
Couch v. United States - Protection of Taxpayers' Records

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**COUCH v. UNITED STATES—
PROTECTION OF TAXPAYERS' RECORDS**

Lillian Couch, a taxpayer, owned and operated a business as a sole proprietor. Since 1955, she had given her business records to her accountant for the preparation of her tax returns. Although the accountant kept possession of these records in his files, the taxpayer retained title to the original documents. In 1969, an Internal Revenue Service agent began an investigation of the taxpayer's tax returns and found indications of a substantial understatement of gross income. Accordingly, a special agent of the Internal Revenue Service Intelligence Division began a joint investigation with the agent to determine the possibility of civil and criminal fraud. The special agent gave "Miranda" warnings¹ to the taxpayer, and issued a summons² to the accountant for the production of his client's records. At his client's request, the accountant delivered the records to the taxpayer's attorney and did not comply with the summons.

The special agent then petitioned³ the United States District Court for the Western District of Virginia seeking enforcement of the summons. The taxpayer intervened, claiming that her ownership of the records warranted an assertion of the fifth amendment privilege against self-incrimination, thus barring their production. Both the district court and the Fourth Circuit⁴ held the privilege unavailable and ordered enforcement of the summons. In a 7-2 decision, the Supreme Court affirmed the lower court's holding that the fifth amendment privilege did not apply. *Couch v. United States*, 409 U.S. 322 (1973).

The immediate significance of the *Couch* decision is that it has clarified the availability of an individual's fifth amendment privilege against

1. *Miranda v. Arizona*, 384 U.S. 436 (1966).

2. The summons was issued pursuant to INT. REV. CODE of 1954, § 7602, which provides in part that:

For the purpose of ascertaining the correctness of any return . . . the Secretary or his delegate is authorized— . . . (2) To summon the person liable for tax . . . or any person having possession, custody, or care . . . to produce such books, papers, records, or other data. . . .

3. The petition was filed pursuant to INT. REV. CODE of 1954, §§ 7402(b) and 7604(a).

4. 449 F.2d 141 (4th Cir. 1971), affirming an unreported district court decision.

self-incrimination where there is a divergence between the individual's ownership and possession of summoned records.⁵ The underlying significance of the decision is that taxpayers who desire to maintain the confidentiality of their records have now been compelled to re-evaluate their legal relationships with their tax consultants.

The purpose of this case note is to examine the impact of the *Couch* decision on the fifth amendment privilege against self-incrimination, the accountant-client privilege of confidentiality, and the attorney-client privilege of confidentiality. The resulting effect of the opinion in the tax fraud area will also be considered.

A federal tax investigation places the statutory authority of the government in conflict with the constitutional rights of its constituents. The Internal Revenue Code imposes a statutory requirement for record keeping upon all taxpayers subject to the income tax.⁶ In conjunction with the record keeping requirement, the government possesses the statutory authority to inspect taxpayer records, and, where such inspection is resisted, to compel their production.⁷ In spite of several important restrictions upon the investigatory powers of the government,⁸ the Internal Revenue Code does not refer to the Bill of Rights, or common law and state-created evidentiary privileges.

FIFTH AMENDMENT PRIVILEGE

The fifth amendment to the Constitution of the United States reads that "No person . . . shall be compelled in any criminal case to be a witness against himself" Historically, the constitutional privilege against self-incrimination grows out of the regard for conducting criminal trials and investigatory proceedings on a level of human dignity and impartiality.⁹ The Supreme Court has regarded the privilege necessary to prevent any recurrence of the Inquisition and the Star Chamber.¹⁰ The underlying policies of the privilege were articulated in *Murphy v. Waterfront Commission*.¹¹

5. It has been the law for more than eighty years that compelled production of documents falls within the scope of the fifth amendment privilege against self-incrimination. *E.g.*, *Boyd v. United States*, 116 U.S. 616 (1886).

6. INT. REV. CODE of 1954, § 6001.

7. *Id.* § 7602.

8. Section 7602(1) restricts the examination to those books and records which are "relevant or material." In reference to the time and place of inspection, section 7605(a) states that it be "reasonable under the circumstances."

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

10. *Ullman v. United States*, 350 U.S. 422 (1956).

11. 378 U.S. 52 (1964).

