In the

Supreme Court of the United States

LILLIAN V. COUCH,

Petitioner,

v.

UNITED STATES and EDWARD F. JENNINGS, etc.,

Respondents.

No. 71-889

Washington, D. C.
November 14, 1972

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The above-entitled matter came on for argument at 2:07 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN G. ROCOVICH, JR., ESQ., Sixth Floor, Boxley Building, Roanoke, Virginia 24015, for the Petitioner.

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Respondents.

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-889, Couch against the United States.

Mr. Rocovich, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN G. ROCOVICH, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. ROCOVICH: Mr. Chief Justice, may it please the Court:

The facts surrounding this case are both clear and undisputed. During the summer of 1969, a field revenue agent commenced an investigation of the returns of the petitioner for the years 1964 through 1969. Petitioner informed him that her records were temporarily in the possession of her accountant, whereupon the field agent proceeded to the accountant's office where the records were made available for his examination.

The records in question were primarily cancelled checks and working papers which were made by the petitioner in her own handwriting for purposes of keeping records for her sole proprietorship restaurant. The field agent examined the records for several days. During the course of his examination, he apparently suspected that criminal fraud was involved, and he requested and received the assignment of special revenue agent.

The trial court found as a matter of fact that the special agent in his capacity as such was conducting a joint investigation with the field revenue agent for the purposes of ascertaining the correctness of the income tax return, plus the purpose of ascertaining whether there was any criminal tax fraud in the case.

The special agent, once he came to the case, proceeded to the accountant's offices, observed the petitioner's records, and thereupon went to the petitioner's house where he introduced himself, showed his credentials, and gave a standard Miranda warning, which included a statement that she did not have to produce any information and she was entitled to seek a lawyer's counsel before she responded to any questions.

Then the special agent proceeded to question the petitioner and then proceeded to the petitioner's accountant's office to seize or copy the records. In the meantime, petitioner had heeded the special agent's advice and had contacted her accountant and lawyer and advised her accountant to turn the record over to no one but her attorney. When the special agent arrived at the accountant's office, the accountant refused to turn over the records. The special agent at that point issued a summons to the accountant directing him to turn the records over.

Upon the special agent's return to the accountant's

office on the return date, he discovered that the accountant had already turned the records over to me as petitioner's attorney.

The Government then instituted a proceeding to judicially enforce the summons under 7402(a) and 7604(b) of the Internal Revenue Code. This action arises from an order of the District Court for the Western District of Virginia, affirmed by the Fourth Circuit Court of Appeals, directing me to turn over the books and records in question.

The central question, we believe, in this case is whether or not the privileges against self-incrimination and unreasonable search and seizure prevent the Government from seizing petitioner's personal books and records whenever they are out of her actual physical possession. By way of background, I think the Government has never denied that the records in the hands of the accountant were the property of petitioner. In fact, in their brief to the Fourth Circuit Court of Appeals, they conceded that the records in question, had they been in the hands of petitioner, would have been protected by the privilege.

Thus, the question becomes, I think, whether the records created and owned by the petitioner somehow lose their privileged status when they are out of her actual physical possession.

Q Mr. Rocovich, does the record show whether

these records were of a nature that the taxpayer would turn them over to her accountant, say, for a few days each year and then get them back or whether, on the other hand, they were more or less permanently in the custody of her accountant?

MR. ROCOVICH: I believe the accountant testified that the records had been delivered to him over a period of years from '55 on for the purpose of preparing tax returns. As a matter of fact, some records are at the petitioner's home records were at the accountant's office, and she delivered the balance of the records to the accountant for the purpose of facilitating a civil investigation. I do not think there is any evidence to the effect that the records were owned by the accountant. In fact, the petitioner has always asserted through the proceedings below that they were clearly her records and owned by her, and the Government has conceded it.

Q But how about year-in, year-out custody or possession of the records. Does the record of this proceeding indicate who had that?

MR. ROCOVICH: I do not believe it does indicate that in completeness, no, sir.

The petitioner believed that the test of whether she may rely on the Fifth and Fourth Amendment privileges is whether she possesses substantial instance of ownership

in the record. We submit that this test, of course, be subject to the condition that where a taxpayer voluntarily and knowingly and intentionally published the record, then they would lose this privilege. In essence, I believe the test is, From what source did the records originate? If they originated with the petitioner, they should be protected. If they did not, then they should not.

Q Are you arguing then a constructive possession theory insofar as the accountant is concerned?

MR. ROCOVICH: Yes, I am. The cases which we cite in our brief--there is a series of cases which state that possession is not the test, that it is ownership, and as long as the petitioner had the right to demand--the taxpayer had the right to demand the records back, that possession was not the key as to whether or not they were privileged.

Q You are asserting no accountant-client privilege as such?

MR. ROCOVICH: No, we do not assert an accountant-client privilege. We will concede there is none.

Q How do you characterize the relationship between the accountant and the petitioner, agent--

MR. ROCOVICH: Yes, sir.

Q --independent contractor?

MR. ROCOVICH: Actually either agent or bailee. Essentially that of an agent.

Q How is he compensated, by the month or by the job?

