

Self-Incrimination and the Federal Excise Tax on Wagering

The Fifth Amendment's protection against self-incrimination, once the stepchild of the Due Process Clause, has more recently emerged as a constitutional favorite son. The Supreme Court has held that the privilege is applicable to the states,¹ that it prevents compelled admissions on one government level from being used in prosecutions on another,² and that it bars any use of compelled admissions of criminal conduct against the speaker.³ Thus revived, the self-incrimination privilege casts grave doubt on a common device of law enforcement: a regulatory statute which necessarily requires admitting a violation of an independent criminal statute as a condition of compliance.

The federal wagering tax⁴ is a prime example of this device. It was inspired by the successful use of the excise tax to prohibit indirectly the traffic in undesirable commodities by taxing them out of existence.⁵ The tax gives the lawbreaker a simple choice: he can either reveal his crime by complying with the taxing and registration provisions, or he can commit the additional crime of tax evasion, thus making a federal case out of it.⁶

The registration provision requires that everyone in the business of accepting wagers, for himself or for others, must register with the Internal Revenue office, and answer several questions, including:

1. *Malloy v. Hogan*, 378 U.S. 1 (1964).
2. *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).
3. *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965).
4. INT. REV. CODE OF 1954, §§ 4401-23 (1964) [hereinafter cited as IRC]. The constitutionality of these provisions is presently being reconsidered by the Court in *Marchetti v. United States*, *cert. granted*, 87 S. Ct. 698 (1967) (No. 823, 1965 Term; renumbered No. 38, 1966 Term); for the opinion below, *see United States v. Costello*, 352 F.2d 848 (2d Cir. 1965); and in a related case, *Grosso v. United States*, *cert. granted*, 385 U.S. 810 (1966) (No. 181); for the opinion below, *see United States v. Grosso*, 358 F.2d 154 (3d Cir. 1966). The Court has also requested the Solicitor General to express an opinion in *Rainwater v. Florida*, 186 So. 2d 278 (Fla. 1966), on whether federal wagering tax evidence should be excluded in a state lottery prosecution. 385 U.S. 944 (1966).
5. These taxes regulate sales of certain commodities by increasing their costs and requiring the maintenance of records open to inspection. *See* IRC §§ 4801-06 (white phosphorous matches); IRC §§ 4811-46 (adulterated butter and filled cheese); IRC §§ 4851-76 (cotton futures). These statutes apply to both legal and illegal activities, thus avoiding the challenge that they are not taxes. *See United States v. Constantine*, 296 U.S. 287 (1935) (liquor tax held unconstitutional). *See infra* notes 34-36 and the accompanying text for a discussion of excise taxes which, like the wagering tax, focus predominantly on illegal activity.
6. *See* IRC §§ 7203, 7262 for the appropriate penalties.

5. Are you or will you be engaged in the business of accepting wagers on your own account?
6. Do you receive or will you be receiving wagers on behalf of or as agent for some other person or persons?⁷

If the answer to either question is yes, the registrant must reveal the places where the business is conducted and the names and addresses of all his business associates. Compliance and payment of the special \$50 tax entitles the registrant to a federal wagering tax stamp, which he must post or exhibit at all times.⁸

Since gambling is a crime in virtually all states, the information given by the taxpaying gambler amounts to a confession that he has violated or intends to violate state laws.⁹ A gambler cannot pay the tax without registering and providing the required information; it is therefore impossible to comply without revealing incriminating information.¹⁰ Registration "[does] not exempt any person from any penalty provided by a law of the United States or of any state for engaging in the same activity. . . ."¹¹ To encourage state prosecution, a list of registrants is kept by every IRS district director, which is available to any prosecutor who wants it.¹² As if there were any doubt, the Internal Revenue Service has informally acknowledged that the tax's primary purpose is to force gamblers to incriminate themselves on either the state or federal level.¹³

Prosecutorial use of the compelled admissions has been constitutionally sanctioned by the courts. In *Irvine v. California*,¹⁴ the state was permitted to introduce the tax stamp as evidence in a gambling prosecution. Other states have gone further, making possession of the stamp

7. U.S. DEPT. OF THE TREASURY, SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING (1963).

8. IRC § 6806(c). Negligent failure to comply with this provision results in a \$50 fine and willful failure a \$100 fine, IRC § 7273(b).

