In the

Supreme Court of the United States

ISADORE H. BELLIS,

Petitioner,

vs

UNITED STATES OF AMERICA,

Respondent.

No. 73-190

Washington, D. C.
February 25, 1974

Pages 1 thru 46

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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Monday, February 25, 1974.

The above-entitled matter came on for argument at 10:05 o'clock, a.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:

LEONARD SARNER, ESQ., 208 Six Penn Center Plaze, Philadelphia, Pennsylvania 19103; for the Petitioner.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in No. 73-190, Bellis against the United States.

Mr. Sarner, you may proceed whenever you're ready.

ORAL ARGUMENT OF LEONARD SARNER, ESQ.,

ON BEHALF OF THE PETITIONER

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

The issue presented here is whether the Fifth Amendment privilege against self-incrimination applies to the books and records of a small, closely held partnership.

In our petition for certiorari we said that the Court never directly decided this issue. In retrospect, I'm satisfied that the Court did decide it in the Boyd case, decided in favor of the position of the petitioner, and that this has been reaffirmed by the formulation that this Court enunciated in White.

The case is brought up in the context of a small, three-man law partnership. Petitioner is in lawful possession of the books and records. The subpoena is addressed to him, from the Federal Grand Jury. Thus we have here the ingredient of personal compulsion, which this Court found lacking in Couch.

As a co-owner in rightful possession of the books,

we submit that the petitioner's Fifth Amendment claim against self-incrimination must be recognized unless there is something significantly unique about the nature of the books and records of a law partnership, to require a difference in result. And we also submit that there is not anything unique about these records.

Your Honors will note that the government is quick and perhaps, we think, a little too quick to point out that although Boyd involved a subpoena addressed to a partnership, to which the partner responded, the Court says -- according to the government -- says that this was ignored by the Boyd court, that the crucial fact of the punishable aspect of the case was disregarded.

Now, if Your Honors will note, Boyd did involve a charge by the government that some 35 cases of plate glass had been imported to this country from England by the firm, the partnership firm of E. A. Boyd and Sons, by means of a fraudulent or false invoice. And a subpoena was directed to the partnership, providing for the production of an invoice from the English seller of this glass, showing the quantity and quality and value of glass contained in 29 of these 35 cases.

Now, emphasis, Your Honors, by the Boyd court that a man's private papers cannot be used to establish a criminal charge against him, where the private paper was the invoice of

the foreign shipper. Hardly, as the government characterizes it in their brief, a partner's private written statement. This was an invoice from the foreign shipper.

It first indicates that the private papers referred to in Boyd didn't refer to the manner of the preparation or writing, or the intimacy of the information contained therein, but, rather, to the ownership aspect: first, that this was considered to be the private paper of the claimant of the partnership, and the partner standing in the shoes of the partnership.

Of course, as Wilson points out, it was never required for Fifth Amendment privilege, that the documents be written by the person himself. In fact, in Wilson, it was emphasized that the mere fact that the officer of the corporation may have written in his own handwriting the incriminating material in the corporate books, in no way it would either enlarge or take away from the privilege.

But, Your Honors, we submit it's too much to suggest, as I think the government does, that the Boyd court ignore the other aspect of private papers, which was involved in Boyd. That is, the private papers concept as opposed to those quasi-public records required by law to be kept for regulatory purposes, justifying public scrutiny in, you know, some area of public domain.

Now, it should be noted that the rationale, as we

understand it, for denying Fifth Amendment protection to corporate books and records lies in the visitorial powers doctrine. The interests of the States, of the government, to inspect and regulate its State-created creatures, as exemplified, really, by the required records doctrine. Thus the Boyd court was well aware what this Court, in Hale vs. Henkel, ten years later, only ten years later, held about the required records doctrine, when the Boyd court itself observed that what was involved in Boyd, in the private papers aspect, was completely different from -- this is the quotation -- the supervision which was authorized to be exercised by revenue officers over the manufacture or custody of excisable articles and the entry thereof in books required by law to be kept for their inspection.

Thus, Boyd specifically recognized the distinction between private papers of a partnership and the required records of a corporation, with partnership papers assimilated to privately or individually owned.

Furthermore, Your Honors, we submit that the White formulation in essence adopts this exact approach.

Now, White recognized the necessity for governmental power to regulate and inspect economically influential, unincorporated associations, such as the union involved therein.

Despite the non-applicability of the visitorial powers

doctrine.

The privilege applying to recast the White formulation in the affirmative rather than in the negative, where the organization has a character so personal -- that means substantially identical -- in scope of membership and activities that it can be said to embody or represent the purely private or personal, that is, the intimate, identical interest of its constituent.

QUESTION: Mr. Sarner, one time Mr. Kolsby and Mr. Wolf had consented to the production of the records, had they not?

MR. SARNER: No, sir, Your Honor, that's -- that was the figment of the imagination of trial attorney, who prepared a memorandum of law prior to any evidentiary hearing.

QUESTION: Whose trial attorney?

MR. SARNER: The government's trial attorney, which was submitted prior to the evidentiary hearing before the District Court.

The record, as Your Honors will note in my reply brief, in which I refer to the citation, the pages of the record, on page 2 of the reply brief: A. 32, 35, 40, A. 55. All these factual allegations were specifically denied.

