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Fifth Amendment Protection Does Not Extend to Documents in Possesion of Taxpayer's Attorney.

Samuel R. Graham

CASE NOTES

CONSTITUTIONAL LAW—Self-Incrimination—Fifth Amendment Protection Does Not Extend To Documents In Possession Of Taxpayer's Attorney

United States v. White, 477 F.2d 757 (5th Cir. 1973).

White, the appellant, was retained by certain taxpayers subsequent to their receiving notification from the IRS that the taxpayers were the subject of a special investigation for the years 1962 through 1965. Appellant immediately contacted the certified public accountant who had assisted the taxpayers in the preparation of their tax returns for the years 1962 through 1968 and who also had aided them in the preparation of a compromise settlement offered to the IRS in 1967. Appellant then obtained all workpapers compiled by the accountant in the preparation of both the tax returns and the offer in compromise. The accountant and the attorney agreed that the latter could retain the workpapers indefinitely, but would return them upon the completion of his representation of the taxpayers. In 1970, the taxpayers withdrew their offer in compromise. Shortly thereafter, the IRS expanded its investigation of the taxpayers to include a review of the years 1966 through 1969. The government issued and served upon White a summons to obtain those workpapers used by the accountant in preparing the taxpayers' income tax returns for the years 1966 through 1968.[1] When

1. The summons was issued pursuant to the INT. REV. CODE of 1954 § 7602 which provides:

Examination of Books and Witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

White refused to produce these workpapers, the government petitioned the district court for enforcement of the summons.[2] In the enforcement proceeding, appellant asserted his clients' fifth amendment privilege as a bar to the compelled production of the documents in his possession, but the district court disallowed his claim. He appealed the holding to the United States Court of Appeals for the Fifth Circuit. Held—*Affirmed.* Internal revenue summons of an accountant's workpapers compiled while preparing taxpayers' returns and in the possession of the taxpayers' attorney does not abridge the taxpayers' fifth amendment protection of self-incrimination.[3]

The fifth amendment to the United States Constitution prohibits a person from being compelled to testify against himself; additionally, one may not be forced to produce evidence that would be self-incriminating.[4] Since the Supreme Court's decision in *Boyd v. United States*[5] in 1886, this prohibition has included one's personal records, papers, and writings. This privilege from the production of self-incriminating documents, however, protects only natural persons[6] and does not protect the records of corporations,[7] labor unions,[8] or unincorporated associations.[9] Nor may a corporate employee pre-

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

2. Enforcement of Summons is provided for in INT. REV. CODE 1954 § 7604.

(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

3. United States v. White, 477 F.2d 757 (5th Cir. 1973).

4. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

5. 116 U.S. 616, 634-35 (1886).

6. United States v. White, 322 U.S. 694, 701 (1944); *accord,* Oklahoma Press Publishing Co. v. Walling, Wage and Hour Adm'r, 327 U.S. 186, 194 (1946).

7. Hale v. Henkel, 201 U.S. 43, 69 (1906); *accord, e.g.,* Wilson v. United States, 221 U.S. 361, 383 (1911).

8. United States v. White, 322 U.S. 694, 704 (1944); *accord,* United States v. Egenberg, 443 F.2d 512, 517 (3d Cir. 1971); United States v. Slutsky, 352 F. Supp. 1105, 1107 (S.D.N.Y. 1972).

9. Brown v. United States, 276 U.S. 134, 142 (1928); *accord,* United States v. Fleischman, 339 U.S. 349, 358 (1950).

vent the production of corporate records, even if in his own possession, that tend to be self-incriminating.[10]

In the instant case the workpapers sought by the government were compiled by a certified public accountant in the preparation of the taxpayers' returns. Though turned over to the taxpayers' attorney before the summons was served, ownership of the workpapers remained in the accountant.[11] The workpapers were held by the attorney, not the taxpayers, who neither saw nor touched them.

The above fact situation has been adjudicated several times in both United States district courts and courts of appeals.[12] These decisions may be divided into two groups: first, those cases centering on the procedural question of whether or not an attorney may invoke the fifth amendment's protection for his client; and second, those decisions turning on the constitutional issue of whether or not compelled production of documents in the possession of the taxpayer's attorney abrogates the taxpayer's privilege against self-incrimination.

From an often repeated Supreme Court statement that the fifth amendment is a purely personal right,[13] several lower courts have determined that an attorney has no standing to invoke the fifth amendment's protection in behalf of his client.[14] Further, they deny fifth amendment protection to

10. Wilson v. United States, 221 U.S. 361, 385 (1911); *accord,* United States v. Held, 315 F. Supp. 352, 354 (E.D. Tenn. 1970), *cert. denied,* 401 U.S. 1010 (1971).

