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Constitutional Law- Self-Incrimination- Information Obtained Through Mandatory Disclosure Statutes Held Subject to Fifth Amendment Protection

Constitutional Law—Self-Incrimination—Information Obtained Through Mandatory Disclosure Statutes Held Subject to Fifth Amendment Protection—*Garner v. United States*, — F.2d — (9th Cir. 1972).

The various agencies charged with the responsibility of administering the routine affairs of government have long relied on compulsory self-reporting of information by citizens to support both the regulatory and revenue-generating functions of the governmental process. The conflict between such compelled self-disclosures and the individual's right to freedom from forced self-incrimination has been neither completely nor satisfactorily resolved, although several hypotheses have been advanced in an effort to furnish a solution.[1] Since virtually every person must, at some time, file an income tax return, the mandatory disclosure provisions of tax laws[2] present a clear example of the need for a conclusive answer to the problems in those situations in which the statute, the privilege against compulsory self-incrimination, or the use of such information must be restricted.

Forty-five years ago, the Supreme Court held that a taxpayer could not rely on the privilege to avoid filing any return,[3] but noted somewhat dubiously that an individual might refuse to answer those questions which could tend to incriminate him.[4] In the recent case of *Garner v. United States*,[5] the Ninth Circuit overturned Garner's conviction for conspiring to violate federal gambling statutes, holding that admission into evidence of income tax returns over objection violated his privilege against compulsory self-incrimination.

Until recently, cases considering the use of compelled self-disclosures have relied on the "required records" exception to the privilege,[6] or have applied

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[1] Powell and Jones, *Self-Incrimination and Fair Play—Marchetti, Grosso and Haynes Examined*, 18 Am. U.L. Rev. 114, 116-120 (1968). For a comprehensive discussion of the privilege, see Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949).

[2] *See, e.g.*, Int. Rev. Code of 1954, § 6001; Va. Code Ann. § 58-27 (Cum. Supp. 1972).

[3] United States v. Sullivan, 274 U.S. 259, 263 (1927). Sullivan, allegedly dealing in liquor in violation of the National Prohibition Act, was convicted for refusing to file a federal income tax return. In defense, he argued that the information required therein might tend to incriminate him. The Court affirmed the conviction, holding that this would be an unwarranted extension of the privilege.

[4] Recognizing the argument that the privilege might, in some situations, be invoked on a tax return, the Court held:

> If 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. We are not called on to decide what, if anything, he might have withheld. *Id.* at 263.

[5] 462 F.2d ... (9th Cir. 1972).

[6] *See* 8 Wigmore, Evidence §§ 2259c, pt. 2, 2259d (McNaughton rev. 1961); 58 Am.

a concept of "implied waiver" [7] as authority for denying the privilege. The Supreme Court, however, in *Marchetti v. United States*[8] and related cases,[9] rejected the reasoning of earlier decisions and overturned convictions of defendants who had refused to comply with statutes requiring self-disclosures in areas "permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." [10] In these cases the statutes generally took the form of taxing legislation and posed a very real threat to persons involved in activities highly susceptible to criminal exploitation.[11]

JUR. *Witnesses* § 73 (1948); 98 C.J.S. *Witnesses* § 448 (1957); Meltzer, *Required Records, the McCarran Act and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 708 (1951); Comment, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681 (1965). The leading case, naming the rule, is Shapiro v. United States, 335 U.S. 1 (1948). Under the *Shapiro* rule, the government can require and use information that is obtained for non-criminal regulatory purposes, "public" in nature, and customarily kept. If these criteria are satisfied, the information may be used notwithstanding a claim of privilege. *Id.* at 32-35.

[7] For illustrations of an "implied waiver," see Lewis v. United States, 348 U.S. 419 (1955); United States v. Kahriger, 345 U.S. 22 (1953). The Court, in each case, held that by deciding to proceed with an illegal activity the defendants had waived the privilege:

> If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. 348 U.S. at 422.

In some of the early decisions involving disclosure laws, the constitutional issue was not raised. Several of these cases are noted in Stillman v. United States, 177 F.2d 607, 617 & n.11 (9th Cir. 1949).

[8] 390 U.S. 39 (1968). *Marchetti* overruled *Kahriger* and *Lewis* on the "implied waiver" concept, leaving its validity open to serious doubt in any situation. *Id.* at 54.

[9] Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968). For a general discussion of these cases, see 13 VILL. L. REV. 650 (1968).

The reasoning followed by the Court in *Marchetti, Grosso*, and *Haynes* is an application of the principles developed in Albertson v. SACB, 382 U.S. 70 (1965). Here, the Supreme Court reversed a lower court order requiring defendants, members of the Communist Party, to register in accordance with the Subversive Activities Control Act of 1950. The Court noted that the risk of incrimination was readily apparent, and that the registration requirements were directed at a group suspect of unlawful activity, and not at the general public. *Id.* at 77-79. *See* McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193.

[10] 382 U.S. at 79.

