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Heads I Win, Tails You Lose: The Taxing Risk When Invoking the Fifth Amendment on a Tax Return

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HEADS I WIN, TAILS YOU LOSE: THE TAXING RISK WHEN INVOKING THE FIFTH AMENDMENT ON A TAX RETURN

*Jacob Hoback**

I. INTRODUCTION

Every calendar year includes fun holidays, such as Christmas, Valentine's Day, and Independence Day. But not all famous dates of the calendar year are affiliated with the same joy as other holidays. On April 15th, taxpayers must file their tax returns with the Internal Revenue Service.¹ Due to the complexity and cost of filing taxes, Tax Day is not a day that many citizens celebrate.² In 2018, the average American family paid \$15,748 in taxes.³ Further, taxpayers almost unanimously agree that the U.S. tax system is too complicated.⁴ Therefore, in both cost and practice, Tax Day is an onerous day for citizens.

An already unfavorable holiday is even more burdensome for taxpayers who have acquired income through illegal activity. When taxpayers report their gross income, they must include illegally-earned income.⁵ Additionally, they must disclose the income's nature and source.⁶ As a result, the government can use that specific information to prove that a taxpayer engaged in illegal activity and is thus criminally liable.⁷ Nevertheless, taxpayers may invoke the Fifth Amendment⁸ on their tax returns to protect themselves from

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1. 26 U.S.C. § 6072(a) (2020).

2. Unless, of course, they received a significant refund.

3. *HOW MUCH DOES THE AVERAGE AMERICAN FAMILY PAY IN TAXES?*, USA FACTS (Sept. 28, 2020, 11:35 AM), <https://usafacts.org/articles/average-taxes-paid-income-payroll-government-transfers-2018/> [<https://perma.cc/HP3Q-XCQP>].

4. *Why are taxes so complicated?*, TAX POL'Y CENTER, <https://www.taxpolicycenter.org/briefing-book/why-are-taxes-so-complicated#:~:text=POLITICS%20OF%20TAX%20POLICY,sources%20and%20uses%20of%20income>. [<https://perma.cc/98XD-NGA7>] (last visited Nov. 30, 2020).

5. *James v. United States*, 366 U.S. 213, 218 (1961) (“[U]nlawful, as well as lawful, gains are comprehended within the term ‘gross income.’”).

6. Richard B. Stanley, *Comments: Conflict Between the Internal Revenue Code and the Fifth Amendment Privilege Against Self-Incrimination*, 15 U. BALT. L. REV. 527, 551 (1986).

7. *See, e.g.*, *Garner v. United States*, 424 U.S. 648 (1976).

8. “Fifth Amendment” in this Article will refer exclusively to the privilege from self-incrimination. The use of “Fifth Amendment” does not include the other securities therein, such as the right to due process.

prosecution by not disclosing the incriminating information.⁹ But this protection is not sufficient, because if a court holds that a taxpayer's Fifth Amendment claim is not valid, the government can prosecute the taxpayer under federal law for tax evasion, specifically for not providing the information necessary to calculate tax liability.¹⁰

To provide taxpayers with the full protection of the Fifth Amendment, the government should offer taxpayers precompliance review. Precompliance review is an opportunity to have a neutral decisionmaker review the validity of an individual's Fifth Amendment claim before the individual would face penalties for tax evasion.¹¹ Under the law today, when taxpayers invoke the Fifth Amendment on their tax returns, the IRS can sue the taxpayers for not disclosing the particular information on their tax returns necessary to calculate tax liability and will prevail if the court finds that their claims are invalid.¹² On the other hand, however, offering precompliance review would allow taxpayers to receive a preliminary judicial ruling on the validity of their claims before facing penalties for failing to comply. Consequently, taxpayers would know whether their claims would prevail and not have to face federal tax evasion charges for invalid claims made in good faith. To be clear, this Note does not argue that taxpayers should be excused from paying taxes on illegally-earned income. Even if a taxpayer does have a valid claim of Fifth Amendment privilege, the taxpayer should still face tax liability, but the taxpayer should not have to disclose the specific incriminating information.¹³

Taxpayers should not have to risk federal prosecution for tax evasion to invoke constitutional protection. Therefore, this Note argues that taxpayers who invoke the Fifth Amendment should be entitled to an opportunity for precompliance review. First, Section II presents the background of Fifth Amendment jurisprudence generally and as applied to tax returns. Next, Section III explains what precompliance review is and how the government offers precompliance review in other areas of the law. Finally, Section IV discusses why the government should afford taxpayers with an

9. *United States v. Sullivan*, 274 U.S. 259, 263 (1926). To be clear, under *Sullivan*, taxpayers would still have to provide the relevant, non-incriminating information. *See Stanley*, *supra* note 6, at 558.

10. *Garner*, 424 U.S. at 663; 26 U.S.C. § 7203 (2020).

11. *City of Los Angeles v. Patel*, 576 U.S. 409, 421 (2015).

12. *Garner*, 424 U.S. at 663; 26 U.S.C. § 7203 (2020).

13. *See Stanley*, *supra* note 6, at 558. ("A taxpayer must prepare a return, or make a similar calculation, to determine the exact amount of his annual liability. The filing of the return with the final tax payment is, of course, unnecessary for the IRS to receive the tax payment. The government's power to collect tax, therefore, does not require the filing of an income tax return from individuals who are incriminated by filing.").

opportunity for precompliance review.

II. BACKGROUND

The requirement for taxpayers to report their illegally-earned income has raised Fifth Amendment self-incrimination concerns. The Fifth Amendment of the Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”¹⁴ An individual faces the risk of self-incrimination when the government forces the individual to provide information that “would furnish a link in the chain of evidence needed to prosecute the [individual].”¹⁵ Consequently, taxpayers have argued that reporting their illegally-earned income would allow the government to use the tax returns as a chain of evidence to obtain a conviction.¹⁶

This Section describes the evolution of the Court’s application of Fifth Amendment protection, both generally and with respect to tax returns. First, Part A explains general, basic Fifth Amendment jurisprudence. Second, Part B explains how the Court has applied the Fifth Amendment to tax returns.