11. "[A]s a general rule accountants' work papers are the property of the accountant unless shown to the contrary." United States v. Zakutansky, 401 F.2d 68, 70 (7th Cir. 1968), *cert. denied,* 393 U.S. 1021 (1969) (citations omitted). *See generally* 35 AM. JUR. 2d *Fed. Tax Enfor.* § 165 (1967); Annot., 90 A.L.R.2d 784 (1963).

12. The following courts upheld enforcement of a summons requesting documents held by an attorney. Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963); *In re* Fahey, 300 F.2d 383 (6th Cir. 1961); *In re* Brumbaugh, CCH 1962 STAND. FED. TAX REP., U.S. TAX CAS. (62-2 at 85,182) ¶ 9521 (S.D. Cal. May 31, 1962); United States v. Boccuto, 175 F. Supp. 886 (D.N.J.), *appeal dismissed,* 274 F.2d 860 (3d Cir. 1959). *Contra,* United States v. Judson, 322 F.2d 460 (9th Cir. 1963); United States v. Foster, Lewis, Langley & Onion, CCH 1965 STAND. FED. TAX REP., U.S. TAX CAS. (65-1 at 95,512) ¶ 9418 (W.D. Tex. Nov. 17, 1964); Application of House, 144 F. Supp. 95 (N.D. Cal. 1956).

13. "The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness." Hale v. Henkel, 201 U.S. 43, 69 (1906). Judge Ainsworth, in his dissent, alludes to the *Hale* statement as dicta. United States v. White, 477 F.2d 757, 766 n.4 (5th Cir. 1973). This idea served as the foundation for the ruling in United States v. Judson, 322 F.2d 460 (9th Cir. 1963). *But see* Comment, *The Attorney And His Client's Privileges,* 74 YALE L.J. 529, 541-43 (1965).

14. The greater number of courts have held the attorney has no right to assert his client's privilege against self-incrimination. United States v. Goldfarb, 328 F.2d 280 (6th Cir.), *cert. denied,* 377 U.S. 976 (1964); Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963); *In re* Fahey, 300 F.2d 383 (6th Cir. 1961); United States v. Boccuto, 175 F. Supp. 886 (D.N.J.), *appeal dismissed,* 274 F.2d 860 (3d Cir. 1959). *Contra,* United States v. Judson, 322 F.2d 460 (9th Cir. 1963); Application of House, 144 F. Supp. 95 (N.D. Cal. 1956); C. MCCORMICK, LAW OF EVIDENCE § 119, at 254 (2d ed. 1972).

a taxpayer even when he holds the summoned documents, unless the taxpayer personally appears at all hearings and pleads its protection. The fifth amendment "may not be invoked in behalf of a third party, even if the witness is an attorney and he asserts the privilege in behalf of his client."[15] Opposing decisions hinge on what one court denominated the "raw logic"[16] of the situation. Tax investigations are lengthy affairs, often lasting several years. To force the taxpayer to be present at all hearings imposes an unfair and expensive burden upon him. Therefore, the United States Court of Appeals for the Ninth Circuit, as well as the District Courts for the Northern District of California and the Western District of Texas have allowed attorneys to invoke the fifth amendment for their clients.[17]

A dichotomy of opinion also exists within the second group (those decisions resting upon constitutional principles) and is best illustrated by comparing *United States v. Judson*[18] with *United States v. White*.[19] In *Judson,* the Court of Appeals for the Ninth Circuit held that compelled production of a taxpayer's records in his attorney's possession violated the fifth amendent.[20] On the other hand, the Court of Appeals for the Fifth Circuit in *White* refused to follow the holding reached in *Judson.* Rather, in determining that no fifth amendment protection extended from the taxpayers to the documents held by the taxpayers' attorney, the court in *White* looked to the recent Supreme Court decision, *Couch v. United States,*[21] for guidance.[22]

In *Couch,* Justice Powell, speaking for the majority, stated that two elements, *possession* of the evidence and *personal compulsion* to produce it, are essential before one has standing to invoke the fifth amendment.[23] The documents summoned by the IRS were books and records owned by Couch, but in the possession of Couch's accountant. The Court held that though own-

15. *In re* Brumbaugh, CCH 1962 STAND. FED. TAX REP., U.S. TAX CAS. (62-2 at 85,183) ¶ 9521 (S.D. Cal. May 31, 1962).