[11] In *Marchetti, Kahriger* and *Lewis*, the disclosures were required to obtain a stamp showing that the occupational tax on those accepting wagers had been paid. The stamp, in turn, was required to be posted conspicuously so that it identified the premises as a gambling establishment, which undoubtedly lessened the duties of the local police. The defendant in *Haynes* was required to register an illegal firearm in his possession under the provisions of a statute taxing such weapons. In *Grosso*, the defendant was required to make disclosures in the course of paying an excise tax imposed on wagering. *Accord*,

The Supreme Court has had opportunity to examine the effect of a logical extension of the *Marchetti* doctrine into an area not as inherently suspect of criminality as those in earlier cases, and has manifested an unwillingness to extend the rule.[12] In *California v. Byers*,[13] the Court vacated and remanded a decision[14] that had considered a constitutional attack on a statute requiring self-disclosures,[15] and upheld the statute by requiring that a use restriction be placed on the information obtained.[16] The Court distinguished *Marchetti*,[17] stating that the statute under consideration was "essentially regulatory, not criminal," [18] and held that to invoke the privilege successfully, the facts must show that the claimant would face a substantial hazard of self-incrimination by compliance.[19]

Leary v. United States, 395 U.S. 6 (1969). Here, the illegal activity was the possession and transfer of marihuana on which no tax had been paid as required by the Marihuana Tax Act.

[12] In essence, *Marchetti* stands for the proposition that an assertion of the fifth amendment privilege bars prosecution for failure to comply with statutes that require the disclosure of information concerning unlawful activities for purposes of taxation or regulatory control, and surveillance of such activities and those individuals involved therein.

[13] 402 U.S. 424 (1971).

[14] Byers v. Justice Court, 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969).

[15] Byers was charged with a violation of CAL. VEHICLE CODE § 20002 (a) (1) (West 1960), which provides that:

> (a) The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there . . . (1) [l]ocate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved. . . .

For a comparison with Virginia's similar statute, see VA. CODE ANN. § 46.1-176 (1950).

[16] 71 Cal. 2d at 1050, 458 P.2d at 477, 80 Cal. Rptr. at 565:

> [W]e must, in order to . . . protect the privilege against self-incrimination, hold that . . . state prosecuting authorities are precluded from using the information disclosed as a result of compliance or its fruits in connection with any criminal prosecution related to the accident.

But see Allen v. Commonwealth, 211 Va. 805, 180 S.E.2d 513 (1971). The defendant in *Allen* was convicted of violating the Virginia "hit and run" statute, and the possibility of a conflict between the statute and the fifth amendment was not raised. For a discussion of use immunities and their effectiveness in preserving fifth amendment rights, see 6 U. RICH. L. REV. 428 (1972).

[17] 402 U.S. at 430-431. *But see* the strong dissent of Justice Black, joined by Justices Brennan and Douglas. *Id.* at 459. Justice Black argued that any distinction lacked substance, since the statute was not aimed at all California drivers as the majority contended, but only at those drivers who were involved in accidents which resulted in property damage. Obviously, this group would at least be suspected of an unlawful act. *Id.* at 460-461.

[18] *Id.* at 430.

[19] Chief Justice Burger, author of the plurality opinion, indicated that more than a mere possibility of incrimination is required; to invoke the privilege successfully, the facts must show that the information disclosed will subject the defendant to a sub-

In recognizing the policy argument for a limitation of the privilege in the area of required self-disclosures, the Court in *Byers* noted that the constitutional problem raised by such statutes must be considered through a balancing process, weighing the public need for information against the individual's rights under the fifth amendment.[20] Significantly, the plurality opinion did not discuss the use restriction imposed by the lower court.[21] The dissent in *Garner* argued that this indicated an implied rejection of any use restriction; the majority felt it indicated that the Court intended to limit the issue to whether the report itself could be constitutionally compelled, and not to decide the admissibility of such information in a subsequent criminal prosecution.[22] The facts, tenor, and division in *Byers*, however, indicate that support for either argument can be found in the opinion.[23]

The *Garner* majority based its decision on the fact that the disclosure had

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stantial hazard of self-incrimination. 402 U.S. at 428-29, *Cf.*, 402 U.S. at 439 (Harlan, J., concurring).

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> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.
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> . . . .
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> In each of these situations there is some possibility of prosecution—often a very real one—for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be a "link in the chain" of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here. *Id.* at 427-28.

21 *But see* 402 U.S. at 442-48 (Harlan, J., concurring). Justice Harlan faced the problem directly by noting that the restriction, if allowed, would effectively limit the government's purpose and capacity to use self-reporting statutes by a presumption that the information would not have been available if the defendant had not complied with the statute. This would leave the state faced with a choice of eliminating self-reporting in some areas or refraining from prosecuting a significant number of cases.

