THE 1990 CLEAN AIR ACT AMENDMENTS AND IMPLICATIONS OF THE SELF-INCRIMINATION CLAUSE: ARE ENVIRONMENTAL MANAGERS RISKING CRIMINAL LIABILITY?

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I. INTRODUCTION

Federal enforcement of environmental crimes is on the rise.[1] Since 1982, over 340 corporations have been indicted for committing environmental crimes.[2] Moreover, since 1988, the Federal Government has instituted $260 million in fines and has imposed 433 years of prison time.[3] This increase in prosecution is mainly due to the recent promulgation of strict federal enforcement sections in many environmental acts.[4] Today, under these stricter enforcement sections, every corporate manager and senior officer risks criminal prosecution.[5]

One of the most extensive federal enforcement sections was recently added to the Clean Air Act ("CAA").[6] On November 15, 1990, Congress passed comprehensive amendments that altered nearly every section of the CAA, including provisions concerning federal enforcement.[7] When the CAA was originally introduced in 1970, it lacked a strong enforcement

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[1]*See* CHRISTOPHER HARRIS ET AL., ENVIRONMENTAL CRIMES, at Int-1 (1994).

[2]*Id.* The most notable corporations of the 340 indicted are: Fisher-Price, United Technologies, Exxon Corporation, Pillsbury Company, International Paper, Ocean Spray, and Bristol-Meyers Squibb Company. *Id.*

[3]*Id.* This approximation of fines only includes $125 million of the $250 million that Exxon Corporation agreed to pay in 1992 due to the Valdez, Alaska oil spill. *Id.* at Int-2.

[4]*Id.* at Int-3.

[5]*Id.* at Int-8.

[6]42 U.S.C. § 7401 (1988 & Supp. V 1993).

[7]HARRIS ET AL., *supra* note 1, § 2.02. For legislative history concerning the federal enforcement sections of previous Clean Air statutes, see *infra* notes 19-61 and accompanying text.

section.[8] In contrast, the 1990 amendments impose significant criminal and civil penalties for non-compliance.[9]

These recent amendments focus liability almost exclusively on senior management.[10] Specifically, the definition of "person" as contained in section 7413(c)(6) of the CAA has been expanded to include "any responsible corporate officer."[11] Additionally, section 7413(h) focuses culpability on corporate managers by excluding non-management employees from criminal liability, unless they act knowingly or willfully.[12] The 1990 amendments also create a new definition of "operator" that exempts from liability stationary engineers, technicians, and those managers with supervisory duties, but not senior management or corporate officers.[13]

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[8]CRAIG A. MOYER & MICHAEL A. FRANCIS, CLEAN AIR ACT HANDBOOK 7-1 (2d ed. 1992).

[9]*See* 42 U.S.C. § 7413 (Supp. V 1993). For an in-depth discussion of the specific criminal and civil penalties set forth in the CAA's new enforcement section, see *infra* notes 42-61 and accompanying text.

[10]*See* Michael S. Alushin, *A Review of Major Provisions: Enforcement of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 2217, 2218, 2221 (1991).

[11]42 U.S.C. § 7413(c)(6). This section provides: "For the purposes of this subsection, the term 'person,' includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer." *Id.* Section 7602(e) states: "The term 'person' includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of United States and any officer, agent or employee thereof." 42 U.S.C. § 7602(e) (1988).

[12]HARRIS ET AL., *supra* note 1, § 2.02. Section 7413(h) of the CAA provides in pertinent part:

> Except in the case of knowing and willful violations, for purposes of subsection (c)(4) of this section, the term "a person" shall not include an employee who is carrying out his normal activities and who is not a part of senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of paragraphs (1), (2), (3) and (5) of subsection (c) of this section the term "a person" shall not include an employee who is carrying out his normal activities and who is acting under orders from the employer.

42 U.S.C. § 7413(h) (Supp. V 1993).

[13]Under § 7413(h), "operator" is defined as follows:

(h) Operator

As a result of these narrow definitions and greater penalties, senior personnel have a greater risk of becoming individually, criminally, and civilly liable for acts committed by the corporate entity. As corporate agents, however, senior corporate personnel retain no privilege against self-incrimination.[14] Thus, as the custodians of corporate documents, these officers must produce subpoenaed documents at the risk of self-incrimination.[15] Furthermore, when regulatory acts require that certain records be maintained,[16] these records must also be produced without benefit of the privilege.[17] Therefore, senior management and corporate officers risk criminal prosecution under the CAA because they are required

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> For purposes of the provisions of this section and section 7420 of this title, the term "operator", as used in such provisions, shall include any person who is senior management personnel or a corporate officer. Except in the case of knowing and willful violations, such term shall not include any person who is a stationary engineer or technician responsible for the operation, maintenance, repair, or monitoring of equipment and facilities and who often has supervisory and training duties but who is not senior management personnel or a corporate officer.

42 U.S.C. § 7413(h).

[14]The Self-incrimination Clause is found in the Fifth Amendment to the United States Constitution. U.S. CONST. amend. V. For a further discussion of the privilege against self-incrimination, see *infra* notes 62-73 and accompanying text.

[15]*See* Wilson v. United States, 221 U.S. 361 (1911) (holding that the Fifth Amendment privilege against self-incrimination does not protect an officer of a corporation from producing corporate documents even if they may incriminate him); United States v. White, 322 U.S. 694 (1944) (determining that the Fifth Amendment privilege is solely for the use of natural individuals and not corporate entities); Bellis v. United States, 417 U.S. 85 (1974) (finding that the privilege applies to records of a sole proprietor but not to records held by a person who represents a collective entity or organization). *See also* Note, *Required Information and the Privilege against Self-Incrimination*, 65 COLUM. L. REV. 681, 685 (1965) (discussing how the privilege has been denied to corporations, labor unions, and partnerships).

[16]For example, the CAA authorizes the Administrator to require persons who own or operate an emission source to establish and maintain records, reports, and auditing procedures pertaining to such emission sources. 42 U.S.C. § 7414(a)(1) (Supp. V 1993). Additionally, owners and operators are required to provide "such other information as the Administrator may reasonably require," and to submit compliance certifications. *Id.* § 7414(a)(3).

[17]Shapiro v. United States, 335 U.S. 1 (1948). See *infra* notes 89-99 and accompanying text for a discussion of *Shapiro v. United States*.

to provide government with corporate records without the protection of the Fifth Amendment privilege against self-incrimination.[18]

This Comment will explore the ramifications associated with the CAA's amended enforcement provisions that have simultaneously increased non-compliance penalties and focused liability on senior personnel without providing the benefit of the Self- Incrimination Clause. Specifically, Part II of this Comment will trace the evolution of the Clean Air Act. Part III will focus on the history and case law regarding corporate liability and the Self-incrimination Clause. Part IV will then analyze case law concerning the scope of the privilege against self-incrimination within the environmental arena. Part V will explore the potential implications of the CAA's narrower definition of "operator" and "person," as well as the resulting impact on senior management and corporate officer liability. Finally, Part VI will provide alternative measures of enforcement that reconcile both the CAA's regulatory objectives and the individual's right to invoke the Fifth Amendment privilege against self-incrimination.

II. THE HISTORY OF AIR POLLUTION LEGISLATION FROM SMOKE ABATEMENT ORDINANCES TO THE CLEAN AIR ACT

Due mainly to the heavy combustion of coal products throughout the Nineteenth and Twentieth centuries, several localities around the world began to suffer air pollution problems resulting in severe health effects.[19] Initially, air pollution problems were settled through litigation based upon common law nuisance and trespass doctrines.[20] By the late Nineteenth century, however, local governments in the United States began enacting smoke abatement ordinances.[21]

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[18]For an in-depth discussion of the Clean Air Act's regulatory purpose and senior management's risk of self-incrimination, see *infra* notes 258-74 and accompanying text.

[19]For example, in 1952, approximately 4000 people died in an ambient air pollution disaster in London, England. In 1930, there were 60 deaths reported in Meuse Valley, Belgium because of an air pollution disaster. In 1948, approximately 20 people died and 7000 people fell ill in Donora, Pennsylvania, due to the effects of emissions from heavy industry. THAD GODISH, AIR QUALITY 131 (2d ed. 1991).

[20]Arthur C. Stern, *History of Air Pollution Legislation in United States*, 32 J. AIR POLLUTION CONTROL ASS'N 44 (1982).

[21]For example, by 1881, both Cincinnati and Chicago had instituted smoke control ordinances. By 1912, 23 additional cities passed similar legislation. GODISH, *supra* note 19, at 247. These ordinances usually required that furnaces consume the smoke emitted or mandated employing a device to consume the smoke. Stern, *supra* note 20, at 45. Air

Despite local governmental efforts, the air pollution problem had become significantly grave by the middle of the Twentieth Century. Due to the tremendous industrial prosperity following World War II, the Nation's air became increasingly polluted, and the problem continued to worsen because of the lack of federal regulation.[22] Recognizing the inevitable environmental and health consequences of air pollution, Congress passed the first federal air pollution legislation in 1955.[23] This legislation authorized the Department of Health, Education, and Welfare to both research the air

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pollution was first controlled by using private and public nuisance causes of action. Only when the prevention of air pollution became both an important and appropriate subject for legislation did nuisance proceedings give way to resolution by governmental agencies. *Id.* at 44. Although local city and county regulation was instituted in the early Twentieth Century, it was not until 1952 that any comprehensive state legislation developed. *Id.* After 1952, however, most states created regulatory authorities to combat air pollution. *Id.* The creation of these new regulatory authorities was clearly encouraged by federal programs that distributed research funds and fiscal aid to qualified states through the federal air pollution control legislation enacted between 1955 and 1970. *Id.* at 47.

[22]GODISH, *supra* note 19, at 241.

[23]Air Pollution Control — Research and Technical Assistance, ch. 360, Pub. L. No. 84-159 (codified at 42 U.S.C. § 1857 (1955)). This Act was subsequently amended by the Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 38-92 (codified at 42 U.S.C. § 1857 (1963)); The Clean Air Act Amendments of 1965, Pub. L. No. 89-272, 79 Stat. 992 (codified at 42 U.S.C. § 1857 (1965)); Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (codified at 42 U.S.C. § 1857 (1967)); The Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified at 42 U.S.C. § 1857 (1970)); The Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 385 (codified at 42 U.S.C. § 7401 (1977)); The Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 1843 (codified at 42 U.S.C. § 7401 (1990)). Congress noted the purpose of the 1955 Act as follows:

> In recognition of the dangers to the public health and welfare, injury to agricultural crops and livestock, damage to and deterioration of property, and hazards to air and ground transportation, from air pollution, it is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution, to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal technical services and financial aid to State and local government air pollution control agencies and other public or private agencies and institutions in the formulation and execution of their air pollution abatement research programs.

Pub. L. No. 84-159 (codified at 42 U.S.C. § 1857 (1955)).

pollution problem and aid the states in pollution control.[24] The continual deterioration of the Nation's air resources forced Congress to pass the Clean Air Act of 1963 ("1963 Act").[25] This Act broadened the federal role in

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[24]GODISH, *supra*, note 19, at 247. *See also* S. REP. No. 389, 84th Cong., 1st Sess. (1955), *reprinted in* 1955 U.S.C.C.A.N. 2457, 2460, (Statement of Rep. Chavez) (noting that despite municipalities obtaining control over certain smoke discharges, federal research and technical assistance was needed because technical advancements resulting in various vapors, gasses, and particulate matter entering the atmosphere severely increased the general air pollution problem).

[25]Pub. L. No. 88-206; 77 Stat. 38-92 (codified as 42 U.S.C. § 1857 (1963)). *See also* H. REP. No. 508, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 U.S.C.C.A.N. 1260. The House Report noted that:

> Air pollution is a serious national problem. It is probable that it will increase greatly, unless appropriate action is taken, owing to further industrial growth and the concentration of population in urban areas. The Nation's rapid progress in technological development has made possible a high level of material benefits for the people, but has also generated, as byproducts of such development, a high level of existing and potential problems of contamination of our environment. The pollutants come from many sources — from furnaces which heat homes, offices, and public buildings; from burning of domestic and industrial waste; from motor vehicle exhaust; from industrial processes which release chemical vapors; and from combustion of fuels for the generation of power. Continuing research and control efforts will be necessary if major adverse effects on the public health and welfare are to be prevented. Federal, State, and local governments are spending large sums to study and control it. Industry likewise has spent many millions on research and abatement. Great progress has been made but the problem is far from solved . . . .
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> This legislation would replace the Air Pollution Control Act (act of July 14, 1955, Public Law 159, 84th Cong., as amended) with a new version, a "Clean Air Act." The new act constitutes a complete revision of existing law by strengthening and making more explicit the authority of the Department of Health, Education, and Welfare with respect to its activities in air pollution research, training, and demonstrations. It is the intention of the committee that the Air Pollution Control Act as revised by this bill shall become the basic authority for appropriations for air pollution programs to be conducted by the Secretary of Health, Education, and Welfare. In addition, two new programs are authorized: a 4-year program of Federal grants to State, regional, and local air pollution control agencies; and a program of limited Federal assistance and participation, under certain circumstances, in actions directed toward abatement of particular air pollution problems.
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> H.R. REP. No. 508.

combating air pollution by funding state programs, increasing the Federal Government's role in research, and developing air quality criteria.[26] The 1963 Act also authorized federal enforcement procedures which allowed the United States to bring a suit in its own right against an entity that violated a state initiative involving interstate pollution where the state's efforts had not abated the problem.[27] Moreover, the 1963 Act authorized the Government to require reports from persons whose activities were causing or contributing to air pollution.[28] Additionally, in 1965, Congress passed amendments to

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[26]GODISH, *supra* note 19, at 247.

[27]Pub. L. No. 88-206, 77 Stat. 38-92, § 5 (codified at 42 U.S.C. § 1857 (1963)). *See also* H.R. CONF. REP. No. 1003, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 U.S.C.C.A.N. 1279. Leaving the main enforcement responsibility with the states, the Federal Government was only authorized to bring suit as follows:

> In the case of interstate air pollution the Secretary was authorized to request the Attorney General to bring a suit on behalf of the United States to secure abatement. He was prohibited from making such a request until he received a certification from the Governor of each State wherein the health and welfare of individuals are being endangered by air pollution (other than the State in which the discharge of discharges causing or contributing to such pollution originate) that such Governor has made a good faith effort to enter into an agreement or compact with the State causing the pollution to secure abatement thereof and has been unable to secure such agreement or compact.

H.R. CONF. REP. No. 1003.

