FIFTH AMENDMENT RIGHTS OF A CLIENT REGARDING DOCUMENTS HELD BY HIS ATTORNEY: *UNITED STATES v. WHITE*[1]

It is well settled that the fifth amendment privilege against self-incrimination may be asserted to bar the forced production of self-incriminatory documents in the hands of an accused.[2] A subject of continuing controversy, however, is whether this privilege can be asserted with respect to documents which are not actually in the accused's possession.[3] Recently, the United States Supreme Court, in *Couch v. United States*,[4] provided guidance for the resolution of this controversy by refusing to extend the privilege to documents owned by the claimant but held by an independent accountant acting on her behalf.[5] The Court did not consider, however, whether the same result would obtain with respect to documents in the actual possession of the claimant's *attorney* for the purpose of providing representation. Shortly after the *Couch* decision was announced, this issue was placed squarely before the Fifth Circuit in *United States v. White*.[6] In *White*, the Fifth Circuit extended the holding in *Couch* to exclude documents in the possession of an attorney on behalf of his client from the scope of the client's privilege against self-incrimination.[7]

This Note will discuss the question of whether a privilege against self-incrimination exists regarding documents in the actual possession of one's attorney. After setting forth the facts and the holding of the court in *White*, it will first consider this question in light of the interests which the fifth amendment was designed and has been held to protect. Then, by critically analyzing the court's decision in *White*, it will examine the effect of the relationship be-

1. 477 F.2d 757, *petition for rehearing denied*, No. 71-2381 (5th Cir. Nov. 28, 1973).

HEREINAFTER THE FOLLOWING CITATION WILL BE USED IN THIS NOTE:

J. WIGMORE, EVIDENCE (McNaughton rev. ed. 1961) [Hereinafter cited as WIGMORE].

2. *See, e.g.*, United States v. White, 322 U.S. 694 (1944); Boyd v. United States, 116 U.S. 616 (1886).

3. See notes 20-25 *infra* and accompanying text.

4. 409 U.S. 322 (1973).

5. See notes 26-31 *infra* and accompanying text.

6. 477 F.2d 757 (5th Cir. 1973).

7. *Id.* at 762-63.

tween an attorney and his client upon the proper resolution of this question. Finally, it will discuss whether fourth amendment considerations should bar the forced production of documents in the hands of one's attorney.

FACTUAL BACKGROUND OF *United States v. White*

In *White* several taxpayers retained an independent accountant to prepare their income tax returns for the years 1962 through 1968. Using information supplied by the taxpayers, the accountant compiled workpapers and other documents summarizing data useful to him in completing each year's return. After filing each return, the accountant retained the workpapers in his files.[8] In 1967, the Internal Revenue Service initiated a review of the taxpayers' tax liability which culminated in an investigation by special agents seeking evidence of possible criminal misrepresentations.[9] Upon learning that this criminal investigation was in progress, the taxpayers retained White as their counsel.[10] White, in order to prepare a case for his clients, immediately obtained from their accountant all workpapers used in preparing their tax returns. It was agreed that White could keep the papers indefinitely, but that he would return them to the accountant once the case had been resolved.[11]

In 1970, the Internal Revenue Service issued a summons to White demanding the production of all workpapers used by the accountant in preparing the taxpayers' income tax returns for the years 1966 through 1968.[12] When White refused to produce these

8. *Id.* at 759.

9. In 1967, the taxpayers had submitted an offer in compromise of their tax liability for the years 1962-1965. An examination of that offer led IRS officers to believe that the taxpayers had not adequately disclosed their assets and that they might have committed criminal violations in making the offer. *Id.* at 759-60.

10. White was officially appointed the taxpayers' attorney and representative-in-fact on a government power of attorney form filed with the Internal Revenue Service. 477 F.2d at 760.

11. *Id.* at 760. See note 45 *infra.*

12. The summons was issued pursuant to INT. REV. CODE OF 1954, § 7602. In order to ascertain the correct tax liability of taxpayers, the IRS is authorized to examine "any books, papers, records or other data which may be relevaut or material," to subpoena the taxpayer or other persous who may be in possession of such documents, and to take testimony under oath of persons concerned. *Id. See generally* Burroughs, *The Use of Administrative Summons in Federal Tax Investigations,* 9 VILL. L. REV. 371 (1964). This statutory authority is not without limits, however. It is well established that the investigatory powers of the IRS must yield to constitutional and other federally recognized rights, including the fifth amendmeut right against self-incrimination, when properly asserted in defense to a summons. *See, e.g.,* Reisman v. Caplan, 375 U.S. 440, 445-49 (1964). See note 13 *infra.*

workpapers on the grounds that the summons unconstitutionally sought to compel his clients to incriminate themselves, the government petitioned the district court to enforce the summons.[13] After rejecting White's assertion that the taxpayers' fifth amendment privilege against self-incrimination barred the forced production of the papers in White's possession, the Court ordered him to obey the summons.[14] On appeal, the Fifth Circuit assumed that White had standing to assert the privilege against self-incrimination on behalf of his clients,[15] but affirmed the lower court's ruling that the fifth amendment does not protect evidence which is not in the personal possession of the accused.[16]

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13. Jurisdiction for the enforcement of such a summons is vested in the district courts by INT. REV. CODE OF 1954 §§ 7402(b), 7604(a). In the case of a refusal to honor a properly issued summons, the government can apply to the court for an attachment against the witness "as for contempt," and a willful failure to comply can even result in criminal prosecntion. *Id.* §§ 7203, 7210. The Supreme Court has made it clear, however, that before any penalties may be imposed, the person directed to testify or produce records must be given the opportunity to test the summons in court and raise any legal defenses or assert any privilege he may have. See Reisman v. Caplan, 375 U.S. 440 (1964). *See generally* Comment, *Summons of Taxpayers' Records: Conflicting Standards of Proof for Judicial Enforcement*, 14 CATH. U.L. REV. 99 (1965); 17 OKLA. L. REV. 425 (1964).

