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Constitutional Law - Due Process and Statutory Presumptions - Self-Incrimination and Marihuana Registration Requirements - Leary v. United States, 395 U.S. 6 (1969)

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COMMENT

CONSTITUTIONAL LAW — DUE PROCESS AND STATUTORY PRESUMPTIONS — SELF-INCRIMINATION AND MARIHUANA REGISTRATION REQUIREMENTS. — *Leary v. United States*, 395 U.S. 6 (1969).

ON December 22, 1965, Timothy F. Leary's attempt to enter Mexico was denied.[1] While returning to the United States, he was stopped and inspected at the American secondary inspection area and was found to have marihuana in his possession. He was subsequently convicted[2] of knowingly transporting marihuana into the United States[3] and of knowingly transporting marihuana without having paid the transfer tax.[4] On certiorari, the United States Supreme Court reversed on the basis that a presumptive provision of the importation statute[5] was not "rationally connected" with the facts of the case and was thus a denial of due process.[6] Also, the Court concluded that the *Marihuana Tax Act*[7] contained a " 'real and appreciable' hazard of incrimination"[8] resulting in a denial of Leary's fifth amendment privilege.[9]

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[1] Leary v. United States, 395 U.S. 6 (1969). Dr. Leary drove across the International Bridge where he was stopped by the Mexican authorities and after apparently being denied entry, he returned across the bridge to the United States.

[2] United States v. Leary, 383 F.2d 851 (5th Cir. 1967), *rehearing denied*, 392 F.2d 220 (1968).

[3] 21 U.S.C. § 176(a) (1964) provided:

> Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.

[4] 26 U.S.C. § 4744(a)(1) (1964) provides:

> (a) Persons in general.
>
> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a) — (1) to acquire or otherwise obtain any marihuana without having paid such tax, or (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

[5] 21 U.S.C. § 176(a) (1964).

[6] 395 U.S. at 33-36.

[7] 26 U.S.C. § 4744(a) (1964).

[8] 395 U.S. at 18.

[9] Justice Harlan delivered the opinion of the court in *Leary*. Justice Black concurred specially as to the due process issue and Chief Justice Warren and Justice Stewart concurred with reservation as to the issue of self-incrimination.

Chief Justice Warren felt himself bound by his dissents in *Marchetti v. United States*, 390 U.S. 39 (1968), *Grosso v. United States*, 390 U.S. 62 (1968), and *Haynes*

I. Due Process and Presumption

Due process, a bastion of protection against aribitrary use of power by the sovereign, is a concept that has been with us since the *Magna Charta.*[10] Though the concept has broadened, its meaning continues to be elusive — best understood within a specific context. Fundamental to the concept of due process is the presumptive innocence of an accused until proven guilty beyond a reasonable doubt, with the burden of establishing guilt resting upon the prosecution.[11] Theoretically then, the prosecution must prove all elements of a crime.[12] However, Congress often includes presumptions within a statute by which various elements of a crime are inferred from a central fact and by so doing lessens the prosecution's burden of proof.[13] Congress creates these presumptions for a number of reasons: (1) they may save time by focusing the courts attention on a central issue; (2) they may shift the burden of proof to the party with superior access to the facts; (3) they are procedurally more convenient; or (4) because of social or economic policies.[14] The effect

v. United States, 390 U.S. 85 (1968). In *Grosso,* the Chief Justice stated that "by its sweeping declaration that the congressional scheme for enforcing and collecting the taxes imposed on wagers and gamblers is unconstitutional, the Court has stripped from Congress the power to make its taxing scheme effective." Grosso v. United States, 390 U.S. 62, 77 (1968).

Justice Stewart expressed the hope that some day the Court would reexamine the whole line of cases which has broadened the original conception of self-incrimination. Leary v. United States, 395 U.S. 6, 54 (1969).

[10] "The Crown or its ministers may not punish, imprison, or coerce the subject in an arbitrary manner." Magna Charta 1215 art. 39, from 7 Halsbury's Law of England § 483 (3d ed. 1954).

[11] Speiser v. Randall, 357 U.S. 513, 524 (1958); United States v. Fleischman, 339 U.S. 349, 363 (1950); Holt v. United States, 218 U.S. 245, 253 (1910); Coffin v. United States, 156 U.S. 432, 459 (1895); Stump v. Bennett, 398 F.2d 111, 118 (8th Cir.), *cert. denied,* 393 U.S. 1001 (1968); Government of the Virgin Islands v. Torres, 161 F. Supp. 699, 700 (D.C.V.I. 1958).

[12] Morissette v. United States, 342 U.S. 246, 273-76 (1952); Christoffel v. United States, 338 U.S. 84, 89 (1949); Stump v. Bennett, 398 F.2d 111, 118-20 (8th Cir.), *cert. denied,* 393 U.S. 100 (1968); Pauldino v. United States, 379 F.2d 170, 172 (10th Cir. 1967); Thurmond v. United States, 377 F.2d 448, 451 (5th Cir. 1967); People *ex rel.* Juhan v. District Court, 439 P.2d 741, 747-50 (Colo. 1968).

[13] A presumption has been defined as follows: "A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action." Uniform Rules of Evidence rule 13 (1965). Extensive literature has developed concerning the nature and effect of presumptions: C. McCormick, Law of Evidence §§ 307-18 (1954); E. Morgan, Basic Problems of Evidence 31-44 (1963); J. Thayer, Preliminary Treatise on the Law of Evidence at the Common Law 313-52 1898); 9 J. Wigmore, Evidence §§ 2490-93 (3d ed. 1940); Brosman, *The Statutory Presumptions,* 5 Tul. L. Rev. 17, 178 (1930); Morgan, *How to Approach Burden of Proof and Presumptions,* 25 Rocky Mt. L. Rev. 34 (1953); Comment, 1964 Duke L. J. 867; Note, 55 Colum. L. Rev. 527 (1955).

