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Constitutional Law--Plea of Fifth Amendment Before House Subcommittee

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CONSTITUTIONAL LAW—PLEA OF FIFTH AMENDMENT BEFORE HOUSE SUBCOMMITTEE—Mrs. Intille, Mrs. Atkinson and Mr. Deacon had been teachers in the Philadelphia Public School System for six, ten and twenty-four years respectively. They were called before the Un-American Activities Committee of the House of Representatives in connection with an investigation of Communist activities in the Philadelphia school system. All three claimed the privilege against self-incrimination contained in the fifth amendment. Within three days after their appearance each was rated "incompetent" by his administrative supervisor and suspended, and dismissal was recommended to the school board. A hearing was conducted for each by the board on the charge of incompetency; neither Mrs. Atkinson nor Mrs. Intille testified. Mrs. Intille offered evidence through counsel of her good reputation, but this was rejected by the board because the charge was based solely upon her appearance before the Committee. Mr. Deacon appeared and testified that he had previously been associated with the Communist Party, but that he had been dropped in 1945 and had not been in contact with the Communist Party since that time, that he had taken the Pennsylvania Loyalty Oath[1] in 1952, and that he had no affection or sympathy for the party at the time of the hearing. After being discharged by the board, the teachers appealed to the Supreme Court of Pennsylvania.[2] *Held*: Reversed. Such a dismissal is an attempt at avoiding the Pennsylvania Loyalty Act[3] which provides that a discharge for disloyalty must be proved by a fair preponderance of evidence at a proper hearing, and is a denial of due process under the fourteenth amendment. *Board of Pub. Educ. v. Intille*, 401 Pa. 1, 163 A.2d 420 (1960), *cert. denied*, 81 Sup. Ct. 273 (1960).

Under the law in Pennsylvania at the time these teachers were discharged there existed two possible avenues for dismissal. Under the Public School Code,[4] a teacher could have been dismissed on grounds of "immorality, incompetency, cruelty, persistent negligence, mental derangement, or persistent and wilful violations of the school laws of the Commonwealth." (Formerly the Code had included in this section as grounds for dismissal, "advocation of or participating in un-American or subversive activities," but this was repealed specifically in 1951.[5]) The second avenue for dismissal could have

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[1] As required by Pa. Stat. Ann. tit. 65 § 214 (1951).

[2] Appeal from Common Pleas Court of Philadelphia County, sustaining the action by the Superintendent of Public Instruction who dismissed the individual appeals of each teacher from the ruling of the Board of Education.

[3] Pa. Stat. Ann. tit. 65 §§ 211-225 (1951).

[4] Pa. Stat. Ann. tit. 24 § 11-1122 (1949).

[5] Pa. Stat. Ann. tit. 65 §§ 211-225 (1951).

been pursuant to the Pennsylvania Loyalty Act, which provided for a dismissal of a disloyal or subversive person as determined by a fair preponderance of the evidence at a proper hearing.[6]

Clearly, the school board sought to use the remaining provisions of the Public School Code to accomplish dismissal for "advocation of or participating in un-American or subversive doctrines" by dismissing the teachers on grounds of incompetency, regardless of the repeal of the provision formerly contained in the act. The result of the court's decision thwarted this attempt and was based on the answers to two underlying questions, *i.e.*, whether the privilege is available to a witness testifying before a House subcommittee; and whether inferences of guilt may be drawn from a refusal to testify.

