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Use of the Income Tax Return in Unrelated Criminal Prosecutions: Garner v. United States

COMMENTS

THE USE OF THE INCOME TAX RETURN IN UNRELATED CRIMINAL PROSECUTIONS: GARNER v. UNITED STATES

To make the process of revenue collection viable, the government necessarily requires self-reporting of information from the taxpayer in the form of an income tax return. However, other uses for which the income tax return may be utilized present a conflict between the government's legitimate need for information and the individual taxpayer's privilege against self-incrimination. The Court of Appeals for the Ninth Circuit recently held in *Garner v. United States*[1] that the privilege against self-incrimination precludes admission of the income tax return as evidence in criminal prosecutions unrelated to internal revenue laws.

In *Garner*, the taxpayer complied with the compulsory self-reporting requirements of the Internal Revenue Code,[2] submitting both the sources and amount of his income. Subsequently, the tax returns were admitted into evidence in a successful criminal prosecution against Garner for conspiring to violate federal gambling statutes.[3] On appeal, the Ninth Circuit was required to decide to what extent and under what circumstances incriminatory information supplied by a taxpayer in an income tax return could be used against him in a criminal prosecution unrelated to the income tax laws.[4] In reversing the taxpayer's conviction, the court held that the evidentiary use of the tax return in unrelated prosecutions was an infringement of his fifth amendment privilege against self-incrimination.

This decision is in direct conflict with the Second Circuit's recent pronouncement in *United States v. Silverman*,[5] and also conflicts with Fifth

1. No. 71-1219 (9th Cir., June 5, 1972), *petition for rehearing denied*, Sept. 11, 1972.

2. INT. REV. CODE of 1954, § 7203, requires taxpayers to file and report income and to pay taxes thereon. Section 7602 requires the taxpayer to maintain appropriate records to substantiate the information reported on his tax return and section 7604 gives the federal district courts jurisdiction to compel production of such records. Such statutory schemes were generally found to be constitutional in United States v. Shlom, 420 F.2d 263 (2d Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).

3. 26 U.S.C. § 1084 (1970) provides criminal sanctions for the transmission in interstate commerce of wagering information.

4. Garner v. United States, No. 71-1219, at 2.

5. 449 F.2d 1341 (2d Cir. 1971), *cert. denied*, 92 U.S. 943 (1972). In *Silverman*, the

Circuit holdings in cases with similar fact situations.[6] The purpose of this Comment is to determine whether *Garner* is a logical application of the individual's privilege against self-incrimination or whether it is an unwarranted extension of the privilege in view of the government's need for such information. Resolution of this issue ultimately involves a balancing of the needs of government against the taxpayer's fifth amendment rights. Initially, however, it is necessary to consider the incriminatory nature of information required on tax returns and the existing guidelines regarding application of the fifth amendment's guarantees.

What Constitutes Self-Incrimination

The danger of self-incrimination must be "real and appreciable" and not merely "imaginary and unsubstantial." [7] Further, the self-incriminating disclosures must be compelled; if they are volunteered, there is no infringement of constitutional rights.[8] Although the protection was first thought to extend only to testimonial disclosures, its scope has since been broadened to include almost any compelled disclosure that is communicative.[9] The privilege "must be accorded liberal construction in favor of the right it was intended to secure," [10] and any "link in the chain" of evidence procured through its violation will vitiate a criminal conviction.[11] The privilege cannot be abridged or diluted by statute, where the resulting protection would be less than replete.

In *Garner*, the court concluded that the statutory scheme of compelled self-reporting was not itself unconstitutional, but rather, that the taxpayer was presented with an unconstitutional choice. The reporting

government used an attorney's closing statement of contingent fees (required by state law) as evidence in a criminal prosecution for income tax evasion. In contrast to the *Garner* decision, admission of the document was found not to be violative of the defendant's fifth amendment privilege.

6. Grimes v. United States, 379 F.2d 791 (5th Cir.), *cert. denied*, 389 U.S. 846 (1967); Shushan v. United States, 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941). In both cases, the incriminating information contained in income tax returns was used as evidence in an unrelated criminal prosecution.

7 Brown v. Walker, 161 U.S. 591 (1896). *Accord,* United States v. Kordel, 397 U.S. 1 (1970).

8. In United States v. Kane, 450 F.2d 77, 86 (5th Cir. 1971), *cert. denied*, 92 U.S. 954 (1972), it was held that since the disclosure was not compelled by statute, the taxpayer was "not constitutionally excused from any resulting prejudice."

