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THE INTERNAL REVENUE SERVICE AND CORPORATE SLUSH FUNDS: SOME FIFTH AMENDMENT PROBLEMS

The post-Watergate era of public morality has, at least temporarily, led Americans to demand higher standards from public officials in both their official and unofficial conduct. Everything from the abuse of official power, to tax returns, to the personal morals of public officials has become a matter of public concern. But public officials are not the only ones to feel the impact of the new post-Watergate standards. Partially as a result of corporate involvement in the Watergate scandal, the activities of corporations and corporate officials have also come under increased scrutiny.

During the summer of 1973, the Internal Revenue Service (IRS) began to cooperate closely with the Watergate Special Prosecutor's office. The IRS initiated a special program designed to uncover "tax violations committed by donors or recipients of campaign contributions, primarily in the 1972 Presidential campaign."¹ Aided by information from the IRS, the Watergate Special Prosecutor's investigations into illegal corporate campaign contributions resulted in a number of guilty pleas by corporate officials and corporations.²

On April 7, 1976, the IRS expanded the scope of its investigation beyond its original Watergate focus on domestic campaign contributions to cover both foreign and domestic bribes, kickbacks and campaign contributions. The IRS issued a new set of instructions to its field offices requiring that the examining offices ask a minimum of eleven questions to present and past corporate officials and employees.³ The instructions require that the

questions be asked in the IRS's large case audits, which cover approximately 1200 major corporations, each of which has gross assets

ble treatment in securing business or to otherwise obtain special concessions, or to pay for favorable treatment for business secured or for special concessions already obtained?

2. Did the corporation, any corporate officer or employee or any third party acting on behalf of the corporation, make any bribes, kickbacks or other payments regardless of form whether in money, property or services, directly or indirectly, to or for the benefit of any government official or employee, domestic or foreign, whether on the national level or a lower level such as state, county or local (in the case of a foreign government also including any level inferior to the national level) and including regulatory agencies or governmentally-controlled businesses, corporations, companies or societies, for the purpose of affecting his/her action or the action of the government he/she represents to obtain favorable treatment in securing business or to obtain special concessions, or to pay for business secured or special concessions obtained in the past?

3. Were corporate funds donated, loaned or made available, directly or indirectly, to or for the use or benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, candidate or committee either domestic or foreign?

4. Was corporate property of any kind donated, loaned, or made available, directly or indirectly, to or for the use or benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, candidate or committee either domestic or foreign?

5. Was any corporate officer or employee compensated, directly or indirectly, by the corporation for time spent or expenses incurred in performing services for the benefit of or for the purpose of opposing, any government or subdivision thereof, political party, candidate or committee, either domestic or foreign?

6. Did the corporation make any loans, donations or other disbursements, directly or indirectly, to corporate officers or employees or others for the purpose of making contributions, directly or indirectly, for the use or benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, candidate or committee, either domestic or foreign?

7. Did the corporation make any loans, donations or other disbursements directly or indirectly, to corporate officers or employees or

¹ WATERGATE SPECIAL PROSECUTION FORCE, REPORT 220 (Oct. 1975).

² The Watergate Special Prosecutor reported that 18 corporate officials and 17 corporations had pled guilty to violations of campaign contribution laws. *Id.* at 158-59.

³ The full text of the 11 questions follows:

1. Did the corporation, any corporate officer or employee or any third party acting on behalf of the corporation, make, directly or indirectly, any bribes, kickbacks or other payments regardless of form, whether in money, property or services to any employee, person, company or organization, or any representative of any person, company or organization to obtain favora-

exceeding \$250,000,000.⁴ The questions will be asked of "those who can reasonably be expected to have had knowledge of the existence or nonexistence of any such scheme."⁵ The eleven questions place no duty to investigate the facts on the corporate officers and employees. They are expected to answer only "to the best of their knowledge, belief and recollection."⁶ The first two questions deal with bribes and kickbacks to government officials and to private individuals and companies. Questions three and four inquire whether corporate funds or property were used to support or oppose any foreign or domestic political party or candidate. The next three questions ask whether the cor-

poration compensated its officers or employees for services rendered or contributions made to support or oppose any foreign or domestic political party or candidate. Questions eight, nine and ten probe whether the corporation has or controls a foreign bank account, and if so, whether the account is reflected on the books of the corporation and whether the account is in the corporation's own name. Question eleven seeks the identity of present or former corporate officers, directors or employees who might have information about any of the preceding questions.

Based on responses from 896 of the 1200 corporations in its eleven question investigation, the IRS issued a preliminary report which indicated that it had uncovered 481 potentially illegal corporate slush funds and 71 potential cases of criminal fraud. The IRS received no response from 304 corporations. Summonses were to be sent to the officers and employees of these corporations to obtain their responses to the questions.⁷

As might be expected, corporate officials are not always willing to answer the eleven questions. Irrespective of any wrongdoing by the corporation or its officers and employees, the questions are themselves viewed as offensive.⁸ According to some corporate executives, the "questionable activities" which the questions are designed to uncover are necessary to prevent the corporation from being placed at a competitive disadvantage, particularly in its foreign operations.⁹ Furthermore, they fear that the

others for the purpose of reimbursing such corporate officers, employees or others for contributions made, directly or indirectly, for the use or benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, candidate or committee, either domestic or foreign?

8. Does now or did any corporate officer or employee or any third party acting on behalf of the domestic corporation have signatory or other authority or control over disbursements from foreign bank accounts?

9. Does now or did the corporation maintain a bank account or any other account of any kind, either domestic or foreign, which account was not reflected on the corporate books, records, balance sheets, or financial statements?

10. Does now or did the corporation or any other person or entity acting on behalf of the corporation maintain a domestic or foreign numbered account or an account in a name other than the name of the corporation?

11. Which other present or former corporate officers, directors, employees, or other persons acting on behalf of the corporation may have knowledge concerning any of the above areas?

Internal Revenue News Release IR-1590, [1976] 9 STAND. FED. TAX REP. (CCH) ¶ 6567.

⁴ The 11 questions will also be addressed to "smaller corporations if warranted by the facts and circumstances in a particular case." Internal Revenue News Release IR-1615, [1976] 9 STAND. FED. TAX REP. (CCH) ¶ 6639.

⁵ The Internal Revenue Manual Supplement notes that these individuals:

would include, for example, chief executive officer, chief financial officer, officer in charge of international operations, officer in charge of governmental activities, directors who are not corporate officers but who serve on audit committees or have similar responsibilities, and others as appropriate.

INTERNAL REVENUE MANUAL, MS 42G-348, § 3.01.

⁶ Internal Revenue News Release IR-1615, [1976] 9 STAND. FED. TAX REP. ¶ 6639.

⁷ DAILY TAX REPORT (BNA), June 6, 1977, at G-7-8.

⁸ The American Bar Association's Section on Taxation viewed the 11 questions as provoking hostility between the business community and the IRS. The Section on Taxation considered that the 11 questions unfairly cast suspicion on the corporate officers and employees of the nation's largest corporations. See Simmons, *The "Eleven Questions"—An Extraordinary New Audit Technique*, 30 TAX LAW. 23, 29 (1976). The scope of the questions was also a source of aggravation. The questions were termed "vague, ambiguous and extraordinarily broad." *Id.* at 32.

⁹ Disclosure of questionable payments to the IRS would most likely be accompanied by disclosure to the Securities and Exchange Commission (SEC) and eventual public disclosure to the corporation's shareholders and the general public. Under §§ 13 and 15(d) of the Securities Exchange Act, 15 U.S.C. §§ 78m, 78o(d) (1970), an issuer of registered securities is required to file reports which the SEC deems necessary and appropriate for the protection of

potential exposure of questionable corporate payments may lead to a legislative or regulatory backlash which could restrict the corporation's future operations in the United States and abroad.¹⁰ Public revelation that the corporation

has made illegal payments may cause the officers responsible for making, authorizing or simply allowing the payments to lose their jobs.¹¹ Finally, of course, it is clear that answers to the questions which disclose corporate bribes, kickbacks and illegal campaign contributions could subject the corporations to back taxes, penalties and fines and its officers and employees to fines and jail sentences.¹²

The possibility that an officer or employee may subject himself to criminal liability by an-

investors. SEC Rules 13a-11 and 15d-11 require that the issuer file a current report on Form 8-K. Item 13 of Form 8-K provides that the "registrant may, at its option, report . . . any events . . . which the registrant deems of material importance to security holders." In Securities Release 8265 (March 8, 1974), the SEC took the position that Form 8-K (or the annual report Form 10-K) should be used to disclose illegal campaign contributions. Subsequently, many disclosures of illegal campaign contributions and other questionable corporate payments have become public knowledge through reports filled with the SEC by the corporation. This level of disclosure would probably force most corporations to abandon making future payments.