9. The intent to violate a state statute is itself a crime under most state conspiracy statutes, with payment of the tax prior to gambling the external act. *See Acklen v. State*, 196 Tenn. 314, 267 S.W.2d 101 (1954) (agreement between parties to violate the Tennessee gaming laws evidenced by the wagering tax stamps and returns). *But see Mansfield, The Albertson Case, Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 152 (1966): "But the registration is not incriminating in the sense of disclosing past or present criminality."

10. *See United States v. Mungiole*, 233 F.2d 204 (3d Cir. 1956) (that a tender of the tax, without registration, was rejected is no defense in a subsequent prosecution for failure to pay).

11. IRC § 4422.

12. IRC § 6107.

13. Caplin, *The Gambling Business and Federal Taxes*, 8 CRIME AND DELINQUENCY 371, 375 (1962). Caplin was Commissioner of the Internal Revenue Service when he wrote the article.

14. 347 U.S. 128 (1954).

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*prima facie*¹⁵ or even conclusive evidence¹⁶ of state gambling violations. The federal government, too, has used the registration information to prove traffic in interstate gambling.¹⁷

The tax itself has twice been challenged on self-incrimination grounds, and has twice been upheld by the U.S. Supreme Court. In *United States v. Kahriger*¹⁸ and *Lewis v. United States*,¹⁹ the Court was unsure that the protestors, who had refused to register and pay the tax, even had standing to raise the privilege. Assuming they did, the Court refused to accept the claim, holding that the wagering tax registration was prospective only—i.e., it required only that the registrant admit a *future intention* to accept wagers. Self-incrimination was not affected, said the Court, since that privilege protected only compelled admissions of past acts.²⁰

15. *Griggs v. State*, 37 Ala. App. 605, 73 So. 2d 382 (1954), upholding the constitutionality of ALA. CODE ANN. tit. 14, § 302(8) (1959):

The holding, owning, having in possession of, or paying the tax for a wagering occupational tax stamp issued by the Internal Revenue Authorities of the United States shall be held in all the courts of this state as prima facie evidence against the person holding such stamp in any prosecution of such person for violation of the gambling laws of this state.

Contra, *Jefferson v. Sweat*, 76 So. 2d 494 (Fla. 1954), holding a similar statute unconstitutional on due process and equal protection grounds.

16. *Deitch v. Chattanooga*, 195 Tenn. 245, 258 S.W.2d 776 (1953) (city ordinance made possession of a wagering tax stamp a crime). In other cases the stamp and returns have been held admissible as evidence. *See State v. Mills*, 229 La. 758, 86 So. 2d 895 (1956), *cert. denied*, 352 U.S. 834 (1956); *State v. Curry*, 92 Ohio App. 1, 109 N.E.2d 298 (1952). *But cf. Commonwealth v. Fiorini*, 202 Pa. Super. 88, 94, 195 A.2d 119, 122 (1963) (seizure of tax stamp illegal since it is not an element of a crime but a receipt for a tax).

17. 18 U.S.C. § 1952 (1964), prohibits interstate travel in aid of racketeering. In *United States v. Zizzo*, 338 F.2d 577 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965), wagering tax forms were used to show that defendant had employed Illinois residents in Indiana in violation of the above statute. In *United States v. Clancy*, 276 F.2d 617 (7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961), records kept pursuant to the taxing provision were held admissible under the required records doctrine, discussed note 37 *infra*. The court rejected the argument that the records were private and protected by the Fifth Amendment. *But cf. United States v. Ansani*, 138 F. Supp. 451 (N.D. Ill. 1955), a non-wagering tax case involving a prosecution under 15 U.S.C. § 1172 (1964) prohibiting the interstate transportation of gambling devices. The requirement that records of monthly sales and deliveries be filed with the Attorney General was held unconstitutional as compelling the admission of a crime; in addition the records were termed private. The defendants were convicted on other grounds. *United States v. Ansani*, 138 F. Supp. 454 (N.D. Ill. 1956), *aff'd* 240 F.2d 216 (7th Cir.), *cert. denied*, 353 U.S. 936 (1957).

