In the

Supreme Court of the United States

Roy D. Garner,

Petitioner,

v.

United States Of America,

Respondent.

No. 74-100

Washington, D. C.
November 4, 1975

Pages 1 thru 43

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

ER IN THE SUPREME COURT OF THE UNITED STATES

ROY D. GARNER,

Petitioner, No. 74-100

v.

UNITED STATES OF AMERICA,

Respondent.

Washington, D. C.

Tuesday, November 4, 1975

The above-entitled matter came on for argument at 11:06 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BURTON MARKS, ESQ., 8383 Wilshire Boulevard, Suite 510, Beverly Hills, California 90211, for the Petitioner.

KEITH A. JONES, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-100, Garner against the United States.

Mr. Marks, you may proceed whenever you are ready.

ORAL ARGUMENT OF BURTON MARKS ON BEHALF OF THE PETITIONER

MR. MARKS: Mr. Chief Justice, and may it please the Court: In this case Mr. Garner submitted some income tax returns for the year 1965, 1966, and 1967, in which he stated certain information which turned out to be highly incriminating to him in a trial which involved some activities allegedly engaged in in 1968. In 1965 he stated his occupation, as required by the tax return, to be professional gambler. In 1966 and 1967 he stated he was a horseman but his wagering income was, or his total income was stated to be as a result of wagering income.

QUESTION: Would he have complied with the statute if he had inserted in the year in question the term "self-employed speculator"?

MR. MARKS: Probably not. It would depend, because one of the interesting propositions with respect to income tax reporting is when you define what you are or where your income came from, you also define the consequences of what types of deductions you can use. Therefore, if Mr. Garner had -- and I was speculating on this -- defined himself as

a self-employed bankrobber, he may have been able to take depreciation for his getaway car, whereas if he is a gambler, the only thing that he could take as a deduction against wins would be losses.

QUESTION: How about tips? Tips on races, wouldn't that be, on your theory wouldn't that be --

MR. MARKS: Payment for tips?

QUESTION: Yes.

MR. MARKS: Perhaps it might be. That would be within the scope of his business.

QUESTION: Could he have answered the question, "I decline to respond on Fifth Amendment grounds"?

MR. MARKS: As to his occupation? I don't know.

QUESTION: Hasn't the Treasury Department ruled on that?

MR. MARKS: They did with respect to Mr. Garner, at least.

QUESTION: No, previously.

MR. MARKS: Prior to that? I really don't know whether they did or not. I really can't answer that question.

It seems that we are in between, and I have some thoughts on this situation.

The case that we have here appears to be in a sense right in the middle of what you would call -- it's a Sullivan v. Marchetti type of case. That is to say -- or Byers, if you

please, because Byers is a more recent type of case.

The question really seems to be could Mr. Garner assert his privilege against self-incrimination at the time he was prosecuted, or did he have to do it at the time that he was filling out his income tax return?

The majority of the Ninth Circuit seemed to indicate, in my opinion, in a rather simplistic fashion that he had to do it at the time he filled out his return, even though he may or may not have known at the time he filled it out that the answers were incriminating or might be incriminating. According to Judge Wallace of the Ninth Circuit, only Mr. Garner would know whether his answers were incriminating at the time he answered the question.

Well, being a gambler is not an incriminating answer. Being a person who makes his wages through gambling or makes his income through gambling is not incriminating. It became incriminating when Mr. Garner's income tax returns were presented to the court and to the jury and certain inferences were raised and argued by the prosecutor that these were incriminating circumstances.

QUESTION: I don't know that I follow you there, Mr. Marks. If it was a link in the chain of causation at the time the chain of inferences that would lead to the judgment that a crime had been committed, at the time the prosecutor was arguing it to the jury, wouldn't it have been the same

at the time he filed the return?

MR. MARKS: Well, he hadn't even committed the crime. It's like being pregnant, or the concept of being pregnant. Mr. Garner would have to have known in 1965 that he was thinking, if he was thinking, of committing a wagering violation in 1968.

QUESTION: But then how was the fact that he admitted to being a wagerer in 1965 incriminate him on the charge that he did it in '68?

MR. MARKS: Well, that was one of the arguments and one of the objections that was raised and is a footnote in our petition and in our brief that there is a subsidiary question that was just glossed over, and that is how are these returns admissible in any case?

QUESTION: That's from your Fifth Amendment.

MR. MARKS: Correct.

But we also, because Haynes, Grosso, and Marchetti had just come out, the question of the Fifth Amendment privilege as being applicable to the tax returns was very vital, and that was an objection that we raised, and that was what the Ninth Circuit finally landed and that's the important question which is here.

QUESTION: What if the prosecution, instead of putting in the tax returns to establish the fact that he was a gambler had brought in three bartenders who said over this

same period of time that he had bought drinks on the house on many occasions because he had made a big killing on the races and that he was the best professional gambler in whatever State he was operating in.

MR. MARKS: I still think it would have been irrelevant, unless --

QUESTION: Would it be admissible?

MR. MARKS: Would it be admissible?

QUESTION: Yes, as an admission of occupation.

MR. MARKS: Not unless it was exactly at the time in which he was alleged to have committed the crime and he said to the public at large, "I'm a professional gambler and that's my business."

QUESTION: My question assumed that it was covering the same period.