Some businessmen maintain that unless they bribe foreign governmental officials, their businesses will be severely damaged. See Yates, *Businessmen Find Payoffs Are Key to Making a Profit in Asian Nations*, Chicago Tribune, Jan. 24, 1977 § 4, at 11, col. 2. The fear is expressed that if American businesses are prohibited from paying bribes to foreign officials, companies from other nations which are not so restricted will gain a competitive advantage. However, former Secretary of Commerce Elliott Richardson reported that no substantial evidence had been advanced to support the competitive disadvantage theory. *Prohibiting Bribes to Foreign Officials: Hearings on S. 3133, S. 3379 & S. 3418 Before the Senate Comm. on Banking, Housing & Urban Affairs*, 94th Cong., 2d Sess. 42 (1976) (letter from Sec. Elliot Richardson to Sen. William Proxmire) [hereinafter cited as *Prohibiting Bribes*]. In a number of cases involving the sales of aircraft, questionable payments were "made not to 'out-compete' foreign competitors, but rather to gain an edge over other U.S. manufacturers." *Id.*

A *Wall Street Journal* survey of 25 large American corporations that had disclosed making questionable foreign payments revealed that "not one of the 25 firms reports losing a significant portion of its foreign business." Pappas, *Crackdown on Bribery Hasn't Damaged Sales, Big Companies Report*, Wall St. J., Feb. 28, 1977, at 1, col. 6 (midwest ed.). It is possible that there has been a loss of bribe-related foreign sales but that this loss is offset by a postrecession increase in the level of foreign business activity. Another possibility is that some of the questionable payments are simply continuing in another form. *Id.*

¹⁰ *Prohibiting Bribes*, *supra* note 9, at 42-43. In one instance one country declared that improper payments made by an oil company in a second country motivated the first country to expropriate the oil company's properties. SECURITIES & EXCHANGE COMM'N, REPORT OF THE SEC ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 15 (submitted to the Senate Comm. on Banking, Housing & Urban Affairs, 94th Cong., 2d Sess., May, 1976).

¹¹ For example, the revelation of Gulf Oil Corporation's illegal payments led to the ouster of four high-ranking Gulf executives, including Gulf's chairman. See Calme, *At Gulf Oil Nowadays A "Questionable" Deal Is One to Be Shunned*, Wall St. J., Jan. 25, 1977, at 1, col. 6 (midwest ed.).

¹² The corporation would be liable for taxes due for deductions disallowed under I.R.C. § 162(c). Under § 162, no deduction is allowed for an illegal payment to domestic governmental officials or employees or for payments to foreign governmental officials or employees if the payment would be illegal if it were made to a domestic governmental official or employee. In addition, no deduction is allowable for bribes, kickbacks or other illegal payments to any persons if these payments are illegal under the laws of the United States or if illegal under state laws if the state laws are generally enforced and subject "the payor to criminal penalty or the loss of license or privilege." I.R.C. § 162(c)(2). See 26 C.F.R. § 1.162-18 (1976).

Penalties would be assessed for failure to pay the tax due. I.R.C. § 6653. The corporation could also be fined for attempting to evade or defeat the tax. I.R.C. § 7201. The corporate officers and employees might be fined or imprisoned for attempting to evade or defeat the tax. I.R.C. § 7201.

In addition to the Internal Revenue Code sanctions, the corporation and its officers and employees might also be subject to fines and imprisonment for violations of non-tax laws. Potentially applicable statutes include: 2 U.S.C.A. § 441a (Cum. Supp. 1977) (violation of dollar limits on campaign contributions); 2 U.S.C.A. § 441b(a) (Supp. Sept. 1976) (contribution by national banks or corporations); 2 U.S.C.A. § 441c (Cum. Supp. 1977) (contributions by government contractors); 15 U.S.C. § 1 (Supp. V 1975) (restraint of trade); 15 U.S.C. § 2 (Supp. IV 1974) (monopoly); 15 U.S.C. 13(c) (1970) (brokerage provision of Robinson-Patman Act); 15 U.S.C. §§ 78m(a), 78o(d) (1970); 15 U.S.C. § 78ff(a) (Supp. V 1975) (violation of reporting requirements of Securities Exchange Act); 18 U.S.C. § 2 (1970) (aiding and abetting); 18 U.S.C. § 201 (1970) (bribery of public officials); 18 U.S.C. § 203 (1970) (bribing members of congress, government officers and employees); 18 U.S.C. § 371 (1970) (conspiracy); 18 U.S.C. § 1001 (1970) (false statement filed with federal agency); 18 U.S.C. § 1341 (1970) (mail fraud); 18 U.S.C. § 1343 (1970) (fraud by wire).

swering the eleven questions suggests that the fifth amendment privilege against self-incrimination should be available to the corporate officers and employees who are asked to respond to the questions. This comment will consider the availability of the privilege against self-incrimination to the corporation's employees and officers, the proper time for claiming the privilege, and the adequacy of a grant of immunity for corporate officials reluctant to answer the eleven questions.

AVAILABILITY OF THE PRIVILEGE

Determining whether a corporate official may claim the fifth amendment privilege when confronted with the eleven questions requires an understanding of the policies underlying the privilege and a consideration of the exceptional situations in which the privilege is not available. The privilege has been hailed as "one of the great landmarks in man's struggle to make himself civilized."¹³ In *Murphy v. Waterfront Commission*,¹⁴ the Supreme Court noted that the privilege "reflects many of our fundamental values and most noble aspirations."¹⁵ According to the Court, one of the fundamental values was "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt."¹⁶ A second value which the privilege protects is "respect for the integrity and worth of the individual citizen."¹⁷ Historically, the origin of the privilege is "closely linked with the abolition of torture,"¹⁸ and the fifth amendment reflects our founding fathers' conscious selection of an accusatorial rather than an inquisitorial criminal process. A third value which the privilege fosters is respect for the integrity of the criminal justice system. If the privilege were not available, the government might be tempted to rely progressively less on thorough, factual investigations and increasingly on its power to extract answers as a means to dispose of crimi-

nal cases.¹⁹ Fourth, the privilege also protects, to some extent, the individual's right to privacy. As early as *Boyd v. United States*,²⁰ the Court held that compulsory production of an individual's private papers would compel the individual to be a witness against himself.²¹ *Boyd* stated that the "constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance."²² However, while the role of the fifth amendment in protecting personal privacy has often been affirmed by the Supreme Court,²³ most recently the Court has shown a tendency to limit the fifth amendment's function as a protector of privacy.²⁴

Although the privilege both reflects and protects values which our society considers of fundamental importance, the utilization of the privilege clearly impairs the government's ability to obtain vital information. Aware of the tension between the government's need for information and the individual's privilege

¹⁹ Wigmore felt that under a system of compulsory self-disclosure, the criminal justice system tended to "suffer morally." He stated:

The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power.

8 J. WIGMORE, EVIDENCE § 2251 (McNaughton rev. 1961).

²⁰ 116 U.S. 616 (1886).

²¹ *Boyd* was decided on both fourth and fifth amendment grounds. The Court "noticed the intimate relation between the two Amendments." *Id.* at 633.

²² *Id.* at 635.

²³ See, e.g., *Bellis v. United States*, 417 U.S. 85 (1974); *Couch v. United States*, 409 U.S. 322 (1973); *Tehan v. United States ex rel. Schott*, 382 U.S. 406 (1966); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁴ In *Fisher v. United States*, 425 U.S. 391 (1976), the Court acknowledged that protecting personal privacy was "one of several purposes served by the constitutional privilege against compelled testimonial self-incrimination." *Id.* at 399. But the Court maintained that it "has never suggested that every invasion of privacy violates the privilege." *Id.* Justice Brennan disagreed sharply with the majority's interpretation of privacy as a mere "by-product" of the fifth amendment and not as a "factor controlling in part the determination of the scope of the privilege." *Id.* at 416 (Brennan, J., concurring in the judgment). See *id.* at 414-28.