18. 345 U.S. 22 (1953). In addition to rejecting the Fifth Amendment challenge by holding registration a valid condition precedent, the Court stated that congressional intent to regulate gambling (a power reserved to the states under the Tenth Amendment) was irrelevant since the tax provided revenue and the registration provisions were adapted to this. No justification was given for encouraging the states to obtain this information.

19. 348 U.S. 419 (1955). *Lewis* involved the District of Columbia, where gambling was a federal crime, and it reached the same result, destroying the belief that *Kahriger* turned on the interjurisdictional question of the Fifth Amendment. The Court held that the government may also tax that which it forbids.

20. The source of this semantic limitation on the Fifth Amendment is 8 J. WIGMORE, EVIDENCE 348-49 (3d ed. 1940):

§ 22.59c. Crime disclosed in (1) Public Books, or (2) Books required by Law to be kept.

This distinction—assuming it was sound in *Kahriger* and *Lewis*—has been substantially undercut by recent fifth amendment cases, most notably *Albertson v. Subversive Activities Control Board*.²¹ Petitioners refused to register as Communist Party members pursuant to the Subversive Activities Control Act. The registration forms required admission of Communist Party membership and the listing of birthplace and date, aliases, and other information.²² An immunity provision provided “that the admission of Party membership thus required shall not *per se* constitute a violation of §§ 4(a) and (c) or any other criminal statute, or ‘be received in evidence’ . . . in any criminal prosecution. . . .”²³

The Court held that an immunity provision was not complete unless it protected the individual against future prosecution for the incriminating disclosure which the question required; it thereby expanded the “absolute immunity” doctrine of *Counselman v. Hitchcock*²⁴ to cover written compulsion under registration as well as oral testimony before a judicial or legislative tribunal.²⁵ Since § 4(f) (50 U.S.C. § 783(f) (1964)) did not bar the use of the information as an “investigatory lead” to uncover related criminal conduct which could lead to prosecu-

(1) The State requires the books to be kept, but it does not require the officer to commit the crime. . . . The State announced its requirement to keep the books long before there was any crime. . . .

(2) The same reasoning applies. . . . [T]he duty, or compulsion [to register] . . . is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty. . . . [T]here is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may not in future be criminal at the choice of the party reporting. (Emphasis in original.)

For an excellent discussion of this rationale and of other aspects of the self-incrimination problem, see Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681 (1965). The author suggests the extreme implications of applying this rationale in the criminal area, *i.e.*, compelling burglars to register before they commit burglary. For those who fail to register, the federal government would provide sanctions just as in the wagering tax field.

By applying this section in a criminal area, the *Kahriger* Court held society's interest in disclosure of criminal acts superior to the right of the individual to be free from unrestrained government inquisition; the present Court may be unwilling to continue this. See *United States v. White*, 322 U.S. 694, 698 (1944): “The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime.”

21. 382 U.S. 70 (1965).

22. 28 C.F.R. § 11.206 (1966) (Form IS-52a) and 28 C.F.R. § 11.207 (1966) (Form IS-52), reprinted in 382 U.S. at 82-85.

23. 382 U.S. at 80.

24. 142 U.S. 547, 585-86 (1892):

[No] statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution. . . . [A] statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.

25. 382 U.S. at 78.

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tion under the Smith Act and other political and economic deprivations,²⁶ its protection was deemed insufficient to supplant the privilege.

The *Albertson* Court distinguished *United States v. Sullivan*,²⁷ which held that a taxpayer could not refuse to fill out a tax return because the answers to some of the questions might be incriminating. That case, said the *Albertson* Court, concerned:

questions in the income tax return [which] were neutral on their face and directed at the public at large . . . [while] here they are directed at a highly selective group inherently suspect of criminal activities.²⁸

The impact of *Albertson* on the wagering tax provisions is apparent. As in *Albertson*, the information required is in an area "permeated with criminal statutes"; similarly, the questions are not neutral, but directed at a selective group—intended gamblers—inherently suspect of criminal acts.

