INTRODUCTION

The tax protestor of today cannot be characterized by reference to any discernable set of attributes. One perhaps envisions the tax protestor as an uneducated member of society, or perhaps one envisions the protestor as a young American who is expressing his displeasure with the political system. However, the fact is, today's tax protestors are persons in almost every occupation, profession, and segment of the economy. Dentists, police officers, pilots, public accountants, lawyers, and businessmen are all representative of the typical tax protestor of today. It is difficult, if not impossible, to classify the protestor in a categorical manner. But one thing is certain, his numbers are growing.

An Internal Revenue Service News Release generated by the Omaha District office cites statistics which indicate the growth of the protest movement. According to the Internal Revenue Service, the total number of taxpayers filing illegal protest returns increased from 7,661 in 1978 to 53,628 in 1982. This represents an astounding 700% increase in four years. There were great increases in protestors who propounded constitutional theories against taxation, formed their own "tax exempt" churches, filed

1. Edwards v. Commissioner, 680 F.2d 1268 (9th Cir. 1982) (owner of an automobile repair business); United States v. Neff, 615 F.2d 1235 (9th Cir. 1980) (police officer); United States v. Hoopes, 545 F.2d 721 (10th Cir. 1976) (dentist); United States v. Jordan, 508 F.2d 750 (7th Cir. 1975) (owner of small service company); United States v. MacLeod, 436 F.2d 947 (8th Cir. 1971) (lawyer).
3. Id.
4. Id. The more common arguments centered around the fourth amendment, U.S. Const. amend. IV (illegal search and seizure), the fifth amendment, U.S. Const. amend. V (prohibits forced self-incrimination), and the sixteenth amendment, U.S. Const. amend. XVI (power to lay and collect income taxes without apportionment).
5. Id. See also text at notes 24-30 infra (example of a salesman of "tax exempt" church schemes).
false withholding forms,\(^6\) and created "Family Estate Trusts."\(^7\) Other commonly advocated tax protest strategies involved challenging the authority of the Internal Revenue Code, claiming that wages are not income, and disputing the legal existence of the Federal Reserve System.\(^8\)

Some protestors feel so strongly about the taxation issue that they have initiated organized groups to educate other citizens on how to avoid paying income taxes. One such group is the National Tax Strike Association (NTSA) which operates out of the Denver area.\(^9\) NTSA claims a mailing list of over 2,000 members;\(^10\) however, the Internal Revenue Service estimates that there are only about 300 active tax strikers in Colorado.\(^11\) Another group, known as the Constitutional Party, operates in the Omaha, Nebraska, area.\(^12\) It was founded in 1975\(^13\) and claims a more reasonable active membership of 150 persons.\(^14\) The Constitutional Party's objective is to enhance public awareness of political issues and it accomplishes this through dissemination of literature on taxation, education of the public through tax seminars, and the sponsorship of candidates for political office.\(^15\)

Some organizations claim to hold a genuine belief that the present tax laws afford citizens the legal opportunity to oppose taxes.\(^16\) These organizations contend that the United States Constitution does not allow the government to lay and collect taxes.\(^17\) They argue that there would need to be another constitutional amendment to properly delegate this authority to the govern-

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\(^6\) Id. See also United States v. Carlson, 617 F.2d 518 (9th Cir. 1980) (example of a taxpayer who had previously filed a false withholding form).

\(^7\) Id. See also text at notes 20-23 infra (example of a family trust).

\(^8\) See generally United States v. Whitesel, 543 F.2d 1176 (6th Cir. 1976) (attack against federal reserve and monetary systems); United States v. Porth, 426 F.2d 519 (10th Cir. 1970) (all Internal Revenue taxing statutes are unconstitutional).


\(^10\) Id.

\(^11\) Id., Apr. 9, 1978, at 18, col. 1 (an Internal Revenue Service answer to the article cited at note 9 supra).

\(^12\) Brief for appellant at 12, United States v. Holecek, No. 83-2455 (8th Cir. filed Oct. 20, 1983).

\(^13\) Id. at 12.

\(^14\) Id. at 7.

\(^15\) See id. at 13.

\(^16\) Id. at 5.

\(^17\) Id.; I.R.S. Versus Ethics (Mar. 3, 1982) (This handbill is on file at the Creighton Law Review Office. It was distributed by the Constitutional Party to the general public in Omaha, Nebraska. The handbill states that the taxing power falls within Article I and the Internal Revenue Service is part and parcel of the Executive Branch).
ment.\textsuperscript{18} Other groups and individuals, though, can be said to possess ulterior motives in persuading their fellow citizens to adopt a chosen course of tax protestation.\textsuperscript{19} For example, James Walsh, the founder of Educational Scientific Publishers, has been described by the \textit{Wall Street Journal} as an "aging con man."\textsuperscript{20} Walsh devised the "family trust" tax scheme under which a wage earner could supposedly transfer his income to a trust and then appoint himself trustee.\textsuperscript{21} Walsh assured those who listened that they would only be taxed on the money they received directly from the trust each year.\textsuperscript{22} In a three-year period, Walsh alone took in nearly $5 million through sales of his tax avoidance scheme.\textsuperscript{23}

Another person who has profited from the tax protest movement is William Drexler, a former attorney\textsuperscript{24} and founder of the Life Science Church.\textsuperscript{25} Drexler publicized himself as the Archbishop of the Life Science Church and, along with his son, induced fellow taxpayers to purchase "how to" church packets.\textsuperscript{26} Drexler stated that the Life Science Church was recognized by the Internal Revenue Service as being tax exempt.\textsuperscript{27} In fact, the church was not tax exempt. The purchasing taxpayers became "ministers" and according to Drexler avoided the payment of federal income taxes by taking a vow of poverty and by assigning all their income to their church.\textsuperscript{28} The church packets sold for $1,000 to $4,000 each.\textsuperscript{29} The Service estimates that for the years 1978 and 1979 Drexler and his son earned in excess of $365,000.\textsuperscript{30} Other well-

\begin{itemize}
\item \textsuperscript{18} See \textit{id.} (an amendment would need to give the Internal Revenue service the power to tax in order to raise revenue).
\item \textsuperscript{19} See notes 21-32 and accompanying text \textit{infra}.
\item \textsuperscript{20} \textit{Wall St. J.}, June 8, 1981, at 30, col. 3.
\item \textsuperscript{21} \textit{id.}
\item \textsuperscript{22} \textit{id.}
\item \textsuperscript{23} \textit{id.}
\item \textsuperscript{24} See \textit{United States v. Hoopes}, 545 F.2d 721 (10th Cir. 1976) (Hoopes consulted William Drexler regarding a method of avoiding taxes after attending a lecture on the subject given by Drexler).
\item \textsuperscript{25} Internal Revenue Service News Release, at 1 (Nov. 25, 1981) (This news release is on file at the Creighton Law Review office. It concerns William Drexler's conviction for federal income tax violations).
\item \textsuperscript{26} These church packets contained information on how to form a Life Science Church such that income to the church would not be subject to tax liability.
\item \textsuperscript{27} Internal Revenue Service Release, \textit{supra} note 25, at 1.
\item \textsuperscript{28} \textit{id.} at 1-2. A church recognized by the Service is tax exempt, therefore, no income taxes are paid on the assigned income. I.R.C. \textsection{} 501 (1982).
\item \textsuperscript{29} Internal Revenue Service Release, \textit{supra} note 25, at 2.
\item \textsuperscript{30} \textit{id.} The Internal Revenue Service Release also mentioned that the Drexlers published a newsletter, the Patriot News, which contained a section titled "Enemy of the Month" which listed identities of Internal Revenue Service agents, their home addresses, telephone numbers, make of car, and license numbers. \textit{id.} at 3.
\end{itemize}
known protestors such as Jerome Daly and Irwin Schiff tour the lecture circuit speaking on tax avoidance to paying audiences and promoting the sale of "how to" books which they have authored.