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses¹²

The constitutional privilege against self-incrimination is "solely for the benefit of the witness"¹³ and "is purely a personal privilege of the witness."¹⁴ The privilege applies only to natural individuals and may not be utilized by, or on behalf of, any organization.¹⁵ Moreover, a person may not assert another's constitutional right against self-incrimination to excuse his own testimony or non-production of summoned documents.¹⁶ In short, the fifth amendment is concerned with compulsion of the person.¹⁷ It was this element of personal compulsion against the accused that the Court found lacking in *Couch* since it was the accountant, and not the taxpayer, who was compelled to do something.¹⁸

Integrally related to the personal nature of the privilege against self-incrimination are the issues of ownership and possession of summoned documents. The Supreme Court has stated that "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."¹⁹

Since the work papers of an accountant under most state laws are recognized to be his property,²⁰ the issue of ownership of tax records has frequently been discussed. Though occasionally clouded by such consid-

12. *Id.* at 55.

13. *United States v. Murdock*, 284 U.S. 141, 148 (1931).

14. *Hale v. Henkel*, 201 U.S. 43, 69 (1906).

15. *United States v. White*, 322 U.S. 694 (1944) (unincorporated association); *accord*, *Wilson v. United States*, 221 U.S. 361 (1911) (corporation official compelled to produce corporate records); *Hale v. Henkel*, 201 U.S. 43 (1906) (corporation).

16. *United States v. White*, 322 U.S. 694, 704 (1944); *McAlister v. Henkel*, 201 U.S. 90, 91 (1906); *Hale v. Henkel*, 201 U.S. 43, 70 (1906). Neither may a person decline to testify or produce documents in his possession based upon his desire to protect others from punishment. *Rogers v. United States*, 340 U.S. 367, 371 (1951); *see Brown v. Walker*, 161 U.S. 591, 609 (1896).

17. *See Holt v. United States*, 218 U.S. 245, 252-53 (1910).

18. 409 U.S. 322, 329 (1973). The Court concluded that "no 'shadow of testimonial compulsion upon or enforced communication by the accused' is involved. *Schmerber v. California*, 384 U.S. 757, 765 (1966)." *Id.*

19. *United States v. White*, 322 U.S. 694, 699 (1944).

20. *See, e.g., Deck v. United States*, 339 F.2d 739 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 967 (1965); *Application of House*, 144 F. Supp. 95 (N.D. Cal. 1956).

erations of ownership, the courts have generally held that the taxpayer's right to invoke the fifth amendment privilege relating to his accountant's work papers focused on who had the rightful and indefinite possession of these papers. Where the accountant had retained title and exhibited no intention of relinquishing rightful and indefinite possession of his papers, the privilege was not upheld.²¹ But where the taxpayer held the papers as undisputed personal property or in his rightful and indefinite possession, the papers were held to have come within the protection of his privilege against self-incrimination.²²

In *Couch*, the Court called attention to the significance of possession over ownership as set forth by one of the latter line of cases between the taxpayer and accountant²³ where the taxpayer was the *possessor* and *non-owner* of the summoned records. The Court conclusively extended this holding to the situation in *Couch* where the taxpayer was the *nonpossessor* and *owner*.

Petitioner would, in effect, have us . . . mark ownership, not possession, as the bounds of the privilege, despite the fact that possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment.²⁴

21. *United States v. Zakutansky*, 401 F.2d 68 (7th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969); *United States v. Baldrige*, 281 F. Supp. 470 (S.D. Tex. 1968), *vacated as moot*, 406 F.2d 526 (1969); *United States v. Pizzo*, 260 F. Supp. 216 (S.D.N.Y. 1966); *see Deck v. United States*, 339 F.2d 739 (D.C. Cir. 1964) (where accountant had demanded return of records before summons was issued); *In re Fahey*, 300 F.2d 383 (6th Cir. 1961) (where accountant had requested transfer of records to the Internal Revenue Service before summons was issued).