The only distinction is that the information subjects gamblers to incrimination largely under state statutes,²⁹ while most laws in the anti-Communist field are federal. This distinction, however, is constitutionally irrelevant, for the Supreme Court, in *Murphy v. Waterfront Commission of N.Y.*,³⁰ has held that to compel testimony an immunity provision must bar prosecution or investigatory use of the information by both federal and state authorities.³¹ Since the wagering

26. 382 U.S. at 77, citing the Smith Act, 18 U.S.C. § 2385 (1964) and the Subversive Activities Control Act, 50 U.S.C. § 783(a) (1964). In addition, being a Communist prevents one from obtaining government defense employment, holding union office, or receiving a political tax deduction. See 17 SYRACUSE L. REV. 560 (1966), citing 50 U.S.C. § 784(a) (1964).

27. 274 U.S. 259 (1927). *Sullivan* was limited to essentially non-criminal and regulatory areas of inquiry (the same field in which the Wigmore rationale, *supra* note 20, would be applicable). 382 U.S. at 79. In *United States v. Kahriger*, 345 U.S. 22 (1953) and *Lewis v. United States*, 348 U.S. 419 (1955), *Sullivan* was cited as foreclosing the self-incrimination claim to petitioners. Since the Court granted certiorari in *Marchetti v. United States*, 87 S. Ct. 698 (1967), limited to this issue, the *Sullivan* argument has apparently been rejected in this area too. (Petitioner had neither registered nor paid the tax.)

28. 382 U.S. at 79.

29. *But cf.* *United States v. Zizzo*, 338 F.2d 577 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965), discussed in note 17, *supra*, where wagering tax information was used in a prosecution under 18 U.S.C. § 1952 (1964).

30. 378 U.S. 52 (1964).

31. [T]here is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction. 378 U.S. at 77.

Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent legitimate source for the disputed evidence.

Id. at 79 n.18.

The Court's holding was made applicable regardless of which jurisdiction had compelled the information. By so holding it rejected the doctrine of "cooperative federalism" under

tax law specifically *denies* that kind of immunity, its foundations do not appear secure.

Nor does the Court appear to have the option of construing the immunity provided by the law to cover the constitutional difficulties. This was accomplished in *Murphy*, where the petitioners were required to answer the questions of the Waterfront Commission, with both federal and state authorities barred from using the information in prosecutions or in investigatory leads against the witnesses. Since the intention of the state was to provide protection for the witness, New York's immunity provisions could be so construed by the Court, because the failure to include protection from federal prosecution resulted from the state's uncertainty about its own power, not from a policy decision.

In the wagering tax, however, Congress has made a specific decision *not* to provide such immunity. Unless the Court is willing overtly to amend the statute, it must construe the provision of immunity on its face, as did the *Albertson* court.³² With such an approach, the tax as written must fall under a self-incrimination claim.

This is not to say, however, that Congress cannot re-enact such a statute with proper immunization. Congress could still force gamblers to register and pay a tax. The law, however, would have to provide that the registrant could not be investigated or prosecuted, by either the federal or the state government, on the basis of information compelled by the tax law.³³ As in *Murphy*, in any prosecution the state

which "the Federal and State Governments are waging a united front against many types of criminal activity." *Id.* at 56. Since this was the obvious function of the wagering tax, *Murphy* foreshadowed its overthrow, although *Albertson* was needed to cradicate the Wigmore past-future distinction.

32. See *Scales v. United States*, 367 U.S. 203, 211 (1961): "Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute." See also *Aptheker v. Sec'y of State*, 378 U.S. 500, 515 (1964): "[T]his Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects."

33. Since *Albertson* does not distinguish between oral compulsion of witnesses and written compulsion of registrants, and since *Murphy* erases the former jurisdictional bounds of the privilege, *Hoffman v. United States*, 341 U.S. 479 (1951) becomes significant. That case concerned the holding in contempt of a grand jury witness for refusing to answer questions about his present business connections and his relations with a suspected criminal. In reversing, the Court held that the self-incrimination privilege must be liberally construed and that it

not only extends to answers that would in themselves support a conviction under a . . . criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime.

Id. at 486 (citation omitted).

To sustain the privilege, it need only be evident from the implications of the

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would bear the burden of showing that information used against the registrant came from independent sources. Further, to ensure that investigatory leads were not derived, the record of registrations should no longer be kept in the district IRS offices nor be made available to local prosecutors. This kind of immunization would, of course, reduce the excise tax to the unlikely goal of revenue raising.

