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Required Records Doctrine - The Privilege against Self-Incrimination, the National Firearms Act and the Federal Wagering Tax

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COMMENTS

REQUIRED RECORDS DOCTRINE--THE PRIVILEGE AGAINST SELF-INCRIMINATION, THE NATIONAL FIREARMS ACT AND THE FEDERAL WAGERING TAX

Uncertainty about the central purpose of the privilege against self-incrimination, among Justices of the United States Supreme Court as well as among the self-appointed critics and defenders of the Court, has deepened in recent years.

The required records doctrine, as expressed in *Shapiro v. United States*[1] and later in *United States v. Kahriger*[2] and *Lewis v. United States*[3] was considered ripe for consideration by the United States Supreme Court after hearing the arguments of *Marchetti v. United States*[4] and *Grosso v. United States.*[5] The latter two cases were argued together on January 17 and 18, 1967, but no decision was made on the basis of those arguments. Instead, the cases were restored to the docket for reargument in the October, 1967 Term. But then further questions were asked. In *Marchetti* the court requested discussion of the following additional questions:[6]

> (1) What relevance, if any, has the required records doctrine, as developed in *Shapiro v. United States,* 335 U.S. 1, to the validity under the fifth amendment of the registration and special occupational tax requirements of 26 USC § 4411, 4412 (1964)?
>
> (2) Can an obligation to pay the special occupational tax required by 26 USC § 4411 (1964) be satisfied without filing the registration statement provided for by 26 USC § 4412 (1964)?

and in *Grosso* the court asked for discussion of these similar, but slightly different questions:[7]

1. 335 U.S. 1 (1947).
2. 345 U.S. 22 (1952).
3. 348 U.S. 419 (1954).
4. 385 U.S. 1000 (1967).
5. 385 U.S. 810 (1966).
6. 388 U.S. 903 (1967).
7. 388 U.S. 904 (1967).

(1) What relevance, if any, has the required records doctrine, *Shapiro v. United States,* 335 U.S. 1, to the validity under the fifth amendment of the obligation to pay the wagering excise tax imposed by 26 USC § 4401 (1964)?

(2) Is satisfaction of an obligation to pay a wagering excise tax imposed by 26 USC § 4401 conditioned upon the filing of a return required under 26 USC § 6011 and pertinent regulations? If it is not, what information, if any, must accompany the payment of a wagering tax obligation in order to extinguish the taxpayer's liability for that obligation?

The combination of questions suggests that the Court believed these cases presented an appropriate vehicle for reconsideration of several aspects of the required-records doctrine and the privilege against self-incrimination.

The balance of this comment will be devoted to analyzing the effect the required-records doctrine has had on the privilege against self-incrimination and some perspective on what effect it should have in the future. Since it is not the purpose of this comment to analyze all areas of the privilege against self-incrimination, only brief references shall be made to those other areas of self-incrimination important in order to develop the historical background or to draw a needed comparison.

HISTORY OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

The origin of the privilege is found in the historic English opposition to the inquisitorial procedure of the ecclesiastical and high prerogative courts, particularly the hated oath ex officio by which clerics and later government officials interrogated suspected persons to discover heresey or political deviation.[8] In America the use of compelled testimony against revolutionaries in the prerogative courts of the colonial governors was in part responsible for elevating the privilege as developed in England to constitutional status.[9] The citizen's

8. *See* 8 WIGMORE, EVIDENCE § 2250 (McNaughton rev. ed. 1961).
9. *See* Pittman, *The Constitutional and Colonial History of the Privilege Against Self-Incrimination in America,* 21 VA. L. REV. 763, 764-66, 783 (1935).

privilege to refuse to disclose information that would tend to be incriminating was guaranteed against invasion by the federal government in the fifth amendment of the Constitution and recently made binding upon the states through the fourteenth amendment.[10] The general language that no person "shall be compelled in any criminal case to be a witness against himself" leaves the scope and extent of the privilege largely undefined. Since the scope and extent of the privilege is undefined (unlike the first amendment which at least confines disputes to the factual aspects of what is reasonable) it is difficult to state a convenient formula which will fairly balance the interests involved. Although most seem to believe that the privilege is "one of the great land marks in man's struggle to make himself civilized,"[11] many are reluctant to accept the logical consequences of a generous interpretation of the privilege, particularly in view of the shelter it affords the guilty and the nonconformist.

