University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1951

Required Records, the McCarran Act, and the Privilege Against Self-Incrimination

Bernard D. Meltzer

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

Part of the [Law Commons](#)

Recommended Citation

Bernard D. Meltzer, "Required Records, the McCarran Act, and the Privilege Against Self-Incrimination," 18 University of Chicago Law Review 687 (1951).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 18

SUMMER 1951

NUMBER 4

REQUIRED RECORDS, THE McCARRAN ACT, AND THE PRIVILEGE AGAINST SELF- INCRIMINATION

BERNARD D. MELTZER*

INTRODUCTION

HISTORY,¹ rhetoric, and parochialism have combined with distrust of official power to make the privilege against self-incrimination a powerful symbol of individual liberty. The origins of the privilege are associated with the struggle of Englishmen against the High Commission and the Star Chamber whose techniques included not only interrogation of suspects under the oath *ex officio*, but also the imprisonment and torture of recalcitrants.² Parochialism reinforced the appeal of history. The privilege, which is incorporated in the federal Bill of Rights and in all but two state constitutions,³ has, somewhat extravagantly, been considered a distinctive feature of the Anglo-American system.⁴ This difference easily became a mark of the "peculiar excellence"

* Professor of Law, University of Chicago Law School.

¹ For a discussion of the history of the privilege, see Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949) and authorities cited therein.

² Consult Trial of Lilburn and Wharton, 3 How. St. Tr. 1315, 1344-46, 1352-55 (1637). Lilburn was allegedly "cruelly tortured and whipped, pilloried, gagged, close imprisoned, ironed, beat and wounded." *Ibid.*, at 1352. See also 5 Bentham, *Rationale of Judicial Evidence* 246 (1827); 5 Holdsworth, *History of English Law* 185 (2d ed., 1937).

³ Consult 8 Wigmore, *Evidence* § 2252 (3d ed., 1940).

⁴ For example, in *Palko v. Connecticut*, 302 U.S. 319, 326 n. 3 (1937), Justice Cardozo stated: "Compulsory self-incrimination is part of the established procedure in the law of Continental Europe." It should be observed, however, that while European procedure permits and stresses the judicial examination of the accused, he is under no legal compulsion to answer. Consult Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 Harv. L. Rev. 433, 434-35 (1935); see also Hogg, *French Criminal Procedure*, 23 Can. Bar Rev. 846 (1945); Hamson, *Prosecutor and Accused*, London Times, p. 7, col. 6-7, (March 15 and 16, 1950). Compare Wigmore's description of the privilege in the Anglo-Ameri-

of our own system.⁵ The privilege reflected our preference for an accusatorial-adversary system as opposed to the inquisitorial system of the continental countries—and “inquisitorial procedure” carries a cluster of connotations which are repugnant to those bred in common-law traditions,⁶ particularly if they disregard administrative, legislative, and grand jury investigations, as well as police interrogations. Because it symbolizes the right of the individual not to be hounded by the state, the privilege has seemed more important, and limitations on its scope have seemed more alarming, whenever liberty has been threatened.⁷

Despite its symbolic value, the privilege has long been under attack.⁸ Criticism has been stimulated by the growth or, at least, the dramatic exposure of organized crime and by the relaxation of the rigors of ancient criminal procedure.⁹ Commentators have directly challenged the premises and policy underlying the privilege.¹⁰ Courts and legislatures, limited by constitutions, have been more oblique, but criticism of the privilege has naturally affected legislative and judicial development. Thus, a series of Supreme Court decisions¹¹ dealing with testimonial evidence may be read as a reflection of the Court's lack of enthusiasm for the policy underlying the privilege. Where documentary evidence is involved, the inroads on the privilege have been so sweeping as to challenge the basis of the general rule of protection.

Two recent developments may be singled out for mention because they bring these inroads into focus and raise a set of perplexing problems: (1)

can system as “merely an *option of refusal*, and not a prohibition of inquiry.” 8 Wigmore, Evidence § 2268 (3d ed., 1940); see page 694 *infra*.

⁵ Consult 1 Cooley, Constitutional Limitations 647 (8th ed., 1927).

⁶ Consult Lord Chorley, More Thoughts on the Problem of Trial, 25 N.Y.U.L. Rev. 513, 520 (1950).

⁷ See, e.g., Rutledge, J., in *Wood v. United States*, 128 F. 2d 265, 278-79 (App. D.C., 1942); Cahn, *The Sense of Injustice* 155 (1949).

⁸ Consult 8 Wigmore § 2251 (3d ed., 1940) and authorities cited.

⁹ See *Wood v. United States*, 128 F. 2d 265, 271 (App. D.C., 1942); Taft, *The Administration of Criminal Law*, 15 Yale L.J. 1, 10-11 (1905); Stevens, *Archaic Constitutional Provisions Protecting the Accused*, 5 J. Crim. L. & Criminology 16 (1914).

¹⁰ Authorities cited note 8 *supra*.

¹¹ *United States v. Murdock*, 284 U.S. 141 (1931), 290 U.S. 389, 396 (1933) (incrimination under state law does not justify refusal to answer in a federal proceeding). This case ignores the contrary dictum in the previous case of *Ballmann v. Fagin*, 200 U.S. 186, 195-96 (1906). See also *Feldman v. United States*, 322 U.S. 487 (1944); *Adamson v. California*, 332 U.S. 46 (1947) (privilege not embraced by the Fourteenth Amendment); cf. *Wolf v. Colorado*, 338 U.S. 25 (1949) (prohibition of unreasonable searches and seizures binding on states through Fourteenth Amendment). See also *Raffel v. United States*, 271 U.S. 494 (1926) (defendant who takes stand to controvert prosecution's evidence may be required to disclose that he had not testified at the first trial). But cf. *State v. Conway*, 348 Mo. 580, 154 S.W. 2d 128 (1941).

In *Shapiro v. United States*,¹² the Supreme Court in a 5-4 decision held (a) that record-keeping requirements which are imposed in aid of a valid regulatory statute and which are valid, the privilege aside, are not invalid because they prescribe the recordation of incriminating data and (b) that such required records even though incriminating are unprivileged in an investigation by the administrative agency charged with enforcing the regulatory program. (2) In the Internal Security Act of 1950,¹³ Congress imposed informational requirements on "Communist organizations" and their members, including the requirement that individuals in certain circumstances register the fact of their membership with, and supply other data to, the Attorney General.

Before turning to the troublesome issues raised by these and related developments, a discussion of the criticism which has surrounded the privilege is appropriate.

THE WISDOM OF THE PRIVILEGE—BENTHAM AND WIGMORE

Bentham's classic attack¹⁴ on the privilege has dominated later criticism. He argued that only the guilty claimed the privilege or were protected by it, that it deprived the trier of the most serviceable evidence, that it fostered the use of illegal means in the gathering of evidence, and that its recognition was based on sentimentality and a confusion of interrogation with torture.

Bentham's argument did not persuade Wigmore, whose appraisal in turn deserves re-examination both because it has been so influential and because its underlying assumptions are not without their difficulties. In making this examination, it will be convenient, in accordance with Wigmore's breakdown, to treat separately the impact of the privilege on: (1) the position of the defendant in a criminal trial; (2) the rights of persons under suspicion in preliminary investigatory proceedings and preliminary hearings; (3) the position of witnesses in all proceedings.

THE PRIVILEGE AND THE DEFENDANT IN A CRIMINAL CASE

In justifying the defendant's immunity from compulsory incrimination at the trial stage, Wigmore implied that it was designed to protect the innocent.¹⁵ His principal emphasis, however, was on the stimulus which

¹² 335 U.S. 1 (1948).

¹³ These provisions of the Act, H.R. 9490 (Pub. L. No. 831, Sept. 23, 1950) are discussed in greater detail page 719 et seq. infra.

¹⁴ 5 Bentham, *Rationale of Judicial Evidence*, 207 et seq. (1827).

¹⁵ 8 Wigmore, *Evidence* § 2251 (3d ed., 1940)-at 308.

the privilege gives to effective and civilized detection practices by the police. He found that

The real objection is that *any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby*. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.¹⁶

The implication that the privilege protects the innocent at the trial stage must be drastically qualified. It is unlikely that it will be invoked by an innocent defendant¹⁷ except where he fears prejudicial impeachment or where he is trying to achieve ends which the law does not recognize as legitimate.¹⁸ The claim of the privilege is humiliating¹⁹ because the community generally considers it a confession. The claim is, moreover, dangerous. Statutes abolishing the defendant's common-law disability generate pressure on the defendant to exercise his option to testify.²⁰ This pressure results from the widespread belief that the jury, even where it is cautioned to disregard the defendant's silence, will consider it evidence of his guilt.²¹ Accordingly, it seems highly unlikely that an innocent defend-

¹⁶ *Ibid.*, at 309.

¹⁷ Although dogmatism on this point is not warranted, well-placed observers, such as Judge (formerly Prosecutor) Knox have expressed this judgment. Consult Knox, *Self Incrimination*, 74 U. of Pa. L. Rev. 139, 148-50 (1924); Frankfurter, J., concurring in *Adamson v. California*, 332 U.S. 46, 60 (1947); and the extreme position taken in *Carman, A Plea for the Withdrawal of Constitutional Privilege from the Criminal*, 22 Minn. L. Rev. 200, 204 (1938).

¹⁸ The defendant may be silent, not because he is guilty, but to shield another. See, e.g., *Rogers v. United States*, 71 S. Ct. 438 (1951). But since the privilege in other contexts is considered personal, it is doubtful that this consideration should be given much weight. The silent defendant may also wish to avoid embarrassing disclosures. He may, moreover, be afraid of reprisal by organized criminal elements. Witnesses who are not defendants are not privileged to be silent for these reasons, and it is difficult to see any superior merit to the defendant's claim based on these considerations.

¹⁹ Except, perhaps, among groups where prestige depends on nonco-operation with law enforcement authorities.

²⁰ It was for this reason that the constitutionality and desirability of the statutes destroying the defendant's incompetency was challenged. Consult Maury, *Validity of Statutes Authorizing the Accused to Testify*, 4 Va. L.J. 712 (1880). The enabling statutes are collected in 2 Wigmore, *Evidence* § 488 (3d ed., 1940).

²¹ Consult Stephen, *Criminal Law of England* 196, 202 (1863); *Raffel v. United States*, 271 U.S. 494, 499 (1926); Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, 31 Mich. L. Rev. 226, 230 (1932); cf. Borchard, *Convicting the Innocent* 209, 232 (1932).

ant, properly advised, will exercise the privilege in order to avoid prejudice from his unprepossessing appearance, from his nervousness, his halting speech or from his inability to cope with a clever or unscrupulous cross-examiner.²² The dangers of such prejudice are generally more remote than the almost certain risk of an adverse inference from the defendant's silence.²³ In several jurisdictions, this inference is not left to chance. Constitutional or statutory provisions sanction comment on the defendant's silence.²⁴

In some situations the dangers to an innocent defendant who waives the privilege may outweigh the dangers in his keeping silent. The defendant in his capacity as a witness has generally not been protected against the usual impeachment devices even though they operate to create great risks of unfair prejudice, when employed against him. It is a commonplace that a defendant impeached by proof of prior conviction, of bad reputation for veracity, or of unsavory associations,²⁵ may be convicted because he is a "bad man" or because the evidence indicates a disposition on his part to commit the crime charged.²⁶

Although the exercise of the privilege permits the defendant to avoid the dangers of such impeachment, it subjects him to the danger of an adverse inference from his silence. The privilege thus furnishes inadequate protection against prejudice even to those who claim it. It obviously furnishes no protection to defendants who prefer the risk of prejudicial impeachment to the dangers of silence.

Wigmore's principal argument for the privilege at the trial stage, the

²² But see *Wilson v. United States*, 149 U.S. 60, 66 (1893).

²³ But cf. *Ruloff v. People*, 45 N.Y. 213, 222 (1871): "Discreet counsel will hesitate before advising a client charged with high crimes to be a witness."

²⁴ In *State v. Baker*, 115 Vt. 94, 53 A. 2d 53 (1947) the Vermont Supreme Court sustained a statute authorizing the prosecution to comment upon, and the jury to make inferences from, the defendant's failure to testify. This is the first time that such an enactment has been held to be compatible with a constitutional guaranty of the privilege. For a discussion of the *Baker* case and the problems raised by the comment statutes, see *Comment on Defendant's Failure To Take the Stand*, 57 Yale L.J. 145 (1947).

²⁵ Impeachment by cross examination of the defendant is forbidden or rigorously limited in some jurisdictions. 8 Wigmore, *Evidence* § 2276 (3d ed., 1940).

²⁶ Consult *Borchard, Convicting the Innocent* xv-xvi (1932). The Supreme Court cavalierly brushed this danger aside in upholding a state statute which sanctioned comment on the silence of a defendant who could be impeached by proof of prior conviction if he took the stand. See *Adamson v. California*, 332 U.S. 46, 57 (1947) and *Frankfurter, J., concurring*, at 61.

It is true, of course, that a defendant impeached by proof of prior conviction, etc., is entitled to an instruction limiting the use of the evidence to the issue of credibility. But it is generally recognized that such an instruction is inadequate to protect the defendant against unfair prejudice. The defendant's danger is particularly acute when the prior conviction involves the same trait involved in the offense charged. Consult *Ladd, Credibility Tests—Current Trends*, 89 U. of Pa. L. Rev. 166, 184 et seq. (1940). See also *Evidence of Defendant's Character in Pennsylvania Criminal Cases*, 96 U. of Pa. L. Rev. 853 (1948); *Stone, Cross Examination by the Prosecution at Common Law and Under the Criminal Evidence Act*, 1898, 51 L.Q. Rev. 443 (1935); 1 Wigmore, *Evidence* § 194 a-b (3d ed., 1940).