22. *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967); *United States v. Re*, 313 F. Supp. 442 (S.D.N.Y. 1970); *United States v. Foster, Lewis, Langley and Onion*, 65-1 U.S. Tax Cas. ¶ 9418 (W.D. Tex. 1965); *see United States v. Levy*, 270 F. Supp. 601 (D. Conn. 1967) (government failed to disprove the taxpayer's legitimate and personal possession of documents); *Application of House*, 144 F. Supp. 95 (N.D. Cal. 1956) (documents were held by the taxpayer in a purely personal capacity); *Application of Daniels*, 140 F. Supp. 322 (S.D.N.Y. 1956) (corporate records were held by the taxpayer in a purely personal capacity). *But see 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 (1959). These latter two cases appear to deny the fifth amendment privilege on the ground that taxpayers' attorneys, although in rightful possession of documents at their clients' requests, could not invoke the privilege on behalf of their clients.

23. 409 U.S. at 330 n.12. The Court referred to *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967) where the possessor nonowner's privilege against self-incrimination was upheld. "[I]t 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." 388 F.2d at 468.

24. 409 U.S. at 331. The majority continued:

To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line. It would hold here that the business records which petitioner actually owned would be protected in the hands of

The Court later concluded:

We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime.²⁵

However, the Court recognized that situations may 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."²⁶ However, based on the accountant's independent status and the length of his possession of the taxpayer's records, the Court concluded that there was no "fleeting divestment"²⁷ in *Couch*.

PRIVILEGES OF CONFIDENTIALITY

The rigid possession test²⁸ laid down in *Couch* leaves little room for question as to when a taxpayer may assert his fifth amendment right to his records. Consequently, if the communications that a taxpayer desires to protect should fall outside his privilege against self-incrimination, he should alternatively be aware of the evidentiary privileges of confidentiality that may be available to him. The relevant privileges in the tax preparation and tax planning areas are the accountant-client privilege and the attorney-client privilege. *Couch* addressed the confidentiality issue in part as it discussed the accountant-client relationship.²⁹ Although the

her accountant, while business information communicated to her accountant by letter, conversations in which the accountant took notes, in addition to the accountant's own workpapers and photocopies of petitioner's records, would not be subject to a claim of privilege since title rested in the accountant. Such a holding would thus place unnecessary emphasis on the form of communication to an accountant and the accountant's own working methods, while diverting the inquiry from the basic purposes of the Fifth Amendment's protections.

Id.

25. *Id.* at 333.

26. *Id.*

27. *Id.* at 334. *But see* *Stuart v. United States*, 416 F.2d 459 (5th Cir. 1969) (where accountant's possession was merely custodial); *Schwimmer v. United States*, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956) (where attorney had stored his office files). *See also* *United States v. Guterma*, 272 F.2d 344 (2d Cir. 1959) (where personal records were stored in corporation safe).

28. In a dissenting opinion, Mr. Justice Marshall expressed his belief that the possession test adopted by the majority was too rigid. Instead, he proposed that four criteria be evaluated: "the nature of the evidence," "the ordinary operations of the person to whom the records are given," "the purposes for which the records were transferred," and "the steps that the author took to insure the privacy of the records." 409 U.S. at 350-51.

29. *Id.* at 335.

attorney-client relationship was not at issue in *Couch*, this privilege is equally worthy of examination, as it not only serves as a meaningful comparison to the account-client privilege, but it may also be vital to a taxpayer's attempts to protect his communications.

At common law no privilege was attached from the accountant to the client.³⁰ Neither has such a privilege been enacted by federal statute.³¹ If such a privilege exists it can only arise from state statute.³² Yet, even where communications between accountants and their clients are expressly protected by statute, the courts have almost uniformly held the privilege to be inapplicable in federal tax litigation.³³ In *Couch* the Court summarily reaffirmed that there is no confidential accountant-client privilege under federal law, and that there has been no recognition of state-created privileges in federal cases.³⁴ Furthermore, the Court added that there should be no justification of the privilege where income tax records subject to mandatory disclosure requirements are involved in a criminal proceeding.³⁵

30. See, e.g., *Falsone v. United States*, 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S. 864 (1953). See generally 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286 (rev. ed. J. McNaughton 1961) [hereinafter cited as 8 WIGMORE] for a discussion of the accountant-client privilege.

