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## Communism, Inferences and the Privilege Against Self-Incrimination

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accordance with sixty years of Federal precedents,<sup>61</sup> a higher court has no power to modify a sentence of the trial court, which is within the limits permitted by statute.<sup>62</sup> Upon the refusal to modify the death sentence in the *Rosenberg* case, the Court said:

If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits permitted by statute.<sup>63</sup>

Espionage has always been, and still remains, of vital importance to the national security of the United States. It has been re-emphasized and given added significance by World War II. If this nation is to survive, it must stringently combat the menace of espionage, maintaining at all times, however, respect for the rules of law and regard for the rights of man and justice. The effectiveness of the United States in thwarting the attempts of those who aim at obtaining information prejudicial to the best interests of this nation, will determine, in large measure, the extent of its existence in tomorrow's world.

ROSEMARIE SERINO

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<sup>61</sup> Cases are too numerous to cite. See *United States v. Rosenberg*, 195 F. 2d 583, 604 (1952).

<sup>62</sup> See note 60 *supra*; FED. RULES CRIM. PROC. 12 (b) (2), 34.

<sup>63</sup> See note 3 *supra*, at p. 604.

## *Communism, Inferences And The Privilege Against Self-Incrimination*

In the last decade, congressional investigations have entered every phase of American life. This is especially true of hearings seeking evidence of Communist infiltration into American institutions.<sup>1</sup> These committees constitute extra-judicial investigatory bodies, before which the witness commands few of the safeguards of Procedural Due Process guaranteed in the courts. They, therefore, force a fanatic reliance on the privilege against self-incrimination secured by the Fifth Amendment to the United States Constitution.<sup>2</sup>

This is an exploratory comment into the merits of discharging an official or employee on the ground of disloyalty solely because of his invocation of the

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<sup>1</sup> At this writing, Congress has investigated Communist infiltration into Labor, Government, the Film Industry and Education. Religion is under consideration. The authority of these congressional committees is established in *Lawson v. United States*, 176 F. 2d 49 (D. C. Cir. 1949), *cert. denied* 339 U. S. 934 (1950) and cases cited therein.

<sup>2</sup> ". . . nor shall (any person) be compelled in any criminal case to be a witness against himself."

privilege against self-incrimination before a congressional committee investigating Communism.

Traditionally, House and Senate committees have utilized their investigative power for the singular purpose of gathering information for future legislation under the delegated powers of the federal government. "(N)either of these bodies possesses the general power of making inquiry into the private affairs of the citizen."<sup>3</sup> Nevertheless, the requirement that a witness divulge information to a congressional committee is qualified by only two prerequisites, (1) the question asked of him must be pertinent to the subject matter of the inquiry,<sup>4</sup> and (2) the subject matter of the inquiry must be confined in scope to a field within which the Congress is competent to legislate.<sup>5</sup>

The power of the federal courts to interfere in the activities of the legislative branch is severely limited by the doctrine of "separation of powers"<sup>6</sup> and by the specific grant to the Congress by the Constitution of the power to "determine the rules of its own proceedings."<sup>7</sup> The only limitation on the power of Congress to conduct investigations is to be found in the limitation imposed on the federal government by the Constitution.<sup>8</sup> The remedy for abuse of discretion lies with the Congress or ultimately with the people at the polls.<sup>9</sup>

Within the last few years, the privilege against self-incrimination has been invoked profusely by witnesses fearing prosecution under the various federal subversive Acts.<sup>10</sup> This constitutional guarantee has been accorded a most liberal construction in favor of the right it was intended to secure, and every doubt has been resolved in favor of the witness.<sup>11</sup> By construction, the United States Supreme Court has extended the right of invocation of the privilege against self-incrimination to a witness in any investigation, even though the protecting clause of the Fifth Amendment is qualified by the words "in a criminal case."

<sup>3</sup> *Kilbourne v. Thompson*, 103 U. S. 168, 190 (1880).

<sup>4</sup> *Sinclair v. United States*, 279 U. S. 263 (1929). Also Cf. 60 Stat. 812, 2 U. S. C. § 192.

<sup>5</sup> *McGrain v. Daugherty*, 173 U. S. 135 (1927); *In Re Chapman*, 166 U. S. 661 (1896). It is significant to note the gradual extension of the "delegated" sovereignty of the federal government through the enlargement of its commerce, war, and taxing powers. Even the last vestiges of the "residual" sovereignty of the states, the police power over public health, safety and morals, are not immune to the "grants in aid program."