The essential principle is simple: a statutory scheme which requires an individual to reveal actual or intended criminal activity is unconstitutional unless absolute immunity is given. This principle both defines and limits the application of the self-incrimination privilege toward compelled disclosures, at least in extreme cases like the wagering tax.

For example, the government imposes special taxes on firearms,³⁴ marihuana and narcotic drugs³⁵—all areas permeated with criminal statutes. It seems apparent that where disclosures of activities under these laws either admit violations of other laws or provide federal or local authorities with investigatory leads, the self-incrimination claim is valid; either the disclosures must be accompanied by absolute immunity, or they will be invalid. In the firearms area, the basic thesis that compliance with one statute cannot on its face be made the basis of a violation of another statute has been recognized.³⁶

question, in the setting in which it is asked, that a responsive answer to the question . . . might be dangerous because injurious disclosure could result.

Id. at 486-87. That the individual was engaged in criminal affairs was a factor to be considered. *Id.* at 487-88.

"If Congress should hereafter conclude that a full disclosure . . . by the [individual] . . . is of greater importance than the possibility of punishing [him] . . . for some crime in the past, it can, as in other cases, confer the power of unrestricted examination by providing complete immunity."

Id. at 490 (citation omitted).

34. IRC §§ 5801-62. *See* *Sonzinsky v. United States*, 300 U.S. 506 (1937), sustaining the constitutionality of the registration and special taxing provisions of the National Firearms Act.

35. IRC §§ 4701-76. *See* *United States v. Sanchez*, 340 U.S. 42 (1950), sustaining the transfer tax on marihuana; *Nigro v. United States*, 276 U.S. 332 (1928), sustaining the constitutionality of the written order requirement of the Anti-Narcotic Act and approving *United States v. Doremus*, 249 U.S. 86 (1919), which likewise had upheld the constitutionality of the Act.

36. In *Dugan v. United States*, 341 F.2d 85 (7th Cir. 1965) and *Russell v. United States*, 306 F.2d 402 (9th Cir. 1962), convictions under IRC § 5841 for failure to register a firearm not obtained in compliance with other provisions of the Act were reversed, since registration on its face admitted criminal liability for failure to comply with these other provisions. In *Dugan*, the court rejected the government's claim that registration information had never been used to incriminate the registrant. 341 F.2d at 87. Subsequent indictments avoided this pleading problem by prosecuting under IRC § 5851 as amended, for possession of an unregistered firearm and not the failure of the individual himself to register. *See* *Prye v. United States*, 315 F.2d 491 (9th Cir.), *cert. denied*, 375 U.S. 859 (1963), and *Starks v. United States*, 316 F.2d 45 (9th Cir. 1963). However, if the individual is charged with possession of a firearm which he himself has failed to register,

In one area, however, Fifth Amendment protection has not been granted. *Shapiro v. United States*³⁷ held that the government could require the keeping of business records as part of a general scheme of regulation (in that case, war-time price control). Moreover, information contained in the records could be used to prosecute the record-keeper, for a violation of the regulatory statute. On similar principles, the government is allowed use of a taxpayer's income-tax returns against him in a tax-evasion prosecution. This use of records does involve compulsory self-incrimination; justification, never attempted by the Court, would have to be in terms of the important non-prosecutorial functions served by the record-keeping requirement.³⁸ Thus, income tax returns are vital for the whole system of tax enforcement,³⁹ not just for criminal prosecution. The required records are not simply a device for compulsory incrimination.

Whatever the merits of this argument, it has no application to wagering tax records. For the statutory provision which throws records open to state prosecutors goes far beyond any federal interest in enforcing

a conviction will be reversed; see, e.g., *Lovelace v. United States*, 357 F.2d 306 (5th Cir. 1966).

In the marihuana cases, it has been held that fear of incrimination under 21 U.S.C. § 176a (1964), which proscribes the illegal importation and transportation of marihuana, is not a defense in a prosecution for possession of marihuana without compliance with the taxing provisions. See *Haynes v. United States*, 339 F.2d 30 (5th Cir. 1964), cert. denied, 380 U.S. 924 (1965); *Haili v. United States*, 212 F. Supp. 656 (D. Hawaii 1962). Since these cases rest on the *Kahriger* rationale, if that rationale is discarded in the wagering tax field the same results will follow here.

