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Federal Statutes Governing Traffic in Marijuana -- The Grass is Still Greener on the Other Side

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FEDERAL STATUTES GOVERNING TRAFFIC IN MARIJUANA —THE GRASS IS STILL GREENER ON THE OTHER SIDE

Petitioner attempted to enter Mexico but was refused admittance at the Mexican end of the Laredo International Bridge. Upon his return to the United States he was arrested by American customs officials and charged with failure to comply with transfer tax provisions of the Federal Marijuana Tax Act,[1] and with facilitating the transportation and concealment of marijuana in violation of the Narcotic Drugs Import and Export Act.[2] Petitioner contended that the transfer tax provision was a violation of his privilege against self-incrimination and that he was denied due process of law by the statutory presumption which equated mere possession of marijuana with knowledge of its illegal importation. The United States District Court, Southern District of Texas, found the defendant guilty on both counts and the Fifth Circuit Court of Appeals, affirmed.[3] On certiorari to the Supreme Court of the United States, *held*, reversed: the transfer tax provisions of the Marijuana Tax Act subjected petitioner to a real and appreciable danger of prosecution under state statutes and was thus violative of Fifth Amendment protections. The presumed knowledge of illegal importation was an unconstitutional encroachment upon petitioner's Fourteenth Amendment right to due process, since there was no rational connection between the basic fact of possession and the presumed knowledge of illegal importation. *Leary v. United States*, 395 U.S. 6 (1969).

In previous cases dealing with the payment of the marijuana transfer tax, no violation of Fifth Amendment rights was found.[4] The Supreme Court's decision in *Marchetti v. United States*,[5] however, forced an opposite result. The defendant in *Marchetti* was convicted of wilful failure to pay the federal occupational tax on gambling.[6] The Supreme Court held that a plea of the Fifth Amendment was a complete defense and that

1. 26 U.S.C. §§ 4741-74 (1964).

2. 21 U.S.C. § 176(a) (1964).

3. 388 F.2d 851 (5th Cir. 1967), *petition for rehearing denied*, 392 F.2d 220 (5th Cir. 1968).

4. Some courts reasoned that if the marijuana, purchased in Mexico, had been invoiced at the border it would have been confiscated. Therefore, there would have been no illegal possession within the United States, and no self-incrimination. Rule v. United States, 362 F.2d 215 (5th Cir. 1966), *cert. denied*, 385 U.S. 1018 (1967); Arrizon v. United States, 224 F. Supp. 26 (S.D. Cal. 1963); Pickett v. United States, 223 F. Supp. 695 (S.D. Cal. 1963).

One court reasoned that the scheme to require persons to fill out marijuana transfer forms required no self incrimination because it referred only to future acts not yet criminal. Haili v. United States, 212 F. Supp. 656 (D. Hawaii 1962).

5. 390 U.S. 39 (1968). *Marchetti* was handed down with two other decisions: Grosso v. United States, 390 U.S. 62 (1968), and Haynes v. United States, 390 U.S. 85 (1968). *Grosso* held that the privilege against self-incrimination would be a defense to prosecution under 26 U.S.C. § 4401 (1964), which imposes an excise tax on wagers. *Haynes* held that the privilege would be a defense to a prosecution for possession of an unregistered weapon under § 5851 of the National Firearms Act, 26 U.S.C. §§ 5801-62 (1964).

6. 26 U.S.C. §§ 4411-12 (1964).

compliance with the statute would have subjected petitioner to a "real and appreciable" risk of self-incrimination.[7] In order for there to be such a risk, the Court held that the taxing legislation must have been "directed to a selective group inherently suspect of criminal activities" and that it must not have been imposed in "an essentially non-criminal and regulatory area."[8]

Possession of any quantity of marijuana is a crime in all fifty states.[9] Compliance with the federal tax requirements[10] would thus amount to at least an admission of the intent to commit a crime under state law, since the information on the order form is made available to state law enforcement officials.[11]

According to its terms, then, the Marijuana Tax Act compels a transferee to expose himself to a "real and appreciable risk of self-incrimination," as in the *Marchetti* case. This is true even when the Act is read with supporting regulations which ostensibly provide that no person will be permitted to register as a "dealer"[12] unless his activities give him the legal right to do so,[13] and that no one may obtain an order form unless so registered.[14] The reason the Court allowed this apparent anomaly is that the wording of the statute indicates that Congress *intended* for non-registrants to be able to obtain order forms and pay the tax.[15] Thus the act

7. Marchetti v. United States, 390 U.S. 39, 48 (1968).

8. *Id.* at 57.