MR. MARKS: Then it would be admissible as an admission against his interest.

QUESTION: Yes. But how do you distinguish that from his making the same statement on his tax return?

MR. MARKS: Because --

QUESTION: Unless you can demonstrate that he was absolutely required to put the truth of the matter in the tax return.

MR. MARKS: Well, the regulations and the statute require that he put in truthful information, and this Court in

Knox v. U.S. said he had better put in truthful information or he can't assert the privilege under any circumstances.

QUESTION: That's my previous question to you. Self-employed speculator.

MR. MARKS: Well, if he had done it --

QUESTION: Or refusal to answer on Fifth Amendment grounds right in the return itself.

MR. MARKS: Well, then the return wouldn't be admissible because it wouldn't have any evidentiary value, I assume. Or based on another ground, and I forget the case, you couldn't use the person's assertion of the privilege against him as an inference of guilt, which is a different subject altogether.

But I perceive in our case, and this is why it is a very interesting proposition. In Sullivan this Court said many years ago you can't take the privilege against a whole tax return. In Marchetti where the Court said, and I use it in quotes, "Where there is an area permeated with criminal statutes where it's obviously incriminating," then the person can assert the Fifth Amendment privilege at the earliest opportunity -- I mean, at the opportunity where he is being prosecuted, to wit, at trial. And that was the specific holding of Marchetti. No question about it. Asserted at trial.

Now, here we have an intermediate situation, but I

submit that it's really no different, Garner is not different from Marchetti because the unconstitutionality of the statutes, if you please, or the unconstitutionality, the permeation of criminal criminality comes not from the face of the statute which is fair, but either from its application by the Government which admittedly uses tax returns for any purpose it wants, in a tax case or a non-tax case. In the appendix and in the Government regulations -- the Internal Rev. is 26 C.F.R., which is cited -- that's all the Government attorney has to do, the youngest assistant U.S. Attorney has to do, is write a letter to the Internal Revenue Service and say, "I want a copy of the tax return of Mr. Garner, and it's necessary," that's the only word he has to use, "it's necessary for my investigation," and he gets it.

Now, the proposition is that the Government -- and the Government says in their brief, "If you deprive us of our right to go into a person's confidential tax returns, you are hampering Government investigation." And what it means simply is that the minute Mr. Garner becomes the subject of investigation, according to the Government's theory, he becomes the suspect for any type of criminal activity and he's fair game for complete Government investigation and complete going into his tax return. And therefore the Government by writing a letter can circumvent the Fourth Amendment and the requirements of Boyd v. U.S. They send the

letter and they say, "We want the income tax return," then they have the income tax return and under Calandra, just recently decided, throw it into the grand jury and the grand jury has this information that they can use, Mr. Garner can't object.

Why doesn't the Government have to show probable cause to get a copy of Mr. Garner's tax return? And if he does need probable cause, then aren't the regulations promulgated by the Government equally unconstitutional on their face? That is to say, they are not in compliance with the Fourth Amendment. And the Government attorney in this case should never have been permitted to get the tax returns in the first place in a nontax-related case. And there is where the evil comes, and that's why this is a Marchetti type case, not a Sullivan case. And that's the reason why Mr. Garner can only object at the time when he is faced with the evidence which was presented against him at trial. Because he never had a chance to object to the use of the evidence before. He would never know that the Government, the U.S. Attorney, the FBI, and if you read the regulations of the Treasury, you would be astounded at how many people have access to your tax return. And if you recall, Mr. Garner testified -- and that's also in the record -- he got up in his defense, and that's the only testimony he gave, he thought his tax returns were confidential. And I would wager

that if you took a -- prior to some of the publicity that's been coming out in recent months, but if you had taken a poll sometime before the citizenry of this country, they would have assumed that they had a sort of a pact with the Government, they report truthfully and honestly what they have done, the Government is going to withhold that information and it's confidential and nobody else has a right to see it.

If they defraud the Government in their tax return, then that's their problem. Then the Government has a right to go to the tax return to detect the fraud. But otherwise they do not.

Now, it seems to me that when you get this type of Government activity which turns an innocent tax return, fair on its face, into the subject of constant investigation, in other words, the person investigated, whether or not he has been accused or not accused, but merely the subject of investigation, and his tax returns are available to the investigators, to the U.S. Attorney's office, and this Court is aware of the task force that have, for instance, a drug, a person suspected of drug activities, they have the Internal Revenue Service working with them so the IRS gets them. They convene a grand jury especially for the purpose of subpoening evidence that they otherwise couldn't get. They use it for investigatory purposes and then they turn the information over to the law enforcement officials by virtue of this grand jury.

They have the tax people, they have the drug people, they have the Department of Justice all working as a team. And this is under some philosophies an appropriate method of investigating what's happening.

But to me it's discriminatory enforcement. It is ... Yick Wo all over again, but it's hidden. It is a fair statute. Everybody has to report, everybody has to state the information truthfully. But the Government has to be fair also. They cannot take a series of regulations and under the guise of law enforcement or what they would like to have take Internal Revenue statutes and turn them into investigatory tools through purported regulations which on their face are violative of the constitutional guarantees of privacy.

The Government has a right to know certain information, but the citizen has the right to privacy.

QUESTION: Is there a constitutional guarantee of the privacy of income tax returns, or is it a statutory provision?