MR. ROCOVICH: He was actually just compensated by the job. I think he prepared the petitioner's tax returns every year and maybe the withholding trust fund tax deposit forms. He actually did very little work for the petitioner, but this was his function with her. He is not a certified public accountant but more in the line of a bookkeeper type.

Q He did similar work for other clients?

MR. ROCOVICH: Yes, this was his full-time job. He had been doing this for 20 years or so.

I think of importance, we believe that the rule in question that we submit is the really only practical and workable rule which this Court can adopt. If that is not true and if the Government test is adopted, I think the alternatives are unsatisfactory. We could return to the case of Burdeau v. McDowell by this Court I think in 1921 where records were turned over to a prosecutor which had been obtained by a party breaking into a man's office, blasting the safe apart with dynamite, smashing his desk with an ax, and turning the records over to a prosecutor. Certainly that type of evidence should not be permitted to be introduced into evidence, and we agree with the dissent of Justices Holmes and Brandeis when they said, "What could be more shocking to our sense of decency or fair play than that?"

Actually the Court's decision did not go off on the point of possession or ownership. They merely said--this Court merely said, "Well, it was not obtained by Government compulsion, so it must be okay." But I think the dissent has to be the proper rule in that case.

Another alternative from a practical and policy standpoint is, What is an informed tax attorney to advise his accounting firm client if the Government's test is adopted? Do you advise them to lease their file storage room to all of their clients so that even though they are working on their personal hand-made records there will be some kind of constructive possession theory they can rely on to prevent waiving their privileges. I do not know what else an informed attorney could advise.

And what about, for instance, your particular taxpayer clients? Do you advise them to only permit their accountant to work on their personal records in the privacy of their own home and in the same room with them, with the door bolted to prevent an Internal Revenue Agent from intruding with a summons and grasping whatever record might happen to be in an accountant's hand at that moment?

Q I think that this is all premised on the assumption that seizing from a taxpayer, say, his sales and purchase records would violate the Fifth Amendment.

MR. ROCOVICH: Yes, it is. These are sales records

made in his personal hand and the Government--

Q Made in his personal hand?

MR. ROCOVICH: These were made in her personal handwriting for her sole, private--

Q Does your position depend on whether it is made in her personal hand for her own use?

MR. ROCOVICH: No, she could have typed it or something of that nature. I suggest the same would prevail if one of her employees made it for her.

Q What about invoices sent to her from sources?

MR. ROCOVICH: The Government can obtain those without--oh, excuse me.

Q How about seizing them from her?

MR. ROCOVICH: We would concede that they could seize invoices.

Q And how about bills that she sent out to her customers?

MR. ROCOVICH: No, she has in effect published those--

Q So, they could seize those from her too?

MR. ROCOVICH: Yes, sir.

Q So what category of material do you say is protected by the Fifth Amendment from seizure from her?

MR. ROCOVICH: I think in this case, as an example, we had the gross daily receipt worksheet where she noted

each one of her three shifts at the restaurant; she took the cash register tab--

Q They could figure those out from the other documents that you say could be seized.

MR. ROCOVICH: No, I do not think so, because in this case she does not really send any bills out; it is a cash business, it is a cash register at a restaurant.

Q I see.

MR. ROCOVICH: We do not believe that the Government's test--

Q Could you not seize--if a waitress gives a check to somebody in a restaurant, they present that to the cashier, the cashier puts it somewhere; I suppose you could say you could seize that, would you not?

MR. ROCOVICH: Yes, I think you could. I do not have any difficulty with that, although that is actually owned by the restaurant and the customer just has it in his hand to notify him what he is supposed to pay and returns it immediately to the restaurant owner with his check. But we do not have any difficulty seizing that either, Your Honor.

Q Mr. Rocovich, we have had the income tax now for almost 60 years, federal income tax. Why do you think issues like this are coming up in 1972 rather than 1923 or '33 or '43 or '53?

MR. ROCOVICH: Well, Your Honor, I think the reason

is that the Miranda case and Escobedo did not come up until the mid-sixties and that started this whole chain of cases when taxpayers discovered they had rights that they never realized they had before. And there are many cases starting immediately after Miranda; there is a long string of these cases.

Q Has it ever been really judicially determined here anyway that Miranda warnings have to be given?

MR. ROCOVICH: In the Mathis case this Court went so far as to say that tax prosecutions were not immune from the Miranda decision. In a case you decided, the Donaldson case I believe two years ago, you specifically stated that the Court was not deciding this question.

Q And we specifically denied certiorari, although there is a conflict in the circuits.

MR. ROCOVICH: Yes, although I believe we have the weight of the circuits, Your Honor.

Q Mr. Rocovich, what would you say is the leading case from this Court that supports Justice White's question that there is a class of records which cannot be subpoenaed from the taxpayer: what one case?

MR. ROCOVICH: I am hard pressed to think of one case.

Q Are there several then?

MR. ROCOVICH: I think all the cases such as

Reisman v. Caplin, for instance--

Q That did not take hold, that was not a holding, was it?

MR. ROCOVICH: There was a strong inference that--

Q Are there any holdings of this Court?