Accountants, however, have been protected by an extension of the attorney-client privilege where the accountant has been employed by the attorney representing the client rather than by the client himself. The privilege has been extended to the accountant in this situation where the legal advice sought from the attorney required specialized accounting knowledge. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). *Contra*, *Garipey v. United States*, 189 F.2d 459 (6th Cir. 1951). The privilege has also been recognized where the communication made to the accountant was in furtherance of the attorney-client privilege. *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963). *But see* *Himmelfarb v. United States*, 175 F.2d 924 (9th Cir.), cert. denied, 338 U.S. 860 (1949). However, for such communications to be privileged, they must occur during the attorney-client privilege. *Compare* *Application of House*, 144 F. Supp. 95 (N.D. Cal. 1956), *with* *Bouschor v. United States*, 316 F.2d 451 (8th Cir. 1963), *and* *Sale v. United States*, 228 F.2d 682 (8th Cir.), cert. denied, 350 U.S. 1006 (1956). These latter two cases indicated that legal title to documents must be transferred from accountant to attorney in order for the attorney-client privilege to be available.

31. See, e.g., *United States v. Ladner*, 238 F. Supp. 895 (S.D. Miss. 1965); *Petition of Borden Co.*, 75 F. Supp. 857 (N.D. Ill. 1948).

32. For a list of states having enacted accountant-client confidentiality statutes, see 8 WIGMORE, *supra* note 30, at § 2286 n.13.

33. See, e.g., *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); *FTC v. St. Regis Paper Co.*, 304 F.2d 731 (7th Cir. 1962); *Falsone v. United States*, 205 F.2d 734 (5th Cir. 1953); *United States v. Threlkeld*, 241 F. Supp. 324 (W.D. Tenn. 1965); *Dorfman v. Rombs*, 218 F. Supp. 905 (N.D. Ill. 1963). *But see* *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960); *Palmer v. Fisher*, 228 F.2d 603 (7th Cir. 1955); *United States v. Ladner*, 238 F. Supp. 895 (S.D. Miss. 1965).

34. 409 U.S. at 335.

35. *Id.*

The attorney-client privilege is the oldest common law privilege,³⁶ and a fundamental element of the attorney's professional responsibility is to preserve his client's confidential communications.³⁷ The privilege is limited to communications made in the course of seeking legal advice from a professional legal adviser in his capacity as such.³⁸ Above all, the communication sought to be protected by the privilege must be made in confidence to the attorney.³⁹

The status of the attorney-client privilege in the tax preparation field is not at all clear. Tax advice and the preparation of tax returns appear to be *prima facie* subject to the attorney-client privilege.⁴⁰ However, a client's tax disclosures might be interpreted as being intended for transmittal by the attorney rather than as a confidential communication,⁴¹ or the preparation of a tax return might not be considered a sufficiently legal service to render the attorney-client privilege applicable.⁴² Thus, a taxpayer should be aware of the possible limitations concerning communications made to an attorney tax consultant.

36. See 8 WIGMORE, *supra* note 30, at §§ 2290 and 2291 for a general discussion on the history and policy of the attorney-client privilege.

37. See ABA CANONS OF PROFESSIONAL ETHICS No. 37.

38. *Olender v. United States*, 210 F.2d 795, 806 (9th Cir. 1954). See generally 8 WIGMORE, *supra* note 30, at § 2292 for a detailed breakdown of the elements of the attorney-client privilege.

39. See 8 WIGMORE, *supra* note 30, at § 2285 where the importance of confidentiality stands out among the four fundamental conditions necessary to a privileged communication.

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one in which the opinion of the community ought to be sedulously *fostered*.

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. (emphasis in original).

40. *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962); *United States v. Schmidt*, 360 F. Supp. 339 (M.D. Pa. 1973); *United States v. Higgins*, 266 F.Supp. 593 (S.D. W.Va. 1966).

41. *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962); *United States v. Teller*, 255 F.2d 441 (2d Cir.), *cert. denied*, 358 U.S. 821 (1958); *In re Fisher*, 51 F.2d 424 (S.D.N.Y. 1931); *United States v. Merrell*, 303 F. Supp. 490 (N.D.N.Y. 1969). For a discussion concerning what communications are made in confidence to an attorney, see 8 WIGMORE, *supra* note 30, at § 2311.

42. *United States v. Higgins*, 266 F. Supp. 593 (S.D. W.Va. 1966); *Clayton v. Canida*, 223 S.W.2d 264 (Tex. Civ. App. 1949); *cf. Colton v. United States*, 306 F.2d 633 (2d Cir. 1962); *Pollock v. United States*, 202 F.2d 281 (5th Cir.), *cert. denied*, 345 U.S. 993 (1953). See also *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954).