MR. MARKS: I believe that the constitutional guarantee is there in the Ninth and Tenth Amendments. It is the right to privacy, the right not to disclose anything to the Government. If you are compelled to disclose it, then there is this constitutional -- and I call it a sort of a social pact. If the Government says, "We want information from you, you must give it to us," the citizen has a right to expect that the Government will not use that information against the citizen

unless the citizen has defrauded or violated the pact with the Government and produced untruthful information.

QUESTION: What about grand juries under that theory?

MR. MARKS: Well, frankly, grand juries,I could accept Calandra except for the fact they are controlled by the United States Attorney's office.

QUESTION: But the fact of the matter is there are cases over a long period of time that said the Government has a right to everybody's testimony and there is no pact whatever that if you tell the truth to the grand jury, you won't be indicted, if your truthful testimony reveals the fact you have committed a crime.

MR. MARKS: Yes, but there is the one protection that the citizen has,to raise the privilege against self-incrimination, and that's what your claim here is about.

And in this case, Congress has said in effect, or it seems to be that Congress has said in effect, and also so has the Internal Revenue Service, that you must answer every question on the return and you must answer it truthfully and as in Garner's case, when he did in fact assert his privilege against self-incrimination, the Internal Revenue Service sent back a letter and said, "Your return is incomplete. So by definition we won't let you file the return and you become a felon." And that's the vice where you allow the Government not only to be the judge, but the jury and all those

things as to when the privilege can be asserted. That's where the majority is wrong in the Ninth Circuit. Garner isn't the judge of what's privileged or not privileged, neither is the Government. What's privileged or not privileged is judged by what the use of the material is at the time it's trying to be used in a court at the time it's incriminatory.

In the broader aspects, as I say, I believe that the way the Government is acting, the way it's administering an otherwise fair statute, a reporting statute, indicates that it is making criminal statutes and using the Internal Revenue reporting system as a method of enforcing criminal statutes or investigating criminal violations, something which Congress never intended to be about to do and something which at least in the process in which it is being done, to write a letter and say, "I want this person's information," without having an affidavit in support of probable cause to show that there is reason. It's just like the King's warrant. "I want to see what he put on his income tax report because maybe I will find something incriminating, because this agent told me that he did something, so let me look at the tax return." That's what the Government says on page 25 of their brief. "If you let this person assert his privilege against self-incrimination or if you let him assert it at the time of trial, all this great investigation that we are now allowed under our own regulations will go down the tubes. We can't use it because, gee whiz, we

sure need it."

QUESTION: Really all that's involved here is the admissibility in evidence at the trial of the tax return, isn't it?

MR. MARKS: Actually that's all we are really talking about.

QUESTION: Whether tax returns can be used for investigation is another subject for another day, isn't it?

MR. MARKS: Yes, but how did they get them into the courtroom?

QUESTION: What is involved here is the admissibility in evidence at this trial of the tax return itself, isn't it?

MR. MARKS: That's the specific question here and the question of whether or not I could object --

QUESTION: Why do you need to take on the question of the use of tax returns in preliminary investigation by Government agency? That's not involved in this case, is it?

MR. MARKS: It is, because if you are going to take the Sullivan-Byers approach that there was nothing incriminating at the time he made the statement, and there is nothing involved in a permeated criminal statute, then Garner never had a right to raise the Fifth Amendment objection at the time of trial. And I say if you look at the way the statutes are used, you get a discriminatory enforcement so that they are unfair as applied rather than unfair on their face.

QUESTION: Well, as I say -- you correct me if I am wrong -- that I thought you said that I was correct in my understanding that what is involved in this case is the admissibility into evidence at this person, at your client's trial of his previous tax return.

MR. MARKS: That's right, but --

QUESTION: So why is there involved here any of the questions that you have talked about involving the confidentiality of a person's tax return?

MR. MARKS: Because the majority said he couldn't raise his Fifth Amendment privilege at trial, he had to raise it at the time he filled out his return.

QUESTION: And that's the issue, whether or not he was too late when at trial he objected to the admissibility of the tax return. That's the issue, isn't it?

MR. MARKS: I'm analogizing this to Marchetti in this sense that the statute and the way that the income tax reporting statute is being used is discriminatory, therefore unconstitutional, therefore the Fifth Amendment applies as well as it did in Marchetti because you are permeated with Government use of unlawful use of the statute.

May I reserve some time for rebuttal.

QUESTION: Mr. Marks, before you sit down, before you reach the ultimate question that Mr. Justice Stewart was posing, don't you have the threshold question that's critical

in this case as to whether or not the responses in the return that concern you were compelled in a Fifth Amendment sense? As I read Sullivan, they were not compelled. Now, I take it you take a different view, but I would like to hear you discuss that. If they were not compelled, that comes pretty close to answering the question put to you by Mr. Justice Stewart.

MR. MARKS: They were compelled.

QUESTION: But why, in light of what Sullivan said?

MR. MARKS: Well, Sullivan -- again I have to say Sullivan was in 1925.

QUESTION: Right.

MR. MARKS: All right. We don't know what questions were raised at the time Sullivan was involved. We don't know whether they had distinctions between gambling income and non-gambling income, what the tax consequences were if Mr. Garner were to -- whether or not he really had to state his occupation. I don't know in 1925. I wasn't around. The point is --

QUESTION: You mean whether the form had a question asking for his occupation. You don't know.

