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Constitutional Law--Self-Incrimination--Gambler's Assertion of Self-Incrimination Privilege Constitutes Defense for Violations of Federal Wagering Tax Statutes (Marchetti v. United States, U.S. 1968)

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states of a needed source of income to which they are entitled. And, even more important, it has given new life to a constitutional doctrine which is clearly outmoded and unfair. The Court has grabbed a statute and broadened its application to an extent never before intended in its attempt to avoid passing on the principal issue. It was hoped that the Court, when it agreed to hear this appeal, would take advantage of the opportunity to examine the federal immunity doctrine in the light of today's needs, of today's banking policy of fostering competitive equality, and of today's banking system and the metamorphosis that it has undergone since the Supreme Court last passed upon the issues here involved. Instead, the decision rendered was merely a verification that past law still applies regardless of new developments, and only the dissent realized the true impact that this opinion could have provided. Let us again hope that the Court, when and if it should decide to hear a case of similar import will re-evaluate its holding in the instant case and determine to take on the task of facing the constitutional issue squarely, as it should have done here.

CONSTITUTIONAL LAW — SELF-INCRIMINATION — GAMBLER'S ASSERTION OF SELF-INCRIMINATION PRIVILEGE CONSTITUTES DEFENSE FOR VIOLATIONS OF FEDERAL WAGERING TAX STATUTES— Petitioner, convicted of violating the federal wagering tax statutes by conspiring to evade and wilfully failing to pay the annual occupation tax, and failing to register with the Internal Revenue Service as required by law, unsuccessfully argued to the trial court that these statutory requirements violated his fifth amendment privilege against self-incrimination. On certiorari, the United States Supreme Court reversed, *holding* that the provisions could not be utilized to impose criminal sanctions on persons who properly asserted the privilege as a defense for non-compliance. *Marchetti v. United States*, 390 U.S. 39 (1968).

In recent years, the fifth amendment privilege against self-incrimination [1] has become the center of a continuing controversy concerning the balance of individual liberties and public interest. A major aspect of this conflict has involved the application and enforcement of the Federal Gambling Stamp Tax.[2] This tax requires all professional gamblers to purchase an annual fifty dollar

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

[2] INT. REV. CODE of 1954, §§ 4401-23, 6107.

gambling stamp[3] and to register with the director of their local internal revenue district.[4] The gambling tax plan further provides that lists of registrants be furnished to state prosecuting authorities upon proper application,[5] and that payment of the tax does not exempt any person from penalties imposed by state and federal gambling laws.[6] Thus a constitutional conflict arises since the gambler, while avoiding the penalties of non-compliance,[7] reveals his violations of state gambling laws.[8]

The constitutionality of federal taxing schemes leveled in whole or in part at criminal activities has frequently been upheld by the United States Supreme Court. As early as 1866, in the *License Tax Cases,*[9] the Court found no objection to a federal act requiring the payment of a "special tax" (*i.e.*, purchase of a license) by sellers of lottery tickets and retail liquor dealers, although such activities were expressly declared illegal in certain states. The granting of the license was regarded simply as a means of special taxation which in no way authorized the licensee to conduct such business within the state.[10] The idea that the federal government was not prohibited from taxing allegedly illegal activities was expressed as a more formal rule in *United States v. Stafoff,*[11] wherein the Supreme Court upheld the principle that "Congress may tax what it also forbids."[12] *United States v. Constantine,*[13] on the other hand, involved a special federal tax on

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[3] "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable." INT. REV. CODE of 1954, § 4411.

[4] "Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—(1) his name and place of residence; (2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and (3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person." INT. REV. CODE of 1954, § 4412(a).

[5] INT. REV. CODE of 1954, § 6107.

[6] INT. REV. CODE of 1954, § 4422.

[7] INT. REV. CODE of 1954, §§ 6653, 7201, 7203, 7262.

[8] *See*, Note, *Self-Incrimination and the Federal Excise Tax on Wagering*, 76 YALE L.J. 839, 847 (1967). For a detailed compilation of state gambling statutes see Marchetti v. United States, 390 U.S. 39, 44 n.5 (1968).

[9] 72 U.S. (5 Wall.) 462 (1866).

[10] *Id.* at 471.