22 The *Garner* majority felt that *Byers*, like *Sullivan*, merely set the starting line for the present inquiry. The court felt that both cases made it clear that these essentially "neutral" reports could be compelled, but that neither answered the question of whether the information so obtained could be used against the defendant in a subsequent prosecution. The dissent interpreted the *Byers* Court's brief mention of the use restriction as an indication that no such limitation was necessary:

> We granted certiorari to assess the validity of the California Supreme Court's premise that without a use restriction § 20002 (a) (1) would violate the privilege against compulsory self-incrimination. We conclude that there is no conflict between the statute and the privilege. 402 U.S. at 427.

23 *See* Meltzer, *Privileges Against Self-Incrimination and the Hit-And-Run Opinions*, 1971 SUP. CT. REV. 1; 15 VILL. L. REV. 759 (1970).

obviously been compelled,[24] and on its belief that *Marchetti* had eliminated the concept of "implied waiver." [25] The dissenting judge argued that *Marchetti* limited the extension to those individuals engaged in activities suspect of criminal involvement,[26] and that the Court's dictum in *United States v. Sullivan*[27] clearly indicated that the privilege must be invoked on the return itself to be effective.[28] The *Garner* court primarily limited its discussion of waiver to the viability of the "implied waiver" concept in the aftermath of *Marchetti*.[29] In view of the complexities surrounding any discussion of the privilege, the court should have analyzed carefully all the facts to determine if the privilege had indeed been waived, as the dissent urged.[30] The court should have determined Garner's status when the return was completed, whether the return was testimonial in nature, and whether the return created a substantial hazard of self-incrimination. These special problems merited thorough analysis by the court before the possibility of an actual waiver was dismissed.[31]

In overturning Garner's conviction, the Ninth Circuit has sanctioned an application of the privilege in a manner that the Supreme Court has had opportunity to do but apparently declined.[32] Considering the possibly far-reaching effects of *Garner*, and interpreting *Byers* as an indication of a more restrictive application of the privilege in areas not inherently suspect of

[24] *See* INT. REV. CODE of 1954, § 6001; VA. CODE ANN. § 58-27 (Cum. Supp. 1972).

[25] 462 F.2d at .... In interpreting *Marchetti* as eliminating the "implied waiver" concept, the *Garner* court was overruling its own decision in *Stillman*. The prosecution in *Garner* relied on the *Stillman* decision, which was more on point than the *Marchetti* decisions. Like Garner, Stillman filed a tax return and did not attempt to invoke the privilege until the return was introduced into evidence in a subsequent criminal proceeding. *Accord*, Shushan v. United States, 117 F.2d 110 (5th Cir. 1941), *cert. denied*, 313 U.S. 574 (1941), *reh. denied*, 314 U.S. 706 (1941), *cited with approval in Stillman v. United States*, 177 F.2d 607, at 618 (1949).

[26] 462 F.2d at ....

[27] See United States v. Sullivan, 274 U.S. 259 (1927).

[28] See notes 4 and 25 *supra*.

[29] See note 7 *supra*. *Marchetti* left little doubt that the reasoning applied in *Kahriger* and *Lewis* is incompatible with the Court's present approach to the rights of defendants.

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> Having failed to assert the privilege at the proper time, if indeed it was applicable, he has waived it. 462 F.2d at ....

[31] The privilege may, of course, be waived, but classifying the person to whom the waiver is to be described is of key importance. A witness, by his own declaration, may be found to have waived the privilege in circumstances where a waiver would not be attributed to an accused. Moreover, the privilege has not been violated until the activity sought to be compelled is "testimonial" in nature. Finally, the facts must meet the substantial hazard test advanced by the Court. *See, e.g.*, California v. Byers, 402 U.S. 424, 429, 431-34 (1971); Rogers v. United States, 340 U.S. 367 (1951); MCCORMICK, EVIDENCE §§ 119-143 (2d ed. E. Cleary 1972).

[32] *See* note 20 *supra*.

criminality, the issue should have been reserved for the Supreme Court.[33] *Garner* goes beyond the limits of the *Sullivan* dictum,[34] which itself is of questionable validity in view of the governmental dependence upon citizen-supplied data. It is doubtful that any widespread refusal to answer various questions on the countless government forms in use today would be tolerated. In such case, the courts or Congress would have to apply a use restriction (possibly rejected in *Byers*), utilize some form of verbal gymnastics to fit the situation into the definition of the "required records" rule, or heed the arguments for a limitation of the privilege to its more traditional role of protecting the accused from compulsory courtroom disclosures.[35] The division within the Supreme Court over the *Byers* decision proves that a judicial solution to the problem is not the answer; rather, the question must be resolved as a matter of policy, balancing the public interest against the individual's rights.

K. W. G.

[33] In *Byers*, the Court made a realistic assessment of the policy behind a more restrictive approach to the privilege, although the fact that the report was never filed presented an alternative basis for the Court's decision. Perhaps *Garner*, with the issue narrowed even further, would have been the vehicle for a judicial answer to the conflict. At any rate, the potential applications of the decision merited the consideration of the Supreme Court. Unfortunately, the Ninth Circuit's opinion is silent as to future effects of the decision.

[34] *See* notes 4 and 29 *supra.*

[35] *See generally* Morgan, *supra* note 1.