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Bernard D. Meltzer

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The Privilege Against Self-Incrimination and Required Income Tax Records

By BERNARD D. MELTZER

Professor of Law, University of Chicago Law School

This is an excerpt from "Required Records, the McCarran Act, and the Privilege Against Self-Incrimination," which appeared in the *University of Chicago Law Review* (Volume 18, Number 4). The original article dealt with the debate regarding the wisdom of the privilege, the operation of the privilege in various kinds of legal proceedings and the withdrawal of the privilege from records required by law and from the records of corporations and of certain unincorporated associations. This excerpt dealing with the questions raised by revenue records is presented with the permission of the University of Chicago Press.

THE RECORDS of corporations and of unincorporated associations are not protected by the privilege against self-incrimination.¹ The doctrines employed to reach this result operate regardless of whether there is a legal requirement that such records be kept. Accordingly, it is only where the taxpayer is an individual or perhaps a small unincorporated association that the applicability of the privilege to taxpayers' records required by law raises a substantial question.

Required Regulatory Records

The cases with the sharpest impact on this question are not tax cases but cases involving government regulation. Probably the most important of these cases is *Shapiro v. U. S.*,² involving the effect of OPA record-keeping requirements on the privileged status

of required records. 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."³ 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."⁴ Shapiro, after claiming his

¹ For a review of authorities with respect to corporate documents, see *Oklahoma Press Publishing Company v. Walling*, 327 U. S. 186, 204-209 (1946); Meltzer, "Required Records, the McCarran Act, and the Privilege Against Self-Incrimination," 18 *The University of Chicago Law Review* 687, at pp. 701-704; with respect to documents of unincorporated associations, see *U. S. v. White*, 322 U. S. 694 (1944); Meltzer, article cited above, at pp.

704-706, which discusses the possibility that the privilege will be maintained as to the books of "smaller" associations.

Recently, the Court of Appeals for the Second Circuit, relying on *U. S. v. White*, held the documents of a trust unprivileged. See *U. S. v. Field, et al.*, decided October 30, 1951.

² 335 U. S. 1 (1948).

³ 335 U. S., at p. 4.

⁴ 335 U. S., at p. 4.

"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 the immunity provisions of the Emergency Price Control Act⁵ insulated him against prosecution was overruled. His conviction followed and was affirmed by the Court of Appeals for the Second Circuit,⁶ and then by a sharply divided Supreme Court.

The majority interpreted the statute as conferring immunity only when 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* case⁷ and reaffirmed in the *Davis* case:⁸

" . . . the 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.'"⁹

Mr. Justice Frankfurter, in a strong dissent,¹⁰ 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. 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.¹¹

Mr. Justice Frankfurter challenged the majority's reliance on the *Wilson* dictum, urging that Mr. Justice Hughes had him-

Mr. Justice Frankfurter's interpretation of the precedents may be questioned, but there is no quarrel with his conclusions.

self limited this dictum by invoking precedents which involved not merely "required" or "quasi-public" records but truly public records, that is, those kept by public officers in the discharge of their public duties.¹² 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*,¹³ 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 records "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."¹⁴ 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."¹⁵ 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."¹⁶ 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.¹⁷ But surely this fictional transformation of a druggist (or a slaughterer) into an *ad hoc* public officer scarcely obscures the fact that the druggist

⁵ 56 Stat. 23 (1942), as amended, 50 USCA App. Sec. 922 (g) (1944).

⁶ *U. S. v. Shapiro*, 159 F. (2d) 890 (CCA-2, 1947).

⁷ *Wilson v. U. S.*, 221 U. S. 361, 381-382 (1911).

⁸ *Davis v. U. S.*, 328 U. S. 582, 589-590 (1946).

⁹ 335 U. S., at p. 33. A similar dictum laid down in *Boyd v. U. S.*, 116 U. S. 616, 623-624 (1886), was quoted in the *Shapiro* case (335 U. S., at p. 33, footnote 42). While the majority opinion pointed to this dictum, Frankfurter, J., pointed to the result in the *Boyd* case (335 U. S., at pp. 67-68): 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 per-

mission 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.

¹⁰ Jackson, J., Murphy, J., and Rutledge, J. also dissented. Rutledge, J., rested his dissent on his interpretation of the applicable immunity provision and merely expressed doubts as to the applicability of the privilege.

¹¹ 335 U. S., at pp. 53 and following.

¹² 335 U. S., at pp. 58 and following.

¹³ 10 N. D. 203, 86 N. W. 709 (1901).

¹⁴ North Dakota Revised Code Sec. 7596 (1899).