[11] 260 U.S. 477 (1923). The Court relied on United States v. Yuginovich, 256 U.S. 450 (1921), wherein the power of Congress to tax the production of intoxicating liquors was upheld even though such production was prohibited by law.

[12] 260 U.S. at 480.

[13] 296 U.S. 287 (1935).

a retail malt liquor business operated in violation of the laws of Alabama. The Court held that the special tax in question was actually a penalty imposed for a violation of state law, regardless of what it may have been called. The Court concluded that if what appears to be an occupational tax is in reality a penalty, it cannot be changed into a tax by merely calling it a tax. Rather, the nature of the measure must be determined by its purpose, substance and application.[14] Thus, it was decided that Congress was simply attempting to usurp state powers under the "guise" of a tax in violation of the tenth amendment.[15] The effect of *Constantine*, however, was greatly limited by the clarification later made in *Sonzinsky v. United States*.[16] The Court declared that the principles set down in *Constantine* were not applicable to taxes which contained registration provisions *obviously* in support of a valid revenue purpose and where the subject of the tax was not treated as criminal *by the taxing statute*. If the tax appeared to be a valid exercise of the taxing power, it would not be any less so because it was burdensome or restricted the subject of the tax in some way.[17]

The first constitutional challenge to the wagering tax provisions of the Internal Revenue Code was rejected by the Supreme Court in *United States v. Kahriger*.[18] The defendant, who was engaged in the business of accepting wagers, had been indicted on charges of failing to comply with the registration and occupational tax provisions of the Code. However, the district court found this tax scheme unconstitutional on the authority of *Constantine*. The United States Supreme Court, in reversing, noted that *Sonzinsky* had distinguished the *Constantine* case from the present situation, for the wagering tax was levied on *all* persons in the business of accepting wagers, whether state law declared such activity illegal or not.[19] Thus, the Code provisions were upheld as valid extensions of the federal taxing power, in no way infringing upon the police powers reserved to the states by the tenth amendment. Relying on the *License Tax Cases* and *Sonzinsky*, the Court concluded that the scheme was not a mere "guise" to penalize illegal state gambling activities. Even though there were certain regulatory requirements, it did produce substantial revenue and was thus valid as a revenue measure.[20]

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[14] *Id.* at 294.
[15] *Id.* at 296.
[16] 300 U.S. 506 (1937).
[17] *Id.* at 513.
[18] 345 U.S. 22 (1953).
[19] *Id.* at 25-26.
[20] *Id.* at 26-28. The Court felt that the registration requirements did not make the tax offensive but, rather, merely facilitated the collection of the tax and thereby aided in the revenue purpose. *Id.* at 31-32.

Consequently, since these regulatory taxation schemes were generally upheld as valid extensions of the federal taxing power, constitutional attack was possible only as to the application of the law. One of these constitutional grounds was based on the fifth amendment privilege against self-incrimination.

The traditional test which sets forth the standards under which the privilege may be properly asserted was first established in the English case of *Queen v. Boyes*.[21] If a court found, after examining the circumstances of the case, and the nature of the evidence to be provided, that there was a "real and appreciable" danger of incrimination to be apprehended by a witness from his being compelled to answer, he should be entitled to assert the privilege.[22] It was also noted that the court should take into account the possibility of an otherwise innocent question being the " 'link in a chain' of evidence" which might lead to conviction of the answering party for another offense.[23]

The tests established in *Boyes* were broadly applied by the United States Supreme Court in *Counselman v. Hitchcock*,[24] which set down certain standards for immunity statutes that might supplant the self-incrimination privilege. Such a statute would be valid only if it provided protection as broad in scope and effect as the constitutional prohibition itself. It could only supplant the privilege if it provided "absolute immunity" against any future prosecutions for the offense related to the question asked. In other words, the use of evidence as an investigatory lead must be barred either by the privilege or by the statute which attempted to replace the privilege.[25] However, the standards for determining when the privilege might be invoked were stated by the Supreme Court in *Brown v. Walker*.[26] Here, the Court stressed the "real and appreciable" danger test as the criterion for allowing assertion of the privilege. The Court refused to extend the *Counselman* rule as far as would be necessary to defeat the immunity clause in question, fearing that the privilege might be used to protect a witness from an *imaginary* danger in order to actually protect a third party.

