the issue before it in terms of

> whether these provisions [in the Bank Secrecy Act], broadly authorizing an executive agency of government to require financial institutions and parties to or participants in transactions with them, to routinely report to it, without previous judicial or administrative summons, subpoena or warrant, the detail of almost every conceivable financial transaction as a surveillance device for the discovery of possible wrongdoing on the part of bank customers, is such an invasion of a citizen's right of privacy as amounts to an unreasonable search within the meaning of the Fourth Amendment.

Id. at 1246.

[92] *Id.* at 1249.

[93] The Bank Secrecy Act can be contrasted to the Internal Revenue Act of 1954, which establishes procedures whereunder the Secretary of the Treasury, for the limited purpose of ascertaining the correctness of an individual's tax return, may summon the person liable or any person having possession or care of books of account relating to the business of that person or any other person to appear and to produce such records and to give testimony as may be relevant to such an inquiry. INT. REV. CODE OF 1954 § 7602. *See* note 2 *supra.* Under these procedures the ultimate enforcement of the summons rests with the judiciary since either the bank or the customer taxpayer himself, as an intervening third party interest whose financial transactions are involved, may challenge the summons. INT. REV. CODE OF 1954 § 7604. *See* note 3 *supra.*

It is fair to suggest that the government itself recognized that the Bank Secrecy Act of 1970 contained no precedural safeguards with respect to the reporting of domestic financial transactions. The government wrote, in its brief to the district court in Stark v. Connally, 347 F. Supp. 1242 (N.D. Cal. 1972), *aff'd in part, rev'd in part sub nom.* California Bankers Ass'n. v. Schultz 416 U.S. 21 (1974):

> Nothing in the [Bank Secrecy Act] gives the government any greater right to access to bank records than it possessed before. Consequently, whenever the federal government desired to inspect any bank records kept under the provisions of the new statute, the federal government must resort to using an administrative summons or judicial subpoena as it did in the past. Upon the issuance of such a summons or subpoena, if the bank customer felt that the use of the summons or subpoena constituted an illegal search and seizure under the Fourth Amendment, that contention could be contested in court in the same manner as it heretofore has been contested.

Id. at 1251.

[94] *See* note 4 *supra.*

[95] The Court writes that the Bank Secrecy Act is

The Court in *Miller,* never squarely focuses on the bank customer's right to privacy which is threatened by the disclosure of his records to investigating government officials. Indeed, the Court leaves unclear whether it ever will discuss that issue, for as long as a depositor lacks standing to challenge the constitutionality of the Bank Secrecy Act both before records are kept and after the records are copied and possessed by the bank, the customer may find that the only alternative method for preserving the privacy of his financial records is to avoid transacting business with a bank at all. This is hardly a realistic alternative, and yet the Court's decision in *Miller* effectively shuts out the only other method for insuring against unrestrained governmental intrusion into the bank customer's financial background and status.

not a novel means designed to circumvent established Fourth Amendment rights. It is merely an attempt to facilitate the use of a proper and longstanding law enforcement technique by insuring that records are available when they are needed.

425 U.S. at 444.