A. *The Fifth Amendment*

The Fifth Amendment of the Constitution provides that “[n]o person...shall be compelled in any criminal case to be a witness against himself.”¹⁷ Importantly, the Founders added the Bill of Rights to the Constitution “in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law.”¹⁸ The self-incrimination clause in the Fifth Amendment comes from the cry of British citizens protesting their government, “No one is bound to accuse himself.”¹⁹ The protest was a response to the government’s unjust methods of interrogating alleged criminals in England.²⁰ As a result of the protests, the English courts established a freedom from self-incrimination.²¹ Accordingly, there was no formalized British rule established by Parliament.²² Ultimately, the privilege against self-

14. U.S. CONST. amend. V.

15. *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (citing *Blau v. United States*, 340 U.S. 159, 161 (1950)).

16. *See infra* Part B.

17. U.S. CONST. amend V.

18. *Hoffman*, 341 U.S. at 486-87 (quoting *Feldman v. United States*, 322 U.S. 487, 489 (1944)).

19. *Brown v. Walker*, 161 U.S. 591, 596 (1896).

20. *Id.*

21. *Id.*

22. *Id.* at 596-97.

incrimination became such a significant part of British criminal procedure that it is included in the U.S. Constitution.²³

The Supreme Court has applied the Fifth Amendment broadly. For example, the Fifth Amendment does not just protect citizens from disclosures that would directly support a conviction. The Fifth Amendment protects citizens against disclosures that “would furnish a link in the chain of evidence needed to prosecute the claimant.”²⁴ Importantly, to wield its protection defendants must immediately claim the privilege, otherwise they effectively waive the privilege.²⁵ Also, for a court to protect a defendant’s privilege from self-incrimination, the defendant’s apprehension of conviction must be “real and appreciable.”²⁶ Finally, if a defendant has voluntarily revealed self-incriminating facts to the government, the defendant cannot invoke the privilege to avoid disclosing further specific details.²⁷

B. The Fifth Amendment as Applied to Tax Returns

The requirement for taxpayers to report illegally-earned income has been subject to Fifth Amendment litigation. When taxpayers prepare their tax returns, taxpayers must first determine their gross income.²⁸ Gross income includes income from illegal activities.²⁹ Therefore, taxpayers who earn income from illegal activity face a “cruel trilemma.”³⁰ If they file their tax returns accurately, they tacitly admit that they committed a crime by identifying the nature or source of the income; if they file their tax returns inaccurately, they commit perjury; and if they fail to file their tax returns, they commit tax evasion.³¹ In certain situations, taxpayers still report their illegally-earned income despite the likelihood of prosecution.³² For example, some taxpayers who fear that they will inevitably be convicted report their illegally-earned income “to avoid getting charged twice: once for their initial

23. *Id.* at 597; U.S. CONST. amend V.

24. *Hoffman*, 341 U.S. at 486 (citing *Blau v. United States*, 340 U.S. 159, 161 (1950)).

25. *Rogers v. United States*, 340 U.S. 367, 371 (1951) (quoting *United States v. Murdock*, 284 U.S. 141, 148 (1943)).

26. *Brown*, 161 U.S. at 599.

27. *Rogers*, 340 U.S. at 373.

28. *How to File Your Federal Taxes*, USAGOV, <https://www.usa.gov/file-taxes> [<https://perma.cc/U4TF-CLS7>] (last visited Nov. 30, 2020).

29. *See James v. United States*, 366 U.S. 213, 218 (1961).

30. *United States v. Egan*, 459 F.2d 997, 997 (2d Cir. 1972).

31. *Id.* at 997-98.

32. Steve Hargreaves, *The IRS wants to tax your illegal income*, CNNMONEY (Mar. 7, 2013, 12:47 PM), <https://money.cnn.com/2013/02/28/news/economy/illegal-income-tax/index.html> [<https://perma.cc/5RRA-FN9H>].

crime, and again for evading the taxes on their windfall.”³³ Consequently, ever since the genesis of federal income tax, taxpayers have invoked the Fifth Amendment to preclude them from incriminating themselves.³⁴

The Court’s approach to applying the Fifth Amendment to tax returns has significantly evolved. Interestingly, income tax is relatively new to the United States, having existed for just over a century.³⁵ Therefore, the law is still developing. This Part analyzes the evolution of the Court’s handling of Fifth Amendment tax return cases.

1. *United States v. Sullivan*

Even if a taxpayer has a valid claim of Fifth Amendment privilege, the taxpayer must still file a tax return.³⁶ Just eleven years after the government began requiring taxpayers to pay taxes on illegal income, a taxpayer claimed Fifth Amendment protection and did not file his tax return.³⁷ In *Sullivan*, the taxpayer earned income through illegal liquor trafficking; therefore, he had to report his earnings to the government.³⁸ Because he feared that reporting income through his illegal activity would incriminate him, he did not file a tax return.³⁹ Consequently, his refusal to complete his tax return made him subject to prosecution under the Revenue Act of 1921.⁴⁰ He contended, however, that if he submitted his tax return accurately, he would effectively be self-incriminating himself because his business was in violation of the National Prohibition Act.⁴¹ Justice Holmes, writing for a unanimous Court, held that the plea for Fifth Amendment protection “was pressed too far,” because while the taxpayer could have invoked a valid claim of Fifth Amendment privilege on his tax return, he could not simply refuse to file a return at all.⁴² Therefore, under *Sullivan*, a taxpayer can, in theory, successfully invoke the Fifth Amendment, but the taxpayer must do so on the tax return.⁴³

33. *Id.*

34. *See infra* Subsections 1-6.

35. In 1913, Congress ratified the Sixteenth Amendment which gave Congress the “power to lay and collect taxes on incomes.” U.S. CONST. amend. XVI.

36. *United States v. Sullivan*, 274 U.S. 259, 263 (1927).

37. *Id.* at 262-63.

38. *Id.* at 263.

39. *Id.* at 262.

40. *Id.*

41. *Id.* at 263.