It is important to emphasize, as was done in *Mason v. United States*,[27] that the final determination of whether an answer might

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[21] 121 Eng. Rep. 730 (1861).

[22] *Id.* at 738. The *Boyes* court further specified "real and appreciable" danger as *not* being a "danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." *Id.*

[23] *Id.*

[24] 142 U.S. 547 (1892).

[25] *Id.* at 585-86.

[26] 161 U.S. 591 (1896).

[27] 244 U.S. 362 (1917).

tend to incriminate a witness is a question to be decided solely by the trial court in its discretion rather than by the witness himself. If the court, in examining the circumstances of the case,[28] should find that there exist no *reasonable grounds* on which to base an apprehension that a direct answer might prove dangerous to the witness, then the court should compel such witness to answer. A clarification of what is meant by "reasonable grounds" is provided in *Hoffman v. United States.*[29] For the court to sustain a claim of privilege, it need only be found that, by implication from the question asked and under the circumstances in which it is posed, a response or an explanation for a failure to respond might prove dangerous in that an "injurious disclosure" could result.[30]

The possibility that taxes on illegal activities might pose a serious fifth amendment problem was first raised in *United States v. Sullivan.*[31] Here, the defendant, whose income was largely derived from businesses in violation of the National Prohibition Act, refused to file a return of net income under the Revenue Act of 1921. While suggesting that it would probably be an extreme use of the self-incrimination privilege to allow a person to refuse to state the amount of his income simply because it had been derived from illegal activities, the Court did not consider the constitutional claims asserted by the defendant. The Court concluded that if the defendant had desired to object to some of the questions on the return, he should have done so on the form itself, but that he had no right to refuse to make out any return at all.[32]

The Court in *United States v. Kahriger*[33] held that the application of the gambling tax provisions of the Code was not violative of the fifth amendment privilege against self-incrimination. Considering the rules laid down in *Sullivan,* the Court found it difficult to perceive how such a claim could be asserted, since the defendant had failed to register for the wagering tax in the first place. Even if the respondent should be allowed to raise the self-incrimination issue, the Court held that the privilege related to *past* acts only and not to *prospective* acts that might not even be

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[28] *Id.* at 365. *See also* Rogers v. United States, 340 U.S. 367, 374-75 (1951), for an example of how such "circumstances" might be defined.

[29] 341 U.S. 479 (1951). *See also* Blau v. United States, 340 U.S. 159 (1950).

[30] 341 U.S. at 486-87. The "injurious disclosure" test was reiterated in Malloy v. Hogan, 378 U.S. 1, 8 (1964), in which the Supreme Court held that the fifth amendment privilege against self-incrimination is applicable to the states under the fourteenth.

[31] 274 U.S. 259 (1927).

[32] "He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." *Id.* at 264.

[33] 345 U.S. 22 (1953).

committed.[34] The Court noted that "[u]nder the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." [35]

While *Kahriger* upheld the Gambling Stamp Tax as constitutional, Mr. Justice Black and Mr. Justice Frankfurter, in separate dissenting opinions, warned that the Code provisions constituted serious infringements upon the self-incrimination privilege. Mr. Justice Black viewed the entire scheme as a "squeezing device" which is really "a coerced confession" that the registrant has violated state gambling laws.[36] Mr. Justice Frankfurter's attack was even more to the point. He asserted that Congress could not compel such self-incriminatory disclosures keyed to aid the enforcement of state gambling statutes "under the guise" of a revenue measure which was so obviously not created for revenue purposes.[37]

The constitutionality of the wagering tax provisions, as established in *Kahriger*, was strongly affirmed in *Lewis v. United States*.[38] The Court once again could find no fifth amendment violations since it saw nothing compulsory about the required disclosures. Petitioner would only have to pay the tax and make the necessary disclosures if he *freely elected* to enter such business. Thus, the only act compelled was that "would-be gamblers" make some sort of decision. The Court could find nothing wrong with the compulsion of such a choice, for it simply meant that a person might have to refrain from gambling—and there is no constitutional right to gamble. But Justice Black, again in dissent, indicated that while no such constitutional right exists, gamblers, as citizens, are nonetheless entitled to protection under the fifth amendment.[39]

It should be noted that certain collateral lines of authority have developed in the area of self-incrimination, and these have frequently been suggested as reasons to preclude assertion of the privilege in the gambling stamp cases. In *Shapiro v. United States*,[40] it was held that the privilege did not extend to records

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[34] *Id.* at 32. The sole authority the Court cited in support of its statements concerning the privilege's application was Wigmore, who concluded that "there is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in the future be criminal at the choice of the party reporting." 8 J. WIGMORE, EVIDENCE § 2259(c) (3d ed. 1940).

