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Fifth Amendment Protection Against Self-Incrimination in Tax Records: Fisher v. United States

The Internal Revenue Service brought an action to enforce a summons seeking the production by Fisher, an attorney, of documents relating to his client's income tax returns. The documents, containing an analysis of the taxpayer's income and expenses as determined from cancelled checks and deposit slips, had been prepared by the client's accountant and ultimately placed in Fisher's possession. Shortly after the IRS had begun an investigation, the taxpayer had obtained the documents from his accountant and delivered them to his attorney. Fisher refused to comply with the summons on the grounds that insofar as the documents were constitutionally protected from summons while in the hands of the client, they were also protected while in the possession of the attorney.¹ The Third Circuit upheld the enforcement order of the district court,² and the Supreme Court granted certiorari.³ *Held, affirmed*: Records prepared by an accountant and delivered to a taxpayer are not protected by the fifth amendment; hence, such documents are not protected while in the hands of an attorney. *Fisher v. United States*, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976).

I. THE FIFTH AMENDMENT'S APPLICATION TO TAXPAYERS' DOCUMENTS

The fifth amendment protects against more than compulsory oral self-incrimination. In *Boyd v. United States*⁴ the amendment prevented the compulsory production of personal documents. The Government sought to introduce into evidence an invoice which indicated that the Boyd partnership had attempted to defraud the Government. The partnership objected on fifth amendment grounds. The United States Supreme Court held that the invoice was inadmissible, stating that "a compulsory production of private books and papers . . . is compelling [an individual] to be a witness against himself, within the meaning of the Fifth amendment"⁵

Although often cited with approval,⁶ the holding in *Boyd* has been limited in subsequent litigation. The most prominent limitation is that the fifth amendment does not permit a custodian of corporate documents to withhold such

1. The attorney claimed that enforcement of the summons would violate not only the fifth amendment, but also the fourth amendment prohibition against unreasonable search and seizure. Further, he argued that the documents were protected under the attorney-client privilege since they would have been protected while in the possession of the taxpayer.

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

3. Consolidated with *Fisher* is *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974), in which the Fifth Circuit reversed the district court's enforcement order. In *Kasmir* the documents sought included accountant's workpapers pertaining to the taxpayer's income tax returns for 1969, 1970, and 1971, retained copies of the taxpayer's income tax returns for 1969, 1970, and 1971, and retained copies of reports and other correspondence between the taxpayer and his accountant during 1969, 1970, and 1971. The Supreme Court's holding reversed the Fifth Circuit's decision in *Kasmir*.

4. 116 U.S. 616 (1886).

5. *Id.* at 634-35.

6. *See, e.g., Bellis v. United States*, 417 U.S. 85, 87 (1974), in which the Supreme Court stated that it "has long been established, of course, that the fifth amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony."

records for fear of self-incrimination.⁷ This limitation was later expanded to include virtually all documents held by an individual in a representative capacity for a collective entity.⁸

A justification for distinguishing between private and corporate documents arises from the fact that the fifth amendment is designed to protect only the individual from self-incrimination.⁹ The privilege is a personal one¹⁰ which cannot be asserted by an artificial entity. Moreover, the fifth amendment stands, to a certain degree, to protect the privacy of the individual.¹¹ These underlying policies of the fifth amendment are in no way served by protecting collective entities; hence, such artificial beings are not protected from the compelled production of incriminating evidence.

Historically, the application of the fifth amendment reflects the personal and private nature of the privilege against self-incrimination and its objective in protecting privacy interests.¹² Problems do, however, arise in determining whether protection of particular documents will further fifth amendment objectives. An individual's tax records present one such problem.