While it is fair to say that not all vociferous tax protestors profit at the expense of an unsophisticated public, it would be naive not to recognize that many taxpayers are swayed into becoming tax protestors by individuals who will profit greatly from the cause. These individuals, however, do not follow their own advice, i.e. they are filing legitimate tax returns. The Internal Revenue Service cannot disclose confidential information about these leaders of the tax protest movement publicly. Therefore, it is limited in its use of what would be an effective tool—the contradiction of false information with the truth.

Congress has, however, given the Service other means by which to discipline tax protestors in order to deter citizens from following the tax protestors' example. Under the power of a civil summons the Internal Revenue Service can command a taxpayer to appear and produce income-related information which has been previously undisclosed. The civil summons would seem to be an effective deterrence tool as other taxpayers who become aware of the Service's ability to formally summon a reticent taxpayer are less likely to withhold income information themselves.

A summons is also normally cost effective as it allows the Service to contact a taxpayer to obtain compliance before the judicial branch is asked to intervene. However, a taxpayer can bring suit directly and move the dispute into the judicial arena, thereby circumventing the Internal Revenue Service's efforts. If the taxpayer fails to appear before the Service, or appears but refuses to give the information sought, the Internal Revenue Service can ask

31. See United States v. Daly, 481 F.2d 28, 29 (8th Cir. 1973); Daly v. United States, 393 F.2d 873, 875 (8th Cir. 1968).
32. Hoopes, 545 F.2d at 722-23.
33. See Brief for Appellant at 6, United States v. Holecek ("The Appellant did not profit from his activities; he generally charged $5.00 for the preparation of each return").
34. Interview with Edward J. Daemon, Public Affairs Officer of the Internal Revenue Service, Omaha District Office in Omaha, Nebraska (Jan. 5, 1984).
35. Id.
36. I.R.C. § 7602 (1982) (power to summon a taxpayer); id. § 7203 (ability to prosecute for willful failure to file); id. § 7205 (ability to prosecute for supplying of false information).
38. Id.
39. See Russell v. United States, 524 F.2d 1152 (8th Cir. 1975) (taxpayer challenged the Internal Revenue Service summons).
the court to judicially enforce its summons.\textsuperscript{40} Taxpayers frequently assert the fifth amendment\textsuperscript{41} as justification for their non-disclosure in response to the Internal Revenue Service’s summons.\textsuperscript{42} This use of the fifth amendment privilege has generally been disallowed by the courts; however, there is dicta in some cases indicating that the claim would be valid.\textsuperscript{43}

The Service can also prosecute the taxpayer for a willful failure to file a return\textsuperscript{44} or for the supplying of false information.\textsuperscript{45} In this context, the use of the fifth amendment as a justification or defense requires careful analysis by the court as disclosure by the taxpayer could result in a criminal prosecution.\textsuperscript{46} The Supreme Court has held that the fifth amendment privilege does not justify a taxpayer’s outright refusal to file a return.\textsuperscript{47} However, the Supreme Court has also held, in the narrow situation where the taxpayer is being prosecuted for a willful failure to file, that a fifth amendment privilege is an absolute defense if it is asserted in good faith as such an assertion negates the required element of willfulness.\textsuperscript{48} This holding was narrow\textsuperscript{49} and as a result the fifth amendment is not a valid defense if it is used solely to justify a tax law violation.\textsuperscript{50}

Implicit in the Supreme Court’s holding that the privilege does not justify an outright refusal to file a return is the notion that the fifth amendment is not violated by the requirement that citizens file a yearly income tax return.\textsuperscript{51} Other statutory reporting re-

\textsuperscript{40} See Daly v. United States, 393 F.2d 873, 875-76 (8th Cir. 1968) (the Service requested enforcement of its administrative summons).

\textsuperscript{41} U.S. Const. amend. V. The fifth amendment of the United States Constitution states in pertinent part that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”

\textsuperscript{42} See United States v. Silkman, 543 F.2d 1218, 1219-20 (8th Cir. 1976) (assertion of fifth amendment to justify refusal to disclose income tax information); Daly, 393 F.2d 873, 875 (8th Cir. 1968) (refusal to comply with court order enforcing an Internal Revenue Service summons).

\textsuperscript{43} Silkman, 543 F.2d at 1219-20 (the court discussed other cases that found it permissible to refuse to disclose the source of income on fifth amendment grounds if there was a real, not remote or speculative, danger of self-incrimination).

\textsuperscript{44} I.R.C. § 7203 (1982).

\textsuperscript{45} Id. § 7205.

\textsuperscript{46} See notes 72-75 and accompanying text infra.


\textsuperscript{49} See notes 135-137 and accompanying text infra.

\textsuperscript{50} United States v. Carlson, 617 F.2d 518, 523 (9th Cir. 1980). Hence, the “good faith” requirement of Garner is difficult to meet in a tax law violation setting. The Carlson court used a balancing process to determine whether the public’s interest or the individual’s interest should prevail in this situation. Id.; See notes 147-153 and accompanying text infra.

\textsuperscript{51} See text at note 86 infra.
quirements have, however, been found to violate the privilege but these reporting schemes were "directed at a highly selective group inherently suspect of criminal activities . . . in an area permeated with criminal statutes." Therefore, there must be something peculiarly incriminating about the circumstances to justify a taxpayer's reliance on the Fifth Amendment.

The focus of this comment will be the use of fifth amendment challenges by tax protestors to justify or defend their actions. This comment will begin with the background of the fifth amendment challenge to consider the foundation which has been laid. A substantive standard with definite policy considerations has gradually evolved and the decisions that were instrumental in this evolution will be analyzed in turn. While the Court of Appeals for the Eighth Circuit played a major role in this evolution, decisions of the Supreme Court, the Fifth Circuit, and the Ninth Circuit are also important and will also be given due consideration.

This comment will then analyze the most recent Eighth circuit tax protestors case, Ueckert v. Commissioner. Woven into the discussion of the court's decision in Ueckert will be an analysis of the holdings of five additional current term cases dealing with the fifth amendment issue. Finally, a brief consideration of future fifth amendment challenges will be presented.

BACKGROUND

United States v. Sullivan

United States v. Sullivan, heard by the Supreme Court in 1927, was one of the first cases to deal with the fifth amendment privilege against self-incrimination in the area of federal taxation. The taxpayer in Sullivan refused to file a return claiming that as his income was earned by illegal means he was not required to pay taxes on it. He further contended that present disclosure of the source of the income on a return could incriminate him.