[35] 345 U.S. at 32-33.

[36] *Id.* at 36-37 (dissenting opinion).

[37] *Id.* at 38-40 (dissenting opinion).

[38] 348 U.S. 419 (1955).

[39] *Id.* at 425 (dissenting opinion).

[40] 335 U.S. 1 (1948). The Court here reaffirmed what was said in dictum in Wilson v. United States, 221 U.S. 361, 380 (1911).

required to be kept by law as a means of acquiring needed information concerning transactions properly regulable by the government. *Murphy v. Waterfront Commission*,[41] on the other hand, introduced a line of authority which attempted to broaden the scope of the privilege. *Murphy* established that a state witness could not be compelled to answer questions if his responses might incriminate him under federal laws, unless absolutely protected under an immunity statute from *all* criminal prosecutions. The Court preserved the self-incrimination privilege here by imposing certain "use restrictions" on the federal authorities. It forbade them from using as evidence such testimony and its fruits as might be compelled during the state proceedings in question. The witness could now freely answer questions on the state level without fear of any infringement upon his fifth amendment privilege.

The significance of the distinction between past and prospective acts, which served as a basis for the rationales in *Kahriger* and *Lewis*, was seriously undermined in *Albertson v. Subversive Activities Control Board*.[42] It was held that the registration form and statement compelling admission of membership in, and details about, the Communist Party, required by the Subversive Activities Control Act, were violative of the fifth amendment privilege. It was found that these forms might be used as evidence in, or supply leads to, criminal prosecutions under the Smith Act and similar statutes, even though such information did not directly reveal the commission of any past criminal acts. *Albertson* also distinguished *Sullivan*, pointing out that the income tax form questions there were "neutral on their face and directed at the public at large," while those in the instant case were aimed at a "highly selective group inherently suspect of criminal activities." Thus, whereas the questions at issue in *Sullivan* were in an essentially noncriminal regulatory sphere, those at issue in *Albertson* were inquiries into an "area permeated with criminal statutes." The Court, therefore, concluded that it was entirely possible that an answer to *any* question on the forms required by the Subversive Activities Control Board could very easily involve the admission of a necessary element in a variety of crimes.

The self-incrimination problem posed by the gambling tax and related provisions becomes much more significant when one observes how frequently the information required by these Code provisions has been admitted as evidence in state criminal prosecutions. For example, *Irvine v. California*[43] upheld a state gambling

[41] 378 U.S. 52 (1964). Here the Court overruled Feldman v. United States, 322 U.S. 487 (1944), which held that compelled testimony which might incriminate a state witness under federal law could be introduced as evidence in federal courts, notwithstanding a state immunity statute.

[42] 382 U.S. 70 (1965).

[43] 347 U.S. 128 (1953).

conviction for bookmaking, even though the conviction had been obtained by the admission into evidence of the defendant's federal wagering tax stamp and documents from the United States Collector of Internal Revenue.[44] Furthermore, many states have gone as far as to impose penalties and restrictions on persons who simply possess the wagering stamp.[45] And, in a recent case, mere ownership or possession of the stamp was held to be prima facie evidence of guilt for violations of state gambling or lottery laws.[46] One exception to this line of decisions, however, held that possession of the gambling stamp was only evidentiary of an intent to gamble in the future.[47]

The United States Supreme Court granted certiorari in the instant case to determine whether the federal wagering tax statutory provisions were consistent with the limitations imposed by the fifth amendment privilege against self-incrimination, and thereby establish whether the leading cases of *Kahriger* and *Lewis* still had vitality.