MR. MARKS: That's right. It turns out that Mr. Garner was compelled to answer each and every question because each and every question was determined by the Government, the Internal Revenue Service, to have some bearing on the computation of tax. He has to answer them and he has to answer them

truthfully. It's compelled. There are some cases -- Sullivan just dealt with the entire return. Mr. Garner never refused to answer the return. Marchetti refused to file an entire return. So you have something right in the middle here. And I say that Mr. Garner was compelled. And we have evidence that he was compelled because when he attempted to assert his privilege in filing a partial return, the Internal Revenue Service said, "It's no good and if you don't file a complete return, you're going to be prosecuted for a felony." That seems to me to be a compulsion.

QUESTION: I understood you to say that in two earlier returns he gave some different answer. Did I misunderstand you?

MR. MARKS: That's right. In the first, in 1965 he said, "My profession is wagering, professional gambler." In 1966 and in 1967 he said "Horseman." But when they asked him the source of his income in '66 and '67, he said "wagering income." And Mr. Uelmen, the trial attorney, used that in his argument, which is at page 58 of the appendix, to prove to the jury that he was engaged in the business of betting and wagering and to establish, if you will, an element of the offense from the mouth of Mr. Garner from prior years.

Thank you, but may I reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Jones.

ORAL ARGUMENT OF KEITH A. JONES ON

BEHALF OF RESPONDENT

MR. JONES: Mr. Chief Justice, and may it please the Court: The principal issue in this case and the only issue that I am likely to have time to discuss at any length is the issue to which Mr. Marks has addressed all of his attention, that is, whether a taxpayer has a Fifth Amendment privilege to exclude from evidence in a subsequent nontax criminal proceeding his prior Federal income tax returns.

For analytical purposes in this case, we have subdivided this principal issue into two separate questions. The first of these is: In what circumstances, if any, the disclosures on a taxpayer's income tax return may be said to be compelled within the meaning of the Fifth Amendment? And the second question is: What stand, if any, does the Fifth Amendment require the imposition of use immunity with respect to disclosures that have in fact been compelled under the Federal income tax laws.

I will address each of these questions in turn, but with major emphasis on our contention that testimonial compulsion was lacking in the circumstances of this case.

Before I take up these questions, however, I would like to at least allude briefly to the significance of this case to the administration of the tax and nontax criminal laws.

Our underlying concern in this case is that if this

Court were to hold in accordance with petitioner's arguments here that a taxpayer's disclosures on his return are entitled to automatic use immunity, then in any nontax criminal proceeding, the prosecutor would be subjected to the heavy burden of disproving taint in any case in which he had had an occasion to review the defendant's tax returns. And those might well be a fairly large number of cases. As we explain in our brief at greater length, pages 22 to 27, there are many situations in which a prosecutor may have occasion to review a defendant's tax return. The easiest one to envision is the case where a taxpayer's returns have been forwarded to the U.S. Attorney by the Internal Revenue Service with the request that the defendant be prosecuted for tax crimes. If the defendant also has been under investigation for nontax offenses, the nontax proceedings will then be subjected to inquiries for taint to determine whether any of the evidence has been derived from the taxpayer's returns. And there may be many other situations in which there are incidental exchanges of information between the Internal Revenue Service and the Department of Justice which may give rise to claims of taint if there was an automatic use immunity.

Now, Mr. Justice Stewart, I think, suggested that that issue was not really involved in this case because what we are concerned about is the possibility of an application of the fruits doctrine whereas all that's at issue here is

the question of the admissibility of the tax returns themselves. But looking into the future, we might find it difficult if there were automatic use immunity as to the returns to distinguish cases like Counselman v. Hitchcock and Kastigar which do require immunity from indirect as well as direct use of the compelled disclosures.

These underlying considerations of practicality are, as I say, spelled out in our brief, and I won't enlarge further upon them here. But I think that they are important considerations that should play a significant role in the Court's analysis of this case.

QUESTION: Is the availability of a person's tax returns to agencies other than the Internal Revenue Bureau all covered specifically and authorized by statute, or is it a matter of regulation or just interagency understandings and agreements?

MR. JONES: Under the Internal Revenue Code the President must authorize, and has done so through regulations, the use of tax returns outside the Internal Revenue Service. And we cite in our brief the pertinent regulations that permit the Department of Justice to have access to the returns in connection --

QUESTION: I thought I remember reading that but I can't find it now.

MR. JONES: I am now looking at the index and

we cite those regulations apparently on pages 25 and 36 of our brief.

QUESTION: Is it true as the petitioner says that anybody in the U.S. Attorney's office can get it?

MR. JONES: The regulation provides that the Department of Justice and the United States Attorneys have the right to inspect the taxpayer's return "where necessary in the performance of official duties." So that they do have access within the limits of that regulation.

QUESTION: How many employees are there in the U.S. Attorney's offices all over the country? Thousands, isn't it?

MR. JONES: I can't answer that, Mr. Justice Marshall.

QUESTION: It's in the thousands, isn't it?

MR. JONES: I guess so.

QUESTION: And any of them can get my tax return by saying that.