MR. ROCOVICH: Holdings on what documents are privileged and what are not?

Q That there is a class of documents that cannot be subpoenaed from the taxpayer in a tax situation like this if she raises the Fifth Amendment.

MR. ROCOVICH: I cannot--well, going back to Boyd v. The United States in 1886, where a man had prepared his own records and invoices, this Court stated that this class of documents in general could not be seized in the possession of the taxpayer, and that was followed by Councilman v. Hitchcock, and it has been cited hundreds of times since. So, I think that is the place to start, Your Honor, is Boyd v. The United States in 1886.

Q Justice Holmes decided that tax returns were admissible and there was a chain of cases that followed that right up to Donaldson.

MR. ROCOVICH: We do not contest the admission of tax returns. They have been given to the Government.

Q And documents related to them.

MR. ROCOVICH: Yes, and schedules, tax returns also

should be admissible.

Q What would you say about work papers in support of the tax return?

MR. ROCOVICH: An accountant's working papers, I think, are admissible too.

Q How about the taxpayer's working papers?

MR. ROCOVICH: I think that records prepared by a taxpayer for purposes of making his return should be privileged because they are prepared by him for his own benefit in his own hand, and they are not part of the tax return. They are personal records.

The Government goes so far as to contend, I believe, with their theory that any time it is out of your actual physical possession it is subject to subpoena, Justice White. If I were helping you across Constitution Avenue by carrying your briefcase, the Government holds that they could hand me a summons in the middle of Constitution Avenue and seize your documents to use against you in a criminal trial. I do not think that can be the law, and I tend to agree with Justices Holmes and Brandeis that it is certainly shocking to our sense of fair play.

Q Getting back to the records, what about cancelled checks that cover items claimed as deductions; would they be privileged?

MR. ROCOVICH: The cancelled checks can be secured

from the bank.

Q How can they be secured from the bank?

MR. ROCOVICH: Most banks keep copies of all checks that they clear. That is the normal method of preparing a net worth case in tax fraud matters.

Q What about the specific cancelled check of the taxpayer in the taxpayer's handwriting?

MR. ROCOVICH: Although the Government has been so kind as to concede that that would be privileged, I would doubt that a cancelled check would be privileged. What we are talking about are personal payroll records, personal worksheets of receipts, expenditures, things of that nature, made by the proprietor for her own purposes.

Q Would that be similarly true under a wage and hour case?

MR. ROCOVICH: I think when you get into wage-hour cases and Office of Price Administration cases for a person where the records are specifically required to be kept by law for the benefit of an agency or a taxpayer enters into a contract with the Government to provide goods, the records he is keeping are essentially public records to start with and differ substantially from those records that are used to prepare tax returns.

Another policy consideration I think that merits attention is the fact that I believe, and I think it was

noted in the Stuart case from the Fifth Circuit, that the Internal Revenue Service will have an increasingly difficult time in enforcing the revenue laws if the Government's test is adopted. Congress has legislated the Internal Revenue to the point that it is fairly incomprehensible to the average person and even to the average attorney. And most taxpayers today I think find it necessary to enlist the aid of experts such as accountants and tax consultants to assist them in the preparation of their return. I submit taxpayers do this not intending to give up either ownership or privileges under the Fourth and Fifth Amendment.

Q Mr. Rocovich, may I ask have you yet addressed yourself to why Donaldson does not pretty much answer the questions presented by this case?

MR. ROCOVICH: In the Donaldson case we had a situation where the Government was subpoenaing or giving a summons, rather, to I believe it was a corporate employer for the corporate employer's records, and we have the case of a former employee coming in and saying, "Well, I want to suppress that because it incriminates me." In that case, the ownership of the records--

Q What I was addressing myself really was to, here as I understand it, there was not any recommendation for prosecution at the time this summons was issued, was there?

MR. ROCOVICH: In the Couch--in the case before the Court?

Q In this case, yes.

MR. ROCOVICH: That is correct. The special agent had just come in to investigate.

Q I am just wondering in that circumstance where is any Fifth Amendment or other problems in the light of Donaldson?

MR. ROCOVICH: The problem comes when a person prepares documents which could likely contain incriminating evidence.

Q As I understand it, when this summons issued, there had neither been--certainly there was not any recommendation made nor any determination that any recommendation would be made; is that right?

MR. ROCOVICH: Yes, that is right. But as the special agent testified on the trial, his principal purpose of his job is to ascertain criminal tax fraud. And in the Miranda case I think the point is reached where they say when the focal point of the investigation changes from a civil or other to a criminal investigation, at that point the defendants have the right to exercise their Fifth Amendment--

Q Does not Donaldson answer that?

MR. ROCOVICH: No. Donaldson specifically--

Q Left it open?

MR. ROCOVICH: The inference in Donaldson is in favor of the taxpayer. I think they stated this did not have to do with records which the taxpayer had no proprietary interest of any kind which are owned by the third person or in his hands and which relate to his business transactions. And they cite with approval Reisman v. Caplin in which case they said the court had deemed the possession to be the same as if they were in possession of the taxpayer himself.