¹³ E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955).

¹⁴ 378 U.S. 52 (1964).

¹⁵ *Id.* at 55.

¹⁶ *Id.* If the individual answered correctly, he might be accusing himself of a crime; if he answered incorrectly, he would be liable for perjury; and if he remained silent, he might be subject to contempt of court.

¹⁷ *California v. Byers*, 402 U.S. 424, 450 (1971) (Harlan, J., concurring in the judgment).

¹⁸ E. GRISWOLD, *supra* note 13, at 7.

against self-incrimination, the courts have in two situations recognized exceptions to the right to claim the privilege. The first involves access to corporate records. Under the corporate records exception, the corporation may not claim the privilege.²⁵ However, the IRS's

eleven questions, although asked in the context of an audit of the corporation's financial records, are not directed toward an examination of corporate records. Rather, they ask the corporation's officers and employees to provide answers, not corporate records or documents. Thus the corporate records exception will not prevent the officers and employees from claiming the privilege. However, their ability to claim the privilege may be affected by the second exception to the privilege, the self-reporting/required records exception. Just as the corporate records exception enables the government to gather information from a corporation, under the self-reporting/required records exception, the government may compel an individual to submit documents or reports. The self-reporting statutes and the required records statutes are quite similar. Self-reporting or registration statutes are designed to elicit particular kinds of information from the individual. The individual is required to tender the desired information to the agency which regulates the activities described in the reports without waiting for a specific request for the information. Under a required records statute, an individual must merely keep the records available for inspection by the regulatory agency. If the agency desires access to the records, it may request or, if necessary, subpoena the records. Because the differences between the required records exception and the self-reporting exception are minimal, the two exceptions are now commonly considered to form a single required records exception to the privilege against self-incrimination.²⁶

deny the privilege to other collective groups. The privilege has been denied to labor unions, *United States v. White*, 322 U.S. 694 (1944), and to partnerships, *Bellis v. United States*, 417 U.S. 85 (1974).

²⁵ The Supreme Court sustained a self-reporting statute in *United States v. Sullivan*, 274 U.S. 259 (1927), prior to its announcement of the required records doctrine in *Shapiro v. United States*, 335 U.S. 1 (1948). There is no significant constitutional difference between the two statutory schemes. The only difference between the self-reporting statutes and the required records statutes involves the time at which the privilege may be claimed. "[W]ith a registration provision, the privilege can be invoked immediately, whereas under a record-keeping statute the claimant must wait until he is served with a subpoena." Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681, 691 (1965). Subsequent to *Shapiro*, the Supreme Court has considered self-reporting and registration stat-

²⁶ See *Hale v. Henkel*, 201 U.S. 43, 76 (1906). Given an understanding of the values which the fifth amendment seeks to foster (see text accompanying notes 13-24 *supra*), it can be readily seen why the courts have consistently denied the corporation access to the privilege. First, the privilege is unavailable to the corporation because the corporation's right to privacy is not impaired. In *Hale*, the Court held that a corporation could not resist a subpoena on fifth amendment grounds. The Court considered the corporation to be a "creature of the state . . . incorporated for the benefit of the public." 201 U.S. at 74. The corporation receives privileges from the state and "holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law." *Id.* Thus, unlike the individual who has rights which exist without any action by the state, the corporation does not have a right of privacy which can be asserted against the "visitorial power of the state." *Wilson v. United States*, 221 U.S. 361, 382 (1911). The corporation's inability to claim the privilege is related to the impersonal nature of the corporation. In *United States v. White*, 322 U.S. 694 (1944), the Court held that if an organization was "so impersonal in the scope of membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only," then the organization could not claim the privilege. *Id.* at 701.

In addition, there is, of course, no danger of government abuse of the corporation by physical compulsion if the corporation is denied the privilege. It would be absurd to think of the corporation being subject to possible torture.

Finally, application of the privilege to the corporation would tend to weaken rather than increase respect for the judicial system. Whatever possibilities for a serious imbalance in power are inherent when the power of the state is pitted against an individual, these possibilities are much less likely when the state faces a corporation, which often has access to substantial resources. Furthermore, evidence of most corporate wrongdoing can usually be found in the corporation's official records and documents. See 8 J. WIGMORE, EVIDENCE § 2259a (McNaughton rev. 1961). "Were the cloak of privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible." *United States v. White*, 322 U.S. at 700. Respect for the judicial system would inevitably decline because of its inability to provide an effective means of uncovering corporate crime. Thus, since *Hale*, the Court has consistently denied the privilege to the corporation and there is no indication of any retreat from this position. Rather, the "corporate records" exception has been expanded to

Several Supreme Court cases have attempted to delineate the scope of the self-reporting/required records exception. In *United States v. Sullivan*,²⁷ the Court sustained a self-reporting tax statute. Sullivan, a bootlegger, failed to file a tax return. He alleged that if he filed he would incriminate himself for violating the National Prohibition Act. Thus, he claimed that the fifth amendment protected him from filing a tax return. Mr. Justice Holmes rejected Sullivan's claim and held that "the protection of the 5th Amendment was pressed too far."²⁸ Justice Holmes considered Sullivan's claims to be an "extravagant application" of the privilege because "[m]ost of the items [on the tax return] warranted no complaint."²⁹ Sullivan had attempted to "draw a conjurer's circle around the whole matter by his own declaration."³⁰ Sullivan's income, although illegal, was still subject to taxation, and so he was required to file a return. However, in dictum, Justice Holmes suggested that the privilege might be available in a more limited context. He stated:

If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection on the return, but he could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld.³¹

In *Shapiro v. United States*,³² the Supreme Court developed the required records exception. William Shapiro, a fruit and produce wholesaler subject to the Emergency Price Control Act, had his business records subpoenaed by the Price Administrator. The regulations announced by the Price Administrator required that a person subject to the regulations "keep and make available for examination . . . records of the same kind as he has customarily kept. . . ."³³ When he turned his records over to the Administrator,³⁴ Shapiro claimed the

fifth amendment privilege and assumed that he would receive a statutory grant of immunity from prosecution regarding the information in the subpoenaed records. However, when Shapiro was later tried for violating the Emergency Price Control Act, his claim of immunity was rejected. He appealed his conviction to the Supreme Court, but the Court affirmed, holding that there was no privilege for Shapiro's required records. The Court assumed that there were "limits which the government cannot constitutionally exceed in requiring the keeping of records."³⁵ Accordingly, it attempted to limit the scope of its decision to records which had "public aspects."³⁶ Furthermore, the Court limited its holding to situations where there was

a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records. . . .³⁷

Despite the Court's attempts to limit its decision, *Shapiro* had potentially far-reaching implications. The required records exception could very well have destroyed the fifth amendment privilege if a legislature, by requiring records to be kept, were able to overcome the privilege with regard to *all* such records. Justice Frankfurter criticized the reasoning involved in the Court's decision:

Subtle question-begging is nevertheless question-begging. Thus: records required to be kept by law are public records; public records are non-privileged; required records are non-privileged.

If records merely because required to be kept by law *ipso facto* become public records, we are indeed living in glass houses. Virtually every

from the production of these books and records.'" *Id.* at 4. The statute which required the records to be kept provided that no one would be excused from compliance with the statute because of his privilege against self-incrimination. Instead, the statute provided that immunity would be available "to any individual who specifically claims such privilege." *Id.* at 10 n.7. Shapiro claimed the privilege. However, the Supreme Court held that under the required records doctrine Shapiro was not entitled to claim the privilege. Consequently the statute did not provide any immunity to Shapiro.

²⁷ *Id.* at 32.

²⁸ *Id.* at 34.

²⁹ *Id.* at 32.

utes under the required records doctrine. See text accompanying notes 39-73 *infra*.

²⁷ 274 U.S. 259 (1927).

²⁸ *Id.* at 263.