16. United States v. Judson, 322 F.2d 460, 466 (9th Cir. 1963). As the court stated:

> The raw logic of the matter compels us to agree with the court in Application of House, supra. Clearly, if the taxpayer in this case, or in House, had been subpoenaed and directed to produce the documents in question, he could have properly refused. The government concedes this. But instead of closeting himself with his myriad tax data drawn up around him, the taxpayer retained counsel . . . . The government would have us hold that the taxpayer walked into his attorney's office unquestionably shielded with the Amendment's protection, and walked out with something less.

Id. at 466.

17. United States v. Judson, 322 F.2d 460, 466 (9th Cir. 1963); Application of House, 144 F. Supp. 95, 100 (N.D. Cal. 1956); United States v. Foster, Lewis, Langley & Onion, CCH 1965 STAND. FED. TAX REP., U.S. TAX CAS. (65-1, at 95,514) ¶ 9418 (W.D. Tex. Nov. 17, 1964).

18. 322 F.2d 460 (9th Cir. 1963).

19. 477 F.2d 757 (5th Cir. 1973).

20. United States v. Judson, 322 F.2d 460, 468 (9th Cir. 1963).

21. 409 U.S. 322 (1973).

22. United States v. White, 477 F.2d 757, 762 (5th Cir. 1973).

23. Couch v. United States, 409 U.S. 322, —, 93 S. Ct. 611, 618, 34 L. Ed. 2d 548, 557 (1973).

ership of the documents remained in the taxpayer, she did not possess them, hence, no personal compulsion rested upon her when the documents were produced.[24] The Court stated by way of dictum, however, that actual possession is not always necessary. In some cases, constructive possession would suffice to establish a fifth amendment claim of privilege.[25] Citing with approval *United States v. Cohen*,[26] the Court made possession, actual or constructive, the means for entry into fifth amendment protection. Proof of possession is a requisite before the drawbridge is lowered, and one may cross into constitutional privilege. Having established possession of the documents, the taxpayer has established a claim superior to all and stands within the protection of the Constitution, shielded from summons or subpoena.[27]

In decisions involving factual situations similar to *White*, a number of courts seem to act by reflex and automatically apply rigid rules to the situation.[28] This mechanical application may be broken down into the following steps. First, the court holds that the fifth amendment is personal to the privilege-holder.[29] The taxpayer must then choose between appearing at all hearings and conferences to invoke his fifth amendment protection or being absent and losing this shield, for his attorney may not open the constitutional umbrella in his absence.[30] The next step usually taken is to rigidly apply the pre-existing document rule to records, bank statements or workpapers in the attorney's possession.[31] Because all of these items ex-

24. *Id.* at —, 93 S. Ct. at 619-20, 34 L. Ed. 2d at 558 (1973).

25. *Id.* at —, 93 S. Ct. at 618, 34 L. Ed. 2d at 557 (1973).

26. 388 F.2d 464 (9th Cir. 1967). The endorsement of *Cohen* by the Supreme Court, Couch v. United States, 409 U.S. 322, —, 93 S. Ct. 611, 617 n.12, 34 L. Ed. 2d 548, 555 (1973), seems to settle the conflict between *Cohen* and United States v. Widelski, 452 F.2d 1, 5 (6th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972). In *Widelski*, the Court of Appeals for the Sixth Circuit respectfully declined to follow *Cohen*. The court chose, instead, to deny taxpayers' claim of protective privilege for documents possessed by taxpayers when those documents would not have been privileged if retained by taxpayers' accountant.

27. Couch v. United States, 409 U.S. 322, —, 93 S. Ct. 611, 616-17, 34 L. Ed. 2d 548, 554-55 (1973).

28. *See* Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963); *In re* Fahey, 300 F.2d 383 (6th Cir. 1961); *In re* Brumbaugh, CCH 1962 STAND. FED. TAX REP., U.S. TAX CAS. (62-2 at 85,182) ¶ 9521 (S.D. Cal. May 31, 1962); United States v. Boccuto, 175 F. Supp. 886 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959).

29. Bouschor v. United States, 316 F.2d 451, 458 (8th Cir. 1963); *accord, In re* Brumbaugh, CCH 1962 STAND. FED. TAX REP., U.S. TAX CAS. (62-2 at 85,183) ¶ 9521 (S.D. Cal. May 31, 1962); United States v. Boccuto, 175 F. Supp. 886, 889 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959).

30. *See, e.g.*, Bouschor v. United States, 316 F.2d 451, 458 (8th Cir. 1963). *But see* United States v. Judson, 322 F.2d 460, 468 & n.1a (9th Cir. 1963); Application of House, 144 F. Supp. 95, 100 (N.D. Cal. 1956) for an analysis of the ramifications thrust upon a taxpayer when fifth amendment protection may only be invoked by the taxpayer personally.