[28]Ironically, in 1963 such reports were to be kept confidential. H.R. REP. No. 508. The House report noted that:

> Section 6 authorizes the Secretary to require any person whose activities causing or contributing to air pollution have been the subject of a conference under section 5 to file certain reports with respect to times and quantities of pollutants discharged and the use by such person of various devices and means to prevent or reduce that pollution. This information is to be considered confidential for the purposes, of title 18, United States Code, section 1905. Failure to file such a report subjects the person in default to forfeit $100 a day to the United States to be recoverable in a civil action. The Secretary may remit or mitigate any such forfeiture.

Id.

the 1963 Act that regulated the most serious of air pollutants — emissions from motor vehicles.[29]

The federal program, however, remained weak by leaving most of the burden of abatement and enforcement on the states and local governments. At the request of the President, Congress enacted the Air Quality Act of 1967 ("1967 Act") introducing, for the first time, a regional approach to air quality control.[30] The most notable enforcement provision of the 1967 Act authorized the Federal Government to proceed immediately to court if it found that air pollution was causing a substantial and imminent public health endangerment.[31] The air pollution problem, however, continued and consequently, the public remained dissatisfied with the Federal Government's efforts.[32]

In 1970, as societal concern for the environment reached its peak, Congress passed the first effective federal air pollution legislation, the Clean Air Act of 1970 ("1970 Act"),[33] which still exists as the basis for federal

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[29]Pub. L. No. 89-272, 79 Stat. 992 (codified at 42 U.S.C. §1857 (1965)). *See also* GODISH, *supra* note 19, at 247.

[30]Pub. L. No. 90-148, 81 Stat. 485 (codified at 42 U.S.C. § 1857 (1967)). The Act authorized the Secretary of the Department of Health, Education, and Welfare to set forth Air Quality Control Regions throughout the United States. GODISH, *supra* note 19, at 248. The federal role also encompassed the development of air quality criteria and control techniques. Then, the individual states would develop air quality standards based on the federal criteria. *Id.* Additionally, far from the appropriations authorized in the 1963 Act, i.e., $5 million for 1964, $20 million for 1965, $30 million for 1966, and $35 million for 1967, the Air Quality Act of 1967 authorized a total of $362.3 million for new obligations under a three year period, including an additional $33 million for 1968, $145 million total for 1969, and $184.3 million for 1970. *Compare* H.R. REP. No. 508 (noting the authorized appropriations for the Clean Air Act of 1963) *with* H.R. REP. No. 728, 90th Cong., 1st. Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 1938 (noting the authorized appropriations for the Air Quality Act of 1967).

[31]The House Report pertaining to the 1967 Act also noted that the imminent endangerment provision was not intended as a substitute for established procedure pertaining to chronic air pollution problems. H.R. REP. No. 728. Rather, the report recognized that the provision was only intended to avert large industrial disasters such as the ones that occurred in the Meuse Valley of Belgium in 1930; in Donora, Pennsylvania in 1948; in New York City in 1953; and in London, England in 1952 and 1953. *Id.* See *supra* note 19 for a discussion of these air pollution disasters.

[32]GODISH, *supra* note 19, at 247.

[33]Pub. L. No. 91-604, 84 Stat. 1676 (codified at 42 U.S.C. § 1857 (1970)).

air pollution law.[34] The 1970 Act's primary purpose was to protect the quality of the Nation's air resources.[35] The 1970 Act contained an extensive regulatory scheme setting national ambient air quality standards and listing pollutants.[36] In addition, the 1970 Act created state implementation plans to achieve the stipulated air quality standards and set up stringent new automobile emission standards.[37]

The 1970 Act provided the Federal Government with substantial authority to bring an action in federal court against a person violating an applicable implementation plan, an order issued by the Administrator, or the emission standards set forth in sections 111(e) or 112(c) of the Act.[38] The Act also authorized courts to assess penalties of up to $25,000 a day until compliance was accomplished.[39] The Act further provided for a $10,000

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[34]GODISH, *supra* note 19, at 249. On August 7, 1977, the 1970 Act was amended and codified at 42 U.S.C. § 7401 (1982), where it can still be found today. No substantial changes to the enforcement section, however, were made until the 1990 amendments. See *infra* notes 42-61 and accompanying text for a discussion of the 1990 amendments.

[35]*See* H.R. REP. No. 1146, 91st Cong., 2nd Sess. (1970), *reprinted in* 1970 U.S.C.A.A.N. 5356. Depicting the federal legislation as a "war against air pollution," the House Report noted that, "[t]he purpose of the legislation . . . is to speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the nation is wholesome once again." *Id.*

[36]Stern, *supra* note 20, at 55. National ambient air quality standards were developed from air quality criteria set forth by the Administrator to reflect the latest scientific technology used to identify the effects of certain air pollutants on the public health and welfare. *See* Pub. L. No. 91-604, § 108(2). Before the 1970 Clean Air Act, the Secretary of the Health, Education, and Welfare Department was merely authorized to set forth criteria regarding pollutants for the States themselves to set up ambient air quality standards. *See* Pub. L. No. 88-206, § 3(b)(2), 77 Stat 38-92 (codified at 42 U.S.C. § 1857 (1963)). In contrast, the 1970 Act authorized the Secretary to create nationwide air quality standards which would allow the war against pollution to be fought on a national level rather than in each geographical area. The following pollutants were the basis for the criteria setting forth ambient air quality standards: sulfur oxides, particulate matter, carbon monoxide, hydrocarbons, and photochemical oxidants. H.R. REP. No.1146.

[37]Stern, *supra*, note 20, at 55. For example, all light duty vehicles and engines manufactured during or after 1975 were required to reduce their emissions of carbon monoxide and hydrocarbons by 90%. Additionally, all light duty vehicles and engines manufactured during or after 1976 were required to reduce the level of nitrogen oxides emitted by 90%. *See* Pub. L. No. 91-604, § 202(b).

[38]Pub. L. No. 91-604, § 113(a)(1), (3).

[39]*Id.* § 113(c)(1).

fine and/or imprisonment not to exceed six months if a person knowingly made false statements, representations, or certifications based on records required to be maintained by the Act, or falsified or tampered with any monitoring device.[40] Lastly, to further secure abatement and enforce provisions of the 1970 Act, Congress provided for citizen suits against violators and governmental agencies.[41]

In 1990, Congress enacted substantial amendments to the Clean Air Act.[42] These amendments provide for the maintenance and revision of state implementation plans,[43] standards of performance,[44] air toxic limits,[45] record keeping,[46] inspection and monitoring requirements,[47] solid waste

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[40]*Id.* § 113(c)(2). *See also* GODISH, *supra* note 19, at 249. Giving ample consideration to the technological and economical feasibility of compliance, the House Report set forth the objectives of the federal enforcement section as follows:

> Whenever the Secretary finds that as a result of the failure of a state to enforce the plan applicable to such state, any ambient air quality standard is not met, the Secretary is directed to notify the affected state or states, persons not in compliance with the plan and other interested parties. If the failure of the state to take action extends beyond the 30 days after the Secretary's notification, the Secretary may request the Attorney General to bring a suit on behalf of the United States in the appropriate U.S. District Court to secure abatement of the pollution. The Court may enter such judgment and orders as it deems necessary in the public interest and the equities of the case. In so doing the Court must give due consideration to the practicability and to the technological and economic feasibility of complying with the provisions of the plan. The Court may also assess a penalty of up to $10,000 for each day for which a person notified by the Secretary of remedial action to be taken fails to take such action. The efforts of the defendant to abate the pollution in question must be taken into account by the Court in determining the amount of the penalty.

H.R. REP. No. 1146.

[41]Pub. L. No. 91-604, § 304.

[42]42 U.S.C § 7401 (Supp. V 1993).

[43]*Id.* § 7410.

[44]*Id.* § 7411.

[45]*Id.* § 7412.

[46]*Id.* § 7414.

[47]*Id.*

performance standards,[48] emission limits,[49] emergency powers,[50] permit requirements,[51] acid rain provisions,[52] and ozone standards.[53] Congress also updated the federal enforcement section of the CAA. These amendments authorize the Federal Government to sanction individuals for non-compliance with any of the above mentioned provisions.[54]

New section 7413(a)(3) creates a broad scheme for criminal liability, and provides that any violation of a rule, order, waiver, or permit under the CAA is a crime.[55] Prior to these amendments, the Act merely authorized misdemeanor penalties; the 1990 Act, however, authorizes felony level

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[48]*Id.* § 7429.

[49]*Id.* § 7521.

[50]*Id.* § 7603.

[51]*Id.* § 7661.

[52]*Id.* § 7651.

[53]*Id.* § 7671.

[54]*See generally id.* § 7413. *See also* HARRIS ET AL., *supra* note 1, § 2.02.

[55]42 U.S.C § 7413(a)(3). Specifically, this section provides that:

> Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV of this chapter, subchapter V of this chapter, or subchapter VI of this chapter, including, but not limited to, a requirement of prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under these provisions or titles . . . the Administrator may -
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> > (A) issue an administrative penalty order in accordance with subsection (d) of this section,
> > (B) issue an order requiring such person to comply with such requirement or prohibition,
> > (C) bring a civil action in accordance with subsection (b) of this section or section 7605 of this title, or
> > (D) request the Attorney General to commence a criminal action in accordance with subsection (c) of this section.

Id.

sanctions for knowing violations.[56] For example, the Act provides for a fine and/or two years in prison if "a person" knowingly makes a false statement, fails to maintain the required records, omits material information, fails to make required reports or to file a mandatory application, or tampers with any monitoring devices.[57] Furthermore, the 1990 amendments provide sanctions for releases of hazardous pollutants when the actor either knowingly or negligently puts another in imminent danger.[58] For a

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[56]S.REP. No. 101-228, 101 Cong., 2nd Sess. (1990) *reprinted in* 1990 U.S.C.C.A.N. 3385, 3745-46.

[57]*See* 42 U.S.C. § 7413(c)(2). The pertinent part of § 7413 reads:

> (2) Any person who knowingly -
> (A) makes any false statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this chapter to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State);
> (B) fails to notify or report as required under this chapter; or
> (C) falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this chapter shall upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more than 2 years, or both.

Id.

[58]*Id.* § 7413(c)(4) & (5). Section 7413(c)(4) provides in pertinent part:

> Any person who negligently releases into the ambient air any hazardous air pollutant . . . [and] negligently places another in imminent danger of death or serious bodily injury shall upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both.

Id. § 7413(c)(4). For knowing releases, Section 7413(c)(5)(A) provides far more serious consequences, that section provides in pertinent part:

> Any person who knowingly releases into the ambient air any hazardous air pollutant . . . and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both.

Id. § 7413(c)(5)(A).

knowing[59] release, a person can receive fines and/or up to fifteen years imprisonment.[60] For a negligent release, a person can receive fines and/or up to a one year jail term.[61] Thus, not only does the CAA set standards to protect the air quality, it also contains a comprehensive enforcement section with criminal penalties of up to fifteen years in prison for knowing violations.

III. THE CORPORATE ENTITY AND ITS AGENTS ARE NOT AFFORDED THE PRIVILEGE AGAINST SELF-INCRIMINATION

The Self-Incrimination Clause of the Fifth Amendment provides in pertinent part, "no person shall be compelled in a criminal case to be witness against himself."[62] Originally, this clause merely protected private persons from incriminating themselves in federal actions.[63] In 1964, in *Malloy v. Hogan*,[64] however, the Supreme Court of the United States held that the

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[59]The CAA defines a knowing state of mind when imposing criminal penalties as follows:

> (B) In determining whether a defendant who is an individual knew that the violation placed another person in imminent danger of death or serious bodily injury -
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> (i) the defendant is responsible only for actual awareness or actual belief possessed; and
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> (ii) knowledge possessed by a person other than the defendant, but not by the defendant, may not be attributed to the defendant;
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> except in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information.

Id. § 7413(c)(5)(B).

[60]*Id.* § 7413(c)(5)(A).

[61]*Id.* § 7413(c)(4). In addition, the federal enforcement section provides for the doubling of fines and imprisonment after the first conviction. *See id.* § 7413(c)(4), § 7413(c)(5)(A).

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

[63]Twining v. New Jersey, 211 U.S. 78 (1908).

[64]378 U.S. 1 (1964).

Fourteenth Amendment extended the Fifth Amendment privilege to those involved in state criminal actions.[65]

The Supreme Court had also extended the scope of the privilege to encompass documentary evidence.[66] The scope of the privilege was first broadened to protect both oral testimony and documents presented in purely criminal proceedings and civil proceedings where criminal prosecution was possible.[67] The privilege was later extended to include all testimony and documents that could "furnish a link in the chain of evidence."[68]

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[65]*Id.* at 11. Initially, the Supreme Court held that the Bill of Rights only limited the national government, and the states retained much of their sovereignty. *See* Barron v. Baltimore, 32 U.S. 243 (1833). When the Fourteenth Amendment was ratified, however, complainants began to argue that both the privileges and immunities provision and the due process clause in the Fourteenth Amendment mandated application of the Bill of Rights to state actions. *See* Palko v. Connecticut, 302 U.S. 319, 328 (1937) (refusing to extend the double jeopardy clause present in the Fifth Amendment to state actions); Twining v. New Jersey, 211 U.S. 78, 99 (1908) (holding that the Self-Incrimination Clause of the Fifth Amendment did not apply to state actions); Adamson v. California, 332 U.S. 46, 53 (1947) (same). It was not until 1964 that the Supreme Court decided to overturn both *Twining v. New Jersey* and *Adamson v. California*, and to extend the complete protections of privilege against self-incrimination to state actions. *Malloy*, 378 U.S. at 11. In overruling these cases, the Court reasoned that because the basis of criminal prosecution was accusatorial, not inquisitorial, the Fourteenth Amendment mandated applying the guarantees of the Fifth Amendment privilege to state actions. *Id.* at 8-9. Additionally, the Court held that the federal standard determining the validity of the privilege, must be used in state actions in order to give force to the Fourteenth Amendment. *Id.* at 11. *See also* Note, *supra* note 15, at 681.

[66]Boyd v. United States, 116 U.S. 616 (1886).

[67]*Id.* at 633-35. In *Boyd*, the Court determined that a forfeiture provision in a civil act, which forced a natural person to produce incriminating private papers, violated the Fifth Amendment privilege. *Id.* The Court found that the civil act was criminal in nature and opined that there was no difference between compelled testimony and forfeiture of documents when applying the privilege against self- incrimination. *Id.*

[68]*See* Hoffman v. United States, 341 U.S. 479, 486 (1951). In *Hoffman*, the Court noted that originally the Fifth Amendment privilege was only afforded when the accused's answers would themselves support a conviction. *Id.* In *Blau v. United States*, however, the Court extended the privilege to encompass any testimony that would help prosecute the accused for a federal crime. 340 U.S. 159 (1950). The *Hoffman* Court also noted that the person claiming the privilege must still risk a real danger of incrimination from the testimony to satisfy Fifth Amendment standards. *Hoffman*, 341 U.S. at 486.