MR. JONES: Well, I wouldn't think so, Mr. Justice Marshall. I think this anticipates there would only be the United States Attorney or perhaps an assistant United States Attorney with his authorization.

QUESTION: There are thousands of United States Attorneys, aren't there?

MR. JONES: That's right. The lawyers would have

access, that's correct, if the United States Attorney authorized it.

QUESTION: It doesn't say here that the U.S. Attorney authorizes it, it says that anybody can do it.

MR. JONES: No, Mr. Justice Marshall. We don't quote the full text of the regulation here, but we do say that the United States Attorneys by regulation have the right to inspect the return. I think that they would have to authorize a request from an assistant United States Attorney. That's my understanding at any rate.

QUESTION: Well, can an assistant U.S. Attorney subpoena anybody and issue a subpoena duces tecum on anybody without approval of the U.S. Attorney? Certainly. He does it every day.

MR. JONES: That may well be. I'm not sure what bearing that has on the construction of this regulation. And I'm not sure just what the exact terms of the regulation are.

QUESTION: We really don't know.

MR. JONES: That's correct. But there is broad access for purposes of investigation of criminal activities.

With these general thoughts in the background, I turn now to a discussion of the testimonial compulsion. And in approaching this question, it is helpful at the outset to describe with some clarity the legal setting in which a taxpayer completes and files his income tax return. The taxing

statutes require that the taxpayer provide all the information requested on the return and the taxpayer must, subject to the penalties for perjury, attest by his signature that the answers on his return are accurate and complete, and a willful failure to file a complete return subjects the taxpayer to prosecution for a misdemeanor under section 7203 of the Internal Revenue Code.

Now, petitioner and the dissenters in the court of appeals perceive this statutory scheme as exerting testimonial compulsion upon the taxpayer to incriminate himself. They reason that any refusal by the taxpayer to complete his return on Fifth Amendment grounds would subject him to prosecution for failure to file a return under section 7203 and that that threat of prosecution would be sufficient to induce a taxpayer to forego a valid claim of privilege and thereby to compel self-incrimination.

We believe that this conclusion reached by the petitioner and the dissenters below is based upon a fundamentally mistaken understanding of the scope of section 7203 and an equally mistaken understanding of the pertinent constitutional principles that apply here.

Section 7203 punishes only a willful failure to file, and the concept of willfulness is crucial in this case. Under this Court's decision in United States v. Bishop, a taxpayer cannot be convicted of a willful failure to file unless his

failure represents a voluntary and intentional violation of a known legal duty. And a taxpayer who believes that his privilege against self-incrimination justifies his refusal to provide an answer on a Federal income tax return cannot be shown to have violated a known legal duty within the meaning of that phrase in the Bishop case, because such a taxpayer by hypothesis has a good faith belief that his statutory duty to provide information has been constitutionally excused.

QUESTION: Mr. Jones, how do you reconcile what you are telling us now with the experience that this taxpayer had with respect to his 1973 return?

MR. JONES: Well, I don't think it's very difficult to reconcile that. What happened was that he filed a return asserting broad claims of privilege --

QUESTION: With an explanatory letter.

MR. JONES: With an explanatory letter. The Service determined that that was not a completed return as required. At that point I will leap ahead in my argument here to spell out at some length what procedures were available to the Secretary and what this letter represents.

If a taxpayer asserts a claim of privilege on a return, it is incumbent upon the Service to secure the information necessary to complete the return and determine the amount of tax due. And it does this first through informal mechanisms by sending a taxpayer a letter such as was sent to the

petitioner here.

QUESTION: Threatening him with a criminal prosecution, the letter did.

MR. JONES: Well, I don't think it's fair to say it was threatening him with prosecution, but pointing out that a failure to provide might subject him, as indeed it might if his claim of privilege was invalid and in bad faith, to a criminal prosecution.

If the taxpayer continued to assert his claim of privilege in informal conferences, the Internal Revenue Service, if it determined that the privilege was not available, could issue to him an administrative summons requesting that he furnish the information. And if the taxpayer continued to assert his privilege as a basis for refusing to comply with the summons, the Service would then be required to seek enforcement of the summons in a district court. And at that point the taxpayer would be entitled to an adjudication of his claim of privilege. If the district court recognized the claim of privilege, determined it to be valid, then it would refuse enforcement of the summons. At that point the Service would, in order to secure the information, have to award the taxpayer immunity under 18 U.S.C. 6004. And with the award of immunity, of course, the taxpayer could be ordered to provide the information sought in the summons.

On the other hand, if the district court determined

that the claim of privilege was not valid, it could order enforcement of the summons without an accompanying grant of immunity. But in either case, the taxpayer is subject to compulsion only at the time the summons is ordered enforced and not before. And the petitioner in this case never asserted his claim of privilege, he never invoked this administrative process, a fortiori he was not compelled to disclose information within the meaning of the Fifth Amendment.

I go back to the processes that would operate if the Service determined that the taxpayer's claim of privilege were in bad faith. At that time if it secured adequate information on its own to determine the taxpayer's liability or that there was sufficient information from which it could conclude that the claim of privilege was invalid -- and there are, by the way, many cases involving invalid claims of privilege by taxpayers who wish to assert such a claim of privilege as a basis for not filing a return at all -- the Service could then bring a prosecution.