9. All states except California, Massachusetts and Pennsylvania have enacted the Uniform Narcotic Drug Act or some slight variation thereof. The prohibitory language of that Act makes it "unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug . . . [defined to include marijuana]." UNIFORM NARCOTIC DRUG ACT § 2.

While California, Massachusetts and Pennsylvania have not adopted the Uniform Act, they have adopted provisions substantially similar in effect. CAL. HEALTH AND SAFETY CODE § 11530 (Deering 1964); PA. STAT. ANN. tit. 35 § 708-04 (1964); MASS. GEN. LAWS ANN. ch. 94, § 198 (1958).

10. 26 U.S.C. § 4742 (a) (1964) makes it unlawful for any person to transfer marijuana except pursuant to a written order form obtained by the transferee.

26 U.S.C. § 4744 (a) (1964) makes it unlawful for any person who is a transferee required to pay the transfer tax imposed by § 4741 to acquire, transport, conceal, or facilitate the transportation or concealment of any marijuana without having paid such tax.

Only a few types of transfers are exempted from the tax. They include: transfer from a registered physician or from a dealer pursuant to a written prescription; exportation in accordance with the regulations of the country to which the marijuana is to be exported; transfers to federal and state officials making purchases for the Department of Defense, the Public Health Service or certain hospitals or prisons; transfers of seeds to any person registered under § 4753; and transfers from persons registered under § 4753 to a registered miller.

11. 26 U.S.C. § 4773 (1964) assures that the information contained in the order form will be available to state narcotics officials upon payment of a nominal fee.

12. 26 U.S.C. § 4751 (1964) provides that all persons who "deal in" marijuana shall be subject to an annual occupational tax.

13. 26 C.F.R. §§ 152.22- .23 (1964) provide that an applicant must show he is entitled to registration under 26 U.S.C. § 4751 (1964).

14. 26 C.F.R. § 152.67 (1964) provides that an application for order forms under § 4742 must be signed by the same person who signed the application for registration or by a person duly authorized by the registrant.

15. 26 U.S.C. § 4741 (1964) provides for a transfer tax of $100 per ounce to *non-regis-*

does not qualify as being "essentially non-criminal and regulatory" in nature.

Since those who may legally possess marijuana are virtually certain either to be registered or exempt from registration, the class of possessors both unregistered and obliged to obtain an order form constitutes a "select group inherently suspect of criminal activities."[16]

With both criteria set forth by *Marchetti* apparently satisfied, the Court found itself unable to redeem the transfer tax provisions of the Marijuana Tax Act as constitutional. There are indications however, that if the element of "select group" was missing, or if the tax was imposed in an essentially non-criminal and regulatory area, the result would be quite different.

In *United States v. Minor*,[17] the defendant raised the privilege against self-incrimination as a defense to prosecution for selling narcotic drugs without the mandatory order form which is required by 26 United States Code section 4705(a) (1964). In affirming the defendant's conviction, the court concluded that section 4705(a) was not directed primarily at those inherently suspect of criminal activities, and that the provisions of section 4705(a) were primarily regulatory in nature (*i.e.* non-criminal).[18]

It would thus appear that where the element of "select group" was absent or the legislation was essentially non-criminal and regulatory, the court would be compelled to find no danger of self-incrimination. We turn now to the question of whether the statutory presumption contained in 21 United States Code section 176(a) (1964) is a denial of due process of law.[19]

Prior to its decision in *Tot v. United States*, [20] the Supreme Court set forth a number of different standards against which to measure such presumptions.[21] The defendant in *Tot* was convicted of a violation of the

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trants. Section 4742 makes it unlawful for an person, *whether or not required to pay a special tax and register*, to transfer marijuana except pursuant to written order forms.

16. Marchetti v. United States, 390 U.S. 39, 57 (1968).

17. 398 F.2d 511 (2d Cir. 1968).

18. *Id.* at 516.

19. Insofar as is here relevant, 21 U.S.C. § 176(a) (1964) imposes criminal punishment upon every person who:

> knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law . . . or receives, conceals, buys, sells, or in any manner facilitates that 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 . . . .

A subsequent paragraph establishes the presumption now under scrutiny:

> 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* . . . . (Emphasis added.)

20. 319 U.S. 463 (1943).