In *Marchetti v. United States*,[48] the Court thoroughly discussed the entire taxing scheme, and then noted the many federal and state statutes imposing criminal penalties on various gambling activities. It stressed especially the variety of measures adopted by Connecticut, where petitioner allegedly conducted his activities, for the punishment of gambling and wagering, and the ease with

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[44] For other instances in which the federal wagering stamp or registration forms have been admitted as evidence in state gambling prosecutions, see United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964) (wagering tax return used as evidence in securing gambling conviction); State v. Baum, 230 La. 247, 88 So. 2d 209 (1956) (wagering tax return admitted in securing gambling conviction); State v. Reinhardt, 229 La. 673, 86 So. 2d 530 (1956) (letter from United States Treasury Department that defendant owned wagering stamp admitted as evidence in prosecution for operating a lottery); State v. Curry, 92 Ohio App. 1, 109 N.E.2d 298 (1952) (wagering tax return admitted as evidence in conviction of defendant of being a common gambler); Commonwealth v. Fiorine, 202 Pa. Super. 88, 195 A.2d 119 (1963) (gambling stamp used as evidence to show that defendant had control over poolroom where lottery equipment was found); McClary v. State, 211 Tenn. 46, 362 S.W.2d 450 (1962) (possession of stamp and tax returns made upon it were considered to be a presumption that defendant had gambled during period covered by stamp and returns); Acklen v. State, 196 Tenn. 314, 267 S.W.2d 101 (1954) (fact that federal wagering stamps had been issued to defendants was evidence that they engaged in gambling activities).

[45] *See, e.g.*, ILL. REV. STAT. ch. 38, § 28-4 (1965) (all who possess stamp must register with county clerk and failure to do so is punishable by imprisonment). *See also* Deitch v. City of Chattanooga, 195 Tenn. 245, 258 S.W.2d 776 (1953) (upholding a city ordinance prohibiting possession of stamp).

[46] Grigg v. State, 37 Ala. App. 605, 73 So. 2d 382 (1954).

[47] Boynton v. State, 75 So. 2d 211 (Fla. 1954).

[48] 390 U.S. 39 (1968).

which information acquired through the federal wagering tax laws is made available to state and federal authorities to enforce their respective penalties. In light of these circumstances, the Court agreed that wagering most certainly was "an area permeated with criminal statutes," and that those so engaged are a group "inherently suspect of criminal activities." Therefore, the requirements of the registration and occupational tax provisions actually did create for petitioner a "real and appreciable" hazard of self-incrimination. It was felt that the compelled information might very well serve as a "link in a chain" of evidence that would lead to a subsequent conviction. It was apparent, then, that these provisions of the wagering tax requirements would have the direct and unmistakable consequence of incriminating the petitioner.

In light of these observations, the Court concluded that the *Kahriger* decision was unwarranted in finding that a registrant who failed to assert the privilege to Treasury officials at the exact time the payments were due irretrievably abandoned his constitutional protections under the fifth amendment. The Court felt that no more could be required of petitioner than to have asserted at and after trial that the statutory requirements were unconstitutional. Since every disclosure could have served to incriminate him, for petitioner to have asserted his claim at the time of filing would have forced him to prove guilt to avoid admitting it. The Court also found that the *Lewis* assertions based on a lack of a constitutional right to gamble could no longer be considered persuasive reasoning. The critical question was whether the gambler would be forced to give evidence against himself after violating state law rather than whether he possessed a right to violate such law in the first place. It must be understood that the privilege was intended to protect the guilty and imprudent as well as the innocent and foresighted. The privilege could not be waived simply because "those 'inherently suspect of criminal activities' have been commanded to cease wagering or to provide information incriminating to themselves, and have ultimately elected to do neither." [49]

The Court also rejected the argument that the statute was entirely prospective and that, therefore, the privilege was unavailable. The Court pointed out that the fulfillment of the registration and occupational tax requirements, in focusing attention on the registrant as a gambler, increased the likelihood that past and present offenses would be discovered and punished. The Court went on to find that there was no foundation for the *Kahriger* conclusion that the privilege was inapplicable to prospective acts, for it "is not mere time to which the law must look, but the substantiality of the risks of incrimination." [50] Furthermore,

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[49] *Id.* at 52.
[50] *Id.* at 54.

the required disclosures did create "real and appreciable" hazards of self-incrimination as to the registrant's prospective acts, for they would not only increase the likelihood of prosecutions for such acts but would also provide evidence that would facilitate future convictions. Thus, the *Marchetti* Court reached the conclusion that nothing in the *Kahriger* and *Lewis* rationales would preclude petitioner from asserting the self-incrimination privilege as a defense in the instant case.