42. *Id.*

43. *Id.*

2. *United States v. Kahriger*

Similar to tax returns, the requirement for an illegal gambler to register for an occupational tax was also the subject of Fifth Amendment litigation.⁴⁴ In 1951, Congress levied a tax on citizens who earned revenue from the illegal business of accepting wagers.⁴⁵ Congress also required taxpayers in the business of accepting wagers to register with the Collector of Internal Revenue.⁴⁶ In *Kahriger*, the taxpayer engaged in illegal gambling and was therefore required to register as an illegal gambler.⁴⁷ Nevertheless, the taxpayer refused, and the government brought charges against him.⁴⁸ In response, the taxpayer fought the charges, arguing that if he registered as a gambler, he would effectively be providing the basis for the government to obtain his conviction.⁴⁹

The Court found the occupational tax constitutional.⁵⁰ It reasoned that a taxpayer registering for the occupational tax as an illegal gambler does not indicate that the taxpayer had violated the law; instead, the taxpayer is merely completing a condition required to engage in the business.⁵¹ In other words, although registering for the occupational tax might indicate a clear intent to violate the law, it does not guarantee that the taxpayer would do so.⁵² Therefore, under *Kahriger*, the Fifth Amendment does not prohibit the government from requiring taxpayers to disclose what they *might* do; instead, the Fifth Amendment only prohibits the government from requiring taxpayers to disclose what they had done illegally in the past.⁵³

3. *Lewis v. United States*

The Court reaffirmed its holding in *Kahriger* only two years later in *Lewis v. United States*.⁵⁴ Writing for a divided Court, Justice Minton reaffirmed that requiring a gambler to register with the Collector of

44. *United States v. Kahriger*, 345 U.S. 22 (1953). Although the next few cases are about registering for an occupational tax, they are still applied when analyzing Fifth Amendment claims on tax returns. See, e.g., *Garner v. United States*, 424 U.S. 648, 659 n.13 (1976) (citing *Kahriger*, 345 U.S. 22 (1953)).

45. *Kahriger*, 345 U.S. at 23.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 24.

50. *Id.* at 32.

51. *Id.* at 32-33.

52. *Id.* at 32.

53. *Id.* at 32-33.

54. 348 U.S. 419 (1955).

Internal Revenue was not a violation of a taxpayer's freedom from self-incrimination.⁵⁵ In *Lewis v. United States*, the government convicted the taxpayer for engaging in illegal gambling without registering for the occupational tax.⁵⁶ The taxpayer faced the same dilemma as the taxpayer in *Kahriger*: if he registered for the occupational tax, it could lead to his conviction.⁵⁷ Consequently, he did not register for the tax, arguing that the occupational tax violated his freedom from self-incrimination.⁵⁸ Importantly, the taxpayer did not argue that the Fifth Amendment applied prospectively, but rather that the occupational tax was de facto retrospective.⁵⁹ In other words, to pay the occupational tax, the taxpayer would have already had to have made an illegal wager.⁶⁰ Nevertheless, the Court ultimately rejected the taxpayer's argument.⁶¹ It applied a strict reading of the text and concluded that, although unlikely, one could have never accepted a wager and still register for the occupational tax.⁶²

Justice Black took a more pragmatic approach in his dissent.⁶³ Justice Black gave an overview of what taxpayers would have to do to comply with the statute.⁶⁴ First, taxpayers would have to register with the Collector of Internal Revenue, revealing that they engaged in the business of wagering in violation of federal law.⁶⁵ Further, taxpayers would have to specify where they conducted their business and the names and addresses of those with whom they worked.⁶⁶ Therefore, those requirements, Justice Black argued, were sufficient to convict a taxpayer under federal anti-wagering laws and were therefore unconstitutional.⁶⁷

4. *Marchetti v. United States*

After a third challenge, the Court ultimately found the occupational tax unconstitutional.⁶⁸ Fifteen years after *Lewis*, the Court overruled

55. *Id.* at 422.

56. *Id.* at 420.

57. *See supra* note 44.

58. *Kahriger*, 345 U.S. at 421.

59. *Id.*

60. *Id.*

61. *Id.* at 422.

62. *Id.*

63. *Id.* at 424 (Black, J., dissenting).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 425.

68. *Marchetti v. United States*, 390 U.S. 39, 53 (1968).

both *Kahriger* and *Lewis* in *Marchetti v. United States*.⁶⁹ Like the taxpayers in *Kahriger* and *Lewis*, the taxpayer in *Marchetti* was convicted for refusing to comply with the occupational tax.⁷⁰ The Court found *Kahriger* and *Lewis* erroneous in two respects.⁷¹ First, the Court reasoned that registration would increase the likelihood that past or present wagering offenses would be discovered and prosecuted.⁷² Second, the Court rejected the presupposition in *Kahriger* and *Lewis* that the self-incrimination privilege is not applicable to prospective acts since there is no basis for such a “rigorous . . . constraint upon the constitutional privilege.”⁷³

The *Marchetti* Court applied a different analysis from its progeny to reach its conclusion.⁷⁴ First, the Court reexamined the standard for application of the self-incrimination privilege—that the taxpayer must be confronted by “‘real,’ and not merely trifling or imaginary, hazards of incrimination.”⁷⁵ Next, the Court found that the hazards of incrimination created by the occupational tax were neither trifling nor imaginary since taxpayers could reasonably fear that completing the registration would increase their likelihood of prosecution for future acts and would substantially aid in facilitating their convictions.⁷⁶ Therefore, the Court concluded that the standard does not permit “the rigid chronological distinction adopted in *Kahriger* and *Lewis*.”⁷⁷ Consequently, the Court overruled *Kahriger* and *Lewis*.

5. *Leary v. United States*

The Court’s decision in *Marchetti* proved beneficial for taxpayers. Just one year later in *Leary v. United States*, a taxpayer used *Marchetti* as a defense to avoid complying with a different occupational tax statute.⁷⁸ The statute in *Leary* subjected all persons engaging in business in the marijuana industry to an occupational tax, and taxpayer argued that, like registering for the occupational tax in *Marchetti*, the fear of self-incrimination in his case was “real and appreciable.”⁷⁹ The Court accepted the taxpayer’s argument, echoing *Marchetti* that the

69. *Id.* at 54.

70. *Id.* at 40-41.

71. *Id.* at 52.

72. *Id.*

73. *Id.* at 53.

74. *Id.*

75. *Id.* (quoting *Rogers v. United States*, 340 U.S. 367, 371 (1951)).

76. *Id.* at 54.

77. *Id.* at 53.

78. 395 U.S. 6 (1969).