<sup>6</sup> *O'Donoghue v. United States*, 289 U. S. 516 (1933).

<sup>7</sup> Article I, Section 5, Clause 2.

<sup>8</sup> This is in effect no limitation at all. Cf. 2 C. U. L. Rev. 34 (1952).

<sup>9</sup> *Barsky v. United States*, 169 F. 2d 241 (D. C. Cir. 1948), *cert. denied* 334 U. S. 843 (1948).

<sup>10</sup> The Smith Act, 18 U. S. C. § 2385 (1948); the McCarran Internal Security Act, Pub. Law 831, 81st Cong., Chap. 1024, 64 Stat. 987 (1950); and the McCarran Naturalization and Immigration Act, 18 U. S. C. § 1251 (6) (1952). In addition, Pennsylvania, Massachusetts and Indiana have declared membership in the Communist Party *per se* to be a crime. This appears to be in conflict with the federal statutes. Cf. 66 Harv. L. Rev. 327, 330 (1952).

<sup>11</sup> *Hoffman v. United States*, 341 U. S. 479, 487 (1951); *Arnstein v. McCarthy*, 254 U. S. 71, 72-73 (1920).

It is impossible that the meaning of the Constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person would not be compelled, when acting as a witness *in any investigation*, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.<sup>12</sup> (Italics added.)

The privilege against self-incrimination has been specifically held to extend to testimony before congressional committees.<sup>13</sup> Valid invocation of the Fifth Amendment must be predicated on the fact that the witness, invoking the privilege, reasonably fears the possibility of criminal prosecution if he would respond.<sup>14</sup> The anticipated prosecution must be for a federal crime.<sup>15</sup>

The federal courts have considered incriminating, and therefore privileged, answers which might supply a material element of a federal crime,<sup>16</sup> or provide "the link in the chain of evidence" to that crime.<sup>17</sup> Broader construction has extended the privilege to include innocuous questions, if they may be the foundation for subsequent incriminating questions.<sup>18</sup> The criterion for the determination of any waiver of the privilege is whether the answer, standing alone, constitutes an admission of guilt or of an incriminating fact which furnishes clear proof of a crime.<sup>19</sup>

The law furnishes examples of attempts to mitigate the effects which follow the exercise of this privilege by a witness. In addition to grounds necessary for the elimination of "security risks" from government service,<sup>20</sup> President Eisenhower very recently added another element to be considered in the discharge of disloyal government employees.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.<sup>21</sup>

Although this provision has not been construed by any court at this writing, there is a similar provision in the New York City Charter<sup>22</sup> which has

<sup>12</sup> *Counselman v. Hitchcock*, 142 U. S. 547, 562 (1892).

<sup>13</sup> *United States v. Jaffe*, 98 F. Supp. 191 (D. D. C. 1951); *United States v. Fitzpatrick*, 96 F. Supp. 491 (D. D. C. 1951).

<sup>14</sup> *Hoffman v. United States*, note 11 *supra*; *Brown v. Walker*, 161 U. S. 591 (1896).

<sup>15</sup> *United States v. Murdock*, 284 U. S. 141 (1931).

<sup>16</sup> *Counselman v. Hitchcock*, note 12 *supra*; *United States v. Burr*, 25 Fed. Cas. 38, No. 14,692e (1807).

<sup>17</sup> *Blau v. United States*, 340 U. S. 159 (1950); *Estes v. Potter*, 183 F. 2d 865 (5th Cir. 1950), *cert. denied* 340 U. S. 920 (1951); *Alexander v. United States*, 181 F. 2d 480 (9th Cir. 1950).

<sup>18</sup> *Coffey v. United States*, 198 F. 2d 438 (3rd Cir. 1952); *United States v. Rosen*, 174 F. 2d 187 (2nd Cir. 1949), *cert. denied* 338 U. S. 851 (1949).

<sup>19</sup> *Rogers v. United States*, 340 U. S. 367 (1950) and cases cited therein.

<sup>20</sup> Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953).

<sup>21</sup> Exec. Order No. 10491, 18 Fed. Reg. 6583 (1953).

<sup>22</sup> Section 903: "Failure to testify. If any . . . officer or employee of the city shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee . . . or having appeared shall refuse to testify or to answer any question . . . on the ground that his answer would tend to incriminate him . . . his term of office or employment shall terminate. . . ."

been frequently interpreted and upheld.<sup>23</sup> Many statutory devices, such as oaths, affidavits, and listing of subversive organizations, have been enacted to screen subversives from employment in government, education, and other fields. These statutes have been construed on five occasions by the United States Supreme Court.<sup>24</sup>

To add to the picture, public agitation in the Cold War and the pressures of the press have prompted the mass conclusion when a witness invokes the privilege to the standard question: "Are you now or have you ever been a member of the Communist Party?"; that he is, in fact, a Communist. In the law, this is called an inference.