The Court also found that this case was not within the exception to the privilege established by the required records doctrine. The three essentials of the required records doctrine described in *Shapiro* were absent in the instant case and thus the use of the doctrine was precluded. Marchetti was required to provide information about his gambling activities that was not related to any records he customarily maintained; there were no "public aspects" to any of the information he was compelled to divulge, since all questions were to be answered by the registrant in his capacity as a private individual; and the inquiries in the present case were directed at a group "inherently suspect of criminal activities."

Finally, the Court rejected the suggestion that it permit the statutory requirements to remain in effect with full force by protecting those who claim the privilege through the imposition of use restrictions similar to those in *Murphy*. It was concluded that it would not be appropriate for the Court to impose such restrictions, for in so doing it would in effect defeat a primary purpose behind enactment of the measure and hamper the enforcement of state prohibitions against gambling. It is the task of Congress, not the Supreme Court, to create an appropriate balance between the conflicting demands of the federal treasury and state gambling prohibitions.

In the companion case to *Marchetti*, *Grosso v. United States*,[51] a conviction for willful failure to pay the excise and occupational taxes required under the wagering provisions of the Internal Revenue Code and for conspiracy to defraud the United States by evading payment of both taxes was reversed in its entirety by the Supreme Court. Applying the same arguments relied on in *Marchetti*, the Court held that a proper assertion of the self-incrimination privilege, in light of the comprehensive statutory system for the punishment of gambling adopted by Pennsylvania (the state in which petitioner allegedly accepted wagers), would constitute a complete defense to the prosecution for failure to pay the excise tax. Furthermore, even though petitioner did not assert a claim of privilege as to the conspiracy and occupational tax counts, the Court was unable to view his failure as an effective waiver of the privilege.

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[51] 390 U.S. 62 (1968).

In a strongly worded dissent,[52] Mr. Chief Justice Warren explained why he felt the *Marchetti* and *Grosso* convictions should be affirmed on the authority of *Kahriger* and *Lewis*. The dissent could not comprehend how the majority could at once profess to accept Congress' power to tax illegal activities and then strip it of the power to make such taxing schemes effective. Noting that the registration and disclosure requirements extended to both lawful and unlawful activities, he concluded that such provisions must have been imposed to aid in the collection of legitimately levied taxes. Arguing that Congress must effectively subject the proceeds of outlawed gambling transactions to these legitimate taxing powers, he maintained that this goal could only be accomplished by *requiring* gamblers, under the threat of criminal sanction, to step forward and reveal the nature and scope of their necessarily secret activities. Furthermore, it was the dissent's position that, since disclosure by registration was a common feature of many regulatory taxes levied against persons in lawful businesses, the effect of the majority's decision in relieving gamblers of such requirements would be to create for such gamblers a special privilege of non-registration. Mr. Chief Justice Warren also found it difficult to follow the majority's reasoning in refusing to impose "use restrictions" on the ground that it would defeat the congressional purpose of making such information available to state authorities. The Chief Justice felt that the Court's sweeping constitutional ruling frustrated the more significant and certainly valid congressional purpose of obtaining revenue. It was argued that the $115,000,000 in wagering taxes that have been collected in recent years is sufficient evidence of a legitimate tax. purpose. It would appear, however, that the strongest contention was that the Court had failed to take into consideration the primary implications of their decision in relation to the other registration and occupational tax provisions of the Internal Revenue Code.

The immediate impact of the *Marchetti* and *Grosso* decisions will probably be effectuated in a series of constitutional defenses to violations of other sections of the Code which are similar in form and substance to the Federal Wagering Stamp Tax Act. There are a number of such regulatory statutes in Title 26,[53] and while provisions of this type have been consistently upheld as constitutional,[54] there still remains the question of whether the

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[52] *Id.* at 77 (dissenting opinion). There were also two separate concurring opinions by Mr. Justice Brennan and Mr. Justice Stewart. *Id.* at 72, 76.

[53] *See, e.g.*, INT. REV. CODE of 1954 § 4722 (dealers in narcotic drugs); § 4753 (dealers in marihuana); § 5179 (registration of stills); § 5802 (importers, manufacturers and dealers in certain firearms).