79. *Id.* at 13, 14 (quoting *Marchetti*, 390 U.S. at 48).

taxpayer “had ample reason to fear that transmittal to [the government] of the fact that he was a recent, unregistered transferee of marihuana ‘surely provide a significant link in a chain of evidence tending to establish his guilt.’”⁸⁰

6. *United States v. Doe*

In the most recent Supreme Court case about Fifth Amendment protection of financial records, the Court made an important distinction about when revealed information is considered compelled.⁸¹ In *Doe*, the taxpayer was the owner of several sole proprietorships. In the 1980s, a grand jury issued five subpoenas for his financial records, including his tax returns, in the midst of an investigation of corruption in the awarding of county and municipal contracts.⁸²

The Court found that preparing business records is voluntary, and therefore, there was no compulsion.⁸³ After all, the subpoena did not require the taxpayer to affirm the accuracy of the records.⁸⁴ Nevertheless, the Court did acknowledge that while the substance of a tax record may not be protected, the act of producing it may be, explaining that, “[c]ompliance with [a] subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena.”⁸⁵ Therefore, the Court held that the act of production could have had substantial testimonial value and therefore remanded the case to the district court to consider whether the evidence should have been precluded.⁸⁶

Thus, the Court’s approach has evolved since *Sullivan*. Under the law today, a taxpayer can invoke Fifth Amendment protection when there is a reasonable apprehension that the information on the tax return could substantially aid the government in obtaining a conviction.

III. PRECOMPLIANCE REVIEW

A taxpayer’s decision to invoke the Fifth Amendment is not always

80. *Id.* at 16 (quoting *Marchetti*, 390 U.S. at 48).

81. *United States v. Doe*, 465 U.S. 605 (1984).

82. *Id.* at 606.

83. *Id.* at 610.

84. *Id.* at 612.

85. *Id.* at 613 (quoting *Curcio v. United States*, 354 U.S. 118, 125 (1957)).

86. *Id.* at 616-17.

straightforward. When taxpayers wish to claim Fifth Amendment protection, they must first decide whether claiming the privilege is worth the ramifications of an unsuccessful claim. This dilemma is unique to taxpayers because when a citizen wishes to invoke constitutional protection in other contexts, an opportunity exists that is not afforded to taxpayers: precompliance review. Precompliance review is an opportunity to have a neutral decisionmaker review the validity of an individual's claim before the individual would face penalties for noncompliance.⁸⁷ Under precompliance review, citizens who wish to invoke constitutional protection can have their claims tested in court before suffering the consequences of refusing to comply with the government if a court found that their claims were invalid.⁸⁸ Consequently, citizens who receive precompliance review do not need to risk the penalty of asserting an invalid claim of constitutional privilege.

This Section provides an overview of situations where citizens are afforded an opportunity for precompliance review and why the Court held that precompliance review was not constitutionally required for taxpayers. First, Part A explains how a witness in a judicial proceeding wishing to invoke Fifth Amendment protection is afforded precompliance review. Second, Part B explains how a citizen wishing to invoke Fourth Amendment protection is entitled to precompliance review. Next, Part C explains how taxpayers are afforded precompliance review from the IRS when they want to verify that they are complying with the Internal Revenue Code ("IRC"). Finally, Part D explains why the Court held that this opportunity was not constitutionally required for taxpayers who invoke the Fifth Amendment.

A. *Maness v. Meyers*

A witness contemplating a claim of privilege in a judicial proceeding has the opportunity for precompliance review.⁸⁹ In *Maness v. Meyers*, an attorney appealed a contempt ruling for advising a store owner to not comply with a subpoena that demanded the store owner to turn over illegal magazines.⁹⁰ After approval from his client, the attorney moved to quash the subpoena, arguing that the subpoena required his client to incriminate himself.⁹¹

87. *City of Los Angeles v. Patel*, 576 U.S. 409, 421 (2015).

88. *See generally Garner v. United States*, 424 U.S. 648, 663 (1976).

89. *Id.*

90. 419 U.S. 449, 450, 457 (1975).

91. *Id.* at 451.

The Court held that judicial witnesses are entitled to precompliance review.⁹² First, the Court affirmed the maxim that lawyers generally must encourage their clients to comply with court orders.⁹³ Nevertheless, the Court clarified that orders requiring witnesses to reveal information that could incriminate them are different, because if a witness complies with an incriminating order, the court cannot “unring the bell” after the information has been released.⁹⁴ Therefore, the Court reasoned that precompliance review is necessary to protect an individual from compulsion to produce evidence that could incriminate the individual.⁹⁵ Further, the Court explained that without precompliance review, the defendant would be compelled to surrender “the very protection which the privilege is designed to guarantee.”⁹⁶

B. City of Los Angeles v. Patel

Citizens who want to claim Fourth Amendment protection are also entitled to precompliance review.⁹⁷ In *Patel*, Los Angeles City Code required hotel operators to record information about their guests to help track criminals.⁹⁸ The City Code also required hotel operators to present their records to the police department upon an investigation.⁹⁹ In 2003, several hotel operators sued the City of Los Angeles challenging the constitutionality of the provisions under the Fourth Amendment.¹⁰⁰

Writing for a divided Court, Justice Sotomayor ruled the statute unconstitutional because it did not afford hotel operators an opportunity for precompliance review.¹⁰¹ The Court reasoned that before suffering the consequences for not complying with a search, citizens should be able to question the search’s reasonableness.¹⁰² Under the statute, a hotel owner who refused to allow a search could be arrested on the spot, and the Court concluded that the government could not reasonably subject citizens to that kind of choice—whether to invoke protection and risk prosecution for noncompliance or comply

92. *Id.* at 462.

93. *Id.* at 459-60.

94. *Id.* at 460.

95. *Id.* at 461.

96. *Id.* at 462 (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

97. *City of Los Angeles v. Patel*, 576 U.S. 409, 413 (2015).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 419.

