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Constitutional Law - Privilege Against Self-Incrimination - Federal Tax Registration Statutes

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CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—FEDERAL TAX REGISTRATION STATUTES

Defendant Marchetti was convicted in the United States District Court for violation of the federal wagering tax statutes, in that Marchetti conspired with others to evade the annual occupation tax imposed on gamblers,[1] wilfully failed to pay the special occupational tax, and wilfully failed to register[2] before engaging in the business of accepting wagers. The Circuit Court of Appeals affirmed the decision of the lower court,[3] based on the authority of *United States v. Kahriger*[4] and *Lewis v. United States*.[5] The Supreme Court of the United States granted certiorari[6] and reversed the decision of the lower court, expressly overruling *Kahriger* and *Lewis* and holding for the first time that the privilege against self-incrimination[7] is a valid defense for a gambler accused of failure to register in compliance with the requirements of the federal wagering tax statutes. *Marchetti v. United States*, 390 U.S. 39 (1968).

In the companion case, defendant Grosso was convicted in the United States District Court for wilful failure to pay the excise tax imposed on wagering,[8] wilful failure to pay the special occupational tax imposed on gambling,[9] and conspiracy to defraud the United States by evading payment of both taxes. Although this decision was affirmed,[10] the United States Supreme Court reversed,[11] holding that the privilege is a valid defense to a charge of failure to register and pay excise tax in compliance with the federal wagering tax statute. *Grosso v. United States*, 390 U.S. 62 (1968).

The companion cases of *Marchetti* and *Grosso* deal with separate sections

[1] INT. REV. CODE OF 1954, § 4411.

[2] INT. REV. CODE OF 1954, § 4412.

[3] 352 F.2d 848 (1965).

[4] 345 U.S. 22 (1953).

[5] 348 U.S. 419 (1955).

[6] 385 U.S. 1000 (1967). The sole issue on appeal was whether the statutory obligations to register and pay the occupational tax violated defendant's fifth amendment privilege against self-incrimination.

[7] U.S. CONST. amend. V.

[8] INT. REV. CODE OF 1954, § 4401.

[9] INT. REV. CODE OF 1954, § 4411.

[10] 358 F.2d 154 (1966).

[11] The sole issue on appeal was whether payment of the excise tax would have required defendant to incriminate himself.

of the federal wagering tax statutes, and by applying the privilege in each instance, the Supreme Court has invalidated the doctrines of *Kahriger* and *Lewis* in their application to any of the essential provisions of the federal wagering tax statutes.[12] This case note will analyze the treatment of the fifth amendment privilege in the *Marchetti* and *Grosso* cases as a logical extension of recent case law, and at the same time, as a complete reversal of the long-standing precedents begun by the *Kahriger* case.[13]

The federal wagering tax is a comprehensive enactment of statutory regulations imposing registration and taxation requirements on certain forms of gambling.[14] The registration provision provides that everyone in the business of accepting wagers, either for himself or for others, shall register with the official in charge of the local Internal Revenue district.[15] This registration is an essential prerequisite to paying the occupational tax and the excise tax.[16] Failure to comply with the above statutes, and then proceeding to engage in the gambling activities controlled by these statutes,[17] renders the offender liable to prosecution for a federal offense.[18] Yet if the same individual were to comply with all the necessary provisions of the statute pertinent to his gambling activities,[19] his name would be placed on a list of gambling registrants at the office of the district director of Internal Revenue, and subsequently made available to state prosecuting authorities.[20] In view of the comprehensive system of state penal statutes punishing various gambling activities,[21] the federally registered gambler provides evidence

[12] §§ 4411, 4412 and 4401 are the main provisions of the federal wagering tax statutes, and the Court, through *Marchetti* and *Grosso*, extended the coverage of the fifth amendment to apply to all three sections.

[13] There has been no case in point which has been at variance with *Kahriger*, yet the development of the scope of the privilege in other areas since 1952 has necessitated further consideration of the registration and taxation issue.

[14] § 4401 of Title 26 imposes upon those in the business of accepting wagers an excise tax of 10% on the gross amount of all wagers they accept, including the value of chances purchased in lotteries conducted for profit. Parimutuel wagering enterprises, coin-operated devices, and state-conducted sweepstakes are expressly excluded from taxation. 26 U.S.C. § 4402 (1954). Marchetti v. United States, 88 S. Ct. 697, 699 (1968).