Additionally, the compelled production of private records has always been protected.[69]

Yet, the advantages of the Self-incrimination Clause have not been extended to every "person" subject to criminal prosecution. A natural person and a sole proprietorship[70] can invoke the privilege against self-

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[69]*Boyd*, 116 U.S. at 633-35. *See also* Fisher v. United States 425 U.S. 391 (1976). In *Fisher*, the Court denied extending the privilege against self-incrimination to a taxpayer's attorney who was in possession of the taxpayer's accounting records. *Id.* at 396. The Court opined that the taxpayer's privilege was not violated by a summons directed at his attorney because the taxpayer was not compelled to produce anything. *Id.* at 397. Even though the Court noted that the question whether a taxpayer would have to produce his own accounting records in response to a subpoena was not involved here, the Court did declare that such papers were not his private documents. *Id.* at 414.

Justice Brennan, in a concurring opinion, also determined that the privilege should not be extended to the attorney because the accounting documents were not the attorney's private papers, but the Justice criticized the majority's reasoning concerning the importance of the privilege in terms of an individual being secure in his private books and papers. *Id.* at 414 (Brennan, J., concurring). Justice Brennan noted that the historical protection of private records stemmed from the fact that personal privacy had long been the main purpose of the Self-Incrimination Clause. *Id.* at 416. *Cf.* United States v. Doe, 465 U.S. 605, 611-12 (1984) (determining that no matter the nature of the subpoenaed document, whether private or public, the production of the document is only compelled and thus privileged if the act of production is testimonial in nature). Also in *Doe*, Justice O'Connor posited that the decision in *Fisher v. United States* expressly or implicitly decided that the contents of private papers were not protected by the Fifth Amendment privilege. *Id.* at 618 (O'Connor, J., concurring). Justice Marshall disagreed with Justice O'Connor's analysis and opined that "there are certain documents no person ought to be compelled to produce at the Government's request." *Id.* at 619 (Marshall, J., concurring in part and dissenting in part).

The New Jersey Supreme Court, however, has retained a *Boyd*-like approach for the protection of certain private papers. Matter of Grand Jury Proceedings of Guarino, 104 N.J. 218, 231 (1986).

[70]*See, e.g.*, Doe, 465 U.S. at 617. In *Doe*, the Court determined that a sole proprietorship could not be compelled to produce subpoenaed business documents without a grant of statutory immunity. *Id.* Initially, the Court found that the business records were not privileged documents because they were voluntarily prepared and, thus, could not be said to be compelled testimony. *Id.* at 611-612. The Court held, however, that the act of producing the documents was protected by the Fifth Amendment privilege. *Id.* at 617. Therefore, accepting the district court's finding of substantial incrimination, the Court held that the privilege could be asserted by Petitioner in response to the subpoena. *Id. Cf.* Bellis v. United States, 417 U.S. 85, 93-94 (1974) (finding that partnerships, unlike sole proprietorships, represented a collective entity and, accordingly, holding that an agent of the partnership could not claim the privilege against self-incrimination to immunize its records from governmental scrutiny). United States v. White, 322 U.S. 694, 698-99 (1944) (holding that a union representative could not claim the privilege against self-

incrimination even when required records are demanded for production. Corporations,[71] however, have not retained the privilege against self-incrimination, although the corporate entity is generally considered to be a legal "person" by courts and legislatures.[72] Generally, the privilege has been interpreted to be a personal one, which applies only to natural individuals and private property held in a personal capacity.[73]

A. THE PRIVILEGE IS NOT EXTENDED TO CORPORATE PERSONNEL

In 1911, the Court, in *Wilson v. United States*,[74] first limited the privilege in the corporate context, determining that the Fifth Amendment privilege did not extend to corporations or their employees.[75] In *Wilson*, Petitioner, claiming the Fifth Amendment privilege, refused to comply with a subpoena to produce corporate records.[76] Initially, the Supreme Court noted that a corporation possessed many of the privileges of a legal entity, as it could sue, be sued, or be restrained by injunction.[77] The Court, however, refused to extend the privilege against self-incrimination in the

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incrimination because the privilege only applied to individuals who risked incrimination from the production of personal documents).

[71]*See* Wilson v. United States, 221 U.S. 361, 382 (1911) (holding that a corporate representative can not claim the privilege against self-incrimination). For a further discussion of the Court's decision in *Wilson*, see *infra* notes 74-85 and accompanying text.

[72]BARRONS, LAW DICTIONARY 103 (3d ed. 1991). *See also supra* note 11 (setting forth the CAA's definition of "person").

[73]*White*, 322 U.S. at 698-99.

[74]221 U.S. 361 (1911).

[75]*Id.* at 382.

[76]*Id.* at 366-69. Petitioner, president of the corporation, refused to produce subpoenaed "letter press copy books" belonging to the corporation. *Id.* at 366. Petitioner argued that the matters contained within the books, if produced, would incriminate him in the underlying grand jury investigation. *Id* at 369. As a result of his refusal to produce the records, Petitioner was adjudged in contempt and sent to jail. *Id.* at 368. On an appeal from a writ of *habeas corpus*, the Supreme Court considered whether a subpoena could be served on a corporation and whether Petitioner's claim of privilege was valid. *Id.* at 372.

[77]*Id.* at 374-75.

corporate context.[78] Reasoning that, unlike an individual, a corporation is a "creature of the state,"[79] the Court held that the corporation must comply with the subpoena demanding the production of corporate documents.[80]

The Court also discussed the extent of the Fifth Amendment privilege against self-incrimination for individuals representing the corporate entity.[81] Determining that the extension of the privilege depended upon "the nature of the documents and the capacity in which they are held,"[82] the Court first found that agents of a corporation risk incrimination not on a personal level but in their capacities as representatives of the corporation.[83] The Court further reasoned that because the records were not Petitioner's personal records, wherein he would have retained the privilege, but were documents under the exclusive control of the corporation, the Fifth Amendment privilege did not attach.[84] Moreover, the Court held that physical custody

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[78]*Id.* at 382-83.

[79]Recognizing the distinct legal nature of the corporate entity, the *Wilson* Court posited:

> [A corporation is] presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved so long as it obeys the law of its creation.

Id. at 383.

[80]*Id.* at 383-84.

[81]*Id.* at 379-80.

[82]*Id.* at 380. For example, the Court noted that the custodian could claim the privilege if the records were in his the absolute control. If the records, however, were public or official documents the custodian could not claim the privilege even if he maintained absolute control. *Id.* at 379-380.

[83]*Id.* at 377.

[84]*Id.* at 377-78. The Court noted both English and state case law to illustrate its decision. For example, in McClory v. Donovan, 86 N.W. 709 (N.D. 1901), a North Dakota state court determined that a pharmacist, required by the Government to maintain records of liquor sales, must produce such records because of their public nature. *See also* State v. Davis, 18 S.W. 894 (Mo. 1892); State v. Davis, 69 S.E. 639 (W. Va. 1910); People v. Coombs, 53 N.E. 527 (N.Y. 1899); Louisville & N. R. Co. v. Comm. 51 S.W. 167 (Ky. 1899); State v. Smith, 38 N.W. 492 (Iowa 1888); State v. Cummins, 40 N.W. 124 (Iowa 1888); People v. Henwood 82 N.W. 70 (Mich. 1900); Langdon v. People, 24 N.E. 874 (Ill. 1890).

of the books did not protect the custodian from compulsory production.[85] Consequently, even if the production of corporate documents were to result in an employee's criminal prosecution, the employee would be denied the individual privilege against self-incrimination and be forced to produce the documents.

B. FURTHER LIMITING THE PRIVILEGE, THE SUPREME COURT CREATED THE REQUIRED RECORDS DOCTRINE

The creation and affirmation of the required records doctrine further eroded the privilege against self-incrimination. Under the required records doctrine, individuals must produce records required by statute or regulation to be kept, notwithstanding the Fifth Amendment's protection against self-incrimination. Underlying the required records doctrine is the belief that governmental interest in effectively regulating and restricting prohibited conduct outweighs the constitutional privilege against self-incrimination.[86] Moreover, the Supreme Court has held that corporate employees must produce subpoenaed corporate documents, reasoning that corporate employees, as custodians of corporate business records, have accepted the obligation to permit inspection.[87]

The Supreme Court re-affirmed the rationale underlying the required records doctrine in *Shapiro v. United States*.[88] In *Shapiro*, Petitioner, a wholesaler of produce, maintained certain sales records pursuant to a

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[85]Wilson v. United States, 211 U.S. 361, 380 (1911). The Court further reasoned that in assuming possession of the documents, the custodian has also accepted the obligation to permit inspection. *Id.* at 382.

[86]*Id.* at 380. Noting that the custodian had voluntarily assumed his duty to hold the documents in a representative capacity, the *Wilson* Court opined that:

> [T]he physical custody of incriminating documents does not of itself protect the custodian against their compulsory production . . . . The principle applies not only to public documents in public offices, but also to records required to be kept in order that there may be suitable information of transactions which are appropriate subjects of governmental regulation, and the enforcement of restrictions validly established.

Id.

[87]*Id.* at 380-82.

[88]335 U.S. 1 (1948).

required records provision set forth in the Emergency Price Control Act.[89] Although Petitioner produced the records when he was prosecuted for violating the Act,[90] Petitioner claimed that the sales records were protected under the Self-Incrimination Clause. Thus, Petitioner asserted that he was entitled to immunity if the records were to be used in any official investigation.[91]

Reviewing both legislative history and prior case law, the Court denied Petitioner's claim of constitutional privilege and determined that Congress did not intend the privilege of self- incrimination to attach to the required records provision of the Emergency Price Control Act.[92] Relying upon *Wilson*, the

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[89]*Id.* at 4. The Emergency Price Control Act authorized the Officer of Price Administration to set forth specific regulations concerning the preservation of certain sales records. Specifically, the Act authorized the Administrator in pertinent part:

> [B]y regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports . . . .

Id. at 9 n.7 (citing 50 U.S.C. § 922 (1944)). Additionally, the Act authorized the Administrator to subpoena such persons to appear, testify, and produce the documents required to be kept. *Id.*

The corresponding regulation promulgated by the Office of Price Administration similarly provided in pertinent part:

> Records. (a) Every person subject to this regulation shall . . . preserve for examination by the Office of Price Administration all his records, including invoices, sales tickets, cash receipts, or other written evidences of sale or delivery which relate to the prices charged pursuant to the provisions of this regulation.

Id. at 5 n.3 (quoting 8 Fed. Reg. 9546, 9548-49 (1943)).

[90]Petitioner was charged with making tie-in sales in violation of the Act. *Id.* at 3. That is, Petitioner was requiring customers to purchase other produce along with the purchase of lettuce. United States v. Shapiro, 159 F.2d 890, 891 (1947).

[91]*Shapiro*, 335 U.S. at 4-5. For an in-depth discussion of Petitioner's immunity argument, see *infra* notes 209-13 and accompanying text.

[92]*Shapiro*, 335 U.S. at 15. The Court determined that:

> It was difficult to believe that Congress, whose attention was invited by the proponents of the Price Control Act to the vital importance of the licensing,

Court recognized that there are bounds to what government can demand without providing the privilege against self-incrimination.[93] The Court, however, reasoned that required documents when they "are the appropriate subjects for governmental regulation," maintain a public aspect and, thus, must be available as evidence.[94] Moreover, the Court noted the importance of increased governmental efficiency, necessarily resulting from the production of required records without the protections of the Fifth Amendment privilege.[95]

> record-keeping and inspection provisions in aiding effective enforcement . . . could possibly have intended . . . [to] grant[] immunity to custodians of non-privileged records. Nor is it easy to conceive that Congress could have intended private privilege to attach to records whose keeping it authorized the Administrator to require on the express supposition that it was thereby inserting "teeth" into the Price Control Act since the Administrator, by the use of such records, could readily discover violations, check on compliance, and prevent violations from being committed "with impunity."

Id.

[93]*Id.* at 33-34.

[94]*Id.* (citing Davis v. United States, 328 U.S. 582, 589-90 (1946)). The Court in *Davis* cited with approval the rationale set forth by Wigmore in his renowned treatise on the law of evidence. Discussing the implications of the required records doctrine on both public officials and private citizens, Wigmore provided that:

> The State requires the books to be kept, but it does not require the officer to commit the crime. If in the course of committing the crime he makes entries, the criminality of the entries exists by his own choice and election, not by compulsion of law . . . . The same reasoning applies to records required to be kept by a citizen not being a public official . . . . The only difference here is that the duty arises not from the person's general official status, but from the specific statute limited to a particular class of acts. The duty or compulsion, is directed as before, to the generic class of acts, not to the criminal act . . . .

Shapiro, 335 U.S. at 33-34 (quoting *Davis*, 328 U.S. at 590 (citing 8 WIGMORE, EVIDENCE § 2259(c) (3d ed. 1940))).

[95]*Id.* at 19. The Court also noted several state opinions that treated required records as non-privileged after the *Wilson* decision. *Id.* at 19 n.25. *See* Paladini v. Superior Court, 173 P. 588 (Cal. 1918); St. Louis v. Baskovitz, 201 S.W. 870 (Mo. 1918); State v. Legora, 34 S.W.2d 1056 (Tenn. 1931).

The Court in *Shapiro* implied that the required records doctrine was limited to statutes with a clear regulatory purpose.[96] Such statutes limit enforcement to mere compliance with authorized laws and regulations and are not meant to facilitate criminal prosecution.[97] Additionally, these records, which are validly required to be kept pursuant to a regulatory act, are considered to be public documents because they are used to enforce laws and benefit the public through public or government inspection.[98] An act, however, that only purports to be regulatory and has the effect of being an aid in criminal prosecution, may be unconstitutional if it does not afford the accused the protection of the Fifth Amendment privilege.[99]

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[96]*Shapiro*, 335 U.S. at 18-19 n.24 (citing Baltimore & O.R. Co. v. I.C.C., 221 U.S. 612, 622-23 (1911)). Moreover, the *Shapiro* Court noted that "the significant element in determining the absence of constitutional privilege was the fact that the records in question had been validly required to be kept to enable the Commission 'properly to perform its duty to enforce the law.'" *Id.* (quoting *Baltimore*, 221 U.S. at 622). Further, the Supreme Court in *Grosso v. United States* interpreted the *Shapiro* opinion and noted that the required records doctrine included three premises:

> [F]irst, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed "public aspects" which render them at least analogous to public documents.