Q Would you say that the agent that carried out the initial audit could ask for these papers and look at them?

MR. ROCOVICH: Yes, we cooperated and delivered the papers.

Q Constitutionally he could require them to be produced?

MR. ROCOVICH: Yes.

Q Even though they might contain incriminating evidence and even though they might be in the taxpayer's handwriting?

MR. ROCOVICH: Yes, that is correct for civil purposes. But at the point where his investigation shifts to a criminal one, at the point where he suspects fraud, at that point he must warn the taxpayer of her rights, and at that point he loses his right to see those records.

Q Your case is somewhat stronger for you than

Donaldson, I would take it, in view of the fact that in Donaldson it was the circus's records that were subpoenaed and then the circus was perfectly willing to give them, whereas here it is claimed, at least, that it is your client's records and neither she nor her accountant had been willing to--

MR. ROCOVICH: Yes, sir, ownership I believe is a test from Donaldson. The Government was going after the corporation, their records. The taxpayer had no right whatsoever to those records. His only connection was they were incriminating. Here they are our records, we own them, they are in the hands of our agent with the right to get them back immediately. And it is our contention that the mere naked possession by one's agent does not waive the rights in question. That is the basis of the rule we suggest to this Court.

Q In any event, the key to your argument is just as soon as they suspected fraud, however reasonable may have been the basis for suspicion, just as soon as they brought in that element of IRS, then everything followed that you are arguing followed.

MR. ROCOVICH: Yes, and there were many cases prior to the issuance of revenue ruling IR 949, I think it is, where this is the Government procedure. There are many cases, and finally they adopted the procedure that once they suspect

fraud, the special agent will be brought in, he will give the Miranda warning.

Q When did he give the Miranda warning here?

MR. ROCOVICH: When the special agent was brought in, his first act was to proceed to the taxpayer's home and give this Miranda warning. We concede that they did this properly. We concede that after we had gotten the warning we would be entitled to keep it, however, and direct our agent who is a mere naked possessor or a bailee, could refuse to turn it over.

The most recent case which has come up since our brief, it is noted in our supplemental brief, is a district court opinion of U. S. v. Tsukuno and Ero, which is identical to the facts of the series of cases we cite in our favor where the records are in the possession of the accountant and they belong to the taxpayer and the Government handed a summons to the accountant and the Court specifically rejected a Fourth Circuit opinion in Couch and several other opinions, and relying heavily on the Donaldson case and Reisman v. Caplin found in favor of the taxpayer in that case and said the Government could not seize the records in question.

Q I understood you to answer Mr. Justice Powell's question that this man was an independent contractor who was paid on a job basis; each time he did some work, he was

separately paid.

MR. ROCOVICH: Right. He was not a salaried employee. As opposed to Common Law Employee v. Independent Contractor, he was an independent contractor, yes, sir, over a long period of years.

I think for a moment it might be worthwhile examining the three cases the Government relies on. I mentioned the Burdeau v. McDowell case where a man used dynamite and a hatchet to obtain the evidence. I think that clearly cannot be the law any longer. They also rely on the Perlman case and the Johnson case. In Johnson, Mr. Johnson took bankruptcy and conveyed his records to the trustee in bankruptcy. This was a voluntary act. He transferred ownership and he transferred possession, and he published his records by making them a matter of public record with the court. So, this case is not related to the one before the Court. Neither is their case entitled Perlman v. The United States where we had a man who invented a pneumatic wheel and obtained a patent. In subsequent patent litigation he introduced the wheel and exhibits and diagrams and documents and there he conveyed title to the Equity Court. He conveyed possession to the Equity Court. He published the records. So, I think that case is not in point. He was subsequently prosecuted for perjury and he tried to suppress this information. But since you have transfer of possession and

ownership and publication, those cases seem to me to be correct but not in point to the case before us. We believe that the Government has not cited any public policy reason or accepted case law for their conclusion that possession is the test of whether you waive the Fifth and Fourth Amendment privileges. On the contrary, we suggest that the policy reasons which I have cited, plus the numerous cases cited in the brief which do not bear going into at this time, should be the basis of adopting our test of ownership as being the key rather than the location or possession.

If I may, I would like to save the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Q Mr. Rocovich, certainly your position would carry you a step beyond Donaldson, would it not?

MR. ROCOVICH: No, sir, I think Donaldson was purely the case--in Donaldson you said, as I recall, that ownership was the test, that since the corporation owned the records, that a former employee had no rights to them. And since ownership was the test, that he could not suppress the evidence.

Q On the other point in Donaldson, I thought that something was said about the recommendation of prosecution as a dividing point. And certainly do I not understand you to say here that this case had not reached

that point?

MR. ROCOVICH: No. This case had only reached the point where the criminal fraud investigator entered the picture and gave the warning. There had been no recommendation for prosecution.

Q Where the special agent showed up?

MR. ROCOVICH: Yes.

Q Of course, many times the special agent shows up and there never is any recommendation for prosecution.