[14] Defendants of presumptions have gone to great lengths to provide rationale for the existence of these policies. *See* C. McCormick, Law of Evidence § 309 (1954); E. Morgan, Basic Problems of Evidence 32-33 (1963). *But see* Chamberlain, *Presumptions as First Aid to the District Attorney,* 14 A.B.A.J. 287 (1928).

of a presumption may be to force a party to come forth and give evidence or it may shift the burden of persuasion.[15]

The power of legislatures to create presumptions has long been recognized by the courts and is limited only by the dictates of the Constitution.[16] Consequently, a number of lines of attack on the constitutionality of presumptions has developed, notably in the areas of equal protection,[17] trial by jury,[18] self-incrimination,[19] and due process of law.[20]

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[15] This is a simplification of the basic effects of a presumption. Much discussion and debate has dealt with this issue, particularly regarding whether or not a presumption continues to have evidentiary effect once evidence as to the issue has been presented. Thayer and Wigmore have taken the position that once evidence comes out regarding the validity of the issue, the presumption drops out of the case and only has a procedural effect. *See* Laughlin, *In Defense of the Thayer Theory of Presumptions,* 52 MICH. L. REV. 195 (1953). This view was adopted by the American Law Institute in its MODEL CODE OF EVIDENCE rule 704(2) (1942). Other authorities feel that a presumption continues to have evidentiary effect even after some evidence to contradict the presumption has been brought forth. Morgan postulates eight gradients of effect that a presumption may take. E. MORGAN, BASIC PROBLEMS OF EVIDENCE 34-37 (1962).

[16] *See* Tot v. United States, 319 U.S. 463 (1943); United States *ex rel.* Shott v. Tehan, 365 F.2d 191 (6th Cir.), *cert. denied,* 385 U.S. 1012 (1966); Shaw v. United States, 357 F.2d 949 (Ct. Cl. 1966). *See generally* Brosman, *The Statutory Presumption,* 5 TUL. L. REV. 17, 178 (1930); Chamberlain, *Presumptions as First Aid to the District Attorney,* 14 A.B.A.J. 287 (1928); Keeton, *Statutory Presumptions—Their Constitutionality and Legal Effect,* 10 TEX. L. REV. 34 (1932).

[17] Presumptions cannot discriminate against a particular industry—McFarland v. American Sugar Refining Co., 241 U.S. 79 (1916); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911)—or race—Cockrill v. People, 268 U.S. 258 (1925). It has been established that although legislatures have a great deal of freedom in the making of presumptions, "[I]t is not within the province of a legislature to declare an individual *guilty* or *presumptively guilty* of a crime." Speiser v. Randall, 357 U.S. 513, 523-24 (1958) (emphasis added). *See also* McFarland v. American Sugar Refining Co., 241 U.S. 79 (1916); Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968).

[18] Justice Black feels that presumptions can unconstitutionally deny a defendant trial by jury in that "it flaunts the constitutional power of courts and juries for Congress to tell them what shall be deemed sufficient evidence to authorize conviction.'" United States v. Gainey, 380 U.S. 63, 77 (1965) (dissenting opinion). *See also* People v. Lyon, 27 Hun 180 (N.Y. 1882); Wynehamer v. People, 13 N.Y. 378 (1856); State v. Papa, 32 R.I. 453, 80 A. 12 (1911); State v. Beswick, 13 R.I. 211 (1883); Francis v. Baker, 11 R.I. 103 (1875); Plimpton v. Somerset, 33 Vt. 283 (1860). *Contra, see generally* Amerada Petroleum Corp. v. 1010.61 Acres of Land, 146 F.2d 99 (5th Cir. 1944).

[19] Justice Black has said that: "The undoubted practical effect of letting guilt rest on unexplained presence alone is to force a defendant to come forward and testify.... The compulsion here is of course more subtle and less cruel physically than compulsion by torture, but it is nonetheless compulsion and it is nonetheless effective." United States v. Gainey, 380 U.S. 63, 87 (1965) (dissenting opinion).

The issue of whether presumptions create self-incrimination has been raised before the courts a number of times unsuccessfully. *See* Yee Hem v. United States, 268 U.S. 178 (1925); United States v. Forgett, 349 F.2d 601 (6th Cir. 1955); Ng Choy Fong v. United States, 245 F. 305 (9th Cir. 1917); People *ex rel.* Woronoff v. Mallon, 166 App. Div. 840, 150 N.Y. Supp. 705 (1914), *aff'd,* 222 N.Y. 456, 119 N.E. 102 (1918); State v. Humphrey, 42 S.D. 512, 176 N.W. 39 (1920).