In *The Fifth Amendment Today*[7] Dean Griswold points out that historians can trace the origin of this privilege back to the 12th century. By the latter half of the 17th century, we find many occasions when this privilege was recognized by the English courts; and it has since been continually recognized. Thus the privilege came to this continent as a part of the legal heritage of our early settlers, and it is not surprising that it was included in the proposals made by Congress which became the fifth amendment.[8] The clause reads: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."[9] Instead of being limited to criminal cases, however, it has been extended to other situations, including Congressional investigations.[10] Cushman, in *Civil Liberties in the United States*,[11] indicates that "it extends to any official inquiry in which testimony under oath may be compelled, such as a coroner's inquest, a grand jury proceeding, or a legislative committee hearing, in which a person is asked questions which might incriminate him."[12]

This appears to be in keeping with the spirit of the amendment. It is in the committee hearing that the privilege is frequently needed the most, because of the unique nature of an investigation. Griswold points out the precarious position of the accused in such a hearing: "answer truly and you have given evidence leading to your conviction for a violation of a federal law; answer falsely and you will be convicted of perjury; refuse to answer and you will be found

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[6] *Id.* § 217.
[7] Griswold, The Fifth Amendment Today (1955).
[8] *Id.* at 2-7 for a more complete historical development of the privilege against self-incrimination.
[9] U.S. Const. amend. V.
[10] See *e.g.*, Quinn v. United States, 349 U.S. 155 (1955).
[11] Cushman, Civil Liberties in the United States (1956).
[12] *Id.* at 142-143.

guilty of criminal contempt and punished by fine and imprisonment."[13] He adds:

> Ordinarily when the privilege . . . is exercised, it is in a criminal trial. There a specific charge has been made, and the prosecution has by evidence established a prima facie case of guilt. . . . Under such circumstances there is much more than the mere claim of the privilege on which to rest an inference of guilt.
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> In investigations, however, there are no carefully formulated charges. Evidence to support such charges has not been introduced and made known to the witness before he is called upon to answer. He has no opportunity . . . to make explanations which might have a material bearing on the whole situation. In the setting of an investigation, therefore, the basis for the inference from a claim of privilege against self-incrimination is much less than it is when the privilege is exercised in an ordinary criminal trial.[14]

The above statement touches on both points under discussion—that the privilege is important in investigations before a legislative body, and that the basis for influence of guilt to be drawn from a claim of the privilege is weaker than it would be in criminal cases. However, despite the strong statements of the Supreme Court that a "sinister meaning"[15] should not be drawn from the plea, the question is usually asked, "Why should anyone take advantage of the privilege when he has nothing to hide?"

This question runs through Justice Mussmanno's dissent in the principal case. He compares with questions regarding Communist affiliations the following questions: "Do you sell narcotics to school children? . . . Are you the person who burned down the Epochal High School? . . . A year ago you said that your wife died of natural causes, but we now have evidence that she was killed criminally. Did you kill her? . . . Suppose a school physician had been asked if he was infected with a malignant communicable disease."[16] Questions dealing with Communist affiliations involve an infinite number of shades of gray, whereas in non-political areas there may be only black or white. In the opinion of Griswold, "we should give careful attention in all cases to the *nature of the question which is asked* and which the witness refuses to answer. . . . Here again the problem is one of degree. There is no clear and sharply demarcated line. The question whether a bank teller stole funds entrusted to him is one sort of question. But the closer the question gets to the area of opin-

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[13] Griswold, The Fifth Amendment Today 21 (1955), quoting from Aiuppa v. United States, 201 F.2d 287, 300 (6th Cir. 1952).

[14] Griswold, *op. cit. supra* note 13 at 21-22.

[15] Slochower v. Board of Educ. 350 U.S. 551, 557 (1956).

[16] 401 Pa. 1, –, 163 A.2d 420, 443 (1960).

ion and political belief, the less significant . . . is the refusal to answer questions."[17]