[15] INT. REV. CODE OF 1954, § 4412.

[16] The Internal Revenue Service has refused to accept the fifty dollar occupational tax unless it is accompanied by the completed registration form. *See* United States v. Whiting, 311 F.2d 191 (1962); United States v. Mungiole, 233 F.2d 204 (1956).

[17] *Supra* note 14.

[18] INT. REV. CODE OF 1954, § 7203.

[19] INT. REV. CODE OF 1954, §§ 4401, 4411, 4412 and 6806.

[20] INT. REV. CODE OF 1954, § 6107.

[21] *See, e.g.*, ILL. REV. STAT., ch. 38, § 28 (1965); PA. STAT. ANN., Tit. 18, §§ 4601-07 (1963); *see* Marchetti v. United States, *supra* note 14, at 701, *n.*5.

sufficient to convict himself in some states,[22] while in other states, he supplies evidence which sets in motion the state prosecuting machinery.[23]

The use of the privilege against self-incriminaton as a defense to a charge of violation of the wagering tax statutes was first considered by the Supreme Court in *United States v. Kahriger.*[24] In that case, the defendant was in the business of accepting wagers and he was charged with wilful failure to register for, and pay, the gambler's occupational tax.[25] Defendant claimed that the registration provision violated his privilege against self-incrimination, and thus presented the court with the identical issue that the *Marchetti* court was to face sixteen years later.

Justice Reed, speaking for the majority, held that the privilege was not a valid defense to the charge. He stated that:

> under 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 accepting wagers in the future he must fulfill certain conditions.[26]

The Court concluded that the registration requirement only admitted to prospective acts, which are not within the protections of the fifth amendment. Prior to *Marchetti,* courts presented with the identical issue concerning the privilege in its relation to gambler's registration uniformly held that the privilege is inapplicable, relying heavily on the prospective acts doctrine laid down in *Kahriger.* Since *Marchetti* completely reversed this *Kahriger* precedent, it is necessary to trace the development of the scope of the fifth amendment privilege, and analyze what role this development has played in leading to the overruling of *Kahriger.*

Originally, the constitutional protection against self-incrimination was designed to protect a person from being compelled to give oral testimony against himself in a criminal proceeding in which he was a defendant.[27] However, case law concerning the application of the privilege has led to a judicial development of the privilege which has broadened its scope.[28] The

[22] Kansas City v. Lee, 414 S.W.2d 251 (Mo. 1967); Acklen v. Tennessee, 196 Tenn. 314, 267 S.W.2d 101 (1954); Deitch v. Chattanooga, 195 Tenn. 245, 259 S.W.2d 776 (1953).

[23] Irvine v. California, 347 U.S. 128 (1954); State v. Curry, 92 Ohio App. 1, 109 N.E.2d 298 (1952).

[24] *Supra* note 4.

[25] INT. REV. CODE OF 1939, §§ 3290, 3291 and 3285. These sections, under which Kahriger was convicted, correspond to §§ 4411, 4412 and 4401 of the INT. REV. CODE OF 1954, under which Marchetti was indicted.

[26] United States v. Kahriger, 345 U.S. 22, 32 (1953).

[27] 15 CATHOLIC U.L. REV. 253, 255 (1966).

[28] *See* 15 BUFFALO L. REV. 595 (1966); 12 U.C.L.A.L. REV. 561 (1965); 65 COLUM. L. REV. 681 (1965); 29 MICH. L. REV. 1 (1930).

privilege has been extended to apply to civil cases as well as to criminal cases.[29] The United States Supreme Court has made it clear that "the privilege extends beyond defendants in criminal proceedings to protect any witness in any type of proceeding which can legally demand testimony, when such testimony might ultimately be used against the person in a criminal proceeding."[30] In *Quinn v. United States*,[31] the privilege was held to protect a person appearing before a legislative committee. In *United States v. Chandler*, the Court stated that:

> to sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.[32]