The privilege against self-incrimination, enhanced by its historical role of safeguarding individual freedom from arbitrary government prosecuton, has in recent times come increasingly into conflict with the legitimate governmental need to acquire and use information to effectively fulfill a proper role in modern society.[12] Confronted by this conflict, supporters of the privilege have conjured up the historical evils the privilege was designed to prevent and have suggested the desirability of unqualified application in all cases arguably within its scope.[13] As Mr. Justice Frankfurter observed in *Ullmann v. United States,*[14] the history of the privilege establishes that "it is not to be interpreted literally". Rather, the "sole concern [of the privilege] is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of penalties affixed to criminal acts."[15]

In 1886, in *Boyd v. United States,*[16] the books and papers of individual citizens were held protected by the privilege

10. *See* Malloy v. Hogan, 378 U.S. 1 (1964).
11. GRISWOLD, THE FIFTH AMENDMENT TODAY, 7 (1955).
12. *See* Meltzer, *Required Records, The McCarren Act, and the Privilege Against Self-Incrimination,* 18 U. CHI. L. REV. 687, 688 (1951).
13. *See* GRISWOLD, *supra* note 11 at 7-9, 61, 75.
14. 350 U.S. 422, 426 (1956).
15. *Id.* at 438-39.
16. 116 U.S. 616 (1886).

against self-incrimination. Emphasizing the "indefeasible right of . . . private property,"[17] the United States Supreme Court struck down a subpoena duces tecum for compulsory production of such material as being repugnant to the fourth and fifth amendments. On its face, the decision suggested a broad restriction on the Government's ability to compel disclosure of any private records or papers. However, the need to acquire essential information for effective programs of taxation and regulation of interstate commerce compelled judicial limitation of the *Boyd* decision to permit required disclosure of documents kept by corporations. Thus the privilege has been limited to "natural persons,"[18] a term construed by a great majority of the courts to apply only to individuals. By this point in time the ground work was laid for the required records doctrine. A protection from use of their records in criminal prosecutions has been denied to corporations,[19] labor unions,[20] and partnerships[21]—in short, to all groups having a character "so impersonal" that they cannot be said to "embody or represent the purely private or personal interest of the constituents."[22]

THE REQUIRED RECORDS DOCTRINE

In *Shapiro v. United States,*[23] decided in 1948, the Supreme Court interpreted the immunity provisions of the Emergency Price Control Act[24] to confer immunity only upon a witness required to present evidence covered by the privilege against self-incrimination. The records required to be kept by OPA regulations in this instance were the ordinary busi-

17. *Id.* at 630.
18. *See* United States v. White, 322 U.S. 694 (1944), Communist Party of the United States v. Subversive Activities Control Bd., 223 F.2d 531 (D.C. Cir. 1954), *rev'd on other grounds* 351 U.S. 115 (1956).
19. *See* Wilson v. United States, 221 U.S. 361, 382 (1911); United States v. Bausch & Lomb Optical Co. 321 U.S. 707, 726-27 (1944); 78 HARV. L. REV. 455 (1964).
20. *See* United States v. White, 322 U.S. 694 (1944).
21. *See* United States v. Silverstein, 314 F.2d 789 (2d Cir. 1959), *cert. denied,* 374 U.S. 807 (1963); 63 COLUM L. REV. 1319 (1963); United States v. Onassis, 133 F. Supp. 327 (S.D. N.Y. 1955).
22. United States v. White, *supra* note 20, at 701.
23. 335 U.S. 1 (1948).
24. 56 STAT. 23 (1942), as amended, 50 U.S.C. § 922(g) (1944): "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U.S.C. 1934 edition, title 49, Sec. 46), shall apply with respect to any individual who specifically claims such privilege."

ness records of the individual, which were held not to be within the reach of the privilege.

The Court reasoned that as a result of the record-keeping requirement the private records became public records over which the record-keeper lost control. By using this simple judicial bootstrap, the Court opened the door to Congress to by-pass the privilege against self-incrimination in every commercial or even purely private transaction that might conceivably be regulated by Congress.

In *Shapiro* the court listed twenty-six statutes, covering most of the important regulatory agencies with parallel provisions requiring information.[25] The usefulness of the record-keeping requirement has caused further proliferation of such statutes, as we will see later in this paper. Mr. Justice Jackson, in his dissent in *Shapiro*, noted the potential for dangerous expansion of the doctrine announced by the majority:

> The protection against compulsory self-incrimination guaranteed by the Fifth Amendment, is nullified to whatever extent this court holds that Congress may require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand of government inspectors, who then can use it to convict him. . .[26]

