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Constitutional Law -- Due Process -- Denial of Admission to State Bar on Ground of Communist Affiliation

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Court, and I reminded him that in the *Gobitis*³³ and *Barnette*³⁴ cases some of the Justices had perceived the error of their own decision and had joined in overruling it three years later.³⁵

"How I welcomed that action," interjected the Justice. "Black and Douglas slipped as grievously in *Gobitis* as Holmes had done in the Nebraska German language case.³⁶ As I have often repeated, every man has his weak moments, and man's judgment is at best fallible.³⁷ But when he has seen his mistake, it is right to correct it. Perhaps the *Cannon* decision was correct in the climate of its day, but I agree that it cannot survive into the post-*Erie* era. However, in my present position, what can I do about it?"

Dreaming boldly along, I explained my idea of a new footnote to be inserted in the *Erie* opinion, citing *Cannon* as one of the errors resulting from the invalid doctrine of *Swift v. Tyson*. Not surprisingly, in the phantasy of the dream, the Justice agreed to the proposal.

I smiled a dreamy smile, picturing myself citing the new footnote as a long overdue epitaph for *Cannon*. As I bid the Justice good-bye, he picked off the floor and handed me a lovely white feather, labelled "*Cannon v. Cudahy Packing Co.*" Its base had begun to disintegrate, causing it to drop off one of his wings.

When I awakened, I resolved to write the story of my dream in the hope that there would be some readers who would recognize the soundness of its message and would help to make it come true.

MICHAEL H. CARDOZO*

Constitutional Law—Due Process— Denial of Admission to State Bar on Ground of Communist Affiliation

In *Konigsberg v. State Bar*,¹ the United States Supreme Court in a five to three decision held that past membership in the Communist Party is not in itself an adequate basis for denying an otherwise qualified applicant admission to a state bar. Because the petitioner had refused to answer questions of the California Committee of Bar Examiners concerning past membership in the Communist Party, the Committee refused to certify him to practice law on the grounds that he had failed to prove (1) that he was of good moral character, and (2) that he did not

³³ *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

³⁴ *Board of Education v. Barnette*, 319 U.S. 624 (1943).

³⁵ See also *Reid v. Covert*, 354 U.S. 1 (1957).

³⁶ *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (dissenting opinion); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

³⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932) (dissenting opinion).

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¹ 353 U.S. 252 (1957).

advocate the violent overthrow of the government.² The Court pointed out that these grounds were the basis for the Committee's action, not his refusal to answer the questions.³ However, the Court ruled that past membership in the party, even if true, did not alone warrant the conclusions reached by the Committee, and that they therefore constituted a denial of due process.⁴

Denial of a privilege based solely on past membership in the Communist Party does not in every case violate due process. It has been consistently held that an alien may be deported for that reason alone.⁵ In *Galvan v. Press*,⁶ the Court said that under the Internal Security Act of 1950,⁷ it is not even necessary that he joined the party fully aware of its advocacy of violence.⁸

Present membership in the party is a valid ground for excluding a person from certain positions. For example, it does not violate due process to require as a condition precedent to a place on the ballot for a municipal election an affidavit to the effect that the candidate is not a communist.⁹ A physician may be denied a commission in the army solely for refusing to state whether he is a member of the Communist Party.¹⁰ In deciding that a municipal employer may inquire into the background of employees to determine their fitness for public service,¹¹ the Court said: "Past conduct may well relate to present fitness; past loyalty may have a reasonable relation to present and future trust."¹²

Aside from communism, there are other beliefs which may justify denial of a privilege. A conscientious objector has been held to lack

² CAL. BUS. & PROF. CODE § 6060 (c) provides that an applicant must have good moral character. Section 6064.1 provides that no one who advocates the violent overthrow of the government shall be certified.

The California Supreme Court had denied *Konigsberg's* petition for review without opinion. 353 U.S. at 254.