In *United States v. Cohen*¹³ an accountant delivered his work papers to a client who was under investigation by the IRS. The taxpayer later refused to comply with a summons ordering the production of the papers, claiming that the papers might tend to incriminate him.¹⁴ The Ninth Circuit held that the documents were protected by the fifth amendment in two respects. First, the production of the documents pursuant to the description on the summons would constitute an incriminating admission of their identity and authenticity.¹⁵ Second, the papers related solely to the taxpayer's personal affairs.¹⁶ Thus, enforcement of the summons against the wishes of the individual would

7. In *Wilson v. United States*, 221 U.S. 361 (1911), the Supreme Court held that a corporate officer could not bar the production of corporate documents sought by a grand jury subpoena duces tecum on the grounds that the documents might incriminate him. In *Wilson* the subpoena was directed against the corporation. Even when the subpoena is directed against the individual corporate officer, however, the Court has held that the documents are not protected by the fifth amendment. *Dreier v. United States*, 221 U.S. 394 (1911). This exception was extended further in *United States v. White*, 322 U.S. 694 (1944), in which the Court held that an officer of a labor union could not assert his fifth amendment right as grounds for refusing to obey a subpoena directing him to produce union records.

8. See *Bellis v. United States*, 417 U.S. 85, 101 (1974), wherein the Court held that a partnership's documents may not be withheld upon the claim that the documents may tend to incriminate the custodian holding them in a representative capacity for the partnership.

9. See *United States v. White*, 322 U.S. 694, 701 (1944).

10. See *Couch v. United States*, 409 U.S. 322, 327 (1973), in which the Court commented that the fifth amendment privilege is an "intimate and personal one . . . which sprang from an abhorrence of governmental assault against the *single individual* . . ." (Emphasis added.)

11. *Boyd v. United States*, 116 U.S. 616 (1886). One of the major concerns throughout *Boyd* was the protection of the privacy of the individual. *Id.* at 630; see note 30 *infra*.

In *Boyd*, however, the Court was also concerned with the fourth amendment. The Court stated that the fourth and fifth amendments "run almost into each other" with respect to private papers. 116 U.S. at 630. For a contemporary discussion of the relationship between the fourth and fifth amendments in this regard see Comment, *Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis*, 69 NW. U.L. REV. 626 (1974).

12. See Comment, *The Fifth Amendment Privilege Against Self-Incrimination in Tax Investigations*, 6 TEX. TECH L. REV. 1055 (1975).

13. 388 F.2d 464 (9th Cir. 1967).

14. *Id.* at 466.

15. *Id.*

16. The court stated that "the work papers were scarcely public documents. They embody countless items of information relating to Cohen's purely personal affairs, including itemizations and summaries of data prepared directly from Cohen's bank statements, cancelled checks, and similar records." *Id.* at 471.

amount to an unconstitutional compulsion of possibly self-incriminating testimony.¹⁷ An almost identical fact situation occurred in *United States v. Beattie*.¹⁸ In that case, however, the Second Circuit held that the summons was enforceable. In *Beattie* the court's analysis focused on the degree to which the documents could be considered sufficiently private so as to be entitled to fifth amendment protection.¹⁹ As the documents had been compiled by another with the taxpayer's consent, the court did not believe that the documents were truly "private."²⁰ These papers were viewed as being more analogous to business documents than personal papers,²¹ and, thus, the fifth amendment was held to be inapplicable.

The conflict between *Cohen* and *Beattie* is even more perplexing in light of the Supreme Court's holding in *United States v. Couch*.²² In *Couch* the Court held that an accountant served with a summons was not entitled to assert his client's fifth amendment privilege.²³ This holding was predicated upon the fact that the person subject to incrimination, the client, was not being compelled to do anything,²⁴ and, thus, there was no state intrusion upon the client's sphere of privacy.²⁵ Possession of the documents by the taxpayer, however, creates a presumption of sufficient personal compulsion to accord fifth amendment protection.²⁶

Although *Cohen* and *Beattie* reached contrary conclusions, the Court's analysis in both cases touched upon a central issue. Both courts gave direct consideration to the degree to which the documents could be considered private so as to be entitled to the fifth amendment privilege. By dealing with the privacy issue, the courts at least maintained the proper respect for the history of the fifth amendment.²⁷ Thus, whether an accountant's work papers in the possession of the taxpayer are protected by the fifth amendment should hinge on how private the papers are.

