North Dakota Law Review

Volume 27 | Number 4 Article 2

1951

Constitutional Law - Self Incrimination - Communist Registration Ordinances

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NOTES

CONSTITUTIONAL LAW—SELF INCRIMINATION—COMMUNIST REGISTRATION ORDINANCES.

In recent months numerous municipal corporations, following the pattern established by the United States Congress,[1] have enacted communist registration ordinances. Although the ordinances differ, each has as its main objective the registration of all communist party members within the corporate limits. The registration statement, which is filed with the police department, usually requires the name of the registrant, with any existing aliases, as well as any communist organizations of which he is a member. Failure to comply subjects the violator to fine and imprisonment.

The courts of two states[2] have ruled such ordinances invalid, having found that compulsory registration of communist members violates their privilege not to give self-incriminating testimony, since it might subject the registrant to prosecution under existing state criminal syndicalism statutes.[3] Although such registration might also be incriminating under the Smith Act,[4] this would not seem to bear upon the validity of the ordinances, a point made in the case of *People v. McCormick*.[5] In that case the court rejected the contention of the state that registration under a county ordinance would not be invalidated by its incriminating effect under a state statute because the county of Los Angeles is not so independent of the State of California that it could require of its citizens declarations which might be incriminating under state law. No distinction was made in that case between incriminating evidence which is written, as in the *McCormick* case, and that which is spoken.

The privilege against self-incrimination is one carefully safeguarded by the Federal Constitution[6] and by comparable provisions

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[1] Internal Security Act of 1950, Pub. L. No. 831, 81st Cong., 2d Sess., (Sept. 23, 1950) Sec. 2 (15) states: "The Communist movement in the United States is an organization . . . awaiting and seeking to advance a moment when . . . overthrow of the government of the United States by force and violence may seem possible." Sec. 15, Penalties provided: ". . . failure to so register or to file any such registration statement of annual report, be punished for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment."

[2] People v. McCormick, 228 P.2d 349, (Cal. 1951); Maryland v. Perdew, 19 U.S.L.Week 2358 (Md. 1951).

[3] *E.g.* Criminal Syndicalism Act. Deering's Gen. Laws of Cal., Act 8428, Stats. 1919, p. 281, "The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage . . . or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

[4] 54 Stat. 670 (1940), 18 U.S.C. § 2385 (Supp. 1948) (Whoever knowingly or willfully advocates or teaches the duty of overthrowing or destroying the government of the United States or becomes or as a matter of, or affiliates with, any such society, group, or assembly of persons knowing the purposes thereof is subject to be fined not more than $10,000 or imprisoned not more than ten years, or both).

[5] 228 P.2d 349 (Cal. 1951).

[6] "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. Const. Amend. V.

of state constitutions.[7] The privilege itself, however, is a vestige of the common law and only received greater permanency through its inclusion in the Constitution.[8] As literally interpreted, the constitutional protection would seem to apply only in criminal actions.[9] However, construed in the light of common law precedents, the privilege has been said to be available to witnesses in a civil case, where the answer to a question might tend to incriminate the witness.[10]

While it is well recognized that the accused in a criminal action may refuse to take the stand by claiming his constitutional right against self incrimination, the rule is broader than this. A witness is protected whenever the answer subjects him to fine, imprisonment, or prosecution, and where he can be compelled to testify.[11] The existence of compulsion is important since the privilege is waived when the witness voluntarily testifies.[12] That the courts have zealously protected the witness' constitutional right is well illustrated by the decision in *State v. Milam*,[13] where the court quoted with approval from a Virginia case: "Whenever the accused . . . is forced to testify that adverse inferences might be drawn from his failure, then he has not volunteered as a witness and has not waived his rights. Such waiver only follows where liberty of choice has been fully accorded."[14]

Since the privilege against self incrimination is predicated upon the right of the witness not to place himself in jeopardy, it would seem clear that the privilege does not extend to instances where the answer to a specific question could not possibly incriminate the witness and the questions must be answered.[15] The witness must also answer incriminating questions if the consequences of the incrimination are removed, as in the case of statutes granting immunity where self incriminating testimony is required.[16] The United States Supreme Court, in *Counselman v. Hitchcock*,[17] decided that an immunity statute was without force to compel testimony where the immunity was not as broad as the privilege it attempted to replace. But in another Supreme Court decision it was held that a federal immunity statute is not inadequate and unconstitutional because it does not bar possible state prosecutions.[18] Thus, an alleged communist, under prosecution for violating the Smith Act, receives little protection from a federal immunity statute when the state has enacted a criminal syndicalism law.[19]