¹⁵ 10 N. D., at pp. 208-209, 86 N. W., at p. 711.

¹⁶ 335 U. S., at p. 60.

¹⁷ *State v. Walker*, 34 N. M. 405, 408, 281 Pac. 481, 482 (1929).

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" business keep records. Moreover, in other cases cited in the *Wilson* opinion, also involving liquor regulation,¹⁸ there was either no attempt to characterize the records as "public"¹⁹ or that characterization was merely a metaphor describing the unprivileged character of records which were held to be "public" only because they were required.²⁰

Mr. Justice Frankfurter's interpretation of the *Wilson* case is unusual. That case has uniformly been read by commentators²¹ 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.²² And the Supreme Court itself, prior to the *Shapiro* case, had apparently adopted a similar interpretation of the

Wilson doctrine,²³ although it had not previously applied it squarely.

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,²⁴ 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, that is, a person who carried on activities subject to record-keeping requirements waives the privilege as to those records.²⁵ 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.²⁶

¹⁸ 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 *Columbia Law Review* 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., at p. 65.) 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 Mamet, "Constitutionality of Compulsory Chemical Tests to Determine Alcoholic Intoxication," 36 *Journal of Criminal Law and Criminology* 132, 142 and following (1945).) 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.

¹⁹ *People v. Henwood*, 123 Mich. 317, 82 N. W. 70 (1900). The requirement that druggists report to prosecuting attorney liquor sales, including illegal sales, was held valid as a "police regulation."

²⁰ *State v. Davis*, 108 Mo. 666, 671, 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," cited at footnote 18, at pp. 840-843.

²¹ See, for example, 8 Wigmore, *Evidence*, Sec. 2259c (3d Ed., 1940); "Quasi Public Records and Self-Incrimination," cited at footnote 18, at p. 841 (1947); Davis, "The Administrative Power of Investigation," 56 *Yale Law Journal* 1111, 1137, footnote 133 (1947); "The Self-Incrimination Privilege in Actions Involving

Government Regulated Enterprises," 37 *Journal of Criminal Law and Criminology* 524 (1947).

²² See, for example, *Rodgers v. U. S.*, 138 F. (2d) 992, 995-996 (CCA-6, 1943) (records and reports required by the Agricultural Adjustment Act of 1938); *U. S. v. Sherry*, 294 F. 684 (DC 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); *U. S. v. Jones*, 72 F. Supp. 48 (DC Miss., 1947) (records under the Fair Labor Standards Act). But cf. *Ryan v. Amazon Petroleum Corporation*, 71 F. (2d) 1, 8 (CCA-5, 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* doctrine. See, for example, *Hagen v. Porter*, 156 F. (2d) 362, 367 (CCA-9, 1946), cert. den. 329 U. S. 729 (1946); *Porter v. Mueller*, 156 F. (2d) 278, 281 (CCA-3, 1946).

²³ See *Davis v. U. S.*, cited at footnote 8, at pp. 589 and following, where the *Wilson* dictum set out at page — is quoted with approval; see also Mr. Justice Frankfurter's dissent (at pp. 595-596), and his dissent in *Harris v. U. S.*, 331 U. S. 145, 156 (1947); cf. *Gouled v. U. S.*, 255 U. S. 298, 308-309 (1921).

²⁴ See footnote 28.

²⁵ "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 criminate him. In assuming their custody he has accepted the incident obligation to permit inspection." (Italics supplied.) *Wilson v. U. S.*, cited at footnote 7, at pp. 381-382.

²⁶ See Frankfurter, J., dissenting in *Shapiro v. U. S.*, cited at footnote 2, at p. 51. For a discussion of the explanation of the required-records doctrine suggested by Wigmore and

Despite the implications of the waiver rationale, the court in the *Shapiro* case recognized that there were limitations on legislative power to abrogate the privilege by the imposition of record-keeping requirements. It did not, however, indicate clearly what these limitations are. 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."²⁷

The foregoing standard makes it easy to pose difficult cases. Suppose, for example, the federal government in order to enforce the Mann Act required the keeping of records of all interstate excursions involving woman.²⁸ 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 dominant 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.²⁹

There are obvious difficulties with a test which stresses an independent purpose. It is almost always possible to suggest some independent purpose, for example, 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 may evolve. Under this test, the governmental need for records to enforce a particular policy, the existence of a purpose other than compelling 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,"³⁰ however difficult it may be to draw that distinction.