²⁹ *Id.*

³⁰ *Id.* at 264.

³¹ *Id.* at 263.

³² 335 U.S. 1 (1948).

³³ *Id.* at 5 n.3.

³⁴ When Shapiro produced his records, "[t]he presiding official stated that the 'witness is entitled to whatever immunity which flows as a matter of law

major public law enactment—to say nothing of State and local legislation—has record-keeping provisions.³⁸

The limits of Shapiro's required records doctrine were tested in *Albertson v. Subversive Activities Control Board*³⁹—although curiously the Court neglected any mention of *Shapiro* in its opinion.⁴⁰ The court held that Albertson, a member of the Communist party, could not be required to register with the Subversive Activities Control Board. The Court decided that in registering, Albertson would encounter obvious risks of incrimination. The Court compared Albertson's situation with that encountered in *Sullivan*. The Court noted that:

[i]n *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities.⁴¹

Furthermore, the Court found that Albertson's claim of privilege arose "in an area permeated with criminal statutes" and might lead to "the admission of a crucial element of a crime."⁴²

In *Marchetti v. United States*⁴³ and *Grosso v. United States*,⁴⁴ the Court once again was confronted with the required records doctrine. Marchetti and Grosso were both gamblers. Marchetti was convicted for failing to register and pay an occupational tax imposed on gamblers; Grosso was convicted for failing to pay an excise tax. Earlier, in *United States v. Kahriger*⁴⁵ and *Lewis v. United States*,⁴⁶ the Court had upheld these same registration and occu-

pational tax requirements on the grounds that the privilege "offers protection only as to past and present acts" and would not protect the prospective acts which Kahriger and Lewis later engaged in.⁴⁷ However, in light of its recently decided *Albertson* case, the Court felt compelled to reexamine the required records doctrine because "every portion of these requirements had the direct and unmistakable consequence of incriminating petitioner."⁴⁸ Noting the parallel to *Albertson*, the Court found that "wagering is 'an area permeated with criminal statutes,' and those engaged in wagering are a group 'inherently suspect of criminal activities'."⁴⁹ While the Court acknowledged the government's ability to tax unlawful activities, the Court focused particularly on the fact that the information that a gambler had paid the occupational tax was "readily available to assist the efforts of state and federal authorities to enforce these [criminal] penalties."⁵⁰ Furthermore, evidence of compliance with federal wagering tax laws was "often . . . admitted at trial in state and federal prosecutions for gambling offences."⁵¹ In *Marchetti*, the Court contrasted the petitioner's situation with that of Shapiro, stating: "Each of the three principal elements of the doctrine, as it is described in *Shapiro* is absent from this situation."⁵² First, Marchetti was required to keep and preserve records which he had not customarily kept. Second, there were no public aspects to the information sought. Third, the information sought was not related to "an essentially non-criminal and regulatory area of inquiry."⁵³ Declaring that the "central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary hazards of incrimination,"⁵⁴ the Court overturned Mar-

³⁸ *Id.* at 51 (Frankfurter, J., dissenting). *Shapiro's* required records doctrine has also been criticized by commentators. See, e.g., McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 215-18; Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 148-50. However, *Shapiro* is cited with approval in Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 716-17 (1968).

³⁹ 382 U.S. 70 (1965).

⁴⁰ More surprisingly, the government's brief in *Albertson* omitted any reference to *Shapiro*. See Meltzer, *Privileges Against Self-Incrimination and the Hit-and-Run Opinions*, 1971 SUP. CT. REV. 1, 7.

⁴¹ 382 U.S. at 79.

⁴² *Id.*

⁴³ 390 U.S. 39 (1968).

⁴⁴ 390 U.S. 62 (1968).

⁴⁵ 345 U.S. 22 (1953).

⁴⁶ 348 U.S. 419 (1955).

⁴⁷ 390 U.S. at 52. The Court's rationale in *Lewis* was also based on a theory of implied waiver. Under the implied waiver theory, when Lewis decided to engage in gambling, he surrendered his fifth amendment privilege. *Marchetti* rejected both the "non-prospective" and waiver theories. See 390 U.S. at 50-54.

⁴⁸ 390 U.S. at 49.

⁴⁹ *Id.* at 47 (quoting *Albertson*, 382 U.S. at 79).

⁵⁰ *Id.* at 47.

⁵¹ *Id.*

⁵² *Id.* at 56.

⁵³ *Id.* at 57. In *Grosso*, the Court found that two of the three *Shapiro* criteria were "plainly absent." *Id.* at 68. Furthermore, it was not clear whether the remaining criterion, that the records were customarily kept, was present. *Id.* at 69.

⁵⁴ *Id.* at 53.

chetti's and Grosso's convictions. *Kahriger* and *Lewis*, which had barred the assertion of the privilege, were overruled.⁵⁵

Subsequent to *Marchetti* and *Grosso*, in *California v. Byers*,⁵⁶ the Court again faced the question whether the fifth amendment could be claimed as a defense for failing to comply with a registration requirement. In *Byers*, the respondent was charged with failing to stop and leave his name and address after being involved in an automobile accident which had resulted in property damage. Byers claimed that the reporting requirement violated his privilege against self-incrimination. Although the California Supreme Court had sustained Byers' claim, the United States Supreme Court rejected it.

A plurality of the Court found no conflict between the statutory reporting scheme and the privilege. The plurality reviewed the "substantial hazards of self-incrimination"⁵⁷ test formulated in *Marchetti*. Since the California statute was directed at all persons who drive automobiles in California, the plurality found it "difficult to consider this group as either 'highly selective' or 'inherently suspect of criminal activities'."⁵⁸ In addition, the plurality noted that the California Supreme Court had construed the statute as "not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents."⁵⁹ Reasoning that "disclosures with respect to automobile accidents simply do not entail the kind of substantial risk involved in *Marchetti* [and] *Grosso*,"⁶⁰ the plurality sustained the reporting requirement.

Mr. Justice Harlan's concurrence provided a majority for the result reached in *Byers*. However, his approach was significantly different from that of the plurality. Justice Harlan acknowledged that *Marchetti* and *Grosso* suggested that "the applicability of the privilege depends exclusively on a determination that, from the individual's point of view, there are 'real' and not 'imaginary' risks of self-incrimination in yielding to state compulsion."⁶¹ But, un-

like the plurality, Justice Harlan acknowledged that there were real risks present in *Byers*. He criticized the plurality for "indulging in a collection of artificial, if not disingenuous judgments that the risks of incrimination are not there when they really are there."⁶² Justice Harlan felt that Byers would have faced a real risk of self-incrimination by complying with the reporting statute. He thought that if the plurality had more honestly applied the "real risk" standard it espoused, Byers' conviction would not have been sustained. Furthermore, he reasoned that a logical application of the "real risk" standard must either protect "all personal judgments which are not patently frivolous" or lead to "a grant of immunity potentially applicable to all instances of compelled 'self-reporting.'"⁶³ But Justice Harlan was dissatisfied with the logical implications of the "real risk" standard and articulated a rationale for reaching the same result that the plurality had reached. Noting the tension between the government's need for information and the individual's privilege against self-incrimination, he maintained that respect for the integrity of the individual and concern for individual privacy, values fostered by the privilege,⁶⁴ were not "of such overriding significance that they compel substantial sacrifices in the pursuit of other governmental objectives in all situations"⁶⁵ where disclosure would contribute significantly to criminal law enforcement. He feared that if an individual's own perception of self-incrimination were sufficient to impose

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.⁶⁶

Consequently, he suggested that explicit limits be placed on the *Marchetti-Grosso* line of cases (including the plurality opinion in *Byers*). To determine what limits should be set on the *Marchetti-Grosso* rationale, Justice Harlan pro-

⁵⁵ *Id.* at 54.

⁵⁶ 402 U.S. 424 (1971).

⁵⁷ *Id.* at 430 (Burger, C.J., plurality opinion).

⁵⁸ *Id.* at 431 (quoting *Albertson*, 382 U.S. at 79).

⁵⁹ *Id.* at 430.

⁶⁰ *Id.* at 431.

⁶¹ *Id.* at 437 (Harlan, J., concurring in the judgment).

⁶² *Id.* at 442.