"lazy prosecutor" argument, slights some important considerations, such as the necessity for a showing of probable cause before the trial is initiated; the reluctance of prosecutors, intent on their record of convictions, to rely on the possibility that the defendant will convict himself; the fact that effective interrogation presupposes careful investigation; and the fact that the most careful investigation may be ineffective without interrogation of the suspect. Moreover, it plays down the protection provided for the defendant by the court and counsel. Indeed, Wigmore seems strangely to ignore his own warning against confusing a public judicial inquiry with a torture chamber.²⁸ If carried to the limits of its logic, his argument would expand the privilege to give the defendant immunity against being required to engage in non-assertive conduct, such as fitting on a blouse, or exposing a scar, or submitting to chemical tests, to aid in identification. This expansion of the privilege the courts have generally rejected.²⁹

If Wigmore's arguments for the privilege at the trial stage are rejected, the principal justification for continuing to recognize it there would appear to be the practical difficulties inherent in any requirement that the defendant testify.³⁰ Such a requirement would involve great dangers of perjury or recalcitrance. It is true that there is the danger of perjury when the defendant elects to take the stand. But the defendant's right to testify, even though it may appear to involve the right to lie, is a necessary element of an effective defense. Moreover, the danger of perjury would be increased if an unwilling defendant were required to testify.³¹ Where recalcitrance rather than perjury resulted, the remedy of contempt would be awkward to enforce during the trial without jeopardizing an orderly trial. The efficacy of its application after the trial as a deterrent to future recalcitrance seems doubtful in a situation where the law of self-preservation commands perjury or disobedience.

Under this view, the privilege at the trial stage is today not the bulwark of the innocent, not the barrier against torture, and not the spur of the police. It is a reflection of the law's unwillingness to command the impossible, of its respect for the law of self-preservation invoked by Lilburn.³² It is also perhaps a reflection of a humane attitude which saves

²⁸ 8 Wigmore, *Evidence* § 2251, at 308 (3d ed., 1940).

²⁹ *Ibid.*, at § 2265; Inbau, *Self-Incrimination* (1950).

³⁰ Consult Wigmore, *Ex-Secretary Hughes on the Privilege against Self-Incrimination*, 16 J. Crim. L. & Criminology 165, 166 (1925). Even Bentham, despite his strong attack on the privilege, proposed only that the defendant should be subject to interrogation, with his silence open to normal inference, and not that he should be compelled to answer. 5 Bentham, *Rationale of Judicial Evidence* 209 (1827).

³¹ Cf. Stephen, *Criminal Law of England* 202 (1863).

³² Trial of Lilburn and Wharton, 3 How. St. Tr. 1315, 1332 (1637): "This oath is against the very law of nature; for nature is always a preserver of itself, not a destroyer: But if a man

even the guilty from a harsh choice among perjury, recalcitrance, or confession. This attitude may be a result of the tradition which the recognition of the privilege has created. It may also spring from an awareness that all of us are potential criminals. As a result, we are uneasy about the punishment of actual criminals, and we find appealing a rule, and a symbol, of almost excessive protection to those charged or suspected of crime.

PRELIMINARY HEARINGS AND INVESTIGATIONS

During preliminary investigations or hearings directed at determining who should be charged, all of the arguments for the privilege which apply to the defendant at the trial stage are applicable. There are, at this stage, additional reasons for granting immunity against compulsion to answer incriminating questions. In some of the preliminary proceedings, such as general grand jury inquiries, the investigation is secret and roving; the witness is not represented by counsel; there is no judge present to protect the witness against unfairness. In preliminary hearings before magistrates, the proceedings are summary and the suspect is often unrepresented. Moreover, at the preliminary stage, Wigmore's argument that the privilege is a spur to effective police work is more persuasive. There is a solid basis for his fear that groundless arrests and other police abuses would grow if the police could, without formal charge, bring persons before investigatory or hearing tribunals authorized to compel answers to incriminating questions.³³

A troublesome problem during the preliminary stage has centered on a suspect's right to be free, not merely from compulsion to answer, but from any interrogation at all. In some jurisdictions, interrogation of the actual suspect under oath in a formal inquiry, whether or not he has been arrested or charged, and whether or not the inquiry is formally directed against him, has been held to be repugnant to the privilege even though the suspect has been fully warned of his right not to answer.³⁴ The poten-

takes this wicked oath, he destroys and undoes himself, as daily experience doth witness." See also *Bram v. United States*, 168 U.S. 532, 546 (1897) and quotations from More and Coke in Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England*, in *Essays in History and Political Theory in Honor of Charles Howard McIlwain*, 210-11, 222 (1936).

³³ 8 Wigmore, *Evidence* § 308 (3d ed., 1940); see also Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 Mich. L. Rev. 1224, 1233, 1244 (1932).

³⁴ See *State ex rel. Poach v. Sly*, 63 S.D. 162, 165-69, 257 N.W. 113, 115-17 (1934); *State v. Rixon*, 180 Minn. 573, 231 N.W. 217 (1930) noted 15 Minn. L. Rev. 344 (1931); *People v. Seamen*, 174 N.Y. Misc. 792, 793-95, 21 N.Y.S. 2d 917, 919-20 (Super. Ct., 1940) and conflicting New York cases summarized in *People v. Ferola*, 215 N.Y. 285, 300-304, 109 N.E. 500, 505-7 (1915); *People v. Gillette*, 126 App. Div. 665, 111 N.Y.S. 133 (1st Dep't, 1908). (Although the *Gillette* case is usually cited for the view that the privilege bans the interrogation of the suspect, a majority of the court did not accept this view as a basis for decision.) But cf.

tial defendant is given the same immunity against interrogation as the actual defendant if an investigation even though ostensibly general is in fact found to be directed at him.

Although this position has an appealing simplicity, there are historical and practical reasons for rejecting it. The early development of the privilege out of resistance to the oath *ex officio* in preliminary investigations appears to support this ban against interrogation. But this apparent support disappears in the light of a closer scrutiny of the purposes behind that resistance. Opposition to the oath was merely a means to other ends—the restriction of the jurisdiction of the ecclesiastical courts and protection against the compulsion to answer which followed the oath.³⁵ Thus in the American colonies the oath was considered a species of torture.³⁶ This makes sense only if the oath presupposed a requirement to answer. And the usual constitutional phrasing of the privilege suggests that it was to protect against compulsion to answer and not interrogation, as such. In any event, the history of the preliminary investigation both in England and in America is inconsistent with the view that the privilege protects the suspect against preliminary interrogation. Preliminary investigation of persons under arrest took place in England until the middle of the nineteenth century, and in the colonies and in the states until that time or somewhat earlier.³⁷

This background supports Wigmore's description of the privilege as "an option of refusal, not a prohibition of inquiry."³⁸ The defendant's immunity from interrogation at the trial stage is not inconsistent with this view. It is explainable, not on constitutional grounds, but as a result

Schiffman v. Bleakley, 46 N.Y.S. 2d 353 (S. Ct., 1943) (permitting interrogation of the suspect in an administrative investigation). Many cases reject the view that the suspect may not be interrogated in a general investigation. See, e.g., *People v. Krug*, 10 Cal. App. 2d 172, 51 P. 2d 445 (1935); *State v. Coleman*, 137 Fla. 80, 187 So. 793 (1939).

The interplay of the privilege and doctrines dealing with the voluntariness of statements made during legal proceedings makes a number of factors relevant to the legality of such interrogation—whether the suspect-witness was (1) under arrest; (2) under oath; (3) under a formal charge; (4) was warned of the privilege; and (5) whether he volunteered to testify. The significance of these factors singly and in combination on the admissibility of such statements and the relation of statutory provisions and constitutional interpretations are examined in 3 Wigmore, *Evidence* §§ 842–52 (3d ed., 1940). See also Use in subsequent prosecution of self-incriminating testimony given without invoking privilege, 5 A.L.R. 2d 1404 (1949).

³⁵ Consult Morgan, *op. cit. supra* note 1, at 1 et seq.; Lowell, *The Judicial Use of Torture*, 11 Harv. L. Rev. 290, 294 et seq. (1897).

³⁶ Consult Pittman, *The Constitutional and Colonial History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763, 779, 783 (1935).

³⁷ Consult Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 Mich. L. Rev. 1224, 1234–36 (1932).

³⁸ 8 Wigmore, *Evidence* § 2268 (3d ed., 1940); see also Stephen, *Criminal Law of England*, 191, 199 (1863).

of the defendant's common-law disability and the enabling statutes which made him competent but not compellable as a witness.³⁹

The implication of a tangled and obscure history will, of course, be less influential than judgments regarding the consequences of competing doctrines. It is to such considerations which we turn. To support the suspect's immunity from interrogation it may be urged: (1) The suspect's failure to answer counts as evidence against him. This is inconsistent with the policy of the privilege against self-incrimination, with the requirement that the state show probable cause, and with the desire to stimulate independent police investigation. (2) In general investigations, such as those originated by grand juries, the suspect may exercise his privilege not to answer without knowing he is an active suspect or that evidence already produced approaches probable cause. He may, therefore, be ensnared into claiming his privilege without being able to assess the practical need for disclosure or the prejudice which may result from his claim.⁴⁰ (3) Even though the suspect is advised of his privilege, he may waive it and may be subjected to unfair interrogation.

There is no entirely satisfactory answer to the first argument. The danger of silence in the face of accusation can never be entirely avoided because of the probative weight of the silence. This danger is not avoided in some situations even though the suspect is free from interrogation. Thus it is questionable that the suspect's claim of privilege in the face of interrogation is more prejudicial than his failure to make a statement at a preliminary hearing. The dangers of prejudice might, of course, be greater where a grand jury rather than a judicial officer is involved. But those dangers might be reduced by clear instructions against drawing adverse inferences from the claim of privilege. Such instructions, in a situation where there has been no charge, might be more effective than the corresponding instruction given at the trial stage.

With reference to the second argument, the possibility that a witness called in a general inquiry will be ignorant of his possible involvement seems remote.⁴¹ But provision could be made for the unusual case by instructing all witnesses as to the general scope of the inquiry and the possibility that witnesses may be indicted.

With reference to the fear of unfair interrogation several considerations are pertinent: Where interrogation takes place in an open inquiry, for

³⁹ See *State v. Baker*, 115 Vt. 94, 98, 53 A. 2d 53, 56 (1947); *Comment on Defendant's Failure To Take the Stand*, 57 Yale L.J. 145, 150 (1947).

⁴⁰ See *United States v. Edgerton*, 80 Fed. 374, 375 (D.C. Mont., 1897); cf. *United States v. Kimball*, 117 Fed. 156, 162, 169 (C.C.N.Y., 1902).

⁴¹ Authorities cited note 40 *supra*.

example, before a magistrate or a judicial officer, the suspect, if he waives his privilege, will be protected both by the court and counsel, if he is present. In grand jury proceedings, despite their secrecy, the presence of the jury should also afford some protection against unfair tactics. In any event, the danger of unfairness to the suspect is considerably less in such proceedings than in police interrogation which is not barred by the privilege.⁴²

The practical difficulties created by the rule prohibiting interrogation of suspects seem to outweigh the difficulties it avoids. The application of the rule after interrogation involves the elusive question of the degree of suspicion attaching to a particular witness when he was called, a question peculiarly susceptible to the distortion of judicial hindsight. The application of the rule by the investigating tribunal obviously reduces its effectiveness.⁴³ The prohibition may also bar interrogation which would exculpate the witness⁴⁴ or others, thereby protecting them against the stigma, expense and inconvenience resulting from an indictment.

When there is a specific inquiry into the probable guilt of a particular suspect, the ban against judicial interrogation creates an unfortunate set of alternatives: Either all interrogation is banned despite the persuasive insistence of enforcement officers that it is indispensable,⁴⁵ or police interrogation, with all its dangers, is permitted. One would expect that the states which have barred judicial examination as repugnant to the privilege would, a fortiori, bar police interrogation. But they have not found the privilege a barrier against such interrogation.⁴⁶ The net result is a queer set of doctrines, which bar interrogation in an orderly inquiry but permit it where the danger of physical abuse and unfair pressure is greater. It is in part this anomaly which has inspired recurring proposals for examination of the suspect before, or by, a magistrate, in lieu of unsupervised police interrogation.⁴⁷

Such a proposal was renewed by Professor Waite in connection with

⁴² See notes 46 and 53 *infra*.

⁴³ See *United States v. Kimball*, 117 Fed. 156 (C.C.N.Y., 1902).

⁴⁴ The suspect is, however, often given an opportunity to clear himself if he signs an immunity waiver.

⁴⁵ Consult Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 Ill. L. Rev. 442, 448 et seq. (1948); 3 Wigmore, *Evidence* § 851 (3d ed., 1940) at 320.

⁴⁶ See, e.g., *People v. Malinski*, 292 N.Y. 360, 55 N.E. 2d 353 (1944), with which compare cases cited note 34 *supra* and 3 Wigmore, *Evidence* § 851 (3d ed., 1940). Indeed, there has been controversy as to whether a coerced confession is barred by the privilege—a controversy rendered largely academic by the development of confession doctrines. Consult Morgan, *op. cit. supra* note 1, at 27-30.