MR. ROCOVICH: Yes, that is correct, Your Honor. As I recall the statistics prepared by Professor Charles Line, roughly 90 percent of all convictions obtained by the Justice Department are obtained on the self-incrimination of the taxpayer.

Q The whole tax system is self-reporting, in a way.

MR. ROCOVICH: Yes, sir.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. WALLACE: Mr. Chief Justice, and may it please the Court:

In this case as in Donaldson against the United States, a joint investigation by a revenue agent and a special agent is a proceeding prior to any recommendation

for a prosecution. And we believe that the issue of the statutory authorization for the issuance and enforcement of a summons in this situation was decided by the Court in Donaldson.

It is true that in Donaldson the taxpayer seeking to intervene in the summons enforcement proceeding there had no proprietary interest and asserted no proprietary interest whatsoever in the corporate records of his former employees that were the subject of the summons. And because of that, the Court unanimously held that the taxpayer had no right to intervene in such a summons enforcement proceeding. Here by contrast the taxpayer was permitted to intervene and indeed the Government did not oppose the taxpayer's intervention, because the taxpayer was asserting a proprietary interest in the records.

But all of the discussion in the Donaldson opinion about the lack of a proprietary interest in the records was in the context of the initial issue, the intervention issue in Donaldson, and two justices of the Court expressed the view that that was all the Court should decide in Donaldson, that the taxpayer had no right to intervene.

Seven justices, however, proceeded in Donaldson to decide the issue that the taxpayer was seeking to raise through his intervention, since the issue had been fully argued and was an important issue in the administration of

tax laws. And in the Court's opinion that issue was expressed as follows. "Donaldson, however, strenuously urges in addition that an Internal Revenue summons proceeding may not be utilized at all in aid of an investigation that has the potentiality of resolving in a recommendation that a criminal prosecution be instituted against the taxpayer."

There is no reference in this part of the Court's opinion to who has a proprietary interest in the records. Indeed, what the opinion does is explain the meaning of the Court's holding in Reisman, which was a case in which the taxpayer was asserting a proprietary interest in the records.

Q The dictum?

MR. WALLACE: That is correct, the dictum in Reisman. What the Court did was explain the meaning of the dictum in Reisman and interpret the statute with respect to the issuances of Internal Revenue summons, whether to the taxpayer, to those dealing with the taxpayer or in the particular case to former employers. And we did not reargue the matter. It had been decided only two terms ago, and it was fully briefed in the Donaldson brief, in our case on pages 24 through 38 of our brief in Donaldson. In our view, that issue has been decided and the new issue presented in this case, as we view it, the principal issue, is whether the issuance and enforcement of the summons here are inconsistent

with the taxpayer's Fifth Amendment privilege that no person shall be compelled in any criminal case to be a witness against himself. We will turn to that.

In one perhaps attenuated sense of that language and the accused is compelled to be a witness against himself whenever a third person discloses in a proceeding what the accused has communicated to him, when the third person is required to disclose it, whether that communication was oral or written. Of course, the Fifth Amendment has never been extended to that extreme and should not be, in light of its historical purpose. If it were extended to that extreme, all communications, instead of just a few specific categories of communications, would be privileged communications.

As we understand it, the petitioner here is not contending that communications to an accountant are privileged under federal law. And the cases uniformly hold they are not. Nor is it contended that the accountant cannot constitutionally be required to disclose communications the taxpayer made to him which may tend to incriminate the taxpayer so long as the disclosure is in the form of oral testimony by the accountant of what the taxpayer communicated to him or in the form of the production of records or documents owned by the accountant. The sole claim here is that the taxpayer owns the paper in the accountant's possession on which the

information is written. The Fifth Amendment protects the taxpayer against the production of those records by the accountant, even though the information disclosed to the accountant is not privileged.

Q Mr. Wallace, suppose this were after a recommendation of prosecution, you would still take the same position, that the summons be issued after a recommendation?

MR. WALLACE: There might be a statutory problem about whether a summons would be the proper form of procedure.

On the constitutional issue, our position would be the same. Our position is that there is no Fifth Amendment privilege when the compulsion is on a third person.

Q This is because the papers are in possession of the accountant?

MR. WALLACE: And it is the accountant who is being compelled to produce them rather than the taxpayer. The accountant does not claim that he may tend to be incriminated by their production.

For decades in Fourth Amendment litigation--

Q What about, Mr. Wallace, if the taxpayer has the records and it is not a special agent that demands it but just the agent that is doing an initial audit and a Fifth Amendment point is raised; what is your answer then?

MR. WALLACE: When in response to a summons the

taxpayer has been claiming the Fifth Amendment privilege, the Internal Revenue Service has been honoring that claim with respect to the taxpayer's production of records. We think that is what the holding of Boyd implies, and Boyd has not been overruled in that respect.

Q Whether there has been a recommendation or not has no relevance?

MR. WALLACE: That is correct, Your Honor.

Q Any kind of IRS inquiry?

MR. WALLACE: That is when the taxpayer is being asked to produce the records. I think a different issue would be raised by an attempt under a search warrant to reach the records when the taxpayer is not being asked to produce them himself.