[20] The due process requirements have followed two fundamental paths: (1) the necessity of a rational connection between the fact presumed and the fact proved—*see* Leary v. United States, 395 U.S. 6 (1969); United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965); Tot v. United States, 319 U.S. 463 (1943)—and; (2) the unfairness of placing the burden of proof on the defendant as to a particular issue. "[T]he burden of going forward with the evidence at some stage of a criminal trial may be placed on the defendant, but only after the State has 'proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation....'" Speiser v. Randall, 357 U.S. 513, 524

The most successful ground of attack on legislative presumptions has probably been that of due process where a "rational connection" between the established facts and the facts presumed is required.[21] Although not the first Supreme Court decision to apply this test, *Tot v. United States* clearly established the "rational connection" test as the controlling rule.[22] In *Tot,* the Court invalidated section 902(f) of the *Federal Firearms Act,* which made it a presumption that a firearm was unlawfully transported from the fact that a felon or fugitive had a firearm in his possession.[23] The court said:

> A statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed .... [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not

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(1958), *quoting from* Morrison v. California, 291 U.S. 82, 88-89 (1934). *See also* Morrison v. California, 291 U.S. 82 (1934); Rossi v. United States, 289 U.S. 89 (1933); Yee Hem v. United States, 268 U.S. 178 (1925); Shaw v. United States, 357 F.2d 949 (Ct. Cl. 1966); Communist Party v. United States, 331 F.2d 807 (D.C. Cir. 1963).

It was once held that the burden of proof could be shifted so long as it didn't subject "the accused to hardship or oppression." Morrison v. California, 291 U.S. 82, 89 (1933). However, it seems it would be impossible to find a criminal case where the shift in the burden of proof would not work to the disadvantage of the accused. *See* Tot v. United States, 319 U.S. 463 (1943).

[21] *See, e.g.,* Leary v. United States, 395 U.S. 6, 33 (1969); *see also* United States v. Romano, 382 U.S. 136 (1965); Tot v. United States, 319 U.S. 463 (1943); McFarland v. American Sugar Refining Co., 241 U.S. 79 (1916); Barrett v. United States, 322 F.2d 292 (5th Cir. 1963); Garcia v. United States, 250 F.2d 930 (10th Cir. 1957); Minski v. United States, 131 F.2d 614 (6th Cir. 1943); United States v. Platt, 31 F. Supp. 788 (S.D. Tex. 1940); United States *ex rel.* Murphy v. Warden of Clinton Prison, 29 F. Supp. 486 (N.D.N.Y. 1939), *aff'd,* 108 F.2d 861 (2d Cir. 1940), *cert. denied,* 309 U.S. 661, (1940), *rehearing denied,* 309 U.S. 696 (1940).

[22] 319 U.S. 463 (1943). There are a number of very early cases which applied the rational connection test. *E.g.,* Robertson v. People, 20 Colo. 279, 38 P. 326 (1894); Manley v. State, 166 Ga. 563, 144 S.E. 170 (1928), *reversed on other grounds,* 279 U.S. 1 (1929); State v. Beach, 147 Ind. 74, 43 N.E. 949 (1896); People v. Cannon, 139 N.Y. 32, 34 N.E. 759 (1893). Later, rational connection was considered as an optional test applied in conjunction with other tests. *See* Morrison v. California, 291 U.S. 82 (1934); Ferry v. Ramsey, 277 U.S. 88 (1928) (dissenting opinion); Mobile, Jackson & Kansas City R.R. v. Turnipseed, 219 U.S. 35 (1910).

One such test, the comparative convenience, or balance of convenience test, determined whether or not it would be more convenient for the defendant to produce the evidence. *See* Morrison v. California, 291 U.S. 82 (1934); Yee Hem v. United States, 268 U.S. 178 (1925). Although never altogether abandoned, the comparative convenience test was later relegated to a mere "corollary" test. Tot v. United States, 319 U.S. 463, 467 (1943).

Similarly, the Court once considered whether or not the legislature might have considered the presumed act to be a crime. *See* Ferry v. Ramsey, 277 U.S. 88 (1928). *But see* United States v. Romano, 382 U.S. 136, 144 (1965); Tot v. United States, 319 U.S. 463 (1943).

[23] Tot v. United States, 319 U.S. 463 (1943), *noted in* 56 HARV. L. REV. 1324 (1943); 17 S. CAL. L. REV. 48 (1943). The Federal Firearms Act, 15 U.S.C. § 902(f) (1964) provided that:

> It shall be unlawful for any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year or [who] is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received ... by such person in violation of this chapter.

> competent for the legislature to create it as a rule governing the procedure of courts.[24]

Some courts have applied the rational connection test with great exactitude,[25] others merely using it in a broad, rhetorical context.[26] Furthermore, the rule has been subject to criticism because of its lack of clarity (*e.g.*, who makes the rational connection — judges, juries, mankind, or possibly some other independent standard?).[27] Also, a confusing aspect, but essential to the question, is how strong an inference is necessary to sustain the presumption as constitutional — a mere inference, a preponderance of evidence, a substantial assurance, or proof beyond a reasonable doubt?

By considering the facts and language of recent Supreme Court decisions one finds clues as to what the test means today. In *United States v. Gainey*,[28] the Court upheld a presumption that one who was found in the presence of a still was "carrying on" the business of illegal distillation.[29] Although it is possible to be in the vicinity of illegal conduct without being involved, the Court felt the inference was permissible because: (1) the statute is broadly worded in that it encompasses a large class of persons who are involved or connected with the illegal activities;[30] and (2) "strangers to the illegal business rarely penetrate the curtain of secrecy."[31]

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[24] Tot v. United States, 319 U.S. 463, 467-68 (1943). *Cf.*, Leary v. United States, 395 U.S. 6 (1969); United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965). It appears that there are two tests implicit within this rule; (1) there must be a rational connection, and (2) the inference must not be strained. The courts, however, have put the emphasis on the first and more stringent portion of the rule. *See* Leary v. United States, 395 U.S. 6 (1969); United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965).

[25] *See* United States v. Margeson, 259 F. Supp. 256 (E.D. Pa. 1966); Government of the Virgin Islands v. Torres, 161 F. Supp. 699 (D.C.V.I. 1958).