⁶³ *Id.*

⁶⁴ In selecting these two values, Justice Harlan relied on Dean McKay's analysis of the purposes of the privilege. See McKay, *supra* note 38, at 209-11.

⁶⁵ 402 U.S. at 448 (Harlan, J., concurring in the judgment).

⁶⁶ *Id.* at 452.

posed consideration of three factors:

an evaluation of the assertedly noncriminal 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.⁶⁷

In discussing the first factor, the "governmental purpose in securing the information," Justice Harlan focused on whether those under a statutory duty to report were "inherently suspect." Although he considered that those required to report under the *Byers* hit-and-run statute could not be characterized as inherently suspect,⁶⁸ he suggested "that the 'inherently-suspect-class' factor is relevant only as an *indicium* of genuine risk as assessed from the individual's point of view."⁶⁹ Thus, while noting "the regulatory scheme's concededly non-criminal purpose,"⁷⁰ Justice Harlan still maintained that it posed "genuine risks of self-incrimination from the driver's point of view."⁷¹

Perhaps because he may have regarded the necessity for self-reporting as obvious in the hit-and-run context,⁷² Justice Harlan neglected to make explicit how his second factor applied. He simply concluded that self-reporting was a necessary means of securing the information.

Regarding the third factor, the nature of the disclosures required, Justice Harlan emphasized that under the California hit-and-run statute, a minimal level of disclosure was required. Even after the driver stopped and left his name and address, the state still had to investigate further to determine whether the driver's involvement in the accident was proximately related to the criminal behavior. Thus, the state still bore a significant and not merely ritualistic "burden of making the main evidentiary case"⁷³ against the driver. On balance then, Justice Harlan found that the California reporting statute did not force the defendant

to violate his privilege against self-incrimination.

On the basis of the Court's analysis in the above cases it is difficult to know whether the self-reporting/required records exception will or will not operate to compel corporate officers and employees to answer the eleven questions. Initially it should be noted that if the privilege is not recognized for the individual officer or employee to whom the questions are addressed and if he fears that his response may incriminate him, he is faced with the "cruel trilemma of self-accusation, perjury or contempt."⁷⁴ A truthful answer may be the equivalent of self-accusation and lead to criminal penalties for the commission of a crime. A false answer may lead to a perjury prosecution because the officer or employee is required to sign his written answers to the questions "in either affidavit form or as a written declaration made under the penalties of perjury."⁷⁵ An individual who willfully makes a false statement on such a form is subject to prosecution under either section 7206 of the Internal Revenue Code or under 18 U.S.C. §1001.⁷⁶ Finally, silence could lead either to criminal penalties or to a contempt penalty. If the officer or employee refuses to answer the eleven questions, he could be prosecuted under section 7203 for failure to supply information requested by the IRS. Alternatively, the IRS could issue a summons

⁷⁴ *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

⁷⁵ Internal Revenue News Release IR-1590, [1976] 9 STAND. FED. TAX REP. (CCH) ¶ 6567.

⁷⁶ Perjury is a felony. Anyone convicted under I.R.C. § 7206 can be fined up to \$5000 or imprisoned up to three years or both. But in *United States v. Levy*, 533 F.2d 969 (5th Cir. 1976), the court overturned a perjury conviction under § 7206 because the defendant had answered questions on an IRS form which was not authorized under the Internal Revenue Code or under a valid regulation. The 11 questions are currently being asked pursuant to a directive from the Commissioner of Internal Revenue. They are not, as far as is known, specifically authorized under any statute or regulation. Under the *Levy* rationale, there could be no perjury conviction under § 7206 until the 11 questions were specifically authorized by statute or regulation.

However, even in the absence of a statutory or regulatory authorization for the eleven questions, the "cruel trilemma" remains. Under 18 U.S.C. § 1001 (1970), anyone who willfully makes false, fraudulent or fictitious statements regarding "any matter within the jurisdiction of any department or agency of the United States" can be fined and imprisoned.

⁶⁷ *Id.* at 454.

⁶⁸ *See id.* at 456.

⁶⁹ *Id.* at 438 (emphasis added).

⁷⁰ *Id.* at 456.

⁷¹ *Id.* at 448.

⁷² There will undoubtedly be circumstances in which there will be no report if the driver leaves the scene of the accident without leaving any information. This would, of course, frustrate the state's regulatory purpose of ensuring financial responsibility for accidents.

⁷³ 402 U.S. at 457-58 (Harlan, J., concurring in the judgment).

under section 7602⁷⁷ directing him to testify. If he persists in his refusal to testify, the IRS can sue for enforcement of the summons under section 7604, and then a district court judge could find the officer or employee to be in contempt and punish him accordingly.⁷⁸ Under section 7602 the officer or employee might also be summoned to appear before a grand jury to testify. Similarly, in the grand jury situation the officer or employee would potentially face the cruel trilemma.⁷⁹

Under the self-reporting/required records exception, however, this risk to the individual must be considered in light of the government's need for information. Under the substantial hazards-real risk test, as applied by the *Byers* plurality, it is necessary to ask whether the target group (here officers and employees of a large corporation) forms a "highly selective" group "inherently suspect of criminal activities."⁸⁰ Unfortunately, the *Byers* plurality opinion gives little guidance regarding what is meant by a "highly selective" group. The plurality indicated that the target group was "all persons who drive automobiles in California"⁸¹ and that this group was essentially equivalent to the public at large. But this group of drivers is actually a group selected out of the general populace. Furthermore, the statute chose drivers involved in accidents causing property damage as the actual target group—a group not only more selective but also more "inherently suspect of criminal activities" than drivers in

general. Thus a reasonable argument could have been made that the group in *Byers* met the "highly selective-inherently suspect" criteria.⁸² In applying the *Byers* plurality's "highly selective-inherently suspect" test to the officers and employees of large corporations who are asked to respond to the eleven questions, it is possible to argue either that they belong to a group which is permissibly selective or to a group which is impermissibly "highly selective." It could be argued, for instance, that the officers and employees of these corporations are not members of a highly selective group since the IRS follows a pattern of subjecting larger corporations to an ever-increasing likelihood of a tax audit. For example, in 1975, corporations with assets under \$50,000 had only a 3.2% chance of being audited; however, corporations with assets over \$100 million had an 82.1% chance of being audited.⁸³ Since there is clearly a greater potential for increased revenue collection from the larger corporations, the IRS's greater concern for auditing large corporations is understandable and well within its valid regulatory role. On this basis then, the selectivity of the eleven questions would appear to be comparable to the level of selectivity found to be permissible in *Byers*. Under the *Byers* statute, all drivers involved in accidents causing property damage were required to report; under the eleven questions, key officers and employees of all corporations with assets above \$250 million are required to report. On the other hand, the questions are directed at a relatively small group—if one considers the population at large. They are directed at corporations of a size which can afford to pay significant bribes or wield untoward political influence—as opposed to all corporations. They are also directed at those within the corporation likely to have knowledge of these activities. But these individuals are also the ones most likely to have been involved in illegal activity. Although the IRS employs a selective process in directing the eleven questions to "corporate officials and employees that have had sufficient authority, control or knowledge of corporate activities so as to be aware of any possible misuse of

⁷⁷ Under § 7602, the Secretary of the Treasury or his delegate is authorized, for the purpose of determining the correctness of a tax return or the amount of tax due, "[t]o summon the person liable for tax . . . or any officer or employee of such person . . . to appear before the Secretary . . . to give such testimony, under oath, as may be relevant or material to such inquiry." I.R.C. § 7602(2). The IRS has directed its agents to use the § 7602 summons to obtain answers to the 11 questions from unwilling officers and employees. See Simmons, *supra* note 8, at 25.

⁷⁸ I.R.C. § 7604(b) authorizes the judge upon a hearing, "to make such order as he shall deem proper . . . to enforce obedience with the requirements of the summons and to punish such person for his default or disobedience."

⁷⁹ For a description of the government's use of grand juries in tax investigations, see Namorato, *The Government's Tools in the Investigation of a Criminal Fraud Case*, 34 N.Y.U. INST. FED. TAX. 1019, 1056-60 (1976).

⁸⁰ 402 U.S. at 431 (Burger, C.J., plurality opinion).