Q When he is being asked by summons to produce them himself, as I understand it, if he asserts the privilege, that is respected by--

MR. WALLACE: The Internal Revenue Service is complying with what it understands to be the holding of Boyd, more recently explained in the Schmerber opinion of this Court, that production of records is compelling a response which is also a communication. The McNaughton edition of Wigmore explains that as meaning that when the taxpayer or other individual has to come forward in response to the production order, he is in effect testifying that these

are the records requested in the order, that this is an authentication from him, an identification of these as the records requested, and Wigmore for that reason distinguishes the situation from the situation under a search warrant.

Q What about the search warrant; could these very papers be seized under a search warrant?

MR. WALLACE: I think we--

Q Without violating the Fifth Amendment?

MR. WALLACE: I think that we would be willing to argue that, but that really is not an issue in this case, and I cannot say we have explored it for purposes of this case. I think the rationale of Boyd as it fits into subsequent cases of this Court indicates that the search warrant situation is a very different one.

Q Perhaps the old notion that the Fourth and Fifth run together.

MR. WALLACE: That is correct, Your Honor.

Q Mr. Wallace, you just mentioned Boyd. In your brief, as I recall, you stated that this case is distinguishable from Boyd because the taxpayer here did not have possession of the records.

MR. WALLACE: And was not being compelled to produce them. Compulsion is not on the taxpayer in this case.

Q Right. Would you talk a little bit about

where you draw the line on this issue of possession? The cases that come to mind--some of them have been mentioned here today already--are, suppose one's secretary had the records, suppose one had an accountant in his office who had the records, suppose one had an employee or here we have an independent contractor. Where do you suggest that the line should be drawn?

MR. WALLACE: In the Internal Revenue Service practice, so long as the taxpayer has retained possession of the records and they are being used only by his full-time employees or others on the taxpayer's premises, without the taxpayer having relinquished possession and control of the records, we ordinarily in those situations issue the summons to the taxpayer, because it is the taxpayer who has the dominion over the records and the authority to return the summons. And if the taxpayer chooses to plead the privilege against self-incrimination, that is up to the taxpayer.

Q Would it not be location primarily or power to control an employee?

MR. WALLACE: It is the relinquishment of possession, when the taxpayer has turned over the possessory right to someone else so that he has the power to comply with the summons; then the summons is issued to him and the compulsory process is on him when he is in rightful possession. It need not be a permanent possession, and it certainly need not

carry title, in our view. I would say that is the way we draw the line in the Internal Revenue Service Practice.

Q What about the accountant in the office carrying them home in his briefcase? And when you finish that, I am going to have him going to the Virgin Islands on his vacation.

MR. WALLACE: I think the crucial question is whether the taxpayer has relinquished possession. There are some cases where this question is difficult to answer, Mr. Justice, and I am not sure I can tell you what our position would be about these particular hypotheticals, but it seems clear to us here that records that were given to this accountant from 1955 on and remained in his continuous possession up until the fall of 1968 when this summons was issued were out of the possession and control of the taxpayer whether the taxpayer technically retained title to them or not.

Q She had not abandoned them, had she?

MR. WALLACE: She had given them over to someone else's possession. She did not abandon her proprietary interest.

Q Right. Right.

MR. WALLACE: That gets me back to the principal contention in this case, that the application of the Fifth Amendment privilege should depend on proprietary interest.

For decades in Fourth Amendment litigation, this Court and other federal courts struggled to apply concepts of property rights, concepts of who has superior proprietary interests in the particular property that gave rise to the mere evidence rule and to its exceptions, and this effort, as the Court well knows, came to grief because it deflected analysis away from the true meaning and purpose of the Fourth Amendment protection against unreasonable searches and seizures.'

Q But surely, Mr. Wallace, my effects are protected by the Fourth Amendment wherever they may be located, are they not? That is what the Fourth Amendment says. That is, they are protected to the extent that they are protected by the Fourth Amendment. They are protected from unreasonable searches and seizures, wherever they may be, if they are my effects.

MR. WALLACE: The limits of the Fourth Amendment protection are not co-extensive with your retaining possession over your own effects, although the protection becomes more attenuated. I am just trying to draw an anlogy here between the experience the Court had with a focus on proprietary interests as the controlling consideration in Fourth Amendment litigation which in Warden against Hayden , and in Katz against The United States the Court rejected as having proved unsatisfactory--I am trying to draw an analogy

here for purposes of Fifth Amendment litigation. In Fifth Amendment litigation, which we are concerned with here, the Court for many years has refused to fall into a similar fallacy of giving controlling significance to questions of property rights. And perhaps this was avoided because it was clear at the outset that the Fifth Amendment privilege is even less concerned with property interests than is the Fourth Amendment right. The great historic purpose of the Fifth Amendment privilege is to protect the individual against forcible extraction of testimony by the Government from the lips of the accused. And the principal issue in Fifth Amendment litigation is whether the accused is being compelled to testify, to be a witness against himself.