14. The district court rejected the taxpayers' request to intervene in the enforcement proceeding in order to protect their own interests. On appeal the Fifth Circuit admitted that this ruling may have been erroneous, but refused to consider the issue because the taxpayers did not appeal the ruling. 477 F.2d at 759 n.2.

For a discussion of a taxpayer's right to intervene under sueh circumstances, see Donaldson v. United States, 400 U.S. 517, 527-30 (1971); Reisman v. Caplan, 375 U.S. 440, 449 (1964).

15. After reviewing the conflicting decisions of other federal courts, the court chose to assume, without deciding, that an attorney does have standing to raise his client's fifth amendment privilege. *Compare* Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963); *In re* Fahey, 300 F.2d 383 (6th Cir. 1961); and United States v. Boccuto, 175 F. Supp. 886 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959) *with* United States v. Judson, 322 F.2d 460 (9th Cir. 1963); Colton v. United States 306 F.2d 633 (2d Cir. 1962); and Application of House, 144 F. Supp. 95 (N.D. Cal. 1956). *See generally* Lay, *Attorney's Assertion of His Client's Privilege Against Self-Incrimination in Criminal Tax Investigations*, 21 U. MIAMI L. REV. 854 (1967); Comment, *The Attorney and His Client's Privilege*, 74 YALE L.J. 539 (1965).

16. The appellant in *White* did not argue that the documents were protected by the attorney-client privilege. The majority opinion noted, however, that such an argument would likely have been rejected on the ground that pre-existing documents, *i.e.*, documents prepared before the attorney-client relationship was established, cannot constitute a confidential communication between attorney and client. 477 F.2d at 762 n.9. See 8 WIGMORE §§ 2307-09. *See generally* Lofts, *The Attorney Client Privilege in Federal Tax Investigations*, 19 TAX L. REV. 405 (1964); Petersen, *Attorney-Client Privilege in Internal Revenue Service Investigations*, 54 MINN. L. REV. 67 (1969); Comment, *supra* note 15.

POSSESSION, OWNERSHIP, AND COMPULSORY SELF-INCRIMINATION

*The Pre-*Couch *Approach*

The fifth amendment provides, *inter alia*, that "no person . . . shall be compelled . . . to be a witness against himself."[17] It has long been recognized that this privilege against self-incrimination extends to private papers and documents as well as to oral testimony.[18] While it is clear that this is a "personal" privilege available only to natural persons,[19] there has been considerable disagreement as to when an individual may withhold documents tending to implicate him in a crime.[20] Traditionally, an individual could invoke the fifth amendment only to protect private papers which both *belonged to him* and were *in his possession*.[21] This view, although not universally accepted, has survived until the present, and a number of recent cases have continued to demand some proprietary interest in the evidence as a prerequisite to assertion of the privilege.[22] A second

17. The Supreme Court, in Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964), articulated the policies and purposes behind this constitutional privilege:

> [O]ur 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 . . . 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. . . ."

See generally Ullmann v. United States, 350 U.S. 422, 426-29 (1956); Brown v. Walker, 161 U.S. 591, 636-38 (1896) (dissenting opinion); Fortas, *The Fifth Amendment*, 25 CLEV. BAR ASS'N J. 91, 97-100 (1954).

18. See note 2 *supra*.

19. *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 74-75 (1906).

20. Authorities dealing with the fifth amendment privilege against self-incrimination as it applies to individual taxpayers include Fuller, *Taxation: Discovery of Documents Relating to the Tax Liability of the Taxpayer in Possession of His Attorney*, 17 OKLA. L. REV. 125 (1964); Garlis & Burke, *Fifth Amendment Protection of the Accountant's Workpapers in Tax Fraud Investigations*, 47 TAXES 12 (1969); Lyon, *Government Power and Citizen Rights in a Tax Investigation*, 25 TAX LAW. 79 (1971); Note, *Books and Records and the Privilege Against Self-Incrimination*, 33 BROOKLYN L. REV. 70 (1966); Comment, *supra* note 15.

21. *See, e.g.*, Johnson v. United States, 228 U.S. 457 (1913); Wilson v. United States, 221 U.S. 361 (1911).

22. *See, e.g.*, United States v. Widelski, 452 F.2d 1 (6th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972) (in which the court denied a taxpayer's claim of privilege as to workpapers belonging to his accountant, although in the taxpayer's possession); United States v. Tsukuno, 341 F. Supp. 839 (N.D. Ill. 1972) (where the court allowed a taxpayer to protect his own tax records, but not his accountant's workpapers); United States v. Boccuto, 175 F. Supp. 886 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959) (where the court enforced a summons requiring production of an accountant's workpapers held by an attorney on behalf of the taxpayer). *Cf.* Bouschor v.

line of cases, however, has rejected the notion that legal ownership of incriminating evidence is necessary in order to protect it from government scrutiny.[23] The Ninth Circuit, for example, noted in *United States v. Cohen*[24] that "it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit."[25]

The Impact of Couch

The United States Supreme Court recently attempted to resolve this issue in *Couch v. United States.*[26] In *Couch,* a taxpayer attempted to assert her fifth amendment privilege to resist the subpoena of business records owned by her but in possession of her accountant.[27] The Supreme Court rejected her claim of privilege, holding that unless an individual is in *actual* possession of the evidence sought, or is clearly in *constructive* possession, he may not claim involuntary self-incrimination because he is not, himself, the object of any impermissible government compulsion.[28] "Possession," said the Court, "bears the closest relationship to the personal compulsion forbidden by the fifth amendment. To tie the privilege against self-incrimination to a concept of ownership would be to draw a mean-