The current question is whether an inference from the fact that a witness invokes the privilege against self-incrimination is admissible and sufficient evidence to support the reasonable discharge of an allegedly disloyal employee. This issue is one of first impression, at least in the federal civil courts.

The conclusion that an inference may be drawn in a *civil* case from the *fact* that a witness invokes the privilege against self-incrimination, necessarily follows on any one of three grounds:

(1) the inherent nature of the privilege, (2) the lack of statutory authority, and (3) the construction placed upon the Fifth Amendment by the federal courts.

#### *The Inherent Nature Of The Privilege*

The privilege against self-incrimination is an English rule of evidence, *nemo tenetur seipsum accusare*, which attained constitutional dignity in the United States because of the fear of many of the Founding Fathers that the new government might institute an inquisitorial system of criminal justice in its courts.<sup>25</sup> However, it has never attained the dignity of a fundamental liberty or right of personality, such as freedom of speech or religion.<sup>26</sup>

<sup>23</sup> *Shalkman v. Board of Higher Education*, 282 App. Div. 718, 122 N. Y. S. 2d 286 (1953); *Koral v. Board of Education*, 197 Misc. 221, 94 N. Y. S. 2d 378 (1950); *Goldway v. Board of Higher Education*, 178 Misc. 1023, 37 N. Y. S. 2d 34 (1942).

<sup>24</sup> *Wieman v. Updegraff*, 344 U. S. 183 (1952)—an unconstitutional Oklahoma statute which created a *conclusive* presumption of disloyalty if a state employee was a member of a subversive organization as designated by the U. S. Attorney General and would not take an oath that he did not advocate the violent and forceable overthrow of the government. The following statutes have been upheld: *Adler v. Board of Education*, 342 U. S. 485 (1952)—membership in a listed subversive organization constituted *prima facie* evidence of disqualification from New York public schools; *Garner v. Board of Public Works*, 341 U. S. 716 (1951)—a Los Angeles ordinance required a non-subversive oath of all city employees; *Gerende v. Board of Supervisors*, 341 U. S. 56 (1951)—a non-subversive oath was required of candidates for public office who sought places on a Maryland ballot; *American Communications Ass'n v. Douds*, 339 U. S. 382 (1949)—the Taft-Hartley Act required union officers to file "non-communist" affidavits with the N. L. R. B. Also Cf. *Brown v. Walker*, note 14 *supra*, and *Counselman v. Hitchcock*, note 12 *supra*, in regard to the federal immunity statutes.

<sup>25</sup> 8 WIGMORE, EVIDENCE § 2250 (3rd ed. 1940); II ELLIOT'S DEBATES, p. 111.

<sup>26</sup> *Twining v. New Jersey*, 211 U. S. 78 (1908). The practice of compulsory self-incrimination, largely through the oath *ex officio*, was not entirely omitted at trials in England until the eighteenth century.

Reviewing the history of the privilege, the United States Supreme Court in *Brown v. Walker*<sup>27</sup> observed that the privilege could not be invoked for reasons of invasion of privacy,<sup>28</sup> reputation, and civil liability. If the privilege cannot be invoked to prevent civil liability, *ipso facto*, an inference drawn in a civil case cannot be in derogation of the privilege, since a civil action merely involves liability. There is no possibility of self-incrimination because the Doctrine of Mutuality of Estoppel operates to exclude evidence of a verdict of civil liability from a criminal prosecution.

The classical reason offered in support of the contention that no inference may be drawn in a *criminal* case is that it will force the accused to surrender the primary aspect of the privilege against self-incrimination, i.e., he will be forced to take the stand in order to prevent the jury from drawing any adverse inference against him for not testifying in his own behalf. In every civil case, the defendant may be required to take the stand and testify. True he may utilize the secondary aspect of the privilege, namely, the invocation of the privilege, if an answer might tend to incriminate him. Nevertheless, the privilege of not taking the stand at all does not apply in a civil case and, therefore, the reason for prohibiting the inference does not exist in a *civil* case.