In fact, in my argument before the Court of Appeals, Your Honor, I was trying to indicate to the court what their case did not involve; it did not in any way involve a wrongful

possession of books as opposed to the other partners. And the Court of Appeals specifically addressed itself to say that the sole issue -- and if you will look at page 15 of the Appendix --

QUESTION: So you are stating now that there is no misunderstanding whatsoever between the three former partners?

MR. SARNER: No misunderstanding whatsoever between the three partners --

QUESTION: And never has been?

MR. SARNER: And there never has been. And the books and records are in the possession of Mr. Bellis, the petitioner, with the blessings, the full blessings of his other partners. And the Court of Appeals so found, in saying that the issue is whether a partner is simply in lawful possession of the books and records. Assuming that --

QUESTION: Well, I think there was never any question about his being in lawful possession. I think the others, as I read the record, --

MR. SARNER: Well, --

QUESTION: Tell me one other thing, what is this investigation all about? Is it an income tax investigation?

MR. SARNER: We understand it's an income tax investigation. That hasn't been fully disclosed, but we do understand it to be an income tax investigation.

QUESTION: But you are stating here and now there is

no bad feeling between the three former partners?

MR. SARNER: I am stating here and now that the record has absolutely nothing in it to justify any such assumption. And not only that, Your Honor, the District Judge, Judge Van Artsdalen, was asked by the trial attorney to open up the secrecy of the Grand Jury. He refused. The witnesses were available to testify. The government said it would not proceed to bring any witnesses. It was satisfied to go on the record.

QUESTION: Mr. Sarner, --

MR. SARNER: Yes, sir.

QUESTION: Suppose that Mr. Bellis had voluntarily surrendered the records to the Internal Revnue Service and subsequently one of his other partners had been prosecuted in a tax fraud case. What position would he have had with respect to claiming the Fifth Amendment if the records were introduced?

MR. SARNER: Well, Your HOnor, I would think that if one of the partners, if Mr. Bellis did surrender the records, and another one, Mr. Kolsby, let us say, were involved in a criminal investigation, that Mr. Kolsby would not be able to claim that there was any violation of his Fifth Amendment rights. At least under the rationale of Couch, the personal compulsion was addressed to Mr. Bellis, it wasn't addressed to one of the other partners.

QUESTION: So that --

MR. SARNER: Unless -- unless you adopt what Your Honor may be referring to, that the possession was so constructive or fleeting in one of the partners; but we don't think we have to meet that problem in our case. In our case, we do have the object of the tax investigation in rightful, peaceful, lawful possession of the books and records.

He is the one that the government is seeking to get the information about, he is the one who will be subject to the personal compulsion when he turns them over.

QUESTION: On your submission, the critical fact is the personal possession by Mr. Bellis of these records?

MR. SARNER: Personal possession plus the rightful -- rightful possession. Personal possession, rightful possession, and the nature of the entity being such that it is a private, intimate, closely held group.

QUESTION: Does every member of a law firm have the rightful possession to the records of the firm, as against other members of the firm?

MR. SARNER: The -- this may be open to some dispute, Your Honor, the -- as I understand the State law which would control this issue, the other members of the firm have the right to inspect the books. No question about the inspection. And so long as the books are in the -- designated in the possession of one of the partners, unless there is some

rule of corporate -- of partnership activity, some vote of the majority partners, to take the books away, then he would be entitled to keep them. And --

QUESTION: So they, in effect, would vote that --

MR. SARNER: No, Your Honor. The government tried to suggest that the legislative history of subchapter (k) of the Uniform Partnership Act, distinguishing between aggregate and entity theory would be a fairly controlling portion.

We cite, I think the most definitive statement on this law, on this point in the reply brief.

The Supreme Court of Pennsylvania's decision in the D. H. Shapiro case, I quoted fully on page 7, and let me just read the last sentence:

"We could multiply authorities, but we must hold that the weight of authority in this Commonwealth is to the effect that a partnership is treated as an aggregate of individuals and not as a separate entity."

And of course on that basis, that point --

QUESTION: Was that in your reply brief? Do we have that?

MR. SARNER: Yes, I filed the reply brief. It wasn't filed -- it was filed by Friday, within the time after I had received the government's brief, which was a little late.

QUESTION: Now, let me see if I understand how far your position goes.

If one of the other partners had released this voluntarily to the government, do I understand you to say that your client would have no complaint, or at least no complaint that he would --

MR. SARNER: Well, I would say, Mr. Chief Justice, that if one of the other partners had released this, we would be faced pretty much with the Couch type of case.

QUESTION: Well, then, hasn't that somewhat undermined your idea that this is a matter of personal, private papers?

MR. SARNER: No, I -- I --

QUESTION: If someone else, if a third person can waive the right for your client, then what's left of your Boyd claim?

MR. SARNER: No. The point would be this. In situations where somebody else was in possession, then if one of the other partners was in possession, I see that that's no different than if the accountant is in possession of my papers; he doesn't waive my claim. But the compulsion is directed against the one in possession.

Unless Your Honors feel that this is the situation and we can't -- I mean I may retrench a little from my answer to Mr. Justice Powell, but you have here a situation where possibly the possession of someone else is considered to be the rightful possession of another, as indicated in the footnote, so that it's a form of constructive possession.