Grosso, 390 U.S. 62, 68 (1968).

[97]For example, in *Grosso v. United States* the Court found that the principal interest of the United States when promulgating the wagering registration statute was not to collect revenue, but to prosecute gamblers. *Grosso*, 390 U.S. at 68. For a further discussion of the Court's decision in *Grosso*, see *infra* notes 114-39 and accompanying text.

[98]*Shapiro*, 335 U.S. at 18-19 n.24 (quoting Wilson v. United States, 221 U.S. 361, 381 (1911)).

[99]*See* Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965); Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968). *But see* California v. Byers, 402 U.S. 424 (1971). For a further discussion of *Albertson, Marchetti, Grosso, Haynes*, and *Byers*, see *infra* notes 100-214 (discussing these cases in terms of the limitations to the required records doctrine including an analysis of immunity provisions).

C. LIMITATIONS ON THE REQUIRED RECORDS DOCTRINE: REGULATORY ACTS MAY VIOLATE THE FIFTH AMENDMENT PRIVILEGE

In 1965, the Court revisited the required records doctrine in *Albertson v. Subversive Activities Control Board*.[100] In *Albertson*, Petitioners, members of the Communist Party, failed to register as required by the Subversive Activities Control Act.[101] Petitioners contended that the Government could not compel them to register without violating their Fifth Amendment privilege against self-incrimination.[102]

The Government initially argued that Petitioners' claim of privilege was premature.[103] Justice Brennan, however, writing the opinion of the Court, rejected this argument, finding that Petitioners risked substantial incrimination by complying with the registration requirements of Act.[104] Justice Brennan determined that the risk of incrimination was real because the regulation required Petitioners to admit they were members of the Communist Party.[105] The Justice explained that the admission of membership potentially could be used in a criminal prosecution under the Smith Act[106] or under the Subversive Activities Control Act.[107]

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[100]382 U.S. 70 (1965).

[101]*Id.* at 71 (citing 50 U.S.C. § 786(d)(4) (1964)). The Subversive Activities Control Act provided that all Communist organizations must register with the Government and include a list of names and addresses of each member of the organization. *Id.* at 72. The Act also authorized the Attorney General to petition the Subversive Activities Control Board for an order mandating that a Communist organization comply with the Act. *Id.*

[102]*Id.* at 73-74.

[103]The Government conceded that the court of appeals' determination that Petitioners' claim was not ripe for adjudication was in error in so far as Petitioners' claim involved the Government's power to order the act of registration. *Id.* at 76. The Government contended, however, that the claim was premature as to any particular inquiry present on the registration forms. *Id.* The Government hypothesized that the forms could be altered by the Attorney General or accepted without being totally complete. *Id.*

[104]*Id.* at 77-78.

[105]*Id.*

[106]*Id.* at 77 (citing 18 U.S.C. §2385 (1964)). The Smith Act criminalizes advocating the overthrow of the Government. Such conduct warrants a fine of not more than $20,000 and/or imprisonment of not more than 20 years. 18 U.S.C. §2385 (1988).

Additionally, the Court opined that merely being a member of the Communist Party created a substantial risk of incrimination sufficient to support a claim of privilege.[108]

Justice Brennan also distinguished the case at bar from the Court's opinion in *United States v. Sullivan*.[109] In *Sullivan*, the Court denied Petitioner's claim of privilege and ordered him to file his tax return because the filing regulation was neutral and directed at the entire population.[110] Justice Brennan determined that, unlike the requirement of filing a tax return in *Sullivan*, the registration requirement in the Subversive Activities Control Act was aimed at a "highly selective group inherently suspect of criminal activities."[111] In addition, the Justice explained that filing a tax return was essentially regulatory, while Petitioners' claim in *Albertson* was asserted in an area "permeated with criminal statutes," so that a response to any of the registration questions would likely involve the admission of a crime.[112]

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[107]Albertson v. Subversive Activities Control Board, 382 U.S. 70, 77 (1965) (citing 50 U.S.C. § 783(a) (1964)). Similarly, before 1993, the Subversive Activities Control Act prohibited conspiracy or the attempt to establish a totalitarian government and provided a penalty of not more than 10 years in prison and/or a $10,000 fine for such conduct. 50 U.S.C. § 783(a), (d) (1988). The 1993 amendments, however, repealed § 783(a). 50 U.S.C. § 783 (Supp. V. 1993).

[108]*Albertson*, 382 U.S. at 77 (citing Blau v. United States, 340 U.S. 159 (1950); Blau v. United States, 340 U.S. 332 (1951); Brunner v. United States, 343 U.S. 918 (1952); Quinn v. United States, 349 U.S. 155 (1955)). Although these cases involved compelled oral testimony, the Court did not view compelled documents distinguishable for constitutional purposes. *Id.* at 78. *See also* Boyd v. United States, 116 U.S. 616 (1886) (holding that if the Government compels a person to produce incriminating documents, the effect is equivalent to compelling a person to be a witness against himself).

[109]247 U.S. 259 (1927).

[110]*Id.* at 263. Petitioner, in *Sullivan*, had abstained from filing a tax return because most of his income was derived from violating the National Prohibition Act and he feared prosecution. *Id.* at 262-63. Finding that even though Petitioner's profits were illegally made they were subject to the income tax, the Court held that the privilege of self-incrimination could not be used to justify the absence of filing a return. *Id.* at 263. The Court refused to extend the privilege to filing a tax return when most of the return's questions would not have incriminated the taxpayer. *Id.*

[111]*Albertson*, 382 U.S at 79.

[112]*Id.*

The Supreme Court again reviewed the required records doctrine in *Marchetti v. United States*[113] and its companion case *Grosso v. United States*.[114] Petitioners in these cases alleged that statutory requirements, requiring individuals accepting wagers to register and pay an occupational tax, violated their privilege against self-incrimination.[115] Determining that wagering was clearly an area permeated with criminal statutes,[116] the Court held that a real and substantial risk of incrimination existed if Petitioners were to pay the occupational tax and register as the Act required.[117]

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[113]390 U.S. 39 (1968).

[114]390 U.S. 62 (1968).

[115]*Marchetti*, 390 U.S. at 40 (citing 26 U.S.C. § 4411, 4412 (1964)). 26 U.S.C. § 4401 was a federal statute created to tax gamblers. Specifically, section 4411 required those in the business of accepting wagers, and those receiving wagers on their behalf, to pay an occupational tax of $50 per year. *Id.* at 42. Section 4412 required those who paid the occupational tax to register with their local internal revenue service. *Id.* The registration form would indicate the taxpayer's residence and business address, the fact that they were in the business of accepting wagers, and the names and addresses of their agents and employees. *Id.* Moreover, the registrant was required to post a stamp "conspicuously" in their place of business denoting that they had paid the occupational tax. *Id.* Furthermore, the gamblers were required to keep daily records and had to allow inspection of their books. *Id.* Finally, the statute provided that the internal revenue service must provide certified copies of the registration list to any prosecuting officer upon request and that payment of the occupational tax did not exempt the gambler from being held liable under any anti-wagering statute. *Id.* at 43.

[116]*Id.* at 46. The Court noted that Connecticut, the state in which Petitioner conducted his wagering business, expressly outlawed gambling and wagering. *Id.* (citing CONN. GEN. STAT. §53-295 (1958)). Moreover, the Court noted that almost every state in the union had statutes which punished either gambling or wagering or both. *Id.* at 46 n.5-6.

[117]*Id.* at 48.

In so holding, the Court overruled both *United States v. Kahringer*[118] and *Lewis v. United States*,[119] which previously held that individuals in the business of wagering were not entitled to assert the Fifth Amendment privilege in response to the registration requirement present in the same federal wagering statute.[120] In *Kahringer*, the Court held that an occupational tax and registration requirement, imposed upon individuals involved in the business of wagering, did not violate Petitioners' privilege against self-incrimination.[121] Relying primarily on *United States v. Sullivan*,[122] the Court in *Kahringer* found that because the privilege did not exist regarding filing income tax forms, it could not exist with regard to paying an occupational tax.[123] Moreover, the Court determined that the privilege against self-incrimination only applied to past acts.[124] The *Kahringer* Court found that the registration requirement did not compel the wagerer to confess to acts already committed, but merely informed the Internal Revenue Service of future wagering and, therefore, held that the privilege did not apply.[125] Likewise, in *Lewis*, the Court reasoned that even if the required information would incriminate the taxpayer, the taxpayer can elect to cease gambling, thereby making disclosure of such information

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[118]345 U.S. 22 (1953). In *Kahringer*, Respondent was indicted for being in the wagering business and failing to register and pay the occupational tax set forth by the Internal Revenue Service. *Id.* at 25. Respondent argued that the registration requirement and the tax were unconstitutional because they violated both the Fifth Amendment privilege against self-incrimination and the Tenth Amendment, which reserves police powers to the states. *Id.* at 24.

[119]348 U.S. 419 (1955). In *Lewis*, a municipal court in the District of Columbia had charged Petitioner with the failure to pay the federal gambling occupational tax. *Id.* at 419. The Court deferred to the *Kahringer* decision when determining whether the payment of the occupational tax violated Petitioner's Fifth Amendment privilege. *Id.* at 422.

[120]*Marchetti*, 390 U.S. at 54.

[121]*Kahringer*, 345 U.S. at 31-32.

[122]247 U.S. 259 (1927). For a detailed discussion of *Sullivan*, see *supra* notes 109-10 and accompanying text.

[123]*Kahringer*, 345 U.S. at 32.

[124]*Id.*

[125]*Id.* at 32-33.

unnecessary.[126] In so finding, the Court further concluded that the taxpayer had "no constitutional right to gamble."[127]

Overturning both the *Kahringer* and *Lewis* decisions, Justice Harlan determined that the privilege against self-incrimination was created to protect both the guilty and the innocent.[128] The Justice further espoused that if the privilege were to be abrogated simply because there was no constitutional protection of gambling, then the privilege would most likely be destroyed for all criminals.[129] Additionally, Justice Harlan found that the Court's limitation of the privilege in *Kahringer* and *Lewis* to past acts was unwarranted.[130] Justice Harlan noted that these cases had created a rigid chronological distinction in order to prevent the use of the privilege for prospective acts.[131] The Justice, however, opined that the central question was not whether the admission of guilt came before the actual commission of the act, but whether the claimant's risk of incrimination was real and substantial.[132]

Finally, Justice Harlan considered whether the required records doctrine espoused in *Shapiro*[133] was applicable to Petitioners' situation.[134] Interpreting *Shapiro*, the Justice noted that the Court had been primarily concerned with three issues: (1) whether the records were customarily kept;

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[126]Lewis v. United States, 348 U.S. 419, 423 (1955).

[127]*Id.*

[128]*Marchetti*, 390 U.S. at 51.

[129]*Id.*

[130]*Id.* at 53.

[131]*See* United States v. Kahringer, 345 U.S. 22, 32-33 (1953); Lewis v. United States, 348 U.S. 419, 422 (1955). Specifically, the *Kahringer* Court reasoned that Respondent was not forced to admit to crimes by complying with the registration requirement. *Kahringer*, 345 U.S. at 32. Rather, the Court posited that Respondent was merely required to register under the wagering tax statute in order to conduct his business in the future. *Id.* at 32-33. The Court, in *Lewis*, summarily affirmed the *Kahringer* Court's reasoning. *Lewis*, 348 U.S. at 422.

[132]*Marchetti*, 390 U.S. at 53.

[133]See *supra* notes 86-99 and accompanying text for an in-depth discussion of the required records doctrine.

[134]*Marchetti*, 390 U.S. at 55.

(2) whether the records had a public aspect; and (3) whether the area of regulation to which the doctrine applied was basically non-criminal.[135] In response to the first issue, Justice Harlan determined that Petitioners in *Marchetti* and *Grosso* were required to provide information basically unrelated to records that customarily would have been kept.[136] Moreover, Justice Harlan stated that the Government's request for desired information did not cause this information to become a public record.[137] Finally, the Court found that unlike the regulatory act in *Shapiro*, which was directed at the public at large, the tax statute in *Marchetti* and *Grosso* was directed at a "highly selective group inherently suspect of criminal activity."[138] Justice Harlan, therefore, held that the required records doctrine did not apply to Petitioners.[139]

Although the Court was willing to extend the privilege against self-incrimination to individuals involved in gambling, those involved in "hit and run" accidents were not as fortunate. In *California v. Byers*,[140] Chief Justice Burger held that the municipal ordinance, which required a driver involved in an automobile accident to stop and provide his name and address

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[135]*Id.* at 57.

[136]*Id.* For example, the wagering statute required individuals in the business of wagering to provide the names and addresses of their agents and employees when registering with the IRS, and to post a stamp conspicuously noting the payment of the occupational tax in their place of business. *Id.* at 42-44. Presumably, Justice Harlan posited that these registration requirements did not amount to records that the individual would normally keep in his place of business.

[137]*Id.* The Court reasoned that if such a request necessarily made the information public, the Fifth Amendment privilege would be entirely abrogated. *Id.*

[138]*Id.*

[139]*Id.*

[140]402 U.S. 424 (1971). Chief Justice Burger authored the plurality opinion in which Justice Stewart, Justice White, and Justice Blackmun joined. *Id.* at 425 (plurality). Justice Harlan wrote a separate concurring opinion. *Id.* at 434 (Harlan, J., concurring in judgment). Justice Black wrote a dissenting opinion in which Justice Douglas and Justice Brennan joined. *Id.* at 459 (Black, J., dissenting). Justice Brennan also wrote a dissenting opinion in which Justice Douglas and Justice Marshall joined. *Id.* at 464 (Brennan, J., dissenting).

at the scene, did not violate the privilege against self-incrimination because drivers were not a group inherently suspect of criminal activity.[141]

Writing for the plurality, Chief Justice Burger initially posited a balancing of individual rights with the public's need for information.[142] The Chief Justice proffered that society puts certain burdens on its citizens in order for the social contract to function.[143] Specifically, the Justice noted that whenever a court must decide between compelled disclosure and protecting the individual from self-incrimination, it must necessarily balance the State's need for efficient government with the individual's constitutional protection provided by the Fifth Amendment.[144] Explaining that certain information, such as filing a tax return or reporting sales of securities on the public market, is required even though such acts may entail potential

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[141]*Id.* at 431 (plurality). In *Byers*, Respondent was charged with violating California's "hit and run" statute. *Id.* at 425 (plurality) (citing CAL. VEH. CODE §20002(a)(1) (West Supp. 1971)). The statute provided in pertinent part:

> 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 . . . locate 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.