31. Bouschor v. United States, 316 F.2d 451, 457 (8th Cir. 1963); *accord, e.g.*, United States v. Judson, 322 F.2d 460, 463 (9th Cir. 1963).

isted before the taxpayer retained counsel, they pre-existed and fall outside the attorney-client privilege.[32] In reference to the pre-existing document rule and attorney-client privilege, Dean Wigmore advances the idea that documents privileged in the hands of a client should remain privileged when given to his attorney.[33] Thus the answer to the enforceability of a summons seeking documents held by an attorney would depend "upon the other privileges of the client *irrespective of the present privilege*" (the attorney-client privilege).[34] It would follow that had the documents been privileged while in the taxpayer's possession they should remain protected when held by counsel. This was the explicit holding in *Judson*.[35]

The critical question in cases of this nature then, is whether or not the documents would have been privileged in any event. In *United States v. Cohen*,[36] enforcement of the summons was disallowed because the taxpayer held the records sought by the government and to allow their compelled production, in that instance, would have been self-incriminating.[37] The Supreme Court in *Couch* implied that had the taxpayer retained the documents or firmly established constructive possession of them, she would have been protected from their disclosure.[38] In *White,* the majority acknowledged that constructive possession was the appellant's strongest argument.[39] The court rejected this, however, on the grounds that the taxpayers had never possessed the workpapers nor known of their transfer at the time it was arranged.[40] One may interpret the decision as a suggestion that the taxpayer must serve temporarily as a repository for any documents before transferring them to counsel.[41] If this is the implication intended by the court, it would create another rule to be mechanically applied. Judge Ainsworth, in his dissent, observed that the attorney established constructive possession by holding the papers for the benefit of the taxpayers.[42]

It is true that the court in *White* did not blindly follow other courts and reason by reflex. Rather, the decision turns upon the fifth amendment privilege itself.[43] In denying this privilege to the taxpayers, the court refused

32. United States v. White, 477 F.2d 757, 762 n.9 (5th Cir. 1973).
33. 8 J. WIGMORE, EVIDENCE § 2307, at 592 (McNaughton rev. ed. 1961).
34. *Id.* at 591.
35. United States v. Judson, 322 F.2d 460, 468 (9th Cir. 1963). Though no court has directly followed *Judson*, the decision has been favorably treated in legal periodicals, *e.g.*, Note, 1964 DUKE L.J. 362, 368; Note, 42 TEX. L. REV. 553, 557 (1964); Recent Decisions, 38 TUL. L. REV. 206-07 (1963).
36. 388 F.2d 464 (9th Cir. 1967).
37. *Id.* at 472.
38. Couch v. United States, 409 U.S. 322, —, 93 S. Ct. 611, 618, 34 L. Ed. 2d 548, 557 (1973).
39. United States v. White, 477 F.2d 757, 763 (5th Cir. 1973).
40. *Id.* at 763.
41. *Id.* at 766 n.7 (Judge Ainsworth dissenting).
42. *Id.* at 766.
43. *Id.* at 759, 764.

to follow *Judson.*[44] "Raw logic,"[45] however, rests with *Judson* and attorney White. If the workpapers would have been protected while in the hands of White's clients, they should also be protected while in the attorney's custody. As Wigmore concluded:

> [*W*]*hen the client himself would be privileged* from production of the document, either as a party at common law or as a third person claiming title or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce.[46]

Elimination of constitutional protection by transferring documents from a client to his attorney is not the only difficulty presented by the *White* decision. Another problem stemming from the transfer transcends the bounds of the instant case and permeates any IRS investigation. A dual purpose lies behind an inquiry into the affairs of a taxpayer: first, the determination of any civil liability, and second, the determination of criminal fraud.[47] In 1971, the Supreme Court in *Donaldson v. United States*[48] sought to resolve this dilemma by holding that an IRS summons is enforceable only if "issued in good faith and prior to a recommendation for criminal prosecution."[49] The investigation continues after delivery of the summons, however, and the final recommendation may be to prosecute the taxpayer for criminal fraud rather than bring a civil action.[50] The decision to criminally prosecute could be swayed by the records obtained with the summons. An attorney who takes records from his client, or gathers them from other sources, to prepare a defense may be collecting information for government prosecutors as well. The Supreme Court, however, has established that a basic purpose of the fifth amendment is to force "prosecutors . . . to search for independent evidence instead of relying upon proof extracted from individuals by force of law."[51] The *White* decision partially removes this burden

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44. *Id.* at 763.