Required Income Tax Records

It is surprising that the applicability of the required-records doctrine to the record-keeping and disclosure requirements under the income tax laws has not been clearly settled.³¹ Comments written after the *Shapiro*

(Footnote 26 continued)

Professor Morgan. see Meltzer, article cited at footnote 1, at pp. 712-714.

²⁷ 335 U. S., at p. 32.

²⁸ 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.

²⁹ See *Shapiro v. U. S.*, cited at footnote 2, at pp. 8 and following.

³⁰ This preference for "personal privacy" is suggested (1) by the cases which have withdrawn the privilege from the books of corporations and unincorporated associations (see

footnote 1) and (2) by the cases narrowing the Fourth Amendment's protection against unreasonable searches and seizures where searches involved business premises. See, for example *U. S. v. Rabinowitz*, 339 U. S. 56 (1950).

³¹ Sec. 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 and testimony of knowledgeable persons. Sec. 3615 authorizes the collector in a variety of specified situations to summon persons and to require them to produce books and records and to give testimony under oath, at a specified time and place. Failure to appear and testify or to appear and produce books in compliance

case have suggested that the privileged character of taxpayers' records is not affected by that decision.³² 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 cases³³ 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 *U. S. v. Sullivan*,³⁴ 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 *U. S. v. Sullivan*, 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 Court, suggested that it might be rejected.³⁵ 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,³⁶ 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. After having removed the privilege from records required

(Footnote 31 continued)

with a summons issued by a collector under Sec. 3615 is expressly made a crime, punishable by fine and imprisonment (Sec. 3616). On the other hand, the Code does not specifically provide that noncompliance with a demand or summons under Sec. 3614 is punishable. The Supreme Court has, however, held that an individual who is summoned under Sec. 3614 and refuses to answer a proper question is subject to Sec. 145 (a) of the Code, which makes the willful failure to supply any information or to keep any records required by the Commissioner a crime punishable by fine and imprisonment. (*U. S. v. Murdock*, 2 usrc ¶ 828, 284 U. S. 141 (1931).) The Regulations require taxpayers to keep the books and records necessary for the determination of their tax liability. (Regs. 111, Sec. 29.54-1 (1949).) For a detailed discussion of the foregoing provisions see Barnes, "Inquisitorial Powers of the Federal Government Relating to Taxes," 28 TAXES 1211 (December, 1950).

³² Kamens and Ancier, "Immunity from Subpoena of Taxpayers' Records," 27 TAXES 639, 642-643 (July, 1949).

³³ See, for example, *Internal Revenue Agent v. Sullivan*, 287 F. 138, 140, 143 (DC 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. U. S.*, 14 F. (2d)

564, 568 (CCA-2, 1926); *Nicola v. U. S.*, 72 F. (2d) 780, 784 (CCA-3, 1934).

³⁴ 274 U. S. 259 (1927).

³⁵ "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., at pp. 263-264.) 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. The former interpretation is supported by Holmes' citation of *Mason v. U. S.*, 244 U. S. 362 (1917), where the Court in effect required a "direct" connection between the anticipated answer and criminality before recognizing a claim of privilege.

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 informative devices. See *Rodgers v. U. S.*, 43-2 usrc ¶ 9664, 138 F. (2d) 992 (CCA-6, 1943); 8 Wigmore, *Evidence*, Sec. 2259c (3d Ed., 1940); Handler, "Constitutionality of Investigation by Federal Trade Commission: II," 28 *Columbia Law Review* 905, 917 (1928).

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

³⁶ 274 U. S., at pp. 260-261.

as an incident of a regulatory program in order to facilitate enforcement, it would be paradoxical for the Court 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.³⁷ Finally, if the independent purpose test mentioned above is recognized, consideration of the purposes behind the record-keeping requirements also leads to the conclusion that required tax records are unprivileged. Such records are obvious and indispensable aids in the determination of the amount of tax liability. Accordingly, it can scarcely be argued that the sole or dominating purpose of the requirements is to force the taxpayer to keep a diary of his own criminality for use in a prosecution against him.

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

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, for example, the preparation of a criminal case against the taxpayer. 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.³⁸

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 incriminating 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.³⁹ 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.

Related problems arise where the revenue authorities examine records for revenue purposes and discover criminal violations of the tax laws or other laws and furnish copies or summaries of the resultant information to the Department of Justice or to any other interested agency. Discussion of these problems will be facilitated by distinguishing between information contained in income tax returns and information contained in records of examination of books and papers or of witnesses.

