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Part I: Introduction

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Probably the most pervasive political issue in American Politics from 1968 to the present has been characterized by the slogan "law and order." The issue's political appeal is directly related to the substantial increase in violent crime in the streets, buildings and homes of our cities, their suburbs and even smaller metropolitan areas throughout the country. In a free society, balancing the legal rights and privileges of an individual accused of a violent crime with the right of citizens to feel safe in their person and property is almost a labor in vain. Nevertheless, we demand that a proper balance be reached, and we nonchalantly place the responsibility for reaching the proper balance on law enforcement agencies and the judiciary.

The persistent cries for law and order have influenced both the appointment of federal judges and the opinion of sitting federal judges. The effect on the judiciary has manifested itself in a shift in the balancing process, giving less weight to the legal rights and privileges of an individual accused of violent crime. Because the legal rights and privileges of an individual accused of non-violent crime are identical to those of an individual accused of violent crime, a resulting contraction of the legal rights and privileges of an individual accused of a non-violent crime is inevitable.[1] The analysis of many recent cases[2] in Parts II and III of the

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1. In Coffee, *Supreme Court's Couch Decision Signals New Directions in Guarding Clients Records*, 38 J. TAXATION 258, 259-60 (May 1973), the author, after reviewing several recent Supreme Court cases, states:

> These conclusions have very concrete applications to the specifics of a tax fraud investigation. In all probability, the courts will allow the Internal Revenue Service to make greater use of the administrative summons during a tax fraud investigation than formerly would have been thought possible . . . .
>
> We, as tax practitioners, can expect Intelligence Division offices to become more and more aggressive because the Special Agents can accurately conclude that ultimate court resolution will attempt to balance competing interests and give greater and greater weight to statutory and administrative conclusions and place less and less of a strict construction upon the words in the Bill of Rights —. . . .
>
> The result is that the tax practitioner must be even more alert and even more creative to the protection of his client's rights than was formerly the case.

2. *See* Couch v. United States, 409 U.S. 322 (1973); United States v. Moore, 73-2 USTC ¶ 9748 (5th Cir. 1973); United States v. Ponder, 475 F.2d 37 (5th Cir. 1973); United

Symposium clearly demonstrates a trend in the federal judiciary's interpretation of the law, producing a significant shift in the balancing process away from protecting the legal rights and privileges of individuals accused of the non-violent crime of federal income tax fraud.

Enthusiasm for the *Symposium* was sparked by a recent decision of the United States Supreme Court, *Couch v. United States*.[3] The Court in *Couch* held that a taxpayer had lost her fifth amendment privilege against compulsory self-incrimination by surrendering her income tax records to her accountant for preparation of her income tax return and for use in a possible civil or criminal income tax investigation. As a result, the taxpayer was unable to prevent the enforcement of an Internal Revenue Service summons[4] issued to her accountant while the accountant was still in possession of her tax records. The Court made clear that the fifth amendment privilege against compulsory self-incrimination is properly asserted, with certain limited exceptions,[5] only by an individual who has possession of documents that he or she is holding in a personal rather than a custodial capacity. The test is actual or constructive possession of documents and not ownership. Some questions created but not answered by the *Couch* decision are:

(1) Would the result in *Couch* be different if a taxpayer's tax records and workpapers were in the possession of an attorney who had prepared the income tax returns and retained possession of the tax records and workpapers for possible future audit?

(2) Does a taxpayer lose his privilege against compulsory self-incrimination when he transfers his tax records and workpapers to an accountant or an attorney to prepare his income tax

States v. White, 477 F.2d 757, *rehearing denied en banc*, 73-2 USTC ¶ 9802 (5th Cir. 1973); United States v. Buck, 479 F.2d 1327 (5th Cir. 1973), *aff'g per curiam* 356 F. Supp. 370 (S.D. Tex. 1973); United States v. Weingarden, 473 F.2d 454 (6th Cir. 1973); United States v. Blank, 459 F.2d 383 (6th Cir. 1972); United States v. Krilich, 470 F.2d 341 (7th Cir. 1972); United States v. Brown, 478 F.2d 1038 (7th Cir. 1973); United States v. Gurtner, 474 F.2d 297 (9th Cir. 1973); United States v. Cromer, 483 F.2d 99 (9th Cir. 1973); United States v. Hickok, 481 F.2d 377 (9th Cir. 1973); United States v. Luther, 481 F.2d 429 (9th Cir. 1973); United States v. Michals, 469 F.2d 215 (10th Cir. 1972); and United States v. Fisher, 352 F. Supp. 731 (E.D. Pa. 1972).

3. 409 U.S. 322 (1973).

4. Section 7602 of the INTERNAL REVENUE CODE OF 1954 provides that the Internal Revenue Service may summon taxpayers and other persons to produce books, papers and records and to give testimony under oath concerning the correctness of a tax return. Section 7604 (a) gives jurisdiction to United States district courts to enforce the summons.

5. 409 U.S. at 333.

return but regains possession of his tax records and workpapers and any accountant's or attorney's workpapers prior to the issuance of an Internal Revenue Service summons? What if photocopies of the tax records and workpapers are retained by the accountant or attorney?

(3) Would the result in *Couch* be different if prior to issuing the summons, the accountant had transferred the tax records and workpapers to an attorney for purposes of representing the taxpayer in the investigation? If not, would the result be different if prior to issuing the summons, the accountant had transferred the tax records and workpapers to the taxpayer, and the taxpayer had transferred them to an attorney for purposes of representing him in the investigation?