I didn't think we'd have to meet that problem in this particular case, because we have the man against whom the subpoena is issued in possession of the books and records.

QUESTION: Let's track this down on a practical basis.

MR. SARNER: Yes, sir.

QUESTION: One partner of the partnership, whether it's three or a hundred partners, one partner has possession of the records, the partnership has presumably made its partnership return, and Internal Revenue is checking out the information.

The man in possession, the partner in possession refuses to give up in response to a request directed to yet another partner, in the process of checking that partner's return. He can refuse for any reason to give it up; is that right?

MR. SARNER: Well -- I don't know whether we have to go that far, Your Honor, Mr. Chief Justice, that he can refuse for any reason to give it up.

QUESTION: Suppose it was one of the other partners here, that's what I'm driving at; one of the other partners, not Mr. Bellis, whose personal returns, individual returns were being checked, and as part of that process they very frequently want to check the partnership records.

Mr. Bellis says, No, if I give those records in

connection with my partner's tax inquiry, that may lead to some incrimination of me.

He can do that, can he?

MR. SARNER: Yes. Yes, I would say that if Mr. Bellis takes the position that because there's an investigation of one of his other partners, that his records, the partnership records in his possession may tend to incriminate him because of items which may be in there or not, in their accepting transactions for clients, I would definitely say that the partner can refuse to return them.

QUESTION: What do you suppose the Internal Revenue might do, then? Do they not have some rather harsh weapons, in terms of their powers?

MR. SARNER: They have whatever weapons are available against all taxpayers. They don't have the weapon, Your Honor, to make a taxpayer divulge his purely private books, books which he holds in a purely personal capacity. And if you assume -- let me, may I just -- I think I answered Your Honor's observation.

If you assume that there is any group activity, any regularly conducted group activity, which is protected where the books and records are protected, where two or more people are associated together, then one of the members must be in possession of the books, in order to assert the privilege.

And, therefore, if you assume, and the government, Your Honor, does assume that there are situations where you can have group activity, some association, and the books and records are protected. In their petition -- in their brief in opposition to our petition for cert, they said they thought it might be the family partnership, where you have a father and son or brother and sister partnership.

They completely discarded that formulation now, and come up with the startling proposition that it is only where you have the informal criminal conspiracy, where no one is said to own the books, where possession is nine-tenths of the law, and where, therefore, the one in possession of these books in a criminal conspiracy has as much claim, or better claim than the others; this is a formulation which has been rejected by every Court of Appeals to which it's been addressed, holding that the books and records of narcotics or gambling enterprises are the --

QUESTION: What do you object to, the admissibility of the contents of the records or are you objecting to your having to produce them, and by the act of producing them you verify, identify the records?

MR. SARNER: I mean, obviously we would like to be able to have the two prongs to our objection, the Schmerber case suggests, by Mr. Justice Brennan, that asking us to produce these books authenticates them and therefore is the

testimony that these are the books required under the subpoena, and therefore that this is the compulsion which is protected against by the Fifth Amendment.

QUESTION: Even -- even if otherwise they would be admissible and not subject to that privilege?

MR. SARNER: Well -- I say that's the -- that would be the rationale, as I understand it, of Schmerber, where you wouldn't have testimony or content to the books, but the books clearly are testimonial and communicative. So we think the contents are --

QUESTION: But it could be -- it could be that if the books were otherwise before the Grand Jury, they would be admissible over your -- over your Fifth Amendment objection, and still you'd have a Fifth Amendment objection to you, yourself, producing them?

MR. SARNER: That's -- that's perfectly true. That could very well be.

QUESTION: Well now, which --

MR. SARNER: Well, we --

QUESTION: -- I mean, are you riding both horses here?

MR. SARNER: Yes, indeed. I mean, we rode -- we're riding primarily, I will say, we are riding primarily the contents of the books, that the books are incriminating, and therefore to compel us to bring in the incriminating

material in the books violates the Fifth Amendment, and in addition, of course, since it's addressed to us, and the subpoena is addressed to us, we must comply and authenticate and say that these are the books and records which are required, then, in that sense, Mr. Justice.

QUESTION: Well, the latter -- the objection to producing them yourself would be obviated if there were, say, a search warrant and the books were seized in your house, in your client's house and taken to court. Then you'd be left with one -- one objection.

MR. SARNER: Well, that's -- yes. That's the -- what the government tried to raise in Hill vs. Philpott in its petition for cert to this Court, and which was rejected by the Circuit Court of Appeals in Hill vs. Philpott, which I think was cited with some approval by Mr. Justice Powell in the Couch case.

QUESTION: Mr. Sarner, does your position mean or suggest a way, then, to make partnership books completely inaccessible? Get them in the hands of one of the partners and --

MR. SARNER: Well, Your Honor, my position is that there is no valid distinction between partnership books, at least of this closely held partnership that we have here, and individually owned books of the sole proprietor.

Now, the individually owned books --

QUESTION: Well, how do you define a small, closely held partnership? Some three-men partnerships are pretty substantial.

MR. SARNER: Well, you -- I think you --

QUESTION: Is that a factor --

MR. SARNER: I think it is. The Courts of Appeals have had no real difficulty with that, with that concept. You have the Mal Brothers, you have the Silverstein case, where you have limited partners with sixty, seventy limited partners, activities of capitalization of several millions of dollars, you admit here, of an economically influential, unincorporated association.