9. *See, e.g.*, McCormick on Evidence, 264-65 (2d ed. E. Cleary ed. 1972).

10. Hoffman v. United States, 341 U.S. 479, 486 (1951). *Accord,* Carnley v. Cochran, 369 U.S. 506, 516 (1962); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

11. Hoffman v. United States, 341 U.S. 479 (1951); United States v. Burr, 25 F Cas. 38, 40 (No. 14692e) (C.C.D. Va. 1807).

of illegal income and sources could result in prosecution for criminal violations which would flow from what the court found to be self-incriminating disclosures, while the failure to file or provide all information required on the return might result in prosecution for income tax fraud.[12] Because both alternatives have the effect of placing the taxpayer in jeopardy of criminal sanction, the *Garner* court held this statutory scheme to be a form of compulsion prohibited by the fifth amendment.[13] The introduction into evidence of an income tax return to prove an element of an unrelated crime clearly creates a "real and appreciable" danger and is precisely the type of "link in the chain of evidence" against which the fifth amendment protects. The use of the income tax return in *Garner* results, therefore, in compelled self-incrimination. But this determination alone does not warrant a conclusion that the fifth amendment protection attaches. There are areas in which the courts have determined limits and conditions applicable to the privilege, even where the result is compelled self-incrimination.

Areas Where The Scope Of The Privilege Has Been Defined

Waiver

In reaching its decision the *Garner* court expressly overruled its previous holding in *Stillman v. United States*,[14] thereby rejecting the implied waiver doctrine. The concept of implied waiver as it relates to income tax returns originated in *Sullivan v. United States*,[15] which held that a taxpayer has no valid constitutional defense for refusing to file an in-

12. The court in *Garner* refers to this as a Hobson's choice. "If a gambler fails to provide this [incriminating] information, he subjects himself to a criminal prosecution for tax evasion or perjury; his 'choice' to disclose is thus a Hobson's choice." Garner v. United States, No. 71-1219, at 6.

13. *Id.* at 2. It was not the compelled reporting which the court found abhorrent, but rather the *unrestricted use* which the government was allowed to make of the information:

> It is one thing to say that government can compel a person to make disclosures which are deemed necessary for government to adequately administer a program such as the revenue collection system. It is entirely another matter, however, to then disregard the fact that the disclosure was forced and to say that, since the original purpose of compelling disclosure was not inherently hazardous to an individual's rights, any subsequent use of that compelled information is the use of "volunteered" information and therefore constitutionally inoffensive.

Id. at 6, 7.

14. 177 F.2d 607 (9th Cir. 1949).

15. 274 U.S. 259 (1927).

come tax return. Although the narrow holding of the Supreme Court was that the "protection of the Fifth Amendment was pressed too far" [16] when applied to the filing requirement in such a way as to permit a failure to file, dictum in *Sullivan* did suggest that the taxpayer could refuse to answer specific questions which he deemed to be incriminating. The *Stillman* court, adopting reasoning consistent with the *Sullivan* dictum, held that the taxpayer had a right to refuse to give incriminating responses on the tax return but that a failure to assert the privilege at that time constituted an implied waiver.[17] The rejection of implied waiver in *Garner* directly conflicts with Fifth Circuit decisions which have upheld the theory upon reasoning consistent with the *Sullivan-Stillman* approach.[18]

The Supreme Court recently restricted the implied waiver theory in *Marchetti v. United States*[19] and related cases,[20] ruling that "in an area permeated with criminal activity," [21] a self-reporting statute directed principally at a "highly selective group inherently suspect of criminal activity," [22] is an unconstitutional infringement of the individual's privi-

16. *Id.* at 263.

17. In *Stillman*, the court stated that:

> If appellants believed that certain declarations in their tax returns might incriminate them they could have refrained from making the voluntary tax declarations here in evidence. However, they chose to report the illicit income rather than risk possible prosecution for making false or incomplete returns covering such income. The disclosures upon the tax returns must therefore he deemed to have been voluntarily entered upon a public record.

Stillman v. United States, 177 F.2d 607, 618 (9th Cir. 1949).