Q The taxpayer has conceded here that this accountant could have been called into the courtroom or in pre-trial and give testimony as to the contents of all these documents, even if the documents themselves could not have been--

MR. WALLACE: That is correct, Your Honor, and has conceded that if the accountant had made his own work papers or his own xerox copies that belonged to him of these documents, that those would be subject to production, which to us highlights what seems to be the inadequacy of saying that the Great Fifth Amendment privilege turns on who happens to have the title to the pieces of paper on which the

information is written.

Q Does this line you are drawing, Mr. Wallace, mean that you in turn are conceding that the Government could not have summoned this material had it been in the petitioner's possession, without violating the Fifth Amendment?

MR. WALLACE: As I previously said, we would honor a claim--if we had asked Mrs. Couch in the summons to produce this material on the theory that she could get it back from her accountant and comply with the summons, and she had pleaded the privilege against self-incrimination--so far as I am aware, we would honor that plea.

Q Fine. Do you think you would be constitutionally compelled to do so?

MR. WALLACE: I think it is more questionable when she did not have possession of the records, but still the compulsion would be on the accused or the individual who was worried about incriminating herself.

Q What decision in this Court, Boyd?

MR. WALLACE: Boyd is the only decision in point, as Boyd has been interpreted as meaning that the response is also a communication in that by producing the individual is authenticating these as the records that were requested. As I say, that rationale of Boyd, it seems to me, applies to a subpoena or a production order but not to a search and

seizure pursuant to a search warrant based upon probable cause. In Warden against Hayden the Court specifically reserved decision on the question whether there are any categories of papers or other materials that are immune from reasonable search warrants. And I do not think the Court has since decided the issue, nor is it presented in this case; this case involves a production order and not to the individual who is concerned about self-incrimination.

Q I do not know how the Government views the accountant here. Was he an independent contractor, in your estimation?

MR. WALLACE: The record implies that, but the record does not show how he was compensated.

Q Does it make any difference to your case whether he is or is merely an employee?

MR. WALLACE: The thing that matters is whether the taxpayer relinquished possession of the records to him so that the compulsion could be on him rather than on the taxpayer for their production. I think that is the thing that matters and we think the record adequately shows that and that that has not been disputed. The petitioner's reliance is solely on who has the title to the papers.

Q Mr. Rocovich did tell us that this man was an independent contractor who was paid on an effective piecework basis.

MR. WALLACE: But I do not believe the record shows that, Your Honor. I learned it for the first time when he said it. So far as I know, that is accurate. In fact, you could say I have reason to believe that it is accurate from what I have been told by the Internal Revenue Service.

Q Would your position be the same if a taxpayer had an employee that came to his office and worked all day and then took his records home at night or on the weekend and the Government just happened to subpoena the records in the hands of the employee while he had them, with the consent of his employer?

MR. WALLACE: I think that would be a much more difficult case for us, whether we could say that the taxpayer could relinquish possession there. Here it is clear that possession has been turned over to someone who has a separate office, and these records have been in that office for many years.

Q So, you are suggesting that it might be different if the Government compulsion was acting against an agent of the taxpayer?

MR. WALLACE: So far as I know, the reason those cases do not arise is because in those cases we issued the summons to the employer. Of course, if the employer is a corporation, there is no Fifth Amendment privilege to worry about.

Q Mr. Wallace, the Government's brief states that the petitioner could have had no reasonable expectation that these documents would have been kept private. I assume you must mean only with respect to the Government. You certainly do not suggest that the accountant would be free to show them to friends and neighbors, do you?

MR. WALLACE: That is what we had in mind, Your Honor, with respect to the claim that is being made here, that the Government cannot have access to them. This is in response to the Fourth Amendment claim, which is essentially part of the Fifth Amendment claim, on the facts of this case so far as we read the claims.

Q Would this be any different, Mr. Wallace, if rather than an accountant--with all the other facts precisely the same--this had been her lawyer?

MR. WALLACE: We have taken the position that when information is given to the lawyer solely for the purpose of preparation of income tax returns, that is not a confidential communication to the lawyer, that those materials are given to the lawyer to be synthesized as the lawyer sees fit to be communicated on to the Government; and, therefore, those communications are not within the attorney-client privilege. When the information is turned over to the lawyer for the purposes of seeking his legal advice, we think it is within the attorney-client privilege.

Q Has that former situation arisen with any court?

MR. WALLACE: Yes, we have Court of Appeals holdings on that point. They are cited in our brief. They are on page 18 at the top.

Q The constitutional issue would be the same though between the two cases?

MR. WALLACE: Under the Fifth Amendment, yes; I think there would be a Sixth Amendment issue about the attorney-client privilege. There may be some basis for the attorney-client privilege when legal advice is sought in the Sixth Amendment when there has been a confidential communication to the attorney.

Q I take it that you would agree that if a certified public accountant--to distinguish him from some fellow who makes tax returns--if a certified public accountant were to give these private records to a newspaper reporter, for example, that he would be subject to disciplinary proceedings within his own profession; that there is an expectation of privacy in that sense, is there not?

MR. WALLACE: I presume so.

Q That would be a private matter first between the principal and the certified public accountant and then between the certified public accountant and perhaps his

professional organization.