But as I have pointed out, that prosecution could be successful only if it was established not only that the taxpayer's claim of privilege was invalid but also that the taxpayer knew that it was invalid and that he was making it in bad faith, merely as a means of avoiding payment of his Federal income tax liability.

In other words, the sanctions imposed by the threat

of a prosecution under section 7203 place no burden on the exercise of a valid claim of privilege or even upon a claim of privilege that the taxpayer erroneously believes to be valid. And therefore section 7203, the enforcement mechanism in the Code, does not coerce the taxpayer into foregoing a claim that he believes to be valid. It does not compel the taxpayer to incriminate himself.

We think that this analysis is buttressed by this Court's prior decisions under the Fifth Amendment, in particular the situation of a taxpayer completing his return may be fairly analogized to that of a witness in a civil proceeding. Both the taxpayer and the witness are confronted with authoritative directives to furnish information. I have already outlined the directives that are addressed to the taxpayer. Those that are addressed to the witness are very similar. Often the witness will have been summoned by legal process to appear and give testimony. And at the time of giving testimony, he is required to affirm, subject to the penalties for perjury, that he will tell the whole truth. And if necessary, the judge will instruct him that he has a duty to provide evidence and that his refusal to do so may subject him to the punishment of contempt. In other words, the judge may, like the Service in the case of the petitioner, threaten the witness with the possibility of punishment if the information is not forthcoming.

If the circumstances, therefore, faced by a taxpayer and a witness are not identical, certainly closely comparable. We believe that the same constitutional rule should apply in each case.

The rule for witnesses is clear. This Court has held and reaffirmed in a number of cases, most recently in United States v. Kordel, that self-incriminatory testimony given by a witness in an ordinary civil proceeding may be used against him in a subsequent criminal trial.

The reason for this rule, or the basis for this rule, was set forth and explained by the Court in a case called United States v. Monia, at least I think that's the pronunciation of it, M-o-n-i-a, and we quote from that opinion on page 15, and I would like to repeat it because it bears directly upon our case as well.

QUESTION: Your page 15 or his?

MR. JONES: Page 15 of our brief. I am just quoting from the Court's decision in the Monia case. The Court stated: "The Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."

That is our contention here. If the taxpayer does not assert his privilege,if he does not claim his privilege, he

cannot be considered to have been compelled at the time of completing and filing his return.

QUESTION: A waiver... irrelevant.

MR. JONES: That's right. We don't discuss this case at all in terms of waiver, but merely in terms of the absence of testimonial compulsion, which I think is the way this Court has analyzed analogous cases in the past.

Precisely the same consideration should govern this case as well as the case of the witness in the ordinary civil proceeding. Although a taxpayer is under some official pressure to complete and file his tax return, pressure such as the letter you have mentioned, Mr. Justice Stewart, just as a witness is subject to some official pressure to testify, the crucial point in each case is that the pressure is not such as would override or nullify a valid timely asserted claim of privilege. In neither situation is a sanction imposed upon a taxpayer or the witness for asserting a valid claim of privilege. Thus in neither situation can answers furnished without any claim of privilege be treated as having been compelled within the meaning of the Fifth Amendment.

And this conclusion, we think, is further supported by contrasting this situation with those in which this Court has found testimonial compulsion in the past, and perhaps the most pertinent example is the case of Garrity v. New Jersey. In that case a police officer was informed or was requested to

testify in an inquiry into alleged traffic ticket fixing. And he was informed that if he refused to testify that he would be removed from his office. And under this threat the policeman did testify and in doing so he incriminated himself. The incriminatory disclosures were then introduced in evidence against him in a subsequent criminal proceeding arising out of the inquiry. And this Court determined that those disclosures were not admissible against the policeman in his trial, reasoning that the policeman's desire to remain silent had been overborne by the threat of a severe economic sanction placed upon the very exercise of a valid claim of privilege. In other words, in that case if the policeman, Garrity, had claimed his privilege, he still would have been subject to the sanction of removal from office.

In this case, if the petitioner had claimed his privilege, he would have been subject to no such sanction, even if his claim of privilege, I might add or reiterate, was invalid so long as he in good faith believed it to be a valid one. Accordingly, unlike Garrity, we believe that the taxpayer in this case, the petitioner, was not subject to any compulsion to incriminate himself.

Before going on to the second question that I've raised, I would like to further point out that even if in this case this line of reasoning was rejected and it was concluded that the directives addressed to a taxpayer at the time he

completes and files his return do represent testimonial compulsion, there was no compulsion upon the petitioner in this case to incriminate himself. As we explain in footnote 13 of our brief, on page 23, the disclosures made by the petitioner on his tax returns, as Mr. Marks has conceded here, were not incriminating when made and the privilege against self-incrimination only protects against the compelled disclosure of self-incriminatory information, it does not protect against the compelled disclosure of information that is not incriminating but that only becomes incriminating because of the subsequent criminal activities of the witness. So that in this case, even if it were found that testimonial compulsion is present, there was no testimonial compulsion to incriminate in this case.

I would also mention that the kinds of disclosures that were made here were not such, as we have shown in our brief at, I think, pages 42 to 45 --

QUESTION: You are speaking now of the answers "Horseman" and those other answers he had given in previous years?

MR. JONES: That's right.

QUESTION: Those were not.