Id. If convicted, Respondent could have served up to six months in prison and/or pay a $500 fine. *Id.* at 426 (plurality). Respondent claimed that the statute violated his right to the privilege against self-incrimination, because compliance with the statute would lead to criminal motor vehicle penalties. *Id.* Although agreeing with Respondent's argument, the California Supreme Court upheld the statute by judicially creating a use restriction. *Id.* at 427 (plurality). This use restriction prohibited State authorities from using the information obtained through the citizen's compliance with the statute in a subsequent criminal prosecution. *See id.* at 435 (Harlan, J., concurring). Although Respondent was not punished for his failure to comply with the code, future violators, because of the use restriction, would be prosecuted as the use restriction destroyed any risk of self-incrimination. *Id.* at 427 n.3 (plurality). The United States Supreme Court granted *certiorari* to determine the validity of the California Supreme Court's decision. *Id.* at 427.

[142]*Id.* at 427.

[143]*Id.* For example, Jean-Jacques Rousseau wrote that by obeying the social contract, "man loses . . . his natural liberty and absolute right to anything that tempts him and that he can take; what he gains by the social contract is civil liberty and the legal right of property in what he possesses." JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 65 (Maurice Cranston trans., 1968).

[144]*Byers*, 402 U.S. at 427.

prosecution,[145] the Chief Justice determined that only a *substantial* risk of incrimination as a result of compliance with a regulatory act would violate the Fifth Amendment.[146]

Distinguishing Respondent's situation in *Byers* from those present in *Albertson*, *Marchetti*, and *Grosso*, Chief Justice Burger concluded that Respondent's disclosure of the automobile accident did not rise to the level of incrimination to which the communists and gamblers were subjected.[147] Comparing the California Vehicle Code with the tax statute in *Sullivan*, the Chief Justice determined that the vehicle code was also neutral on its face and aimed at the public at large.[148] Finally, Chief Justice Burger opined that even though some criminal offenses existed within the California Code, the Code was essentially regulatory in nature because very few accidents resulted in a criminal prosecution.[149]

Justice Harlan, in a concurring opinion,[150] opined that the Court must look not to the public at large, but rather to the individual asserting the privilege in order to determine whether there was a substantial risk of incrimination.[151] Justice Harlan determined that Respondent had a substantial risk of incrimination if he gave his name and address as the vehicle code required,[152] but was dissuaded by the inefficiency he foresaw if governmental authorities relied primarily on use restrictions to gain

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[145]*Id.* at 427-28 (plurality).

[146]*Id.* (emphasis added).

[147]*Id.* at 431 (plurality).

[148]*Id.* at 430-31 (plurality). The Court noted that the statute was neutral because it did not regulate individuals only involved in accidents but all drivers of automobiles. *Id.*

[149]*Id.* at 431 (plurality).

[150]*Id.* at 434 (Harlan, J., concurring).

[151]*Id.* at 437 (Harlan, J., concurring) (citing Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968)). *See supra* notes 113-39 (discussing *Marchetti* and *Grosso*, which held that individuals involved in the business of wagering had a substantial risk of incrimination by complying with the registration requirement set forth in the federal wagering statute).

[152]*Id.* at 439 (Harlan, J., concurring).

necessary information.[153] The Justice reasoned that if the privilege against self-incrimination was extended to all self-reporting regulations, government's capacity to respond to societal concerns would be greatly inhibited.[154] Consequently, Justice Harlan opined that even though

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[153]*Id.* at 443, 450-51 (Harlan, J., concurring). Justice Harlan explained that the California Supreme Court's adoption of a use restriction would render the State incapable of prosecuting a large number of automobile accident cases where illegal driving was involved. *Id.* at 443. (Harlan, J., concurring). The California Supreme Court held:

> Imposing use restrictions in the present case merely involves this court in making a judgment, based on an assessment of probable legislative intent, that the Legislature would prefer to have the provisions of section 20002 of the Vehicle Code upheld even in the cases involving possible criminal misconduct at the cost of some burden on prosecuting authorities in criminal cases arising out of or related to an accident covered by that section rather than avoid that burden at the cost of significantly frustrating the important noncriminal objective of the legislation.

Id. at 445 (Harlan, J., concurring) (quoting Byers v. Justice Court, 458 P.2d 465, 476-77 (1969)).

As for the privilege against self-incrimination compelling state and federal authorities to rely on a pure accusatorial system, the Justice cautioned a strict construction of the privilege. *Id.* at 448 (Harlan, J., concurring). Although Justice Harlan recognized that the Court had been uncertain in its attempt to demonstrate the purpose of the privilege, *id.* at 450 (Harlan, J., concurring) (citing Tehan v. Shott, 382 U.S. 406, 413-16 (1966); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); Miranda v. Arizona, 384 U.S. 436, 460 (1966); Boyd v. United States 116 U.S. 616 (1886)), the Justice also commented on two basic themes that the Court had proposed. First, Justice Harlan explained that "the privilege is designed to secure among governmental officials the sort of respect for the integrity and worth of the individual citizen thought to flow from the commitment to an 'accusatorial' as opposed to an 'inquisitorial' criminal process." *Id.* Second, the Justice stated that "the privilege is part of the 'concern for individual privacy that has always been a fundamental tenet of the American value structure.'" *Id.* (citing McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 210 (1967)). The Justice concluded, however, that these purposes of the privilege do not necessitate a sacrifice of governmental efficiency. *Id.* at 448 (Harlan, J., concurring).

[154]*Id.* at 451-52 (Harlan, J., concurring). Noting that technological progress has increased governmental need for information from individual citizens, Justice Harlan reasoned:

> If the individual's ability in any particular case to perceive a genuine risk of self-incrimination is to be a sufficient condition for imposition of use restrictions on the government in all self-reporting contexts, then the privilege threatens the capacity of the government to respond to societal needs with a realistic mixture of criminal sanctions and other regulatory devices.

Respondent risked incrimination, governmental efficiency mandated that the privilege not be extended to those who violate motor vehicle codes.[155]

Four justices dissented from the plurality opinion.[156] Justice Black, joined by Justices Douglas and Brennan, posited that Respondent did, in fact, have a substantial risk of incrimination.[157] The Justice further stated that it was clear that the motor vehicle code was permeated with criminal violations.[158] In addition, the Justice found that the regulations focused on a suspect group because the Code specifically dealt with automobile drivers who had been in accidents involving property damage.[159] Finally, Justice Black distinguished *United States v. Sullivan* from *California v. Byers*, determining that, in *Sullivan*, the taxpayer, even though he had to file the tax return, could still assert the privilege when refusing to answer some of the tax return's questions, while, in *Byers*, Respondent had no such

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Id. at 452 (Harlan, J., concurring).

[155]*Id.* at 452.

[156]Justice Black authored the first dissenting opinion, joined by Justice Douglas and Justice Brennan. *Id.* at 459 (Black, J., dissenting). Justice Brennan wrote a subsequent dissenting opinion, joined by Justice Marshall and Justice Douglas. *Id.* at 463 (Brennan, J., dissenting).

[157]*Id.* at 459-61 (Black, J., dissenting). Specifically, Justice Black noted that:

> A California driver involved in an accident causing property damage is in fact very likely to have violated one of the hundreds of state criminal statutes regulating automobiles which constitute most of two volumes of the California Code. More important, the particular facts of this case demonstrate that Byers . . . has now been charged not only with failing to give his name but also with passing without maintaining a safe distance as prohibited by California Vehicle Code § 21750 . . . . Thus, if Byers had stopped and provided his name and address as the driver involved in the accident, the State could have used that information to establish an essential element of the crime under § 21750. It seems absolutely fanciful to suggest that he would not have faced a "substantial risk of self-incrimination," by complying with the disclosure statute.

Id. at 460-61 (Black, J., dissenting) (footnote omitted).

[158]*Id.* at 461 (Black, J., dissenting).

[159]*Id.*

recourse.[160] Accordingly, the Justice concluded that the Court in *Sullivan* merely held that the taxpayer could not use the Self- Incrimination Clause to excuse his failure to file a tax return, and thus, the case did not extinguish the privilege.[161]

Justice Brennan, author of the *Albertson* decision, also dissented from the plurality opinion in *California v. Byers*.[162] First, the Justice criticized the plurality's finding that Respondent did not have a substantial risk of incrimination.[163] Second, Justice Brennan asserted that the plurality misconstrued the language found in several of the Court's previous opinions by making membership in a "highly selective group inherently suspect of criminal activity" indispensable to a decision to extend the privilege.[164] Justice Brennan pointed out that in many cases the privilege was extended to non-criminal groups such as bankrupts, businessmen, policemen, and lawyers.[165] The Justice thus posited that the real test was whether there would be a substantial hazard of self-incrimination if the individual were to provide the required information.[166] Accordingly, Justice Brennan determined that the individual's membership in a group suspect of criminal activity was only relevant to the question of whether a substantial risk of incrimination existed.[167]

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[160]*Id.* at 462 (Black, J., dissenting). Justice Black noted that Respondent in *Byers* did not have the option to refuse to answer certain questions posed by the State. *Id.* Rather, the Justice posited that the information he was required to disclose would greatly enhance the possibility that he would be convicted of a crime. *Id.*

[161]*Id.* at 461-62 (Black, J., dissenting).

[162]*Id.* at 463 (Brennan, J., dissenting).

[163]*Id.* (noting the plurality's contrary conclusion to the three state court opinions below). In fact, five of the nine Justices determined that Respondent had a substantial risk of incrimination if he complied with the statute. *See id.* at 439 (Harlan, J., concurring); *id.* at 459-61 (Black, J., dissenting); *id.* at 463 (Brennan, J., dissenting). *See also supra* note 140 (setting forth a breakdown of the Court's decision).

[164]California v. Byers, 402 U.S. 424, 469 (1971) (Brennan, J. dissenting). *See also supra* notes 100-39 (discussing the Court's opinions in *Albertson, Marchetti*, and *Grosso*).

[165]*Byers*, 402 U.S at 469 (Brennan, J., dissenting) (citing McCarthy v. Arndstein, 266 U.S. 34 (1924); Counselman v. Hitchcock, 142 U.S. 547 (1892); Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klein, 385 U.S. 511 (1967)).

[166]*Id.* at 470 (Brennan, J., dissenting).

[167]*Id.*

D. IMMUNITY PROVISIONS AND USE RESTRICTIONS MAY SAVE AN ACT WHICH VIOLATES THE FIFTH AMENDMENT PRIVILEGE

Immunity provisions and use restrictions provide an effective means of balancing an individual's right to be free from self-incrimination and government's need to provide efficient and effective law enforcement.[168] Generally, a statutory grant of use immunity allows governmental entities to use the disclosed information, but grants the individual who supplied the information immunity from prosecution that may result from the disclosure.[169] Such an immunity provision, however, must fully protect the accused from all criminal prosecution to save a regulatory act that aids criminal enforcement but does not afford the accused the Fifth Amendment privilege.[170] Although the privilege is not extended in this situation, the grant of immunity will effectively provide the accused similar protections

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[168]*See* Gregory Thomas Stremers, *The Self-Incrimination Clause and the Threat of Foreign Prosecution in Bankruptcy Proceedings — A Comment on* Moses v. Allard, 70 U. DET. MERCY L. REV. 847 (1993) (advocating the use of immunity in foreign prosecution of bankrupts in order to protect an individual's right against self-incrimination, yet, allow efficiency in litigation); Bernard Penner, *Immunity and Oil Spill Reporting Statutes*, 3 U. BALT. J. ENVTL. L. 34 (1993) (noting the conflict between government's need for information concerning an oil spill and the individual's right to be free from self-incrimination and how immunity statutes strike a balance between these two competing principles).

[169]There are basically two types of immunity: use immunity and transactional immunity. Although courts and commentators sometimes refer to a third type of immunity, namely derivative use immunity, this classifications is often considered to be the same as use immunity. *See* 1 MCCORMICK ON EVIDENCE §143, at 544 (4th ed. 1992) (John William Strong, ed.) ("Increased reliance upon 'use and derivative use' immunity has resulted in considerable concern regarding the scope of the 'taint' of the immunized testimony."). Use immunity is a governmental grant of immunity that prohibits government from using compelled testimony or evidence in a criminal prosecution. Kastigar v. United States, 406 U.S. 441 (1972). Transactional immunity, however, completely protects the accused from prosecution as it relates to the immunized testimony. *Id.* Additionally, the Court, in *Kastigar v. United States*, discussed a limitation on use immunity, namely, the independent source doctrine. In *Kastigar*, the Court held that a use and immunity provision did not prohibit the Government from admitting evidence in a criminal trial that was obtained from a legitimate, independent source. *Id.* at 461-62. The Court, however, found that the burden rested on the State to prove that the evidence was gained from a independent source when a defendant has testified pursuant to a grant of immunity. *Id.*

[170]*See* Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1892); United States v. Freed, 401 U.S. 601, 606 (1971).

against self-incrimination usually allowed in criminal prosecutions.[171] Additionally, a use restriction, either judicially or statutorily, prohibits prosecuting authorities from using certain evidence against the accused when the information is gained through that individual's compliance with a reporting statute or regulation.[172]

United States v. Freed[173] and the evolution of the National Firearms Act ("Firearms Act")[174] provide excellent examples of how an immunity provision can save a regulatory act that is an aid to criminal prosecution. In *Freed*, the Supreme Court determined that the Firearms Act, as amended, was constitutional because it included an immunity provision that shielded the possessor of an unregistered firearm from criminal prosecution upon registration of the firearm.[175] Prior to the inclusion of an immunity provision in the Firearms Act, however, the Court held that requiring a possessor of a firearm to register without benefit of the Self-Incrimination Clause violated the Fifth Amendment privilege.[176] Accordingly, without an effective use restriction or immunity provision, a regulatory act that creates criminal culpability without benefit of the Fifth Amendment privilege can be held unconstitutional. Moreover, the Supreme Court has held that it will not unilaterally create a use restriction to save a violative act, reasoning that such a remedy is better left to the legislature.[177]

For example, in *Haynes v. United States*, the Supreme Court held that § 5851[178] and § 5841[179] of the Firearms Act violated the Self-

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[171]MCCORMICK ON EVIDENCE, *supra* note 169, at 538.

[172]For a further discussion of use restrictions, see *supra* notes 153-55 and accompanying text.

[173]401 U.S. 601 (1971).

[174]26 U.S.C. § 5800 (1988).

[175]*Freed*, 401 U.S. at 606. For an in-depth discussion of *Freed*, see *infra* notes 186-93 and accompanying text.

[176]Haynes v. United States, 390 U.S. 85 (1967).