Current Treasury Regulations⁴⁰ based on Section 55(a) of the Code endow the Secretary of the Treasury with discretion to grant the request of other federal agencies to inspect income tax returns. These regulations, moreover, explicitly provide for the use of the resultant information as evidence in any proceeding before a federal agency or in any proceeding to which the United States is a party.⁴¹ Finally, the regulations provide that income tax returns may be furnished to a United States attorney or the Department of Justice for use in grand jury proceedings or in court litigation in which the United States is interested.⁴²

Where the information requested by, or furnished to, another agency is derived by internal revenue agents from the taxpayer's books and records, as distinguished from his return, different problems of statutory authority and of policy are involved. The Internal Revenue Code does not explicitly regulate the furnishing of such information to other agencies or their inspection of such

³⁷ 335 U. S., at pp. 53-54.

³⁸ Cf. *In re International Corporation*, 4 vstc ¶ 1225, 5 F. Supp. 608, 611 (DC N. Y., 1934). A different result might perhaps be reached when, as in *Internal Revenue Agent v. Sullivan*, cited at footnote 33, the taxpayer has been indicted prior to inspection of his books.

³⁹ 335 U. S., at p. 54.

⁴⁰ T. D. 4929, 1939-2 CB 91, Sec. 463C.33. Similar regulations provide access to returns by

state officers and by shareholders (T. D. 4945, 1939-2 CB 97, Secs. 463D.1-463D.3). Code Sec. 55 (d) (1) authorizes inspection by committees of Congress.

⁴¹ T. D. 4945, 1939-2 CB 97, Sec. 463D.1. The Regulations do not deal with the admissibility of returns in state proceedings.

⁴² T. D. 4945, 1939-2 CB 97, Sec. 463D.4.

The cases, although not clear, appear to sanction the interchange of information by government agencies.

information. Accordingly, the controlling statute would appear to be Section 22 of Title 5 of the United States Code, which provides as follows:

"The head of each department is authorized to prescribe regulations, *not inconsistent with law*, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." (Italics supplied.)

Section 22 is sufficient statutory authority for the Treasury Regulations which authorize the inspection of official records containing material obtained from the taxpayer's books and records.⁴³

Under the foregoing regulations, it is obvious that returns filed, and books kept, to aid in the determination of tax liability may become the instrument of the taxpayer's incrimination not merely under the tax laws but under any federal criminal statute. The attempted use of the information in such criminal proceeding might be met with the argument that the taxpayer's privilege is being circumvented: Another federal agency (B) is securing from the collector's office (A) information which B could not secure directly because of lack of statutory authority or because the books, if incriminating, would be privileged. Where the collector's office (A) has obtained information from the taxpayer's books, it could also be argued that permitting use of that information by another agency (B) would encourage B to induce A to act as its investigatory arm. Accordingly, the regulations permitting such use would be inconsistent with the limitations on both A's and B's authority to investigate and would be "inconsistent with law" as that term is used in Section 22 of Title 5.

⁴³ Regs. 111, Sec. 29.55(b)-1, Sec. 1.2. A general federal statute prohibits unauthorized disclosure of information obtained by a federal officer in the course of his employment (18 USCA Sec. 1905, 62 Stat. 791 (1948)). See also Code Sec. 4047 (a) (1). Sec. 55 (f) of the Internal Revenue Code contains a similar prohibition applicable to returns. Disclosures authorized by the Secretary of the Treasury pursuant to Sec. 22 of Title 5 would avoid these prohibitions.

The argument based on the construction of Section 22 will not survive analysis. That argument requires an assumption that what is ostensibly a tax investigation is prompted by other motives. Absent any evidence that the revenue authorities were acting on behalf of another agency, the presumption of official regularity would operate to require the acceptance of a tax investigation at face value. Moreover, where a possible revenue motivation for the investigation is present, it is probable that the courts would give short shrift to a contention that hidden motives to aid another agency prompted an ostensible revenue investigation.⁴⁴ The collector's investigation would thus be valid regardless of the multiple use of the resultant information, except in the unusual situation where there was proof that he was acting solely as the arm of another agency. And since there is no law against interchange of information, regulations by the Secretary of the Treasury authorizing other agencies to use the resultant information would not be "inconsistent with law" and would be justified by Section 5 of Title 22.

The argument based on the privilege is no more persuasive. The complying taxpayer has furnished information unprivileged at the time of its acquisition. He is not subjected to testimonial compulsion, or indeed to any further compulsion, when another agency uses this information, and the taxpayer cannot, therefore, invoke the privilege. Congress, moreover, could in many situations have constitutionally required the direct submission of reports to, and the keeping of records for, the other federal agency. There is no apparent reason why Congress cannot properly authorize federal agencies to do indirectly (through the collector's office) what they could be authorized to do directly (through their own original investigations). Indeed, such measures are desirable because they avoid harassment of the honest citizen and useless expenditure by the government.

