

The Burger Court Opinion Writing Database

Andresen v. Maryland

427 U.S. 463 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 15, 1976

Re: 74-1646 - Andresen v. Maryland

Dear Harry:

I join your proposed June 11 opinion.

Regards,

WSB

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 17, 1976

RE: No. 74-1646 Andresen v. Maryland

Dear Harry:

I shall be circulating a dissent hopefully on Monday
in the above.

Sincerely,

Bair

Mr. Justice Blackmun

cc: The Conference

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackman
 Mr. Justice Powell
 Mr. Justice Brennan
 Mr. Justice Stevens

SUPREME COURT OF THE UNITED STATES

No. 74-1646 O.T. 1975

From: Mr. Justice Brennan

6/21/76

Brennan

Peter C. Andresen, Petitioner

v.

On Writ of Certiorari to the Court
of Special Appeals of Maryland

Maryland

[June ____ 1976]

MR. JUSTICE BRENNAN, dissenting.

In a concurring opinion earlier this Term in Fisher v. United States, ____ U.S. ____ (1976), I stated my view that the Fifth Amendment protects an individual citizen against the compelled production of testimonial matter that might tend to incriminate him, provided it is matter that comes within the zone of privacy recognized by the Amendment to secure ^{to} the individual "a private inner sanctum of individual feeling and thought." Couch v. United States, 409 U.S. 322, 327 (1973). Accordingly, the production of testimonial material falling within this zone of privacy may not be compelled by subpoena. The Court holds today that the search and seizure pursuant to valid warrant of business records containing statements made by the petitioner and in petitioner's possession does not violate the Fifth Amendment. I can perceive no distinction of meaningful substance between compelling the production of such records through subpoena and seizing such records through warrant against the will of the petitioner.

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated:

Rejected:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1646

Peter C. Andresen,
 Petitioner, } On Writ of Certiorari to the Court
 v. } of Special Appeals of Maryland.
 State of Maryland.

[June —, 1976]

MR. JUSTICE BRENNAN, dissenting.

In a concurring opinion earlier this Term in *Fisher v. United States*, — U. S. — (1976), I stated my view that the Fifth Amendment protects an individual citizen against the compelled production of testimonial matter that might tend to incriminate him, provided it is matter that comes within the zone of privacy recognized by the Amendment to secure to the individual "a private inner sanctum of individual feeling and thought." *Couch v. United States*, 409 U. S. 322, 327 (1973). Accordingly, the production of testimonial material falling within this zone of privacy may not be compelled by subpoena. The Court holds today that the search and seizure pursuant to valid warrant of business records containing statements made by the petitioner and in petitioner's possession does not violate the Fifth Amendment. I can perceive no distinction of meaningful substance between compelling the production of such records through subpoena and seizing such records through warrant against the will of the petitioner. Moreover I believe that the warrants under which petitioner's papers were seized were impermissibly general. I therefore dissent.¹

¹ The Court notes, *ante*, at — n. 4, that decision of the constitutional issues presented in this case, is unnecessary since the Court could "apply the discretionary concurrent sentence doctrine . . .

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 14, 1976

74-1646 - Andresen v. Maryland

Dear Harry,

I am glad to join your opinion for
the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 14, 1976

Re: No. 74-1646 - Andresen v. Maryland

Dear Harry:

I had hoped that we had settled in Fisher v. United States that the Fifth Amendment did not do duty for the Fourth and that where search warrants, rather than subpoenas are involved, the Fifth Amendment is not implicated. See page nine of the slip opinion. Hence I am somewhat concerned by your emphasis on page twenty-one of your circulating draft on the fact "that the challenged evidence in this case consists of documents prepared in the normal course of petitioner's business as a real estate lawyer and not papers that might be said to be within 'a private sanctum of individual feeling and thought.'" That emphasis might be very relevant if a subpoena were involved but not where the documents are seized under a search warrant.

I also have some question about the last sentence of footnote two where a search warrant rather than a subpoena is involve.

I do hope you agree.

Sincerely,



Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 23, 1976

Re: No. 74-1646 - Andresen v. Maryland

Dear Harry:

With respect to your note of June 18, I appreciate your willingness to omit the last sentence of footnote 2. I am still uneasy, however, about the paragraph beginning at the bottom of page 13. A search warrant, not a subpoena, is involved here, and I would suggest that the reach of the Fifth Amendment ends when compulsion ends. As you indicate earlier, there is no compulsion here. I consequently find it difficult to join your reservation with respect to more private papers than are involved here.