The Court disposed of the taxpayer's first contention that ille-
gal income was not taxable by turning to congressional intent.\(^{57}\) Congress had recently changed the revenue laws to define taxable income as gains, profits or income from any source whatsoever.\(^{58}\) This change omitted the word “lawful” which had been included in the predecessor clause.\(^{59}\) The Court stated that Congress intended to tax all income, legal or illegal, and held that the taxpayer was required to report his illegal gains.\(^{60}\)

The taxpayer’s second contention, that disclosure of the source of the income on a return would violate his fifth amendment privilege against self-incrimination, posed a weightier problem for the Court. The Court observed that as the defendant’s income was taxable, the income tax statutes required the filing of a return.\(^{61}\) They held that it strained the protection of the fifth amendment too far to allow a taxpayer to use this constitutional privilege to refuse to obey an income tax statute.\(^{62}\) The Court stated that a taxpayer could not assert a fifth amendment privilege to justify a total failure to file a return.\(^{63}\)

The Supreme Court in *Sullivan* thus articulated a narrow standard for a valid fifth amendment defense in the tax protestor area. After stating that a taxpayer could not refuse to disclose income solely because it was received through illegal transactions, the Court delineated a requirement that the taxpayer file a return and claim the fifth amendment privilege to each individual incriminating question.\(^{64}\)

Justice Holmes, in writing the opinion, stated that a taxpayer could not draw a “conjurer’s circle” around the whole matter by simply declaring he would be incriminated by the filing of a return.\(^{65}\) This “conjurer’s circle” analogy was later to become the

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\(^{57}\) *See id.* at 263.

\(^{58}\) *Id.* The Supreme Court refers to I.R.C. § 213(a) as the statute for this authority. However, in the 1954 Code the pertinent section is I.R.C. § 61(a).

\(^{59}\) *Id.* The Court stated, “We see no reason to doubt [our] interpretation of the Act, or any reason why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay.” *Id.*

\(^{60}\) *Id.*

\(^{61}\) *Id.*

\(^{62}\) *Id.*

\(^{63}\) *Id.* The Court did not address the issue of the applicability of the fifth amendment if the taxpayer filed a return claiming the privilege to every incriminating question.

\(^{64}\) *Id.* “If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all.” *Id.*

\(^{65}\) *Id.* at 284. This is the most oft-cited quote from the *Sullivan* case: “He could not draw a conjurer’s circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law.” *Id.*
true significance of *Sullivan* despite the Court's limitation of the fifth amendment privilege. In one sense, *Sullivan* said that the Fifth Amendment could be a valid defense if a return were filed and each incriminating question were individually objected to.\(^6\)

In another sense, however, *Sullivan* gave indications that the judicial system would weigh the individual's interest in protecting himself from incrimination against the public's interest in raising revenue through taxation. Subsequent courts have acknowledged Justice Holme's analogy as a policy to protect the government's constitutional power to tax from the individual's assertion of a fifth amendment right.\(^6\)

This construction of a policy through interpretation of the Supreme Court's language in *Sullivan* has propelled the *Sullivan* decision to a higher level of significance than the case warranted at the time it was decided.\(^6\) The substantive requirement delineated in *Sullivan* became only one of the basic requirements that evolved through Court decisions in this area.\(^6\) These substantive requirements, though, did not adequately address every situation presented to the courts.\(^7\) The policy of balancing competing interests implicit in *Sullivan* became the deciding factor in fifth amendment based taxation cases.\(^7\)

*Daly v. United States*

In the *Sullivan* case, the taxpayer had asserted the fifth amendment as justification for his failure to file a tax return.\(^7\) He contended that disclosure of the source of his income would incriminate him for participation in illegal activities.\(^7\) Tax protestors have also claimed the fifth amendment in situations where they have not filed returns for prior years.\(^7\) They contended that present disclosure would reveal their prior failure to file which was a violation of criminal law.\(^7\) A more subtle argument has been made by other protestors who filed returns containing only mini-

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\(^6\) See note 64 and accompanying text supra.

\(^7\) United States v. Carlson, 617 F.2d 518, 521 (9th Cir. 1980) (explicit balancing of the individual's interest and the public need); California v. Byers, 402 U.S. 424, 427 (1971).

\(^8\) At the time of decision, the case delineated a single requirement and this requirement, not being met, decided the case. The policy considerations were only a minor portion of the court's holding.

\(^9\) See text at note 64 supra.

\(^10\) See Carlson, 617 F.2d at 520-21.

\(^11\) See id. at 520-22.

\(^12\) See *Sullivan*, 274 U.S. at 263.

\(^13\) See id.


\(^15\) Id.
mal identifying information. The Internal Revenue Service has the authority to pursue these tax protestors either through the use of a civil summons or by a criminal conviction for failure to file a proper tax return. Although the assertion of a fifth amendment privilege is valid only when an individual is faced with criminal prosecution, tax protestors will usually also assert a fifth amendment privilege if the Internal Revenue Service utilizes a civil summons. The argument seems to be that present disclosure of income information would be an admission of past failure to supply the requested information and this admission could subject the taxpayer to criminal prosecution.

The Eighth Circuit Court of Appeals had occasion to address such a situation when Jerome Daly was held in contempt by a Minnesota District Court for failure to produce income information. Daly refused to comply with an Internal Revenue Service summons requesting information for the taxable year 1965. Daly was an avowed tax protestors who, for the year in question, filed a return containing only his name and occupation along with a statement titled “Exhibit A” which set forth Daly's constitutional objections to the income tax laws.

The court began by analyzing Daly's situation and his relation to the requirement delineated in Sullivan. Even though Daly's use of a blanket fifth amendment assertion on his return was not enough to meet the level of specificity required in Sullivan, the Eighth Circuit held that Daly's specific fifth amendment assertion at a subsequent interrogation by the Internal Revenue Service was enough to satisfy the Sullivan requirement. As Sullivan also

76. See, e.g., Edwards v. Commissioner, 680 F.2d 1268, 1269 (9th Cir. 1982) (taxpayer filed a "protest type" return claiming the fifth amendment on most relevant lines); United States v. Johnson, 577 F.2d 1304, 1307 (5th Cir. 1978) (the 1040 form disclosed only the taxpayer's name, address and other basic identifying information); Daly v. United States, 393 F.2d 873, 875 (8th Cir. 1968) (the tax return disclosed only the taxpayer's name and occupation—an attachment to the return asserted a fifth amendment privilege).

77. See notes 37-45 and accompanying text supra.

78. See note 41 supra.

79. See, e.g., McCoy v. Commissioner, 696 F.2d 1234, 1235-36 (9th Cir. 1982) (asserted fifth amendment at a hearing for an order compelling compliance); United States v. Jones, 533 F.2d 225, 226 (8th Cir. 1976) (appeared pursuant to a summons and asserted the fifth amendment); Daly v. United States, 393 F.2d 873, 874-75 (8th Cir. 1968) (refused to comply with order enforcing a summons by claiming the fifth amendment protected him).

80. Daly, 393 F.2d at 878.

81. Id. at 874-75.

82. Id. at 875 (Daly's listed occupation was attorney and farmer).

83. Id. at 877-78.

84. See note 64 and accompanying text supra.

85. Daly, 393 F.2d at 878.
held that a taxpayer could not use the fifth amendment to justify his failure to file a return, it necessarily followed that the requirement that citizens file a yearly income tax return did not violate the fifth amendment. It is clear that there would need to be something peculiarly incriminating about the taxpayer's circumstances to justify his reliance on the fifth amendment.