18. Grimes v. United States, 179 F.2d 791 (5th Cir), *cert. denied*, 389 U.S. 846 (1967); Shushan v. United States, 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941). In *Grimes*, the taxpayer stated on his income tax return that his source of income was gambling, and this disclosure was subsequently used against him in an unrelated criminal prosecution. The court felt that: "Not claiming [his privilege against self-incrimination] then, his statement amounted to a voluntary admission which we hold could be used in this prosecution." *Id.* at 796. Likewise, in *Stillman*, the court held that "[t]he income tax returns were voluntarily executed [and] . the disclosures upon the tax returns must therefore be deemed to have been voluntarily entered upon a public record." Stillman v. United States, 177 F.2d 607, 618 (9th Cir. 1949).

19. 390 U.S. 39 (1968).

20. Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968). *Marchetti* and *Grosso* involved a statute requiring a gambler to register and pay a wagering occupational tax. *Haynes*, decided the same day, dealt with an analogous statute, the National Firearms Act, which required the self-reporting of the possession of illegal firearms.

21. Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965).

22. *Id.*

lege against self-incrimination. Although the statutes were not held unconstitutional per se, an individual who properly asserts the constitutional privilege in the absence of use restrictions or immunity cannot be punished for failure to comply.[23]

Both the majority and dissenting opinions in *Garner* agreed that the *Marchetti* cases are distinguishable in that the statutes in *Marchetti* required self-reporting of inherently criminal activity, whereas the income tax return in *Garner* was neutral; *i.e.*, the return was not permeated with criminal elements, but a potential for disclosure of criminal activity existed. *Marchetti* did, however, further emphasize the principle that courts will "indulge every reasonable presumption against waiver of fundamental constitutional rights" [24] and "will not presume acquiescence in the loss of [these] rights." [25]

The use of "implied waiver" is thus a mere expedient for avoiding the constitutional confrontation between government and individual. It imputes an intentional waiver of a constitutional right to an individual who fails to assert the privilege at the proper time. In light of *Marchetti*, it is a doctrine of questionable vitality,[26] and its specific rejection is fundamental to the *Garner* majority opinion.[27] A waiver of constitutional rights should be manifested by clear and unequivocal words or deeds and not by operation of the law.[28]

Regulatory, Non-Criminal Self-Reporting

The Supreme Court, in *California v. Byers*,[29] reiterated the requirement, first enunciated in *Brown v. Walker*,[30] that the threat of self-in-

23. Marchetti v. United States, 390 U.S. 39, 61 (1968); Leary v. United States, 395 U.S. 6 (1969). *Cf.* Iannelli v. Long, 333 F Supp. 407 (W.D. Pa. 1971). In United States v. Lookretis, 398 F.2d 64 (7th Cir. 1968), unlike the other cases following *Marchetti*, the taxpayer did comply with the federal wagering tax statutes. In this case, the court imposed a use restriction on the compelled disclosures—the same remedy fashioned in *Garner*.

24. Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1957).

25. Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 307 (1937).

26. "[I]n view of recent constitutional developments, this concept [implied waiver] has no place where the issue involves the assertion of a constitutional right and, consequently, we believe that the Supreme Court has eliminated the doctrinal keystone of the *Stillman* decision." Garner v. United States, No. 71-1219, at 4.

27. Although the implied waiver theory is no longer viable, a recent Supreme Court decision suggests that the privilege may, in effect, be waived if the taxpayer responds with false information. United States v. Knox, 396 U.S. 77 (1969)

28. Marchetti v. United States, 390 U.S. 39, 51 (1968).

29. 402 U.S. 424 (1971).

30. 161 U.S. 591 (1896).

crimination must be "real and substantial" and not trivial, implying that where the threat of self-incrimination is de minimis, the privilege does not attach. In *Byers*, the driver of an automobile involved in an accident was convicted for failure to stop and give his name and address, in violation of a "hit and run" statute.[31] On appeal, the California Supreme Court held that, absent restrictions on the use of the disclosures, the statute was unconstitutional.[32] The Supreme Court reversed, holding that there was no infringement of the self-incrimination privilege. The Court reasoned that "disclosures with respect to automobile accidents simply do not entail the kind of substantial risk of self-incrimination involved in *Marchetti*, *Grosso*, and *Haynes*... [and] ... [f]urthermore, the statutory purpose is non-criminal and self-reporting is indispensable to its fulfillment." [33] Although *Byers* and *Garner* appear to be factually similar,[34] the similarity is minimized when one considers the question whether giving the sources of illegal income is as "neutral" an act as furnishing a name and address. Further, the majority in *Garner* distinguished *Byers* on two bases: First, the defendant in *Byers* refused to yield to the self-reporting requirement, whereas the taxpayer in *Garner* complied with the reporting statute.[35] This distinction does not destroy the basic similarity, however. Both statutes are essentially regulatory and non-criminal. Additionally, self-reporting is indispensable to their respective regulatory functions, and the probability of self-incrimination is not substantial in either instance.