EFFECT IN THE TAX FRAUD AREA

So long as the government's tax investigation is conducted for the purpose of ascertaining the correctness of a return and the items sought are material and relevant to the inquiry, the Internal Revenue Code does not expressly restrict the government's power to issue a summons.⁴³ However, the Supreme Court has expressed in dictum that the summons may be subject to challenge where its purpose is to obtain evidence for use in a criminal prosecution.⁴⁴ In response to this dictum, the Court held in *Donaldson v. United States*⁴⁵ that "the summons may be issued in aid of an investigation if issued in good faith and prior to a recommendation for criminal prosecution."⁴⁶ In commenting on *Donaldson*, the Court in *Couch* stated:

It is now undisputed that a special agent is authorized, pursuant to 26 U.S.C. § 7602, to issue an Internal Revenue summons in aid of a tax investigation with civil and possible criminal consequences.⁴⁷

In light of the *Couch* and *Donaldson* decisions, it would now be reasonable to expect the Internal Revenue Service to make greater use of the administrative summons. Some commentators believe that the Intelligence Division will become more aggressive in summoning taxpayers' records.⁴⁸ One commentator even expects special agents to use more of the powers of routine field agents in serving the administrative summons.⁴⁹

Accordingly, the taxpayer and the tax practitioner must take adequate precautions to insure the confidentiality and privacy of tax records. In his dissenting opinion, Mr. Justice Douglas recognized the implications of *Couch*.

The decision may have a more immediate impact which the majority

43. INT. REV. CODE of 1954, § 7602.

44. See *Reisman v. Caplin*, 375 U.S. 440, 449 (1964).

45. 400 U.S. 517 (1971).

46. *Id.* at 536. See *United States v. Billingsley*, 469 F.2d 1208 (10th Cir. 1972). The word recommendation refers to the time when the Internal Revenue Service forwards a case to the Department of Justice for criminal prosecution.

47. 409 U.S. at 326. See *United States v. Cleveland Trust Co.*, 474 F.2d 1234 (6th Cir. 1973).

48. See *Coffee, Supreme Court's Couch Decision Signals New Directions in Guarding Client's Records*, 38 J. TAXATION 258, 260 (1973) [hereinafter cited as *Coffee*], and *Garbis and Schwait, Supreme Court Decision in Couch May Intensify I.R.S. Summons Activity Against Accountants*, 6 PRACTICAL ACCOUNTANT 16, 18 (1973).

49. Where the special agent foresees a full scale investigation, it would give him a clear advantage to serve the summons on the accountant while the taxpayer's property is still in the accountant's possession. See *Coffee, supra* note 48, at 260.

does not consider. Our tax laws have become so complex that very few taxpayers can afford the luxury of completing their own returns without professional assistance. If a taxpayer now wants to insure the confidentiality and privacy of his records, however, he must forego such assistance. To my mind, the majority attaches a penalty to the exercise of the privilege against self-incrimination.⁵⁰

As set forth in the discussion below, it does not necessarily follow that a taxpayer would have to forego tax assistance as Mr. Justice Douglas suggests; however, there is no question that the taxpayer will be put to some degree of inconvenience and additional expense to protect his rights.

In view of the limited applicability of the common law and state-created privileges of confidentiality in federal income tax matters, it appears that the best advice to a taxpayer desiring to protect the privacy of his records is to take the necessary steps to assure his right against self-incrimination. Pursuant to the *Couch* decision, a taxpayer must be aware of two fundamental principles.

First, where practicable, a taxpayer must avoid transferring his records to the possession of an independent third party for extended periods of time. Prolonged possession of the taxpayer's records, especially by an independent third party, may subject the records to a summons thereby cutting off the taxpayer's privilege against self-incrimination.⁵¹

Second, only *prior* to the service of summons may records owned by and in the hands of a third party be transferred to the taxpayer desiring to preserve his fifth amendment privilege.⁵² It is quite clear that a post-subpoena transfer of documents from a tax preparer to a taxpayer will be recognized as an impermissible attempt to thwart government investigation.⁵³ As stated in *Couch*, "constitutional rights obviously cannot be enlarged by this kind of action. The rights and obligations of the

50. 409 U.S. at 342.

51. *Id.* at 334-35.