SELF-INCRIMINATION VERSUS REQUIRED INFORMATION

Following the *Shapiro* case, the United States Supreme Court struggled with the need to protect the individual versus the need of regulatory statute requirements for information —now partially labeled the required records doctrine. Five years after the Shapiro decision the Supreme Court considered a parallel provision requiring information. The Gambler's Registration Act, incorporated in the Internal Revenue Code of 1954,[27] imposes a tax of fifty dollars per year on persons engaged in the business of accepting wagers, and requires that those who are subject to the tax register with the Internal Revenue Service, listing both name and place of business. The statutory compulsion to admit gambling was

25. Shapiro v. United States, *supra* note 23, at 6.
26. *Id.* at 70-71.
27. 26 U.S.C. §§ 4401 (c), 4411, 4412 (1964).

challenged in *Kahriger v. United States*[28] as a violation of the privilege against self-incrimination. The Supreme Court, after finding a valid exercise of the taxing power, distinguished between admitting anticipated conduct and past conduct. The Supreme Court reasoned that the provision, therefore, was outside the scope of the privilege which related "only to past acts, not to future acts that may or may not be committed".[29]

In *Lewis v. United States*,[30] a 1955 case involving unlawful gambling in the District of Columbia, the Court again denied the privilege in an analysis reminiscent of the waiver rationale: "The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They give up gambling, but there is no constitutional right to gamble. If they elect to wager . . . they must pay the tax."[31]

In its last four consecutive terms, the United States Supreme Court has answered more questions about the privilege against self-incrimination than in its entire previous history. In 1964 the Supreme Court held the privilege fully applicable to the states through the due process clause of the fourteenth amendment.[32]

The 1965 case of *Albertson v. Subversive Activities Control Board*[33] represents one more unsuccessful attempt to secure the registration (and to subject to criminal penalties) of the Communist Party and some of its individual members. When the Party failed to register with the Attorney General of the United States pursuant to a Control Board order previously sustained by the Supreme Court,[34] the Attorney General invoked other provisions of the Subversive Activities Control Act of 1950[35] that authorized him to require registration by individual members. The Supreme Court, however,

28. 345 U.S. 22(1953).
29. *Id.* at 32; *See* United States v. Joseph, 278 F.2d 504 (3d Cir. 1960); United States v. Ansani, 138 F. Supp. 451, 543-54 (N.D. Ill. 1955); United States v. Forester, 105 F. Supp. 136 (N.D. Ga. 1952).
30. 348 U.S. 419 (1955).
31. *Id.* at 422-23.
32. Malloy v. Hogan, 378 U.S. 1 (1964).
33. 382 U.S. 70 (1965).
34. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961).
35. 50 U.S.C. § 786(d)(4) (1964).

refused to enforce the order because it violated the privilege against self-incrimination. The court went on to say, "if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes."[36] The court distinguished *United States v. Sullivan*,[37] in which a conviction had been upheld for failure to file an income tax return, on two theories:

(1) The questions in the income tax return "were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities"[38] and (2) that "[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all."[39] The Court in *Albertson* did not even mention *Kahriger* or *Lewis* in which the registration requirement was similar.

This now brings us to the October, 1967 Term of the Supreme Court, in which the court asked for argument on the required records doctrine and privilege against self-incrimination in *Grosso* and *Marchetti* as pointed out earlier in this paper. The several theories under which record-keeping requirements had been sustained up to this time may be summarized as follows:

(1) *Denial of the privilege to custodians. Shapiro* adopted the extreme example of this rationale with the notion that records originally private became public when required to be kept by Congress, so that the record-keeper became a mere custodian.

(2) *Suspension of the privilege by implied waiver.* The implied waiver concept was used in *Lewis* to hold that the individual who wishes to engage in an activity subject to regulation, must accept the conditions thereto.

(3) *Required statements concerning criminal activity.* This category includes such cases as *Kahriger, Lewis* and possibly *Albertson* where the registration requirement was directed at persons

36. Albertson v. Subversive Activities Control Bd., *supra* note 33, at 78.
37. 274 U.S. 259 (1927).
38. Albertson v. Subversive Activities Control Bd., *supra* note 33, at 79.
39. United States v. Sullivan, *supra* note 37, at 263.

who had in the past been, or would in the future be, engaged in gambling activities that are unlawful in most states.

(4) *Information required by the needs of government.* Where all else fails, some courts have simply denied the privilege in direct reliance on the compelling need of the Government for information.