102. *Id.* at 420 (quoting *Donovan v. Lone Steer*, 464 U.S. 408, 415 (1984)).

to what could be an unreasonable search.¹⁰³ Further, the Court explained that the statute created an “intolerable risk,” leading to targeted harassment and oppression of citizens.¹⁰⁴

C. Private Letter Rulings

Preliminary rulings are not foreign to the tax world. If a taxpayer wants guidance from the IRS about the tax consequences of a transaction, the taxpayer can request a private letter ruling (“PLR”). A PLR is “a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer’s represented set of facts.”¹⁰⁵

PLRs are different from judicial opinions, but they function similarly. First, PLRs do not come from the judiciary but rather from the executive branch. Nevertheless, the IRS’s role in a PLR is similar to that of a judge—apply the law to a unique set of facts. Second, PLRs are only applicable to the taxpayers who request them.¹⁰⁶ In other words, taxpayers can only rely on the PLRs that they individually request.¹⁰⁷ Therefore, even a taxpayer with identical facts could not rely on another taxpayer’s PLR, because the IRS is not bound by any prior PLR.¹⁰⁸ Nevertheless, a taxpayer could still use a PLR from another taxpayer as persuasive authority.¹⁰⁹ Further, in the interests of fairness, it is unlikely that the IRS would capriciously rule differently for taxpayers in different situations.

PLRs are well-regarded within the tax community. Tax scholars have lauded tax rulings due to their “broad impact on [the] national economy and on proper and reasonable tax administration.”¹¹⁰ Also, PLRs benefit taxpayers by guiding them to decisions that will ultimately avoid litigation with the IRS.¹¹¹ Not only do PLRs benefit the taxpayer, but they also benefit the IRS, because avoiding litigation is likewise beneficial to the IRS.¹¹² Further, PLRs elicit compliance by

103. *Id.* at 421.

104. *Id.*

105. *Tax Exempt Bonds Private Letter Rulings: Some Basic Concepts*, I.R.S., <https://bit.ly/31noOYL> [<https://perma.cc/S9AH-YH2U>] (last visited Nov. 30, 2020).

106. Stephanie Hunter McMahon, *Classifying Tax Guidance According to End Users*, 73 *TAX LAW* 245, 261 (2020).

107. *Id.*

108. *Id.* at 261-62,

109. *Id.* at 262.

110. Mitchell Rogovin & Donald L. Korb, *The Four R’s Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 *DUQ. L. REV.* 324, 344 (2008); *See also* Joshua D. Blank, *The Timing of Tax Transparency*, 90 *S. CAL. L. REV.* 449 (2017).

111. *Id.*

112. *Id.*

guiding taxpayers through complex issues.¹¹³

Overall, while PLRs are different from judicial rulings, PLRs serve the same purpose as precompliance review—to allow taxpayers test the legality of their tax decisions to mitigate prosecution for noncompliance with the IRC.

D. Precompliance Review of Fifth Amendment Claims on Tax Returns

Taxpayers who do not disclose all information that is required on a tax return violate 26 U.S.C. § 7203 (“Section 7203”). Section 7203 prohibits taxpayers from “willfully” failing to provide all applicable information on their tax returns.¹¹⁴ While taxpayers can prevail on valid Fifth Amendment claims, the government can prosecute taxpayers under Section 7203 who raise invalid claims.¹¹⁵ In other words, if a taxpayer’s apprehension of reporting the amount, nature, or source of illegally-earned income on a tax return was not “real and appreciable,” the government could prosecute the taxpayer under Section 7203.¹¹⁶

Despite the opportunities for precompliance review in other contexts, the government does not extend precompliance review to taxpayers who invoke the Fifth Amendment. In *Garner v. United States*, the government indicted Roy Garner for engaging in a gambling conspiracy.¹¹⁷ At trial, the government introduced supporting evidence from Garner’s tax returns where Garner labeled himself as a professional gambler.¹¹⁸ Garner argued, however, that the government could not use his tax return against him under the Fifth Amendment, but the district court rejected his argument, holding that by providing the information on his tax returns, Garner waived his Fifth Amendment rights.¹¹⁹ Consequently, the jury found Garner guilty.¹²⁰ In response, Garner appealed, contending that he could not

113. *Id.* at 374. (“The Service and the Office of Chief Counsel believe that a key to furthering compliance with the tax law is helping taxpayers to understand the law and to perceive that the [IRS] is fairly and uniformly administering the [IRC].”).

114. 26 U.S.C. § 7203 (2020). (“Any person required under this title to pay any estimated. . .who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty. . .”).

115. *Garner v. United States*, 424 U.S. 648, 662 (1976).

116. An individual does not have a valid Fifth Amendment claim if the apprehension is not “real and appreciable.” *See supra* pp. 3-4.

117. 424 U.S. at 649.

118. *Id.* at 649-50.

119. *Id.* at 657.

120. *Id.* at 650.

have waived Fifth Amendment protection since the government compelled him to provide the information and that, like a witness in a judicial proceeding, he should have been afforded precompliance review.¹²¹

The Court did not agree.¹²² Instead, it reasoned that taxpayers are not compelled to make the disclosures because taxpayers have a “free choice to admit, to deny, or refuse to answer” when filing their returns.¹²³ In other words, if Garner believed that the information provided on a tax return was incriminating, Garner could have invoked the Fifth Amendment on his tax return.¹²⁴ Accordingly, Garner was never actually compelled to disclose the information.¹²⁵ Therefore, since the government did not deny him an opportunity to refuse to answer, he was never compelled to disclose his illegal activity.¹²⁶

The Court further explained that Section 7203’s requirement for “willfulness” provided taxpayers with sufficient protection, even without precompliance review.¹²⁷ Importantly, the Court noted that the willfulness requirement effectively prohibited the government from prosecuting a taxpayer for making an invalid claim of privilege in good faith.¹²⁸ But the concurring justices disagreed.¹²⁹ Justice Marshall found that the willfulness requirement did not totally afford the protection that the Fifth Amendment provides.¹³⁰ Nevertheless, the majority reasoned that lack of precompliance review would not injure a taxpayer who made a good-faith claim of privilege, whether valid or invalid.¹³¹

Therefore, since taxpayers have an opportunity to raise the Fifth Amendment and not provide incriminating information, and Section 7203 broadens Fifth Amendment protection by requiring willfulness, the Court held that precompliance review is not constitutionally required for taxpayers who invoke the Fifth Amendment.¹³²

121. *Id.*

122. *Id.* at 656-65.

123. *Id.* at 657.

124. *Id.*

125. *Id.* at 665.

126. *Id.*

127. *Id.* at 663.

128. *Id.* at 663 n.18.

129. *Id.* at 667-68 (Marshall, J., concurring in judgment).

130. *Id.* (Marshall, J., concurring in judgment).

131. *Id.* at 663 n.18.

132. *Id.* at 665.