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United States, 316 F.2d 451 (8th Cir. 1963) and Sale v. United States, 228 F.2d 682 (8th Cir. 1956) (both requiring a proprietary interest in the client in any materials sought to be protected by the attorney-client privilege). See text accompanying note 31 *infra.*

23. *See, e.g.,* United States v. Cohen, 388 F.2d 464 (9th Cir. 1967) (in which a taxpayer successfully claimed his fifth amendment privilege with regard to workpapers then in his possession although admittedly owned by his accountant); Application of House, 144 F. Supp. 95 (N.D. Cal. 1956) (where the court recognized a taxpayer's right to withhold workpapers held by an attorney in his behalf) (dictum); Application of Daniels, 140 F. Supp. 322 (S.D.N.Y. 1956) (which allowed an accused to protect personally incriminating corporate records which he held in a personal capacity).

24. 388 F.2d 464 (9th Cir. 1967).

25. *Id.* at 468. According to the court, "possession . . . is thus the necessary *and sufficient* condition of the privilege, for the compelled production, identification, and authentication of incriminating materials by the possessor will incriminate him, whether or not the documents are his." *Id.* (emphasis added).

26. 409 U.S. 322 (1973).

27. The accountant was not the taxpayer's personal employee but an independent contractor with his own office and numerous other clients. *Id.* at 324.

28. *Id.* at 333. For a critical analysis of the *Couch* holding, suggesting that the Court failed to consider all the purposes of the fifth amendment and instead based its decision on a "superficial procedural distinction" (possession), see Comment, *Couch v. United States—Taxpayer's Records and the Privilege Against Self-Incrimination: The Fifth Amendment Bows to the Government's Bank Account,* 1973 UTAH L. REV. 106. *See also* text accompanying notes 54-61 *infra.*

ingless line."[29] Ownership without possession, the Court concluded, does not give rise to the privilege, because the owner himself is not compelled to disclose the evidence. He is neither threatened with inquisition and inhumane treatment, nor forced to choose between self-accusation and contempt.[30] On the other hand, the *possessor* of self-incriminating evidence sought by the government *is* entitled to the privilege. He is personally subject to compulsion and threats, he faces invasion of his personal privacy, and he must choose between self-accusation and contempt—regardless of whether the documents belong to him. Although the Court did not decide the issue specifically, the plain implication of *Couch* is that possession alone is a sufficient basis for claiming the fifth amendment privilege and that ownership of the evidence is immaterial. Accordingly, earlier cases which can be interpreted to make ownership a prerequisite must be considered to that extent overruled.[31]

THE ATTORNEY, HIS CLIENT, AND CONSTRUCTIVE POSSESSION

The Limits of Couch

Couch did not reach the central issue presented in *United States v. White*.[32] The Supreme Court's opinion explicitly acknowledged that no attempt was made to "decide what qualifies as rightful possession enabling the possessor to assert the privilege."[33] The majority did suggest, however, that actual physical possession might not always be required. They noted that "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,"[34] thereby permitting his assertion of the privilege even though he is not actually holding the incriminating evidence.[35] The court's primary task in

29. *Id.* at 331. The Court noted that recognition of ownership as the sole criterion for invoking the privilege would produce plainly illogical results. It would mean that business records owned by a taxpayer asserting his fifth amendment rights would be protected in the hands of his accountant, while the same information communicated to the accountant by letter, or even photocopied from the original records and given to the accountant, would not be protected since title to the documents would rest with the accountant. *Id.*

30. See note 17 *supra*.

31. See cases cited in note 22 *supra*.

32. 477 F.2d 757 (5th Cir. 1973).

33. 409 U.S. at 330 n.12.

34. *Id.* at 333. See note 51 *infra*.

35. This concept of "constructive possession" is not a new one. Two circuit courts have ruled that, for fifth amendment purposes, an individual is "in possession" of

White was to determine whether a taxpayer can be in constructive possession of workpapers prepared on his behalf by his accountant and possessed by his attorney for the purpose of preparing a legal defense, even though the taxpayer never actually possessed the papers himself. After *Couch*, a taxpayer seeking to protect documents not in his own possession could assert the fifth amendment to bar their disclosure only if he could establish constructive possession.[36]

Constructive Possession and the Attorney-Client Relationship

In the past, federal courts have recognized the existence of constructive possession under very similar circumstances, when evidence sought was held by the attorney of the person invoking the fifth amendment.[37] These decisions rested largely on judicial recognition of the unique nature of the attorney-client relationship.[38] It is commonly accepted that the attorney acts as an agent for his client, taking the client's place in all matters of law.[39] But it is a special kind of agency in which the parties share a mutual identity and enjoy a degree of privacy foreign to other agency arrangements. "The attorney-client relationship is a personal one, guaranteed by the Sixth Amendment right to counsel, the attorney-client privilege and

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personal records temporarily turned over to a third person for custodial safekeeping. United States v. Guterma, 272 F.2d 344 (2d Cir. 1959); Schwimmer v. United States, 232 F.2d 855 (8th Cir. 1956). Another circuit has found constructive possession in a taxpayer who had temporarily placed his records in the hands of his accountant in order to facilitate a government investigation. Stuart v. United States, 416 F.2d 459 (5th Cir. 1969). And a U.S. District Court held recently that a taxpayer did not waive his fifth amendment privilege as to his personal financial records by temporarily surrendering them to an accountant for the sole purpose of having his tax return prepared. United States v. Tsukuno, 341 F. Supp. 839 (N.D. Ill. 1972).