As to what constitutes a peculiarly incriminating circumstance, the Eighth Circuit delineated the requirement that the taxpayer be faced with a real and substantial, as opposed to a trifling or imaginary, threat of incrimination. However, the court did not specifically indicate what a real and substantial danger would be. They deemed the lower court capable of making this determination and remanded the case. The Eighth Circuit Court of Appeals did, however, give the lower court some guidance in reaching this decision. They stated that "it must be 'evident from the implications of the question, in the setting in which it [was] asked, that a responsive answer to the question ... might be dangerous because injurious disclosure could result.' Thus, the lower court is to determine whether disclosure would be injurious to the taxpayer.

While this may have been somewhat helpful to the lower court, it does not clarify what a real and substantial danger is. The guidance offered is vague in that the injury to the taxpayer may not be considered real and substantial by one court, yet could very well be considered so by another.

86. See note 63 supra.
87. Daly, 393 F.2d at 878.
88. See id.
89. Id. The court felt that in a situation where imprisonment may be the ultimate consequence to the taxpayer, where the taxpayer did not defiantly refuse to comply with the government's summons, and where the lower court did not set forth specific reasons for its ruling, the case should be remanded to the lower court for a plenary hearing. Id.
90. Id.
91. If the trial court decides that no threat of self-incrimination exists, it becomes incumbent upon the defendant to show that answering the questions might incriminate him. If the defendant does not do this, he cannot prevail on a fifth amendment claim as he will not meet the requirement that he be faced with a real and substantial danger of self-incrimination. Carlson, 617 F.2d at 520.
92. See id. As an example, consider the use of refunds generated by the filing of a return to cover the taxpayer's arrearages in child support. I.R.C. § 6305 (1982); Treas. Reg. § 301.6305-1, T.D. 7808 (1982). The taxpayer's refund would be rerouted without his permission to those to whom he has an obligation to support. Id. at § 6305(4)(iii). The taxpayer's return is no longer a sacred confidential disclosure to the government. See, e.g., Garner v. United States, 424 U.S. 648, 649 (1976) (government introduced taxpayer's return to prove that the taxpayer was a professional gambler; this was the profession the taxpayer has listed as his occupation). The disclosed information may also be routed to another federal or state entity who
The Eighth Circuit in the Daly opinion offers no concrete guidance as to the application of this clear and substantial danger requirement, but only formalizes the nature of the self-incrimination which would be necessary to a valid fifth amendment privilege. Daly, then, adds to the requirement of specific objections on a return, as stated in Sullivan, the further stipulation that the objections be based on a real and substantial danger of self-incrimination. The Daly opinion also acknowledges Sullivan's policy considerations as it illustrates a judicial policy of frustrating the use of the fifth amendment by tax protestors to avoid federal income taxes.

Daly again challenged the revenue laws for the taxable years 1967 and 1968 by filing a “return” similar to the one he had filed in 1965. On the return blanks Daly furnished his name, address, and signature. He again referenced to an attached “Exhibit A” which reiterated his objections to the income tax laws and also repeated his assertion of a fifth amendment privilege. Daly again had not met the basic requirements which had been set forth as necessary prerequisites in his first case and the Eighth Circuit Court of Appeals ruled against him on those grounds. The court, however, proceeded to discuss the policy considerations inherent in a tax protestor type of action. The court stated that “since the government has a substantial interest in its tax revenues, appellant’s privilege would relate only to his refusal to respond to the

could use the information as a basis for criminal prosecution of the taxpayer. Id. This certainly seems to support the taxpayer’s fear of incrimination. However, it is conceivable that one court would find this a justifiable danger of self-incrimination while another would not. It may also be argued that this injurious disclosure is used only in a civil context and, hence, is not substantial enough. However, it must be remembered that the distance to a criminal conviction depends on the particular jurisdiction. In some areas, non-support in itself is a criminal offense.

93. See Daly, 393 F.2d at 878.
94. Id.
95. See id. At one point in the opinion the court refers to “the present taxpayer’s false concepts of the [fifth amendment] privilege.” Id. at 878. The court clearly does not favor the assertion of a fifth amendment privilege by one whose intent is to challenge the validity of the government’s taxing power.
96. Daly, 481 F.2d at 29-30. The word “return” is encapsulated in quotations because the court ultimately decided that an income tax blank containing limited information such as that given by Daly was not a return within the meaning of the Internal Revenue Code. See also United States v. Porth, 426 F.2d 519, 523 (10th Cir.1970); 10 J. Mertens, The Law of Federal Income Taxation § 55.22 (Supp. 1976).
97. Daly, 481 F.2d at 29.
98. Id.
99. Id. at 30.
100. Id.
question, not to a total failure to file the return.”

Later in the opinion the court stated that “[t]he public need for requiring voluntary disclosures of income transcends any personal right to thwart national objectives by allowing an undisclosed self-determination of possible incrimination.” Thus, the policy consideration implied in Sullivan of balancing the individual’s interest with the public interest had been formally stated as a factor that the judicial body was concerned with, although not yet a guiding requirement.

**United States v. Johnson**

The Fifth Circuit Court of Appeals had occasion to consider the fifth amendment issue and its relation to tax protestors when Donald Johnson appealed a tax conviction. Johnson, utilizing the now typical modus operandi, submitted a tax form containing only his name, address, and other minimal identifying information. Since Johnson had derived income from illegal activities, it was his contention that the fifth amendment protected him from prosecution for failure to file an income tax return. He argued that disclosure on the return would have exposed him to criminal prosecution. Johnson also attached to his return a document explaining the legal theories upon which he challenged the federal tax system. In addition, seemingly confident of the success of his challenge and in deference to the government, Johnson also attached a check for $200 as a donation to the treasury.

The Fifth Circuit after express notation of the above facts undertook a systematic evaluation of the law in this area. The Johnson case is important as it analyzes prior law in the fifth amendment area and summarizes three guiding principles that constitute a common thread in these decisions. Johnson is an excellent illustration of the manner in which a court of appeals at-

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101. *Id.* (quoting from United States v. Egan, 429 F.2d 997, 998 (2d Cir. 1972)).
102. *Id.* (quoting from Heligman v. United States, 407 F.2d 448, 452 (8th Cir. 1969)).
104. *Id.* at 1307.
105. *Id.* at 1310.
106. *Id.*
107. *Id.* at 1307.
108. *Id.* The Internal Revenue Service returned the form to Johnson and explained that it was not a proper return because it did not contain sufficient financial information. The $200 “donation” was credited to a suspense account to await determination of Johnson’s tax liability. *Id.*
109. *Id.* at 1310-11 (this portion of the opinion, pages 1310-11, is especially valuable for research purposes as it cites many fifth amendment cases).
110. *Johnson*, 577 F.2d at 1311.
tempts to maintain consistency in judicial holdings. In *Garner v. United States* the Supreme Court held that a good faith assertion of a fifth amendment privilege is a valid defense to prosecution for willfully failing to file a return. The *Johnson* court had to reconcile this decision with the Supreme Court decision in *United States v. Sullivan* which stated that a fifth amendment privilege does not justify a taxpayer's outright refusal to file a return.