52. See *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967); *United States v. Re*, 313 F. Supp. 442 (S.D.N.Y. 1970). Note, however, that where a valid pre-subpoena transfer of tax records from the taxpayer's accountant to his attorney takes place, there is a split of authority as to whether an attorney can assert the fifth amendment privilege against self-incrimination on behalf of his client. Compare *Bouschor v. United States*, 316 F.2d 451 (8th Cir. 1963) and *United States v. Boccuto*, 175 F. Supp. 866 (D.N.J. 1959), with *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963), and *Application of House*, 144 F. Supp. 95 (N.D. Cal. 1956); *United States v. Foster, Lewis, Langley and Onion*, 65-1 U.S. Tax Cas. ¶ 9418 (W.D. Tex. 1965).

53. See, e.g., *United States v. Lyons*, 442 F.2d 1144 (1st Cir. 1971); *United States v. Zakutansky*, 401 F.2d 68 (7th Cir. 1968); *Deck v. United States*, 339 F.2d 739 (D.C. Cir. 1964); *Bouschor v. United States*, 316 F.2d 451 (8th Cir. 1963); *United States v. Boccuto*, 175 F. Supp. 886 (D.N.J. 1959).

parties became fixed when the summons was served, and the transfer did not alter them."⁵⁴

From the tax consultant's standpoint, in some instances, it may now be necessary to adopt new procedures where the client desires to protect his rights. It has been suggested that this may even call for tax preparation on the client's premises.⁵⁵ But where the accountant or attorney must perform the tax service in his office, it may be desirable to devise definitive letter agreements. Such agreements must clearly show that any of the client's documents in the preparer's possession are only there temporarily, and that work papers that are normally considered to be the accountant's property have been transferred to the client and have become the client's property.⁵⁶

CONCLUSION

In his dissenting opinion, Mr. Justice Douglas commented on the trend of recent Supreme Court decisions, and stated: "The decision today sanctions yet another tool of the ever-widening governmental invasion and oversight of our private lives."⁵⁷

However, the *Couch* decision should not necessarily be regarded so strongly pro-government as it first may appear.⁵⁸ In the government brief, the Solicitor General of the United States called the Court's attention to two thought provoking footnotes. First, the government noted⁵⁹ Judge Friendly's position that the production of documents as opposed to oral testimony should not be protected by the privilege against self-incrimination.⁶⁰ The Supreme Court in *Couch* did not make reference to this assertion. Second, although admittedly not urging its application in *Couch*,⁶¹ the government nevertheless mentioned the required records doctrine of *Shapiro v. United States*⁶² in conjunction with the taxpayer's statutory requirement to keep records for purposes of disclosure.⁶³ The

54. 409 U.S. at 329 n.9.

55. See Coffee, *supra* note 48, at 260.

56. *Id.*

57. 409 U.S. at 338.

58. See Coffee, *supra* note 48, at 259.

59. Brief for Respondent at 13 n.4, *United States v. Couch*, 409 U.S. 322 (1973).

60. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 701-03 (1968).

61. Brief for Respondent at 25 n.14, *United States v. Couch*, 409 U.S. 322 (1973).

62. 335 U.S. 1 (1948).

63. INT. REV. CODE of 1954, § 6001.

required records doctrine holds that the privilege against self-incrimination may not be pleaded so as to protect official public records or records required by law to be maintained.⁶⁴ Although the Court in *Couch* did briefly allude to the mandatory disclosure requirements of the Internal Revenue Code,⁶⁵ the Court made no reference whatsoever to the required records doctrine.⁶⁶

Although the Supreme Court in *Couch* may not have accepted all of the government's reasoning, as discussed above, it appears that a trend has been set. Whether this decision, in the words of Mr. Justice Douglas, "has cleared the way for investigatory authorities to compel disclosure of facets of our life we heretofore considered sacrosanct"⁶⁷ remains to be seen.

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64. See 335 U.S. 1 (1948).

65. 409 U.S. at 335.

66. *But see*, *Falsone v. United States*, 205 F.2d 734 (5th Cir. 1953); *Application of Howard*, 210 F. Supp. 301 (W.D. Pa. 1962), *rev'd*, 325 F.2d 917 (3d Cir. 1963); *United States v. Willis*, 145 F. Supp. 365 (M.D. Ga. 1955).

67. 409 U.S. at 341.