The same is true in the narcotics area. See *Palmer v. United States*, 332 F.2d 788 (9th Cir. 1964) (per curiam): "We find no merit in Palmer's contention that 26 U.S.C. § 472a violates the Fifth Amendment."

37. 335 U.S. 1 (1948). Petitioner was convicted of violating the Emergency Price Control Act. The Court upheld the compulsory production of his sales records and their use as evidence against him, since the records were: "required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained." 335 U.S. at 17 (quoting *Wilson v. United States*, 221 U.S. 361, 380 (1911)). The unique circumstances of this post-war emergency measure, and a recognition of the implications of its decision, led the Court to acknowledge that: "[T]here are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself." 335 U.S. at 32.

38. See Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 715 (1951). Meltzer suggests a test which would consider the government's need for the records to enforce a particular policy, the existence of a purpose other than getting documentary confessions, and the extent of the encroachment on the citizen's personal privacy.

39. In *Rutkin v. United States*, 343 U.S. 130 (1952) (affirming conviction for failure to report income from extortion) and *James v. United States*, 366 U.S. 213 (1961) (holding that income from embezzlement must be reported), the question of self-incrimination resulting from identification of the source was not considered by the majority. See *United States v. Sullivan*, 274 U.S. 259 (1927), discussed in note 27 *supra*.

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payment of the tax.⁴⁰ Its only function is to compel gamblers to reveal their illegal activities; it adds nothing to the enforcement of the tax or to any other federal regulatory purpose. Whether a finding of unconstitutionality here portends additional re-examinations by the Court into the broader area of regulatory record-keeping remains unclear.⁴¹

These considerations do not bar the federal government from taxing gambling as a revenue measure. Nor do they exclude federal criminal prosecutions for gambling. Under the commerce clause Congress already regulates certain aspects of gambling and marihuana; within the broad area permitted by the Tenth Amendment, these gambling provisions could be extended so that the federal government could reach gamblers insulated from state prosecution by indifference, incompetence, or corruption.

What the government cannot do is compel information under one statute which necessarily admits the violation of an unrelated criminal statute: this is the essence of self-incrimination.

40. In its briefs in the wagering tax cases the government's alternative argument suggests the adoption of a "use restriction" theory. This would confine the use of compelled information to tax purposes, and prohibit its use in a criminal prosecution relating to the underlying activity. (Brief for the United States in *Grosso v. United States*, *supra* note 4, at 18-19). As has been recently stated,

[B]y insulating the disclosure from prosecutory use, it may be possible both to preserve the essence of the privilege and at the same time give recognition to the government's interest in obtaining information for certain purposes.

Mansfield, *The Albertson Case, Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 Sup. Ct. Rev. 103, 121 (1966). As Mansfield recognizes, registration and recordkeeping requirements in criminal areas either seek to compel incriminating information or to use the withholding of such information as a means to punish indirectly the crime of another jurisdiction. *Id.* at 157. But this use restriction theory does not provide a solution in the civil regulatory area of *Shapiro* and in the income tax field where criminal prosecution is not independent of but intimately entwined with the regulatory provisions.

41. In *Garrity v. New Jersey*, 87 S. Ct. 616 (1967), the convictions of police officers for conspiracy to obstruct justice were reversed, the Court holding that confessions obtained under threat of job forfeiture were inadmissible under the fourteenth amendment in a subsequent criminal prosecution. This holding implies a "use restriction" on all statements obtained under threat of removal from office. On the same day, in *Spevack v. Klein*, 87 S. Ct. 625 (1967), the Court held that an attorney's refusal, based on the self-incrimination privilege, to produce his financial records or to testify at a judicial hearing was not a ground for disbarment. This overruled *Cohen v. Hurley*, 366 U.S. 117 (1961). In *Spevack*, the Court of Appeals had alternatively affirmed the disbarment under *Shapiro v. United States*, 335 U.S. 1 (1948), discussed in note 37 *supra*, since petitioner was under a duty to keep and produce such records. Although asked to overrule *Shapiro*, the majority in *Spevack* found it unnecessary to reach it. 87 S. Ct. at 629. But Mr. Justice Fortas, in his concurrence, expressed a willingness "in an appropriate case to re-examine the scope of the principle which *Shapiro* announces." *Id.* at 631. However, the wagering tax cases will probably not provide this "appropriate" forum.