[177]*See, e.g.*, Haynes v. United States, 390 U.S. 85, 100-01 (1967); Marchetti v. United States, 390 U.S. 39, 58-60 (1968); Grosso v. United States, 390 U.S. 62, 69 (1968).

[178]Section 5851 of the National Firearms Act provided:

> It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of section 5811, 5812(b), 5813, 5814,

Incrimination Clause because § 5841 of the Act required every possessor of a firearm to register, and § 5851 authorized the use of the registration information in a criminal prosecution.[180] The Act further provided for criminal penalties in case of a violation.[181]

5844 or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

Haynes, 390 U.S. at 87 n.3 (quoting 26 U.S.C. § 5851 (1964)).

[179]Section 5841 of the Act provided that:

Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation , or making as the case may be, and if the provisions which applied thereto were complied with.

Id. at 89 n.5 (quoting 26 U.S.C. § 5841 (1964)).

[180]*Id.* at 90. Petitioner in *Haynes* violated the National Firearms Act because he knowingly possessed a firearm that was not registered in accordance with § 5841 of the Act. *Id.* at 86. At trial, Petitioner claimed that § 5851 violated his privilege against self-incrimination, and therefore requested that the judge dismiss his case. *Id.* The trial court, however, denied Petitioner's motion, and he was subsequently convicted. *Id.* at 87. The appellate court affirmed Petitioner's conviction, and the Supreme Court, granting *certiorari*, reversed. *Id.*

[181]*Id.* at 89 (citing 26 U.S.C. § 5861 (1964)). Before determining the self-incrimination issue, however, the Court first considered whether a violation under § 5851 was distinguishable from a violation under § 5841 for failure to register a firearm. *Id.* at 90. The United States argued that the two sections had different purposes because § 5851 intended to punish the acceptance of an unregistered firearm, while § 5841 only punished a present possessor of a firearm who failed to register it. *Id.* at 91. Justice Harlan, however, found that Congress clearly intended to incorporate the registration requirement present in § 5841 into the registration clause present in § 5851. *Id.* at 94. The Court determined that the sections were indistinguishable, and thus, both were subject to "any constitutional deficiencies arising under the Fifth Amendment from the obligation to register." *Id.* at 95.

To avoid violating the Fifth Amendment privilege, the United States argued that the Firearms Act should be interpreted as containing a use restriction prohibiting state and federal authorities from using any incriminating evidence obtained.[182] Justice Harlan, however, following the reasoning set forth in both *Marchetti* and *Grosso*,[183] declined to create a use restriction.[184] The Justice concluded that such a course of action was better left to the legislature.[185]

As noted above, Congress, following the *Haynes* decision, amended the Firearms Act to include, among other changes, an immunity provision.[186]

Subsequently, the Court determined that because the registration requirement focused upon those individuals who had acquired a firearm illegally, i.e., the firearm was not manufactured by them or acquired by transfer or importation, it immediately threatened those individuals with criminal prosecution. *Id.* at 96 (citing Albertson v. Subversive Activities Control Board., 382 U.S. 70, 79 (1965)). The Court found that because these individuals were "inherently suspect of criminal activity," the risk of incrimination was real and substantial. *Id.* Moreover, the Court concluded that because the area of the law was permeated with criminal statutes, those individuals subject to the Act were entitled to assert the privilege against self-incrimination as a complete defense to a violation under § 5841 or § 5851. *Id.* at 97-99.

[182]*Id.* at 99.

[183]*See* Marchetti v. United States, 390 U.S. 39, 58-60 (1968); Grosso v. United States, 390 U.S. 62, 69 (1968). In *Marchetti* and *Grosso*, the Court refused to judicially prescribe a use restriction to save a wagering statute that violated the privilege against self-incrimination. *Marchetti*, 390 U.S. at 58-60; *Grosso*, 390 U.S. at 69. The Court in these cases opined that such a judicial remedy would hamper federal and state enforcement procedures and would be more appropriately left to the Congress. *Marchetti*, 390 U.S. at 58-60; *Grosso*, 390 U.S. at 69.

[184]Haynes v. United States, 390 U.S. 85, 100 (1967).

[185]*Id.* at 100-01.

[186]United States v. Freed, 401 U.S. 601, 602 (1971). Unlike the prior Act, requiring all possessors of firearms to register, the amendments to the Firearms Act only required the transferor to provide the required information. *Id.* at 603-04 (citing 26 U.S.C. § 5812(a) (Supp. V 1964)). Section 5812(a) provided:

> A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary or his delegate a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary or his delegate; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the

The new immunity provision, however, was challenged in *United States v. Freed*.[187]

Upholding the amended Act, Justice Douglas, writing the opinion of the Court, reasoned that, unlike the prior Act, the amendments to the Firearms Act did not require the transferee to register the newly purchased firearm, despite requiring the transferor to fill out a transfer application which included paying a transfer tax and registering the firearm.[188] In addition, Justice Douglas recognized that although the amendments to the Firearms Act required the transferee to supply fingerprints and a photograph to facilitate the transfer, this information only made the transferee a lawful possessor of the firearm and, thus, was not incriminating.[189] As such, the Justice

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> Secretary or his delegate may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; and (6) the application form shows that the Secretary or his delegate has approved the transfer and registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.

Id. at 604. Further, section 5841(b) of the amended Act provided that, "[e]ach manufacturer, importer and maker shall register each firearm he manufactures, imports or makes. Each firearm shall be registered to the transferee by the transferor." *Id.* (citing 26 U.S.C. § 5841(b) (Supp. V 1964)). The law, however, still provided that it was unlawful for anyone to possess or receive an unregistered firearm. *Id.* at 604 (citing 26 U.S.C. § 5861(d) (Supp. V 1964)). Furthermore, in contrast to the prior Act which provided for the sharing of disclosed information with law enforcement authorities, the amendments to the Firearms Act prohibited such disclosure. *Id.* In addition, the amendments provided that no evidence or information furnished under the Act could be used as evidence against the registrant in a criminal proceeding with respect to either a prior or concurrent violation of the law. *Id.* at 604-05.

[187]*Id.* at 605. In *Freed*, the defendants were indicted for possession of unregistered hand grenades. *Id.* at 604-05. The district court dismissed the indictment holding that the National Firearms Act even with the immunity provisions violated the defendants' privilege against self-incrimination. *Id.* On direct appeal, the Supreme Court reversed. *Id.* at 605.

[188]*Id.* at 605 (citing 26 U.S.C. § 5811 (1964)).

[189]*Id.* at 606.

opined that any risk of possible future incrimination was an imaginary hazard and, therefore, not a substantial risk.[190]

Justice Douglas believed the risk of incrimination to be trivial for two reasons. First, the Justice stated that the supplied information, as a matter of law, could not be used as evidence in a criminal proceeding for a prior or concurrent offense.[191] Second, the Justice determined that the information would not be disclosed to law enforcement authorities as a matter of practice, apparently believing the Government's representation at trial.[192] Thus, Justice Douglas declared that the amendments to the Firearms Act placed a transferee, who supplied the required data, in the same position as he would have been in had he not complied with the statute by claiming the privilege against self-incrimination.[193] The Justice held that the immunity provision satisfied the requirements respecting self-incrimination, and, accordingly, that the amended Act did not violate the Constitution.[194]

As exemplified in *United States v. Freed*, immunity provisions must fully protect an individual from self-incrimination to satisfy the requirements of the Self-Incrimination Clause. For example, in *Albertson*, Justice Brennan determined that the immunity provision contained in the Subversive Activities Control Act did not fully protect Petitioners from criminal prosecution, and thus, the registration requirement violated the Self-incrimination Clause.[195]

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[190]*Id.*

[191]*Id.*

[192]*Id.* at 604-06. Specifically, the Solicitor General had declared that as a matter of practice no information filed under the Act would be disclosed to law enforcement authorities. *Id.* at 604

[193]*Id.* at 606.

[194]*Id.*

[195]Albertson v. Subversive Activities Control Board, 382 U.S. 70, 80 (1965) (citing Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1892)). Section 4(f) of the Subversive Activities Control Act, at the time of *Albertson*, provided:

> Neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of subsection (a) [the organization registration requirement] or subsection (c) [the member list requirement] of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal

Justice Brennan concluded that the protection was incomplete because the subject regulation did not preclude using the members' names and addresses as evidence or as an investigatory lead.[196] Therefore, the Justice held that the registration requirement was inconsistent with the Fifth Amendment, and Petitioner did not have to supply the Government with the requested information.[197]

Conversely, regulatory acts that validly require the maintenance of certain business records can compel the production of such documents without a grant of statutory immunity. Unlike regulatory acts that aid in criminal prosecution, such as the statutes examined in *Haynes*, *Marchetti*, and *Grosso*, valid record keeping statutes do not implicate the protections of the Fifth Amendment privilege. Therefore, immunity provisions contained within such acts are inapplicable when such records are subpoenaed. The Supreme Court first dealt with this issue in *Heike v. United States*.[198]

In *Heike,* Petitioner was subpoenaed to produce certain business records as potential evidence in a Sherman Antitrust Act prosecution.[199] Petitioner produced the records which were used as evidence in the subsequent criminal prosecution where he was ultimately convicted.[200] The Sherman Act, however, contained an immunity provision prohibiting criminal prosecution based on evidence that was produced in an antitrust suit.[201] Petitioner, therefore, argued that once he presented evidence during his antitrust suit he

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statute.

Id. (citing 50 U.S.C. § 783(f) (1964)).

[196]*Id.*

[197]*Id.* at 81.

[198]227 U.S. 131 (1913).

[199]*Id.* at 139-140.

[200]*Id.* at 140. Petitioner was convicted of fraudulently representing the weights of raw sugars by means of false statements. *Id.* at 139.

[201]*Id.* at 141. The immunity clause specifically provided: "[N]o person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts." *Id.*

should have been protected from all criminal prosecutions surrounding that action.[202]

Justice Holmes, writing the opinion of the Court, proffered that the purpose of the immunity provision was to make compulsory information available when it otherwise would not be due to a claim of privilege.[203] Nevertheless, the Justice determined that the immunity provision did not apply in this case.[204] Justice Holmes first noted that the Government had obtained most of its evidence, used in convicting Petitioner, from the earlier produced corporate books.[205] Recognizing that Petitioner would have been required to produce the corporate documents even without being afforded immunity, the Justice concluded that the Fifth Amendment privilege did not apply.[206] Second, Justice Holmes determined that the evidence presented in the prior antitrust action had no connection to the criminal violation for which Petitioner was ultimately convicted.[207] The Justice thus held that, under this Act, immunity would be granted only to evidence produced in criminal prosecutions concerning matters directly linked to the former testimony.[208] This determination was consistent with the Court's earlier jurisprudence that extended the privilege only when affected individuals had a substantial risk of incrimination.

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[202] *Id.*

[203] *Id.* at 142.

[204] *Id.* at 143

[205] *Id.* at 142-43. The production of the corporate books was not subject to the privilege because the custodian of such documents does not retain the privilege according to the *Wilson* doctrine. *Id.* Thus, because Petitioner would not have enjoyed the Fifth Amendment privilege, Justice Holmes' decision to deny the use of the immunity provision put Petitioner in no worse of a position. Further, Justice Holmes found that the evidence produced in the former antitrust suit had no connection to the present investigation of fraud on the revenue, and thus, the Self-Incrimination Clause was not implicated because there was no way Petitioner would be criminally prosecuted based on such evidence. *Id.* at 143-44. *See supra* notes 74-85 and accompanying text (discussing the Court's opinion in *Wilson*).

[206] *Heike*, 227 U.S. at 142-43 (citing Wilson v. United States, 221 U.S. 361, 377 (1911)).

[207] *Id.* at 143.

[208] *Id.* at 144.

The Court confronted a similar situation in *Shapiro v. United States*.[209] In *Shapiro*, Petitioner claimed that an immunity provision in the Emergency Price Control Act prohibited governmental entities from using his sales records as a means to incriminate him.[210] Affirming the *Heike* decision, which held that immunity provisions were inapplicable when dealing with non-privileged documents,[211] the *Shapiro* Court held that the immunity provision in the Emergency Price Control Act would only apply if Petitioner could make a valid claim of privilege.[212] Otherwise, the Court reasoned that the provision would be offering a "gratuity to crime."[213]

Thus, immunity provisions are limited in application even though they foster governmental efficiency and protect an individual's right to be free

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[209]*See supra* notes 86-99 and accompanying text (discussing the *Shapiro* Court's decision concerning the Self-Incrimination Clause and the required records doctrine).

[210]Shapiro v. United States, 335 U.S. 1, 6 (1948). The immunity provision in the Emergency Price Control Act, incorporating by reference the Compulsory Testimony Act of 1893, provided:

> 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.

Id. at 4 n.2. The Compulsory Testimony Act provided that:

> No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission . . . on the ground or from the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena . . . .

Id.

[211]*Id.* at 19-20 (citing Heike v. United States, 227 U.S. 131 (1913)).

[212]*Id.*

[213]*Id.* (citing *Heike*, 227 U.S. at 142).

from self-incrimination.[214] The Court will only mandate the use of immunity when a regulatory act violates the Fifth Amendment privilege, that is, when the act facilitates criminal prosecution instead of regulating compliance. In contrast, a regulatory act that validly requires that certain records be kept does not need to afford the custodian of such records immunity to remain constitutional. The custodian must produce these required documents even if the production of such documents will cause incrimination. Thus, once again, the Court upheld the governmental right to efficiently gather information at the expense of individual liberty. As will be discussed below, this trend continued in the environmental arena where the privilege against self-incrimination is not extended to individuals violating environmental statutes and the few immunity provisions, if enacted, are further limited.

IV. ENVIRONMENTAL STATUTES ARE ESSENTIALLY REGULATORY, AND THUS, THE PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT APPLY

Many environmental statutes, including the Clean Air Act, were enacted in the 1970's.[215] Most of these acts have reporting requirements that carry potential criminal penalties for violations, and federal courts have often confronted privilege and immunity issues with respect to such violations.

A pertinent challenge to the required records doctrine was brought in *Environmental Defense Fund v. Lamphier*[216] which involved a violation of the Resource Conservation and Recovery Act of 1976 ("RCRA").[217] In

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[214]*See generally* Penner, *supra* note 168 (arguing that, under California v. Byers, 402 U.S. 424 (1971), the Constitution does not automatically require the imposition of immunity provisions in a regulatory disclosure context).

[215]*See, e.g.*, Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (1988 & Supp. IV 1992).

[216]714 F.2d 331 (1983).