The cases, although not entirely clear, appear to sanction interchange of information by government agencies.⁴⁵ It is not

⁴⁴ Cf. *In re International Corporation*, cited at footnote 38. A different result might perhaps be reached when, as in *Internal Revenue Agent v. Sullivan*, cited at footnote 33, the taxpayer had been indicted prior to inspection of his books.

⁴⁵ See *Zap v. U. S.*, 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

likely that these cases would be repudiated by the Supreme Court. The Court has sanctioned dramatically direct inroads on the privilege, through the required-records doctrine and otherwise.⁴⁶ It is unlikely

that it would now strike down the shadowy and oblique limitation involved in the sensible exchange of information by government agencies. [The End]

WHY PRICES ARE HIGH

NO SUBJECT is so much discussed today—or so little understood—as inflation. The politicians in Washington talk of it as if it were some horrible visitation from without, over which they had no control—like a flood, a foreign invasion or a plague. It is something they are always promising to “fight”—if Congress or the people will only give them the “weapons” or “a strong law” to do the job.

Yet the plain truth is that our political leaders have brought on inflation by their own money and fiscal policies. They are promising to fight with their right hand the conditions they have brought on with their left.

Inflation, always and everywhere, is primarily caused by an increase in the supply of money and credit. In fact, inflation is the increase in the supply of money and credit. If you turn to the recent *American College Dictionary*, for example, you will find the first definition of inflation given as follows: “Undue expansion or increase of the currency of a country, especially by the issuing of paper money not redeemable in specie.”

The word “inflation” originally applied solely to the quantity of money. It meant that the volume of money was *inflated*, blown up, overextended. It is not mere pedantry to insist that the word should be used only in its original meaning. To use it to mean “a rise in prices” is to deflect attention away from the real cause of inflation and the real cure for it.

Let us see what happens under inflation, and why it happens. When the supply of money is increased, people have more money to offer for goods. If the supply of goods does not increase—or does not increase as much as the supply of money—then the prices of goods will go up. Each individual dollar becomes less valuable because there are more dollars. Therefore, more of them

will be offered against, say, a pair of shoes or a hundred bushels of wheat than before. A “price” is an *exchange ratio* between a dollar and a unit of goods. When people have more dollars, they value each dollar less. Goods then rise in price, not because goods are scarcer than before but because dollars are more abundant.

In the old days, governments inflated by clipping and debasing the coinage. Then they found they could inflate cheaper and faster simply by grinding out paper money on a printing press. This is what happened with the French assignats in 1789, and with our own currency during the Revolutionary War. Today the method is a little more indirect. Our government sells its bonds or other IOU's to the banks. In payment, the banks create “deposits” on their books against which the government can draw. A bank in turn may sell its government IOU's to the Federal Reserve Bank, which pays for them either by creating a deposit credit or having more Federal Reserve notes printed and paying them out. This is how money is manufactured.

The greater part of the “money supply” of this country is represented not by hand-to-hand currency but by bank deposits which are drawn against by checks. Hence, when most economists measure our money supply they add demand deposits (and now usually, also, time deposits) to currency outside of banks to get the total. The total of money and credit so measured was \$64,099,000,000 at the end of December, 1939, and \$174,200,000,000 at the end of June this year. This increase of 171 per cent in the supply of money is overwhelmingly the main reason why wholesale prices rose 135 per cent from 1939 to June of this year.—Henry Hazlitt, *Newsweek*, September 3, 1951 (Foundation for Economic Education Clipping of Note No. 42).

(Footnote 45 continued)

had lawfully obtained knowledge.” See also *Gouled v. U. S.*, cited at footnote 23, at pp. 311-312; *Harris v. U. S.*, cited at footnote 23, at p. 154; *U. S. v. Monjar*, 147 F. (2d) 916, 924 (CCA-3, 1944); *Shinyu Noro v. U. S.*, 148 F. (2d) 696 (CCA-5, 1945). But cf. *Shushan v. U. S.*, 117 F. (2d) 110, 117-118 (CCA-5, 1941); *U. S. v.*

Cooper, 288 F. 604 (DC Iowa, 1923), rev'd on other grounds, 9 F. (2d) 216 (CCA-8, 1925). (Noncorporate books and papers obtained by revenue agents and turned over to Department of Justice for use in grand jury proceedings suppressed.)

⁴⁶ See Meltzer article cited at footnote 1, at p. 688, footnote 11.