³ "If it were possible for us to say that the Board had barred *Konigsberg* solely because of his refusal to respond to its inquiries . . . then we would be compelled to decide far-reaching and complex questions There is no justification for our straining to reach these difficult problems when the Board itself has not seen fit, at any time, to base its exclusion of *Konigsberg* on his failure to answer." 353 U.S. at 261.

⁴ U.S. CONST. amend. XIV, § 1.

Due process will be considered in this Note only as applied to the power of the federal and state governments to regulate the enjoyment of certain privileges.

⁵ *Galvan v. Press*, 347 U.S. 522 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

⁶ 347 U.S. 522 (1954).

⁷ Internal Security Act of 1950, 64 STAT. 987 (1950), 50 U.S.C. § 781 (1952).

⁸ "It is enough that the alien joined the party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will." 347 U.S. at 528.

⁹ *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951).

¹⁰ *Orloff v. Willoughby*, 345 U.S. 83 (1953). The Court said, "The petitioner appears to be under the misconception that a commission is not only a matter of right, but is to be had upon his own terms." *Supra* at 90.

¹¹ *Garner v. Board of Pub. Works*, 341 U.S. 716 (1951).

¹² *Id.* at 720.

the necessary fitness for admission to a state bar because he could not in good faith take the required oath to support the state constitution.¹³

In the above decisions, the Court has apparently fixed or agreed to standards which must be met by one seeking a position or status involving honor and trust. Its position in the principal case is not easily reconciled with these decisions. Membership in a state bar is a privilege burdened with conditions,¹⁴ and good moral character is well established as a requisite for admission.¹⁵ In proceedings for admission, the burden of proving good moral character is on the applicant,¹⁶ and it has been held that there is an absolute duty on him to make a full disclosure of relevant matters.¹⁷ If he fails to satisfy the state bar examiners, then it is their duty to deny his application.¹⁸

Thus it can be seen that the states themselves have fixed high standards for admission to the bar, and necessarily so. Attorneys occupy a quasi-judicial office.¹⁹ They are officers of the court,²⁰ and, like the court, they are instruments to advance the ends of justice.²¹ Therefore a state has both a right and a duty to control and regulate the practice of law in order to protect the public welfare.²² However, a decision which violates a right secured by the Federal Constitution authorizes intervention by the Supreme Court.²³

In the principal case, most of the testimony corroborated the good

¹³ *In re Summers*, 325 U.S. 561 (1945).

¹⁴ *In re Rouss*, 221 N.Y. 81, 116 N.E. 782 (1917).

¹⁵ *Spears v. State Bar*, 211 Cal. 183, 294 Pac. 697 (1930); *In re Stover*, 65 Cal. App. 622, 224 Pac. 771 (1924); *In re Roberts*, 30 Hawaii 588 (1928); *In re McDonald*, 200 Ind. 424, 164 N.E. 261 (1928); *In re Farmer*, 191 N.C. 235, 131 S.E. 661 (1926); *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924); *In re Casablanca*, 30 P.R. 368 (1922); *In re Law Examination of 1926*, 191 Wis. 359, 210 N.W. 710 (1926).

¹⁶ *Spears v. State Bar*, *supra* note 15; *In re Wells*, 174 Cal. 467, 163 Pac. 657 (1917); *Rosencranz v. Tiddington*, 193 Ind. 472, 141 N.E. 58 (1923); *Baker v. Varser*, 240 N.C. 260, 82 S.E.2d 90 (1954); *In re Farmer*, *supra* note 15; *In re Crum*, 103 Or. 296, 204 Pac. 948 (1922).

¹⁷ *Spears v. State Bar*, *supra* note 15. The court said, "We are aware that this requirement calls for a high degree of frankness and truthfulness . . . but no good reason presents itself why such a high standard of integrity should not be required." *Supra* at 187, 294 Pac. at 698.