In its analysis of prior decisions in this area, the Fifth Circuit summarized three requirements which seemed to permeate the prior opinions. These three requirements were that: (1) the fifth amendment privilege must be asserted as a specific response to a particular question as a blanket refusal to respond negates the privilege; (2) a judicial officer is to determine whether the requested information is incriminating; and (3) the taxpayer himself is not the final arbiter. The Fifth Circuit did not, however, recognize the requirement delineated in the *Daly* case that the danger of self-incrimination must be real and substantial. It may be implied from the language of the second and third requirements that the court intended a judicial officer to find the information incriminating only when a real and substantial danger would inure to the taxpayer through release of the requested information. Explicitly acknowledging the real and substantial danger requirement could have provided the court with one more factor to justify their ultimate decision that Johnson could not prevail. However, the fact that Johnson received illegal income could not constitute a real and substantial danger of self-incrimination as *Sullivan* had previously held that the amount of illegal income must be disclosed although its source could be kept confidential. While recognition of this requirement was not necessary to the decision in the *Johnson* case, its absence is noteworthy as the court offered a

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112. Id. at 663.
114. Id. at 263.
115. *Johnson*, 577 F.2d at 1311.
116. Id. The court does not appear to recognize that the third principle is unnecessary. If a judicial officer is to determine the effect of a disclosure on the return, it seems reasonable to conclude that the taxpayer, or for that matter any other person, cannot.
117. See id.
118. See id. That this is a hidden premise is suggested by the explicit inclusion of the third principle. A taxpayer cannot make his own determination as his subjectivity will lead him to believe, or at least to declare, that he is in real and substantial danger of incrimination.
summary of guiding principles gathered from prior cases.\textsuperscript{120} Even delineating these requirements though was not a direct aid to the court when it was faced with what appeared to be contradictory holdings from the Supreme Court.

Johnson, relying on the Supreme Court's holding in \textit{Garner}, contended that he was automatically and completely insulated from prosecution for failure to file a return as he had asserted the fifth amendment privilege in good faith.\textsuperscript{121} The Fifth Circuit held that the ruling in \textit{Garner} did not overrule the principle in the \textit{Sullivan} case.\textsuperscript{122} They reasoned that \textit{Garner} required a good faith assertion before the fifth amendment could be a valid defense to prosecution for failure to file a return.\textsuperscript{123} After considering the judicial response to analogous situations in other circuits, the court stated that "[t]he courts which have considered the issue have agreed that filing a 'protest return' of the type filed . . . by Johnson cannot be justified solely under the Fifth Amendment."\textsuperscript{124} The Fifth Circuit seemed to say that a tax protestor can never meet the good faith element of the \textit{Garner} holding. Yet to hold that a tax protestor can never assert a fifth amendment claim in good faith requires a court to overlook the stated reason for the protestor's assertion of a fifth amendment privilege.

This would seem to be in defiance of the Supreme Court's holding in \textit{Garner} that a good faith assertion of a fifth amendment privilege is a valid defense to prosecution.\textsuperscript{125} The \textit{Johnson} court ultimately held that \textit{Sullivan} stands for the proposition that a fifth amendment privilege cannot justify a taxpayer's refusal to file a return,\textsuperscript{126} that \textit{Garner} carves out an exception to this proposition where the privilege is asserted in good faith,\textsuperscript{127} but that a tax protestor can never assert a good faith fifth amendment privilege.\textsuperscript{128} The court could have achieved the same result, i.e. denying Johnson the ability to utilize the fifth amendment in this narrow situation, without using such complicated reasoning. That is, the court could have acknowledged that its decision was based on a balancing of Johnson's interest with that of the government's, and could have analyzed the \textit{Garner} and \textit{Sullivan} decisions in relation to this balancing process. To reason that a tax protestor can never

\textsuperscript{120} \textit{Johnson}, 577 F.2d at 1311.
\textsuperscript{121} \textit{Id.} at 1310.
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.} at 1310-11.
\textsuperscript{124} \textit{Id.} at 1311.
\textsuperscript{125} \textit{Garner}, 424 U.S. at 663.
\textsuperscript{126} \textit{Johnson}, 577 F.2d at 1310.
\textsuperscript{127} \textit{Id.} at 1310-11.
\textsuperscript{128} \textit{Id.}
assert a good faith fifth amendment claim only serves to delay deciding the issue.

The Ninth Circuit, however, in the case of United States v. Carlson, rejected the Johnson court's method of reconciling prior opinions on the basis of generalities by explicitly utilizing the balancing considerations the Fifth Circuit had so gingerly avoided.

United States v. Carlson

The Ninth Circuit was the first circuit court to face the ultimate issue and to decide a protest case solely on the policy grounds of Sullivan and Daly. Carlson, as part of a tax protest movement, utilized a tax evasion scheme of claiming ninety-nine withholding exemptions on the W-4 form that was filed with his employer. The trial court had earlier found that Carlson's "activities and...methods of submitting his return were those of a tax protestors only" and decided that, as such, he had no reasonable ground for asserting a Fifth Amendment privilege.

The Ninth Circuit proceeded, as had previous courts when faced with protestor challenges, by analyzing the groundwork that had been laid to discern some guidance from prior opinions. The court was aware of the seemingly contradictory opinions of Garner and Sullivan and its first step was to reconcile those two opinions by distinguishing the Garner holding. This was accomplished by limiting Garner to its facts and emphasizing language in the opinion which supported their view that the holding was intended to be very narrow. The Garner case was important in that it held that a Fifth Amendment privilege asserted in good faith was a valid defense to prosecution for willful failure to file a return. However, the fifth amendment had been asserted in the case as protection from disclosure that would have incriminated the taxpayer for a non-tax criminal violation. In contrast, Carl-

129. 617 F.2d 518 (9th Cir. 1980).
130. See id. at 521.
131. Id.
132. Id.
133. Id. at 519. The trial court's analysis in this respect is similar to the analysis in the Johnson case. Johnson, 577 F.2d at 1304.
134. Carlson, 617 F.2d at 520.
135. Id.
136. Id. The Carlson court employed language from a footnote in Garner, 424 U.S. at 650 n.3, to illustrate the intended narrowness of the Garner holding. They found Garner narrowed to "only those [claims of privilege] justified by a fear of self-incrimination other than under the tax laws." Id.
138. Id. at 649.
son was asserting the fifth amendment as protection from incrimination for a separate tax violation. This dichotomy between tax and non-tax violations became central to the court's reasoning in Carlson.

The court viewed Carlson's assertion that the fifth amendment was valid protection from incrimination for a tax violation as a question of first impression. From that premise, it considered decisions in prior cases where the Fifth Amendment was asserted to avoid self-incrimination for non-tax law violations. It found three factors necessary to consider in such situations: (1) whether the privilege was asserted in response to specific questions on a return, (2) whether there was a real and appreciable danger of self-incrimination, and (3) whether the trial judge could find the requested disclosure potentially incriminating.

The Ninth Circuit reasoned that even though this dichotomy was present, the assertion of the fifth amendment to shield incrimination from tax law violations should, at a minimum, be analyzed in the same manner as the assertion in non-tax law violation cases. In the present case the court determined that Carlson had satisfied these basic requirements as, first, he had asserted the fifth amendment on his return as specifically as he could; second, he was under a real and substantial danger of incrimination under a separate tax law; and third, a trial judge could find his disclosure incriminating as to that law. After reaching these conclusions the court had set the stage for the final determination. That determination centered on the policy considerations that were present in the Sullivan and Daly cases.