45. United States v. Judson, 322 F.2d 460, 466 (9th Cir. 1963).

46. 8 J. WIGMORE, EVIDENCE § 2307, at 592 (McNaughton rev. ed. 1961) (author's emphasis).

47. *See generally* Lyon, *Government Power and Citizen Rights in a Tax Investigation*, 25 TAX LAW. 79 (1971); Comment, *Is The Odd Man Out: The Taxpayer's Right to Intervene in Judicial Enforcement of a Summons Directed Against a Third Party—Donaldson v. United States*, 1971 UTAH L. REV. 561; Note, *Criminal Tax Fraud Investigations: Limitations on the Scope of the Section 7602 Summons*, 25 U. FLA. L. REV. 114 (1972).

48. 400 U.S. 517 (1971).

49. *Id.* at 536. In his dissent, Judge Ainsworth doubted "that the requisites of *Donaldson v. United States* have been complied with since the evidence points most strongly to an absence of good faith on the part of the Government . . . in issuing the summons." United States v. White, 477 F.2d 757, 765 (5th Cir. 1973) (citations omitted).

50. Couch v. United States, 409 U.S. 322, —, 93 S. Ct. 611, 615, 34 L. Ed. 2d 548, 553 (1973). *See generally* Comment, *Is The Odd Man Out: The Taxpayer's Right to Intervene in Judicial Enforcement of a Summons Directed Against a Third Party—Donaldson v. United States*, 1971 UTAH L. REV. 561-62.

51. United States v. White, 322 U.S. 694, 698 (1944).

from federal prosecutors in tax situations. Certainly, the IRS should be allowed to summon documents[52] held by an attorney as long as the documents sought would not be privileged were they in the hands of the taxpayer.[53] Documents privileged in the hands of the taxpayer, however, should also be privileged in the hands of his attorney.

At present, the only certain way to avoid the government's obtaining such documents would be for counsel to arrange the transfer of all records held by taxpayer's accountant to the taxpayer as soon as possible. These records would have to be maintained on the taxpayer's premises and examined by his attorney on those premises only.[54]

It is respectfully submitted that the United States Supreme Court should resolve the present discordance among the federal courts in determining whether a taxpayer's fifth amendment privilege has been abridged.[55] Such a resolution could be reached by adoption of the principle that documents possessed by the taxpayer are privileged from governmental production. Perhaps the Supreme Court in *Couch* foreshadowed their endorsement of this concept by favorably quoting *Cohen*.[56] In addition, endorsement of Wigmore's position that documents privileged in the hands of a client are also privileged in the hands of his attorney would provide a more efficacious rule than one based on purely formal constructive possession. Government prosecutors would again have to seek "independent evidence"[57] and a basic purpose of the fifth amendment will have been re-established.

Samuel R. Graham

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52. The summons is essential to IRS operation. Its utility in gleaning information from those hesitant to volunteer data is unquestioned. Comment, *Is The Odd Man Out: The Taxpayer's Right to Intervene in Judicial Enforcement of a Summons Directed Against a Third Party—Donaldson v. United States*, 1971 UTAH L. REV. 561, 567.

53. For example, records required by the government to be kept by an individual may be summoned even if self-incriminating. Shapiro v. United States, 335 U.S. 1, 19 (1948); *accord*, United States v. Kaufman, 429 F.2d 240, 247 (2d Cir.), *cert. denied*, 400 U.S. 925 (1970); Phelps v. United States, 160 F.2d 858, 871 (8th Cir. 1947), *cert. denied*, 334 U.S. 860 (1948); Stern v. Robinson, 262 F. Supp. 13, 15 (W.D. Tenn. 1966), *cert. denied*, 390 U.S. 1027 (1968). *But see* Note, *Criminal Tax Fraud Investigations: Limitations on the Scope of the Section 7602 Summons*, 25 U. FLA. L. REV. 114, 127 n.107 (1972) for the suggestion that courts are reluctant to apply the required records doctrine.

54. United States v. Judson, 322 F.2d 460, 466 (9th Cir. 1963).

55. White has applied for a re-hearing before the United States Court of Appeals for the Fifth Circuit sitting *en banc*. If it is denied, he will probably apply for a writ of certiorari to the United States Supreme Court. Letter from George A. Hrdlicka, attorney for White, to the *St. Mary's Law Journal*, June 5, 1973, on file in St. Mary's Law Library.

56. Couch v. United States, 409 U.S. 322, —, 93 S. Ct. 611, 617 n.12, 34 L. Ed. 2d 548, 555 (1973).

57. United States v. White, 322 U.S. 694, 698 (1944).