36. See text accompanying note 28 *supra*.

37. *See, e.g.*, United States v. Judson, 322 F.2d 460 (9th Cir. 1963); United States v. Foster, Lewis, Langley & Onion, 65-1 U.S. Tax Cas. ¶ 9418 (W.D. Tex. 1965); Application of House, 144 F. Supp. 95 (N.D. Cal. 1956). In each of these cases the claimant's attorney held financial records or workpapers in his client's behalf. Although all the papers were shown to be the property of the individual taxpayer, that fact now seems largely irrelevant for fifth amendment purposes in light of *Couch*. Likewise, if possession alone determines privilege, the fact that, in *Foster*, the papers travelled from the accountant to the client, then to his attorney, instead of directly to the attorneys, would seem of little consequence. See text accompanying notes 45-48 *infra*.

38. *See, e.g.*, United States v. Judson, 322 F.2d 460, 467 (9th Cir. 1963). There the court noted that "[n]o other 'third party,' nor 'agent,' nor 'representative' stands in such a unique relationship between the accused and the judicial process as does his attorney."

39. *See* 3 W. BLACKSTONE, COMMENTARIES *25.

ethical restraints on the attorney."[40] Its purpose is to protect the rights and privileges of an accused and to ensure the unrestricted preparation of his defense. Assertion of such rights and privileges does not depend on whether evidence is being held by the client or by his attorney. For such purposes, the two parties are identical.[41] In the cases holding that a client is in constructive possession of documents actually held by his attorney,[42] the courts have followed Professor Wigmore's reasoning that any privilege enjoyed by an individual, independent of his relationship with an attorney, continues to operate through the attorney as his agent once the relationship is established.[43] According to Professor Wigmore, "when the client himself would be privileged from production of a document . . . , the attorney having possession of the document is not bound to produce."[44]

The White *Decision*

In *White,* the Fifth Circuit rejected the Wigmore argument, choosing to interpret restrictively the meaning of constructive possession. In concluding that the taxpayers were not in constructive possession of the evidence sought, the court disregarded the attorney-client relationship and concentrated instead on the more tangible links between the taxpayers and the documents. It noted that the taxpayers could make no claim of ownership to the workpapers,[45]

40. United States v. White, 477 F.2d 757, 766 (5th Cir. 1973) (dissenting opinion) (footnotes omitted).

41. See United States v. Judson, 322 F.2d 460, 467 (9th Cir. 1963), where the court noted that "[t]he attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry."

42. See cases cited note 37 *supra.*

43. 8 WIGMORE § 2307. "The attorney is but the agent of the client to hold the deed [or other documentary evidence]. If the client is compellable to give up possession, then the attorney is; if the client is not, then the attorney is not. It is merely a question of possession, and the attorney is in this respect like any other agent." *Id.* See text accompanying notes 51-53 *infra.*

44. 8 WIGMORE § 2307. Opinions can be cited lending support to the contrary conclusion that possession by an attorney is not equivalent to possession by the client himself, but since these cases focused on ownership as the criticial test, their authority has been seriously eroded by *Couch. See, e.g.,* Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963); United States v. Boccuto, 175 F. Supp. 886 (D.N.J.), *appeal dismissed,* 274 F.2d 860 (3d Cir. 1959). In both cases, standing to assert a client's fifth amendment privilege was denied to an attorney in possession of accountant's workpapers because his client could claim no proprietary interest in those papers. Neither case reached the merits of the possession issue. See note 22 *supra.*

45. The proprietary status of accountants' workpapers is determined by state law, but as a general rule they are assumed to be the property of the accountant unless shown to the contrary. *See, e.g.,* Sale v. United States, 228 F.2d 682 (8th Cir.

and that they had never been in actual possession of them. Their attorney had obtained the documents directly from the accountant, without specific instructions to do so, and had held them for over a year.[46] The court reasoned that the attorney's possession was neither "temporary nor insignificant" as specified in *Couch*[47] and that the client's connection with the evidence was simply too attenuated to allow a claim of constructive possession.[48] Under such circumstances, the court concluded, a demand for production of the evidence exerted no impermissible governmental compulsion on the taxpayers.[49]

Fifth Amendment Protected Interests and the Attorney-Client Relationship

The court's solution to the problem presented in *White* is unsatisfactory in that it fails to consider the special significance of the attorney-client relationship. As Judge Ainsworth noted in his strongly worded dissent, the attorney-client relationship is central to the case and thus distinguishes it from *Couch*.[50] In the aftermath of *Couch*, proof of ownership, the means of acquisition, and the duration of possession of incriminating evidence are unimportant in determining whether one can assert the privilege. Instead, the decisive factor is whether the claimant of the privilege is in actual or constructive possession of the documents sought to be excluded. Where the question is one of constructive possession, the relationship between the accused and the person actually holding the incriminating evidence is crucial. If one accepts the proposition, long expounded by legal scholars and now almost beyond debate, that an attorney serves as his client's agent,[51] acting on the client's behalf in all mat-

1956), *cert. denied*, 350 U.S. 1006 (1956); Falsone v. United States, 205 F.2d 734 (5th Cir. 1953). The *White* court noted that the accountant had surrendered the papers on the condition that they be returned to him upon conclusion of the case. Despite the *Couch* decision, the court seemed to feel that *ownership* of the documents was of some importance in determining constructive possession and, thus, in defining the necessary eligibility for asserting the fifth amendment privilege. 477 F.2d at 763. See notes 29-30 *supra* and accompanying text.

46. 477 F.2d at 763-64.

47. 409 U.S. 322, 333 (1973).

48. 477 F.2d at 763.

49. *Id.*

50. *Id.* at 766-67. Judge Ainsworth pointed out that the accountant-client relationship involved in *Couch* lacks the constitutional underpinnings, the evidentiary privileges, and the expectation of privacy which distinguishes the attorney-client relationship. *Id.* See text accompanying notes 39-41 *supra*.