⁴⁷ See references in *Federal Rules of Criminal Procedure* (Prelim. Draft) 250 (1943).

the drafting of the Federal Rules of Criminal Procedure.⁴⁸ Although there are well-founded doubts about the practical effectiveness of such proposals in the absence of drastic changes in the personnel of hearing commissioners,⁴⁹ it seems unfortunate that the proposal was rejected, in part because of fear of its unconstitutionality.⁵⁰

There is language by the Supreme Court which warrants this fear.⁵¹ Nevertheless, it is doubtful that this language would be followed. It runs counter to the use of the preliminary examination long after the privilege arose, a practice which the Court itself appeared to sanction in one case.⁵² Moreover, the Court has never accepted the contention that police interrogation of a suspect, even during the period of unlawful detention, is repugnant to the privilege⁵³—although there is language in *Upshaw v. United States*⁵⁴ which may be read as reserving that question. Police interrogation is fraught with much more danger to the suspect than is an

⁴⁸ *Ibid.*, at 249. The text of the proposed rule follows: "At the time of holding a preliminary hearing the commissioner may interrogate the accused person concerning his possible connection with the alleged crime, his whereabouts at the time, or other matters that may tend to show his guilt or innocence; provided, however, that the commissioner shall not so question an accused person until he has first informed him of his right to the advice of counsel, that he is under no obligation to answer any question, that any answer he chooses to give may possibly be used as evidence against him, and that his refusal to answer cannot be used in evidence against him."

⁴⁹ *Ibid.*, at 253.

⁵⁰ *Ibid.*

⁵¹ See *Brown v. Walker*, 161 U.S. 591, 596-97 (1896).

⁵² *Wilson v. United States*, 162 U.S. 613 (1896). (Defendant while under arrest but not under oath was examined by a federal hearing commissioner without warning as to his privilege or right to counsel. The admissibility of defendant's answers for impeachment purposes was sustained by the Supreme Court. The opinion referred to the fact that the defendant was not under oath, to his failure to testify that he did not know of his privilege, and to the exculpatory character of his statements before the commissioner. Compare on this last point *Bram v. United States*, 168 U.S. 532, 541-42 (1897) holding that a statement even though exculpatory when made is not admissible if coerced.)

In the *Wilson* case, the Court found that the statement was "voluntary" under confession doctrines. It did not explicitly deal with the problem of privilege but did cite cases discussing it.

See also *United States v. Graff*, 14 Blatch. 381, 387 (C.C.N.Y., 1878) and the following cases indicating that the actual suspect may be interrogated before a federal grand jury: *Mulloney v. United States*, 79 F. 2d 566 (C.A. 1st, 1935); *O'Connell v. United States*, 40 F. 2d 201 (C.A. 2d, 1930); *United States v. Price*, 163 Fed. 904 (C.C.N.Y., 1908); cf. *United States v. Miller*, 80 F. Supp. 979, 982 (E.D. Pa., 1948). The grand jury cases which involve ostensibly general investigations might be distinguished from hearings before a commissioner on the ground that at that stage criminal proceedings have not yet been instituted against the suspect-witness. See *United States v. Kimball*, 117 Fed. 156, 162 (C.C.N.Y., 1902); *Post v. United States*, 161 U.S. 583, 587 (1896). But cf. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

⁵³ See *United States v. Mitchell*, 322 U.S. 65 (1944); *McNabb v. United States*, 318 U.S. 332, 340 et seq. (1943).

⁵⁴ 335 U.S. 410, 414 n. 2 (1948); see also concurring opinion of Douglas, J., in *Watts v. Indiana*, 338 U.S. 49, 57 (1949): "We should . . . stand ready to outlaw . . . any confession obtained . . . during the period of the unlawful detention."

orderly interrogation before a magistrate. It is unlikely that the Court, which has not held police interrogation unconstitutional, would invalidate judicial examination of the suspect. Finally, the development in the national system of the rule of *McNabb v. United States*⁵⁵ (which renders inadmissible statements of a suspect elicited during his illegal detention) highlights the need for providing an opportunity for interrogation under circumstances which protect against the dangers of police abuse.⁵⁶ There is implicit in Professor Waite's proposal the possibility of meeting that need, and, although prophecy is dangerous, it is doubtful that the Supreme Court would have found the privilege a barrier against the fruitful experimentation which such a rule might have stimulated.

THIRD PARTY WITNESSES

Wigmore argued that the privilege should be accorded to third party witnesses in order to encourage their attendance at legal proceedings.⁵⁷ It should be observed that this argument emphasizes not the individual's interest in privacy but the state's interest in disclosure. The protection of the state's interest scarcely justifies what appears to be a judicially-imposed constitutional restriction on investigatory power.⁵⁸ This argument would, moreover, tend to support the application of the privilege to a third party only if there were grounds for believing that the privilege produced more information from such witnesses than it suppressed. This

⁵⁵ 318 U.S. 332 (1943).

⁵⁶ It is true that under English practice, which is held up as a model of fairness and effectiveness, neither the police nor magistrates are permitted to interrogate the suspect after arrest. Consult Kauper, *op. cit. supra* note 37, at 1233; St. Johnston, *The Legal Limitation of the Interrogation of Suspects and Prisoners in England and Wales* 89 (1948), 39 J. Crim. L. & Criminology 89 (1948). But the great differences between the problems of criminal enforcement in England and the United States suggest caution in importing the English rules. Should the policeman, like the Bobby, patrol his beat without a gun? Moreover, there is always the danger of error in assuming compliance by the police with paper rules prohibiting the use of common-sense expedients. Thus informal communication from a well-placed British observer indicates that the Judge's Rules against interrogation after arrest are frequently violated by the police.

⁵⁷ 8 Wigmore, *Evidence* § 2251, at 307 (3d ed., 1940).

⁵⁸ The extension of the privilege to witnesses who are not suspects or defendants in criminal proceedings is not required by the usual constitutional phrasing of the privilege. It is doubtful that constitutional provisions were designed to incorporate a witness' common-law privilege against self-incrimination. Marshall, C. J., in *In re Willie*, 25 Fed. Cas. 38, 39 (C.A. Va., 1807) refers to the witness' privilege as "a settled maxim of the law" but makes no reference to the Constitution. See also *In re Strouse* (Fed. case No. 13,548) 23 Fed. Cas. 261 (1861); *Applicability of Privilege against Self-Incrimination to Legislative Investigations*, 49 Col. L. Rev. 87, 90-94 (1949). In later decisions, the common-law protection has been read into constitutional provisions. *Ibid.*, 89-90. There is, of course, the possibility of proceedings with spurious suspects or parties, which would be trumped up to circumvent the actual suspect's or defendant's privilege by calling him as a witness. But this possibility appears to be fanciful. 8 Wigmore, *Evidence* § 2251 (3d ed., 1940), at 307.

assumption is open to question. The prospect of claiming the privilege is, as we have seen, not attractive. To the community, it is admission of criminality. To the police, it may be an invitation to investigate the claimant or to investigate him more thoroughly. Moreover, in borderline cases, the prospective witness must reckon with the possibility that the claim of privilege will be denied by the tribunal.⁵⁹ Finally, the privilege is in many jurisdictions denied to witnesses who urge they will be incriminated under the laws of another jurisdiction, federal or state.⁶⁰ As the Kefauver investigation has so clearly indicated, this limitation is growing in importance with the expansion of federal power, the overlapping of state and federal jurisdiction, and the increasing co-operation between the federal and state governments. Given these considerations, it is doubtful that a witness with a genuine option not to appear would be induced to appear by the existence of the privilege. Even where this inducement operates, it seems unlikely that it produces as much testimony as it suppresses by virtue of the claim of privilege by third party witnesses who cannot or do not avoid the witness box. Such witnesses will often invoke the claim to protect others rather than themselves. Although it is settled that A may not invoke the privilege to protect B, it is difficult to enforce this restriction whenever there are close relations between A and B. Accordingly, the third-party argument may well be inconsistent with its basic postulate—the desirability of increasing the amount of information supplied to the tribunal. In this context also, the fear of perjury or recalcitrance by the witness confronted with an incriminating question would appear to be the reason behind the privilege.

PRE-EXISTING DOCUMENTS

Both in England and in the United States, courts have held for a long time that the privilege operates to protect against the compulsory production of pre-existing writings.⁶¹ It is arguable, however, that the tech-

⁵⁹ There is uncertainty as to when a putative disclosure is sufficiently connected with a crime to be privileged. See *Mason v. United States*, 244 U.S. 362 (1917), with which compare *Ballman v. Fagin*, 200 U.S. 186 (1906) and *United States v. Weisman*, 111 F. 2d 261 (C.A. 2d, 1940); see also A.L.I. Model Code of Evidence (1942), Rule 202 and Comments thereto; *The Privilege Against Self Incrimination*, 49 Yale L.J. 1059, 1067-69 (1940).

⁶⁰ Consult cases cited in note 11 supra; Privilege against self-incrimination as extending to danger of prosecution in other state or country, 59 A.L.R. 895 (1929); Privilege against self-incrimination as extending to danger of prosecution in another jurisdiction, 82 A.L.R. 1380 (1933); Privilege against self-incrimination as applicable to testimony that one has been compelled to give in another jurisdiction, 154 A.L.R. 994 (1945).

⁶¹ Consult 8 Wigmore, Evidence § 2264 (3d ed., 1940); Morgan, op. cit. note 1, at 34; Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1, 13 et seq. (1930).

nical criterion for the application of the privilege does not apply to documentary evidence. Wigmore tells us that

[t]he kernel of the privilege . . . is testimonial compulsion. . . . The privilege protects a person from any disclosure sought by legal process against him as a witness. . . .

For though the disclosure thus sought be not oral in form, and though the documents or chattels be already in existence and not desired to be first written and created by a testimonial act or utterance of the person in response to the process, still no line can be drawn short of any process which treats him as a witness; because in virtue of it he would at any time be liable to make oath to the authenticity or origin of the articles produced.⁶²

But it does not necessarily follow that the obligation to produce documents would involve the obligation to authenticate them under oath. It is true that, as the corporate cases suggest, once a requirement to produce is enforced, the "auxiliary" requirement to authenticate may follow.⁶³ But this result is attributable, not to any requirement of logic, but probably to a skepticism about the wisdom of the privilege in general, and in particular as it applies to documents. It is also true that once an incriminating document is introduced there is increased pressure on the defendant to take the stand and exculpate himself. But this pressure exists when the accused is forced to expose an incriminating identification mark, or whenever the prosecution introduces any persuasive evidence.

More important than refinements concerning what constitutes "action *qua* witness" is the fact that the arguments for the privilege as applied to testimonial evidence are more attenuated when documents are involved. The most appealing argument, the protection of the nervous defendant from the terror of the witness box, is not even applicable. Since "the document speaks for itself," there is no need for the defendant to take the stand. The prosecution could be required to authenticate the documents without calling on the defendant.

There is in connection with documents an analogue of Wigmore's principal argument for the privilege which remains to be mentioned: If the privilege were withdrawn from documents, the "lazy prosecutor" might rely on a battery of vague subpoenas rather than on solid detection work. Prosecutors would be corrupted and privacy destroyed. These undesirable consequences, which seem more fanciful than real, may be avoided by the proper application of the Fourth Amendment's prohibition of unreasonable searches and seizures. It is that amendment rather

⁶² 8 Wigmore, Evidence § 2264 (3d ed., 1940) at 363-64. But cf. 6 *ibid.*, § 1844, at 565: "A person summoned by *subpoena duces tecum* does not by merely attending and *producing the document* become the summoner's witness. He has himself furnished no testimony; the document is not receivable in evidence unless proved by someone; it is the person proving it, and not the person bringing it, who furnishes testimony."

⁶³ See page 702 *infra*.

than the self-incrimination clause which has properly been said to be of pivotal significance in the protection of privacy.⁶⁴ Indeed, there is an element of paradox in a protection of privacy which operates only if the citizen can demonstrate a possible connection between his papers and crime. Finally, in important cases of law enforcement, where the privilege has not been applied to documents, viz., corporate records and required records, there is no evidence that the legitimate claims of privacy are afforded inadequate protection by the Fourth Amendment—properly construed.

The application of the privilege to documents may reflect the same unwillingness to command the impossible, which is the most intelligible basis for the application of the privilege to testimonial evidence in all situations, except perhaps the preliminary investigation. A party directed to produce an incriminating document would be tempted to destroy, conceal, or withhold it rather than to incriminate himself. Although wilful destruction might be punishable as contempt of court or as a violation of statutory provisions, proof would be difficult and defense against a charge of obstruction would invite perjury. In this connection, it may be significant that the principal exceptions to the rule that documents are privileged involve documents such as corporate records which cannot easily be destroyed or concealed.

CORPORATE DOCUMENTS

The rule that incriminating documents are covered by the privilege has, as we have seen, been limited by significant exceptions. In the corporate field, it is now settled that a corporation is not protected by the privilege against self-incrimination.⁶⁵ Accordingly, a corporate officer may not withhold testimony or documents on the ground that his corporation would be incriminated.⁶⁶ Nor may a corporate officer withhold books on the ground that he would be incriminated thereby.⁶⁷ Even after the dissolution of a corporation and the transfer of its books, the transferee may not invoke the privilege as to the (formerly) corporate records.⁶⁸ The de-

⁶⁴ See, e.g., Justice Frankfurter dissenting in *Harris v. United States*, 331 U.S. 145, 157, 161 (1947).

⁶⁵ See *Wilson v. United States*, 221 U.S. 361, 382 (1911); *Essgee Co. v. United States*, 262 U.S. 151 (1923); for a review of the authorities, see *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 196, 204-5 (1946). This result involved a departure from established common-law doctrines. Consult Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence*, 15 So. Cal. L. Rev. 60, 65-67 (1941).

⁶⁶ Authorities cited note 65 *supra*.

⁶⁷ *Ibid.*; consult *Admissibility of corporate books and records against officers or stockholders in criminal prosecutions against them*, 154 A.L.R. 279 (1945).