If Your Honors --

QUESTION: Mr. Sarner, --

MR. SARNER: Yes, sir.

QUESTION: -- after Justice Blackmun's earlier question to you about whether Mr. Wolf and Mr. Kolsby had consented, I went back to the Appendix and I see on A13, that the government in its memorandum alleged that authorization was given by Mr. Herbert F. Kolsby and Edward L. Wolf for the Grand Jury to examine those records.

Then on A22 there is your motion to quash the subpoena, and on A24 is a memorandum in support of the motion.

Now, in one of those two documents that you filed, did you traverse that allegation?

MR. SARNER: No, Your Honor, because those documents were filed prior to the evidentiary hearing also. All this was --

QUESTION: Well, where is the denial of the government's allegation?

MR. SARNER: Well, the government's allegation is only a memorandum of law. There was no factual basis for it, but the denials are several, Your Honors, and they're specified in the reply brief. A32, A55 -- in fact we say that they, the government,"haven't even come forward with any suggestion that this is not with the complete consent and authorization of the other partners. Nothing has been adduced, you must find that that is so. They waive their right to proceed." On A114.

And the court, the District Court, asked the government whether it wanted to proceed, --

QUESTION: On A32, for example, scanning that page, I don't see anything there, and perhaps I'm overlooking something, but --

MR. SARNER: All right, let me see what I referred to on A32, Your Honor.

QUESTION: Well, on A114, you're quoting yourself, aren't you?

MR. SARNER: Yes, I mean -- this was counsel -- yes, we denied, this is the denial of the allegation.

Specifically. On A114, at the very end.

Yes, the last paragraph, Your Honor: "In addition, if Your Honor please, there are matters that are alleged as factual matters which we claim are not correct."

QUESTION: Well, but is that your way of traversing a specific allegation?

MR. SARNER: Well, it wasn't a specific -- it wasn't a specific allegation, it was a memorandum filed before any --

QUESTION: No, but it was a very specific allegation. Let me read it to you. "Authorization was given by Mr. Herbert F. Kolsby and Edward L. Wolf on behalf of Kolsby and Wolf for the federal Grand Jury to examine those records."

Now, do you, anywhere in the Appendix, specifically deny that?

MR. SARNER: Yes. A114. If you'll look at A114.

QUESTION: Whereabouts on A114?

MR. SARNER: Right -- the last paragraph before the 104.

QUESTION: Where you say "They haven't even come forward with any suggestions that this is not with the complete consent and authorization of the other partners"?

MR. SARNER: Yes, "Nothing has been adduced. You must find" -- and then the court went on to so find.

They said -- they -- the government was content to --

QUESTION: Where did the court find that it was with

the consent -- or without the consent of the other partner?

MR. SARNER: Well, the Court of Appeals --

QUESTION: Well, I'm talking about the District Court.

MR. SARNER: The District Court --

QUESTION: Well, I don't mean to make you --

MR. SARNER: No. Well, the District Court finds that they are in the possession of Mr. Bellis and no suggestion --

QUESTION: Well, but that -- the finding there --

MR. SARNER: -- no suggestion of any unlawful or wrongful possession.

QUESTION: I know, but I don't think Justice Blackmun's question was addressed to the issue of wrongful possession. I think his question was addressed to the consent of the other partner.

MR. SARNER: Yes. I would say -- I would say that the record indicates -- the record there indicates that it was with the consent of the other partners; there is nothing to suggest that it's not with the consent of the other partners, other than the allegation in the memorandum, filed before any evidence whatsoever, and denied, factually denied by counsel, the same as the allegation was made by counsel; no testimony was brought. And the government refused to do so. The men were available. They refused to --

QUESTION: Well, on A114, all you say is the government hasn't come forward with any evidence. You don't deny that it's the case.

MR. SARNER: Oh, yes. I say -- I think we do. We thought we did. Maybe --

QUESTION: Well, you're referring to that last statement on A114? You say "They haven't even come forward with any suggestions that this is not with the complete" --

MR. SARNER: Then I say, "You must find that this is so. They waived their" --

QUESTION: Well, you don't say it's not so or anything.

MR. SARNER: Well, I -- I -- we meant to. Maybe we were a little inartistic then in our --

QUESTION: I think you're a little inartistic in answering Justice Blackmun's question.

MR. SARNER: I'm sorry, I didn't mean -- I didn't mean to be that.

QUESTION: To go back to my other question --

MR. SARNER: Yes, Your Honor?

QUESTION: -- which I think has not been answered, and that is: whether your posture here opens the way to a complete closure of any partnership books in any case?

MR. SARNER: No, it doesn't open the way to a complete closure of any partnership books, it opens the way

to the complete closure of partnership books which are of a small, closely held partnership in the possession of one of the partners, just like the individual books of the sole proprietor are.

QUESTION: Well, isn't the way, then, to put the books in the possession of a -- one of the partners?

MR. SARNER: If the books -- if the books are in the possession of one of the partners, and if it's an intimate close relationship, as this law partnership is, then the books are protected from scrutiny by subpoena. The same as your individual books --

QUESTION: I asked again, and I still get a negative answer from you. I ask again: does this not open the way to a complete barring of partnership books to any investigation?

MR. SARNER: If they are in the hands of one of the partners.