Further expanding the scope of the privilege, the Supreme Court in *Malloy v. Hogan* stated that "the Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment secures against Federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."[33] On the same day, in *Murphy v. United States*, the Court held that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law."[34] Consequently, in any future federal prosecution for violation of the wagering tax statutes, the court had to consider the gambler's invocation of the defense of the privilege against self-incrimination in view of the threat of prosecution from the widespread state criminal statutes.[35] The privilege has been ruled applicable not only to answers which would in themselves be sufficient to criminally prosecute the person answering, but also to those answers which would supply a link in the chain of evidence needed to successfully prosecute the person answering.[36] In the words of Professor Wig-

[29] McCarthy v. Arndstein, 266 U.S. 34 (1924).

[30] Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Development and New Confusion*, 10 ST. LOUIS U.L.J. 327, 329 (1966).

[31] Quinn v. United States, 349 U.S. 155 (1955).

[32] United States v. Chandler, 380 F.2d 993, 997 (1967).

[33] Malloy v. Hogan, 378 U.S. 1, 8 (1964).

[34] Murphy v. United States, 378 U.S. 52, 77 (1964).

[35] The *Kahriger* decision was a federal case decided before *Murphy*, and thus the only threat of prosecution was from federal statutes punishing gambling. Today, due to the *Murphy* decision, there is a definite threat of prosecution from the states, and the fifth amendment must now encompass these state threats and protect the defendant from them.

[36] Quinn v. United States, 349 U.S. 155 (1955); Brunner v. United States, 343 U.S.

more, "The privilege thus protects facts which may by disclosure lead ultimately to the extra-judicial detection of the criminal fact and its subsequent infra-judicial proof by other testimony."[37]

In accord with this expanding interpretation, and of particular significance in the *Marchetti* decision, is the case of *Albertson v. Subversive Activities Control Board*.[38] Petitioners there, members of the Communist Party, were required by federal statute to register as members of the Communist Party,[39] and petitioners claimed that this compulsory registration violated their privilege against self-incrimination. The United States Supreme Court decided for petitioners, basing its decision on two factual suppositions. First, the filing of form IS-52A admitting to party membership "may be used to prosecute the registrants under the membership clause of the Smith Act, . . . or under the Subversive Activities Control Act . . . ,"[40] and thus there is sufficient threat of present prosecution to warrant the use by petitioners of the privilege against self-incrimination.[41] Secondly, "the information called for by form IS-52 . . .[42] might be used as evidence in or at least supply investigatory leads to a criminal prosecution."[43]

In deciding that petitioners had a valid defense, the Court also distinguished the type of registration in *Albertson* from the income tax registration in *United States v. Sullivan*.[44]

> In Sullivan 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. Petitioners' claims are not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area 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.[45]

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918 (1952); Hoffman v. United States, 341 U.S. 479 (1951); Blau v. United States, 340 U.S. 332 (1951); Blau v. United States, 340 U.S. 159 (1951).

[37] 8 WIGMORE, EVIDENCE § 2261 (3d ed. 1940).

[38] 382 U.S. 70 (1965).

[39] Subversive Activities Control Act, Tit. I, Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. §§ 781 *et seq.*

[40] 18 U.S.C. § 2385 (1964); 50 U.S.C. § 783(a) (1964).

[41] The threat of prosecution under the Smith Act is analogous to the threat of state prosecution to the defendant in *Marchetti*.

[42] Form IS-52 requires the registrant to list his name, aliases, date of birth, residence, business address, and a list of offices held in the organization. This information is similar to that demanded of the gambler: his name, place of residence, address of gambling activity, and the names of persons from whom he receives wagers.

[43] *Supra* note 4, at 78.

[44] 274 U.S. 259 (1927).

[45] *Supra* note 38, at 79.

Thus the privilege is a good defense when raised in a fact situation similar to *Albertson*, and this also represents a further expansion of the scope of the privilege: it is a valid defense in the area of federally required registration.