⁶⁸ *Wheeler v. United States*, 226 U.S. 478 (1913); *Grant v. United States*, 227 U.S. 74, 79-80 (1913).

cisive factor is the fact that the records were corporate records when made.⁶⁹ A corporate officer may, however, refuse to give oral testimony concerning corporate matters if he would personally be incriminated thereby⁷⁰ with this exception: A corporate officer who has been required to produce corporate documents which incriminate him may also be required to authenticate them.⁷¹

The argument for withholding the privilege from corporations emphasized that the corporation was created by the state of incorporation for the benefit of the public, that the state's reservation of visitatorial power was inconsistent with the recognition of the privilege, that the national government in the sphere of national regulation should have the power of the state, and that since illegality could be determined only by examination of the papers, the withdrawal of the privilege from corporations was indispensable to effective regulation. But the doctrinal arguments begged the essential question—the extent to which the visitatorial power was subject to the constitutional provisions against self-incrimination.

This difficulty is sharpened by the English cases on self-incrimination and the American cases on search and seizure. The English cases, although recognizing the visitatorial power, have accorded the privilege against self-incrimination to corporations;⁷² the American cases have generally accorded them the privilege against unreasonable searches and seizures⁷³ even though the "logic" of the self-incrimination cases would have been equally applicable to search and seizure cases.⁷⁴

The denial of the privilege to the corporation as such would have involved only a minor victory for law enforcement if a corporate officer had been permitted to withhold corporate books on the ground that they would incriminate him. Effective enforcement of criminal statutes applicable to corporations presupposes the personal criminal accountability of

⁶⁹ *Ibid.*

⁷⁰ See *Shapiro v. United States*, 335 U.S. 1, 27 (1948); *Wilson v. United States*, 221 U.S. 361, 385 (1911).

⁷¹ *United States v. Austin-Bagley Corporation*, 31 F. 2d 229, 253-54 (C.A. 2d, 1929) cert. denied, 279 U.S. 863 (1929); *Pulford v. United States*, 155 F. 2d 944, 947 (C.A. 6th, 1946).

⁷² See dissenting opinion of Mr. Justice McKenna in *Wilson v. United States*, 221 U.S. 361, 386 ff. (1911); *Triplex Safety Glass Co.*, [1939] 2 K.B. 395.

⁷³ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); see also *Lagow v. United States*, 159 F. 2d 245 (C.A. 2d, 1946). In *United States v. Morton Salt Co.*, 338 U.S. 632, 651 (1950) the Court, by a cautionary phrase, implied there were doubts about this proposition.

⁷⁴ Cf. *Wibmer v. State*, 182 Wis. 303, 304, 195 N.W. 936, 936 (1923). (Statute authorizing a search without a warrant of any premise licensed to sell intoxicating liquor is constitutional. "The acceptance of the license is necessarily an acceptance of the accompanying statutory conditions, or as to the premises is an implied waiver of the search-and-seizure provision of the Constitution.")

the natural persons responsible for corporate criminality. The decision in *Wilson v. United States*⁷⁵ was designed to facilitate such accountability, by rendering corporate books completely unprivileged. Invoking waiver notions, the Court found that "the custodian has voluntarily assumed a duty which overrides his claim of privilege,"⁷⁶ that "in assuming their custody, he has accepted the incident obligation to permit inspection";⁷⁷ "the reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection and records of the corporation."⁷⁸ In view of the importance sometimes attached to the ownership of documents by the claimant of the privilege,⁷⁹ it is worth noting that the Court in the *Wilson* case, by elaborating the waiver notion, implied that the lack of ownership of documents did not per se render a claim of privilege ineffective.

The Court's argument in the *Wilson* case did not squarely meet the dissenter's contention that the imposition of the obligation to permit inspection conflicted with the "spirit of the privilege," that "a witness shall not be used in any way to his crimination."⁸⁰ No talk about the corporate entity could obscure the fact that the corporate officer could be forced to produce a self-incriminating document. Nor could talk about the visitatorial power disguise the fact that the impediment to prosecution raised by a corporate officer's claim to the privilege was essentially no different from the difficulties raised by any claim of the privilege. Moreover, the Court's reliance on the waiver notion raised the usual question: Why not a broader waiver, a waiver of the privilege as to oral testimony by a corporate officer regarding corporate affairs. The custodian could have been found to have "voluntarily assumed [this] duty which overrides his claim of privilege."⁸¹

The difficulties in the rationale of the *Wilson* case suggest that the Court in the corporate context was moved by the same considerations of expediency which, as we shall see, are behind the required-records doctrine. The power of government had been invoked to check the excesses of corporate combination. Obstacles to the exercise of government power were to be swept aside. It is probably no accident that the first case—*Hale v. Henkel*⁸²—which suggested the rationale for withdrawing the

⁷⁵ 221 U.S. 361 (1911).

⁷⁷ *Ibid.*, at 382.

⁷⁶ *Ibid.*, at 380.

⁷⁸ *Ibid.*, at 384-85.

⁷⁹ See page 706 *infra*.

⁸⁰ *Wilson v. United States*, 221 U.S. 361, 390 (1911).

⁸¹ Earlier comments did in fact suggest that the privilege did not protect a corporate officer against self-incrimination by oral testimony regarding corporate affairs. Consult Visitatorial Power of Congress, 30 Col. L. Rev. 103, 105 (1930).

⁸² 201 U.S. 43 (1906).

privilege from corporate books was an anti-trust case. "Corporations" were closely identified with the odious trust.⁸³ Anti-trust cases are hard to prove even with the defendants' books and records. This, of course, is true regardless of the formal legal structure of the defendants' business operations.

DOCUMENTS OF UNINCORPORATED ASSOCIATIONS

In dealing with the question of whether the doctrines developed for corporations would be carried over to labor unions, the Court let the doctrinal cat out of its transparent bag. In *United States v. White*,⁸⁴ the Court held that a union officer, whether or not a member of the union, could not withhold union documents regardless of whether they would incriminate him or the union. A majority of the Court of Appeals (3d Circuit) had rejected the asserted analogy between labor unions and corporations, on the ground that the union was not created by the state, and that its affairs were not subject to the state's visitatorial power. Accordingly, the Court of Appeals had ruled that the custodian of union documents, provided that he was also a union member, was entitled to withhold documents which would incriminate him.⁸⁵

Mr. Justice Murphy, speaking for the Court, dismissed as unimportant the differences between corporations and voluntary associations. He declared that "the fact that the state charters corporations and has visitatorial power over them provides a *convenient vehicle* for justification of governmental investigation of corporate books and records"⁸⁶ (emphasis supplied). The decisive justification was "public necessity"—"the inherent and necessary power of the federal and state governments to enforce their laws."⁸⁷ Reshaping history to meet the demands of necessity,⁸⁸ Mr. Justice Murphy also referred to the historic function of the privilege as that of "protecting only the natural individual from compulsory incrimination through his own testimony or personal records."⁸⁹ Earlier in the opinion he had also brought in title notions, stating "the papers and effects

⁸³ Consult Lloyd, *Wealth Against Commonwealth* 1-2 and passim (1894).

⁸⁴ 322 U.S. 694 (1944). For a collection of earlier cases involving the documents of associations, see *Privilege against self-incrimination as available to member or office of unincorporated association as regards its books or papers*, 152 A.L.R. 1208 (1944).

⁸⁵ *United States v. White*, 137 F. 2d 24 (C.A. 3d, 1943).

⁸⁶ 322 U.S. 694, 700 (1944).

⁸⁷ 322 U.S. 694, 700-701 (1944). The opinion also referred to the suability of a union as an entity under federal law. *Ibid.*, at 705. Although this may be seized upon as a basis for distinction in states which reject the entity theory, it is doubtful that this subtlety will be given any weight.

⁸⁸ See note 68 supra.

⁸⁹ 322 U.S. 694, at 701 (1944).

which the privilege protects must be the private property of the person claiming the privilege or at least in his possession in a purely personal capacity."⁹⁰ To determine the applicability of the privilege to documents of an organization in the hands of an officer or member incriminated thereby, i.e., to determine whether possession was held in a "personal capacity":

The test . . . is whether one can fairly say under all circumstances that a particular type of organization has a character so impersonal in the scope of its 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. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity. Labor unions—national or local, incorporated or unincorporated—clearly meet that test.⁹¹

This test will produce serious uncertainty. Professor Morgan has said that most voluntary organizations "of any importance" would meet the test,⁹² i.e., their records would be unprivileged. The unresolved question is what are the criteria of importance: the size of the association's operations, the number of its members, the proportion of their total time given to group activities.⁹³

There are more substantial difficulties with the test than its vagueness. It is a questionable premise that some organizations represent only purely private interests of their members and other organizations represent group interests only. All associations obviously represent both personal and group interests.⁹⁴ This would be as true of a two-man partnership as of a national labor union.

Moreover, the criterion of importance or of the impersonal character of the organization has no clear-cut relationship to the purpose of the privilege as defined in the *White* case. Whatever its larger purposes, the privilege, Mr. Justice Murphy declared, "protects the individual from any disclosure in the form of oral testimony, documents, or chattels by legal process against him as a witness."⁹⁵ This purpose is frustrated even though Mr. Justice Murphy's criterion is satisfied. It is true, of course, that this purpose may be subordinated to the community's interest in

⁹⁰ *Ibid.*, at 699.

⁹¹ *Ibid.*

⁹² Morgan, *The Law of Evidence* 1941-45, 59 *Harv. L. Rev.* 481, 528 (1946).

⁹³ The difficulty of applying the *White* test is revealed by a comparison of the dictum in *In re Subpoena Duces Tecum*, 81 F. Supp. 418, 421 (N.D. Cal., 1948) with *United States v. Wernes*, 157 F. 2d 797 (C.A. 7th, 1946).

⁹⁴ "Unless we remember that whatever is said in law is said about men, even if the words used are about things and entities, we shall obviously never get to experience." Radin, *Law as Logic and Experience* 135 (1940).

⁹⁵ 322 U.S. 694, 699 (1944).

effective regulation. But even though the Constitution is sufficiently elastic to permit such accommodation, the criterion made decisive is a dubious measure of the community's interest. Importance or size is no more justified as a test for the application of the Fifth Amendment than for the application of the Fourth, and Mr. Justice Frankfurter has told us that "the Fourth Amendment does not differentiate between large and small enterprise."⁹⁶

There is another source of uncertainty in the *White* opinion, which flows from the statement already quoted, that the "papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity."⁹⁷

Possession in a purely personal capacity where the possessor is not an agent of a large association or a corporation is an elusive concept. Does an agent of an individual owner, in possession of a document, have possession "in a purely personal capacity?" What of a co-conspirator who has been lent an incriminating document by a confederate? There is nothing in the Court's opinion which will answer these questions. Moreover, there is no apparent relationship between the character of possession and the policy of the privilege which will help answer them.

DOCUMENTS OWNED BY ANOTHER

Rule 206 of the American Law Institute's Model Code of Evidence would go beyond the *White* opinion and would deny the privilege to the possessor of documents owned by a third person, regardless of the character of the possession. This rule would avoid the uncertainties surrounding "possession in a purely personal capacity." But it is difficult to square this rule with the general rule of protection or, as the Comments on Rule 206 indicate, with the implications of earlier Supreme Court opinions.⁹⁸

⁹⁶ Dissenting opinion in *Davis v. United States*, 328 U.S. 582, 602 (1946).

⁹⁷ 322 U.S. 694, 699 (1944).

⁹⁸ See *Johnson v. United States*, 228 U.S. 457, 458 (1913); *McCarthy v. Arndstein*, 266 U.S. 34, 41 (1924); *Perlman v. United States*, 247 U.S. 7, 15 (1918).

In his dissent in the *Shapiro* case Mr. Justice Frankfurter intimated that a possessor of a document could not withhold it on the ground that it was privileged. In explaining the *Wilson* case, he stated: "The Court's holding boiled down to the proposition that 'what's not yours is not yours.' It gives no sanction for the bold proposition that Congress can legislate private papers in the hands of their owner, and not in the hands of a custodian, out of the protection afforded by the Fifth Amendment." 335 U.S. 1, 58 (1948). But the elaboration of the waiver rationale in the *Wilson* opinion suggests, as has already been indicated, that lack of ownership was not there considered decisive. See also the cases cited note 68 *supra*, in which the privilege was denied to the individual owner of documents which were corporate documents at the time they were prepared.

The Comments on Rule 206 do not advance any reasons for engrafting this exception but merely predict that courts will treat documents not owned by the possessor as corporate documents. The waiver rationale elaborated for corporate documents scarcely applies to the situation covered by Rule 206. Accordingly, the Comments may be read as a guess that courts would seize on the fact that possession is not coupled with ownership as a device for limiting a questionable rule. It is difficult to see anything in the policy of the privilege which should operate to make title notions decisive. If a subpoena involves testimonial compulsion, that compulsion exists regardless of whether the person subpoenaed has title to the documents called for. If the privilege is designed to protect witnesses from unpleasant choices, its applicability should not depend on title because title is irrelevant to the attractiveness of the alternatives open to the witness subject to a subpoena.

Rule 206 might be supported on the grounds that considerations of procedural convenience override the considerations underlying the general rule of protection: Where possession of a document is held in defiance of a lawful owner who wishes the government disclosure order to be obeyed, Rule 206 could be justified as a short-cut which would save the owner the trouble of retrieving the document. Moreover, even though the owner sanctions the possession, it appears that if the owner were subpoenaed to produce the document, he would be under a duty to demand the documents from the possessor.⁹⁹ Accordingly, if a subpoena has been issued to the owner, retention of the document by the possessor would be wrongful if the owner discharged his duty to demand the document. Thus the denial of the privilege to the possessor could be justified as a device which makes it unnecessary for the government to subpoena the owner or for the owner to vindicate his superior rights to possession.¹⁰⁰

An interesting complication develops when both the owner and another person in possession of a document would be incriminated thereby. Since the owner, as such, is not entitled to invoke the privilege,¹⁰¹ it would appear that under Rule 206, the document would be unprivileged. This result seems strange: If the denial of the privilege to the possessor rests on the assumption that the owner could be required to demand the docu-

⁹⁹ See *United States v. Fleischman*, 339 U.S. 349, 356-59 (1950).