QUESTION: What if one of the other partners involved in a tax case needs them by way of defense to a government claim on a deficiency assessment? Is he barred from getting them, too?

MR. SARNER: From the -- no, I would assume that he --

QUESTION: From Mr. Bellis?

MR. SARNER: No, I assume that he can get them

from Mr. Bellis. I mean, --

QUESTION: Even in the face of a claim on Mr. Bellis' part that turning them over to IRS for the other partner will expose him to criminal prosecution?

MR. SARNER: Well, Your Honor, what you're -- what you're asking me to speculate on is the fact that once you have two people associated in some joint enterprise, you can never have any Fifth Amendment protection. I don't think that's -- that's so. I think that what you have here is the situation that the mere fact that one of the partners is entitled to get them from the other partner, in now way means that the government is entitled to get them from the other partner.

And it's never been equated to the fact that because there are other ways that the material can be obtained, that therefore the Fifth Amendment privilege doesn't apply with the one in possession.

May I just --

QUESTION: Well, that doesn't -- the fact that you might be able to just object to producing them, because it authenticates the records, that wouldn't be -- that wouldn't be distinctive partnership books, it would be of any kind of a record in your possesion.

MR. SARNER: It would be -- and I --

QUESTION: Not just a partnership, but a corpora-

tion, a friend, anybody.

MR. SARNER: That's right, and the government's suggestion that Schmerber means just that very thing, would actually protect the corporate books and records from being produced.

That's why I think the contents --

QUESTION: Well, it doesn't protect them against being introduced.

MR. SARNER: Well, being subject to subpoena. Yes.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The records at issue here are the financial records of a law partnership. The production order, which is set forth on page 116 of the Appendix, excludes any individual client files, containing any advice or confidential relationships between the attorney and attorney and client. They are essentially -- essentially we are dealing here with a production order, enforcing a Grand Jury subpoena for the financial records of the partnership, the receipts and disbursements, records of that kind.

The claim is that the partner in possession is entitled to assert the Fifth Amendment claim that this would violate the provision stating that no person shall be compelled in any criminal case to be a witness against himself.

This is a provision, the background of which has been reviewed by the Court many times in recent years. Last term, in the Couch opinion, the Court noted that historically the privilege was to protect the individual from resort by the State to the expedient of compelling incriminating evidence from the individual's own mouth, as the Court put it in Couch.

And in light of the language of the amendment and its historical background, the view has been expressed by members of the Court, including Mr. Justice Stewart, that perhaps the privilege might have been intended to be restricted to the protection of testimony in judicial proceedings, and only to bar the compulsion of the testimony

But in the Boyd case, in 116 U.S., the Court did extend the privilege also to compulsion of the production of a person's papers in his possession.

Now, it was only -- the issue in Boyd didn't -- the parties in Boyd and the court in Boyd didn't address the problem of the relationship between an individual and an association or group with whom he was related; the entire issue is whether the privilege would be extended beyond

testimony or compulsion.

And as the Court noted in the Shapiro case, the government in essence contended that the privilege didn't extend to In Rem proceedings of any kind, that it only extended to in personam proceedings.

The fact that these were partnership records in the Boyd case simply wasn't discussed, either by the parties or in the Court's opinion, which treated them as Mr. Boyd's personal papers, and several times in the principal passages of the Boyd opinion, the Court referred to these as personal papers, as it has in subsequently referring to the Boyd holdings in United States v. White, and also in the Couch case last term.

It was only after Boyd was decided and the privilege was thus extended that the issue arose as to the records of entities other than natural individuals, and the rights of individuals who are parts of those entities.

And throughout that entire series of cases, the Court has been very conscious of the basic concept that's implicit in the history of the amendment, that was also restated last term in the Couch case, that in its nature the privilege is an intimate and personal one. And even in the context of its extension to the production of papers, or perhaps of other effects, this personal element of the privilege and the personal delimitation of the privilege has

been emphasized. And, accordingly, in the series of cases beginning with Hale v. Henkel, through United States v. White and its progeny, the Court first held that the privilege is not available to a corporation or to an unincorporated organization of any kind, although there was no specific discussion of partnerships; but the rationale of the White case, which extended this, was that the privilege does not extend to, quote, "the records of any organization, whether it be incorporated or not", unquote, but that it is, quote, "limited to its historic function of protecting only the natural individual from compulsion incrimination through his own testimony or personal records."

Now, there is a possible limitation on that principle expressed in dictum in the White case, to which I will return in a moment.

The other aspect involved in this series of cases, and the slightly more difficult aspect, in light of the Boyd holding, is what about the individual through whom the State seeks to compel the production, the government seeks to compel the production of the group's records; isn't he being forced to come forward in producing them and identify and authenticate what might incriminate him, and doesn't that run into the essence of the Boyd holding.

Or as it was re-expressed not long ago by the Court in Schmerber v. California, that the privilege extends not only

to testimony but also to responses, which are themselves communications, such as the production of one's papers like in the Boyd case.

Well, the Court has rejected that argument in the context of compulsory production by an individual who is holding papers in a representative capacity, so long as the production order requires him to do no more than produce papers that he is holding in that fashion. We're not dealing here with a situation where the production order says that he's to produce such records of the partnership as will show that you, Isadore Bellis, under-reported your income tax. So that the production would constitute more of a communication --

QUESTION: You say the court rejected it?