¹⁸ *Spears v. State Bar*, *supra* note 15; *Baker v. Varser*, 240 N.C. 260, 82 S.E.2d 90 (1954).

¹⁹ *Langen v. Borkowski*, 188 Wis. 277, 206 N.W. 181 (1925).

²⁰ *Powell v. Alabama*, 287 U.S. 45 (1932).

²¹ *People ex rel. Karlin v. Culkun*, 248 N.Y. 465, 162 N.E. 487 (1928).

²² *Nelson v. Smith*, 107 Utah 382, 154 P.2d 634 (1944). The right to control and regulate the practice of law is not one of those powers transferred to the federal government. *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1872).

In exercising this right, Maryland has disbarred an attorney for present participation in the Communist Party. *Braverman v. Bar Ass'n*, 209 Md. 328, 121 A.2d 473 (1956). But the states are not in agreement as to the extent to which the right should be exercised. For example, in *Fellner v. Bar Ass'n*, 213 Md. 243, 131 A.2d 729 (1957), an attorney was permanently disbarred for putting slugs in a parking meter, whereas in *Kentucky State Bar Ass'n v. McAfee*, 301 S.W.2d 899 (Ky. 1957), a conviction of willful income tax evasion was held to be an insufficient ground for disbarment.

²³ *In re Summers*, 325 U.S. 561 (1945).

moral character of the petitioner.²⁴ In addition, there was no evidence that he had in fact ever been a member of the Communist Party.²⁵ It is therefore submitted that the question of whether past membership in the party is a valid ground for denying one admission to a state bar was not in issue, and that the Court thus went beyond the bounds necessary to its decision and rendered what may be a dangerous precedent.

RICHARD C. CARMICHAEL, JR.

Constitutional Law—Regulation of Obscene Matter

Dissemination of obscene books, publications, and other materials has been punishable both under common law¹ and under modern statutory law.² All forty-eight American states currently exercise some form of regulation over obscene materials and extensive restrictions in this area are imposed by the federal government.³

Toward the end of its 1957 session, the North Carolina General Assembly enacted chapter 1227⁴ as a supplement to existing state laws.⁵ The new statute is designed to suppress commerce in the obscene and redefines "obscenity" by taking into account contemporary circumstances, scientific and sociological knowledge.

In all of its essential parts, the legislation is an enactment of section 207.10 of the American Law Institute's Model Penal Code,⁶ which was tentatively approved by the institute in May 1957.⁷ With the adoption of the statute, North Carolina became the first state in the union to accept this definition of obscenity.⁸

Fourteen days later the United States Supreme Court in *Roth v.*

²⁴ Forty-two witnesses attested to Konigsberg's good moral character. Among them were a Catholic priest, a Jewish rabbi, lawyers, doctors, professors, businessmen, and social workers. None testified that his moral character was bad or questionable in any way.

²⁵ The only evidence that Konigsberg might have been a member of the Communist Party was the testimony of one ex-communist. However, she did not testify that he had in fact been a member, but only that he had attended meetings of a party unit in 1941. This was the sole basis for her belief that he was a communist. She did not know him personally, nor was her identification of him convincing.

¹ See Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40-53 (1938).

² See Lockhart and McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954).

³ *E.g.*, 18 U.S.C. §§ 1461-64 (1952), concerning use of the mails for sending or receiving obscene materials, importation or sending obscene matter by common carrier or express company, displaying obscene matter on envelopes or postcards, and using obscene language in radio broadcasting.

⁴ N.C. Sess. Laws 1957, c. 1227.

⁵ N.C. GEN. STAT. §§ 14-189 to -194 (1953), as amended, § 14-189 (Supp. 1955).

⁶ ALI Model Penal Code § 207-10 (Tent. Draft No. 6, 1957).

⁷ Schwartz, *Criminal Obscenity Law*, 29 PA. B. ASS'N Q. 8 (1957).

⁸ Schwartz, *supra* note 7, at 13.