MR. JONES: Those answers did not themselves constitute the admission of any criminality, nor did they form a link in a chain of evidence with regard to any crime that we know of as of the date that the tax returns were completed.

The conspiracy for which the petitioner was prosecuted for his participation in it began in May of 1968. His last tax return that was introduced in this trial was filed in April of '68 for the preceding year of 1967. So there were no self-incriminatory disclosures made on this taxpayer's return whether or not he was subject to testimonial compulsion.

QUESTION: This taxpayer was a resident of Nevada, was he?

MR. JONES: I don't know whether he was a resident of Nevada at that time.

QUESTION: 1973 return --

MR. JONES: Now he is a resident of Nevada.

QUESTION: Because wouldn't it be incriminating in certain States to say that your occupation was professional gambler?

MR. JONES: I don't think so, Mr. Justice Stewart. I believe at the time this taxpayer resided in California. His tax returns are in the appendix.

Yes, it indicates that at the time these returns were filed, he was a resident of California. But I don't believe that under California law it would be illegal to be a gambler if your gambling activities, in fact, were taking place in Nevada, or indeed there may well be gambling activities in California that can be engaged in. At any rate, there is no allegation here by petitioner that those answers were

incriminating when made, and indeed, as I indicated earlier, Mr. Marks has conceded that they were not in fact incriminating.

QUESTION: Mr. Jones, I notice your footnotes to be ... incriminating when made but having a potential for incrimination. Is there a difference?

MR. JONES: Well, I would --

QUESTION: What you say is even if the taxpayer is to be permitted to invoke the privilege for the first time at trial, he should be required to establish not only the previous disclosure now has a potential for incrimination but also that it had that potential when made.

MR. JONES: Well, by that I think we meant potential for incrimination means that the taxpayer doesn't -- that any person asserting a claim of privilege does not have to show actual incrimination but only the potential of incrimination if his answer were provided. And all we meant to say was that the situation at the time of filing the return has to be the same as the time of subsequent use.

I turn now to the second question that I undertook to address at the beginning of this argument, which is to what extent, if any, the Fifth Amendment requires the imposition of use immunity with respect to disclosures that have in fact been compelled under the Federal income tax laws. Time does not permit a full discussion of this issue, and I can do little more than outline the arguments that we set forth

at some length at pages 27 to 41 of our brief. But we suggest there that in the context of the neutral self-reporting requirements of the Federal income tax laws the Fifth Amendment requires the imposition of use immunity only with respect to those compelled disclosures that constitute, that entail, a substantial risk of prosecution and that the only disclosures on a tax return that entail such a risk are those that involve a direct admission of criminality when made. And the relatively innocuous disclosures that petitioner made on his tax returns in this case clearly do not meet that test. His disclosures that he was a gambler, that he made money as a gambler, were not admissions of criminality as such.

Now, our suggestion along these lines draws in large part from this Court's decision in California v. Byers in which it was held that a driver involved in an accident could be compelled under a State hit-and-run statute to make certain disclosures, and that those disclosures could be used against the driver in a subsequent criminal proceeding arising out of the accident. Although there was no opinion for the Court in that case, both the plurality opinion and the concurring opinion of Mr. Justice Harlan evidence a concern that self-reporting requirements that further a legitimate nonprosecutorial Government purpose might be substantially hindered or frustrated by assertions of privilege based upon a mere possibility as contrasted with a substantial probability of incrimination.

We think that that concern is also appropriate here.

Under the standard of incrimination applicable in the criminal context under the so-called Hoffman test propounded by this Court in United States v. Hoffman, a refusal to comply with a request for information or a refusal to testify may be based upon even a very attenuated risk of incrimination. And we fear that widespread refusals to answer questions on tax returns based upon that relatively permissive Hoffman standard of incrimination could seriously disrupt the administration of the taxing laws.

Now, if, as I have spelled out in the earlier part of my argument, the procedure to be invoked is one of administrative summons and a determination of the validity of claims of privilege, the administration of the taxing laws could be seriously disrupted by fraudulent, invalid claims of privilege that require a lengthy administrative and judicial hearing before the information necessary is finally secured.

If, on the other hand, a higher standard of incrimination is required in the self-reporting context that we are considering here, then it would be clear what questions on the return might entail a substantial risk of prosecution and those which would not. And we suggest in our brief that the only questions on a taxpayer's return that the answers to which are likely to entail a substantial risk of prosecution are those

that relate to the source of miscellaneous income or possibly occupation, although that seems somewhat unlikely.

We feel that permitting the invocation of the Fifth Amendment privilege only on the basis of the higher standard of incrimination that we suggest would afford a substantial measure of protection to all individual taxpayers while at the same time not significantly impairing the Government's ability to secure and use the information it needs in raising the revenue.

QUESTION: We would never get to this if we agree with your first proposition.

MR. JONES: If you agree that there is no compelled disclosure here, there is no need to consider what would be the appropriate result if in fact there were compelled disclosures.

QUESTION: Or no self-incrimination at the time the disclosure is made.

MR. JONES: Or as we also point out in our brief it is determined that error, if any, were harmless here. I haven't addressed that issue, but at pages, I think, 42 to 45 of our brief --

QUESTION: You addressed the first two questions --

MR. JONES: That's correct.

QUESTION: -- we wouldn't need to --

MR. JONES: If you decided the case on either of those.