MR. WALLACE: Well, the court has rejected the --

QUESTION: What's the case?

MR. WALLACE: Well, the first case was Wilson v. the United States, where the question came up in the context of corporate records, and the custodian holding corporate records. In Hale v. Henkel, which was 201 U.S., the custodian of the corporate records had been granted immunity, so the question didn't arise. The sole issue was whether the corporate records themselves were privileged.

QUESTION: Right.

MR. WALLACE: And the Court held that they were not.

And then, in the Wilson case, in 221 U.S., --

QUESTION: Didn't the Court hold, really, that the corporation didn't have any Fifth Amendment privilege against compulsory self-incrimination.

MR. WALLACE: It did in Hale v. Henkel.

QUESTION: Right. So that's a wholly different --

MR. WALLACE: Well, the question in the Wilson case is whether the custodian could claim that his producing the records would tend to incriminate him, because the act of production would identify and authenticate the records, and the records --

QUESTION: I thought he was given immunity.

MR. WALLACE: That was in Hale v. Henkel, --

QUESTION: That's what --

MR. WALLACE: -- Mr. Justice.

QUESTION: I thought that was the case you were just talking about.

MR. WALLACE: No, now I've gone on to the Wilson case, which is in 221 U.S., in which the custodian made the claim that he could assert the privilege and not produce the records because their production would incriminate him.

And the Court rejected that claim, in an opinion by Chief Justice Hughes during his earlier tenure as an Associate Justice on the Court. And the rationale of its rejection is summarized in a quotation that's on page 17 of

our brief. And this is, I think, the most precisely that the Court has addressed this issue in the context of these cases:

"The fundamental ground of decision in this class of cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to incriminate him. In assuming their custody he has accepted the incident obligation to permit inspection."

And that --

QUESTION: But you wouldn't suggest that -- however, that whether you're obligated to produce them or not, that at a criminal trial the defendant could be called to the stand to identify these records that he's produced.

MR. WALLACE: I would not suggest that the Curcio case seems to suggest the contrary.

QUESTION: Unh-hunh.

MR. WALLACE: In 354 U.S., this Court --

QUESTION: Well, if you respond to a subpoena and produce records that are described in such and such a way, aren't you authenticating them in that respect?

MR. WALLACE: Well, that is what the Court has emphasized as what seems to be the basic rationale that

remains of the Boyd holding. It was restated again just last term in Couch, quoting from the White case.

QUESTION: Well, how does that score with Wilson? What do you say Wilson holds there?

MR. WALLACE: Well, Wilson has created an exception to this rationale for anyone holding records in a representative capacity. This exception was reiterated in United States v. White, with respect to association records. And the custodian in that case of the labor union records, and the Court there -- I'm quoting on page 699 of Volume 322 -- put it this way: That individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties, nor to be entitled to their purely personal privileges; rather, they assume the rights, duties, and privileges of the artificial entity or association of which they are agents or officers, and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination.

At least to the extent of having to comply with the production order, when they are the custodian of the records.

That seems to be the basic rationale of this series of cases, and I think in light of the Couch, in particular, which holds that financial records of this kind, if properly secured by the government, are admissible in evidence over a Fifth Amendment claim by their owner. The rationale about

authentication and identification of the records becomes really what is left of the Boyd holding, as I understand it.

QUESTION: Well, in the Couch case, --

MR. WALLACE: It isn't that the record themselves can't be introduced against the person.

QUESTION: If I may interrupt you, Mr. Wallace. In the Couch case, was there any suggestion that the records in that case would have been producable if it had been the accountant who was asserting Fifth Amendment privilege?

MR. WALLACE: Well, that -- there was no --

QUESTION: He was custodian of the records, was he not?

MR. WALLACE: He was the -- he had them in his possession, --

QUESTION: Yes.

MR. WALLACE: -- yes, sir.

QUESTION: And there's no suggestion in that case that the -- that he could not have asserted a Fifth Amendment privilege, is there?

MR. WALLACE: No, he did not assert a Fifth Amendment privilege --

QUESTION: No, it wasn't in the case at all.

MR. WALLACE: -- because he had no occasion to.

QUESTION: And --

MR. WALLACE: But the fact is the Court upheld the admissibility of the records against Mrs. Couch, even though they were her records and she was claiming that their admission into evidence against her violated her privilege against self-incrimination.

So that it isn't --

QUESTION: Because they were in the possession of somebody else.

MR. WALLACE: That's right.

QUESTION: The accountant. But there's no suggestion that had the accountant been asserting the privilege, his personal privilege, there would have been --

MR. WALLACE: But implicit in the holding, it seems to us, is that if the government properly secures the records, they are admissible, --

QUESTION: That's not the question --

MR. WALLACE: -- financial records are admissible against their owner.

QUESTION: The whole question is whether or not this is --

MR. WALLACE: I can't see any other claim of privilege.

QUESTION: -- this is securing them properly. That's the whole question in this case.

MR. WALLACE: That is correct.

Now, these are not records that are individually owned, as was the case in the Couch case. But they are records of the partnership, in which each of the partners has sort of tenancy in common rights, the rights as a co-owner. And for that reason we have argued that the rationale of the White case and subsequent cases in this Court, all of which have reached the same result with the mere citation of the White case with respect to associational records, is that in that circumstance the custodian does not have a right to resist their production.