[217]In *Lamphier*, Respondent, charged with violating RCRA, disposed and stored hazardous waste on his farm in Culpeper County, Virginia. *Id.* at 333. Specifically, the defendant was dumping some of the waste on his land, lagooning bulk liquids, and burying the drummed waste in the ground. *Id.* Prior to the effective date of RCRA's notification requirements, the Virginia State Department of Health had learned of the defendant's activities and ordered him to cease his disposal activities. *Id.* On August 19, 1980, however, the notification requirements of RCRA went into effect, but the defendant failed to notify the Environmental Protection Agency of his actions. *Id.* at 335. Specifically, § 6930(a), the notification provision of RCRA, states in pertinent part:

Lamphier, Respondent maintained that if he were forced to comply with RCRA's permit and notification requirements, he would inevitably make incriminating disclosures.[218] The Fourth Circuit Court of Appeals, however, found Respondent's argument meritless.[219] Without discussing the federal enforcement section of RCRA and assuming that environmental statutes were purely regulatory, the circuit court reasoned that pursuant to *Shapiro*, the Government could require records to be provided under a regulatory scheme without violating the Fifth Amendment.[220] The court further determined that the Supreme Court's opinions in *Marchetti* and *Grosso* were inapplicable.[221] Reasoning that the Supreme Court, in those cases, had only determined that statutes directed at a "selective group

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> [A]ny person generating or transporting such [hazardous] substance or owning or operating a facility for treatment, storage, or disposal of such substance shall file with the Administrator . . . a notification stating the location and general description of such activity and the identified or listed hazardous waste handled by such person.

42 U.S.C. § 6930(a) (1988). Additionally, the defendant never filed for an operator's permit as required by § 6925 to treat, store, or dispose of hazardous waste. *Lamphier*, 714 F.2d at 335. Section 6925(a) mandates that the Administrator facilitate the requirement that:

> Each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section.

42 U.S.C. § 6925(a). As a result of the defendant's alleged violations, a citizens' suit was brought by the Environmental Defense Fund and the Chesapeake Bay Foundation pursuant to § 6972 of the Act. *Lamphier*, 714 F.2d at 335. These environmental organizations alleged that the defendant violated RCRA's notification and permit requirements. *Id.* The defendant was subsequently convicted and the district court ordered him to comply with the applicable regulations. *Id.*

[218]*Lamphier*, 741 F.2d at 339. Specifically, the defendant argued that the district court's order, forcing him to notify the EPA of his waste disposal activities, to apply for a permit for such activities, and forcing him to comply with interim hazardous waste facility operating procedures violated his Fifth Amendment privilege. *Id.* The defendant relied on *Marchetti v. United States* and *Grosso v. United States*. *Id.* For an in-depth discussion of these cases, see *supra* notes 113-39 and accompanying text.

[219]*Id.* at 39.

[220]*Id.*

[221]*Id.*

inherently suspect of criminal activities" were unconstitutional, the *Lamphier* Court concluded that because Respondent was not part of such a group there could be no Fifth Amendment violation.[222]

The Fourth Circuit's analysis, however, failed to accurately follow Supreme Court precedent in two ways. First, the court incorrectly determined that membership in a "selective group inherently suspect of criminal activities" was a requirement for instituting the privilege.[223] Second, the court simply assumed that all environmental statutes were purely regulatory, thereby ignoring the extensive criminal penalties present in the federal enforcement section of RCRA.

Under the circuit court's analysis, it appears that only those persons whom the court believes are involved in criminal activity are entitled to the privilege against self-incrimination. Hence, by purely focusing on membership in a "highly selective group inherently suspect of criminal activity" when determining whether the privilege is warranted, the circuit court has effectively denied the Fifth Amendment right to law-abiding citizens. Further, the application of such a "litmus test" not only abrogates a constitutional right for the majority of citizens, it also gives preferential treatment to those least worthy of, although most likely to need, the privilege. Thus, to constitutionally preserve the accused's liberty interests, courts should follow the principles set forth in Justice Brennan's dissent in *California v. Byers*.[224] Rather than focusing on an accused's membership in a suspect group, courts should analyze whether an individual has a real risk of criminal prosecution when determining whether a claim of privilege should be granted.[225]

Second, the circuit court failed to consider the extensive criminal penalties in RCRA. When the Fourth Circuit found that the Act was purely regulatory and, thus, subject to the *Shapiro* analysis, it ignored the fact that, like the Clean Air Act, RCRA also provides for an extensive federal enforcement section with criminal penalties. For example, RCRA § 6928(d)(1) institutes criminal penalties for knowingly transporting, treating,

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[222]*Id.*

[223]See *supra* notes 162-67 and accompanying text for Justice Brennan's dissent in *California v. Byers*.

[224]*See supra* notes 162-67 and accompanying text (setting forth Justice Brennan's dissenting opinion in *Byers*).

[225]California v. Byers, 402 U.S. 424, 470 (1971).

storing, or disposing of hazardous waste without a permit.[226] Subsection (3) provides for criminal penalties when a person knowingly omits material information or makes a false representation.[227] Subsection (4) states that a person who knowingly conceals or destroys records required to be maintained will be subject to criminal penalties.[228] Finally, subsections (5) and (6) provide that a person will be subject to criminal penalties if he knowingly transports hazardous waste without a manifest[229] or knowingly exports the waste without the consent of the receiving country.[230]

These provisions clearly indicate that RCRA is permeated with criminal penalties and is not a purely regulatory act. Moreover, analyzing RCRA's criminal penalty scheme, it appears that Respondent in *Lamphier* would have been subject to an array of fines or even imprisonment for his initial failures to comply with the notification and permit requirements of the Act.[231]

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[226]*See* 42 U.S.C § 6928(d) (1988) which provides:

> [Any person who] knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter . . . shall, upon conviction be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed [five years] or both.

Id.

[227]*See id.* § 6928(d)(3).

[228]*Id.* § 6928(d)(4).

[229]As used in this statute, a "manifest" is a term used to identify the "quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage." *Id.* § 6903(12).

[230]*Id.* § 6928(d)(5), (d)(6). For such violations under RCRA, a person is subject to a fine of not more than $50,000 and/or imprisonment not to exceed two years. *Id.* § 6928(d)(7)(B). Moreover, a violation concerning the knowing transportation, treatment, storing or disposing of hazardous waste without a permit can itself result in up to five years imprisonment. *Id.* RCRA also provides that a person who knowingly places another in imminent danger by violating any of the above-mentioned sections may receive a fine of not more than $250,000 and/or imprisonment for not more than fifteen years. *Id.* § 6928(e). Finally, similar to the Clean Air Act, repeat violators can receive double penalties. *Id.* § 6928(d)(7)(B).

[231]As noted above, Respondent in *Lamphier* failed to obtain a permit to treat, store, or dispose of hazardous waste located on his property. Pursuant to § 6928(d), Lamphier could have been subject to a fine of up to $50,000 and/or up to five years imprisonment

Applying Justice Brennan's test, it is clear that Respondent had a real risk of incrimination if he disclosed prior non-compliance with the statute, and therefore, he should not have been denied the right to assert the privilege.

The Supreme Court has also held that a person who is subject to civil penalties resulting from violations of environmental regulations cannot assert the privilege against self-incrimination. For example, in *United States v. Ward*,[232] the Court held that reporting requirements, used to support a civil penalty under the Federal Water Pollution Control Act ("FWPCA")[233] did not violate Petitioner's Fifth Amendment right to be free from self-incrimination.[234]

Distinguishing between civil and criminal penalties, the Court initially noted that the privilege against self-incrimination only expressly applied to

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if the appropriate scienter was found. *See id.* § 6928(d).

[232]448 U.S. 242 (1980).

[233]*Id.* at 244 (citing 33 U.S.C. § 1251 (1980)).

[234]*Id.* at 255. In *Ward*, Petitioner, owner of L.O. Ward Oil & Gas Operations, notified the Environmental Protection Agency about an oil leak from his oil retention pit, which escaped into the Boggie Creek, a tributary of the Arkansas River. *Id.* at 246. Such spills were prohibited by the FWPCA, and thus, Petitioner was fined. *Id.* Any failure to report a spill resulted in a fine and/or not more than one year imprisonment. *Id.* However, immunity from criminal prosecution existed for those who complied with the notification requirements. *Id.* at 244. The spill notification provision of the FWPCA, § 311(b) provided at the time of the violation:

> Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or giving a false statement.

Id. at n.3. Petitioner brought his case before the federal district court claiming that the reporting requirement violated his Fifth Amendment privilege against self-incrimination. *Id.* at 247. The district court rejected Petitioner's contention and affirmed the fine. *Id.* On appeal to the Tenth Circuit, the court reversed and finding that the penalty was sufficiently punitive to violate the Fifth Amendment's protections. *Id.* at 247-48. Accordingly, the Supreme Court granted *certiorari*. *Id.* at 244.

"any criminal case."[235] Accordingly, the Court's initial inquiry focused on whether Petitioner's fine was civil or criminal in nature.[236] Finding that Congress's label of the remedy was not dispositive,[237] the Court further inquired into whether the penalty was so punitive as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty."[238] Finding that Petitioner's fine was neither criminal nor quasi-criminal in nature,[239]

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[235]*Id.* at 248 (quoting U.S. CONST. amend V).

[236]The Court's inquiry first focused on whether Congress had intended the fine's label, civil in this case, to be an express preference of the penalty. *Id.* Second, the Court, if the fine was expressly labeled a civil penalty, would determine whether the statutory scheme was so punitive as to negate Congress's intention. *Id.*

[237]*Id.* at 248. The Court determined that although Congress had intended that the fine be a civil penalty, in that it was labeled as such and other violations were labeled as criminal penalties, it still had to analyze whether the statutory scheme was so punitive as to transform the civil fine into a criminal penalty. *Id.* at 249.

[238]*Id.* at 249 (citing Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

[239]*Id.* at 250-55. The Court relied on the test laid out in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), which set forth the following standards:

> [W]hether the sanction involv[ed] an affirmative disability or restraint, whether it ha[d] historically been regarded as a punishment, whether it [came] into play only on a finding of scienter, whether its operation [would] promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it appli[ed was] already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appear[ed] excessive in relation to the alternative purpose assigned.

Id. at 248 n.7 (citing *Kennedy*, 372 U.S. at 168-69). Moreover, the Court in *Ward* summarily disposed of Petitioner's claim that he would risk incrimination under the section 13 of the Rivers and Harbors Appropriation Act of 1899 by notifying the EPA of the oil spill under the FWPCA. *Id.* at 250. Although strict liability could be imposed under section 13 and criminal penalties instituted, the Court found that "the placement of criminal penalties in one statute and the placement of civil penalties in another statute enacted 70 years later tend[ed] to dilute the force of the . . . *Mendoza-Martinez* criteria in this case." *Id.*

Additionally, although Petitioner argued that under *Boyd v. United States*, the fine was quasi-criminal because it was similar to the forfeiture in property which the Court found to be criminal in nature in *Boyd*, the Court in *Ward* decided not to follow the *Boyd* rule reasoning that many of the *Boyd* Court's declarations had not stood the test of time. *Id.* at 253.

the Court found no punitive purpose to the fine and, therefore, declined to extend the self-incrimination clause to the civil penalty.[240]

The Supreme Court's analysis in *Ward*, explains the distinction between civil and criminal penalties for Fifth Amendment privilege purposes. Basically, the Court determined that if a person risks civil fines from their actions under a regulatory statute rather than imprisonment, there is no real risk of self-incrimination from compelled testimony, whether documentary or testimonial.[241] Further, the FWPCA provides immunity for criminal prosecution upon the reporting of a spill.[242] Theoretically, this provision should protect those persons who are forced to report potential pollution of federal waters from subsequent or concurrent criminal prosecution. Recently, the Alaskan Supreme Court dealt with this issue in the notorious case involving the Exxon Valdez oil spill in Valdez, Alaska.

The Supreme Court of Alaska, applying United States Supreme Court precedent, further eroded the privilege of self-incrimination and limited the use of immunity provisions within environmental statutes in *Alaska v. Hazelwood*.[243] In *Hazelwood*, Captain Joseph J. Hazelwood, of the Exxon Valdez, reported the grounding of a tanker in the Prince William Sound, and the State of Alaska promptly charged him with several crimes.[244] A use and immunity provision in the FWPCA,[245] however, prevented state and

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[240]*Id.* at 254.

[241]*See id.* at 254.

[242]33 U.S.C. § 1321(b)(5) (Supp. II 1990).

[243]866 P.2d 827 (Alaska 1993). It must be noted, however, that such state court precedent is not binding on any other state or the federal court system.

[244]*Id.* at 828. Captain Hazelwood was charged with three counts of criminal mischief, reckless endangerment, negligent discharge of oil, and operating a watercraft while intoxicated. Hazelwood v. Alaska, 836 P.2d 943, 944 (Alaska Ct. App. 1992). *See generally*, Penner, *supra* note 168. Captain Hazelwood was convicted for negligently discharging oil and received a suspended sentence of 90 days in jail and a $1,000 fine. *Hazelwood*, 836 P.2d at 944. The jail sentence was suspended on the condition that Captain Hazelwood complete 100 hours of community service, pay 50,000 in restitution, and complete one year of probation. *Id.*

[245]33 U.S.C. § 1321(b)(5) (Supp. II 1990).

federal authorities from using compelled testimony as evidence in a criminal prosecution against violators.[246]

Nonetheless, the State attempted to argue that not all of the information reported by Captain Hazelwood was covered by the immunity provision.[247] The supreme court, however, found that reporting the accident was one single statement.[248] Thus, the State had the burden of proving that Captain Hazelwood's whole statement was provided by an independent source in order for it to be used against him in a criminal prosecution.[249] The State of Alaska did not meet its burden.[250]

The Alaskan Supreme Court, however, held, that despite the fact that the State gained the contested statement in violation of the defendant's constitutional rights, the State could use the information against the defendant at trial if it fell within the inevitable discovery doctrine.[251] The Court,

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[246]*Hazelwood*, 866 P.2d at 829. Specifically, the notification requirement present in the FWPCA provided for use immunity. For a definition of use immunity, see *supra* note 169. For the full text of the FWPCA's notification provision, see *supra* note 234.

[247]*Hazelwood*, 866 P.2d at 830.

[248]*Id.* at 831. The Alaskan Supreme Court noted that Captain Hazelwood apparently stated:

> Yeah, ah Valdez back, ah we've, should be on your radar there, we've fetched up ah hard aground, north of Goose Island, off Bligh Reef, and ah evidently leaking some oil and we're gonna be here for awhile and ah, if you want ah, so you're notified, over.