The court's second ground for distinguishing *Byers* concerned the ultimate use of the information. The information from the accident report was used to further the statutory purpose for which it was elicited—to facilitate the determination of liability for automobile accidents. Failure to comply resulted in a conviction pursuant to that scheme. By contrast, the information for the tax return was used not to determine tax liability but as evidentiary criminal matter in a prosecution for an offense

31. CAL. VEHICLE CODE, § 20002 (a) (1) (West 1971)

32. Byers v. Justice Court, 80 Cal. Rptr. 553, 458 P.2d 465, 467 (Sup. Ct. 1969).

33. California v. Byers, 402 U.S. 424, 431 (1971). *Cf.* United States v. Perez, 426 F.2d 799 (9th Cir.), *cert. denied*, 400 U.S. 841 (1970). In the latter case, an individual was convicted of violating a federal smuggling statute by failing to report certain items. As in *Byers*, the laws violated "were imposed in an essentially non-criminal area and were primarily designed to produce federal revenue." *Id.* at 800.

34. The plurality in *Byers* stated that "[T]here is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement." 402 U.S. at 434. The Court also indicated that the "[d]isclosure of name and address is an essentially neutral act." *Id.* at 432.

35. Garner v. United States, No. 71-1219, at 5.

unrelated to the law which compelled the reporting of the information in the first instance. In light of an individual's fifth amendment privilege, the question becomes whether the government can use information gathered for a specific purpose to fulfill any other needs or whether its use as evidence ought to be restricted to the purpose for which the information was originally required. Analysis of the income tax return as a public document is helpful in considering this fundamental issue.

The Required Records Doctrine

The required records doctrine, first enunciated in *Shapiro v. United States*,[36] permits the government to require and to utilize certain information regardless of any fifth amendment claim. The Supreme Court, in *Grosso v. United States*[37] elucidated the legal basis for this doctrine:

> The premises of the rule as it is described in *Shapiro* are evidently three: first, 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 the 'public aspects' which render them at least analogous to public documents.[38]

By requiring that the records be used essentially for a regulatory purpose, the Court defined the area in which information can be compelled, and impliedly refused to sanction laws which would compel self-reporting for the sole purpose of crime detection. The "public aspect" is a term which describes a vesting of governmental interest in the document, so that the individual is considered merely a custodian for the government. Although the definition of the doctrine is clear, the scope of its application is uncertain.

Two conflicting—but nonetheless reasonable—interpretations of the *Shapiro* doctrine seem possible. Arguably, once the document fulfills the prerequisites delineated in *Shapiro*, it becomes a public document to be used for any and all purposes, so that the self-incrimination privilege can be regarded as inapplicable. This is a broad interpretation of the requirement that the purpose of an inquiry must be essentially regulatory. Under this approach, an income tax return filed pursuant to a valid

36. 335 U.S. 1 (1948).
37. 390 U.S. 62 (1968).
38. *Id.* at 67-68.

regulatory scheme becomes a public document with no restrictions on its use.

This argument is supported by the recent Second Circuit decision in *United States v. Silverman*,[39] which held that the closing statements filed by a lawyer pursuant to a state regulatory scheme became public information for some purposes. The self-incrimination claim was found unavailing when the documents subsequently were introduced as evidence in a prosecution for income tax evasion. The similarity to the *Garner* fact situation is striking. However, in *Garner* the Ninth Circuit held that the privilege attaches, thereby implicitly rejecting the Second Circuit's interpretation of the *Shapiro* doctrine.

Shapiro also is subject to the interpretation that the reporting requirement pursuant to a valid regulatory purpose renders the documents public only for the purpose for which the information was elicited. The *Garner* court adopted this restrictive interpretation of *Shapiro* in holding that a tax return can be used in furtherance of the government's statutory scheme of enforcement of income tax laws, but not as evidence in unrelated criminal proceedings.