In answer to their own question (quoted earlier) of what relevance, if any, the required records doctrine (*Shapiro*) has to the validity under the fifth amendment of the federal wagering registration and special occupational tax[40] the Supreme Court in *Marchetti* on January 29, 1968 held "that neither *Shapiro* nor the cases upon which it relied are applicable here."[41] Thus, in effect, the Supreme Court said the requiring of information to be kept as in *Shapiro* could not be applied to the gambling situation in *Marchetti.*

The United States argued that a distinction existed between maintaining records as in *Shapiro* and submitting reports as was required in *Marchetti.* The Supreme Court in rejecting the distinction said: "We perceive no meaningful difference between an obligation to maintain records for inspection, and such an obligation supplemented by a requirement that those records be filed periodically with officers of the United States."[42]

The Supreme Court gave three reasons for distinguishing *Shaprio* from the *Marchetti* case. (1) Petitioner, Marchetti, was not obliged to keep and preserve records of a kind he has customarily kept. (2) Whatever "public aspects" there were to the records at issue in *Shapiro,* there were none to the information demanded from Marchetti:

> The government's anxiety to obtain information known to a private individual does not without more, render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the government has formalized its demands in the attire of a statute;

40. 26 U.S.C. §§ 4411, 4412 (1964).
41. 390 U.S. 39, 56 (1968).
42. *Id.*

if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress.[43]

(3) The requirements at issue in *Shapiro* were imposed in an essentially non-criminal and regulatory area of inquiry while those in Marchetti were directed to a "selective group inherently suspect of criminal activities."

In reversing the Second Circuit Court of Appeals, the Supreme Court in *Marchetti* did rule the wagering tax provisions unconstitutional, but did rule that contrary to the court's earlier opinions in *Kahriger* and *Lewis* those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements.

Grosso, argued and decided in conjunction with *Marchetti,* used the same reasoning expressed in *Marchetti* to dispose of the required records doctrine.

The third case decided on January 29, 1968, along with *Marchetti* and *Grosso,* was *Haynes v. United States.*[44] Again the Supreme Court disposed of the required records doctrine by use of the reasoning expressed in *Marchetti* as discussed above. The defendant in the *Haynes* case was charged under the National Firearms Act[45] of knowingly possessing a firearm in violation of 26 U.S.C. Section 5851 (1964) which had not been registered with the Secretary of the Treasury or his delegate as required by Section 5841. The Supreme Court held that a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm under Section 5841 or for possession of an unregistered firearm under Section 5851.

In all three cases, *Marchetti, Grosso* and *Haynes,* the Supreme Court stressed the following considerations which were used to distinguish and decide the cases:

(1) The obligation to register and pay the tax created for the taxpayer "real and appreciable"

43. Marchetti v. United States, *supra* note 41, at 57.
44. 390 U.S. 85 (1968).
45. 18 U.S.C. §§ 921-928 (1968).

and not merely "imaginary" and "unsubstantial" hazards of self-incrimination.

(2) The statutes in question were aimed at a highly selective group inherently suspect of criminal activities.

(3) The information required was not "public" in nature but private information desired by the government to be used in criminal prosecutions.

(4) The true purpose of the statutes was not to collect tax revenue, as evidenced by the total collected thereunder, but to aid in law enforcement.

It seems obvious the Supreme Court has adopted a new attitude on requiring information versus the privilege against self-incrimination. Ironically it seems to reflect both the attitude of the early colonial days when the privilege was given a constitutional status, and that of today's younger generation crying out for more freedom from the oppressions of big government.

Using the four considerations stressed by the Supreme Court in *Marchetti, Grosso* and *Haynes* in ruling that the required records doctrine did not apply, I submit that similar regulatory provisions may in the future fall to the newly strengthened privilege against self-incrimination.

Section 4722 requires registration by those engaged in dealing with narcotic drugs, while Section 4753 requires the same of those who deal in marijuana. Section 4704 and Section 4744 enforce the statutes respectively by declaring it to be unlawful to handle drugs and marijuana without paying the tax, the result being a stiff penalty as imposed by Section 7237. Upon request, a list of those who have registered will be furnished by the Treasury Department. A statute in the same area but not a regulatory tax is 18 U.S.C. 1407 (1964), which requires narcotic addicts and violators to register whenever they enter or leave the country, or face a fine of up to $1,000 or imprisonment of one to three year or both.

The four considerations applied by the Supreme Court to decide the cases of *Marchetti, Grosso* and *Haynes* when

applied to the above regulatory statutes provide interesting questions. If we assume that there exist stiff state laws dealing with narcotics and marijuana, then the registration under the above federal statutes may be "real and appreciable" hazards against self-incrimination. An often heard contra argument is that the individual who wishes to engage in such regulated activities has waived the privilege. Such an argument was rejected in *Marchetti.*[46] The above statutes—especially Section 1407, requiring registration on entering and leaving the country might be said to be aimed at a highly selective group inherently suspect of criminal activities. This consideration was used in *Marchetti* to distinguish the *Sullivan* case where the defendant was required to file an income tax return. Whether the true purpose of the above statutes is to collect tax revenue may be evidenced by the tax imposed on those dealing in marijuana, which ranges from $1 to $3 per year except for an importer, who must pay $24 a year.[47] The only consideration which the marijuana and narcotic regulatory tax statutes may satisfy is the public nature of the information required since the taxpayer must furnish only his name, place of business, and place of business activity.[48] Yet that information may be all that is required for a conviction under a state statute.