[54] United States v. Sanchez, 340 U.S. 42 (1950) (upheld imposition of tax on transfers of marihuana made without the required order form); Sonzinsky v. United States, 300 U.S. 506 (1937) (upheld regulatory pro-

privilege against self-incrimination is now a defense to violations of them. These registration and occupational tax provisions, like those of the wagering stamp tax, are directed toward a group or groups "inherently suspect of criminal activities." It is clear, therefore, that they too are open to attack on the ground that they create "real and appreciable" hazards of self-incrimination.

Furthermore, it is reasonable to argue that the *Marchetti* and *Grosso* holdings will have an even broader effect. Registration provisions not associated with the various occupational tax schemes, but which do concern allegedly illegal activities, may be placed in a similar position. An example is the provision regulating border crossings by narcotics addicts,[55] which requires that addicts and people who have violated certain narcotic and marihuana laws register with a customs official whenever departing from or entering the United States. Alleged violators of this provision have previously been denied the use of the privilege against self-incrimination as a defense.[56] However, if the principles set down by the Court in *Marchetti* and *Grosso* are to be uniformly observed, it would appear that alleged violators of such provisions must also be given the same protection.

The defense of self-incrimination has already been successfully asserted in cases involving the registration[57] and illegal possession[58] provisions of the National Firearms Act. In *Haynes v. United States*,[59] the Court reversed a conviction for knowingly possessing a firearm that had not been properly registered under Section 5841 of the Act. The Court held that compliance with the registration requirements would, in effect, have compelled petitioner to incriminate himself. Since the registration section was directed primarily at those persons who acquired the defined firearms without complying with the Act's other provisions, they would thus be immediately threatened with criminal prosecutions under the two penal sections of the same Act.[60] The Court therefore held that a proper assertion of the self-incrimination privilege would constitute a complete defense to any prosecution for

visions of National Firearms Act as valid taxes); Nigro v. United States, 276 U.S. 332 (1928) (upheld registration provisions of Anti-Narcotic Act as valid taxes).

[55] 18 U.S.C. § 1407(a)-(b) (1964).

[56] United States v. Eramdjian, 155 F. Supp. 914, 931 (S.D. Cal. 1957), held that section 1407 did not violate the fifth amendment's self-incrimination clause because it did not compel the direct confession of the commission of a crime.

[57] INT. REV. CODE of 1954, § 5841.

[58] INT. REV. CODE of 1954, § 5851.

[59] 390 U.S. 85 (1968).

[60] The Court reached this conclusion because persons who made firearms, or obtained such by transfer or importation, were not required to register as long as they complied with the provisions concerning transfer, making and importation. *Id.* at 96.

failure to register under section 5841 or for illegal possession under section 5851.

These new interpretations of the scope of the fifth amendment's self-incrimination privilege seem to clarify the protection that is actually being offered. It appears that the Court believes that the privilege must be extended to all individuals who are operating within the private spheres of society without regard to the nature of the criminal activity with which they are charged. It is only in this way that the protection offered by the Constitution can be truly effectuated.

This line of thought leads one to question whether these recent decisions are improperly upsetting the balance between the government's need for information and the private rights of the individual. It is arguable that these broad interpretations of the privilege will create new hazards and burdens that will impede law enforcement agencies in their attempts to acquire information vital to effective crime prevention. As far as illegal gambling activities are concerned, law enforcement officials generally agree that gambling and ancillary activities provide the largest single source of revenue available to organized crime in the United States.[61] In fact, while there exists no accurate method of computing crime's gross annual income from gambling, reliable estimates have placed the figure at between seven and fifty billion dollars. Illegal wagering on horse racing, lotteries and sporting events accounts for at least twenty billion dollars a year.[62]

Due to the lucrative nature of professional gambling, it is in the public interest not only that the income therefrom be taxed, but also that this activity be discouraged. It is not so readily apparent, however, that the compulsory disclosure provisions of the wagering stamp tax have significantly contributed to the attainment of the latter of these two goals. In light of the incriminatory nature of the information required by the wagering tax scheme and the vast network of state gambling statutes that have been cited, a common sense appraisal would indicate that only the most secure or naive of gamblers would risk the possibility of prosecution by complying with the tax's registration provisions. And the statistics as to the amount of revenue actually collected under the Act seem to add validity to this assumption. Not only did the Act fall far short of its expected revenue intake in the first months of its operation,[63] but also Chief Justice Warren's figures as to the one hundred fifteen million dollars collected under the Act

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[61] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT 1967 at 188.