⁸¹ *Id.* at 430.

⁸² Justices Black, Douglas and Brennan thought that the statute in *Byers* was clearly directed at a group suspected of illegal activities. See *id.* at 461 (Black, J., dissenting).

⁸³ See COMMISSIONER OF INTERNAL REVENUE, 1975 ANNUAL REPORT 89.

funds,"⁸⁴ this level of selectivity should not, of itself, require this group to be characterized as impermissibly selective. It would be highly impractical to require that the IRS's eleven questions be addressed to everyone of a large corporation's employees to avoid being "highly selective." A level of selectivity based on the officer's or employee's presumed "authority, control or knowledge" merely represents an efficient utilization of the IRS's resources. Furthermore, while some corporate officers and employees might have engaged in criminal activities, the entire group would not be considered to be inherently suspect of criminal activities. Consequently, as a group, the corporate officers and employees stand in sharp contrast to the members of the Communist party in *Albertson* and the gamblers in *Marchetti* and *Grosso*. In *Albertson*, everyone who registered and admitted membership in the Communist party would have been directly confessing an element of a crime.⁸⁵ Similarly, in *Marchetti* and *Grosso*, everyone who registered or paid the occupational tax would have "subjected him[self] to possible state or federal prosecution."⁸⁶ By contrast, the majority of corporate officers and employees who respond to the eleven questions are not suspect of any crime and do not face the threat of prosecution.⁸⁷ Thus, although the conclusion is not free from all doubt, if the *Byers* plurality's approach were used to determine whether the corporate officers and employees faced a real risk of self-incrimination, it is probable that a court would find that the officers do not form a "highly selective" group that is "inherently suspect."⁸⁸

⁸⁴ Internal Revenue News Release IR-1590, [1976] 9 STAND. FED. TAX REP. (CCH) ¶ 6567.

⁸⁵ Membership in the Communist party is an element of a crime under both the membership clause of the Smith Act, 18 U.S.C. § 2385 (1970), and under § 4(a) of the Subversive Activities Control Act, 50 U.S.C. § 783(a) (1970).

⁸⁶ 390 U.S. at 47.

⁸⁷ A preliminary report by the IRS on the status of its 11 questions investigation revealed that out of responses by 896 corporations, only 71 showed evidence of possible criminal fraud. DAILY TAX REPORT (BNA), June 6, 1977 at G-7. Thus as a group, the corporate officers and employees would appear not to be "inherently suspect."

⁸⁸ Regardless of whether one characterizes corporate officials as a select group, the real problem with the *Byers* plurality's approach is that, in effect, it equates a finding that there is a real risk of self-incrimination with a finding that there is a "highly

The officers face no real risk by answering the questions.

Under the alternative *Byers* approach proposed by Justice Harlan, the analytical starting point is to see whether there is "an assertedly noncriminal governmental purpose in securing the information."⁸⁹ With regard to tax collection procedures, the courts have generally presumed such a non-criminal purpose. For example, in *Grosso* the Court declared, "[t]he principal interest of the United States must be assumed to be the collection of revenue."⁹⁰ While the presumption of a valid regulatory purpose is rebuttable, it would seem that the IRS would have little difficulty in establishing that there is a valid regulatory, non-criminal purpose to the eleven questions. The IRS is interested in ascertaining the proper amount of tax due. Although the IRS's questions are directed to the corporation's officers and employees, their answers relate directly to whether the corporation has taken any illegal deductions. By statute, deductions are not allowed for certain types of payments⁹¹ and the IRS fulfills its regulatory duty when it checks to see that no improper deductions are taken. Nonetheless, although the underlying purpose of the questions relates to a valid regulatory duty, the questions, in their present form, are not narrowly directed at the problem of illegal deductions.⁹²

selective" group "inherently suspect of criminal activities." If the latter doesn't exist, neither does the former. Yet a determination that a group is "highly selective" or "inherently suspect" is merely one factor in the determination of whether a member of the group faces a real risk. It is quite possible that members of groups which are not highly selective or inherently suspect may still face substantial hazards of self-incrimination. For example, regardless of the selectivity of the group, the amount of regulation that a group is subject to can affect the amount of risk faced by the group members who are required to file a statement. In *United States v. Whitehead*, 424 F.2d 446 (6th Cir. 1970), Judge McCree, dissenting in part, noted that while distillers did not constitute a "group inherently suspect of criminal activities," they were "involved in a business which is subject to extensive state and federal controls." Consequently, he reasoned that "compliance with the disclosure provisions of the alcohol tax laws" would create a risk of self-incrimination that was not "merely trifling or imaginary." *Id.* at 453 (McCree, J., dissenting in part).

⁸⁹ 402 U.S. at 454 (Harlan, J., concurring in the judgment).

⁹⁰ 390 U.S. at 68.

⁹¹ See note 12 *supra*.

⁹² The 11 questions should be rewritten to focus

Justice Harlan's second factor, "the necessity for self-reporting as a means for securing the information"⁹³ differentiates the eleven questions from the *Byers* situation. Although as in *Byers*, a driver involved in an accident might flee the scene leaving virtually no clue to his involvement, the IRS has alternative means of securing the information the eleven questions are aimed at uncovering. The corporate books and records can be examined by the IRS for clues of improper activities. While a routine audit might not uncover illegal corporate payments, a more intensive IRS audit of the corporate books and records would be more likely to uncover irregularities in the corporation's books.⁹⁴ In addition, corporate officers and employees not claiming the fifth amendment privilege would be required to render some

minimal assistance to the IRS in its investigation.⁹⁵

The final factor to be considered in using the Harlan approach is the nature of the disclosure required. In *Byers* the disclosures were kept to a minimal level. Disclosure of only the name and address of the driver was required by the *Byers* reporting statute. However, under the eleven questions, the disclosures are of a more detailed nature and relate to an area in which there are numerous criminal statutes.⁹⁶ A corporate officer or employee who acknowledges that the corporation has engaged in bribes and kickbacks, or has in some way supported or opposed a foreign or domestic political candidate, might be incriminating himself. The fifth amendment provides a privilege against self-incrimination to anyone who is compelled to give an answer "which would furnish a link in the chain of evidence needed to prosecute the claimant."⁹⁷ If the officer or employee revealed information about illegal activities in which he had himself participated, this information could be a "link in the chain of evidence" leading to his prosecution because it could be introduced into evidence as a party admission.⁹⁸ Thus, if the officer or employee could be compelled to respond to the eleven questions, the state's evidentiary burden might well be reduced to "a merely ritualistic confirmation of the 'conviction' secured through compliance with the reporting requirement."⁹⁹

If Justice Harlan's approach were utilized in the eleven questions situation, a corporate officer or employee who feared self-incrimination would be able to make a valid fifth amendment claim. Justice Harlan's second and third conditions for compelling testimony under a required records rationale are absent. Alternative

on deductions and not on the broader topic of payments made by the corporation. Then the questions would relate directly to the tax liability of the corporation and the regulatory purpose of the questions becomes more apparent.

In *United States v. Richards*, 77-1 USTC ¶ 9362 (E.D. Va. 1977), a corporate president refused to answer 8 of the 11 questions. The court refused to enforce an IRS summons directing the president to answer the questions in their present form. The court noted:

[T]he scope of at least some of the questions involved here by their very phraseology relate to potentially illegal payments, not deductions made by the Corporation, and to that extent, constitute a "fishing expedition" beyond the relevant scope of an Internal Revenue Service investigation. If, for example, the Corporation had made such illegal payments but had not utilized such payments to affect its tax liability in any manner, such payments would be beyond the scope of the present investigation.

Id. (emphasis in original). However, the court resolved the matter by simply rewriting the questions to relate directly to the corporation's tax liability and then directed the corporation president to answer the rewritten questions.

⁹³ 402 U.S. at 454 (Harlan, J., concurring in the judgment).

⁹⁴ A more extensive audit might well reveal that: Significant changes in the amounts paid to foreign consultants, discrepancies in amounts paid to different consultants providing essentially the same services, unusual investments or loans, the sudden writeoff of a loan, foreign subsidiaries showing minimal revenues or accumulated deficits, and transfers of large cash amounts to foreign units.