The Supreme Court has treated the privilege against self-incrimination as an organic concept, not to be confined to its original interpretations, and thus not susceptible to a rigid interpretation based solely on precedent. The privilege is to be liberally construed so as to afford adequate protection against the type of harm that it was intended to limit, and not confined to the particular harms that it had limited in the past.[46]

Subsequent to the *Albertson* case, in *United States v. Millo*,[47] the Court held that the wagering tax statutes do not violate the privilege against self-incrimination even in view of *Albertson*, since *Albertson* had not expressly overruled *Lewis v. United States*,[48] or *United States v. Kahriger*.[49] Nevertheless, *Albertson* did foreshadow a future reversal of the *Kahriger* precedent.

The Court in *Marchetti* was cognizant of the implications of *Albertson* and therefore granted certiorari for that sole issue: "Should not this court, especially in view of its recent decision in *Albertson v. Subversive Activities Control Board*, . . . overrule *United States v. Kahriger* . . . and *Lewis v. United States* . . . ?"[50]

The defendant in the *Marchetti* case answered the wagering tax indictment by invoking the plea that such indictment violated his privilege against self-incrimination. The Court rejected the *Kahriger* Court's view "that the registration and occupational tax requirements are entirely prospective in their application, and that the constitutional privilege, since it offers protection only as to past and present acts, is accordingly unavailable."[51] As in the *Albertson* case, the Court felt that there was sufficient threat of prosecution to warrant defendant's use of the privilege, regardless of the chronological order of the events leading up to its use. There are federal[52] as well as state[53] laws prohibiting gambling, and since the answers demanded of defendant are in this "area permeated with criminal statutes,"[54] there is a "real and not merely trifling or imaginary hazard of incrimination."[55]

[46] 8 WIGMORE, EVIDENCE § 2252 (3d ed. 1940).

[47] 354 F.2d 224 (1965).

[48] *Supra* note 5.

[49] *Supra* note 4.

[50] *Supra* note 6.

[51] Marchetti v. United States, *supra* note 14, at 704.

[52] 18 U.S.C.A. §§ 1082, 1083, 1084, 1302 and 1953 (1964); 15 U.S.C.A. §§ 1171-77 (1958).

[53] *Supra* note 21.

[54] *Supra* note 38, at 79.

[55] Marchetti v. United States, *supra* note 14, at 705.

The Court also felt that apart from the existence of the danger of a present incrimination in the face of federal and state laws, there exists the danger that registration in accordance with the wagering tax statutes will supply "a link in the 'chain of evidence' culminating in conviction"[56] since "state prosecutors are apprised of the registrants' places of illegal activity and also of the names and addresses of everyone who collects wagers for him."[57] Hence registration, in effect, coerces confession of present criminal activity, is evidence of conspiracy to carry on this activity, and elicits information which may supply a link in the chain of evidence necessary for conviction, posing therefore a real, not imaginary, threat of prosecution.

The Court also distinguished this case from *United States v. Sullivan*.[58] In *Sullivan*, defendant taxpayer was convicted of wilful failure to file an income tax return, and defendant claimed the privilege against self-incrimination. The *Sullivan* Court rejected defendant's claim since the income tax return was directed at the public at large and "most of the return's questions would not have compelled the taxpayer to make incriminating disclosures."[59] Therefore, defendant could not refuse to submit any registration at all merely because some of the questions might incidentally demand incriminatory disclosures. In contradistinction, the questions in *Marchetti* were "directed at a highly selective group inherently suspect of criminal activity."[60]

In *Shapiro v. United States*,[61] the Supreme Court held that where records are required to be kept by an individual, this person cannot refuse to produce these records based on his constitutionally guaranteed privilege against self-incrimination, provided the facts are that "he is obliged to keep and preserve records 'of a kind customarily kept,' "[62] the information is of a public character, and it is required in an "essentially non-criminal and regulatory area of inquiry."[63] These prerequisite elements not being present, the *Marchetti* Court rejected the attempted extension of the *Shapiro* doctrine.

While not altering the wording of the fifth amendment, the Supreme Court has further expanded the umbrella of its protection to encompass the present system of federal registration for gambling activities. At the same time, the Court has left the door wide open for Congress to implement new

[56] Comment, *The Fifth Amendment and the Federal Gambling Tax*, 5 DUKE B.J. 86, 89 (1956).

[57] *Id.* at 91.

[58] *Supra* note 44.

[59] *Supra* note 55, at 703.

[60] *Supra* note 38, at 79.