In an attempt to determine why people plead the fifth amendment, Professor Daniel Pollitt sent questionnaires to 120 witnesses who had availed themselves of the privilege. He categorized the replies received as follows: (1) A belief that the question infringed on the witness' freedom of speech, association, or conscience; (2) A fear that answering a particular question would "waive" the right to refuse to answer questions concerning the identity of others; (3) A fear of perjury indictment if questions were answered in the negative; (4) A desire to protect the integrity of the fifth amendment or to support the position of others who have relied upon it; (5) A belief that the fifth amendment is the only safe way to refuse to co-operate with the committee; (6) A belief that the question was not pertinent to the committee's business; (7) A fear that answering a particular question would waive the right to plead the amendment when asked other questions about his own activities; (8) A fear that an answer would cause public humiliation, economic hardship, or social ostracism to the witness; (9) Miscellaneous, *e.g.* the fifth amendment as a grant of the right to be confronted with witnesses; the right to silence, retained by the people under the tenth amendment and the due process clause of the fifth amendment.[18]

> The Supreme Court has never had to decide squarely whether or not an innocent man may validly plead self-incrimination. In 1955, however, Chief Justice Warren, quoting from Twining v. New Jersey [211 U.S. 782 (1908)] stated that the privilege against self-incrimination is "a protection to the innocent though a shelter to the guilty," and urged that it must be liberally construed.[19]

It is clear that in many cases the possibility of incrimination might arise from a man's testimony even though he is innocent. Even if it were unlawful for one to invoke the fifth amendment on the ground that he wishes to avoid public embarrassment and ridicule, it would be difficult to determine that these were the real reasons for the plea. At most, however, the offender would be guilty of contempt, and not the offense alleged. To allow the court or an investigating body to draw inferences of guilt from a refusal to testify would be to allow the development of a doctrine in constitutional law similar to that of *res ipsa loquitur* in tort law, providing a prima facie case

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[17] Griswold, The Fifth Amendment Today 58 (1955).

[18] Pollitt, "The Fifth Amendment Plea Before Congressional Committee Investigating Subversion; Motives and Justifiable Presumptions—A Survey of 120 Witnesses," 106 U. Pa. L. Rev. 1117, 1128-1132 (1958).

[19] Cushman, Civil Liberties in the United States 142 (1956).

from the refusal to answer where the evidence against the accused had failed.

There were cases touching these points prior to *Intille*. *Slochower v. Board of Educ.*[20] involved a teacher who refused to testify before a House subcommittee, and was discharged pursuant to section 303 of the New York City Charter, which provided that "whenever an employee of the City utilizes the privilege . . . to avoid answering a question relating to his official conduct, his term or tenure of office or employment shall terminate. . . ." The Supreme Court held that this charter was invalid because it contained a built-in inference of guilt derived from the plea of the fifth amendment.

However, in *Nelson v. County of Los Angeles*,[21] the Court upheld a similar statute. That statute imposed a duty to answer upon any public employee appearing before any investigating agency and prescribed that one who refused was guilty of insubordination and could be dismissed. The Court distinguished this statute from the one in *Slochower* on the basis that the latter did not contain built-in inference of guilt as a result of the plea. This is a somewhat tenuous distinction, since by phrasing the statute to avoid the built-in inference of guilt the legislature could vest in the employing agency the power to dismiss an employee for the sole reason that he invoked the privilege.

In *Bielan v. Board of Pub. Educ.*,[22] a teacher was discharged for refusing to answer questions of his administrative supervisor. The Court upheld this dismissal. The distinction between this and the other cases is less troublesome, since the rating of incompetency and the dismissal were based on the relationship between the accused and his administrative supervisor, rather than his relationship with an agency of the United States.

The result of this chain of decisions, therefore, is that an administrative board may discharge a public employee for refusing to answer the questions of his administrative supervisor or of a legislative body where a statute puts an affirmative duty upon him to testify and contains no built-in inference of guilt. A board may not, however, dismiss an employee for not answering the questions of a legislative body where the witness is required to testify by a statute which contains a built-in inference of guilt, or where there is no applicable statute.[23]

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[20] 350 U. S. 551 (1956).
[21] 362 U. S. 1 (1959).
[22] 357 U.S. 399 (1958).
[23] Three allied cases have been argued before the Supreme Court, but

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