QUESTION: What -- to whom did the subpoena run in this case?

MR. WALLACE: It ran to Mr. Bellis, who is the custodian of the records.

QUESTION: It didn't run to the partnership?

MR. WALLACE: It was not a subpoena issued to the partnership.

QUESTION: Well, to whom did the subpoena run in the Wilson case?

MR. WALLACE: I don't recall --

QUESTION: Well, it ran to the corporation.

MR. WALLACE: In the White case --

QUESTION: If you're going to subpoena corporate records, you've got to serve some person, you just can't serve the corporation.

MR. WALLACE: That is correct.

QUESTION: Then whomever you serve or whoever has got custody of the corporate papers has to produce them.

MR. WALLACE: In the White case, if I recall correctly, the subpoena was issued to the custodian of the labor union's records, rather than to the association itself. But I don't see that that makes a difference. He's the one who has to comply with it.

QUESTION: No, the subpoena in the White case was directed to Local No. 542, International Union of Operating Engineers.

What do you suppose the -- what do you suppose the Court meant by setting up that test, so-called test, in the White case? What do you think that test means?

MR. WALLACE: Well, this -- we've been puzzled by that, as have the district courts in all of these cases cited on page 29 of Mr. Sarner's brief.

We have noted, first of all, that neither this Court nor any Court of Appeals has ever yet held that any organizational records are privileged or that the custodian is entitled to assert their privilege in resisting a production order. And in light of the question put by the Chief Justice, we suggested one possibility of what this rationale -- what this, essentially, dictum in the White case may mean.

QUESTION: Well, it's a test -- it's a test that --

MR. WALLACE: It's a test that was stated, but a test --

QUESTION: And applied.

MR. WALLACE: -- that --

QUESTION: In the White case.

MR. WALLACE: It may have been part of the rationale of the decision.

QUESTION: Right.

MR. WALLACE: But the courts have found it difficult to apply in any meaningful way.

The Chief Justice has suggested, well, what if the government were investigating one of the other partners, rather than the one who happens to have custody of the records at the moment; what is the situation there?

Well, --

QUESTION: That would be the Couch case, wouldn't it? You wouldn't need to have this partnership doctrine.

MR. WALLACE: Well, it -- it's not exactly the Couch case, because the custodian might say that these records would tend to incriminate him as well as his other partner.

QUESTION: Well, then it would be this case.

MR. WALLACE: Even if his partner needed them for exculpatory purposes, he might still raise the same claim.

QUESTION: If the custodian was making the claim,

then that would be this case.

MR. WALLACE: That would be this case.

And that seems to us to suggest one possible answer to what is meant by the White case, and we suggested that on page 22 of our brief: that when the association is one in which the law recognizes testimonial privilege of confidential communications between the members of the group, then it seems to us the extension of protection in the White case makes some sense.

For example, a family's own financial records. They belong to the husband, and the wife. But the law does recognize a privilege of confidentiality in that relationship. That is what, in the words of Murphy v. Waterfront Commission, can accurately be characterized as a private enclave, where persons are entitled to lead a private life. At least free from the intrusion of the law to compel self-incrimination in the absence of a grant of immunity, which is what we understand that rationale to mean.

And we suggested on page 22 that that seems to us to mark the sensible bounds in terms of legal rights of this rationale or dictum expressed in the White case, which the Court has not yet applied in any context which gives guidance. It's difficult for us to see that this statement from the White case distinguishes meaningfully between a three-man partnership or a four-man partnership, or between a nineteen-man partner-

ship or a twenty-man partnership.

But what is involved here, as we set forth in some detail, are the ordinary business records of the ordinary operation of a law partnership, receipts and disbursements of a partnership that had been in the general practice of law for some fifteen years, which had, in addition to the three partners, at least five other employees, which had a firm name, a firm bank account, firm stationery, was representing itself as engaged in the general practice of law.

It's difficult to see on what basis distinction should be drawn.

QUESTION: I understand, Mr. Wallace, that he says that while he's the custodian of these records, these records would incriminate him personally.

That's his point.

MR. WALLACE: That was the point made in Wilson and White also, Your Honor.

QUESTION: Yes. Well, that's -- it seems to me that here there's no showing of criminality at all, yet.

Right? It's just an investigation.

MR. WALLACE: It's just an investigation by the Grand Jury, which has very broad investigatory powers.

QUESTION: And he has -- suppose he has two sets of records, one are his personal records, and the other are

his records in relationship to the partnership. Does he have to produce all of them?

MR. WALLACE: Well, under Boyd he can claim a privilege with respect to his personal papers, and the Internal Revenue Service, in its enforcement activities, has been complying with Boyd.

QUESTION: Good. Next case. He says they're so entwined together I can't separate them.

MR. WALLACE: Well, that -- he would have the burden of showing that. I mean, he has obligations as a fiduciary under State law to be able to make an accounting to his partners of the partnership records, and they are available to his partners for inspection, and the district judge said for copying. His partners can inspect and copy these records, and they have a right to an accounting from him.

He would be violating his fiduciary obligations if he were unable to separate the partnership records from his own.

QUESTION: Couldn't he tell his partners: I can't let you have this, because if I let you have it you'll take it to the authorities and I'll end up in jail.

