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Attorneys: Refusal to Answer Charges of Communism as Grounds for Disbarment

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CASE COMMENTS

ATTORNEYS: REFUSAL TO ANSWER CHARGES OF COMMUNISM AS GROUND FOR DISBARMENT

State v. Sheiner, So.2d (Fla. 1955)

Appellant, a Florida attorney, during his appearance before a county grand jury and later before a subcommittee of the United States Senate, invoked his rights under constitutional guarantees against self-incrimination and refused to answer questions concerning alleged past communist affiliations. A verified suggestion that disciplinary action be taken was filed in the circuit court by an amicus curiae. Pursuant to the suggestion and under authority of Section 454.24, Florida Statutes 1953, a motion to disbar was filed by the state's attorney. On hearing, appellant again refused to state whether he was or had been a communist. Without further relevant testimony having been taken, the court entered an order of disbarment.[1] On appeal, HELD, disbarment for refusal to answer questions concerning communist affiliation, without other evidence to sustain the charge, is a violation of the due process of law requirement. Judgment reversed.

A number of theories have been advanced as bases for the privilege against self-incrimination.[2] The privilege arose during the era of the ill-famed Star Chamber and High Commission of England and had for its purpose the shielding of religious dissenters.[3] In colonial America the privilege was asserted mainly as protection against political inquiries by the prerogative courts.[4] The principle is now encompassed in the fifth amendment to the United States Constitution. Today the favorite rationale used to support the exercise of the privilege is Bentham's reasoning that a man should not be forced to do the unnatural act of bringing about his own conviction of crime.[5]

It was early held that the privilege against self-incrimination related only to testimony that would itself constitute a basis for con-

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[1]6 Fla. Supp. 127 (1954).

[2]See Noonan, *Inferences from the Invocation of the Privilege Against Self-Incrimination,* 41 VA. L. REV. 311 (1955).

[3]*Ibid;* Note, 7 U. FLA. L. REV. 194 (1954).

[4]Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,* 21 VA. L. REV. 763, 783 (1935).

[5]*Rationale of Judicial Evidence,* 7 WORKS 452 (Bowring ed. 1843).

viction of a crime.[6] This narrow interpretation of the right has been extended over the years until it now covers not only answers that would in themselves support a conviction but also those that would furnish a link in the chain of evidence needed for a prosecution.[7] The instant case involves the seeming conflict between the purpose of the privilege and the harsh results that sometimes follow from its assertion.

Police officers, by virtue of their special status as public servants and keepers of the peace, breach their public duty when they invoke the constitutional privilege in regard to matters connected with official duties. A number of dismissals from service based on the invocation of the privilege by policemen have been upheld.[8]

Political activities of federal civil servants are regulated by the Hatch Act.[9] Under one provision of this act they are required to attend and give testimony at hearings. The validity of this provision was recently upheld[10] on the ground that the provision is coextensive with the privilege. A servant can assert his right against self-incrimination, but in doing so he subjects himself to dismissal under the act. The court, after contrasting the "right" to public office with the "privilege" of public employment, reasoned that such dismissal cannot be regarded as the forfeiture of a right, because it can be terminated at the will of the employer, except as limited by the civil service laws. A subsequent presidential order lists refusal of a civil servant to testify before a congressional committee as a proper ground for discharge if the matter under investigation is the servant's misconduct.[11]

Teachers have likewise been summarily dismissed when they refused to testify as to communist affiliations.[12] The basis for dismissal has usually been a charter provision[13] or statute.[14] In one case[15]

[6]Brown v. Walker, 161 U.S. 591 (1896).

[7]Hoffman v. United States, 341 U.S. 479 (1951); Blau v. United States, 340 U.S. 159 (1950); State *ex rel.* Feldman v. Kelly, 76 So.2d 798 (Fla. 1954).