Id. at 828. The Government argued that this statement was immunized at one point but an independent source at another. *Id.* at 830. The court determined, however, that his statement could not be divided and, thus, affirmed the court of appeals decision as to this point. *Id.* at 831.

[249]*Id.* at 830. *See also supra* note 169 (discussing use immunity and the independent source doctrine).

[250]*Id.* at 831 (noting that *Kastigar v. United States*, 406 U.S. 441, 460 (1972) requires that the government show that the evidence was derived from a "wholly independent" source) (emphasis in original).

[251]*Id.* at 831-32. The inevitable discovery doctrine is an exception to the exclusionary rule, which has been applied in cases where evidence has been obtained by violating the defendant's constitutional rights. Nix v. Williams, 467 U.S. 431 (1984). Evidence obtained, for example, in violation of the Fifth Amendment privilege against self-incrimination must be excluded at a criminal trial because it is tainted. *Id.* at 441. The exclusionary rule applies to the tainted evidence as well as incriminating information

noting the differences between the inevitable discovery doctrine and the independent source rule, stated that the inquiry did not focus upon whether the police obtained the evidence through an untainted source but whether the evidence obtained through violating the Constitution would have been inevitably "discovered through lawful means."[252]

The Alaskan Government contended that witnesses would have alerted the State of the Exxon Valdez's grounding even if Captain Hazelwood did not report the incident to the Coast Guard.[253] Thus, the Government claimed that the evidence gained as a result of Captain Hazelwood's reporting was admissible pursuant to the inevitable discovery doctrine.[254] The Alaskan Court of Appeals, rejecting the Government's argument, posited that the inevitable discovery doctrine could not be applied to a grant of statutory immunity.[255] The court reasoned that the application of the doctrine would discourage individuals from reporting spills because of a fear of incrimination.[256] The Supreme Court of Alaska, however, determined that because there were severe penalties in the Act for non-reporting, applying the doctrine would not discourage disclosure.[257] The court, therefore, held that the inevitable discovery doctrine could be applied to the use and immunity provisions set forth in the Act.[258]

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derived from the tainted evidence. *Id.* The inevitable discovery doctrine admits evidence, normally excluded, if the proponent can prove that the evidence would have been discovered through lawful means. *Hazelwood*, 866 P.2d at 832 (citing 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(a), at 378 (2d ed. 1987)).

[252]*Hazelwood*, 866 P.2d at 831-32.

[253]*Id.* at 831 n.7.

[254]*Id.* at 831-32.

[255]*Id.* at 833.

[256]*Id.*

[257]*Id.*

[258]*Id.* at 834.

V. THE NEW ENFORCEMENT PROVISIONS OF THE CLEAN AIR ACT, FOCUSING LIABILITY ON SENIOR MANAGEMENT AND CORPORATE OFFICERS, WARRANT THE PROTECTIONS OF THE FIFTH AMENDMENT PRIVILEGE

Although the courts have not expressly denied the Fifth Amendment privilege against self-incrimination to a violator of the Clean Air Act, either corporate or individual, the above cases and their progeny suggest that the privilege will not be extended.[259] Yet, the extensive federal enforcement section set forth in the 1990 Amendments makes the risk of criminal prosecution almost inevitable in any violation situation under the CAA.[260] Additionally, because the enforcement provisions seem to limit liability to senior personnel, the purported regulatory nature of the Act is questionable.[261] When the principles set forth in Justice Brennan's dissent in *California v. Byers* are analyzed, it becomes even more apparent that a violator of the CAA risks substantial self-incrimination when complying with the reporting requirements.[262]

Although the plurality opinion in *California v. Byers* suggests that membership in a "highly selective group inherently suspect of criminal activity" is a prerequisite to invoking the privilege in defense to regulatory requirements, Justice Brennan's dissent clearly illuminates the inadequacies

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[259]For example, the privilege has been denied in a challenge to the Federal Water Pollution Control Act in United States v. LeBeouf Bros. Towing Co., 537 F.2d 149 (1976), and in United States v. Eureka Pipeline, 401 F. Supp. 934 (1975). Additionally, in United States v. Charles George Trucking Co., 642 F. Supp. 329 (1986), the privilege was denied in a challenge of RCRA and CERCLA regulations. Moreover, many cases that followed the *Ward* decision have not extended the privilege to civil penalties. *See* Student Public Interest Research Group v. Monsanto Co., 600 F. Supp. 1479 (D.N.J. 1985); Student Public Interest Research Group v. P.D. Oil & Chemical Storage, Inc., 627 F. Supp. 1074 (D.N.J. 1986).

[260]*See* 42 U.S.C. § 7413(a)(3) (Supp. V 1993).

[261]Even Michael S. Alushin, Associate Enforcement Counsel for Air Enforcement at the EPA, has noted that "[t]he apparent congressional intent [was to] focus liability for . . . violations at the management level . . . ." Alushin, *supra* note 10, at 221. *See also* Peter M. Gillon & Steven L. Humphreys, *Corporate Officer Liability Under Clean Air Act May Create Disincentives*, 6 INSIDE LITIGATION 6 (1992) (noting that the provisions "focus enforcement of the statute's criminal provisions primarily on senior management," and that they "target senior corporate management for increased civil liability or imputed criminal liability in the event of non-compliance at the operational level").

[262]*See supra* notes 162-67 and accompanying text (discussing Justice Brennan's dissent in *California v. Byers*).

in the plurality's reasoning.[263] Finding that the plurality misunderstood the Court's reasoning embodied in *Albertson* and *Marchetti*, Justice Brennan determined that membership in a "selective group inherently suspect of criminal activity" was not indispensable for a Fifth Amendment claim.[264] Rather, the Justice posited that the Court should focus upon whether a "real and appreciable" hazard existed for the specific claimant, not whether Petitioner was a member of a suspect group.[265]

It is noteworthy that Justice Brennan, who originated the membership factor years earlier, criticized the Court for its subsequent misuse of his creation. It appears that Justice Brennan's dissent embodies the sounder approach. Membership is only one factor to be considered by a court, and thus, the real focus should be on whether the statute's requirements cause a substantial hazard of self-incrimination.

Applying Justice Brennan's analysis to the CAA enforcement and reporting provisions, it is apparent that senior management has a substantial risk of incrimination if they comply with the Act's reporting requirements. As stated previously, any non-compliance can result in both civil and criminal penalties under the CAA.[266] Moreover, the term "person" used in the criminal penalties section of the Act expressly delineates that any responsible corporate officer may be found liable for violations set forth in § 7413(c).[267] Additionally, the term "person" as used in § 7413(c)(4), which provides that a negligent release of a hazardous substance is a violation of the Act, does not include "an employee who is carrying out his normal activities."[268] Thus, an employee that negligently releases such a hazardous air pollutant will not suffer the consequences of his actions. Rather, the amendments specifically provide that the responsible corporate officer will be liable for all such negligent violations which can result in a fine and/or up to one year imprisonment. Moreover, the term "operator" is also limited for enforcement purposes and excludes "any person who is a stationary engineer or technician responsible for operation, maintenance,

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[263]California v. Byers, 402 U.S. 424, 469-70 (1971).

[264]*See supra* notes 162-67 and accompanying text (setting forth Justice Brennan's dissenting opinion in *Byers*).

[265]*Byers*, 402 U.S. at 469-70.

[266]*See* 42 U.S.C. § 7413(a)(3) (Supp. V 1993).

[267]*Id.* § 7413(c)(6).

[268]*Id.* § 7413(h).

repair or monitoring of equipment and facilities and who often has supervisory and training duties but who is not senior management personnel or a corporate officer."[269] Therefore, not only is the CAA permeated with criminal penalties, it also focuses on senior personnel for liability purposes and exempts all other employees.

Additionally, the fact that the enforcement provisions target senior personnel for liability purposes makes the CAA's reporting requirements suspect even under Chief Justice Burger's analysis. Unlike Respondent in *Byers*,[270] a corporate officer affected by the enforcement provisions of the CAA could argue that he was a member of a suspect group and that the enforcement provisions did not apply to the public at large. Although senior management may not inherently be suspect of criminal activity, the CAA is focusing liability on one particular group, and often that liability can result in extensive imprisonment. Moreover, one commentator has noted that the CAA has created an "increasingly broad standard of liability."[271] Because circumstantial evidence can be used pursuant to § 7413(c)(5)(B) to prove that a defendant had actual knowledge of a violation, state and federal authorities could impute an employee's knowledge to his supervisor for criminal penalty purposes.[272] Therefore, criminal liability could result for both the supervisor and the company, further increasing the risk of incrimination.[273] Additionally, unlike the motor vehicle violations at issue in *Byers*,[274] where the most extensive jail term was one year, the criminal penalties in the CAA can result in up to fifteen years of imprisonment. Thus, even under Justice Burger's balancing test, it seems clear that the substantial risk of self-incrimination, under the enforcement provisions of the CAA, outweighs the government's need to gather information efficiently.[275]

Finally, the Clean Air Act does not provide senior management with any immunity from criminal prosecutions. Unlike the Federal Water Pollution

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[269] *Id.*

[270] *See supra* notes 140-49 and accompanying text.

[271] *See* James Arnold, *Compliance Auditing: Not a "Safe Harbor" But a "Course out of Harm's Way," in* 797 PRAC. LEGAL INST./CORP. LAW AND PRAC. 511 (1993).

[272] *Id.*

[273] *Id.*

[274] *See supra* note 141.

[275] *See* California v. Byers, 402 U.S. 424, 427 (1971).

Control Act and the Comprehensive Environmental Response, Compensation, and Liability Act,[276] the CAA does not provide any protections for corporate officers if they voluntarily give governmental authorities incriminating information. Therefore, these officers are left without even the meager protections provided by such provisions in other comparable legislation.

VI. ALTERNATIVES TO DESTROYING THE FIFTH AMENDMENT PRIVILEGE BUT MAINTAINING THE NECESSARY REPORTING TO PROTECT THE ENVIRONMENT

Government has a legitimate interest in creating regulatory schemes that protect the environment. Additionally, certain reporting and record keeping requirements are necessary to facilitate the enforcement of such regulations. Yet, in the same way that citizens of the United States comply with such regulations to gain certain environmental protections, citizens also enjoy certain rights and privileges so that their individual freedoms are protected. One of these rights is the Fifth Amendment privilege against self-incrimination. This right must not be denied when there is a real risk of self-incrimination merely because it would make the government's job easier to require the production of certain information without affording the protection of the privilege.

Environmental commentators have speculated that the extensive federal enforcement section in the Clean Air Act will not cause greater compliance,

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[276]Section 1321 of the FWPCA immunizes statements made when reporting a discharge of oil. Specifically, this section provides in pertinent part:

> Notification received pursuant to this paragraph shall not be used against any such natural person in any criminal case, except a prosecution for perjury or giving a false statement.

42 U.S.C. § 1321(b)(5) (Supp. V 1993). Similarly, CERCLA provides immunity for the reporting of a release of a hazardous substance and notifying the EPA of a facility that does not comply with permit and licensing requirements. Specifically, § 9603(b) &(c) provide in pertinent part:

> Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

42 U.S.C. § 9603(b) &(c) (1988).

but will actually decrease reporting for fear of criminal penalties.[277] Additionally, strict reporting requirements, coupled with the enforcement provisions, place the individual responsible for corporate environmental compliance in an unfavorable position. Not only may the environmental enforcement officer risk self-incrimination from complying with the Act's requirements, he may also incriminate other senior management in the process. Inevitably, resulting hostility will develop between the officer responsible for compliance and other senior personnel. Without the protections of the Fifth Amendment privilege, it may be difficult for companies to find competent environmental managers.

Additionally, because the CAA amendments target senior management, companies may also have to offer legal services to their managers to protect them when criminal prosecution results. It may be very expensive to hire and keep responsible persons in compliance oriented positions because of the tremendous risks involved. This may result in a substantial financial burden, especially for small companies. Consequently, although the CAA amendments were enacted to enforce greater compliance with the air pollution laws, the risk of incrimination and the strict penalties involved may not only cause underreporting but may also increase the cost of maintaining responsible compliance officers.

Affording simple immunities, however, would make compliance easier and would protect a person's individual liberties.[278] With such immunity provisions, the government's goal of obtaining information efficiently would be achieved, and the Fifth Amendment privilege against self-incrimination would not be violated by the Act's requirements. Additionally, penalties may be limited to civil fines rather than possible imprisonment. Especially where corporations are involved, monetary punishment would be the most effective deterrence. It is hard to believe that criminal punishment of one of its corporate officers or senior personnel would dissuade environmental

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[277]James T. Banks et al., *Developing and Implementing an Environmental Corporate Compliance Program*, C776 ALI-ABA 107, 127 (1992) (noting that employees themselves may not voluntarily disclose certain information for fear of personal liability). *See generally* Gillon & Humphreys, *supra* note 261 (noting that because the EPA reserves the right to use information provided voluntary against an individual in a corporation, there may be a chilling effect where the government will have a hard time getting early compliance with the statute. The authors further noted that this would be especially damaging because one of the goals of the CAA amendments was to gain early compliance).

[278]*See* Arnold, *supra* note 271 (noting that the reporting requirements for disclosing environmental contamination are extensive and would be more often met if there were some simple immunities).

contamination when the corporation could easily find another body to replace its fallen soldier.

VII. CONCLUSION

The individual liberties of our country's citizens should not be abrogated merely because government requires that certain information be maintained for efficiency and inspection purposes. The Fifth Amendment privilege is too vital a part of our criminal justice system to be outweighed by regulatory necessity, especially when the risk of criminal prosecution is substantial and government is targeting a specific group through regulatory or statutory action. The criminal justice system is accusatorial, not inquisitorial, and the accused has the right to protect himself from governmental inquisition.

Government, however, does have a legitimate interest in securing certain information to successfully mandate compliance of its rules and regulations, especially within the environmental context. Compliance with environmental statutes is not only necessary to have effective regulation, it is mandatory for a clean and non-toxic atmosphere, workplace, and environment.

With these two competing policies being so important to both individuals and government, the only solution is immunity from prosecution. This would allow state and federal authorities to effectively enforce violations and compliance problems through the use of record keeping and reporting requirements without infringing on an individuals right to be free from self-incrimination. Our government was built on a social contract where individual freedoms set forth in the Bill of Rights were traded for certain prohibitions mandated by the Government. When those freedoms are eroded, the compact breaks down. Thus, without immunity from criminal prosecution, corporate personnel and individuals will inevitably forego early compliance with environmental regulations. Not only will such forbearance frustrate the goals of the Clean Air Act of 1990, it will hurt both the objectives of the government and the individual citizen who has to live in a polluted environment.