51. *See, e.g.*, 3 W. BLACKSTONE, *supra* note 39, at *25; 8 WIGMORE § 2307. See note 43 *supra* and accompanying text.

ters relating to the client's legal affairs, then the attorney's possession of evidence *is the client's possession,* regardless of the means of acquisition or of how long maintained. In *White,* the taxpayers plainly retained White as their legal representative[52] and authorized him to take all appropriate steps to protect their interests in the event of their criminal prosecution. It was by this authority that White obtained the accountant's workpapers; the accountant himself acknowledged that he surrendered the documents to White only as a representative of the taxpayer. Thus, for all practical purposes, White's possession was that of his clients. Constructive possession was clear.[53]

In holding that such possession of documents by an attorney on his client's behalf was an insufficient basis for invoking the client's fifth amendment rights, the court focused exclusively on the element of the direct personal compulsion. It failed to recognize that the "basic concerns which . . . underlie the privilege [against self-incrimination] are more subtle and far-reaching than mere aversion to the methods of the Inquisition and the Star Chamber . . . ."[54] If the only purpose of the fifth amendment were to protect an accused from torture or abusive questioning, there would be little reason to allow an attorney to withhold his client's incriminating documents. But, given the amendment's other objectives of guaranteeing a fair contest between the accused and the government,[55] of forcing the prosecutor to produce independent evidence,[56] and of protecting each individual's right to privacy,[57] evidence incriminating to an accused should be no

52. See note 10 *supra.*

53. The majority, however, in analyzing the facts of this case according to the *Couch* guidelines, relied entirely on the words "where . . . relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." 409 U.S. at 333; see text accompanying note 34 *supra.* They disregarded the preceding words offering an alternative criterion: "where constructive possession *is so clear* . . . as to leave personal compulsions . . .," etc. *Id.* (emphasis added). While the attorney's possession was concededly more than "temporary and insignificant," the acquisition of documents in his role as the taxpayer's legal representative could well be interpreted as a "clear" case of constructive possession.

54. Couch v. United States, 409 U.S. 322, 338 (1973) (dissenting opinion).

55. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964), *quoted in* note 17 *supra.*

56. *See* United States v. White, 322 U.S. 694, 698 (1944). The fifth amendment requires that "prosecutors . . . search for independent evidence instead of relying upon proof extracted from individuals by force of law." *Id.*

57. *See* United States v. Grunewald, 233 F.2d 556 (2d Cir. 1956) (dissenting opinion), *rev'd,* 353 U.S. 391 (1957).

> [T]he [fifth amendment] privilege . . . has, *inter alia,* an important "substantive" value, as a safeguard of the individual's "substantive" right of privacy, a right to a private enclave where he may lead a private life. *Id.* at 581-82.

less protected in the hands of his legal counsel than in his own hands. If the full scope of the amendment's guarantees is to be honored, the individual must be protected against more than physical coercion. As Justice Brennan noted in his concurring opinion in *Couch*:

> In some . . . instances, to be sure, the person claiming the privilege would not himself have been the subject of direct Government compulsion. And there is no doubt that the Fifth Amendment is concerned solely with *compulsory* self-incrimination. But surely the availability of the Fifth Amendment privilege cannot depend on whether or not the owner of the documents is compelled personally to turn the documents over to the Government. If private, testimonial documents held in the owner's own possession are privileged under the Fifth Amendment, then the government cannot nullify that privilege by finding a way to obtain the documents without requiring the owner to take them in hand and personally present them to the government agents.[58]

Compulsion may be exerted in many ways, most of which are much more subtle than the rack and screw. A man is "compelled" within the broad meaning of the fifth amendment anytime he is made the unwilling source of evidence to be used against him in a criminal prosecution.[59] The amendment entitles every man to a fair contest with the state and demands that the government "shoulder the entire load" in assembling proof of criminal conduct.[60] Government acquisition of incriminating evidence which an accused seeks to protect from disclosure violates this broader conception of the fifth amendment, whether the "compulsion" is exerted directly on the accused or indirectly on him through his attorney.[61] The results are identical:

See also Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964), *quoted in* note 17 *supra*; text accompanying notes 58-65 *infra*.

58. 409 U.S. at 337 n.

59. One commentator has suggested that compulsion is no longer a completely relevant criterion on which to base the protections of the fifth amendment. He contends that "willingness" to furnish evidence must supplant compulsion as the appropriate guide if the amendment is to retain its full vitality in the future. Note, *Seizure of Personal Records Violates the Fifth Amendment*, 46 TUL. L. REV. 545, 551 (1972).

60. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). See note 17 *supra*. *See generally* 8 WIGMORE §§ 2251-52.

61. The Ninth Circuit reached just this conclusion in United States v. Judson, 322 F.2d 460 (9th Cir. 1963), in which it honored a fifth amendment claim as to self-incriminating documents in possession of the accused's attorney. The court noted that "the inherent power thus to compel indirectly an individual's self-incrimination is curbed by the Fifth Amendment as effectively as the power to compel the same result directly." *Id.* at 468. Its reasoning, in part, was that:

> The government has at its disposal inquisitorial powers and administrative procedures which it may invoke at its pleasure. If the government's position [that incriminating evidence is not protected in the hands of the accused's attorney] were sustained here, those powers could be used to stimulate a taxpayer's consultation with his attorney and the predictable transfer of his

self-incriminating evidence must be surrendered by the party defendant, the prosecutor is relieved of the burden of seeking out independent evidence, and individual privacy is invaded. This obviously violates the spirit of the amendment and strongly suggests that the privilege against self-incrimination must be viewed as proscribing indirect compulsion as effectively as it does direct compulsion.