The expansive interpretation of *Shapiro* protects the government's need for information, whereas the narrow reading affords the individual a greater degree of protection against self-incrimination. Neither approach effectively resolves the conflict between the needs of the government and those of the individual. Even under the broadest interpretation of *Shapiro*, three conditions must be satisfied before the document assumes a completely "public" aspect. Likewise, under the narrow interpretation, the use restriction applies only to the document itself (and not to the information), and then only to unrelated criminal prosecutions.

The determinative issue, then, is how far the self-incrimination privilege should be extended into this difficult area. The ultimate interpretation of *Shapiro* will result from balancing the legitimate needs of government against the self-incrimination privilege. As Justice Harlan stated in *California v. Byers:*

> In other words, we must deal in degrees in this troublesome area. The question whether some sort of immunity is required as a condition of compelled self-reporting inescapably requires an evalua-

39. 449 F.2d 1341 (2d Cir. 1971). "Records required to be kept pursuant to a reasonable regulatory scheme have 'public aspects' and may be examined for evidence of criminal conduct. . " *Id.* at 1345.

> tion of the assertedly non-criminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures required.[40]

The narrow interpretation of *Shapiro* comes closest to striking a proper balance between the needs of the government and those of the individual. This approach allows the government to compel information which is indispensable to successful enforcement of a particular regulatory scheme, and yet affords the individual adequate protection. The purpose of the *Shapiro* doctrine was to compel disclosures required for successful inplementation of the statute's goals. To adopt the broader interpretation of that decision would seem to be an unwarranted extension of the "public records" character of the tax return and an unnecessary infringement upon the fifth amendment privilege.

Conclusion

Three solutions to the public necessity-private right conflict seem possible. Each must be analyzed in relation to its efficacy in striking a proper balance. The first is the broad interpretation of *Shapiro* allowing unrestricted use of the income tax return by the government. While ostensibly offering optimum efficiency in eliciting information, such a solution infringes upon the fifth amendment privilege.[41] Moreover, introduction of the tax return as evidence in prosecutions unrelated to internal revenue laws probably would inhibit the reporting of income and collection of revenue. Fear that non-tax-related criminal prosecution could result from a truthful filing would enhance the temptation to falsify a return or to evade payment completely.

A second solution is to grant immunity to the taxpayer who files a truthful return. Immunity is most appropriate whenever the government's interest in eliciting information exceeds its interest in criminal prosecution. In *Counselman v. Hitchcock*,[42] immunity was held to mean transactional immunity, that is, protection from prosecution encompassing any transaction to which a witness was compelled to testify. To grant transactional immunity to a taxpayer would resolve summarily the con-

40. California v. Byers, 402 U.S. 424, 454 (1971) (Harlan, J., concurring).

41. *See, e.g.*, Spevack v. Klein, 385 U.S. 511 (1967); Slochower v. Board of Educ., 350 U.S. 551 (1956); Comment, *Self-Incrimination and the Federal Excise Tax on Gambling*, 76 Yale L.J. 839 (1967).

42. 142 U.S. 547 (1892).

flict between the individual's rights and the government's needs in favor of the individual. If a valid claim of privilege provides total immunity from all prosecution, however, much needed information would be rendered useless. Such an approach would preclude a meaningful balancing of interests.

The third solution is to resolve the conflict by balancing governmental needs against individual rights on a case by case basis, as was done in *California v. Byers*. Where the government's needs and the individual's rights conflict, both should yield to some extent, so that a viable accommodation can be realized. The result in *Garner*—imposition of an evidentiary use restriction on the income tax return but not on the information itself—represents such a balancing. However, *Garner* was based upon a specific rejection of implied waiver, so that although its result was correct, its reasoning does not support this approach.[43]

The balancing solution not only comports with the result in *Garner*, but also accords with the narrow interpretation of *Shapiro* By allowing compelled self-incrimination to be used for regulatory purposes but prohibiting its use in unrelated criminal prosecutions, the legitimate interest of the government and the constitutional privilege of the individual are both given optimum recognition. Such a balance seems to be the only logical approach where there are two conflicting substantial needs which require protection.

43. Although the *Garner* court does not speak of balancing, it does state that its approach is an examination of the "context" in which the disclosures were made, which indicates a willingness to approach the problem in terms of degree of danger of self-incrimination. Garner v. United States, No. 71-1219, at 5.