

# The Burger Court Opinion Writing Database

## *Fisher v. United States*

425 U.S. 391 (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

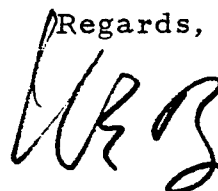
April 14, 1976

Re: (74-18 - Fisher v. U. S.  
(74-611 - U. S. v. Kasmir)

Dear Byron:

I join your February 27 circulation.

Regards,



Mr. Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 28, 1976

RE: Nos. 74-18 & 74-611 Fisher and Kasmir v.  
United States

Dear Byron:

I'll be writing a separate opinion in the  
above.

Sincerely,



Mr. Justice White

cc: The Conference

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

From: Mr. Justice Brennan

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 74-18 AND 74-611

Solomon Fisher et al., Petitioners, 74-18 v. United States et al.	} On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.
United States et al., Petitioners, 74-611 v. C. D. Kasmir and Jerry A. Candy.	

[April —, 1976]

MR. JUSTICE BRENNAN, concurring in the judgment.

I concur in the judgment. Given the prior access by accountants retained by the taxpayers to the papers involved in these cases and the wholly business rather than personal nature of the papers, I agree that the privilege against compelled self-incrimination did not in either of these cases protect the papers from production in response to the summons. See *Couch v. United States*, 409 U. S., 322, 335-336 (1973); *id.*, at 337 (BRENNAN, J., concurring). I do not join the Court's opinion, however, because of the portent in much of what is said of a serious crippling of the protection secured by the privilege against compelled production of one's private books and papers. According to the Court, "whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers.'" *Ante*, at 22. This implication that the privilege might not protect against compelled production of tax records that are his "private

To: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Pow  
Mr. Justice Rehn  
Mr. Justice Ste

From: Mr. Justice B

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3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 74-18 AND 74-611

Solomon Fisher et al.,  
Petitioners,  
74-18 v.  
United States et al.) On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit.

United States et al.,  
Petitioners,  
74-611 v.  
C. D. Kasmir and  
Jerry A. Candy.) On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit.

[April —, 1976]

MR. JUSTICE BRENNAN, concurring in the judgment.

I concur in the judgment. Given the prior access by accountants retained by the taxpayers to the papers involved in these cases and the wholly business rather than personal nature of the papers, I agree that the privilege against compelled self-incrimination did not in either of these cases protect the papers from production in response to the summons. See *Couch v. United States*, 409 U. S., 322, 335-336 (1973); *id.*, at 337 (BRENNAN, J., concurring). I do not join the Court's opinion, however, because of the portent in much of what is said of a serious crippling of the protection secured by the privilege against compelled production of one's private books and papers. Like the Court's recent decision in *United States v. Miller*, — U. S. — (1976), it is but another step in the denigration of privacy principles settled nearly 100 years ago in *Boyd v. United States*, 116 U. S. 616 (1886). According to the Court, "whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a ques-

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

CHAMBERS OF  
JUSTICE POTTER STEWART

April 14, 1976

RE: Nos. 74-18 and 74-611, Fisher v. United States

Dear Byron,

I am glad to join your opinion for the Court in  
these cases.

Sincerely yours,

P.S.  
/

Mr. Justice White

Copies to the Conference

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

From: Mr. Justice White

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 74-18 AND 74-611

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74-18 v.  
United States et al. } On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit.

United States et al.,  
Petitioners,  
74-611 v.  
C. D. Kasmir and  
Jerry A. Candy. } On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit.

[January —, 1976]

MR. JUSTICE WHITE delivered the opinion of the Court.

In these two cases we are called upon to decide whether a summons directing an attorney to produce documents delivered to him by his client in connection with the attorney-client relationship is enforceable over claims that the documents were constitutionally immune from summons in the hands of the clients and retained that immunity in the hands of the attorneys

I

In each case, an Internal Revenue agent visited the taxpayer or taxpayers<sup>1</sup> and interviewed them in connection with an investigation of possible civil or criminal liability under the federal income tax laws. Shortly

<sup>1</sup> In No. 74-18, the taxpayers are husband and wife who filed a joint return. In No. 74-611, the taxpayer filed an individual return.

✓  
STYLISTIC CHANGES THROUGHOUT.

SEE PAGES: 6, 7, 9, 10-13, 17, 21, 22

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

From: Mr. Justice White

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 74-18 AND 74-611

Solomon Fisher et al.,  
Petitioners,  
74-18 v.  
United States et al. } On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit.