In an attempt to answer these and other questions, two members of the *Hofstra Law Review* have researched and written in Parts II and III of the *Symposium* a comprehensive analysis of the following: (a) the non-constitutional privileges (e.g., accountant-client or attorney-client privilege) of taxpayers involved in federal civil or criminal income tax investigations or litigation; (b) the use of a summons or search warrant in such investigations; (c) constitutional rights and privileges (fourth, fifth or sixth amendment) of a taxpayer in such investigations or litigation; and (d) the effect on all legal rights and privileges of a taxpayer when he retains professional assistance to prepare his income tax return or to represent him in such investigations or litigation. In Part IV of the *Symposium* this writer has outlined procedures for accountants, attorneys and others who prepare federal income tax returns or who represent taxpayers in federal civil or criminal income tax fraud investigations or litigation that are designed to preserve all the legal rights and privileges of their clients.

The purpose of Part IV of the *Symposium* is to stimulate tax professionals and their respective associations to reevaluate the criteria they currently consider in deciding whether or not to advise their clients to cooperate with the Internal Revenue Service in federal income tax investigations. It will be apparent from Parts II and III of the *Symposium* that the advice given in Part IV can neither be accepted as gospel nor rejected as fantasy. The complexity of the federal income tax law,[6] the federal civil and

6. In *A Report on Complexity and the Income Tax* by the 1970-71 Committee on Tax Policy of the New York State Bar Association's Tax Section, 27 TAX L. REV. 325 (1972), seven respected members of the New York State Bar unanimously concluded that the present complexity of the tax laws and their continued development in a complex manner

criminal income tax fraud provisions, and the substantive and procedural aspects of a taxpayer's constitutional and other legal rights and privileges, and, in particular, the current flux in interpreting these laws,[7] require every professional to reevaluate continually the appropriate procedures to follow to protect his clients. General rules on whether or not to advise cooperation are no longer possible.

The law in this area is changing so rapidly that it is necessary to warn readers that statements of law or advice in the Symposium may be misleading or obsolete shortly after publication.[8] The complexity and flux in the law has forced a limitation on the scope of the *Symposium*. No consideration is given to federal civil or criminal income tax fraud investigations or litigation of corporations, partnerships, estates and trusts. No consideration is given to federal civil or criminal tax fraud other than income tax fraud.

The limitation on the scope of the *Symposium* does not substantially reduce the number of taxpayers covered by its application. In 1972, of the more than 70 million individual income tax returns filed, 1.3 million were examined by the Internal Revenue Service.[9] Special agents of the Intelligence Division of the Internal Revenue Service screened more than 132,000 allegations of federal criminal tax fraud and completed approximately 8,900 full-scale tax fraud investigations.[10]

Out of the 8,900 full-scale investigations, the Intelligence Division recommended to the Internal Revenue Service prosecu-

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would lead to a break-down in the self-assessment system. The reasons given were three: (1) Complexity turns a taxpayer's interpretation of the law into a lottery—will he be audited and, if so, will his corruption be detected; (2) Complexity leads to corruption in the administration of the law; and (3) Bad practitioners who advise clients to rely on the complexity of the law will drive out good practitioners who advise compliance based on reasonable interpretation of the law.

7. Having spent more than three months researching every aspect of the law concerning federal civil and criminal income tax fraud, the only conclusion about which this writer is certain is that certainty in this law is not to be found. Conflicts of interpretation of the law in the lower federal courts is not the exception, but the rule. As a result, it is important to evaluate the law, giving careful consideration to the law of the circuit in which the taxpayer resides. Forum shopping, when available, is beneficial in this area of the law.

8. Several contributors to the book, TAX FRAUD, edited by G. HOLMES and J. COX, the Institute of Continuing Legal Education (1973), commented in a conference on federal income tax fraud in New York shortly after the book was published that many of their statements were misleading or obsolete in view of several 1973 cases (*see* note 3, *supra*).

9. 1972 ANNUAL REPORT OF THE COMMISSIONER OF THE INTERNAL REVENUE SERVICE, at 10.

10. *Id.* at 17.

tion in over 1,750 cases.[11] The Internal Revenue Service forwarded 1,355 prosecution recommendations, involving 1,364 prospective defendants, to the Department of Justice.[12] In income and miscellaneous tax fraud cases, the Department of Justice obtained 1,074 indictments and informations and disposed of 1,011 cases: 722 by plea (guilty or *nolo contendere*), 113 by conviction after trial, 39 by acquittal, and 137 by dismissal (including 10 because of death of principal defendant, 6 because of serious illness, and 102 because the principal defendant had pleaded guilty or had been convicted in a related case).[13]

Two significant points may be gleaned from these statistics:

(1) The conviction rate of the Department of Justice based on the number of Internal Revenue Service tax fraud investigations is less than 11 percent.[14]

(2) The conviction rate of the Department of Justice based on the number of cases disposed of is more than 94 percent.[15]

Thus, to have any significant chance of preventing your client from being convicted of federal criminal income tax fraud, you must convince the Internal Revenue Service or the Department of Justice that your client's case has weaknesses that would reduce the likelihood of a conviction. The 94 percent conviction rate by the Department of Justice is accomplished by a thorough examination of all cases by the Internal Revenue Service for the purpose of rejecting any case where there is not a strong probability of successful prosecution. This thorough screening process is intended not to rehabilitate the convicted, but to further the government's goal to deter taxpayers contemplating the commission of income tax fraud. The 50 percent of deficiency civil income tax fraud penalty is often sufficient to accomplish the government's goal of rehabilitating convicted taxpayers. The Internal Revenue Service and the Department of Justice effectively advertise their win-loss record and their convictions of respected taxpayers to enhance their policy of deterrence. Your client's future is almost entirely dependent on your success in having his case rejected before indictment or information. To avoid criminal prosecution of your client, you do not have to demonstrate his innocence but merely convince the government of the weakness in its case.

11. *Id.*
12. *Id.* at 19.
13. *Id.*
14. 956 · 8900.
15. 956 · 1011.