MR. WALLACE: Well, there has been no holding on that, that I'm aware of.

QUESTION: I'm not, either.

MR. WALLACE: The whole thrust of State law is that his partners have rights --

QUESTION: But I'm not too sure --

MR. WALLACE: -- that can't be frustrated.

QUESTION: I'm not too sure Boyd covers this personal complaint he has with these papers: I'm the one who's been doing the dirty work here, and I'm the one that's messed with the books and everything else; and so I can't turn them loose, because they'll send me to jail for sure.

MR. WALLACE: Well, the only response I can make to that is that the whole thrust of this line of cases in the Court is that when one is holding the papers, as a custodian, in a representative capacity rather than holding his own personal papers, he's not entitled to make that claim. Because --

QUESTION: He wouldn't if --

MR. WALLACE: -- it diminishes the rights of the other persons in the organization.

QUESTION: You wouldn't extend it to the huge partnerships who have two or three hundred partners, would you?

You wouldn't extend it there, you say you want to limit it.

MR. WALLACE: Well, many of the cases have involved large partnerships, but some of them have involved small --

QUESTION: Well, I mean that's --

MR. WALLACE: -- partnerships.

QUESTION: Well, that's what the appellant says, and of course it's true in one of these huge partnerships. But where you have a small partnership it's different.

MR. WALLACE: Well, I --

QUESTION: And you originally said that the family one, of course, would be very little problem with that.

MR. WALLACE: No, I didn't -- I didn't refer to a family partnership necessarily. I was referring to the family's own family records.

QUESTION: Right.

MR. WALLACE: Now, when you get into a partnership, there are legal rights that State law recognizes between the partners that affects the confidentiality --

QUESTION: Well, wouldn't you --

MR. WALLACE: -- of the partnership records, and whether one individual has the right to take them into what the Court called his own inner sanctum in Couch. He doesn't have that right.

QUESTION: Well, to you it would make no difference how small the partnership was or how intimate it was.

MR. WALLACE: Well, we think that the legal attributes of the partnership relationship are what are more meaningful than comparing the size and activities of various partnerships

which the courts have had great difficulty in trying to --

QUESTION: So you don't base it on numbers alone, you base it on the nature of the partnership.

MR. WALLACE: Well, our contention doesn't base it on numbers at all. Our contention bases it on the legal right between partners, who are associated together in the partnership. And because each individual partner -- each individual partner's rights are limited with respect to the partnership records by State law. In this case by the Uniform Partnership Act. As in most States. His rights are limited by the rights of the other partners.

And that doesn't vary, whether there are two partners or two hundred.

QUESTION: Mr. Wallace, I take it if Mr. Bellis had gotten these records and thrown them in the river and they were then subpoenaed, he was subpoenaed for a Grand Jury, he has to produce them, he said he didn't have them, and then he was asked: What did you do with them?

Under Curcio he would have the right to plead self-incrimination there, wouldn't he?

MR. WALLACE: He would. He would, Your Honor. He's not required to testify under Curcio. But he is required to produce. The Court in Curcio assumed that he would be required to produce them in response to the subpoena. In fact, they even noted in a footnote that he had produced them,

in response to the subpoena. The Court reaffirmed the White holding, that he could be required to produce them.

But they said that he couldn't be required to testify as to their whereabouts, if he chose not to produce them.

That isn't the issue here.

Of course there can be subpoenas, whether they deal with papers or not, that would elicit incriminatory information from an individual. If you subpoena someone to produce the blunt instrument with which you beat a certain individual on the night of April 14th, or something of that sort, his producing the instrument in response to the subpoena is, in effect, some communication.

If -- if the subpoena attempts to elicit that kind of information.

But we're not dealing with anything of that sort here. The only thing that's required here is the essentially neutral obligation of the custodian, that he undertook when he undertook custody of the association's records, to produce them and say, These are the records of the association that are called for in the subpoena. Not to say anything else about his own activities that would tend to incriminate him.

And there's no need to introduce in evidence even that much of an admission on his part. It's just implicit in his responding to the subpoena.

And the consistent holding of this Court's series of cases dealing with associational records is that that's an obligation he undertook in undertaking custody of the associational records.

QUESTION: Well, your suggested limitation of the White test, what's an example of associational relationship with respect to which the law recognizes testimony for --

MR. WALLACE: Well, the one that occurred to me is the one I mentioned, the family's records, where the law recognizes a testimonial privilege between the wife and the husband.

Now, there needn't be --

QUESTION: Can you conceive of any in connection with a partnership of this size?

MR. WALLACE: I could not, Your Honor, unless, under the law, a partnership between a husband and a wife would be treated the same way. I have some doubt that it would, because of the provisions under the Uniform Partnership Act, giving the partners rights against one another in producing fiduciary obligations in that context.

But that was one possibility that occurred to us.

QUESTION: It would be very limited, wouldn't it?

MR. WALLACE: It would be very limited.

But, on the other hand, no Court of Appeals has found any -- any context at all in which to apply this test,

and neither has this Court. And we don't think that this case is a proper context for applying it, either.

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

Thank you, Mr. Sarner.

The case is submitted.

[Whereupon, at 11:06 o'clock, a.m., the case in the above-entitled matter was submitted.]

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