[8]Christal v. Police Comm'n, 33 Cal. App. 2d 564, 92 P.2d 416 (1939); Drury v. Hurley, 339 Ill. App. 33, 88 N.E.2d 728 (1949); Canteline v. McClellan, 282 N.Y. 166, 25 N.E.2d 972 (1940); Souder v. Philadelphia, 305 Pa. 1, 156 Atl. 245 (1931).

[9]53 STAT. 1147 (1939), 5 U.S.C. §118 (1952).

[10]Pfitzinger v. United States Civ. Serv. Comm'n, 96 F. Supp. 1 (1951).

[11]Exec. Order No. 10491, 1 U.S.C. CONG. AND ADM. NEWS 1060 (1953).

[12]Board of Educ. v. Wilkinson, 125 Cal. App. 2d 100, 270 P.2d 82 (1954); Faxon v. School Comm., 120 N.E.2d 772 (Mass. 1954); Daniman v. Board of Educ., 306 N.Y. 532, 119 N.E.2d 373 (1954).

[13]Daniman v. Board of Educ., 306 N.Y. 532, 119 N.E.2d 373 (1954).

[14]Faxon v. School Comm., 120 N.E.2d 772 (Mass. 1954).

[15]Faxon v. School Comm., 120 N.E.2d 772 (Mass. 1954).

the court, in affirming a teacher's dismissal, stated that the public would draw an inference of guilt from the teacher's refusal to testify and that this would result in a lack of faith in the school system.

Courts have given the due process clause a broader interpretation when an attorney's disbarment is sought as a result of his refusal to testify. Disbarment has been ordered only when ample corroborative evidence sustained the charge.[16] Some courts have said that an inference of guilt may be drawn from a refusal to testify,[17] but in every case other testimony substantiated the attorney's guilt.

Some support for the lower court's decision in the instant case can be found in the case of *In re Fenn*,[18] in which the Missouri court stated that, when an attorney fails to testify in confutation of material matters peculiarly within his own knowledge, a compelling inference is drawn that his testimony would have been unfavorable to him. In the instant case, however, the attorney's alleged connection with the communist conspiracy was not a matter peculiarly within his own knowledge.

Other courts have not adopted the inference of guilt concept used by the Missouri court. The usual holding is that no one is presumed guilty just because he asserts his privilege against self-incrimination, unless circumstances require him in honesty and good conscience to waive his right.[19] The right is a barrier between the sovereign power and the individual, and neither legislators nor judges are free to disregard it.[20]

Three other recent cases, all distinguishable from the instant case, involve individuals charged with communist affiliations. In two of these cases applicants were denied admission to the bar – one for being an admitted communist[21] and the other for refusing to answer a question of the fitness board as to whether he was a communist.[22] In the third case[23] an attorney charged with being a communist failed to appear at the disbarment proceeding. In upholding the disbar-

[16]*In re* Holland, 377 Ill. 346, 36 N.E.2d 543 (1941); *In re* Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940); *In re* Ellis, 282 N.Y. 435, 26 N.E.2d 967 (1940).

[17]Fish v. State Bar, 214 Cal. 215, 222, 4 P.2d 937, 940 (1931) (dictum); *In re* Fenn, 235 Mo. App. 24, 35, 128 S.W.2d 657, 664 (1939) (dictum).

[18]235 Mo. App. 24, 128 S.W.2d 657 (1939).

[19]*In re* Holland, 377 Ill. 346, 36 N.E.2d 543 (1941).

[20]Doyle v. Hofstader, 257 N.Y. 244, 177 N.E. 489 (1931).

[21]Martin v. Law Soc'y of Brit. Colum., 3 D.L.R. 173 (B.C. Ct. App. 1950).

[22]*In re* Anastaplo, 3 Ill. 2d 471, 121 N.E.2d 826 (1954).

[23]Welanko's Case, 112 A.2d 50 (N.H. 1955); *accord, In re* Turnquist, 206 Minn. 104, 287 N.W. 795 (1939).