In 1938, the American Bar Association Committee on the Improvement of the Law of Evidence reported in regard to inferences and comment upon the invocation of the privilege against self-incrimination:

178 Judges in five states (California, Iowa, Ohio, New Jersey and Vermont) answered the questionnaire and the replies showed that 93.65 per cent regarded comment as important and proper aid in the administration of justice, while only 2.65 per cent considered it definitely unfair to the accused. . . .<sup>29</sup>

The significance of this questionnaire is that it concerned inferences drawn in a *criminal* case. Obviously, these results indicate that the judiciary would not consider prohibiting inferences in a civil case.

In his Treatise on Evidence, Dean Wigmore concludes his comment concerning the policy of prohibiting inferences in *criminal* cases:

. . . The inference, as a matter of logic is not only possible but inherent, and cannot be denied.

Yet, though not denied, can it be ignored? This is the true question, whether, in view of trial methods, it is possible and proper to insist on the practical ignoring of this inference. If our trial tribunals were not divided in function and if the issues of fact and law came equally to the judge's mind for decision, the question would be a mere quibble, because the judge could hardly perform the impossible feat of ignoring the operations of his own mind.<sup>30</sup>

<sup>27</sup> Note 14 *supra*.

<sup>28</sup> Another restraint is represented in 2 U. S. C. § 193 (1946): "No witness is privileged to refuse to testify to any fact, or to produce any paper . . . on the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous."

<sup>29</sup> 8 WIGMORE, note 25 *supra* at § 2272, p. 425-426.

<sup>30</sup> *Id.* at § 2272, p. 410

Dean Wigmore's discussion is limited to inferences drawn in *criminal* cases. Nowhere does he give any support whatsoever to the contention that such inferences may not be drawn as a matter of policy in a civil case.

As a practical matter, if the Communist witness fears prosecution should he answer the question to which he actually invokes the privilege, such prosecution would be under the Smith Act<sup>81</sup> or the Federal perjury statute.<sup>82</sup> If the witness be innocent of any association or affiliation with Communism, he certainly would answer all of the questions posed by the congressional committee. An innocent man has no fear of prosecution under either the Smith Act or the perjury statute. A loyal American would be eager to assist a congressional committee in eliminating the Communist menace.

One additional factor must be considered, since the privilege is for the protection of the innocent as well as the guilty.<sup>83</sup> It has been said that counsel by the skillful use of the art of cross-examination can draw from the witness substantially the responses he desires. It is quite possible that a witness might invoke the privilege to prevent partially complete answers to leading questions from being falsely interpreted into incriminating statements or ultimate waiver of the privilege. However, congressional committees have been most zealous in affording even hostile witnesses the opportunity to enter statements into the record and to amplify their replies.<sup>84</sup> In any event, there can be no ambiguity or false interpretation if a witness claims the privilege to obviously incriminating questions: "Are you a member of the Communist Party?" or "Have you knowingly attended meetings of the Communist Party in the last three years?"

"For more than three centuries it has now been recognized that the public has the right to every man's evidence." There is a general duty to give testimony and any exceptions which may exist are distinctly exceptional, being so many derogations of a positive general rule.<sup>85</sup>

#### *The Lack Of Statutory Authority*

No jurisdiction, state or federal, prohibits the drawing of the inference in *criminal* cases, in the absence of statutory authority.<sup>86</sup> The federal statute provides in regard to the criminally accused: ". . . And his failure to make such request (to testify in his own behalf) shall not create any presumption against him."<sup>87</sup> With the exception of California, which allows inferences to be drawn in both civil and criminal cases, among the several states universal

<sup>81</sup> Note 10 *supra*.

<sup>82</sup> 62 Stat. 833, 18 U. S. C. § 3486 (1948).

<sup>83</sup> *Wilson v. United States*, 149 U. S. 60 (1892); *Spector v. United States*, 193 F. 2d 1002 (9th Cir. 1952).

<sup>84</sup> Jenner Subcommittee investigating "Subversive Influence in the Educational Process", Senate Rep. 153, 83rd Cong., 1st Ses., p. 5 (1953).

<sup>85</sup> *United States v. Bryan*, 339 U. S. 323, 331 (1949).

<sup>86</sup> 8 WIGMORE, note 25 *supra* at § 2272, p. 412 *et seq.*

<sup>87</sup> 20 Stat. 30 c. 37, 18 U. S. C. § 3481 (1948).

legislation has been enacted in varying phraseology that no inference may be drawn in a *criminal* case.<sup>38</sup> The modern statutory trend, however, is to the contrary.<sup>39</sup>

A very few, early state decisions have prohibited inferences in a civil case, however, they are against the modern weight of authority.<sup>40</sup> There is no statutory authority specifically prohibiting the inference in civil cases. It would appear, therefore, that it is incumbent upon the witness to demonstrate that by construction of the Fifth Amendment, in the absence of statutory authority, no inference may be drawn in a *civil* case. There is no *stare decisis* in the federal courts to support the contention that an inference may not be drawn in a civil case.