The court noted the presence of two competing interests in this situation: the individual's privilege against self-incrimination and the public need and governmental interest in the collection of revenue. The Ninth Circuit found that although Carlson sought protection against self-incrimination, he did so only as part of an

139. Carlson, 617 F.2d at 520.
140. See id. at 520-23.
141. Id. at 520. The court stated: "No case has been cited to us, and we have found none in other circuits that has dealt directly with this question left open by Garner." Id.
142. Id. Sullivan and Johnson are examples where the taxpayer contended he would suffer self-incrimination for a past non-tax law violation.
143. Id.
144. See id.
145. Id. "Thus, it appears that Carlson satisfies those indicia of validity previously considered by us in cases where the privilege has been asserted to avoid self-incrimination other than under the tax laws." Id.
146. See notes 67, 100-102 and accompanying text supra.
147. Carlson, 617 F.2d at 520-21.
overall plan to evade taxes. The court observed that the effect of allowing Carlson the protection of the fifth amendment would be to undermine the entire system of personal income tax collection. The key to the plan Carlson presented was the use of the fifth amendment to protect him from incrimination for his past tax law violation—the filing of a false withholding certificate. On the other hand, the court stated that "[t]he federal government's power to raise revenue is its lifeblood." It observed that the public need for income tax collection is very great. Forcing the government to determine the tax liabilities of its citizens in another manner would be unduly burdensome. They concluded, therefore, that the public need and the governmental interest must prevail over this use of the Fifth Amendment.

Summary of the Standard

The policy of balancing competing interests implicit in the cases previously discussed has come to the forefront as the deciding factor in fifth amendment based taxation cases. Sullivan was one of the first cases to set a substantive requirement—that the taxpayer file a return and claim the fifth amendment privilege to each individual incriminating question. Sullivan also alluded to the policy considerations which were later expounded in Carlson. The Daly opinion becomes important as it states the requirement that a claimant of the fifth amendment privilege must face a real and substantial danger of incrimination. Daly also requires the court to be the final arbiter of the incriminatory nature of the requested disclosure. The Johnson opinion is equally important for its summary of three guiding principles that constitute a common thread in these prior decisions. Although the Johnson opinion pointed to the remaining obstacles in this development, such as the need for reconciliation of the Supreme Court's holding in the Garner and Sullivan opinions, its analysis fell short

148. Id. at 522. The court stated that Carlson attempted to take advantage of the protective capacity of the Fifth Amendment to avoid the payment of income taxes. Id.
149. Id. at 520.
150. Id.
151. Id. at 523.
152. Id.
153. Id.
154. Id. at 522-23.
155. See note 64 and accompanying text supra.
156. Id.
157. See notes 87-94 and accompanying text supra.
158. Daly, 393 F.2d at 878.
159. See notes 115-16 and accompanying text supra.
of removing these obstacles. Only in Carlson was the development completed, as the Ninth Circuit recognized that the substantive requirements were not enough to decide which of two competing interest should prevail—the individual’s or the government’s. The final step in this development was to balance these interests and, as Carlson illustrates, the government will prevail.

**The Current Response of the Eighth Circuit Court of Appeals**

The Eighth Circuit, in deciding the current taxation cases asserting a fifth amendment privilege, dealt with the substantive requirements delineated in the development of the overall standard. Although the Eighth Circuit never had occasion to apply the policy analysis of Carlson, its application of the substantive requirements is worthy of analysis.

Six of the twenty-four tax related cases decided by the Eighth Circuit Court of Appeals in the 1983 term dealt with taxpayers who claimed a Fifth Amendment right against self-incrimination either as justification for their nondisclosure or as a defense to prosecution. Perhaps the most comprehensive and important of these, in the sense that it discusses three of the four substantive requirements the Eighth Circuit has set forth, is Ueckert v. Commissioner. Ueckert followed the time-honored tradition of tax protestors by filing a 1040 form containing only his name, address and signature. On each pertinent line of the form he wrote “object” and on the back of the form explained that the notation “object” was his assertion of a fifth amendment privilege. The Internal Revenue Service rejected these forms and mailed Ueckert a notice of deficiency. Ueckert disagreed with the Internal Revenue Service’s actions and subsequently brought suit in the Tax Court seeking a redetermination of the deficiency. The Tax

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160. See notes 121-28 and accompanying text supra.
161. See notes 141-53 and accompanying text supra.
162. Carlson, 617 F.2d at 523.
163. These cases were: See Ueckert v. Commissioner, 721 F.2d 248, 249 (8th Cir. 1983); Lukovsky v. Commissioner, 692 F.2d 527, 528 (8th Cir. 1983); Rechtzigel v. Commissioner, 703 F.2d 1063, 1063 (8th Cir. 1983); United States v. Drefke, 707 F.2d 978, 982-83 (8th Cir. 1983); United States v. Dick, 694 F.2d 952, 954 (8th Cir. 1983); United States v. Carr Enters., Inc. v. United States, 698 F.2d 952, 954 (8th Cir. 1983).
164. 721 F.2d 248 (8th Cir. 1983).
165. Id.
166. Id. at 249.
167. Id. (The I.R.S. calculated that the plaintiff owed a total of $11,082.09 in additional taxes).
168. Id.
Court considered Ueckert's suit frivolous because Ueckert was not the target of any pending or threatened prosecution, nor had he shown that the original determinations made by the Internal Revenue Service were erroneous.\textsuperscript{169} Ueckert then appealed to the Eighth Circuit.\textsuperscript{170}

The Eighth Circuit's analysis of the case followed a form it had gradually developed through its determination of fifth amendment arguments in other tax cases.\textsuperscript{171} This form essentially follows the format of Johnson and consists of an outline of applicable substantive requirements.\textsuperscript{172} The specifics of the case before the bench are then analyzed in relation to these requirements.\textsuperscript{173} In Ueckert the court laid out three principles: (1) a taxpayer cannot rely on a blanket fifth amendment claim to refuse to disclose information or to file a proper return; (2) the danger of self-incrimination must be real and substantial, not speculative or remote; and (3) the court is the final arbiter of whether the information sought would pose a real danger of incrimination.\textsuperscript{174} The discussion below will separately examine each of the requirements.

Recent cases decided by the Eighth Circuit offer another view of the principles addressed and present a measure of comparison. A fourth principle, which was not delineated in Ueckert as it was inapplicable to the decision, will also be discussed.