The privilege against self incrimination has not been narrowly restricted to court proceedings. By a liberal construction of the Fifth Amendment, the privilege has been extended to witnesses summoned

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[7] *E.g.*, N.D. Const. Art. I, Sec. 13: "No person shall . . . be compelled in any criminal case to be a witness against himself . . ."
[8] 8 Wigmore, Evidence § 2252 (3d Ed. 1940).
[9] See note 6, *supra*.
[10] McCarthy v. Arndstein, 266 U.S. 34 (1924).
[11] Counselman v. Hitchcock, 142 U.S. 547 (1892).
[12] *See* May v. United States, 175 F.2d 994, 1001 (D.C. Cir. 1949) (volunteered testimony made the evidence admissible at the trial of witness).
[13] 48 So.2d 594 (Miss. 1951).
[14] Powell v. Commonwealth, 167 Va. 558, 189 S.E. 433, 436 (1937).
[15] United States v. Greenberg, 187 F.2d 35 (1951) (being appealed).
[16] 8 Wigmore, Evidence § 2281, (3d Ed. 1940), where it is stated at p. 469: "By an immunity the offender's guilt ceases . . ."
[17] 142 U.S. 547 (1892).
[18] United States v. Murdock, 284 U.S. 141 (1931).
[19] Feldman v. United States, 322 U.S. 487 (1944) (nor can a state immunity statute prevent a prosecution of the same party by the United States).

before grand juries, coroner's juries, and investigating committees.[20] In fact, many of the more recent decisions have arisen out of grand jury investigations where a witness is cited for contempt of court for failing to answer a question put to him in the course of the investigation.[21] Representative of the courts' view is *United States v. Glockner*,[22] where the court said: "This provision, long regarded as one of the safeguards of civil liberty, should be, and according to the authorities must be, applied in a broad spirit to secure to the citizen immunity from self-accusation, and applies to all proceedings wherein the defendant is acting as a witness in any investigation that requires him to give testimony that might tend to show him guilty of a crime."[23]

Since the decision in *United States v. Burr* (In re *Willie*),[24] the courts have followed the view that the presiding judge ultimately must determine the incriminatory character of the question.[25] The court must see, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to the witness if he is compelled to answer.[26] Bearing upon this point are remarks of Chief Justice Marshall in the *Burr* case which have been often quoted: "When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge of what his answer would be . . . If . . . he say upon oath that his answer would criminate himself, the court can demand no other testimony of the fact."[27]

Great difficulty is encountered in an attempt to distinguish between a question which is incriminating and one which is not, and hence when the privilege against self incrimination is available. Professor Wigmore states that the privilege "applies:

(1) to a fact which is relevant to an inquiry whose sole or essential object is to charge a specific crime upon the claimant; or

(2) to a fact which forms an essential part of a crime now desired to be charged against the claimant as a subordinate purpose in the inquiry; or

(3) though no crime is desired to be charged against the claimant for any purpose whatever, to a fact which would form an essential part of a crime under certain circumstances, which circumstances for practical purposes must now be deemed to be true of the claimant."[28]

Included in the first group are questions which directly incriminate and apparently no court has required an answer to this type of question. So too is the privilege generally available in the second group, which includes cases revealing a material element of an

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[20] 8 Wigmore, Evidence § 2252 (3d Ed. 1940).
[21] *E.g.* Blau v. United States, 340 U.S. 159 (1950); Alexander v. United States, 181 F.2d 480 (9th Cir. 1950).
[22] 35 F. Supp. 286 (D. Colo. 1940).
[23] *Id.* at 290.
[24] 25 Fed. Cas. 38, No. 14, 269e (1807).
[25] Mason v. United States, 244 U.S. 362 (1917).
[26] *Ibid.*
[27] 25 Fed. Cas. 38, 40, No. 14, 692e (1807).
[28] 8 Wigmore, Evidence § 2260, p. 356 (3d Ed. 1940).

offense. More controversial is the application of the privilege in the third group of cases, where in early decisions the courts have held that a witness must answer questions which did not directly incriminate or did not constitute a material link in the chain of evidence.[29] The modern view was first expressed in *Counselman v. Hitchcock*[30] where the court held that an immunity statute was not coextensive with the privilege against self incrimination since it allowed use of testimony or evidence obtained as a result of a lead supplied by the compelled testimony and thus the witness could not be required to answer a question which might supply a clue which would lead to incriminating evidence.