QUESTION: -- we would not get to your --

MR. JONES: That's correct, Mr. Justice Stewart.

QUESTION: Shouldn't we really address the harmless error question first?

MR. JONES: That would, of course, be a way of avoiding the necessity of a constitutional decision in this case.

MR. CHIEF JUSTICE BURGER: We will resume there after lunch.

(Whereupon, at 12 noon, a luncheon recess was taken.)

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Jones you have about a minute left.

ORAL ARGUMENT OF KEITH A. JONES ON BEHALF OF RESPONDENT (RESUMED)

MR. JONES: Mr. Chief Justice, I have completed my presentation of the Government's arguments in this case. But if the Court has any further questions, I would be happy to try to respond to them.

MR. CHIEF JUSTICE BURGER: There appear to be none.

QUESTION: Could I -- did the court of appeals address your point of harmless error?

MR. JONES: No, it did not, not so far as I can tell at any rate. In that event, I simply ask the Court that the judgment below be affirmed.

MR. CHIEF JUSTICE BURGER: You have about 5 minutes left, Mr. Marks.

REBUTTAL ARGUMENT OF BURTON MARKS ON BEHALF OF PETITIONER

MR. MARKS: Thank you, Mr. Chief Justice.

First of all, I would like to point out that the Government, I think, wants too much. The Government not only wants full use of the information in the income tax return, but it also wants this Court to hold that there could be no

assertion of privilege, perhaps except as to the source. And I would like to point out to the Court the dangers inherent in that type of approach where we have today --

QUESTION: That isn't an issue here, is it?

MR. MARKS: Well, --

QUESTION: I mean whatever the Government wants, that isn't an issue in this case. That may be some other day.

MR. MARKS: All right.

I think the question of testimonial compulsion is a false issue because in my opinion testimonial compulsion occurs when it's testimony, when it's being used as evidence. In this case statements of Garner were being introduced at trial as testimony or admission against him. And whether you want to call it testimonial compulsion because he testified or didn't testify I think is begging the issue. These are statements that he made, statements that were compelled, and they are not testimony, they were just statements, they were admissions against interest, which perhaps weren't when he made them, but they certainly turned out to be when the Government wanted to use them against his interest.

Now, the case cited by counsel --

QUESTION: When do you suggest the compulsion was applied?

MR. MARKS: The compulsion was applied in the first instance by the statute, in the second instance when they were

attempted to be introduced at the trial.

QUESTION: Assuming there was no compulsion with respect to the tax return, assume that legally he was not compelled then. Let's just assume that. Do you say there was still compulsion within the meaning of the Fifth Amendment by the Government offering them against his will at the trial?

MR. MARKS: Yes, but under a different theory. I think at that point we get into this privacy right, because he supplied this information to the Government as testified to him under the assumption that what he supplied to them is confidential and would not be disclosed, would not be used against him.

QUESTION: Otherwise you would run into the Monia case, wouldn't you, and the Kordel case?

MR. MARKS: Well, Kordel is different, because Kordel, the civil proceedings were right at the same time as the criminal proceedings were had, and Kordel, if he wasn't smart enough to know that he could assert his privilege against self-incrimination during a civil proceeding when he was having criminal proceedings against him, then that's his tough luck.

Here Garner didn't have anything against him.

QUESTION: You can run it the other way as proof that he was incompetent.

MR. MARKS: I wouldn't say it, but I think he was.

QUESTION: Monia stands for the same propoaition, even

more clearly perhaps than Kordel, that a witness who testifies as a third party witness and does not claim his constitutional right against compulsory self-incrimination, that that testimony can later be used against him at his criminal trial.

MR. MARKS: Well, to whatever extent you want to rely on Monia, I believe that it's wrong where the question of waiver may or may not be involved. That's the reason that the Government is avoiding the question of waiver, because it has to be knowing. You have to know when you want to assert something.

QUESTION: Monia says if you don't claim your privilege, it's gone. But the Government's position doesn't rest on waiver, it rests on no compulsion. That's in the first place.

MR. MARKS: The Government refused to discuss the waiver question because if you get into --

QUESTION: It isn't involved.

MR. MARKS: It is involved, because --

QUESTION: No, not if there no compulsion, you don't need to get to waiver if there isn't compulsion.

MR. MARKS: If a person has a privilege against self-incrimination --

QUESTION: Has a privilege against compulsory self-incrimination.

MR. MARKS: But if he doesn't know he is incriminating

himself and then at a later point it turns out that he was, he has a right to assert his privilege. That's my opinion.

QUESTION: That isn't Monia, I guess.

MR. MARKS: No, it isn't.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

Do you have a factual there?

MR. JONES: Yes, I do, Mr. Chief Justice.

In response to Mr. Justice White's question, I just wanted to point out that in the original panel of opinion in this case, the dissenting judge, Judge Wallace, did raise the question of harmless error. So far as I can tell the majority in the panel did not reach it and neither did the court --

MR. CHIEF JUSTICE BURGER: And it was all withdrawn on the rehearing.

MR. JONES: On rehearing en banc the only issue considered was the major issue --

MR. CHIEF JUSTICE BURGER: And the original opinions were all withdrawn.

MR. JONES: That's correct.

[Whereupon, at 1:07 p.m., arguments in the above-entitled matter were concluded.]