Should you care for a concrete suggestion, a substituted paragraph is attached. I have shown it to both Lewis Powell and Bill Rehnquist, and they would prefer it.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Mr. Justice Powell
Mr. Justice Rehnquist

9
You reviewed this
with Byron

We recognize, of course, that the Fifth Amendment protects privacy to some extent. However, "the Court has never suggested that every invasion of privacy violates the privilege." Fisher v. United States, ___ U.S. ___, slip opinion, at 7. Indeed, we recently held that unless "compelled testimony" is involved, any invasion of privacy is outside the scope of the Fifth Amendment's protection, saying that "the Fifth Amendment protects against 'compelled testimony not [the disclosure of] private information.'" Fisher v. United States, ___ U.S. ___, slip opinion, at 8. Here, as we have already noted, petitioner was not compelled to testify in any manner.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 28, 1976

Re: No. 74-1646 - Andresen v. Maryland

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

Copies to Conference

✓

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: JUN 23 1976

Recirculated: _____

No. 74-1646, Andresen v. Maryland

Mr. Justice Marshall, dissenting.

I agree with Mr. Justice Brennan that the business records introduced at petitioner's trial should have been suppressed because they were seized pursuant to a general warrant. Accordingly, I need not consider whether petitioner's alternative contention -- that the Fifth Amendment precludes the seizure of private papers, even pursuant to a warrant -- can survive Fisher v. United States, ___ U.S. ___ (1976), and, if so, whether this Fifth Amendment argument would protect the business records seized in this case.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated:

Recirculated: JUN 25 1976

PRINTED

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1646

Peter C. Andresen,
Petitioner,
v.
State of Maryland. } On Writ of Certiorari to the Court
of Special Appeals of Maryland,

[June —, 1976]

MR. JUSTICE MARSHALL, dissenting.

I agree with MR. JUSTICE BRENNAN that the business records introduced at petitioner's trial should have been suppressed because they were seized pursuant to a general warrant. Accordingly, I need not consider whether petitioner's alternative contention—that the Fifth Amendment precludes the seizure of private papers, even pursuant to a warrant—can survive *Fisher v. United States*, — U. S. — (1976), and, if so, whether this Fifth Amendment argument would protect the business records seized in this case.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

No. 74-1646 - Andresen v. Maryland

Circulated: 6/11/76

Recirculated: _____

MR. JUSTICE BLACKMUN delivered the opinion of the
Court.

WJB
This case presents the issue whether the introduction into
evidence of a person's business records, seized during a search of
his offices, violates the Fifth Amendment's command that "[n]o
person . . . shall be compelled in any criminal case to be a witness
against himself." We also must determine whether the particular
searches and seizures here were "unreasonable" and thus violated
the prohibition of the Fourth Amendment.

No. 74-1646

1/

Before these search warrants were executed, the Bi-
County Fraud Unit had also received complaints concerning other
Potomac Woods real estate transactions conducted by petitioner.

The gist of the complaints was that petitioner, as settlement attorney,
took money from three sets of home purchasers upon assurances that
he would use it to procure titles to their properties free and clear of
all encumbrances. It was charged that he had misappropriated the money
so that they had not received clear title to the properties as promised.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1976

Re: No. 74-1646 - Andresen v. Maryland

Dear Byron and Lewis:

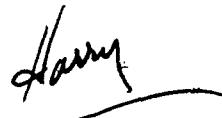
Each of you has written me privately about footnote 2 and the phrase on page 21 of the typewritten draft. I believe each of you is saying the same thing. I had tried to walk the tightrope of accommodation with Couch and Fisher and thought I had done so. I suggest, however, the following changes:

1. I shall omit the last sentence of footnote 2.
2. I propose the omission of the reference on page 21 to documents prepared in the normal course of business and to make the sentence in question read: "We emphasize, however, that the challenged evidence in this case did not consist of papers that might be said to be within 'a private inner sanctum of individual feeling and thought.'"

Would you let me know whether these changes meet with your respective objections. If, of course, the two of you are at odds with each other, I shall be glad to look at what the two of you can evolve.

The printed draft has now been received, but not circulated. The sentence in question is near the bottom of page 13.