MR. WALLACE: I think that is correct, Your Honor. There might possibly be some civil remedy between the accountant and his client for breach of professional duties, if they are recognized by state law; I think this would be a question of state law and I frankly have not looked into it.

We have cited and discussed in our brief on pages 14 through 16 the decisions of this Court which has held that the issue is not proprietary interests or proprietary rights when a Fifth Amendment claim is raised with respect to the compelled production of records when the compulsion operates on a third person.

The petitioner seeks to distinguish these cases in various ways, but the distinctions really overlook the rationale of the cases, which is pretty well summarized in the quotation on page 15 at the end of the quotation in the Perlman case where reliance was placed solely on a claim of title, which the Court did not even decide, because it is considered unnecessary to decide because, as the Court said, the criterion of immunity is not the ownership of property but the physical or moral compulsion exerted, all based on the reasoning of the epigram of Justice Holmes in the leading case, Johnson against United States, where the party is privileged from producing the evidence but not from

its production.

It is true that in the case involving the introduction of the stolen records, Justices Holmes and Brandeis dissented from the holding, but that dissent was not based on the view that the Fifth Amendment privilege had been violated by the introduction of the records in evidence. Indeed, it was premised very explicitly on the proposition that no constitutional provision had been violated and that they were accepting as true the majority's holding that the papers could have been subpoenaed from the thief. But the dissenting opinion said there are principles of decency and fair play which lead them to the conclusion that the evidence should not be accepted in this case. For all that is written in the opinion, this is not a constitutional holding but a rule of evidence, in their view, that Congress could have overturned; the dissent is not at all premised on the idea that there had been a Fifth Amendment violation, nor has any other case in this Court held that the Fifth Amendment is violated when someone else is compelled to produce evidence created by or owned by the person attempting to claim the privilege, who is not himself being compelled to be a witness against himself. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.

Do you have any more, Mr. Rocovich? You have about three minutes remaining.

REBUTTAL ARGUMENT BY JOHN G. ROCOVICH, JR. ESQ.,

ON BEHALF OF THE PETITIONER

MR. CHIEF JUSTICE BURGER: Let me ask you at the outset, suppose the taxpayer here, your client, had been in Europe or some distant place at the time the subpoena was served on the accountant and the accountant is then confronted with the situation, what kind of compulsion is there being exerted on the taxpayer herself? The taxpayer might not even know about the existence of the subpoena.

MR. ROCOVICH: Yes, sir, that is correct. The--

Q And is not the thrust of the Fifth Amendment the compulsion on the principal?

MR. ROCOVICH: Your Honor, we believe and contend that the rights in question are personal human civil type rights to protect one's documents. Compulsion directed against one's agent who is holding one's paperson his behalf is equivalent to directing that same compulsion against the person himself; I think it is essentially a principle of agency. I do not see why a man's privileges should all be waived just by delivering his records to a temporary bailee, a mere naked possessor. It would appear to me that that would be no firm basis for waiving these privileges. We take the position here in looking for a moment at when this recommendation for criminal prosecution is reached or at what point it becomes a criminal matter, Justice Brennan. It seems to me

if the taxpayer was not in jeopardy, then why would the Government, for instance, issue a Miranda warning telling her she was in jeopardy? If in fact the point that the special agent comes in--we have at the district trial court level and the Fourth Circuit Court of Appeals volunteered to produce these records, if the Government will obtain immunity for us under Murphy v. Waterfront Commission, that line of cases. The Government steadfastly returns to Gilson to grant immunity in this situation. So, they must be interested in this point and securing evidence for criminal prosecution. Otherwise, they would not give the Miranda warning, nor would they refuse to grant us immunity if they are not interested in a criminal prosecution.

My opponent has cited the Fourth Amendment and following the line of cases on title. We suggest a test. Instance of ownership of these records should be the test rather than sticking to a strict title situation, although most of the cases cited in the Government's brief involve Carmen and Burdeau and Johnson and several other cases like that do turn on the title and ownership concept. And I suggest a careful reading of Justice Blackmun's opinion in the Donaldson case will show this Court clearly set this particular question aside and did not decide in that case, and the inference in that case and in Reisman v. Caplin is that these records are personal records and should be

protected wherever they are, just as in the Fourth Amendment. I mean, the Fourth Amendment search and seizure situation, which we contend that it falls under too. Because I think of necessity documents that are subject to the Fifth Amendment privilege, any search and seizure by the Government would be an unreasonable search and seizure. So, I think that line necessarily falls over into this area.

Q Would the Fourth Amendment help you if a subpoena, summons, were issued and it was properly grounded; would that be a reasonable or an unreasonable search then?

MR. ROCOVICH: If you assume it was properly grounded, I think you assume the problem. Our position is that the location or naked possession of these documents is not the test. It is who owns them and against whom is this directed.

Q I was just getting at your Fourth Amendment argument. If there is a valid warrant or a valid subpoena, the Fourth Amendment problem goes away, does it not?

MR. ROCOVICH: Yes, sir, but we do not think that subpoena can be valid if it is directed toward the documents owned by a taxpayer.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen. The case is submitted.

[Whereupon, at 3:07 o'clock p.m. the case was submitted.]