Sixth Amendment Implications of White

The impact of the *White* decision, however, must logically extend beyond the strict confines of the fifth amendment. It is immediately apparent that a narrow interpretation of the fifth amendment with respect to documents held by one's attorney may well endanger the individual's sixth amendment rights.[62] If the government is able to obtain evidence from an attorney which it cannot obtain directly from his client, a client may hesitate to entrust any potentially incriminating document to his counsel for fear it will be seized. Clients may be forced either to withhold evidence from their own attorneys or to be present whenever counsel needs to refer to it. A client choosing the latter alternative in hopes of optimizing his defense may suffer a heavy penalty in terms of time and money. And the attorney, forced to forego reference to important documents or limited in his use of them to periods during which his client can meet with him, will unquestionably be hampered in his preparation of the case.[63] Surely, effective assistance of counsel would be jeopardized if, for this reason, the attorney was denied free access to incriminating evidence in the hands of his client. There can be little doubt that the accountant's workpapers in *White* would have been privileged if they had been in possession of the taxpayers themselves instead of the taxpayers' at-

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records. The government's powers could then be utilized to compel disclosure of those matters by the attorney whenever the taxpayers were not available to utter the magic words. *Id.*

62. The sixth amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The Supreme Court has made it clear, however, that more than just formal appointment of a defense attorney is required to satisfy the rights of an accused under the sixth amendment and the due process clauses of the fifth and fourteenth amendments. *See* Avery v. Alabama, 308 U.S. 444, 446 (1940) and Powell v. Alabama, 287 U.S. 45, 58, 71 (1932), recognizing that the right to counsel necessarily includes an opportunity for the defense counsel to confer and consult with the accused and to prepare his defense. *See generally* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964).

63. For a discussion of what the *Couch* decision has done to the accountant-client relationship in this regard, see Coffee, *Supreme Court's* Couch *Decision Signals New Directions in Guarding Clients' Records*, 38 J. TAXATION 258, 260 (1973).

torney.[64] A taxpayer cannot be held to have waived this privilege by retaining counsel to represent him and authorizing him to obtain the papers on his behalf. The courts should not be expected to tolerate a situation in which an individual must sacrifice one constitutional right in order to fully exercise another.[65]

THE FOURTH AMENDMENT AND SELF-INCRIMINATION

In addition to the fifth and sixth amendment issues, the Fifth Circuit in *White* might well have devoted more attention to fourth amendment problems raised by the case.[66] Where the government compels production of an individual's private papers for use as evidence against him,[67] both the fourth and fifth amendments come into play, because the state not only forces the individual to be a witness against himself, but unreasonably invades his privacy as well.[68] The Supreme Court recognized this overlap almost a century ago in *Boyd v. United States*,[69] when it said:

> [A] compulsory production of . . . private books and papers . . . is compelling [their owner] to be a witness against himself, within the meaning of the Fifth Amendment . . . , and is the equivalent of a search and seizure—*and an unreasonable search and seizure*—within

64. *See, e.g.*, United States v. Cohen, 388 F.2d 464 (9th Cir. 1967) (cited with approval in *Couch*).

65. See Lay, *supra* note 15, at 864. *See also* Couch v. United States, 409 U.S. 322, 342 (1973) (dissenting opinion).

66. The fourth amendment provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

67. It is well established that the requisite "compulsion" may be exerted by the use of a summons, subpoena, warrant or other process of the court, since the courts have the means to enforce them through the contempt power or by resort to criminal sanctions. *See, e.g.*, Wood v. United States, 75 U.S. App. D.C. 274, 128 F.2d 265 (1942). Moreover, the courts have recognized that any distinction between obtaining evidence from an accused by search and seizure rather than by force of process is "more shadow than substance." Hill v. Philpott, 445 F.2d 144, 149 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); *accord*, Gouled v. United States, 255 U.S. 298, 306 (1921). *But see* 8 WIGMORE § 2264, at 381.

68. This interplay between the fourth and fifth amendments was recognized by Justice Marshall in his dissent in *Couch*:

> The Fourth and Fifth Amendments do not speak to totally unrelated concerns . . . . Both involve aspects of a person's right to develop for himself a sphere of personal privacy. Couch v. United States, 409 U.S. 322, 349 (1973) (Marshall, J., dissenting) (footnotes omitted).

See note 17 *supra*. *See generally* Comment, *The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations*, 6 LOYOLA L.A.L. REV. 274 (1973); Comment, *The Fourth and Fifth Amendments—Dimensions of an Intimate Relationship*, 13 U.C.L.A.L. REV. 857 (1966).

69. 116 U.S. 616 (1886).

the meaning of the Fourth Amendment.[70]

The *Boyd* court's conclusion was that there is a category of testimonial evidence—private books and papers—which may *never* be the object of a lawful seizure where they are to be used to establish a criminal charge against the possessor. In effect, the Court read the fourth and fifth amendments together, combining the elements of testimony, compulsion, self-incrimination, and privacy to find a class of evidence absolutely protected by the joint operation of both amendments.[71] This basic principle remained unchallenged for many years, and was even extended in *Gouled v. United States*[72] to include a prohibition against the seizure of not only testimonial evidence, but of any items of "mere evidence."[73] Although the Supreme Court backed away from the *Gouled* rule in *Warden v. Hayden*,[74] and held that mere evidence could lawfully be seized in the course of a properly authorized search,[75] the *Hayden* court was careful to point out that there might still be "items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."[76] While the majority opinion made no effort to define the boundaries of this exception, Justice Douglas, in his dissent, argued forcefully that private papers, letters, and documents must be included.[77] In the years since *Hayden*, the Court has declined (most recently in *Couch*) to propound more definite stand-

70. *Id.* at 634-35 (emphasis added). The Court interpreted the fifth amendment privilege against self-incrimination as "throwing light on" the question of what is an unreasonable search and seizure within the meaning of the fourth amendment. *Id.* at 633. According to this view, the two amendments must be read together when testimonial evidence is involved, the theory being that the fifth amendment privilege against self-incrimination "places a restriction on the kinds of evidence that reasonably may be seized under the fourth amendment." Note, *supra* note 59, at 545-46.