Another interesting regulatory statute is Section 7011 which imposes a general registration requirement similar to those just discussed, on all those liable for other special taxes. This includes those liable for registration and taxation on stills under Section 5179. Comparison of these two statutes with the four considerations outlined by the Supreme Court in *Marchetti, Grosso* and *Haynes* would result in similar reasoning and conclusions as discussed above.

The last regulatory tax statute to be considered is the Firearms Act passed in June of 1968[49] which seems to be the most demanding for information:

> Such importers, manufacturers and dealers shall make such records available for inspection at all

46. Marchetti v. United States, *supra* note 41, at 52.
47. 26 U.S.C. § 4751 (1964); *See also* 26 U.S.C. § 4721 (1964) for the imposition of tax on those who deal in narcotic drugs.
48. 26 U.S.C. §§ 4722, 4753 (1964).
49. 18 U.S.C. § 923 (d) (1968).

> reasonable times, and shall submit to the secretary such reports and information with respect to such records and the contents thereof as he shall by regulations prescribe. The secretary or his delegates may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, or dealer for the purpose of inspecting or examining any records or documents required to be kept by such importer or manufacturer or dealer under the provisions of the chapter of regulations[50] issued pursuant thereto, and any firearms or ammunition kept or stored by such importer, manufacturer or dealer at such premises. Upon the request of any state, or possession, or any political subdivision thereof the Secretary of the Treasury may make available . . . any information which he may obtain by reason of the provisions of this chapter with respect to the identification of persons within such state, or possession, as political subdivision thereof, who have purchased or received firearms or ammunition together with a description of such firearms or ammunition.[51]

The effect of the above provision seems to give almost unlimited access to the business premises and records in an effort to acquire information. Inspections may be made once a week, twice a week or three times a day if the Secretary of the Treasury or his delegate deems it necessary. The Secretary also has the authority to demand any information he deems necessary. This evidently includes information on any acts which may by state law be declared illegal. For example a 1968 Illinois statute lists certain sales of firearms which are unlawful,[52] but are not unlawful for federal purposes. Yet information required under the Firearms Act may be used in a prosecution under the Illinois law. From this example it is clear that the obligation to register and pay the tax under the Firearms Act may under proper circumstances be a "real and appreciable" hazard of self-incrimination which the Supreme Court considered a relevant factor in *Marchetti, Grosso* and *Haynes*. The fact that the Firearms Act is aimed at a highly selective group inherently suspect of

50. 26 U.S.C. § 4722 (1964); 26 U.S.C. § 4753 (1964).
51. At the time this article was written no regulations had been published on what information would specifically be required under this act.
52. ILL. REV. STAT. Ch. 38, § 24-3 (1968).

criminal activities is well illustrated by Section 901 which states the findings, declarations and purpose for which the act was passed: The purpose is stated to be to stop illegal use of firearms by known criminals, youths, etc. Whether the information to be required is "public" in nature may in part depend upon what information may be deemed necessary by the Secretary of the Treasury in the future, acting under the authority of the act. At this time, however, the complete freedom to inspect premises and records of dealers, manufacturers and importers of firearms and ammunition as granted by Section 923 (I) does not seem to be public in nature. The revenue to be generated from this act ranges from $10 to $1,000 per year for dealers, importers and manufacturers. While this may seem to be a lot, if such revenue is compared to the total revenue of the United States Government it is only a small amount. This fact plus Section 901 outlining the purpose of the act makes it evident the Firearms Act was not enacted principally to collect revenue.

In summary, we see the privilege against self-incrimination given constitutional status during the colonial period and strengthened by the *Boyd* decision in 1886. From that time until January 1968, the Supreme Court yielded to the governmental need for information by expanding the required records doctrine on such theories as implied waiver, public nature of the information, and criminal activities requiring disclosure. Today, after *Marchetti, Grosso* and *Haynes,* the Court has outlined new considerations to be emphasized which strengthen the privilege and deny the required information demanded by governmental needs. As a result the regulatory statutes in narcotic drugs, marijuana, firearms, etc. requiring information which satisfy the four considerations as outlined in *Marchetti, Grosso* and *Haynes* will probably be held subservient to the privilege against self-incrimination.

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