Schellhardt, *Many Big Corporations Face Tax-Fraud Cases in Slush-Fund Audits*, Wall St. J., Dec. 10, 1976, at 10, col. 1 (midwest ed.).

⁹⁵ Under the eleventh of the 11 questions, these corporate officers and officials would be required to state whether they knew of any "present or former corporate officers, directors, employees or other persons acting on behalf of the corporation (who) may have knowledge" concerning the issues raised by the 11 questions. Internal Revenue News Release IR-1590, [1976] 9 STAND. FED. TAX REP. ¶ 6567.

⁹⁶ Criminal statutes which are potentially applicable to the officers and employees are listed in note 12 *supra*.

⁹⁷ *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

⁹⁸ See FED. R. EVID. 801(d)(2)(A).

⁹⁹ 402 U.S. at 458 (Harlan, J., concurring in the judgment).

means of securing the information sought be the eleven questions are available; consequently there is no "necessity for self-reporting as a means for securing the information." In addition, the detailed nature of the disclosures required by the eleven questions necessitate that the privilege against self-incrimination be available to the officer or employee.

CLAIMING THE PRIVILEGE AT THE PROPER TIME AND THE EFFECT OF IMMUNITY

Even if the Harlan approach is utilized, making the privilege available to the corporate officer or employee who fears self-incrimination in answering the eleven questions, the officer or employee will not be protected if he fails to assert the privilege before responding to the questions. In *Garner v. United States*,¹⁰⁰ the petitioner was a professional gambler who disclosed his occupation on his tax return. Garner was later tried for conspiring in interstate gambling schemes. At his trial, the government introduced Garner's tax returns. Garner was convicted and later sought to have his tax returns excluded on the basis of the privilege against self-incrimination. The Supreme Court held that Garner's failure to assert the privilege on his return defeated his claim of privilege. The Court held that the disclosures were not compelled because it viewed them as the voluntary testimony of a witness. Unless a witness claims the privilege, the government is entitled to "assume that its compulsory processes are not eliciting testimony that he deems to be incriminating."¹⁰¹ The Court reasoned that this rule was "consistent with the fundamental purpose of the Fifth Amendment—the preservation of an adversary system of criminal justice."¹⁰² The Court rejected Garner's argument that he was in fact compelled to give testimony because he feared that if he did not complete his income tax return, he would be prosecuted for failure to file a return under section 7203 of the Internal Revenue Code.¹⁰³

The Court answered this argument with a dictum that a *valid*¹⁰⁴ claim of privilege would be a complete defense to the section 7203 prosecution.

Applying *Garner* in the context of the eleven questions, a corporate officer will not be able to claim that he is being compelled to answer the questions out of a fear of being prosecuted under section 7203 for failure to supply information since a "valid claim of privilege" would be a defense to any such prosecution. Further, as in *Garner* any privilege the officer or employee claims must be asserted before supplying any information to the IRS or before testifying in response to a summons. If he answers before claiming the privilege, then the answers given will be deemed not to have been compelled. If the officer or employee does claim the privilege, it seems probable that the claim will have to be a particularized one with regard to each question that he fears may lead to self-incrimination. *Garner* repeated the dictum from *United States v. Sullivan* which "indicated that the privilege could be claimed against specific disclosures sought on a return."¹⁰⁵

If a corporate officer or employee claims the privilege, the IRS or a grand jury may still be

law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both together with the costs of prosecution.

I.R.C. § 7203.

¹⁰⁴ 424 U.S. 648, 663. The Court shifted ground slightly when, in a footnote, it indicated that "a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith." *Id.* at 663 n.18 (emphasis added). Justices Marshall and Brennan, who concurred in the result, emphasized their view that a "good faith erroneous assertion of the privilege does not expose a taxpayer to criminal liability." *Id.* at 666 (Marshall, J., concurring in the judgment). Under § 7203 a taxpayer might face prosecution without first having had a judicial determination of the validity of his fifth amendment claim. By way of contrast, if the IRS had proceeded against Garner by using its summons power, then before Garner would be subject to contempt of court, the district court would have to rule on his claim of privilege. Because a prior judicial determination of the invalidity of the taxpayer's claim was not a prerequisite to a § 7203 prosecution, Justices Brennan and Marshall felt that "a good faith erroneous claim of privilege entitles a taxpayer to acquittal under § 7203." *Id.* at 668.

¹⁰⁵ 424 U.S. at 650. See text accompanying note 31 *supra*.

¹⁰⁰ 424 U.S. 648 (1976).

¹⁰¹ *Id.* at 655.

¹⁰² *Id.*

¹⁰³ Section 7203 states:

Any person . . . required by this title or by regulations made under authority thereof to make a return . . . keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by

able to compel his testimony through a grant of immunity.¹⁰⁶ The grant of use immunity would prohibit the government from using the individual's testimony or information derived from his testimony in a criminal case against that individual.¹⁰⁷

The constitutionality of the use immunity statute was upheld in *Kastigar v. United States*.¹⁰⁸ In *Kastigar*, the petitioners claimed that full transactional immunity—that is, complete immunity from prosecution regarding the matters about which testimony is given—was necessary to compel testimony against a claim of privilege. The Court held that transactional immunity need not be given because it gave the witness “considerably broader protection”¹⁰⁹ than he enjoyed under the fifth amendment. The Court held that a grant of immunity from use and derivative use of the testimony put the witness and the government “in substantially the same position as if the witness had claimed his privilege.”¹¹⁰ Since the immunity granted was “coextensive with the scope of the privilege against self-incrimination,” it was “sufficient to compel testimony over a claim of privilege.”¹¹¹

But while a grant of use and derivative use immunity generally is constitutionally sufficient to compel testimony, it is an insufficient shield for a witness who may face prosecution in a

foreign country, because a grant of immunity given by an American court cannot be enforced in the foreign country.¹¹² Officials in a foreign country might become aware of the officer's or employee's admitted violation of their country's laws and move to extradite and try him in their country. Even testimony under a grant of immunity before a grand jury, whose proceedings are supposed to be secret, subjects the corporate officer or employee to this risk. Grand jury “leaks” and subsequent newspaper publicity are no longer rare events.¹¹³ Whether a witness who has been given a grant of immunity can still assert the privilege against self-incrimination and refuse to testify in such a situation is uncertain.

In *Murphy v. Waterfront Commission*,¹¹⁴ the petitioners were offered immunity under state law. They still refused to testify because they feared that their answers might incriminate them under federal law. The Court held that the privilege protected “a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.”¹¹⁵ But before the Court reached its decision, it undertook an extensive examination of both the English and American cases dealing with the scope of the privilege.¹¹⁶ The Court cited the English Rule of *United States of America v. McRae*¹¹⁷ with approval.¹¹⁸ In *McRae* the United States sued the defendant in England for an accounting of money which it claimed he had received from the Confederacy during the Civil War. The defendant refused to answer questions because he claimed that this would incriminate him under the laws of the United States. The Lord

¹⁰⁶ 18 U.S.C. § 6002 (1970) authorizes a grant of immunity to be given in proceedings before or ancillary to a grand jury or an agency of the United States. 18 U.S.C. § 6004 (1970) authorizes an agency to issue a grant of immunity under § 6002. However, the present policy of the IRS appears to be to refrain from employing § 6004. See *Garner v. United States*, 424 U.S. at 652 n.6 (1976).

¹⁰⁷ Section 6002 provides use and derivative use immunity:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information . . . and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case. . . . 18 U.S.C. § 6002 (1970).

¹⁰⁸ 406 U.S. 441 (1972).

¹⁰⁹ *Id.* at 453. The transactional immunity statute, 18 U.S.C. § 2514, has been repealed. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 227(a), 84 Stat. 922.

¹¹⁰ 406 U.S. at 458-59.

¹¹¹ *Id.* at 453.

¹¹² If officials in a foreign country decided to ignore the grant of immunity and prosecute the witness, the American court would have no power to enforce its grant of immunity.

¹¹³ The problem of self-incrimination under the laws of a foreign country is more likely to occur in proceedings before a grand jury than in proceedings before a court. For example, if the IRS attempted to get a summons enforced and the corporate officer or employee defended on the grounds of self-incrimination, the court could take more effective protective measures (e.g., in camera proceedings) than could a grand jury to assure that no leaks occurred.