\textit{A Taxpayer Cannot Rely on a Blanket Fifth Amendment Claim}

As authority for the principle that a taxpayer cannot rely on a general Fifth Amendment claim to refuse to disclose information or to file a proper return, the court cites the case of United States v. Sullivan.\textsuperscript{175} As addressed earlier in this comment, Sullivan is the pertinent authority for this proposition and unmistakably sets this standard.\textsuperscript{176} As Ueckert did not provide any relevant information pertaining to his income, it appears that the court deemed his reluctance to provide such information a blanket refusal, even

\begin{itemize}
\item \textsuperscript{169} \textit{Id.} at 250.
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{See id.} (The adherence to this form is evident from the current term cases. There is no deviation from this basic structure in any of these opinions).
\item \textsuperscript{172} \textit{See notes} 115-16 \textit{and accompanying text supra.}
\item \textsuperscript{173} \textit{See note} 163 \textit{supra.}
\item \textsuperscript{174} \textit{Ueckert,} 721 F.2d at 250. The court also stated that the burden of proving a real and substantial danger rests with the claimant of the fifth amendment privilege. As this closely ties to the second requirement that the danger be real and substantial and with the third requirement that the court is to decide the substantiability of the danger, it is not addressed as a separate requirement. \textit{Id.}
\item \textsuperscript{175} \textit{Id.} The court, however, does recognize in footnote 2 of the opinion that a claim of the fifth amendment privilege may be valid to a specific question. \textit{Id.}
\item \textsuperscript{176} \textit{See notes} 63-64 \textit{and accompanying text supra.}
\end{itemize}
though he had inserted the word "object" on the relevant lines of his return.\textsuperscript{177} In \textit{United States v. Drefke}\textsuperscript{178} this principle was addressed and the court simply stated that an individual may not refuse to disclose information regarding his income if his only support for so doing is the fifth amendment.\textsuperscript{179}

The Eighth Circuit in \textit{Drefke} failed to explain why the assertion of a fifth amendment privilege could not justify a refusal to disclose information.\textsuperscript{180} It can be deduced from the court's references to \textit{Sullivan} that a blanket refusal is unsatisfactory and cannot meet the requirement that specific objections to each incriminating question be made on the return.\textsuperscript{181} While Ueckert went further by writing "object" on certain lines of his return, the net effect was the same, i.e. nondisclosure of financial information.\textsuperscript{182} Thus the court has been consistent in its adherence to the \textit{Sullivan} requirement and consistent in its application of this standard.\textsuperscript{183}

While the finding that Ueckert had not met the \textit{Sullivan} requirement was enough to dispose of the case, the Eighth Circuit continued through a logical analysis in the remainder of its opinion.\textsuperscript{184} It is apparent from the number of cases heard in the recent term alone that tax protestors are not convinced that the fifth amendment issue has been satisfactorily decided.

\textbf{A Real and Substantial Danger of Self-Incrimination Must Exist}

The Eighth Circuit's second stated requirement is that the danger of self-incrimination must be real and substantial.\textsuperscript{185} Closely related to this requirement is the requirement that the burden of proving such a substantial danger lies with the taxpayer purporting to invoke the privilege.\textsuperscript{186} The Eighth Circuit curtly stated that Ueckert had not met his burden and the court, therefore, declined to find a substantial danger of self-incrimination.\textsuperscript{187} In analyzing the court's opinions on this requirement it becomes

\textsuperscript{177} See id.
\textsuperscript{178} 707 F.2d 978 (8th Cir. 1983).
\textsuperscript{179} Id. at 982-83.
\textsuperscript{180} See id.
\textsuperscript{181} See id.; \textit{Sullivan}, 274 U.S. at 263-64.
\textsuperscript{182} \textit{Ueckert}, 721 F.2d at 249.
\textsuperscript{183} Id. at 248 (citing \textit{Sullivan}, 274 U.S. at 263); \textit{Drefke}, 707 F.2d at 983 (citing \textit{Sullivan}, 279 U.S. at 263); \textit{Rechtzigel}, 703 F.2d at 1069 (taxpayer required to make specific fifth amendment objections); \textit{Silkman}, 543 F.2d at 1219-20 (taxpayer cannot refuse to disclose any information at all).
\textsuperscript{184} \textit{Ueckert}, 721 F.2d at 249-51.
\textsuperscript{185} Id. at 250.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
evident that, even though the Eighth Circuit purports to rely on established precedent, the court is modifying this requirement in its application to the particular case at hand. The filing of annual income tax returns by citizens does not, of itself, violate their privilege against self-incrimination.\textsuperscript{188} This conclusion is implicit in the Supreme Court ruling that taxpayers cannot rely on the fifth amendment to justify a complete failure to file.\textsuperscript{189} For a valid claim of a fifth amendment privilege, the taxpayer must be faced with a substantial hazard of self-incrimination and he must have "reasonable cause to apprehend [such] danger from a direct answer."\textsuperscript{190} It also seems equitable to require the taxpayer to show that disclosure would incriminate him when there is no apparent danger of this result or the circumstances appear innocuous.\textsuperscript{191} In this respect the Eighth Circuit's holding in \textit{Ueckert} is in line with prior precedent.\textsuperscript{192}

In other respects though, the Eighth Circuit seems to apply a different standard than prior precedent. In \textit{Hoffman v. United States}\textsuperscript{193} the Supreme Court held that a witness is not "required to prove the [danger] in the sense in which a claim is usually required to be established in court, [for] he would be compelled to surrender the very protection which the privilege is designed to guarantee."\textsuperscript{194} The Eighth Circuit noted that \textit{Ueckert} had been informed by the Commissioner that there was no pending or threatened criminal prosecution against him.\textsuperscript{195} Thus, it seemed to apply a new twist to the requirement of a real and substantial danger, namely, that the taxpayer must be facing a threat of prosecution.\textsuperscript{196} While the Supreme Court has held that a taxpayer need not prove beyond doubt the danger of self-incrimination,\textsuperscript{197} the Eighth Circuit implicitly holds anything less as only a generalized fear on the part of the taxpayer.\textsuperscript{198}

This criticism is buttressed by the Eighth Circuit's holding in \textit{United States v. Silkman}.\textsuperscript{199} In that case the government's counsel stated there would be no criminal prosecution if the taxpayer pro-

\textsuperscript{188} See note 86 and accompanying text \textit{supra}. \\
\textsuperscript{189} \textit{Sullivan}, 274 U.S. at 263-64. \\
\textsuperscript{190} \textit{Hoffman v. United States}, 341 U.S. 479, 486 (1951). \\
\textsuperscript{191} \textit{Ueckert}, 721 F.2d at 250. \\
\textsuperscript{192} See notes 87, 115-16, 143 and accompanying text \textit{supra}. \\
\textsuperscript{193} 341 U.S. 479 (1951). \\
\textsuperscript{194} Id. at 486-87. \\
\textsuperscript{195} \textit{Ueckert}, 721 F.2d at 250. \\
\textsuperscript{196} See id. \\
\textsuperscript{197} \textit{Hoffman}, 341 U.S. at 486-87. \\
\textsuperscript{198} See \textit{Ueckert}, 721 F.2d at 250. \\
\textsuperscript{199} 543 F.2d 1218 (8th Cir. 1976).
duced the necessary records. The presiding judge represented that he would not allow the taxpayer to be prosecuted if the requested information was produced. He referred the taxpayer to 18 U.S.C. § 6002 which grants immunity to the defendant in these types of cases. Thus, in Silkman the court acknowledged a specific grant of immunity before holding there was no real and substantial danger of self-incrimination. In Silkman it was clear that the Commissioner could not subsequently bring action against the taxpayer. In Ueckert there was no true grant of immunity, only assurances by the Commissioner that the taxpayer was not a target at that time.