IV. DISCUSSION

The government should afford taxpayers the opportunity for precompliance review to allow taxpayers with illegally-earned income to test the validity of their Fifth Amendment claims. While implementing precompliance review might seem burdensome for the government, affording taxpayers precompliance review would not rework the Court's Fifth Amendment jurisprudence or dismantle the IRS's existing procedures. After all, the opportunity for precompliance review is afforded and recognized in many other legal spaces. Nevertheless, the government does not extend precompliance review to taxpayers, even though there is no compelling reason for such inconsistency. First, judicial witnesses are afforded the opportunity of precompliance review under the Fifth Amendment.¹³³ Second, precompliance review is not exclusive to the Fifth Amendment when combatting the potential of governmental overreach. The Court in *Patel* extended this opportunity for precompliance review to individuals questioning the reasonableness of a search and seizure under the Fourth Amendment.¹³⁴ Finally, the IRS already has its own system of quasi-precompliance review through PLRs. Overall, precompliance review is not new to modern criminal procedure, nor is it new to the tax world. Therefore, the government should offer precompliance review to taxpayers who invoke the Fifth Amendment on their tax returns.

This Section demonstrates three ways that the government can extend the opportunity for precompliance review to taxpayers. Importantly, the government can successfully afford taxpayers precompliance review by applying any one of the three proposals. First, Part A explains how the government could reconsider *Garner* and ultimately hold that taxpayers who earn gross income through illegal activity are compelled to incriminate themselves. Next, Part B demonstrates how the government could use recent Fourth Amendment precedent in *Patel* to conclude that taxpayers have a constitutional right to precompliance review. Finally, Part C demonstrates how the government could provide taxpayers an opportunity for precompliance review, even without judicial declaration.

133. *Id.* at 664.

134. *See* City of Los Angeles v. Patel, 576 U.S. 409, 419 (2015).

A. *Rethinking Compulsion*

A taxpayer does not have a free choice to refuse to provide information on a tax return just because the taxpayer may invoke the Fifth Amendment. The Court in *Garner* concluded that the taxpayer was not compelled to incriminate himself because he had a “free choice to admit, to deny, or refuse to answer.”¹³⁵ In other words, the taxpayer had the ability to refuse to answer by making a valid claim of privilege.¹³⁶ But this conclusion is drawn from a flawed assumption—that a taxpayer will always bring a valid claim.

Taxpayers must be extremely confident in their Fifth Amendment claims, whereas witnesses in judicial proceedings do not need to be. If a judicial witness invokes a Fifth Amendment protection claim, the court can test it, and if the court finds the claim invalid, the witness can reconsider it before facing penalties for noncompliance.¹³⁷ A taxpayer, on the other hand, is not afforded the same privilege; the taxpayer must make an informed guess about the strength of the claim and hope that a court agrees, because if a court holds that the taxpayer’s claim is invalid, the government can prosecute the taxpayer for tax evasion, without giving the taxpayer an opportunity to reconsider.¹³⁸

The risk required to invoke the Fifth Amendment contradicts *Garner*’s ruling that taxpayers have the freedom to refuse to answer. In *Garner*, the Court explained that compulsion exists where there is a factor that prevents a taxpayer from claiming the privilege.¹³⁹ Importantly, since a serious risk exists when invoking the Fifth Amendment on a tax return, a taxpayer could ultimately be better off by not invoking the Fifth Amendment and risking federal prosecution. In other words, the possibility of prosecution for tax evasion could be a factor that prevents a taxpayer from invoking the Fifth Amendment. A hypothetical is necessary to illustrate this.

Suppose Andrew, an Ohio citizen, wagered an online bet on a professional baseball game and won \$100. Andrew would then be required to report the \$100 on his tax return. Reporting the source of the income, however, would be evidence that Andrew violated state law forbidding online sports betting.¹⁴⁰ Andrew would likely prevail in court if he invoked Fifth Amendment protection on his tax return. Nevertheless, the ramifications would be severe if a court rejected his

135. *Garner*, 424 U.S. at 657 (quoting *Lisenba v. California*, 314 U.S. 219, 241 (1941)).

136. *Id.* at 663.

137. *Id.* at 664.

138. *Id.*

139. *Id.* at 654 n.9.

140. 29 O.R.C. § 2915.02 (2020).

claim of privilege, since the government could prosecute him under federal law for tax evasion. Generally, individuals have different levels of risk aversion, but it is safe to assume most reasonable people do not want to risk violating federal law, even if it meant being convicted for a state law misdemeanor. Therefore, suppose Andrew decided to not risk conviction for tax evasion and reported the earnings from his illegal bet. Under *Garner*'s definition of compulsion, Andrew was compelled, because here, a factor existed that kept Andrew from claiming the privilege.

The requirement for "willfulness" under Section 7203 is insufficient in affording taxpayers Fifth Amendment protection. The Court explained in *Garner* that the willfulness requirement does provide taxpayers some protection if a taxpayer's claim is invalid.¹⁴¹ Indeed, due to the willfulness element, a good faith claim, even if invalid, could entitle the taxpayer to acquittal.¹⁴² Nevertheless, even this broadened protection still falls short of adequately protecting taxpayers.¹⁴³ Importantly, even the concurring justices recognized that with the willfulness requirement, taxpayers still face a risk of criminal penalty when invoking the Fifth Amendment.¹⁴⁴ Therefore, the Court in *Garner* should have found the willfulness requirement insufficient and instead afforded taxpayers the opportunity for precompliance review.

The Court should overrule *Garner* and hold that taxpayers are compelled to disclose illegally-earned income. Not only did the Court underappreciate the risk that taxpayers entertain to invoke the Fifth Amendment, but the Court also overestimated the effect of Section 7203's requirement for willfulness. Therefore, the Court should overrule *Garner* and establish that the Fifth Amendment requires precompliance review for taxpayers.

B. The Intersectionality of the Fourth and Fifth Amendments

The relationship between the Fourth and Fifth Amendments has not

141. *Garner*, 424 U.S. at 663 n.18.

142. *Id.*

143. *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 533 (1967) ("Broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.")