¹¹⁴ 378 U.S. 52 (1964).

¹¹⁵ *Id.* at 78.

¹¹⁶ See *id.* at 58-77.

¹¹⁷ L.R. 3 Ch. App. 79 (1867).

¹¹⁸ The Court described *McRae* as representing “the most recent authoritative announcement of the English Rule.” 378 U.S. at 67.

Chancellor sustained the defendant's claim of privilege stating that the case before the court was indistinguishable "from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law."¹¹⁹

Though the Supreme Court suggested in *Murphy* that it might grant the privilege to one who fears prosecution under foreign laws, the Court has not conclusively decided this issue. In *Zicarelli v. Investigation Commission*,¹²⁰ the appellant refused to answer questions put to him by a state investigation commission after he was given immunity. Zicarelli claimed that he feared foreign prosecution. However, only one question of the one hundred questions he refused to answer posed "a substantial risk of incrimination under foreign law."¹²¹ That question asked: "In what geographical area do you have Cosa Nostra responsibilities?"¹²² The Court noted that "the context in which the question is asked imparts additional meaning to the question and clarifies what information is sought."¹²³ The commission was interested solely in Zicarelli's activities in the New Jersey area, and its questions were accordingly New Jersey oriented. Thus Zicarelli could have easily avoided incriminating himself under foreign law by limiting his response to a description of his activities in the New Jersey area. Accordingly, the Court found that he was "never in any real danger of being compelled to disclose information that might incriminate him under foreign law."¹²⁴ The Court thus found it unnecessary to reach the question whether the privilege would have been avail-

able to Zicarelli if he actually faced foreign prosecution.

Although the Supreme Court has never decided whether the privilege would protect a witness who refused to answer questions because he might incriminate himself under the laws of a foreign country, other courts have reached this question. Both the fifth and tenth circuits have held that a witness who has been given a grant of immunity to testify before a grand jury cannot refuse to testify for fear that he will incriminate himself under the laws of a foreign country. In *In re Parker*,¹²⁵ the tenth circuit reasoned that the witness was in no danger of incriminating himself because his testimony was to be given before the grand jury and Rule 6(e) of the Federal Rules of Criminal Procedure prevents disclosure of testimony given before a grand jury unless a court orders the disclosure. Because such a court order would be contrary to both grand jury secrecy and to the court's own promise of immunity, the tenth circuit held that the witness should be required to testify.¹²⁶ Similarly, the fifth circuit in *In re Tierney*¹²⁷ held that the witness should testify because grand jury secrecy afforded by Rule 6(e) precluded any substantial risk of foreign prosecution.¹²⁸

A contrary position upholding the right of a witness who was offered immunity to refuse to testify for fear of prosecution under the laws of a foreign country was taken in *In re Cardassi*.¹²⁹ As in *Parker* and *Tierney*, the witness refused to answer questions even after being given immunity. However, stating that the "the constitutional protection of the witness must rest on more than faith,"¹³⁰ the *Cardassi* court rejected the argument that reliance upon Rule 6(e) would sufficiently protect the witness.¹³¹

¹²⁵ 411 F.2d 1067 (10th Cir. 1969), *vacated and remanded for dismissal as moot sub nom.* *Parker v. United States*, 397 U.S. 96 (1970).

¹²⁶ 411 F.2d at 1069-70.

¹²⁷ 465 F.2d 806 (5th Cir. 1972).

¹²⁸ *Id.* at 811.

¹²⁹ 351 F. Supp. 1080 (D. Conn. 1972).

¹³⁰ *Id.* at 1082.

¹³¹ A case involving an officer or employee of a major American corporation would be likely to attract a greater amount of attention than would the average case. As public interest in a case rises, the incentives to breach the grand jury wall of secrecy also increase. One writer expressed concern that "the alarming rise in grand jury investigations of celebrated people has placed enormous strains on a grand jury's secrecy." Fahringer, *The Problem of Grand Jury Leaks*, TRIAL, May, 1976, at 33.

¹¹⁹ *Murphy v. Waterfront Comm'n*, 378 U.S. at 67 (quoting *McRae*, L.R. 3 Ch. App. at 87).

¹²⁰ 406 U.S. 472 (1972).

¹²¹ *Id.* at 479-80.

¹²² *Id.* at 480.

¹²³ *Id.* The information expected by the questioner in response to the question is not determinative of whether the privilege is applicable. Rather, the privilege is dependent upon "what a truthful answer might disclose." *Id.* In *Hoffman v. United States*, 341 U.S. 479 (1951), the Court announced a standard for determining the availability of the privilege. It stated:

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

Id. at 486-87.

¹²⁴ 406 U.S. at 480.

The court noted that there were effective safeguards against the use of compelled testimony in American courts by federal or state officials. Either the testimony could be excluded or the conviction set aside. By contrast, the witness who feared prosecution by a foreign government was protected by no such safeguards. If the United States had an extradition treaty or convention with a foreign government, a court would merely certify to the Secretary of State in an extradition proceeding whether the evidence was "sufficient to sustain the charge under the proper treaty or convention."¹³² The court in certifying "probable cause" to allow extradition would not have an opportunity to pass upon the person's possible fifth amendment claims. The American court would have no power to speculate upon the foreign government's possible violation of the defendant's fifth amendment rights. Also the court, in certifying whether extradition might take place, would not be abusing its judicial power by refusing to consider the defendant's fifth amendment claim during the extradition hearing, it would be "simply declining to interfere in an area of traditional executive control."¹³³ Because post-testimony control of information would be difficult if not impossible to maintain when foreign governments are involved, *Cardassi* decided it was necessary to avoid the problem of post-testimony control by refusing to order the witness to testify.

The position taken by the court in *Cardassi* appears to be more in harmony with *Murphy*

and *Zicarelli* than the fifth and tenth circuit cases. The *Cardassi* decision recognizes that *Murphy* approved of the English Rule¹³⁴ which would protect a witness against incriminating himself under both foreign and domestic laws. Furthermore, *Cardassi* takes a more practical view of the *Zicarelli* substantial risk test.¹³⁵ As noted earlier, grand jury leaks are not rare.¹³⁶ Consequently, reliance on Rule 6(e) is insufficient to protect the witness from the possibility of self-incrimination under the laws of a foreign country.

CONCLUSION

The eleven questions which the IRS is asking in its audits of the 1200 largest American corporations present the threat of subjecting the officers and employees of these corporations to the "cruel trilemma" of self-accusation, perjury or contempt. The self-reporting and required records exception to the fifth amendment privilege against self-incrimination has, under certain circumstances, been able to overcome the individual's privilege. While both the theory and the application of the self-reporting and required records exception are still evolving, the approach suggested by Justice Harlan in *Byers* provides the most satisfying theoretical framework for an application of the exception. Under Justice Harlan's approach, the officers and employees would be able to claim the fifth amendment privilege.

If the government wants to obtain the testimony of the corporate officer or employee, it may be able to do so by offering him use immunity. However, use immunity will not provide an adequate protection to an individual who faces a substantial risk of prosecution under the laws of a foreign country. In this situation, the courts are divided on whether an individual who has been granted immunity can be compelled to testify. However, the better position appears to be the one which allows the individual to remain silent without fear of any penalty for his silence.

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Rule 6(e) specifically provides: "Disclosure of matters occurring before the grand jury . . . may be made to the attorneys for the government for use in the performance of their duties." FED. R. CRIM. P. 6(e). Disclosure to United States Attorneys may lead to information leaks. In the context of the receipt of confidential tax information by United States Attorneys, a caution was raised: "United States Attorneys are political appointees. Placing confidential material in their hands raises a potential for abuse. . . . Problems have arisen regarding alleged leaks of tax information by United States Attorneys." REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. DOC. NO. 266, 94th Cong., 2d Sess. 916 (Oct. 1975).

¹³² 18 U.S.C. § 13184 (1970).

¹³³ *In re Cardassi*, 351 F. Supp. at 1085.

¹³⁴ See text accompanying notes 117-18 *supra*.

¹³⁵ See text accompanying notes 121-24 *supra*.

¹³⁶ See note 131 *supra*.