[26] *See* People v. Scott, 24 Cal. 2d 774, 151 P.2d 517 (1944); State v. Grinnett, 33 Idaho 203, 193 P. 380 (1920); State v. Spiller, 146 Wash. 180, 262 P. 128 (1927); Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 17, 178 (1930); Note, 55 COLUM. L. REV. 527 (1955).

[27] *See* Note, 55 COLUM. L. REV. 527 (1955). The test has been faulted because it is called a rational connection test whereas it is really an inferential test. *Id.*

[28] 380 U.S. 63 (1965), *noted in* 51 A.B.A.J. 482 (1965); 33 GEO. WASH. L. REV. 1137 (1965); 79 HARV. L. REV. 159 (1965); 27 MONT. L. REV. 216 (1966). Gainey was apprehended late at night as he approached the still, flashlight in hand. He was surprised by revenue agents and attempted to flee, but was caught after a short chase.

[29] *Id.* at 67. 26 U.S.C. § 5601(b)(2) (1964) provides:

> Whenever on trial for violation of subsection (a)(4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

[30] 26 U.S.C. § 5601(a)(4) provides: "Any person who . . . carries on the business of a distiller or rectifier without having given bond as required by law . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense."

[31] 380 U.S. at 67-68 (1965). The Court also noted that the circuit courts had differed as to the significance of one's presence at a still and thus the question was proper for legislative determination. *Id.* at 67. *See also* Bozza v. United States, 330 U.S. 160 (1947); United States v. Freeman, 286 F.2d 262 (4th Cir. 1961).

In *United States v. Romano,*[32] a similar case involving a still, decided a few months after *Gainey,* the Court came to a different conclusion. The Court considered the question of whether possession, custody, or control can be inferred from mere presence at the site of an illegal still, and concluded that "[p]resence is relevant and admissible evidence in a trial on a *possession* charge; but absent some showing of the defendant's function at the still, [such presence] is too tenuous to permit a reasonable inference of guilt . . . ."[33] The Court, in *Romano,* distinguished *Gainey* on the basis that section 5601 (a)(1), is narrow in scope, addressing itself to "only one of the various aspects of the total undertaking,"[34] whereas *Gainey* involved a violation of section 5601(a)(4), a "sweeping prohibition of carrying on a distillation business."[35] That is, the prohibition against "carrying on" the business is aimed at a broad category of persons (*e.g.,* those in supply, delivery, or operational activities as well as those having possession and/or control), while the statute enjoining "possession, custody or control" affects a mere subclass of the former.[36] It is more probable that one who is present at a still is "carrying on" the business because of the large number of persons in this category. Thus, it appears, the Court will scrutinize carefully the language of the applicable statute with a view toward determining the breadth of its application, particularily where the offense is defined narrowly and the presumption seems far afield.

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[32] 382 U.S. 136 (1965), *noted in* 52 A.B.A.J. 82 (1966), *and* 8 WM. & MARY L. REV. 164 (1966). Romano was apprehended when federal authorities, armed with a search warrant, surprised the defendant and found him standing a few feet from an operating still.

[33] 382 U.S. at 141 (emphasis added). A number of circuit courts had already concluded that something more than presence at a still was necessary to prove possession. *See* Pugliese v. United States, 343 F.2d 837 (1st Cir. 1965); McFarland v. United States, 273 F.2d 417 (5th Cir. 1960); Vick v. United States, 216 F. 2d 228 (5th Cir. 1954); Graceffo v. United States, 46 F.2d 852 (3d Cir. 1931).

[34] United States v. Romano, 382 U.S. 136, 141 (1965).

[35] *Id.* at 140. 26 U.S.C. § 5601(a)(1) (1964) provides that: "Any person who . . . [h]as in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179 (a) . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense."

Compare 26 U.S.C. § 5601(a)(4) (1964) *supra* note 30.

Judicial determination of whether a statute is broad or narrow in effect sometimes seems like speculation into the mysteries of the unknown, though it seems that more people would fit into the category of carrying on the business than would fit into the categories of possession, custody, or control. For one such speculation see *Vukich v. United States,* 28 F.2d 666 (9th Cir. 1928).

[36] Both categories are quite broad in light of the fact that accessories come within the statute and are treated as principals. 18 U.S.C. § 2 (1964) provides that:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Although the Court's distinction based on breadth of the applicable statute has logical validity, an alternative interpretation is that the Court is today applying the test in a more critical fashion.[37] The very fact that it drew such a fine distinction may be an indication that the Court has begun to move toward a more strict application of the *Tot* rule.

Few courts have tried to define how strong a connection is necessary to sustain a presumption, but it appears that they are making an effort in this direction. A recent district court decision did try to define this threshold question and required a surprisingly strong nexus.[38] The court felt that a presumption should in no way lighten the burden of proof and therefore must be abandoned if the relationship cannot be proved beyond a reasonable doubt.[39]

The most recent case in the series applying the *Tot* rule, *Leary v. United States,*[40] strikes down a presumption whereby all the elements of *knowingly* transporting marihuana are inferred from its possession.[41] The Court noted that the validity of a presumption is not a "matter within specialized judicial competence" and " 'significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.' "[42] However, the Court did consider a vast amount of empirical data in order to negate the presumption and indicated that if Congress did not limit presumptions to the "circumstances of life as we know them," the Court would.[43] It concluded that the presumption was " ' highly empirical,' "[44] and must be based on a consideration of all the available and pertinent facts. Thus, when ascertaining the constitutionality of a presumption the Court will keep three considerations in mind: the particular wording of the statute, the empirical bases of

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[37] *See* 8 WM. & MARY L. REV. 164 (1966).