144. *Garner*, 424 U.S. at 667-68 (Marshall, J., concurring in judgment) ("It is one thing to deny a good-faith defense to a witness who is given a prompt ruling on the validity of his claim of privilege and an opportunity to reconsider his refusal to testify before subjecting himself to possible punishment for contempt. It would be quite another to deny a good-faith defense to someone like petitioner, who may be denied a ruling on the validity of his claim of privilege until his criminal prosecution, when it is too late to reconsider.") (internal citations omitted).

gone unnoticed. In *Boyd v. United States*, the Court asserted that there is an “intimate relation” between the Fourth and Fifth Amendments.¹⁴⁵ Further, the Court explained that they “throw great light on each other” since the reason for prohibiting unlawful searches and seizures is to prevent the government from compelling citizens to release evidence that would incriminate themselves.¹⁴⁶ This view of the relationship between the Fourth Amendment and the Fifth Amendment has evolved, and in some respects, has been criticized.¹⁴⁷ Nevertheless, there still exists an acknowledged penumbra of the Fourth and Fifth Amendments—that the government cannot unreasonably retrieve information from its citizens.¹⁴⁸

The strikingly similar situations in *Patel* and *Garner* are evidence that the Fourth and Fifth Amendments cannot be seen as completely distinct. In *Patel*, the statute compelled hotel owners to turn over their records whenever requested by the government.¹⁴⁹ Similarly, Section 7203 compels taxpayers to file a tax return, which includes properly calculating gross income and reporting income earned through illegal activity.¹⁵⁰ Also, under the statute in *Patel*, a hotel owner who refused to comply with the search could be “arrested on the spot.”¹⁵¹ Similarly, a taxpayer who refuses to file a tax return can be prosecuted under Section 7203.¹⁵² However, not all searches, seizures, and required disclosures are constitutional; therefore, hotel owners may want to contest the reasonableness of a search from the *Patel* statute, and taxpayers may want to contest whether certain disclosures on their tax returns would incriminate them. Nevertheless, hotel owners would likely not prevail every time they contested a search. Therefore, hotel owners would have to weigh the likelihood of the Fourth Amendment claim against the severity of the prosecution for failing to comply. The Court in *Patel*, however, concluded that hotel owners could not “reasonably be put to this kind of choice,” and therefore,

145. *Boyd v. United States*, 116 U.S. 616, 633 (1886).

146. *Id.*

147. *United States v. Doe*, 465 U.S. 605, 618 (1984) (O’Connor, J., concurring). (“Several of *Boyd*’s express or implicit declarations [had] not stood the test of time.”)

148. See, e.g., Michael S. Pardo, *Disentangling the Fourth Amendment and the Self-Incrimination Clause*, 90 IOWA L. REV. 1857 (2005). This type of argument has been accepted by the Court. See, e.g., *Griswold v. Connecticut*, 318 U.S. 479, 486 (1965). In fact, the argument here takes fewer leaps than the argument in *Griswold*. Under *Griswold*, the Court held that the entire Bill of Rights had a penumbra of privacy, whereas this argument suggests simply that the two Amendments have the same goal. In other words, the argument that a penumbra exists in the Fourth and Fifth Amendment is significantly narrower than the argument that was accepted by the Court in *Griswold*.

149. *City of Los Angeles v. Patel*, 576 U.S. 409, 413 (2015).

150. *Garner*, 424 U.S. at 651; 26 U.S.C. § 7203 (2020).

151. *Patel*, 576 U.S. at 421.

152. *Garner*, 424 U.S. at 651; 26 U.S.C. § 7203 (2020).

precompliance review was necessary for the law to be constitutional.¹⁵³ Therefore, since the facts are nearly identical in *Patel* and *Garner*, the Court could apply the reasoning in *Patel* to hold that precompliance review is constitutionally required for taxpayers.

The *Garner* Court did not value the risk of invoking the Fifth Amendment, similar to how a high-risk gambler does not value the risk in making wagers. In other words, when a wild gambler considers a bet, all the gambler can think about is, “This bet is great, because if I win, I’ll be rich!” On the other hand, the *Patel* Court viewed the risk of invoking the Fifth Amendment as a risk-averse gambler would view a bet. Generally, a reasonable gambler recognizes the rewarding result of a winning bet, but also appreciates the inherent risk. Consequently, the *Patel* Court ruled that citizens should not have to flip a coin to see if their constitutional rights would prevail, when one side of the coin is prosecution under federal law. Nevertheless, the *Garner* Court essentially concluded that no risk existed, since the taxpayer *could* prevail after invoking Fifth Amendment privilege. Simply put, the *Patel* Court appreciated the inherent risk, and the *Garner* Court did not.

The reasoning of *Patel* should be used as a foundation for why courts should afford taxpayers precompliance review. While not precedent for Fifth Amendment cases, the Court could apply the reasoning in *Patel* to the next taxpayer who comes before the Court in *Garner*’s shoes. Using *Patel*, the Court would not have to expressly overrule *Garner*. However, applying the reasoning in *Patel* would likely make *Garner* no longer relevant because it would establish a new standard, which would make precompliance review constitutionally required, like *Patel* did for searches and seizures.

C. Precompliance Review From the IRS

Using PLRs as a means of precompliance review could allow taxpayers to have the same protection without requiring a change in the Court’s Fifth Amendment jurisprudence. The IRS does not have the power to say what is and what is not a valid exercise of privilege, but the IRS could assure taxpayers that it would not pursue litigation against them for invoking the Fifth Amendment. *Garner* explained that when a taxpayer claims the Fifth Amendment, the IRS is able to proceed in two ways: (1) the IRS can attempt to prosecute the taxpayer for tax evasion, or (2) the IRS can complete the tax returns

153. *Patel*, 576 U.S. at 421.

administratively without the incriminatory information.¹⁵⁴ But, under this proposal, the IRS would proceed in a third way: the IRS would advise taxpayers that it would or would not commence litigation against them. In other words, the IRS would either notify taxpayers that it does not consider their claims valid, in which case the taxpayers would have to file a return, or the IRS would notify taxpayers that it considers their claims valid, in which case the taxpayers would make an undisclosed tax payment and be relieved from filing a return.¹⁵⁵ Consequently, this solution would satisfy both the interests of the IRS and the interests of taxpayers; the approach would protect taxpayers from facing a risk when invoking the Fifth Amendment, and the approach would still enable the IRS to receive tax revenue.