Sincerely,



Mr. Justice White
Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 23, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 74-1646 - Andresen v. Maryland

There are three holds for Andresen:

1. No. 75-601 - Shaffer v. Wilson. This case comes to us from a divided vote of the CA 10. Shaffer is a practicing dentist. In 1971 a number of IRS special agents searched his office pursuant to a warrant. The warrant, issued by a U. S. magistrate, referred to an affidavit made by an IRS special agent to the effect that

"there is now being concealed certain property, namely fiscal records relating to the income and expenses of Dr. Wendell L. Shaffer from his dental practice and other sources from January 1, 1966 to December 31, 1970 including, but not limited to, dental patient cards, appointment books, cash receipts books, cash disbursements books, expense records, business ledgers, log books, bank ledger sheets and statements, deposit tickets, canceled checks, purchase invoices, copies of receipts covering payments of fees, copies of invoices and bills sent to patients . . . [a] . . . paper pad on which . . . notations are recorded and allegedly known as a 'cheat book', and diverse other records of financial transactions which have been used in violating the provisions of the Internal Revenue laws or regulations prescribed thereunder, particularly Sections 7201 and 7206(1) Said records also comprise evidence of criminal offenses in violation of these laws"

The present litigation was initiated by Doctor Shaffer under Federal Criminal Rule 41(e), 28 U. S. C. § 1331, and the Bivens case for damages and injunctive relief. He asserted both Fourth and Fifth Amendment claims. He sought return of all the records seized and

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 23, 1976

Re: No. 74-1646 - Andresen v. Maryland

Dear Byron:

Your proposed concrete suggestion as a replacement for the entire paragraph beginning at the bottom of page 13 of the uncirculated printed draft is acceptable to me. I shall have it rerun, together with the elimination of the last sentence of footnote 2 and with some other typographicals that have been noted.

Sincerely,

Mr. Justice White

cc: Mr. Justice Powell
Mr. Justice Rehnquist

Dear Harry

In view of the
exchange of ^{views} ~~correspondence~~
today between you and
Byron, I ~~am~~ am
happy to join your
opinion for the Court.

pp. 3, 4, 5, 13, 14

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 6/28/76

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1646

Peter C. Andresen,
Petitioner,
v.
State of Maryland. } On Writ of Certiorari to the Court
of Special Appeals of Maryland.

[June —, 1976]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether the introduction into evidence of a person's business records, seized during a search of his offices, violates the Fifth Amendment's command that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." We also must determine whether the particular searches and seizures here were "unreasonable" and thus violated the prohibition of the Fourth Amendment.

I

In early 1972, a Bi-County Fraud Unit, acting under the joint auspices of the State's Attorney's Offices of Montgomery and Prince George's Counties, Md., began an investigation of real estate settlement activities in the Washington, D. C. area. At the time, petitioner Andresen was an attorney who, as a sole practitioner, specialized in real estate settlements in Montgomery County. During the Fraud Unit's investigation, his activities came under scrutiny, particularly in connection with a transaction involving Lot 13T in the Potomac Woods subdivision of Montgomery County. The investigation, which included interviews with the purchaser, the mortgage

June 15, 1976

No. 74-1646 Andresen v. Maryland

Dear Harry:

Confirming our conversation, I think you have a fine opinion and I will join it.

I do have in mind the question I mentioned as to the inference that may be drawn from your emphasis upon the fact that the documents were "prepared in the normal course of petitioner's business". See p. 21. It may be inferred that the line is to be drawn between business and private papers. I had thought that, for Fifth Amendment purposes, this was not necessarily a viable distinction. I would agree that there may well be a privacy interest in some limited type of personal papers (e.g., a diary) that would protect them against a valid search warrant, but this right probably would arise from the First and Fourth Amendments. My opinion in United States v. Miller and Byron's in Kasmir and Fisher may be relevant.

One other point: One of my clerks has asked me about the last sentence in footnote 2. I rather doubt that the physical preparation of a document necessarily would be controlling in a Fifth Amendment cases. Perhaps you could simply drop this sentence.

I am not circulating this letter to the Conference.

Sincerely,

Mr. Justice Blackman

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 23, 1976

No. 74-1646 Andresen v. Maryland

Dear Harry:

In view of the exchange of views between you and Byron,
I am happy to join your opinion for the Court.

Sincerely,



Mr. Justice Blackmun

1fp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 24, 1976

Re: No. 74-1646 - Andresen v. Maryland

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 15, 1976

Re: 74-1646 - Andresen v. Maryland

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

Copies to the Conference