II. FISHER V. UNITED STATES

In *Fisher v. United States* the issue before the Supreme Court was whether an accountant's work papers, delivered to an attorney by a taxpayer-client,

17. *Id.* at 472.

18. 522 F.2d 267 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 2165, 48 L. Ed. 2d 793 (1976), *noted in* 54 TEXAS L. REV. 432 (1975).

19. 522 F.2d at 272.

20. *Id.* at 276. The court did, however, modify the lower court's order which would have compelled the production of Beattie's private letters. *Id.* at 279.

21. This reasoning is revealed by the fact that the court regarded the compelled production of documents in *Beattie* as less of an invasion of privacy than there had been in *Bellis*. *Id.* at 273.

22. 409 U.S. 322 (1973).

23. *Id.* at 328-29.

24. The Court stated that the "essential inquiry is whether [the taxpayer's interest enables him] to assert successfully a privilege against compulsory self-incrimination to bar enforcement of the summons and production of the records, despite the fact that the records no longer remained in [his] possession." *Id.* at 327 (emphasis added).

25. The compulsion element ties in closely with the privacy goals of the fifth amendment: one's privacy interest is invaded if one is compelled to act.

26. The Court stated that "actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime." 409 U.S. at 333. *See also* Note, *Constitutional Law: Privilege Against Self-Incrimination Denied as to Documents Recovered by Taxpayer from His Accountant and Transferred to His Attorney*, 59 MINN. L. REV. 751 (1975).

27. *See generally* Comment, *The Taxpayer's Expectation of Privacy as a Bar to Production of Records Held by His Attorney*, 16 WM. & MARY L. REV. 666 (1975).

would be shielded from discovery under the client's fifth amendment privilege against self-incrimination. If a taxpayer-client is immune under the fifth amendment from a summons directing production of documents, then due to the attorney-client privilege his attorney is also immune.²⁸ Thus, the question before the Court was actually whether or not a taxpayer is privileged to withhold tax records prepared by an accountant.²⁹ To answer this question the Court set out the following standard for fifth amendment application:³⁰ protection will be extended only if the summons compels the production of "testimony" which tends to incriminate the taxpayer.³¹ No protection will exist if the aspects of the documents which may tend to incriminate the individual are not testimonial in nature.

Although the Court accepted the proposition that a summons served on a taxpayer involves considerable compulsion,³² the more important question was whether a summons would compel "testimony." The fifth amendment cannot be used as a shield merely because the evidence sought is incriminating;³³ testimony must exist before the fifth amendment privilege can apply. Therefore, the Court held that since the documents sought did not compel the taxpayer to "restate, repeat or affirm the truth of the documents" contents,³⁴ they were not subject to the protection of the fifth amendment.³⁵ In addition, as the preparation of the documents was "wholly voluntary," the documents could not be said to contain any "compelled" testimonial evi-

28. 96 S. Ct. at 1577-78, 48 L. Ed. 2d at 52. The attorney-client privilege exists to encourage clients to keep their attorneys fully informed. If the attorney is not protected when the client is, then clients may hesitate before supplying the attorney with the necessary information for fear that the information may be exposed. *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963). This situation is to be distinguished from that in which the attorney attempts to assert his client's fifth amendment privilege. As to this issue, the Court held that the attorney could not claim his client's fifth amendment rights since, although the client was subject to incrimination, he was not the person being compelled to produce anything. The Court stated that "it is not the taxpayer's fifth amendment privilege that would excuse the attorney from production." 96 S. Ct. at 1573, 48 L. Ed. 2d at 47.

29. Prior to addressing this issue, the Court pointed out that the claim of protection grounded upon the fourth amendment was inapplicable. 96 S. Ct. at 1580, 48 L. Ed. 2d at 55; see note 11 *supra*.