[38] United States v. Adams, 293 F. Supp. 776 (S.D.N.Y. 1968).

[39] *Id.; but see* Caudillo v. United States, 253 F.2d 513 (9th Cir.), *cert. denied;* Romero v. United States, 357 U.S. 931 (1958); State v. Knudsen, 3 Conn. Cir. 458, 217 A.2d 236 (1965).

[40] 395 U.S. 6 (1969).

[41] The elements which are presumed from possession are that: (1) the marihuana was smuggled; (2) the defendant knew it was smuggled; and (3) it was smuggled with intent to defraud the United States. *Id.* at 37. 21 U.S.C. § 176(a) (1964) provides in part that: "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

[42] 395 U.S. at 38, *quoting from* United States v. Gainey, 380 U.S. 63 (1965).

[43] *Id.* at 34, *quoting from* Tot v. United States, 319 U.S. 463, 468 (1943); *cf.* United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965); Tot v. United States, 319 U.S. 463 (1943).

[44] 395 U.S. at 38; *cf.* United States v. Gainey, 380 U.S. 63, 67 (1965).

the inferences, and the determinations of Congress, if any, with respect to these bases.

In *Leary,* the Court indicated that the inference must necessarily be quite strong, saying "unless it can at least be said with *substantial assurance* that the presumed fact is more likely than not to flow from the proven fact on which it is made to depend," the statutory presumption will be deemed unconstitutional.[45] An analysis of the *Leary* decision indicates just how strong the connection between the actual facts and the presumption must be. The presumption of knowledge that the marihuana was of foreign origin was found invalid even though: (1) "most domestically consumed marihuana is still of foreign origin" — possibly as much as 90 percent;[46] and (2) there are five possible ways by which the consumer may become aware of the source. He may: (a) be aware of the high percentage of marihuana which is smuggled and deduce that his was illegally imported; (b) have smuggled the marihuana himself; (c) have specified that he wanted foreign marihuana when he bought it; (d) be able to tell from the appearance, packaging, or taste of the marihuana; or (e) know by indirect means that his supplier smuggled it.[47] These possibilities could obviously lead one to the presumption that the user knew the source of the marihuana. But in applying the test, the Court refused to uphold this presumption and held that there must be "substantial assurance" of a rational connection.[48]

It appears that the Court has adopted a strict application of the *Tot* rule. A number of statutes may therefore be in jeopardy as a result of the Court's stringent application of the test, specifically those statutes concerning smuggled goods, [49] kidnapping,[50] obscene

[45] 395 U.S. at 36 (emphasis added). The Court uses the phrase "substantial assurances" for the first time in a case of this nature and seems to put a good deal of emphasis on it in that the term appears in the opinion at least three times. To determine how strong an inference must be in order to constitute a rational connection is necessarily difficult. However, one court has stated that a presumption should in no way lighten the burden of proof and therefore must be abandoned if not able to be proven beyond a reasonable doubt. United States v. Adams, 293 F. Supp. 776 (S.D.N.Y. 1968). *But see* Caudillo v. United States, 253 F.2d 513 (9th Cir.), *cert. denied,* Romero v. United States, 357 U.S. 931 (1958); State v. Knudsen, 3 Conn. Cir. 458, 217 A.2d 236 (1965), *appeal granted* 222 A.2d 810 (1966).

[46] 395 U.S. at 41. Ninety percent of all marihuana seized is said to be smuggled from Mexico, but this may in part reflect the positioning and activities of the federal authorities. *Id. See also* S. REP. NO. 1997, 84th Cong., 2d Sess. 7, 13 (1956); H.R. REP. NO. 2388, 84th Cong., 2d Sess. 14 (1956); BUREAU OF NARCOTICS, REPORT ON THE TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS 67 (1965).

[47] Leary v. United States, 395 U.S. 6 (1969).

[48] *Id.* at 36.

[49] 18 U.S.C. § 545 (1964) provides that smuggling is presumed from possession of smuggled goods.

[50] 18 U.S.C. § 1201 (1964) provides that transportation in interstate commerce is presumed from a victim's absence for 24 hours.

publications,[51] narcotics,[52] heroin,[53] opium,[54] stills,[55] and firearms.[56]

It also appears from the holding of the Court that, in the future, statutory presumptions will be subject to attack wherever there is a question as to the empirical validity of the inference.[57]

II. THE PRIVILEGE AGAINST SELF-INCRIMINATION

The fifth amendment provides that; "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."[58] This privilege has broadened since its inception, and has always been a "powerful symbol of individual liberty."[59] The protection from self-incrimination has no clear-cut standards implicit within it

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[51] 18 U.S.C. § 1465 (1964) provides that transportation of obscene publications for sale or distribution is presumed from possession of any five such publications.

[52] 21 U.S.C. § 174 (1964) provides that smuggling of a narcotic into the United States is presumed from its possession. 26 U.S.C. § 4724(c) (1964) provides that failure to register and pay special tax is presumed from narcotics possession. 26 U.S.C. § 4755(a)(2) (1964) provides that production of illegal marihuana is presumed from its presence on the land.

[53] 21 U.S.C. § 176(b) (1964) provides that illegal importation of heroin is presumed from its possession.

[54] 21 U.S.C. § 181 (1964) provides that illegal importation of opium is presumed from its possession.

[55] 26 U.S.C. § 5601(b)(3) (1964) provides that unlawful production of distilled spirits is presumed from one's presence at the place where mash, wort, or wash is being fermented. 26 U.S.C. § 5601(b)(4) (1964) provides that unlawful production of distilled spirits is presumed from one's presence at the site of a still.