In order to come within the protection of the rule of the *Counselman* case the witness must establish that there is a danger even though the question appears harmless.[31] Once this has been established the witness need not answer. Since membership in the communist party is not a crime per se[32] the question, "Are you or have you been a member of the communist party," would not seem superficially to be incriminating. When viewed, however, in the light of the conviction of the eleven top communist leaders[33] there would seem to be a trend toward treating party membership and conspiracy under the Smith Act as synonymous. This trend has been recognized by recent decisions in the Ninth Circuit[34] where it has been held that newspaper reports of communist investigations, the wide notoriety given the conviction of the top communist officials and the findings of the Loyalty Review Board[35] are sufficient to furnish grounds for affording the privilege to witnesses questioned as to the communist party organization and officers.[36] A Fifth Circuit case[37] held that a witness did not have to answer a question as to whether he knew if an alien was a communist, since the witness would have to be intimately associated with the party in order to know the alien's status. Similarly the Supreme Court in another decision[38] resolving conflicting Circuit Court rulings, extended the privilege against self incrimination to a witness where admission of knowledge of the communist party workings and of employment by the party might have furnished the link in the chain of evidence needed for prosecution under the Smith Act. On the basis of these precedents, the conclusion may be drawn that the question "Are you a member of the communist Party?" must now be considered not only a lead to incriminating evidence but directly incriminating in and of itself. Concealment of party membership appears to rest, at best, in a twilight zone between legality and illegality; it may well constitute an important link in a chain of

[29] United States v. Burr (*In re* Willie), 25 Fed. Cas. 38, No. 14,692e (1807).

[30] 142 U.S. 547 (1892).

[31] Estes v. Potter, 183 F.2d 865 (5th Cir. 1950), *cert. denied*, 340 U.S. 920 (1951); United States v. Weisman, 111 F.2d 260 (2d Cir. 1940).

[32] Estes v. Potter, 183 F.2d 865, 867 (5th Cir. 1950) "There is no statute that makes it a crime to be a member of the Communist Party . . ."

[33] Dennis v. United States, 71 S. Ct. 857 (U.S. 1951).

[34] Doran v. United States, 181 F.2d 489 (9th Cir. 1950); Kasinowitz v. United States, 181 F.2d 632 (9th Cir. 1950) *cert. denied*, 340 U.S. 923 (1951); Alexander v. United States, 181 F.2d 480 (9th Cir. 1950).

[35] Fed. Reg. Vol. 13, No. 206, p. 6138 (Loyalty Review Board has the Communist Party, U.S.A. listed under the following classifications: (1) Communist; (2) Subversive; (3) Organizations which seek to alter the form of Government of the United States by unconstitutional means).

[36] Alexander v. United States, 181 F.2d 480 (9th Cir. 1950).

[37] Estes v. Potter, 183 F.2d 865 (5th Cir. 1950), *cert. denied*, 340 U.S. 920 (1951).

[38] Blau v. United States, 340 U.S. 159 (1950).

evidence leading to conviction. It follows that the answer to a question concerning it cannot be compelled.[39]

In striking down the registration ordinances on the ground they violate the privilege against self incrimination, the courts have not recognized the distinction between oral testimony and written statements; both possess the same incriminatory potential.[40] It is evident that the municipalities had resorted to a subterfuge when prior grand jury investigations had disclosed the reluctance of witnesses in answering questions concerning membership in the communist party.[41] No other result would be tenable; the ordinances could not, it is self-evident, grant immunity from prosecution to those who would be compelled to reveal their party affiliations, yet failure to register would subject the individuals affected to fine and imprisonment. The courts allow the witness the right to establish that reasonable grounds exist for believing that the question would be incriminating,[42] while the ordinances deny this right. Such a denial is unduly harsh when recent convictions have demonstrated the dangers facing registrants.[43]

Undoubtedly there are individuals who will look upon this result as judicial protection for those who would destroy valued liberties. It is submitted, however, that the attitude of the courts is reassuring in the midst of an undeniable wave of popular sentiment directed against individuals and groups holding views not in accord with those of the more conservative elements on the national scene. The distinction between moderate liberalism, genuine native radicalism, and communism is one which such elements often find it difficult to make. In view of this fact, to deny the protection of the constitution to members of any group because they hold views distasteful to majority opinion may well be to imperil the existence of the division of opinion on public issues which is one of the healthy features of American democracy.

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[39] See note 1, *supra.*

[40] People v. McCormick, 228 P.2d 349 (Cal. 1951).

[41] See note 34, *supra.*

[42] Estes v. Potter, 183 F.2d 865 (5th Cir. 1950), *cert. denied,* 340 U.S. 920 (1951).

[43] See note 33, *supra.*