¹⁰⁰ Where the possessor obtained the document by fraud or theft, he could be denied the privilege on the ground that his possession was tainted with illegality *ab initio*. See *Clark v. United States*, 289 U.S. 1, 12 (1933).

¹⁰¹ See *Perlman v. United States*, 247 U.S. 7, 15 (1918); cf. *In re Subpoena Duces Tecum* 81 F. Supp. 418 (N.D. Cal., 1948).

ment and turn it over to the government, the assumption is unwarranted when the owner would also be incriminated. The opposite result is equally strange: If the owner not in possession or the possessor who is not the owner may not invoke the privilege, it is difficult to see why the rights of either to claim a personal privilege should be increased because both would be incriminated.

Shapiro v. United States—REQUIRED RECORDS

It was against the background of the limiting doctrines discussed above that the Supreme Court confronted the problems raised by *Shapiro v. United States*.¹⁰² Shapiro, a licensee under OPA food regulations, had been suspected of having made tie-in sales in violation of those regulations. He was served with a subpoena directing him to produce certain records which OPA regulations required him to keep. At Shapiro's appearance with those records before an OPA hearing officer, his lawyer asked whether Shapiro was being granted immunity "as to any and all matters for information obtained as a result of the investigation and examination of these records."¹⁰³ The hearing officer, more circumspect than illuminating, replied that "the witness is entitled to whatever immunity flows as a matter of law from the production of those books and records which are required to be kept pursuant to M.P.R.'s 271 and 426."¹⁰⁴ Shapiro, after claiming his "constitutional privilege" and his statutory immunity, produced the subpoenaed records.

In his trial for having made illegal tie-in sales, his plea in bar based on a claim that Section 202 (g) of the Emergency Price Control Act¹⁰⁵ immunized him from prosecution, was overruled. His conviction followed and was affirmed by the Court of Appeals for the Second Circuit,¹⁰⁶ and then by a sharply divided Supreme Court.

The majority interpreted the statute as conferring immunity only when

¹⁰² 335 U.S. 1 (1948).

¹⁰³ *Ibid.*, at 4.

¹⁰⁴ *Ibid.*

¹⁰⁵ 56 Stat. 23 (1942), as amended, 50 U.S.C.A. App. § 922 (g) (1944) which provides as follows: "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U.S.C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege." The Compulsory Testimony Act of February 11, 1893, 27 Stat. 443, 49 U.S.C.A. § 45 (1950) provides: "[N]o person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission . . . on the ground . . . that the . . . evidence . . . required of him, may tend to criminate him. . . . But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction . . . concerning which he may testify, or produce evidence . . . before said commission. . . ."

¹⁰⁶ 159 F. 2d 890 (C.A. 2d, 1947).

a witness is required to present evidence covered by the privilege against self-incrimination. It supported its conclusion that the records produced by Shapiro were not privileged by invoking the principle announced by Mr. Justice Hughes in the *Wilson* case and reaffirmed in the *Davis* case.

[T]he privilege which exists as to private papers cannot be maintained in relation to "records 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."¹⁰⁷

Mr. Justice Frankfurter, in a strong dissent, argued that the Court had needlessly reached a grave constitutional question by adopting a "sophisticated" construction of the immunity provision which, read literally, conferred immunity.¹⁰⁸ On the constitutional question, which is our primary concern, Mr. Justice Frankfurter, although conceding the validity of the record-keeping requirements, denied that the mere requirement that records be kept rendered the required records unprivileged.¹⁰⁹

Mr. Justice Frankfurter challenged the majority's reliance on the *Wilson* dictum, urging that Mr. Justice Hughes had himself limited this dictum by invoking precedents which involved not merely "required" or "quasi-public" records but truly public records, i.e., those kept by public officers in the discharge of their public duties.¹¹⁰ But with deference, it is submitted that those precedents do not support the asserted limitation on the scope of the *Wilson* dictum. This will be clear from an examination of *State v. Donovan*,¹¹¹ one of the cases cited by Mr. Justice Hughes. In that case, the privilege was held inapplicable to a register of sales of intoxicating liquor kept by a druggist pursuant to a statute providing that such rec-

¹⁰⁷ 335 U.S. 1, 33 (1948); 116 U.S. 616 (1886). A similar dictum laid down in *Boyd v. United States*, 116 U.S. 616, 623-24 (1886) was quoted in the Shapiro case, 335 U.S. 1, 33 n. 42 (1948). While the majority opinion pointed to this dictum, Mr. Justice Frankfurter pointed to the result in the Boyd case. 335 U.S. 1, 67-68 (1948). An importer, although required to present the original invoice to the collector in order to clear goods for entry, was held privileged from producing it in a subsequent forfeiture proceeding. The apparent conflict between the result and the language in the Boyd case may have resulted from the double meaning of the word "required." The invoice was "required" only as part of an application for governmental permission to carry out a transaction. It was not "required" in the sense that a failure to record an executed transaction would be subject to penal sanctions. And it is such records which typically constitute required records for the purpose of applying the self-incrimination clause. Indeed, the Boyd dictum seems to reflect this distinction.

¹⁰⁸ Although the controversy regarding the interpretation of the immunity statute will not be discussed here, it seems appropriate to suggest that the difficulties revealed in the Shapiro case and in *United States v. Monia*, 317 U.S. 424 (1943), indicate the need for clarifying the immunity statutes to prevent them from becoming a trap for the unwary citizen or prosecutor. A single carefully drafted statute which could be incorporated by reference in new legislation would seem desirable. Consult 8 Wigmore, Evidence § 2284 (3d ed., 1940).

¹⁰⁹ 335 U.S. 1, 58 et seq. (1948).

¹¹⁰ *Ibid.*

¹¹¹ 10 N.D. 203, 86 N.W. 709 (1901).

ords "shall be open for the inspection of the public at all reasonable times during business hours and any person so desiring may make memoranda or copies thereof."¹¹² The court stated that the registers "are not private documents, but are public documents, which the defendant was required to keep not for his private use but for the benefit of the public."¹¹³ Mr. Justice Frankfurter argued that "the state court construed the statute to make the druggist a public officer and, as such, the custodian of the register for the state."¹¹⁴ This analysis is reminiscent of a New Mexico case where the state court, in sustaining the validity of a statute which required the preservation for inspection of a bovine animal's hide after it was killed, stated that the legislature had made the hide a public record.¹¹⁵ But surely this fictional transformation of a druggist (or a slaughterer) into an *ad hoc* public officer scarcely obscures the fact that the druggist was an *ad hoc* official only because he was required to keep the records. The same verbal ceremony could have been used in the *Shapiro* case or in any case involving the requirement that "private" businesses keep records. Moreover, in other cases cited in the *Wilson* opinion, also involving liquor regulation,¹¹⁶ there was either no attempt to characterize the

¹¹² N.D. Rev. Code § 7596 (1899).

¹¹³ *State v. Donovan*, 10 N.D. 203, 209, 86 N.W. 709, 711 (1901).

¹¹⁴ 335 U.S. 1, 60 (1948).

¹¹⁵ *State v. Walker*, 34 N.M. 405, 408, 281 Pac. 481, 482 (1929). It may, however, be argued that the situation is significantly different where required records are made accessible not only to enforcement officers as in the New Mexico case but also to the general public as in *State v. Donovan*. This distinction was not, however, made in the *Wilson* opinion, and it is difficult to see why it should be made. If, despite the privilege, incriminating records may be made available to both the government and the public, the privilege should not be an impediment to disclosure to the government alone. The only apparent basis for holding otherwise is that legislation opening required records to public inspection would be more vulnerable to attack on constitutional grounds other than the privilege, since a stronger social justification would presumably have to be made out for a broader invasion of privacy. But this approach would produce strange results. It would require the government to provide for a broader invasion of privacy than it deemed necessary in order to secure the validation of a more limited invasion or would, at least, require it to show that a broader invasion would be justified before a limited invasion were sustained.

¹¹⁶ Many of the state cases involved regulation of medical prescriptions as an incident of general prohibition statutes. See *Quasi Public Records and Self-Incrimination*, 47 Col. L. Rev. 838, 840 (1947). This fact may be a partial explanation of Mr. Justice Frankfurter's implication that governmental access to required records would be constitutional as to "occupations which are malum in se, or so closely allied thereto as to endanger the public health, morals or safety." 335 U.S. 1, 65 (1948). But this rationale will surely not explain cases such as those generally denying the privilege to motorists required to make reports which may be incriminating. See note 128 *infra*. Moreover, if the privilege is grounded in a wise social policy, it is not entirely clear that the constitutional protection should be narrowed in the malum-in-se area even assuming that area could easily be fenced off. For the community's greater need for information in that area may well be offset by the citizens' greater need for protection.

records as "public"¹¹⁷ or that characterization was merely a metaphor describing the unprivileged character of records which were held to be "public" only because they were required.¹¹⁸

Mr. Justice Frankfurter's interpretation of the *Wilson* case is unusual. That case has uniformly been read by commentators¹¹⁹ as withdrawing the privilege from records which *private* citizens are by law required to keep. Lower federal courts, relying on the *Wilson* dictum, have, moreover, almost uniformly held that records required under a variety of regulatory statutes are unprivileged.¹²⁰ And the Supreme Court itself, prior to the *Shapiro* case, had apparently adopted a similar interpretation of the *Wilson* doctrine,¹²¹ although it had not previously applied it squarely.

¹¹⁷ *People v. Henwood*, 123 Mich. 317, 82 N.W. 70 (1900). Requirement that druggists report to prosecuting attorney liquor sales, including illegal sales, held valid as a "police regulation."

¹¹⁸ *State v. Davis*, 108 Mo. 666, 668, 18 S.W. 894, 895 (1892). For a more extended discussion of the justifications urged by state courts in excluding required records or reports from the privilege against self-incrimination and a collection of cases see *Quasi Public Records and Self-Incrimination*, 47 Col. L. Rev. 838, 840-41, 842 (1947). English courts have similarly held that required records are unprivileged. Thus in *Bradshaw v. Murphy*, 7 C. & P. 612 (N.P., 1836), a vestry clerk was required to produce the vestry book despite the claim that he would be incriminated thereby. Mr. Justice Frankfurter argues that the basis of the decision was the fact that the clerk was a public officer and the fact that the books were not his. But the court relied on a different rationale: "It is a book directed to be kept by the second section of the stat. 58 Geo. 3, c. 69. You must produce it." See also *Rawlings v. Hall*, 1 C. & P. 11, 13-14 (N.P., 1823).

¹¹⁹ See, e.g., 8 Wigmore, *Evidence* § 2259c (3d ed., 1940); *Quasi Public Records and Self-Incrimination*, 47 Col. L. Rev. 838, 841 (1947); *Davis*, *The Administrative Power of Investigation*, 56 Yale L.J. 1111, 1137, n. 133 (1947); *The Self-Incrimination Privilege in Actions Involving Government Regulated Enterprises*, 37 J. Crim. L. & Criminology 524 (1947).

¹²⁰ See, e.g., *Rodgers v. United States*, 138 F. 2d 992, 994, 996 (C.A. 6th, 1943) (records and reports required by the Agricultural Adjustment Act of 1938); *United States v. Sherry*, 294 Fed. 684 (N.D. Ill., 1923) (records under Harrison Act; although the *Wilson* doctrine was invoked, the court found also that defendant had failed to object to inspection and removal of the required records); *United States v. Jones*, 72 F. Supp. 48 (S.D. Miss., 1947) (records under the Fair Labor Standards Act). But cf. *Ryan v. Amazon Petroleum Corp.*, 71 F. 2d 1 (C.A. 5th, 1934). Early cases sustaining the disclosure provisions of the Emergency Price Control Act emphasized the emergency character of the Act. But later cases relied squarely on the *Wilson* case and the *Rodgers* case. See, e.g., *Hagen v. Porter*, 156 F. 2d 362 (C.A. 9th, 1946); *Porter v. Mueller*, 156 F. 2d 278, 280 (C.A. 3d, 1946).

¹²¹ See *Davis v. United States*, 328 U.S. 582, 582-90 (1946), where the *Wilson* dictum set out supra page 709 is quoted with approval; see also Mr. Justice Frankfurter dissenting, *ibid.*, 595-96; and dissenting in *Harris v. United States*, 331 U.S. 145, 156 (1947); cf. *Gould v. United States*, 255 U.S. 298, 308-9 (1921). See also *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 725 (1944), sustaining enforcement provisions of a judgment restraining violations of the anti-trust laws which required the defendant corporation to give the Department of Justice access to all records "relating to any of the matters contained in this judgment . . . subject to any legally recognized privilege." Rejecting the claim that this discovery provision and related ones provided by the decree were unconstitutional, the Court emphasized the need for drastic action in order to achieve the statutory objective. The defendant, a corporation, could not, of course, invoke the Fifth Amendment. But the same

Perhaps these considerations explain the petitioner's failure to raise the constitutional question in the *Shapiro* case.¹²²

Although Mr. Justice Frankfurter's interpretation of the precedents is questionable, there can be no quarrel with his conclusion that the required-records doctrine, where it operates, abrogates the privilege. The consequence of the doctrine is that Congress by passing a statute requiring the keeping of records may, subject to elastic limitations,¹²³ withdraw a constitutional privilege from those records. This is a bizarre result in a constitutional system. The technical rationale for this inroad on the Fifth Amendment has been an ill-defined notion of waiver, i.e., a person who carries on activities subject to record-keeping requirements waives the privilege as to those records.¹²⁴ But since the "waiver" is said to result from the statutory requirement, the waiver rationale is generally no more than a statement that books required to be kept are not privileged because they are required to be kept.¹²⁵

Wigmore, in explaining the doctrine, embroidered the waiver notion with rhetoric that was more complicated¹²⁶ but no more persuasive. Professor Morgan, after showing that Wigmore's rationale will not survive analysis¹²⁷ has submitted the following explanation:

argument—the demands of effective regulation which underlie the decision in the *Shapiro* case—was used to support the conclusion that the decree did not violate the Fourth Amendment.