United States et al.,  
Petitioners,  
74-611 v.  
C. D. Kasmir and  
Jerry A. Candy. } On Writ of Certiorari to the  
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[January —, 1976]

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STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 4, 21

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

From: Mr. Justice White

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3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 74-18 AND 74-611

Solomon Fisher et al., Petitioners, 74-18 v. United States et al.	} On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.
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United States et al., Petitioners, 74-611 v. C. D. Kasmir and Jerry A. Candy.	} On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[January —, 1976]

MR. JUSTICE WHITE delivered the opinion of the Court.

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✓

12, 19

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

From: Mr. Justice White

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4th DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 74-18 AND 74-611

Solomon Fisher et al., Petitioners, 74-18 v. United States et al.	} On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.
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United States et al., Petitioners, 74-611 v. C. D. Kasmir and Jerry A. Candy.	} On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[January —, 1976]

MR. JUSTICE WHITE delivered the opinion of the Court.

In these two cases we are called upon to decide whether a summons directing an attorney to produce documents delivered to him by his client in connection with the attorney-client relationship is enforceable over claims that the documents were constitutionally immune from summons in the hands of the clients and retained that immunity in the hands of the attorneys.

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<sup>1</sup> In No. 74-18, the taxpayers are husband and wife who filed a joint return. In No. 74-611, the taxpayer filed an individual return.

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74-18

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 29, 1976

MEMORANDUM TO THE CONFERENCE

Re: Case held for Fisher v. United States, No. 74-18,  
and United States v. Kasmir, No. 74-611: Beattie  
v. United States, No. 75-407, and United States  
v. Beattie, No. 75-700

In this case the Internal Revenue Service served a summons on a taxpayer directing him to produce the following documents which had been transferred to the taxpayer by his accountant after the taxpayer learned that he was under investigation for criminal tax fraud.

"All original workpapers of Arthur Robeson, C.P.A., which are in your possession and were used in the preparation of Form 1040 U.S. Individual Income Tax Return of John L. Beattie Jr. and Margaret Beattie for the years 1968, 1969, 1970, 1971 and 1972 consisting of but not limited to the following: trial balances, balance sheets, adjusting entries, closing entries, workpapers, notes, memorandums and any correspondence used in the preparation of the aforementioned returns."

When the taxpayer refused on Fifth Amendment grounds to comply with the summons, an enforcement action was brought in the United States District Court for the Western District of New York. The summons was ordered enforced. CA 2 affirmed except with respect to the correspondence from the taxpayer to his accountant and from the accountant to the taxpayer. It held that such correspondence, when in the possession of the taxpayer, was within the "private inner sanctum" of the Fifth Amendment's privilege against self-incrimination. The court also noted that the documents other

To: The Chief Just  
Mr. Justice Br  
Mr. Justice Ste  
Mr. Justice Whit  
Mr. Justice Black  
Mr. Justice Powe  
Mr. Justice Rehn  
Mr. Justice Stev

From: Mr. Justice Ma

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 74-18 AND 74-611

Solomon Fisher et al.,  
Petitioners,  
74-18 v.  
United States et al. } On Writ of Certiorari to the  
United States Court of Appeals  
For the Third Circuit.

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Petitioners,  
74-611 v.  
C. D. Kasmir and  
Jerry A. Candy. } On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit.

[April —, 1976]

MR. JUSTICE MARSHALL, concurring in the judgment.

Today the Court adopts a wholly new approach for deciding when the Fifth Amendment privilege against self-incrimination can be asserted to bar production of documentary evidence.<sup>1</sup> This approach has, in various forms, been discussed by commentators for some time; nonetheless, as I noted a few years ago, the theory "has an odd sound to it." *Couch v. United States*, 409 U. S. 322, 348 (1973) (dissenting opinion). The Fifth Amendment basis for resisting production of a document pursuant to subpoena, the Court tells us today, lies not in the document's contents, as we previously have suggested, but in the tacit verification inherent in the act of production itself that the document exists, is in the possession of the producer, and is the one sought by the subpoena.

This technical and somewhat esoteric focus on the

<sup>1</sup>The Court's theory would appear to apply to real evidence as well.

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 26, 1976

Re: No. 74-18 - Fisher v. United States  
No. 74-611 - United States v. Kasmir

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 17, 1976

No. 74-18 Fisher v. United States  
No. 74-611 United States v. Kasmir

Dear Byron:

Please join me.

Sincerely,

*L. Lewis*

Mr. Justice White

lfp/ss

cc: The Conference

2  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 29, 1976

Re: Nos. 74-18 and 74-611 - Fisher v. United States,  
et al.

Dear Byron:

Please join me.

Sincerely,  
*WHR*

Mr. Justice White

Copies to the Conference