30. 96 S. Ct. at 1580, 48 L. Ed. 2d at 55. The Court's analysis of the fifth amendment ignores many of the underlying policies of the privilege against self-incrimination. These policies were outlined by the Supreme Court in *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964):

[The fifth amendment] 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 fear that self-incriminating statements will be elicited by inhumane treatment and abuses; 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 inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'

Justice Brennan commented that the "Court's treatment . . . here is . . . most inadequate. The gaping hole is in the omission of any reference to the taxpayer's privacy interests and to whether the subpoenas impermissibly invade those interests." 96 S. Ct. at 1589, 48 L. Ed. 2d at 66 (Brennan, J., concurring).

31. 96 S. Ct. at 1580, 48 L. Ed. 2d at 55.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* But see *Hoffman v. United States*, 341 U.S. 479, 486 (1951), in which the Supreme Court noted that the fifth amendment protection extends to information which "would furnish a link in the chain of evidence" necessary to prosecute the individual.

dence.³⁶ All that is compelled is the production of the documents, not their preparation.

The *act* of producing the documents in compliance with the summons, however, presumes that the taxpayer believes he is delivering the papers described in the summons, that the documents exist, and that they are in his possession and under his control.³⁷ Since the act of producing the papers is compelled, an additional analysis was required to determine whether or not the fifth amendment should apply. Such analysis involved two questions: first, whether or not the information conveyed by the production of the evidence amounts to "testimony" for the purposes of the fifth amendment,³⁸ and, if so, whether that testimony is incriminating.³⁹ To respond to this issue the Court determined that the information conveyed by compliance with the summons was not "testimony" for purposes of fifth amendment application.⁴⁰ Since the existence and location of the papers were already known to the IRS and were the only items of information surrendered by the *act* of producing the documents, the taxpayer would be supplying no new information by acting in compliance with the summons.⁴¹ "The question is not of testimony but of surrender."⁴² Consequently, the fifth amendment again was held to have no application since no testimony was compelled by the act of producing the documents in accordance with the summons.⁴³

The Court then assumed *arguendo* that the production of the accountant's work papers had some "minimal testimonial value."⁴⁴ Nevertheless, the fifth amendment was held to have no application since there is nothing unlawful in securing an accountant to aid in preparing tax returns, nor in having an

36. 96 S. Ct. at 1580, 48 L. Ed. 2d at 55. Mr. Justice Brennan's concurring opinion, however, indicated that "it does not follow that the protection is necessarily unavailable if the papers were prepared voluntarily, for it is the compelled production of testimonial evidence, not just the compelled creation of such evidence, against which the privilege protects." *Id.* at 1586-87, 48 L. Ed. 2d at 63 (Brennan, J., concurring).

Contrary to the premises advanced by both the Court and Justice Brennan, one wonders if the contents are not in some sense "compelled." To claim that bringing tax information to an accountant for compilation is not compelled is equivalent to claiming that the taxpayer had a choice in the matter, that he could have compiled the information himself. The Court's conclusion on this point is misguided. Many persons are incapable of compiling their own tax information, and, thus, the delivery of the information to the accountants cannot be said to be totally voluntary.

37. *Id.* at 1580, 48 L. Ed. 2d at 56.

38. *Id.*

39. *Id.*

40. *Id.* at 1580-81, 48 L. Ed. 2d at 56-57.

41. *Id.* at 1581, 48 L. Ed. 2d at 56. Brennan criticized this reasoning as a "principle which makes the testimonial nature of evidence, and therefore, one's protection against incriminating himself, turn on the strength of the Government's case against him." *Id.* at 1589, 48 L. Ed. 2d at 66.

42. *Id.* at 1581, 48 L. Ed. 2d at 56, quoting *In re Harris*, 221 U.S. 274, 279 (1911).