[56] 26 U.S.C. § 5851(1) (1964) provides that unlawful receipt of firearms in violation of interstate commerce is presumed from their possession.

[57] In *Leary*, the Court went to great lengths to examine the probability of the validity of the presumption in light of the habits of marihuana users and indicated that this is a proper function of the Court, especially where the legislature's fact finding was not conclusive. 395 U.S. at 39. 18 U.S.C. § 837(c) (1964) is an example of how statutes could be written and probably withstand the test of constitutionality. It provides that:

> The possession of an explosive in such a manner as to evince an intent to use, . . . damage or destroy any building . . . creates rebutable presumptions that the explosive was transported in interstate or foreign commerce . . . *provided, however,* that no person may be convicted under this section unless there is evidence independent of the presumption that this section has been violated.

[58] U.S. CONST. amend. V. The courts have construed the fifth amendment liberally. *See* Quinn v. United States, 349 U.S. 155 (1955); Hoffman v. United States, 341 U.S. 479 (1951); Gouled v. United States, 255 U.S. 298 (1921); Gilbert v. United States, 163 F.2d 325 (10th Cir. 1947). It has been held that this constitutional guarantee includes a freedom from prejudicial remarks about the defendant's silence. *See* Griffin v. California, 380 U.S. 609, *petition for rehearing denied,* 381 U.S. 957 (1965); De Luna v. United States, 308 F.2d 140 (5th Cir. 1962). The privilege is a personal right and does not apply to papers of a public nature. Thus, with exceptions such as required records, tax forms, licenses, and other records required under an *appropriate regulation* the immunity does not extend to all areas. *See* Shapiro v. United States, 335 U.S. 1 (1948); United States v. Sullivan, 274 U.S. 259 (1927); Amato v. Porter, 157 F.2d 719 (10th Cir. 1946), *cert. denied,* 329 U.S. 812 (1947). In defining an appropriate regulation, the required records doctrine has been limited to noncriminal and regulatory areas rather than areas permeated with criminal statutes. Haynes v. United States, 390 U.S. 85 (1968). *Cf.* Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968).

[59] Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination,* 18 U. CHI. L. REV. 687 (1951). *See also* Malloy v. Hogan, 378 U.S. 1 (1964); Mapp v. Ohio, 367 U.S. 643 (1961).

and "yields to no convenient formula."[60] Nevertheless, the courts have specified a number of guidelines. In order to invoke the privilege, the testimony in question must be compelled by some coercive force, legal or factual.[61] Both oral and written testimony are treated equally;[62] however, the privilege is limited to "testimonial" or "communicative" evidence (diaries, letters, other written communications, or statements) rather than "real" and "physical" evidence (blood tests, handwriting and voice tests, and a large number of other police investigatory techniques).[63] The privilege has been held to apply to any testimony which would furnish "a link in the chain of evidence needed to prosecute. . . ."[64] However, there are limitations placed upon the privilege. For example, until recently a person's communications with the government (*e.g.*, registration or income and excise tax forms) were outside the privilege and

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[60] McKay, *Self-incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 194; *see generally* 3 J. WIGMORE, EVIDENCE § 2250 (McNaughton rev. ed. 1961); Kalven, *Invoking the Fifth Amendment: Some Legal and Impractical Considerations*, 9 BULL. ATM. SCI. 181 (1953); Kamisar, *A Dissent from the Miranda v. Arizona Dissent; Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Morgan, *The Privilege against Self-incrimination*, 34 MINN. L. REV. 1 (1949); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-incrimination in America*, 21 VA. L. REV. 763 (1935); Symposium, *Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 169 (1966); Note, 45 DENVER L.J. 427 (1968).

[61] Hoffa v. United States, 385 U.S. 293 (1966); United States v. Knohl, 379 F.2d 427 (2d Cir. 1967). Where the defendant was a juvenile, the court found psychological domination by the authorities sufficient to satisfy the necessity of compulsion, indicating that youths must be treated with even greater care. *In re Gault*, 387 U.S. 1 (1967).

[62] Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965); People *ex rel.* Ferguson v. Reardon, 197 N.Y. 236, 90 N.E. 829 (1910).

[63] This distinction has recently been the subject of a large amount of litigation particularly as to handwritten samples which have been deemed to be physical and real evidence and thus not within the privilege. Granza v. United States, 381 F.2d 190 (5th Cir.), *cert. denied*, 389 U.S. 939 (1967); Weaver v. United States, 379 F.2d 799 (8th Cir.), *cert. denied*, 389 U.S. 962 (1967); United States v. Serad, 367 F.2d 347 (2d Cir. 1966), *vacated*, 390 U.S. 1034 (1968); Shelton v. United States, 205 F.2d 806 (5th Cir. 1953), *cert. dismissed*, 346 U.S. 892 (1953), *motion denied*, 349 U.S. 943 (1955). *But see* Lewis v. United States, 382 F.2d 817 (D.C. Cir.), *cert. denied*, 389 U.S. 962 (1967); United States v. Green, 282 F. Supp. 373 (S.D. Ind. 1968). Some types of evidence, considered to be real and physical, is outside the scope of this privilege, *e.g.*: fingerprints—Pearson v. United States, 389 F.2d 684 (5th Cir. 1968); United States *ex rel.* O'Halloran v. Rundle, 384 F.2d 997 (3d Cir. 1967); United States v. Laub Baking Co., 283 F. Supp. 217 (N.D. Ohio 1968); stand and give name—Stovall v. Denno, 388 U.S. 293 (1967); Cowans v. Warden Md. Penitentiary, 276 F. Supp. 696 (D. Md. 1967); blood samples—Schmerber v. California, 384 U.S. 757 (1966); Brent v. White, 276 F. Supp. 386 (E.D. La. 1967); psychological examination—United States v. Albright, 388 F.2d 719 (4th Cir. 1968); Early v. Tinsley, 286 F.2d 1 (10th Cir. 1960), *cert. denied*, 365 U.S. 830 (1961), *rehearing denied*, 365 U.S. 890 (1961); police line up—United States v. Hutto, 393 F.2d 783 (4th Cir. 1968); Schmidt v. United States, 380 F.2d 22 (5th Cir. 1967), *cert. denied*, 390 U.S. 908 (1968); Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966), *cert. denied*, 388 U.S. 922 (1967); voice identification—Biggers v. Tennessee, 390 U.S. 404 (1968); Wise v. United States, 383 F.2d 206 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 964 (1968).