[61] 335 U.S. 1 (1948).

[62] *Supra* note 55, at 707.

[63] *Supra* note 38, at 79.

means of enforcing taxation of gambling. In summing up the opinion of the Court, Mr. Justice Harlan stated:

> We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissable; we hold only that those who properly assert the constitutional privilege as to *these* provisions may not be criminally punished for failure to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside of the privilege's protections, *nothing* we decide today would shield him from the various penalties prescribed by the wagering tax statutes.[64]

The Court has limited this decision to a very narrow fact situation, and also has invited Congress to enact immunity statutes, thereby placing the taxpayer "outside the privilege's protections."[65]

Since 1857 Congress has adopted many compulsory immunity statutes which, by removing the possibility of criminal prosecution for matters revealed in compelled testimony, thereby also makes unnecessary and impossible resort by a defendant to the fifth amendment privilege.[66] There are many federal statutes today with immunity provisions included within the statute itself.[67] Congress has precedent to effectively enforce these gambling provisions, for "immunity law may replace the privilege provided that protections under immunity law are co-extensive with the protections afforded by the privilege against self-incrimination."[68]

The Court in *Marchetti* has liberally cast the protections of the fifth amendment into a new dimension, heretofore untouched by a successful defense of the privilege; and in the next breath, the Court has devoted the entire conclusion of its opinion to urging Congress to enact an immunity statute, thereby defeating the use of the privilege in this area. The Court has let the citizenry know that the privilege against self-incrimination is indeed a very basic and broad concept in the Constitution, but the Court also recognizes that there are many necessary functions of Congress which must and can be enforced by law, if accompanied by statutory safeguards of the constitutional rights of the individual. But until Congress decides to pursue this course of action, gambling activities in the United States will flourish by virtue of the protection granted to them in *Marchetti*.

This protection also extends beyond gambling into other areas of mandatory registration. In *Haynes v. United States*,[69] defendant was convicted of

[64] *Supra* note 14, at 709.

[65] *Supra* note 14, at 709.

[66] Shapiro v. United States, *supra* note 61, at 6.

[67] Shapiro v. United States, *supra* note 61, at 6, *n.*4.

[68] Counsel v. Hitchcock, 142 U.S. 547, 586 (1892).

[69] 88 S. Ct. 722 (1968).

knowingly possessing a firearm which had not been registered.[70] In view of *Marchetti* and *Grosso*, the Supreme Court reversed the decision of the lower court holding "that a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm . . . or for possession of an unregistered firearm. . . ."[71] Nevertheless, one court has rejected an attempt to extend the privilege as a defense in the area of marijuana registration. In *United States v. Reyes*,[72] defendant was convicted of possessing illegally imported marijuana. Marijuana is imported illegally if the importer does not register and pay the tax levied on its importation.[73] The defendant claimed that he could not be prosecuted for possession of illegally imported marijuana because the statute makes registration an essential prerequisite to importation. Basing his defense on the *Marchetti* case, he claimed that this registration violates the importer's privilege against self-incrimination, and thus the statute is unconstitutional and cannot be used to prosecute him. Significantly, the court denied this contention, emphasizing that the defendant here is not being forced to register, while in *Marchetti* and *Grosso*, failure to register was an essential element of the crimes.

The Court in *Reyes* refused to overextend the *Marchetti* decision, but did leave the door open for the importer of the marijuana, who must register under the statute, to use the privilege as a defense.

To predict exactly where the Supreme Court will allow the reasoning of the *Marchetti* decision to prevail is an impossible task, but it is worthy of note that cases in areas other than gambling are arising, and the Court must struggle with them in view of the *Marchetti* decision. With much greater facility, Congress can remove this burden from the courts by enacting immunity statutes in the fields of taxation and registration which involve an infringement upon a taxpayer's constitutional rights—a course of action which the Supreme Court, itself, recognized as necessary to avoid the confusion which would otherwise inevitably arise.

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[70] 26 U.S.C. §§ 5851, 5841 (1964).

[71] *Supra* note 69, at 732.

[72] 280 F. Supp. 267 (S.D.N.Y. 1968).

[73] 21 U.S.C. § 176(a) (1964).