[62] *Id.* at 189.

[63] Comment, *The Federal Gambling Tax and the Constitution*, 43 J. CRIM. L.C. & P.S. 637 n.11 (1953).

in recent years is entirely inconsistent with the estimated seven to fifty billion dollars per year income. This disparity seems to indicate that only a small percentage of professional gamblers actually comply with the wagering tax statutes. Such a conclusion would lead one to seriously question any contention that the Act as implemented in the past served as a vital and essential enforcement tool in the area of gambling control. In attempting to resolve the conflict between the needs of the government and the liberties of the individual, it must be remembered that the essential meaning of the fifth amendment has never before been contravened. The limited efficiency with which the Act operates as a penal measure can certainly afford no justification for any attempt to sacrifice the substantial rights guaranteed to the individual in order to facilitate the procedural obligations of the government.

It may be argued that the Court reached its decision here by looking into the motive behind the creation of this tax which was apparently to discourage illegal gambling.[64] Such an approach would be unjustified in light of the well-established rule that the judiciary, in determining the validity of a legislative enactment, will not inquire into the hidden motives or reasons which move the legislature to exercise its constitutional powers.[65] It is the opinion of this author, however, that such was not the case in the instant decision. In neither *Marchetti* nor *Grosso* was the Act itself invalidated as an unconstitutional exercise of the federal taxing power. The Court found issue only with the unconstitutional effects that the application of the Act produced in relation to the self-incrimination privilege. Furthermore, as the Court stated:

> If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes.[66]

Thus, while the Court may have made some incidental references to motive in the opinion, the holding itself was a result of the subsequent unconstitutional *application* of the registration requirements of the Act.

In so declaring the effects of the scheme unconstitutional, the Court has left Congress with the option of either leaving the Act as is, or reenacting the Act in such a manner that its application would not constitute an infringement upon the self-incrimination privilege. Congress could only accomplish such a reenact-

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[64] *See* United States v. Kahriger, 345 U.S. 22, 27 n.3 (1953); Comment, *supra* note 63, at 637; 67 HARV. L. REV. 164 (1953).

[65] *See* Sonzinsky v. United States, 300 U.S. 506 (1937).

[66] Marchetti v. United States, 390 U.S. 39, 61 (1968).

ment through a statutory amendment to the taxing scheme by which "absolute immunity" against self-incrimination, satisfying those standards first established in *Counselman,* would be guaranteed. Such an amendment would necessarily involve the imposition of "use restrictions" like those levied in *Murphy* and would have to provide that the registrant could "not be investigated or prosecuted, by either the federal or the state government, on the basis of information compelled by the tax law." [67] However, in view of the amount of revenue produced and the fact that the primary motive behind enactment was to aid in the enforcement of state anti-gambling statutes, it seems highly unlikely that Congress will reenact the statute with the necessary protections.

In rendering the *Marchetti* and *Grosso* decisions, the Supreme Court has not imposed any radical changes upon the scope of the fifth amendment. Rather, the Court has merely returned to the traditional tests by which the privilege has been applied in *Boyes* and the later American cases. The Court realistically determined whether a "real and appreciable hazard of self-incrimination" was present, and finding that there was, it held the privilege applicable.

The Court has in no way diminished the *Kahriger* conclusions as to the Act's validity as a taxing measure. As was said, if reenacted with the proper protections, the Court would most likely uphold the provisions in their entirety. What the Court has made clear is that *all* private individuals, including those who may be involved in allegedly illegal activities, are entitled to protection under the self-incrimination clause. Such a clarification is both correct and necessary if the rights guaranteed under the fifth amendment are to be effective. The only possible detrimental effects of such a decision may be in the law enforcement area. The limited role which the Act actually had in that area indicates that government agencies should be able to find an adequate and realistic alternative. Thus, it does appear that the other occupational tax and registration provisions of the Code, similar in form and effect to those of the wagering stamp tax, will be challenged with the same results. It is only in this way that the Supreme Court can maintain the fifth amendment's self-incrimination privilege as it was intended to be applied.

[67] Note, *Self-Incrimination and the Federal Excise Tax on Wagering,* 76 YALE L. J. 839, 844 (1967).