¹²² See 335 U.S. 1, 32 (1948).

¹²³ See page 714 *infra*.

¹²⁴ "The fundamental ground of decision in this class of cases, is that where, *by virtue of their character and of the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority*, the custodian has no privilege to refuse production although their contents tend to incriminate him. In assuming their custody, he has accepted the incident obligation to permit inspection" (emphasis added). *Wilson v. United States*, 221 U.S. 361, 381 (1911).

The question which the passage obviously begs is whether "the books and papers are held subject to examination by the demanding authority."

¹²⁵ See Frankfurter, J., dissenting in *Shapiro v. United States*, 335 U.S. 1, 51 (1948).

¹²⁶ Wigmore, after explaining that a public official has no privilege as to official books because his assumption of office involved an implied undertaking to yield the official documents, stated:

"The State requires the books to be kept, but it does not require the officer to commit the crime. If in the course of committing the crime he makes entries, the criminality of the entries exists by his own choice and election, not by compulsion of law. The state announced its requirement to keep the books long before there was any crime; so that the entry was made by reason of a command or compulsion which was directed to the class of entries in general, and not to this specific act. The duty or compulsion to disclose the books existed generically, and prior to the specific act; hence the compulsion is not directed to the criminal act, but is independent of it, and cannot be attributed to it."

Wigmore then treats as public records records required to be kept by a private citizen, the citizen for this purpose becoming an "ad hoc public officer." 8 Wigmore, *Evidence* §2259c, at 349 (3d ed., 1940).

¹²⁷ Consult Morgan, *op. cit. supra* note 1, at 36.

In situations where a license is required for engaging in the activity and the objecting party is a licensee, judicial reliance for support of the regulation is upon waiver by acceptance of the license as in *State v. Sterrin*.¹²⁸ It would not be difficult to produce arguments based upon the historical background of the privilege for the proposition that it never was conceived to have application to such situations, and to buttress them by considerations of overpowering public policy for the preservation of life, property and public safety. Where the activity is such that the state may properly require a license which would operate as a waiver of the privilege, it may impose an equivalent condition upon engaging in the activity. On this theory the statutes are justified which authorize service of process without the state on non-resident motorists in actions brought against them for injuries inflicted within the state.¹²⁹

Professor Morgan's rationale, which was put forward without reference to the *Shapiro* case, is not without its difficulties.

It is true that a distinction between recording requirements and testimonial requirements would be justified by the history of the privilege. Originally, the privilege was designed to bar "the employment of legal process to extract from a *person's own lips* an "admission of his guilt."¹³⁰ But if it is this item of history which is pertinent, it obviously suggests a broader distinction, viz., that between pre-existing documents and oral evidence. It is true also that the privilege was originally recognized in situations where a recalcitrant might summarily be subject to legal compulsion to produce the incriminating matter.¹³¹ Since such compulsion does not exist with reference to the recording requirement, it is arguable that the privilege does not invalidate such requirements and that sanctions for non-compliance could be imposed for failure to record matter even though it was incriminating. But this argument does not technically support the conclusion that the required records if kept could be subpoenaed even though they were incriminating. That conclusion is, of course, supported by a practical argument, i.e., that the purpose of the recording requirement would be frustrated unless the data required could be subpoenaed or inspected in connection with an enforcement action. But this argument poses, and does not answer, the question of whether the privilege is designed to impose such an impediment to enforcement. Nor does a refer-

¹²⁸ 78 N.H. 220, 98 Atl. 482 (1916). For a discussion of the rationale for upholding "hit and run" statutes and similar statutes requiring a motorist involved in an accident to identify himself or to make a report to the authorities, see Mamet, *Constitutionality of Compulsory Chemical Tests to Determine Alcoholic Intoxication*, 36 J. Crim. L. & Criminology 132, 142 et seq. (1945). Mr. Mamet finds the escape from the privilege via the police power "simple." But cf. Frankfurter, J., dissenting in *Shapiro v. United States*, 335 U.S. 1, 65 (1948).

¹²⁹ Consult Morgan, op. cit. supra note 1, at 37-38.

¹³⁰ 8 Wigmore, *Evidence* § 2264, at 363 (3d ed., 1940).

¹³¹ Professor Morgan suggested this point in a letter to the author, in which he elaborated the views set forth in his article in 34 Minn. L. Rev. 1, at 37-38 (1949).

ence to the existence of the power to license answer this question. The power to license does not necessarily include the power to require the waiver of a constitutional privilege as a condition of securing the license. The waiver-license theory pushed to the limits of its logic would justify the state's requiring an actual licensee or one whom the state could require to become a licensee, as well as the agents of actual or possible licensees, to give incriminating testimony regarding the activity which is or could be regulated. But in the *Shapiro* case, the Court stated that "oral testimony by individuals can properly be compelled only by exchange of immunity for waiver [sic] of privilege."¹³² In the *Shapiro* case, moreover, the majority in resolving the constitutional question did not attach any weight to the fact that Shapiro had been licensed.¹³³ And Mr. Justice Frankfurter in his dissent stated explicitly that the government's power to license, whether or not exercised, was irrelevant to the privileged character of required records.¹³⁴ Finally, the Court in the *Shapiro* case did not limit the required-records doctrine to situations where there were "overpowering considerations of public policy." Mr. Chief Justice Vinson, for the Court, declared:

It may be assumed at the outset that there 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. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is 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, subject to inspection by the Administrator.¹³⁵

The foregoing standard makes it easy to pose difficult cases. Suppose, e.g., the federal government in order to enforce the Mann Act required the keeping of records of all interstate excursions involving women.¹³⁶

¹³² 335 U.S. 1, 27 (1948).

¹³³ The licensing provisions were emphasized in connection with the issue of statutory construction. See 335 U.S. 1, 10 ff. (1948).

¹³⁴ *Ibid.*, at 65.

¹³⁵ *Ibid.*, at 32.

¹³⁶ The purpose of the hypothetical statute is not obscured by the fact that some of the recorded transactions would be innocent. Innocent transactions can always be brought under the record-keeping requirements by draftsmanship which makes the category of transactions to be recorded broad enough to include both legal and illegal transactions. Cf. Section 6 of the Mann Act, 36 Stat. 825 (1910), 18 U.S.C.A. § 2421 (1951), requiring those harboring any alien in a house of prostitution, to file with the Commissioner General of Immigration, a report of the alien's name, residence, etc. *United States v. Lombardo*, 228 Fed. 980 (W.D. Wash., 1915) held the statute unconstitutional but neglected to consider the required-records doctrine or the fact that the defense was based on incrimination under state law. The Supreme Court in affirming dealt only with the venue question. *United States v. Lombardo*, 241 U.S. 73 (1916); similarly, *United States v. Portale*, 235 U.S. 27 (1914) involved only the interpretation of the statute.

Would that requirement be valid? One can fit the statute under the standard announced by the Chief Justice in the *Shapiro* case, but it obviously has a different flavor from statutes requiring records as an incident of a comprehensive regulatory program.

It is not easy, however, to say precisely what the difference is. Perhaps it is that the sole or the dominating purpose of the hypothetical record requirement appears to be to compel criminals to keep incriminating records to be used to convict the record-keepers in subsequent criminal trials. Where this appears to be the dominant purpose, a compelling argument may be made that the statutory requirement would appear to be invalid under the Fifth Amendment or, at least, ineffective to destroy the privilege. The OPA requirements could be said to have had an independent purpose: Facilitating the determination or modification of price ceilings by preserving relevant data.¹³⁷

There are obvious difficulties with a test which stresses an independent purpose. It is almost always possible to suggest some independent purpose, e.g., the need for data bearing on the question of whether more investigators or new laws are needed. Furthermore, the existence of a proper purpose for record-keeping would not necessarily justify the use of the records for an improper purpose—self-incrimination. Finally, the criterion laid down by the Court does not specifically exclude records whose “sole” purpose is to furnish a diary of crime to the prosecution.

Although it is arguable that under the Court’s language, a record-keeping requirement “reasonably” related to the enforcement of a valid substantive regulation will itself be valid, the Court’s language is so elastic as to suggest that a different test will evolve. Under this test, the governmental need for 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 privacy may all be weighed. In applying the test, less weight may be given to “business privacy” as opposed to “personal privacy,” however difficult it may be to draw that distinction.

INCOME TAX AND REVENUE RECORDS

It is surprising that the applicability of the required-records doctrine to the record-keeping and disclosure requirements under the internal revenue laws has not been clearly settled.¹³⁸ Comments written after the

¹³⁷ *Shapiro v. United States*, 335 U.S. 1, 8 et seq. (1948).

¹³⁸ Section 3614 of the Internal Revenue Code authorizes the Commissioner or his delegates, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none is filed, to examine relevant books and records, and to require the attendance of knowledgeable persons. Section 3615 authorizes the collector to summon persons and to require them to produce books and records and to give testimony under oath, at a specified

Shapiro case have suggested that the privileged character of taxpayers' records is not affected by that decision.¹³⁹ If by that it is meant that a taxpayer may, on the ground that he would be incriminated thereby, withhold required records sought by the revenue authorities in order to fix tax liability, the conclusion is open to serious doubt.

It is true that several lower federal court cases¹⁴⁰ indicate that the taxpayer may withhold required records from revenue agents seeking to determine the amount of his tax liability. But these cases, which do not even discuss the required-records doctrine, are of doubtful authority for two reasons: (1) the implications of *Sullivan v. United States*,¹⁴¹ decided by the Supreme Court in 1927; (2) although a formal distinction between regulatory and revenue records may be made, that distinction is insubstantial in the light of the purposes underlying the required-records doctrine.

In *Sullivan v. United States*, the defendant, indicted for failing to file an income tax return, defended on the ground that he was privileged to withhold it because it would have disclosed his illegal bootlegging activities. The Supreme Court, reversing the Fourth Circuit Court, which had sustained that defense, held that the privilege did not justify the failure to make any return; the proper course for the defendant would have been to file a "return" and to claim his privilege with reference to answers which he considered protected. Although not directly passing on the proper disposition of such a claim, Mr. Justice Holmes, speaking for a unanimous

time and place. Failure to appear and testify or to appear and produce books in compliance with a summons issued by a collector under Section 3615 is expressly made a crime, punishable by fine and imprisonment, Section 3616. On the other hand, the Code does not specifically provide that noncompliance with a demand or summons under Section 3614 is punishable. That an individual who is summoned under Section 3614 and refuses to answer a proper question is subject to Section 145 of the Code, which makes the wilful failure to supply any information or to keep any records required by the Commissioner a crime punishable by fine and imprisonment. *United States v. Murdock*, 284 U.S. 141 (1931). The Regulations require taxpayers to keep the books and records necessary for the determination of their tax liability. CCH Income Tax Regulations 29.54-1 (1949). For a detailed discussion of these provisions see Barnes, *Inquisitorial Powers of the Federal Government Relating to Taxes*, 28 *Taxes* 1211 (1950).

¹³⁹ *Kamens and Ancier, Immunity from Subpoena of Taxpayer's Records*, 27 *Taxes* 639, 642 (1949).

¹⁴⁰ See, e.g., *Internal Revenue Agent v. Sullivan*, 287 Fed. 138, 140, 143 (W.D.N.Y., 1923). (Taxpayer previously indicted for conspiracy to defraud held privileged to withhold books from revenue agent. The pendency of the fraud indictment may have created the suspicion that the "tax" examination was designed to circumvent the privilege in an independent criminal proceeding.) See also *Manton, J., concurring in Steinberg v. United States*, 14 F. 2d 564, 568 (C.A. 2d, 1926); *Nicola v. United States*, 72 F. 2d 780, 784 (C.A. 3d, 1934).

¹⁴¹ 274 U.S. 259 (1927).

Court, suggested that it might be rejected.¹⁴² His cautionary language, when read in the light of the government's contention in the *Sullivan* case that a tax return was a public record within the meaning of the *Wilson* dictum,¹⁴³ casts doubt on the applicability of the privilege to income tax returns—doubts which are equally applicable to required tax records.

If the questions left open by the *Sullivan* case are resolved in the light of the purposes underlying the required-records doctrine, it seems likely that tax records will be given no more protection than records required by the OPA. It is true that the Court in the *Shapiro* case spoke in terms of records required for regulatory purposes and that this language could be seized upon as a basis for distinguishing tax records and excluding them from the operation of the required-records doctrine. This distinction, however, lacks substance. There appears to be no reason for holding that the Constitution imposes greater restraints on disclosure when the revenue power rather than the regulatory power is involved. Revenue, the backbone of enforcement, goes to the heart of effective regulation. It would be paradoxical for the Court, after having removed the privilege from records required as an incident of a regulatory program—in order to facilitate enforcement—to stop short where revenue records are involved. And Mr. Justice Frankfurter's dissent in the *Shapiro* case indicates that he would not add this paradox to the law of the privilege.¹⁴⁴

Complications are introduced when records required by statute for the purpose of determining tax liability are allegedly being examined for other purposes. Such complications will, of course, arise whenever Agency A is charged with using its informatory powers for Agency B, and the ensuing discussion, although dealing largely with tax records, will also illustrate the general range of problems involved whenever records are

¹⁴² "It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime." 274 U.S. 259, 263 (1927). This quoted statement is ambiguous. It may mean that the connection between a statement of the amount of one's income and a crime is not close enough for the statement to be privileged; or it may mean that income tax reports, as such, are not privileged.