A PLR is not the same as a judicial opinion, but a PLR could function similarly to a judicial opinion. Like a judicial opinion, taxpayers could rely on the validity of PLRs to determine whether their claims were valid. In other words, if the IRS determined that a taxpayer's Fifth Amendment claim was valid, the IRS could not "bait and switch" and commence litigation against the taxpayer for tax evasion since PLRs are binding on the IRS.¹⁵⁶ Indeed, the primary purpose of PLRs is to promote "sound tax administration" by providing clarity to taxpayers, benefitting both the taxpayer and the government.¹⁵⁷ Overall, PLRs would have the same practical effect for taxpayers as a judicial opinion. Therefore, the government could use PLRs to offer taxpayers precompliance review.

D. Implementation

Offering precompliance review would not impede the government from exercising its taxing power. Some might argue that affording taxpayers greater constitutional protection would hinder the government from collecting taxes. But that skepticism would be shortsighted. Importantly, filing a tax return is not necessary for the IRS to receive the tax payment; the act of filing a tax return and

154. *Garner*, 424 U.S. at 651. Under I.R.C. § 6020, if a taxpayer does not complete part of the return, the Secretary has the authority to "make such return from his own knowledge or from such information as he can obtain through testimony or otherwise."

155. See Stanley, *supra* note 6, at 558 (explaining that even taxpayers with valid claims would still have to submit a separate tax payment). But the government would have to amend these specific PLRs to not be made public via the Freedom of Information Act.

156. *Understanding IRS Guidance – A Brief Primer*, IRS, <https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer#:~:text=A%20PLR%20is%20issued%20in,other%20taxpayers%20or%20IRS%20personnel> [<https://perma.cc/Q5UT-CH7C>] (last visited Nov. 30, 2020).

157. 26 C.F.R. § 601.201 (2020).

submitting a tax payment are two separate acts.¹⁵⁸ Therefore, the government's taxing power would not be undermined by relieving a taxpayer from filing a tax return since the taxpayer could still pay the tax in an undisclosed payment.¹⁵⁹ Further, offering precompliance review would not invite frivolous claims. Either way the government implemented precompliance review, the opportunity would not guarantee a taxpayer victory, because a taxpayer's claim would still have to either survive judicial scrutiny or the IRS's judgment of the validity of a Fifth Amendment claim.¹⁶⁰ Also, accessing precompliance review would not be without cost since a taxpayer would have to undergo administrative fees to properly obtain review, such as attorney's fees and filing fees. Consequently, only taxpayers who truly believed that their contentions were valid would seek precompliance review.¹⁶¹

In sum, the government has a multitude of ways to implement precompliance review. To afford taxpayers precompliance review, the Court could overrule *Garner*; the Court could apply the reasoning in *Patel*; or the IRS or Congress could allow taxpayers to test their claims through a PLR. Importantly, implementing precompliance review for taxpayers seeking to invoke the Fifth Amendment would not require reinventing the wheel by any means. Minimally, it should be clear that precompliance review is available in many situations, and it makes sense to make it available to taxpayers in the same regard. This Article does not endorse a specific means of implementing precompliance review, although given its relevance, extending precompliance review from the reasoning in *Patel* would likely be the avenue that the Court would take. Nevertheless, the methods would likely not produce substantively different outcomes.

Administrative efficiency would be the biggest roadblock in implementing precompliance review. PLRs are great in theory, but they are very expensive for the IRS to issue.¹⁶² Therefore, the IRS has a very narrow scope of the kinds of requests for which it will issue PLRs.¹⁶³ Consequently, in 2018, the IRS only issued 802 PLRs.¹⁶⁴ Moreover, implementing judicial precompliance review could result in judicial backlog. Therefore, the government would need to be very strategic in implementing precompliance review for taxpayers.

158. Stanley, *supra* note 6, at 543.

159. *Id.*

160. *Id.* at 559.

161. *Id.*

162. McMahon, *supra* note 106.

163. *Id.*

164. *Id.* at 246.

Despite the administrative burden, precompliance review should still be explored. First, the cost of PLRs could be worth the benefit of more taxpayers complying with the IRS. PLRs benefit the IRS because they promote compliance; therefore, the government investing in expanding PLRs could result in even greater tax revenue for the IRS. Second, if precompliance review is understood as a constitutional right, administrative convenience should not be given as weighty of consideration. After all, when the Court in *Patel* established that precompliance review was a right, the Court did not inquire about the administrative burden of implementing precompliance review. Finally, the number of claims for precompliance review would not likely be overwhelming because the taxpayers who have both earned illegal income and believe that they have a valid claim of Fifth Amendment privilege are likely few and far between.¹⁶⁵ Therefore, even though the administrative burden might be high, the government would benefit by the gained revenue from taxpayers who would otherwise not comply with the IRS.

V. CONCLUSION

The government should offer taxpayers the opportunity for precompliance review. Because of the risk of prosecution for tax evasion under an invalid claim, taxpayers might choose not to invoke Fifth Amendment protection. Therefore, the Court should revisit *Garner* and hold that taxpayers are compelled to incriminate themselves like judicial witnesses and are thus entitled to precompliance review. Revisiting *Garner* is not the only avenue for the Court to afford taxpayers with precompliance review. In a recent Fourth Amendment case with similar facts as *Garner*, the Court held that precompliance review was constitutionally required. Since the Fourth and Fifth Amendments seek to accomplish the same goal, the Court could apply the reasoning in *Patel* to find precompliance review necessary under the Fifth Amendment. Taxpayers do not need to rely on the judicial branch for precompliance review. The IRS already has a system for preliminary rulings that could be extended to taxpayers. Therefore, by using PLRs, the IRS could allow taxpayers to obtain precompliance review. Further research should be devoted to determining the most efficient way to afford taxpayers precompliance review and what such implementation would look like.

The mere ability to claim the Fifth Amendment on a tax return is not sufficient constitutional protection. Underneath the fig leaf of an

165. Stanley, *supra* note 6, at 559.

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opportunity to invoke constitutional protection lies a very serious risk that taxpayers must undergo to invoke their privilege. Because of the risk, the government gets two bites of the apple. In other words, the government can either hope that the taxpayer is too risk averse to invoke the privilege, or the government can hope that when the taxpayer invokes the privilege, the government can prosecute the taxpayer for tax evasion. Therefore, taxpayers should be able to have an opportunity for precompliance review so that they do not face such a risk. Otherwise, the government will still be able to keep playing “Heads I win, Tails you lose.”