71. 116 U.S. at 630, 633.

72. 255 U.S. 298 (1921).

73. *Id.* at 309-11. The "mere evidence" doctrine espoused in *Gouled* limited the right of search and seizure to cases where the government could assert a valid claim of superior interest in the subject evidence. *Id.* at 309. Such an interest, *Gouled* suggested, was present only when the evidence could be categorized as fruits of crime, instrumentalities of crime, or contraband. *Id.* at 308.

74. 387 U.S. 294, 306-07 (1967).

75. *Id.* at 300-02.

76. *Id.* at 303.

77. *Id.* at 321. "The full privacy protected by the Fourth Amendment is . . . reached when we come to books, pamphlets, papers, letters, documents, and other personal effects . . . . By reason of the Fourth Amendment the police may not rummage around among these personal effects, no matter how formally perfect their authority may appear to be. They may not seize them. If they do, those articles may not be used in evidence. Any invasion whatsoever of those personal effects is 'unreasonable' within the meaning of the Fourth Amendment." *Id.*

ards in this area.[78] The result is that the *Boyd* rule, precluding the seizure of any private testimonial evidence to establish a criminal charge against its possessor, remains largely intact.[79]

The lower federal courts have articulated the present state of the law in various ways. Only the Second Circuit has specifically rejected the *Boyd* rationale,[80] although several other courts have permitted the seizure of arguably testimonial evidence without considering the issues raised by the combined operation of the fourth and fifth amendments.[81] On the other hand, two circuit courts have very deliberately chosen to follow *Boyd* in cases involving the seizure of financial rec-

78. In Berger v. New York, 388 U.S. 41 (1967) and Katz v. United States, 389 U.S. 347 (1967), the Court indicated that under carefully controlled circumstances police could engage in electronic surveillance of telephone conversations. This suggests that some items of a testimonial or communicative nature may be subject to lawful seizure. Neither case, however, dealt with private papers, so neither can be considered determinative in that regard. Moreover, neither decision addressed the issue of whether there are fifth amendment restrictions on the seizure of purely testimonial evidence. The Court may have felt that the "compulsion" essential to any fifth amendment claim was not present, since the accused, being unaware of the electronic intrusion, was not forced to choose between incriminating alternatives. *See* Note, *supra* note 59, at 550.

In Couch v. United States, 409 U.S. 322 (1973), the Court never reached the issue. basing its decision instead on the accused's lack of possession and unreasonable expectation of privacy. The decision implied, however, that if the accused had held the records in his own possession and had attempted to safeguard their privacy, their seizure by the government would likely have violated his fourth amendment rights. *Id.* at 333-36.

The Supreme Court, by denying certiorari in a number of other post-*Hayden* cases, has refused to clarify its position. *See, e.g.*, United States v. Blank, 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972); United States v. Fuller, 441 F.2d 755 (4th Cir.), *cert. denied*, 404 U.S. 830 (1971); Hill v. Philpott, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); United States v. Bennett, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 402 U.S. 984 (1971).

79. In Couch v. United States, 409 U.S. 322, 330-31 (1973), the Supreme Court reaffirmed *Boyd's* continuing validity by attempting to distinguish it on possessory grounds.

80. In United States v. Bennett, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 402 U.S. 984 (1971), the court upheld police seizure of a *personal letter* during an authorized search in connection with narcotics violations. The judges could find "no distinction of constitutional dimensions" between the seizure of clothing in *Hayden* and the letter in their own case. *Id.* at 896. They concluded that "[d]espite Mr. Justice Bradley's dicta in *Boyd v. United States*, now largely repudiated by *Hayden*, the Fourth Amendment does not protect broadly against the seizure of things whose compulsory production would be forbidden by the Fifth." *Id.* (citations omitted). The court felt that the "vice lies in unlimited search," and that where a search is properly circumscribed to prevent unreasonable rummaging through non-incriminating materials, there are no items whose very nature precludes them from seizure. *Id.* at 897.

81. *See, e.g.*, United States v. Fuller, 441 F.2d 755 (4th Cir.), *cert. denied*, 404 U.S. 830 (1971) (gambling records and betting slips); Application of Paperboard Sales, Inc., 291 F. Supp. 1018 (S.D.N.Y. 1968) (business records).

ords by agents of the Internal Revenue Service.[82] These courts have insisted that, regardless of judicial authorization, private testimonial evidence is inherently immune to seizure under both the fourth and fifth amendments, and that personal business and financial records are clearly testimonial in nature.[83] Still other courts have found a middle ground, suggesting that certain personal and private types of communication are immune from seizure, provided they are not the instrumentalities of a crime.[84]

If the *Boyd* doctrine is alive and well—and there is impressive authority for believing so—it is apparent that the *White* court paid too little attention to the problems which arise due to the nature of the evidence involved. The proper procedure for a court to follow in a case involving the seizure of testimonial evidence, such as *White*, has been outlined by the Seventh Circuit in *Hill v. Philpott*:[85]

> [I]n any case where a seizure under the Fourth Amendment also involves Fifth Amendment claims, the first step . . . is to determine whether the . . . evidence "relates to some communicative act or writing." If it does, the search is barred under both Amendments.[86]

The Fifth Circuit did not take this first step, although it could have furnished independent fifth amendment grounds for holding invalid the Internal Revenue Service subpoena.[87] Of course, it is arguable that the accountant's workpapers in *White* did not constitute personal testimo-

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82. See VonderAhe v. Howland, 13 CRIM. L. REP. 2096 (9th Cir. March 26, 1973); Hill v. Philpott, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). In each case a tax investigator, armed with a search warrant, entered a doctor's office and confiscated records relating to the income and expenses of the defendant's medical practice. Both seizures were found to violate the defendant's fifth amendment rights, although the fourth and fifth amendments were clearly read together. *Id.* at 146-48. The *Hill* court stated that:

> In overruling *Gouled* as to its fourth amendment teachings, we do not believe that the Court intended to in any way diminish the fifth amendment characteristics which might attach to certain items of property such as personal books and records. *Id.* at 148.