It appears, then, that assurances of this type offered to the taxpayer and the court by the Commissioner will negate any claimed substantial danger of self-incrimination in the Eighth Circuit. Further evidence of this can be found in other cases heard this term. One such case is Lukovsky v. Commissioner. The Ueckert case cites Lukovsky as authority for the proposition that the danger of incrimination must be real and substantial. In Lukovsky the court determined that the taxpayers would have no reasonable basis for fearing a real and substantial danger of incrimination if the Commissioner had assured the taxpayers they would not be criminally investigated. The Eighth Circuit, therefore, holds that where the Commissioner has offered assurances that the taxpayer will not be criminally prosecuted, the taxpayer cannot meet the stated substantiality requirement as his fears of prosecution are only of a general nature, if not remote or speculative.

A more extreme example of this is Rechtzigel v. Commissioner. Here the taxpayer alleged a fear of criminal prosecution on the basis that he had previously been investigated by the Criminal Investigation Division of the Internal Revenue Service. The court stated: “Notwithstanding the Commissioner's representation that the Internal Revenue Service had made a decision against

200. Id. at 1220.
201. Id.
202. Id. The lower court in Silkman appears to have taken the government's representation of no prosecution as a request for a grant of immunity provided the records were produced.
203. Id.
204. See id.
205. Ueckert, 721 F.2d at 520.
206. 692 F.2d 527 (8th Cir. 1982).
207. Ueckert, 721 F.2d at 250.
208. Lukovsky, 692 F.2d at 528.
209. See notes 194-208 and accompanying text supra.
210. 703 F.2d 1063 (8th Cir. 1983).
211. Id. at 1064.
criminal prosecution, and that no criminal prosecution was pend-
ing or threatened, taxpayer invoked his expressed fear as a blan-
et justification for his refusal to produce any material whatsoever. While the court's actual holding in the case cen-
tered on the taxpayer's failure to make specific objections, it is in-
teresting to note the court's reliance on the Commissioner's
assertions of no prosecution. It appears settled in the Eighth
Circuit that the requirement of a real and substantial danger of
dependency cannot be met if the Commissioner has in-
formed the taxpayer and the court that, for the present, there is no
pending or threatened prosecution.

The Court is the Final Arbiter

The third requirement delineated by the Eighth Circuit in
Ueckert is that the court is the final arbiter of the incriminating
nature of the information sought. Ueckert had declined to pro-
duce any information and on this basis the court stated its inability
to determine the merits of his self-incrimination claim. Rechtzigel
and Lukovsky, however, provide working examples of this require-
ment. The Tax Court, acting in its capacity as the
arbiter, determined that there was no reasonable basis for a fear of
self-incrimination because there was no pending or threatened
prosecution against the taxpayer. Thus, the court made the final
determination as to the incriminating nature of the information
sought. If there could be no future prosecution, it follows, inter
alia, that the information sought cannot be incriminating to the
taxpayer. This principle differs from the other delineated prin-
ciples in its application by the court to the facts of the controversy.
It is usually held either that the taxpayer did not provide enough
information for the court to weigh the incriminatory nature of the
information sought or the lower court, by concluding there was no
pending or threatened prosecution, finalized the outcome as the
appellate court would not overturn the lower court's decision as
the final arbiter.

A Taxpayer Must Make Specific Objections

The Eighth Circuit Court of Appeals has also held that a tax-

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212. Id.
213. Id.
214. Ueckert, 721 F.2d at 250.
215. Id.
216. See notes 207-12 and accompanying text supra.
217. Rechtzigel, 703 F.2d at 1064; Lukovsky, 692 F.2d at 528.
218. See notes 214-17 and accompanying text supra.
payer must "make specific objections in response to specific ques-
tions or to specific demands for particular documents." 219  This
requires a taxpayer to assert an objection to each question or de-
mand he feels will incriminate him. 220  It is not enough for a tax-
payer to object wholesale to the questions on a return or to
demands for the production of different documents. 221  This is a
fourth requirement that was not specifically mentioned in Ueckert
as there were no facts in Ueckert that warranted attention to this
requirement. 222  However, in Rechtzigel the court found occasion
to discuss this requirement. 223  In Rechtzigel the taxpayers ex-
pressed a fear of prosecution even though the Commissioner had
assured them there would be no criminal investigation. 224  Here,
the Eighth Circuit assumed that the taxpayer's fear was justified,
but then held that the taxpayers could not meet this specificity re-
quirement. 225  This requirement of specificity has been developed
and utilized in prior cases in the Eighth Circuit. 226  It is usually
evident that the taxpayer has not met this standard. 227

CONCLUSION

The outstanding characteristic which can be noticed about the
Eighth Circuit's decisions in this area is brevity. As mentioned
earlier, the court utilizes a very structured analysis that is faith-
fully consistent to each controversy brought before it. When con-
sidering a fifth amendment challenge to the tax laws or their
subsequent enforcement, the court states the facts, the principles,
the authority and their holding. This is done by illustrating, on the
facts of the case, why the principles were not met. If one were
seeking the ultimate sketch of a well written opinion, this struc-
ture would be indicative of the quality sought. However, it is obvi-
ous that the circuit court developed this structure through sheer
repetitiveness. It is doubtful they found it a happy task after the
intellectual groundwork had been laid. Yet their dismissal of these
cases and their statements that these issues are clearly resolved
directly contradicts public perception as illustrated by the continu-
ing number of cases raising this issue.

219. Dick, 694 F.2d at 1119.
220. See Daly, 393 F.2d at 878-79.
221. See Sullivan, 274 U.S. at 263-64.
222. See Ueckert, 721 F.2d at 749-50.
223. Rechtzigel, 703 F.2d at 1064.
224. Id.
225. Id.
226. United States v. Jones, 538 F.2d 225, 226 (8th Cir. 1976); Russell v. United
States, 524 F.2d 1152, 1153 (8th Cir. 1975).
227. See Jones, 538 F.2d at 226.
There are many factors that may have brought about this prevalence of suits concerning the fifth amendment. One could argue that the brevity of the court's opinions in these cases has left the door open to challenges. While this may offer an explanation, it does not seem justified. Any taxpayer or practicing member of the bar could quickly research this area and find that the assertion of a fifth amendment privilege is not effective when challenging federal income tax laws. Another explanation could be the prevalence of the tax protestor movement. Many citizens find the tax laws complicated and confusing. The persuasive quality of outspoken protestors, combined with authoritative sounding legal jargon, has been a moving force in motivating some citizenry to openly defy the law.

It seems apparent that the judiciary, at least, views the fifth amendment challenge as thoroughly debated and clearly resolved. Future challenges to federal revenue laws will need to move in a more imaginative direction to stimulate the judiciary to reconsider the competing interests of the individual and the government. For the present, a fifth amendment based justification or defense cannot override the public need for the funding of a central government.

It is pertinent, at this point, to quote the Eighth Circuit in its last tax case of the 1983 term, which summarizes the court's present attitude toward tax protestor cases:

The issues raised by appellant have been decided many times, yet taxpayers insist on raising them again and again. Meritless appeals of this nature are becoming increasingly burdensome on the federal court system. . . . [W]e give notice that, in the future, this court will consider assessing just damages as well as double costs for taking frivolous appeal on issues already clearly resolved.228

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228. *Ueckert*, 721 F.2d at 250-51.