Although the *Sullivan* opinion dealt with required reports to the government rather than required records open to inspection, no distinction has been drawn between the privileged status of these two informatory devices. See *Rodgers v. United States*, 138 F. 2d 992 (C.A. 6th, 1943); 8 Wigmore, Evidence § 2259c (3d ed., 1940); Handler, Constitutionality of Investigations by Federal Trade Commissioner II, 28 Col. L. Rev. 905, 917 (1928).

For a collection of early federal cases and state cases dealing with the privileged status of taxpayers' records, see *Gange Lumber Co. v. Henneford*, 185 Wash. 180, 53 P. 2d 743 (1936), annotated in 103 A.L.R. 513 (1936).

¹⁴³ 274 U.S. 259, 261 (1927).

¹⁴⁴ 335 U.S. 1, 54 (1948).

sought for purposes other than these which produced the record-keeping requirements.

Where an examination is being conducted by revenue authorities ostensibly for revenue purposes, it is doubtful that courts will undertake to determine whether the examination is in actuality prompted by some other purpose. Such an inquiry raises so many practical difficulties that it is likely that the "power" of the revenue agent rather than his "motive" will be decisive.¹⁴⁵

Where an agency not authorized by statute to inspect the required records seeks to subpoena or examine them, a different question is raised: Whether records required under a particular statute are unprivileged only in the proceedings contemplated by the particular statute or whether the required records are unprivileged generally. Could the Securities and Exchange Commission, for example, in an investigation of market manipulation, compel the production of incriminatory records which are required to be kept only under the revenue statutes? Mr. Justice Frankfurter in his dissenting opinion in the *Shapiro* case read the majority opinion as rendering records required for one purpose unprivileged for all purposes.¹⁴⁶ This result might follow from a mechanical application of the "public document" metaphor. But there are persuasive reasons for rejecting it: Congress by requiring the keeping of records to achieve a particular purpose has indicated only that privacy, or more bluntly, the privilege, should yield to that purpose. It does not follow that the privilege should yield to other regulatory purposes.

A related problem would arise where the revenue authorities examined records for revenue purposes and discovered criminal violations of the tax laws or other laws and turned summaries over to enforcement officers. Would a motion to suppress such evidence as illegally required be granted? The answer will depend on the value attached to the privilege and to the importance of discouraging Agency A from inducing Agency B to use its investigatory power on A's behalf. Although it is possible to argue that such exchange of information must be barred to prevent the indirect expansion of Agency A's powers, and the use of Agency B's powers for illicit purposes, the argument is not persuasive: the citizen's privacy has already been invaded; he has already produced records unprivileged when demanded by Agency B. To prevent the use by Agency A of the informa-

¹⁴⁵ Cf. *In re International Corporation*, 5 F. Supp. 608, 611 (S.D.N.Y., 1934). A different result may be reached when, as in *Internal Revenue Agent v. Sullivan*, 287 Fed. 138 (W.D. N.Y., 1923), the taxpayer has been indicted prior to inspection of his books.

¹⁴⁶ 335 U.S. 1, 54 (1948).

tion gathered by Agency B would discourage sensible governmental cooperation.¹⁴⁷

THE REGISTRATION PROVISIONS OF THE INTERNAL SECURITY ACT
OF 1950 (THE MCCARRAN ACT)¹⁴⁸

The scope of the required-records exception may be sharply tested by attempts to enforce the informational requirements of the Internal Security Act of 1950. The Act imposes registration and record-keeping requirements on "Communist organizations"¹⁴⁹ and, under some circumstances, registration requirements on the individual members of "Communist-action organizations."¹⁵⁰ These informational requirements are supported by criminal sanctions, which, however, do not appear to operate until there has been a final order¹⁵¹ by the Subversive Activities Control Board, directing the organization or individual to register.¹⁵² The Act em-

¹⁴⁷ The cases are not clear on this point. See *Zap v. United States*, 328 U.S. 624, 629 (1945): "Neither the Fourth nor Fifth Amendment would preclude the agents from testifying at the trial concerning the facts about which they had lawfully obtained knowledge." See also *Gouled v. United States*, 255 U.S. 298, 311 (1921); *Harris v. United States*, 331 U.S. 145, 154 (1947); *United States v. Monjar*, 147 F. 2d 916, 924 (C.A. 3d, 1944). But see *United States v. Cooper*, 288 Fed. 604 (N.D. Iowa, 1923), rev'd on other grounds, 9 F. 2d 216 (C.A. 8th, 1925). (Non-corporate books and papers obtained by revenue agents and turned over to Department of Justice for use in grand jury proceedings suppressed.)

¹⁴⁸ This paper will deal only with the questions of self-incrimination raised by the McCarran Act, 81st Cong. 2d. Sess. (Pub. L. No. 831, Sept 23, 1950). It will not attempt to deal with the more fundamental questions of civil liberties raised by the Act. For a discussion of these questions, see Sutherland, *Freedom and Internal Security*, 64 Harv. L. Rev. 383 (1951); American Civil Liberties Union (New York), *The Internal Security Act of 1950* (mimeo. 1950).

¹⁴⁹ The Act classifies Communist organizations as "Communist-action" and "Communist-front" organizations, Sections 3(3) and (4). Both types of organizations are required to register with the Attorney General, the registration statement to include the names of officers and a description of their duties and an accounting of receipts and expenditures, during the preceding year. Section 7(d)(1), (2), (3). The registration statements of "action" organizations must include a list of their members. Section 7(d)(4). All registers are open to public inspection. Section 9(b). Both types of organizations are required to keep records of current receipts and expenditures, as prescribed by rules of the Attorney General. Section 7(f)(1). "Action" organizations must, in addition, keep records of members and active participants. Section 7(f)(2).

¹⁵⁰ A member of an action-organization is required to register with the Attorney General if his organization has either failed to register within the time specified or is known by the member to have registered without including his name. Section 8(a) and (b). Publication in the Federal Register of a final order directing an organization to register constitutes notice of that fact to all members. Section 13(b).

¹⁵¹ A Board order becomes final only after judicial review has been waived or has sustained the order. See Section 14(b).

¹⁵² Sections 7 and 8 appear to require registration prior to the issuance of an order. But other provisions indicate that the obligation imposed by these sections is imperfect since it is not supported by sanctions until a final order has been issued. See Sections 15(a), 13(a). This position was taken by the American Bar Association with respect to a predecessor bill (Sen. 2311), which was not materially different. See Senate Rep. No. 1358 on Sen. 2311, 81st Cong. 2d Sess. 37 (1950).

powers the Attorney General to issue rules and regulations prescribing the contents of registration statements and the other reports and records required by the Act.¹⁵³ It also contains the following immunity provisions: (1) that neither the holding of office nor membership in any Communist organization shall constitute a violation of Section 4(a) or 4(c) of the Act or of any other criminal statute; and (2) that the fact of the registration of any person as an officer or member of a Communist organization shall not be received as evidence against that person in a prosecution for violations of Sections 4(a) or 4(c) of the Act or of any other criminal statute.¹⁵⁴

The conventional questions of self-incrimination¹⁵⁵ raised by the disclosure requirements imposed on organizations are relatively easy to dispose of. Under the doctrine of *United States v. White*, the pre-existing documents of "impersonal" associations are, as we have seen,¹⁵⁶ unprivileged. Presumably, reports required from an association will be subject to the same limitation¹⁵⁷ even though the association or its agent who is to prepare the report will be incriminated thereby. It is true, of course, that it is not clear which associations are so "personal" as to fall outside of the *White* doctrine. An association which represents the basic political loyalties of its constituents could easily be labeled "personal." But it would be hard to square such a result with the not unreasonable legislative finding in the McCarran Act that the Communist movement is a world-wide conspiracy.¹⁵⁸ A world-wide conspiracy can scarcely be more personal than a local labor union.¹⁵⁹

In examining the self-incrimination problems raised by the registration requirements imposed on individuals it is useful to divide these requirements into two categories: (1) the statutory requirement that a member of an action-organization register as such (this presumably means that he state the fact of his membership),¹⁶⁰ (2) the supplementary registration requirements imposed by the regulations and the registration form promul-

¹⁵³ Sections 7(d), 7(e), 7(f), 8(c).

¹⁵⁴ Section 4(f).

¹⁵⁵ "Conventional" questions of self-incrimination are, in this discussion, distinguished from questions raised by doctrines concerning "coerced" statements. The latter questions, which concern the registration requirements imposed on organizations as well as those imposed on individuals, are discussed page 721-22 *infra*.

¹⁵⁶ See page 704-6 *supra*.

¹⁵⁷ See note 142 *supra*.

¹⁵⁸ Consult Section 2(1).

¹⁵⁹ See *Rogers v. United States* (U.S. Sup. Ct. 1951), 19 U.S.L.W. 4155, 4156 (privilege not applicable to books and records of Communist Party of Denver).

¹⁶⁰ The phrase "shall . . . register . . . as a member" in Section 8(a) is ambiguous in that it does not clearly indicate whether a potential registrant must merely execute the prescribed registration form or whether he also must declare himself to be a member on the form or otherwise. But Section 8(c), which provides that registration shall be accompanied by the prescribed registration form, seems to require both a declaration of membership and the execution of the registration form. See House Rep. 2980 on H.R. 9490 (a predecessor bill), 81st Cong. 2d Sess. 11 (1950), which adopts this construction.

gated by the Attorney General.¹⁶¹ Critics of the Act have been preoccupied with the statutory requirement and, on the basis of a conventional self-incrimination analysis, have found it incompatible with the privilege.¹⁶² The ensuing discussion will suggest (1) that this emphasis on the statutory requirement is misplaced because that requirement is of negligible importance; (2) that the important questions of self-incrimination are raised by the supplementary requirements prescribed by the Attorney General; (3) that these requirements violate the privilege unless the *Shapiro* doctrine is held to be controlling; and (4) that doctrines relating to coerced statements, rather than a conventional self-incrimination analysis,¹⁶³ are pertinent to the validity of the statutory requirement. The last point, which will be discussed first, requires an examination of the peculiar position of the registrant under the Act.

Under the Act, a member of an action-organization has only an imperfect obligation to register until an order directing him to register becomes final;¹⁶⁴ for it is the final order which brings into operation the sanctions imposed for failure to register. After the order becomes final, the potential registrant has no choice regarding the tenor of the statement about his membership. He must register as a member even though he believes in good faith that he is registering an untruth.¹⁶⁵ Moreover, registration of the fact of membership in compliance with an order does not furnish the government with any data or clues it did not already have. The registrant merely confirms the fact—his membership status—which the government was required to establish as a prerequisite for the final order directing registration. Thus the individual registrant is, with respect to the statutory requirement, in a position similar to that of a thief who, after being convicted of theft, is required to register the fact of his theft regardless of his belief about his innocence.

The conventional self-incrimination analysis seems inapplicable to the

¹⁶¹ For the regulations and an outline of the registration form, see Dept. of Justice Order 4147, 75 Fed. Reg. 7011 et seq. (1950).

¹⁶² Consult American Civil Liberties Union, op. cit. supra note 148, at 12; cf. Sutherland, op. cit. supra note 148, at 407, n. 116.

¹⁶³ Courts and commentators are divided as to whether coerced statements are barred by the privilege. See Morgan, supra note 1, at 27-30. The exclusion of such statements under due process notions makes the controversy largely academic.

¹⁶⁴ See note 151 supra.

¹⁶⁵ It is not clear whether the registration form incorporates this requirement. Item 3 calls for the name of each action-organization of which registrant is a member. Does the statute permit a person subject to a final registration order who does not answer this item to relitigate the question of his membership in a prosecution under Section 15(a) (2) of the statute? In this connection, it is pertinent that the regulations provide that they are to be read together with, and are not to limit, the statute. Consult Dep't. of Justice Order 4147, supra note 161, at § 11.3.

peculiar position of the registrant when he is directed, at the risk of criminal punishment, to tell the government what it has already been found to be true. Since the registration flows not from the individual's determination that he is a member but from a governmental direction to register as such, doctrines regarding "involuntary" confessions appear to be applicable. Registration as a member in response to a governmental command supported by criminal sanctions appears to be no less the product of coercion than a confession prompted by a threat of long imprisonment unless a specified confession is made. Accordingly, even in the absence of the immunity provisions, the admissibility, in a criminal prosecution of the registrant, of evidence of his registration as a member as proof of the fact of membership, would be barred by doctrines excluding coerced statements.¹⁶⁶

In addition, the coercion to register predetermined data may well render the provision requiring such registration invalid. Although the legislature may attach certain consequences, including a duty to furnish information, to an administrative determination,¹⁶⁷ it does not follow that it may compel a person to parrot an official finding which he does not believe to be true. Such compulsion resembles the Soviet tactic of requiring those found guilty, not only to pay for, but also to proclaim, their guilt. Such compulsion seems especially odious in the context of due process notions, when it touches the sensitive area of personal association. Finally, the exercise of this compulsion in the McCarran Act cannot be justified as being necessary to achieve any of the consequences of registration since these could flow from the administrative determination itself. (Parenthetically, it should be observed that the implications of the coercion argument are equally applicable to the requirement that an organization directed by a final order to register as an action or front organization, register "as such.")

The acceptance of the coercion argument need not have any practical consequences. Such consequences could be avoided either by omitting from the registration form any requirement that the registrant state the fact of his membership or by including only a requirement that the registrant list the action-organizations of which he was found to be a member by the Board. The use of either device would avoid the contention that the registrant is forced to affirm what, in good faith, he does not believe. At the same time, the use of such devices would not deprive the govern-

¹⁶⁶If this conclusion were rejected and a self-incrimination approach were adopted, the adequacy of the immunity provisions with respect to the statutory requirement would have to be considered. This question is discussed page 724 *infra*.