[64] Hoffman v. United States, 341 U.S. 479, 486 (1951); Blau v. United States, 340 U.S. 159, 161 (1950); United States v. King, 402 F.2d 694 (9th Cir. 1968). *See also* United States v. Klehman, 397 F.2d 406 (7th Cir. 1968), *cert. denied*, 343 U.S. 987 (1969).

thus had to be filed regardless of their nature.[65] However, *Leary* is the fourth in a series of recent decisions wherein the privilege has been extended to include excise tax registrations if such disclosures are likely to lead to arrest or conviction.[66]

In *Leary,* the Court found "real and appreciable risk of self-incrimination"[67] based on the fact that an individual's coming forward and registering makes him highly suspect and increases the possibility of investigation.[68] Also, the information required was "in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime."[69] Not only does the Secretary of the Treasury become aware of the individual's activities, but these activities become a matter of public record as well.[70]

In light of the fact that 48 states have statutes restricting the distribution and use of marihuana,[71] Justice Black has described the

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[65] *See* United States v. Forgett, 349 F.2d 601 (6th Cir. 1965), *vacated and remanded,* 390 U.S. 203 (1968) (bringing the case in alignment with the *Haynes* decision); United States v. Eramdjian, 155 F. Supp. 914 (S.D. Cal. 1957); *cf.* Myres v. United States, 174 F.2d 329 (8th Cir.), *cert. denied,* 338 U.S. 849 (1949). It was felt that the government needed information to carry on its day to day business and that it must be able to compel disclosure so that the information would be received in a timely manner. The government's argument breaks down when a tax is a tax only on its face, collecting only negligible revenue, but is in fact a regulatory statute. *See generally* Mansfield, *The Albertson case: Conflict Between the Privilege Against Self-incrimination and the Government's Need for Information,* 1966 SUP. CT. REV. 103; McKay, *Self-incrimination and the New Privacy,* 1967 SUP. CT. REV. 193.

[66] Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968). A number of other decisions have also considered this question and reached similar results. *See* United States v. Covington, 395 U.S. 57 (1969); United States v. Walden, No. 12,849 (4th Cir., June 10, 1969); United States v. Freeman, 412 F.2d 1180 (10th Cir. 1969); Lewis v. United States, 408 F.2d 1310 (10th Cir. 1969); Whaley v. United States, 394 F.2d 399 (10th Cir. 1968), where the privilege, though recognized, was found to be waived because of lack of proper assertion.

[67] 395 U.S. at 16. In *Marchetti* the court said: "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." 390 U.S. 39, 53 (1968). *See also* Rogers v. United States, 340 U.S. 367 (1951); Brown v. Walker, 161 U.S. 591 (1896).

[68] 395 U.S. at 18. *See generally* Mansfield, *The Albertson Case: Conflict Between the Privilege against Self-incrimination and the Government's need for Information,* 1966 SUP. CT. REV. 103; McKee, *The Fifth Amendment and the Federal Gambling Tax,* 5 DUKE B.J. 86 (1956).

[69] Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965); *see also* Leary v. United States, 395 U.S. 6 (1969); Marchetti v. United States, 390 U.S. 39, 47 (1968); Grosso v. United States, 390 U.S. 62, 64 (1968).

[70] INT. REV. CODE of 1954 § 4773 provides that:

> [S]tatements or returns . . . shall be open to inspection by officers and employees of the Treasury Department duly authorized for that purpose, and such officials of any State or Territory, or of any organized municipality therein . . . as shall be charged with the enforcement of any law or municipal ordinance regulating the production of marihuana or regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana.

[71] These states have enacted a prohibition similar to the provisions of the UNIFORM NARCOTIC DRUG ACT. *See* 9B UNIFORM LAWS ANN. 409-10 (1966). Section 2 of this act provides: "It shall be unlawful for any person to . . . possess . . . any narcotic drug, except as authorized in this act." Section 1(14) includes "cannabis" in the category of "narcotic drugs."

effect of federal registration statutes as a "squeezing device contrived to put a man in federal prison if he refuses to confess himself into a state prison . . . ."[72]

Presuming that tax measures are valid,[73] the courts have traditionally deferred to Congressional power; "[s]o long as Congress acts in pursuance of its constitutional power, the judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."[74] This freedom gives Congress a great deal of power because "[e]very tax is in some measure regulatory. To some extent it imposes an economic impediment on the activity taxed as compared with others not taxed."[75] However, the Supreme Court has recently stated: "This Court must give deference to Congress' taxing powers, and to measures reasonably incidental to their exercise; but we are no less obliged to heed the limitations placed upon those powers by the Constitution's other commands."[76] Thus, the freedom from self-incrimination will provide a complete defense to a registration requirement unless there is no substantial risk of self-incrimination,[77] the plea is untimely,[78] or the privilege has been waived.[79]

The successful invocation of this privilege in a number of taxation areas (*e.g.*, the excise taxes on gambling, firearms, and marihuana) indicates that the Court has considered the question carefully and even in light of the changing complexion of the Court, the ques-

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[72] United States v. Kahriger, 345 U.S. 22, 36 (1953) (dissenting opinion). Justice Black's dissent became the accepted view when *Kahriger* was overruled by *Marchetti v. United States,* 390 U.S. 39, 54 (1968).