The Supreme Court cited the *Hill* decision with apparent approval in Couch v. United States, 409 U.S. 322, 330 (1973).

83. *See* VonderAhe v. Howland, 13 CRIM. L. REP. 2096, 2097 (9th Cir. March 26, 1973). "The numerous sheets of notes, figures and estimates . . . are the kind of 'communicative act or writing' that would reflect the author's personal thoughts, opinions and conclusions." *Id.*, *citing* Schmerber v. California, 384 U.S. 757 (1966).

84. *Cf.* United States v. Blank, 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972) (worksheets of gambling operation seizable as instrumentalities, and do not comprise personal records or communications); Taylor v. Minnesota, 342 F. Supp. 911 (D. Minn. 1972) (memorandum instructing defendant's wife as to preparation of prostitutes ruled an instrumentality of crime not protected by fourth or fifth amendment).

85. 445 F.2d 144 (7th Cir. 1971).

86. *Id.* at 148, citing Schmerber v. California, 384 U.S. 757 (1966).

87. See notes 50-61 *supra* and accompanying text.

nial evidence over which the taxpayer retained a reasonable expectation of privacy.[88] But there is much to recommend a contrary conclusion,[89] and the court would seem to have been remiss in failing to consider the issue.

CONCLUSION

The Court of Appeals for the Fifth Circuit's decision in *United States v. White*[90] is a significant, albeit restrictive, interpretation of the Supreme Court's ruling in *Couch*. By narrowly construing the concept of constructive possession set forth in *Couch*, the Fifth Circuit has, in effect, restricted the scope of the fifth amendment privilege that can be asserted to protect incriminating documentary evidence from disclosure. Its refusal to find constructive possession of

88. *See* Couch v. United States, 409 U.S. 322 (1973), where the majority held that "no Fourth or Fifth amendment claim can prevail where . . . there exists no legitimate expectation of privacy . . . ." *Id.* at 336.

In *Couch*, the Court found no reasonable expectation of privacy with respect to financial records turned over to an *accountant* for use in preparing tax returns and left in his possession. Such records, the Court noted, were subject to disclosure at the accountant's discretion. *Id.* at 435-36.

89. The workpapers sought contained a great deal of essentially private information relating to the taxpayers' purely personal affairs, all of which had been extracted from their confidential financial records. They were obviously intended to be handled confidentially and made available only to those persons designated by the taxpayers. Only a limited amount of the data was meant to be included in tax returns, and thus be exposed to government view; there was little reason for the taxpayers to expect a compromise of the entire contents of the papers. Moreover, at the first indication that a compromise of their privacy might be forthcoming, the taxpayers secured possession of the documents through their attorney. While the Court in *Couch* found that the taxpayers there surrendered any expectation of privacy by turning their records over to an accountant for disclosure on tax returns, it is important to recognize that those taxpayers made no effort to reassert their rights of privacy prior to the government seizure. The reasonableness of any privacy expectations, like the reasonableness of the search itself, must logically be determined at the time of the search and seizure. *See* United States *ex rel.* Manduchi v. Tracy, 233 F. Supp. 423, 427 (E.D. Pa. 1964), *aff'd*, 350 F.2d 658 (3d Cir.), *cert. denied*, 382 U.S. 943 (1965); *cf.* Comment, *supra* note 15, at 550-51 (1965). There would seem to be no good reason why an individual who has previously risked the exposure of some private item cannot later change his mind and protect its privacy again, at least where the item has not, in fact, been exposed. In *White*, the papers, although subject to possible compromise while in the hands of the taxpayers' accountant, had not, in fact, been compromised, and the taxpayers reasserted their privacy rights by securing constructive possession of the papers prior to service of the subpoena. Transfer of the evidence to their attorney was not an act inconsistent with a desire to maintain privacy; on the contrary, "a transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given." Couch v. United States, 409 U.S. 322, 350 (1973) (Marshall, J., dissenting).

90. 477 F.2d 757 (5th Cir. 1973).

evidence in a client whose attorney was temporarily holding such evidence in the client's behalf, all but abrogates the constructive possession concept as applied to third persons. If an attorney's possession on behalf of his client is not equivalent to actual possession by the client himself, who else's can be? Despite the protestations of Judge Ainsworth, the majority simply disregarded the special relationship that exists between attorney and client and its significance to a proper resolution of the case.

The court's narrow reading of the privilege against self-incrimination proceeded inevitably from its belief that the fifth amendment was intended to prohibit only direct physical compulsion against one who is or may be accused of a crime. Had it analyzed the taxpayer's position in terms of all of the amendment's objectives,[91] the majority might well have reached a different conclusion. Moreover, if the court had carefully considered the impact of its decision on an attorney's ability to prepare his client's case effectively, it seems that it would have realized that its holding raises serious sixth amendment questions. No attempt, however, was made to deal with these questions. Neither was there any attempt to deal with the potential fourth amendment issues inherent in any seizure of testimonial evidence. While treatment of these questions might not necessarily have compelled a different result in the case, it would seem that the court was remiss in not considering them. By the decision handed down, the Fifth Circuit has seriously weakened the attorney-client relationship and diluted the protection of individual rights under the fourth, and fifth, and sixth amendments.

91. See note 17 *supra.*