¹⁶⁷See *Shields v. Utah Idaho Central Railroad Co.*, 305 U.S. 177, 183 (1938).

ment of any information which it did not already have. Moreover, even if the statutory requirement were held invalid as coercive, the broad separability clause in Section 32 of Title 1 of the Act would probably prevent the automatic invalidity of the other provisions of the Act. Specifically, the separability clause would make a separate question of the validity of the supplementary informational requirements imposed on members subject to a final order by the regulations and the registration form adopted by the Attorney General.

The supplementary requirements call upon the individual registrant to set forth certain information¹⁶⁸ which has not previously been established in an administrative hearing. He must list, *inter alia*, the offices which he holds in the organizations of which he was found to be a member, his previous aliases, his connections with foreign governments, his previous and prospective foreign travel, his foreign military service. In addition, the registration form appears to require the registrant to list each action-organization of which he is a member or an officer whether or not a final order has directed him to register as a member of "each" organization.¹⁶⁹

There is a serious question as to whether the last requirement is authorized by the statute. The statute does not, as we have seen, impose an enforceable obligation on a member of an action-organization to register until he has been directed by a final order to register as such. And if a member of organization "A" is not required to register as such until there is a final order directing such registration, it is arguable that a final order directing his registration as a member of organization "A," is not a sufficient predicate for an administrative requirement that he also register as a member of organization "B," "C" and "D," or be subjected to criminal sanctions. This argument is reinforced by the fact that the registration form does not limit the disclosure requirements to memberships in those action-organizations previously ordered by the Subversive Activities Control Board to register as such or voluntarily registering as such. The criteria for identifying action-organizations are vague enough to raise a serious constitutional question regarding the validity of the Attorney General's requirement.¹⁷⁰ To avoid that question as well as serious self-incrimination questions, the requirement may be held invalid as exceeding the Attorney General's rule-making powers. Nevertheless, for the purpose

¹⁶⁸ See note 161 *supra*.

¹⁶⁹ Form ISA-2, Item 3. It is not clear whether Item 3 is to be read as an administrative interpretation that the statute makes such registration mandatory or merely as an attempt to stimulate voluntary registration. The regulations permit the latter construction, which is consistent with the statute, since they expressly state that they are to be read together with, and are not to limit, the statute. Consult 75 Fed. Reg. 7011, § 11.3 (1950).

¹⁷⁰ Consult Sutherland, *op. cit. supra* note 148, at 404.

of discussing the self-incrimination questions involved, the propriety of this requirement under the statute will be assumed.

Under the recent decision by the Supreme Court in *Blau v. United States*¹⁷¹ the requirement that the registrant list the other action-organizations of which he is a member or officer is obviously incriminating under the Smith Act and probably under the Foreign Agents Registration Act.¹⁷² Although the immunity provisions apply to this requirement, they appear inadequate to displace the privilege, if it is applicable, for two reasons. The first is their failure to provide absolute immunity, i.e., immunity against prosecution for the matter or transaction to which the compelled disclosure "relates,"¹⁷³ and not merely protection against the admissibility of the compelled disclosure in a subsequent prosecution of the registrant. In *Counselman v. Hitchcock*,¹⁷⁴ absolute immunity was held to be a prerequisite for supplanting the privilege since otherwise the witness might be compelled to furnish clues or leads to other evidence. The connection between communist affiliations and possible violations of the Smith Act and the Foreign Agents Registration Act appears to be sufficiently close to require absolute immunity against prosecution in order to displace the privilege.¹⁷⁵

The second reason for the inadequacy of the immunity provisions is the gap in the area to which they apply. They do not appear to apply to prosecutions under sections of the Act, other than Sections 4(a) and 4(c). Thus, for example, a member of a communist action-organization prosecuted for accepting federal employment in violation of Section 5(a)(1)A or for applying for a passport in violation of Section 6(a)(1) could not invoke the immunity provisions to bar the introduction of his registration of his membership.¹⁷⁶

¹⁷¹ 71 S. Ct. 223 (1950). A witness in a grand jury investigation was privileged to refuse to answer questions regarding Communist Party of Colorado and her employment by it since answers might incriminate her under the Smith Act, 54 Stat. 670, 671 (1940), as amended, 62 Stat. 608 (1948), 18 U.S.C.A. § 2385 (1951).

¹⁷² 52 Stat. 631 (1948), as amended, 56 Stat. 248 (1942), and 64 Stat. 399 (1950), 22 U.S.C.A. § 612 (1950).

¹⁷³ If the gaps in the immunity statute discussed below are disregarded, it is arguable that the Act confers absolute immunity. The argument is that the "transaction" to which registration "relates" is membership in an action organization, and that the statute, by providing that membership, per se, shall not be criminal, protects against prosecution for the transaction involved. But the flaw in this argument is that membership has a "direct and substantial" bearing on violations of the Smith Act. See *Blau v. United States*, 71 S. Ct. 223, 224 (1950); *Smith v. United States*, 337 U.S. 137, 148 (1949). Accordingly, absolute immunity involves immunity for such related crimes, which the McCarran Act fails to provide.

¹⁷⁴ 142 U.S. 547 (1892), criticized in 8 Wigmore, Evidence §§ 2283, 2261 (3d ed., 1940).

¹⁷⁵ Consult authorities cited note 59 supra.

¹⁷⁶ Consult Sutherland, op. cit. supra note 147, at 408, n. 116. The gaps might be construed away by a broad construction of Section 4(f), which is paraphrased, page 720 infra. But prior

It is appropriate to digress from the supplementary requirements in order to point out that the failure to confer absolute immunity would not make the immunity provisions inadequate with respect to the statutory requirement that a member of an action-organization subject to a final order register the fact of his membership. Even if that statement were not barred from evidence in a subsequent criminal proceeding by the doctrines regarding "involuntary" statements discussed above, it would be barred by the immunity provisions. Moreover, there would be no basis for the contention that the registrant was being forced to supply a clue or a lead since the government is required to establish the existence of the clue before an enforceable duty to register arises. But, unless doctrines regarding involuntary statements are controlling with respect to the statutory requirement, the registrant could effectively argue in some situations that the immunity provisions are inadequate because of the gaps in the area to which they apply.

We return from our digression to deal with another imperfection in the immunity provisions. Since they operate only with respect to registration as a member or an officer, they are not applicable to some of the supplementary information requirements, e.g., the registrant's aliases and his connection with foreign governments. As the legislative findings incorporated in the McCarran Act indicate,¹⁷⁷ the connection of such information with a possible criminality will frequently be close enough so that the information would be held to be incriminating.¹⁷⁸

In view of the imperfections in the immunity provisions, the supplementary informational requirements imposed on individuals will frequently run afoul of the privilege unless the limiting doctrines discussed earlier in this paper are invoked, viz., the doctrine of the *Shapiro* case and the related doctrine that the privilege is applicable only to disclosures required of persons *qua* witnesses.

These supplementary requirements, assuming they are valid the privilege aside, could be sustained on the basis of the elastic standards laid down in the *Shapiro* case. But the application of the *Shapiro* doctrine to

to such construction, it is unlikely that a potential registrant would be required to take the risk that Section 4(f) would be construed literally.

A qualification of the suggestion that the gaps would make the immunity inadequate should also be noted: The privilege protects against disclosures connected with past, and not future, crimes. Accordingly, unless there was some basis for concluding that a potential registrant, before his duty to register arose, had violated sections of the Act to which the immunity provisions are not applicable, the immunity gaps would not be fatal to the registration requirement.

¹⁷⁷ Consult Section 2 of the Act.

¹⁷⁸ See note 59 *supra*.

these requirements will underscore the queer results which that doctrine produces. Thus a person, although immune from disclosing his Communist affiliations or his aliases to a grand jury, could be impelled to register that information with the Attorney General. Confronted with such a result, the Court may bend or avoid the precedents which have limited the privilege. It is easy to suggest arguments for distinguishing or limiting these precedents. The limiting doctrines arose largely out of economic regulation—in areas remote from civil liberties. The McCarran Act was assailed in the President's veto message as "the greatest danger to freedom of speech, press, and assembly since the Alien and Sedition Laws of 1798."¹⁷⁹ In this view, the Act is a modern outbreak of the heresy hunts which contributed to the recognition of the privilege in English law. The present hysteria against unpopular views makes the early history of the privilege a particularly pertinent caution against narrowing its scope.

Technical distinctions between the OPA requirements and the supplementary informational requirements are also available. Many persons could presumably have recorded the prescribed OPA data without involving themselves in the slightest suspicion of criminality.¹⁸⁰ This is not true of the potential registrant faced with the supplementary requirements of the McCarran Act. Although the Act somewhat disingenuously provides that Communist membership shall not per se be criminal,¹⁸¹ a person who registers his membership in an action organization practically confesses his violation of the Smith Act. Indeed, he also comes close to confessing a violation of Section 4(a)¹⁸² of the McCarran Act if that section is loosely construed. Compliance with other supplementary requirements has similar tendencies, although to a lesser degree.

The answers to the foregoing arguments are implicit in the earlier discussion. Although history supports the use of the privilege as a limitation

¹⁷⁹ N.Y. Times, p. 8, col. 5 (Sept. 23, 1950). For an appraisal of this view, see Sutherland, *op. cit.* supra note 147, at 397 et seq.

¹⁸⁰ See on this point *California v. LaRue McCormick*, Los Angeles Daily Journal, p. 1 (Cal. App., Feb. 28, 1951). The LaRue case involved a Los Angeles County ordinance which required Communists to register and to supply data comparable to the data required by the regulations under the McCarran Act. The ordinance did not, however, provide for advance administrative determination of those subject to the registration requirement. The ordinance was invalidated as requiring incrimination under the California Criminal Syndicalism Act. The ordinance was distinguished from statutes requiring an automobile driver involved in an accident to give his name and other data, on the ground that such information does not necessarily implicate the driver in a crime. *Ibid.*, at 7.

¹⁸¹ Section 4(f).

¹⁸² Section 4(a) makes it unlawful to agree to perform any act which would substantially contribute to the establishment in the United States of a foreign-controlled totalitarian dictatorship.

on repressive legislation, the pertinence of that history is weakened, if not destroyed, by the development of more relevant constitutional protections. If the Act violates the First Amendment, it is obviously unnecessary to invoke the privilege. Indeed, it is undesirable to confuse these two protections, for such confusion anomalously requires men to stigmatize themselves as criminals in order to vindicate basic constitutional values. If no constitutional values independent of the privilege are involved, potential registrants under the Act are, so far as the privilege is concerned, in a position essentially no different from that of persons required to record evidence of illegality in income tax returns or in price records.¹⁸³ The fact that compliance with the latter requirements need not in some cases approach a confession is, as the earlier discussion indicated, not a satisfactory basis for distinction. The number of cases in which compliance will involve incrimination can in a large measure be determined by the mechanics of statutory drafting. Moreover, the fact that others may comply without incriminating themselves is of small comfort to the businessman or taxpayer whose compliance necessarily involves self-incrimination. Accordingly, unless the Court (if it reaches the question) upholds the registration provisions as compatible with the privilege, it must repudiate the *Shapiro* doctrine, or limit it in some fashion which will suggest that the application of the doctrine depends on the Court's appraisal of the substantive policy implemented by informational requirements.

CONCLUSIONS

However the Court resolves—or avoids—the perplexing issues of self-incrimination presented by the McCarran Act, the repudiation of the required-records doctrine would, it is submitted, be unfortunate. The issues raised by that exception cannot be dissociated from the deep-rooted doubts regarding the utility of the privilege. These doubts operate with special force where the documents of business subject to regulation or where the security of the state is involved. The answer that these doubts were resolved by the Fifth Amendment cannot be controlling in a forum which narrowed the privilege in the corporation and association cases. For these decisions opened the door to the claim of the regulatory power. And the major regulatory programs of our time have clearly reflected the conviction that effective administration presupposes access to books and records.¹⁸⁴ Without that tool, the enforcement of complicated regulation

¹⁸³ But cf. *California v. LaRue McCormick*, Los Angeles Daily Journal, p. 1 (Cal. App., Feb. 28, 1951).

¹⁸⁴ See *United States v. Shapiro*, 335 U.S. 1, 6, n. 4 (1948), for a collection of such statutes.

would break down or would involve additional costs not easily met in a period when the government is assuming staggering commitments. It is not surprising that a majority of the Supreme Court was convinced that the application of the privilege to required records is a luxury which a welfare-warfare state cannot afford.

It is true, as Mr. Justice Frankfurter has said, that the protection of the regulatory power in the *Shapiro* case marks a shift in the relationship of the citizen to his government.¹⁸⁵ But the *Shapiro* case merely reflects, it did not produce, the changed relationship. The change is an incident of the pervasive expansion of the government's regulatory and revenue powers. Like the line of cases which have removed the barriers to administrative investigation which were once spun out of the Fourth Amendment,¹⁸⁶ the *Shapiro* case, in limiting the Fifth Amendment, merely recognizes that the government, having assumed far-reaching tasks, must be given appropriate investigatory powers.

The *Shapiro* case, despite its dangers, does not leave the citizen without protection against governmental demands for records and reports. For the due process clause and the privilege against unreasonable search and seizures, as well as the First Amendment, are still barriers against "unjustified" invasions of privacy. These restraints seem more appropriate for the accommodation of the conflicting values involved because they are openly more flexible and because their operation does not require a paradoxical connection between the required data and crime. Experience in the corporate field and with the required-records doctrine suggests that these restraints can be applied to achieve a "proper" balance between the demands of privacy and those of modern regulation.

¹⁸⁵ *Ibid.*, at 50.

¹⁸⁶ Consult Davis, *The Administrative Power of Investigation*, 56 *Yale L.J.* 111 (1947).