43. The Court also pointed out that it had upheld subpoenas served upon custodians of corporate documents over objections that they might incriminate the custodians. After citing numerous cases, the Court stated that the "existence and possession or control of subpoenaed documents being no more in issue here than in the above cases, the summons is equally enforceable." 96 S. Ct. at 1581, 48 L. Ed. 2d at 57. The cases cited by the Court, however, do not seem to support this proposition. In the most recent of such cases, *Bellis v. United States*, 417 U.S. 85, 92 (1974), the Court's refusal to permit custodians of corporate documents to assert the fifth amendment rests upon the ground that "corporate records do not contain the requisite element of privacy or confidentiality essential for privilege to attach." Thus, even if the existence, possession, or control of the documents were in issue, the fifth amendment should still remain inapplicable to corporate records.

44. 96 S. Ct. at 1581, 48 L. Ed. 2d at 57.

accountant deliver work papers into the possession of a taxpayer. Since there exists no testimony as to illegal acts, there is no testimony which can tend to be incriminating.⁴⁵

Since the fifth amendment does not protect the taxpayer who is in possession of documents prepared by an accountant, the attorney-client privilege does not protect the attorney from compliance with a summons demanding production of such documents. The attorney-client privilege can be applied only to further its purpose: to prevent the client from failing to keep his attorney fully informed for fear that disclosed information may be obtained by third parties.⁴⁶ This purpose is in no way served by allowing the client to shield from the Government otherwise nonprivileged documents merely by delivering them to an attorney.

Mr. Justice Brennan concurred in the decision⁴⁷ but expressed dissatisfaction with the Court's analysis.⁴⁸ In his view the scope of the fifth amendment is controlled to a great extent, not by the amendment's language, but by the privacy interest the amendment was intended to protect.⁴⁹ Thus, the threshold question should be whether or not the documents sought are sufficiently private to be entitled to protection.⁵⁰ Although Brennan thought the documents in question did not possess the requisite privacy qualities,⁵¹ he was concerned about the Court's failure to address this issue adequately.⁵² By not deciding this point he feared the Court may have established a precedent for future decisions which would further restrict the protection to be afforded personal documents.⁵³

Although the decision in *Fisher* is correct, the Court's analysis should not have been grounded upon such a strained and overly technical interpretation of the fifth amendment. A better reasoned rationale would have centered upon the accountant's work papers as being insufficiently private to be

45. *Id.*

46. See note 28 *supra* and accompanying text.

47. 96 S. Ct. at 1582, 48 L. Ed. 2d at 58. Brennan's concurring opinion contains an extensive historical analysis of the fifth amendment and the cases which have been decided under it.

48. *Id.* at 1582, 48 L. Ed. 2d at 58. Justice Brennan's grounds for concurring were based on the prior access to the documents by the accountant, and the business rather than personal nature of the papers. He did not expand on these grounds. Apparently, he felt these facts removed the privacy aspect of the documents on which fifth amendment claims should be based. The business nature of the papers renders them more akin to corporate documents than personal papers, and as such they are not entitled to the same protection. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 204-05 (1946), in which the Court noted that private corporations have historically "been subject to broad visitatorial power Correspondingly, it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have"

49. 96 S. Ct. at 1584, 48 L. Ed. 2d at 60.

50. *Id.*

51. See note 48 *supra* and accompanying text. In Brennan's opinion the critical question is whether the documents are private enough to be sheltered by the privilege. 96 S. Ct. at 1584, 48 L. Ed. 2d at 60. Since he concurred in the judgment of the Court, it follows that he judged the papers as not sufficiently private.

52. 96 S. Ct. at 1583, 48 L. Ed. 2d at 58-59.

53. *Id.* Mr. Justice Marshall concurred on similar grounds although he expressed less concern for future misuse of the Court's analysis. *Id.* at 1590, 48 L. Ed. 2d at 67. In his view there exists an inverse relationship between the private nature of the documents and the extent to which their existence may be assumed. Thus, the more private the documents, the less the Government may assume they exist. Under this analysis the act of producing the documents would provide substantial testimony. It follows that as substantial testimony would be provided, the fifth amendment would apply.