[73] *See* Helvering v. Gerhardt, 304 U.S. 405 (1938); Binns v. United States, 194 U.S. 486 (1904); Nicol v. Ames, 173 U.S. 509 (1899).

[74] Barenblatt v. United States, 360 U.S. 109, 132 (1959). *Cf.* United States v. Sanchez, 340 U.S. 42 (1950); Sonzinsky v. United States, 300 U.S. 506 (1937); Costellano v. United States, 350 F.2d 852 (10th Cir. 1965), *cert. denied,* 383 U.S. 949 (1966).

[75] Sonzinsky v. United States, 300 U.S. 506, 513 (1937). The use of taxing measures to regulate behavior is frequently used. This device has generally been held to be constitutional. "[A] tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." United States v. Sanchez, 340 U.S. 42, 44 (1950). *See also* McCray v. United States, 195 U.S. 27 (1904).

[76] Haynes v. United States, 390 U.S. 85, 98 (1968). *See also* United States v. Covington, 395 U.S. 57 (1969); Leary v. United States, 395 U.S. 6 (1969); Marchetti v. United States, 390 U.S. 39 (1968).

[77] Risk of incrimination is an absolute necessity to the application of this privilege and where the activity involved is not illegal (*i.e.,* liquor manufacture and sales) there is no defense available to a charge of failure to register and pay the tax. *See* Anderson v. United States, 403 F.2d 206 (5th Cir. 1968); Shoffeitt v. United States, 403 F.2d 991 (5th Cir. 1968), *cert. denied,* 393 U.S. 1094 (1969); Brown v. United States, 401 F.2d 769 (5th Cir. 1968), *cert. denied,* 394 U.S. 962 (1969).

[78] United States v. Covington, 395 U.S. 57 (1969). The Court has held that "A plea on motion to dismiss the indictment is plainly timely." *Id.* at 60.

[79] *See* 18 U.S.C.A. rule 12(b)(3) (1969). A defendant may waive the privilege against self-incrimination; this waiver must be made voluntarily, intelligently, and with full knowledge of his rights. *See* Gardner v. Broderick, 392 U.S. 273 (1968); Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Neilsen, 392 F.2d 849 (7th Cir. 1968).

tion will continue to be answered in a like manner.[80] By invalidating the registration requirement under the *Marihuana Tax Act,* the Court has cast doubt on the validity of a number of other statutes.[81] Similarly, the Court's willingness to invalidate a tax act puts Congress on notice that the Court will not allow Congress to do indirectly, through taxation, what it could not do directly.[82] Moreover, this decision seems to signal at least a temporary return to an earlier position of the Court where tax measures were scrutinized carefully in order to determine if they were a proper exercise of the tax power.[83]

The *Leary* decision is well founded in reason and justice. There appears to be no reason to allow Congress to circumvent the dictates of the Constitution by use of its taxing power. Unquestionably, the freedom from self-incrimination is so fundamental to our values that the court should and will go to great lengths to protect this and all other rights.

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[80] Only two justices of the Court, Chief Justice Warren and Justice Stewart, have expressed reservations as to the self-incrimination issue, thus it appears that a strong majority of the court approves of the discussion and will be of like mind in the future. Leary v. United States, 395 U.S. 6 (1969).

[81] In the past, a number of registration requirements have been challenged, although on the whole unsuccessfully, *e.g.*: United States v. Toussie, 280 F. Supp. 473 (E.D.N.Y. 1967); Foreign Agents Registration Act—22 U.S.C. § 612 (1958), *see* United States v. Peace Information Center, 97 F. Supp. 255 (D.D.C. 1951); distilleries—26 U.S.C. §§ 5173, 5179, 5222, 5801 (1964), *see* United States v. Young, 284 F. Supp. 1008 (E.D. Tenn. 1968); United States v. McGee, 282 F. Supp. 550 (M.D. Tenn. 1968).

[82] When the *Marihuana Tax Act* was passed, Congress was fully aware of the publicity a user would receive from registration yet it did not really consider the implication in light of the privilege against self-incrimination.

> Two objectives have dictated the form of H.R. 6906, first, the development of a plan of taxation which will raise revenue and at the same time render extremely difficult the acquisition of marihuana by persons who desire it for illicit use, and second the development of an adequate means of publicizing dealings in marihuana in order to tax and control the tax effectively.

H.R. REP. No. 792, 75th Cong., 1st Sess., 2 (1937). *See also* S. REP. No. 900 75th Cong., 1st Sess., 103 (1937). The Court does not challenge Congress' powers of taxation, but it demands that the methods used be "entirely consistent with constitutional limitations . . . ." Haynes v. United States, 390 U.S. 85, 98 (1968).

[83] *See* Child Labor Tax Case, Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Hill v. Wallace, 259 U.S. 44 (1922); Knowlton v. Moore, 178 U.S. 41 (1900); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). *McCulloch* was the first case in which the Court exercised power of judicial review over congressional legislation and since that case was decided, the Court has broadly expanded the use of that power.