21. One test was whether there was a "rational connection" between the basic fact and the presumed fact. Western and Atlantic R.R. v. Henderson, 279 U.S. 639 (1929); McFarland v. American Sugar Ref. Co., 241 U.S. 79 (1916); Mobile J. & K.C. R.R. v. Turnipseed, 219 U.S. 35 (1910). A second test was whether the legislature might have made it a

Federal Firearms Act,[22] which made it unlawful for one previously convicted of a violent crime to receive a firearm shipped in interstate commerce. The presumption contained in section 902(f) of the Act, and found unconstitutional in *Tot*, provides that:

> 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, as the case may be, by such person in violation of this Act.[23]

In deciding *Tot*, the Court put an apparent end to the "choice of alternative" test. The "rational connection" test[24] was established as controlling, with the "comparative convenience" test[25] as its corollary. This rule has been followed in the two subsequent cases in which the issue was presented.[26]

The upshot of *Tot* and its successors is:

> that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. [*I.e.* the fact of knowledge of illegal importation must flow from the fact of possession.][27]

The Court in the instant case therefore concluded that it could not uphold the presumption of petitioner's knowledge of illegal importation of marijuana without making "serious incisions" on the teaching of *Tot* and its progeny.[28]

This writer believes the Court was correct in its determination.[29]

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crime to do the thing from which the presumption authorized an inference. Ferry v. Ramsey, 277 U.S. 88 (1928). A third test involved the "comparative convenience" of adducing evidence of the presumed fact (*i.e.* whether it would be more convenient for the defendant or for the prosecution to adduce such evidence). Morrison v. California, 291 U.S. 82 (1934). *Cf.* Rossi v. United States, 289 U.S. 89 (1933); Yee Hem v. United States, 268 U.S. 178 (1925).

22. 15 U.S.C. §§ 901-09 (1964).

23. 15 U.S.C. § 902(f) (1964).

24. Note 21 *supra.*

25. Note 21 *supra.*

26. United States v. Gainey, 380 U.S. 63 (1965); United States v. Romano, 382 U.S. 136 (1965).

27. Leary v. United States, 395 U.S. 6, — (1969).

28. *Id.* at —.

29. An examination of the lower court decisions regarding the constitutionality of the presumption does not suggest the contrary. Although all courts of appeal which have ruled on the question have sustained the presumption, there is no indication that in any of the cases the court had before it even a fraction of the evidence regarding knowledge of illegal importation which the Supreme Court considered in the instant case. Caudillo v. United States, 253 F.2d 513 (9th Cir. 1958); Costello v. United States, 324 F.2d 260 (9th Cir. 1963); United States v. Soto, 256 F.2d 729 (7th Cir. 1958); Born v. United States, 332 F.2d 565 (5th Cir. 1964); United States v. Gibson, 310 F.2d 79 (2d Cir. 1962).

The only lower court which conducted an extensive factual inquiry into the validity of the presumption also held it unconstitutional. United States v. Adams, 293 F. Supp. 776 (S.D.N.Y. 1968).

Insistence upon the rational connection criteria provides the accused some protection against the temptation of prosecutors to initiate litigation based on insufficient evidence, using the presumption as a crutch. It also assures that Congress will not abrogate the accused's right to a jury trial by dictating to the judge and jury what evidence is sufficient for conviction, without sufficient factual basis for such determination. In the words of Mr. Justice Black:

> Congress has no more constitutional power to tell a jury it can convict upon any such forced and baseless inference then it has power to tell juries they can convict a defendant of a crime without any evidence at all from which an inference of guilt could be drawn.[30]

The impact of the principal case on the question of statutory presumptions will be relatively slight, since *Leary* is merely further re-affirmation of the *Tot* doctrine. However, the impact on the question of narcotics transfer taxes as an infringement of the right against self incrimination remains to be seen.

In *United States v. Minor*,[31] the Second Circuit indicated that the self-incrimination privilege was not available as a defense to prosecution under section 4705(a) of the Narcotics Tax Act[32] on the theory that the tax was not directed at an inherently suspect group, and was essentially regulatory in nature. This decision appears to give Congress an easy way of avoiding the entire issue of self-incrimination presented by *Leary*, by merely including marijuana as a narcotic under the Narcotics Tax Act.

This writer subscribes to Mr. Justice Stewart's philosophy on the matter of the privilege against self-incrimination; that "the fifth amendment guarantee against compulsory self incrimination was originally intended to do no more than confer a testimonial privilege in a judicial proceeding."[33] However, until some future date when, and if, the Court decides to re-evaluate its decisions in this area, the weight of precedent soundly supports the decision in the principal case.

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30. Leary v. United States, 395 U.S. 6, — (1969) (concurring opinion).

31. 398 F.2d 511 (2d Cir. 1968).

32. 26 U.S.C. §§ 4701-24 (1964) makes it illegal to possess narcotic drugs unless the possessor has registered and paid the prescribed tax, or is exempt from such registration (§ 4724 c).

33. Leary v. United States, 395 U.S. 6, — (1969) (concurring opinion).