*The Construction Placed Upon The Fifth Amendment By The Federal Courts*

In *Raffel v. United States*,<sup>41</sup> the defendant was tried in a United States District Court for a prohibition violation. He exercised his privilege against self-incrimination by failing to take the stand as a witness. On retrial, he took the stand and denied the accusation. Raffel was then required by the trial judge to answer the question which disclosed his presence and silence at the first trial and to explain the reason for his previous silence. He was convicted.

True, Raffel took the stand as a witness and thus waived this aspect of his privilege *at the second trial*. Nevertheless, in regard to his invocation of the privilege to the question, the answer to which would incriminate him, Mr. Justice Stone, speaking for the United States Supreme Court, held:

His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inferences, and the jury may be so instructed.<sup>42</sup>

Only the claim of the privilege at the first trial can constitute the "evidence of incriminating circumstances." Continuing the Court declared:

We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal than that in which the defendant preserves it by refusing to testify.<sup>43</sup>

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<sup>38</sup> Note 36 *supra*. Also Cf. *Adamson v. California*, 332 U. S. 46 (1946).

<sup>39</sup> *Id.*

<sup>40</sup> *Berg et al. v. Pontilla*, 173 Minn. 512, 217 N. W. 935 (1928); *Loewenherz v. Merchants & M. Bank*, 144 Ga. 556, 87 S. E. 778 (1916); *Lloyd v. Passingham*, 16 Ves. Jr. 59, 64 (1809). These decisions argue that the claim of the privilege and its allowance is properly no part of the evidence submitted to the jury, and no inference should be legitimately drawn by them from the legal assertion by the witness of a constitutional right. However, in *Drury v. Hurley*, 402 Ill. 243, 83 N. E. 2d 575 (1949), the Supreme Court of Illinois held that no constitutional question was presented because the judgment of the trial court, affirming a discharge, did not operate to deprive the employee of any constitutional right. Also Cf. *Ikeda v. Curtis*, 261 P. 2d 684 (Wash. 1953); *Shalkman v. Board of Higher Education*, note 23 *supra*. The cases in 2 A. L. R. 2d 1297 (1948), turn on the point that the transcript of testimony from the congressional committee is inadmissible for the purpose of impeachment. But Cf. note 62 *infra*.

<sup>41</sup> 271 U. S. 494 (1925).

<sup>42</sup> *Id.* at 497. Also Cf. *Adamson v. California*, note 38 *supra* at 55.

<sup>43</sup> Note 41 *supra* at 499.

Thus, it appears that an employee may be required to explain his reason for invoking the privilege before a congressional committee at a subsequent civil trial in which he may challenge the reasonableness of his discharge.

A recent decision, *United States ex rel. Belfrage v. Shaughnessy*,<sup>44</sup> deserves consideration for the court held in an unfortunate use of legal terminology:

Here the error is clear. The privilege is for the innocent as well as the guilty and no inference can be drawn against the person claiming it that he fears he is "engaged in doing something forbidden by Federal law."<sup>45</sup>

This case concerned bail proceedings pending deportation which is not a criminal proceeding nor punishment.<sup>46</sup> It can be distinguished on two grounds. First, it did not concern merely civil liability but incarceration violating the Constitutional right to bail<sup>47</sup> and the inalienable right of liberty of the human personality. Moreover, the United States simply alleged that because the defendants were indicted under the Smith Act, they would obey Communist Party orders and flee the jurisdiction, when, in fact, they had respected congressional subpoenas, attended all hearings, and maintained their permanent residence throughout all proceedings. Manifestly, the inference invoked was quite different, if it could be called an inference at all.<sup>48</sup>

In conclusion, it may be summarized that when a witness in any proceeding refuses to answer a question on the ground of self-incrimination, such refusal cannot be used against him in a subsequent *criminal* proceeding. However, in a civil action subsequent to the congressional investigation, the witness may be required to "explain the incriminating circumstances." Upon his failure to do so, the trier of facts, the jury, is entitled to draw an "adverse" inference against the witness and such inference is admissible against him.<sup>49</sup>

#### *The Inference Itself*

Before proceeding further, it would be well to consider whether Communist association *per se* may be the basis for the reasonable termination of employment by an employer. The United States Supreme Court in *Adler v. Board of Education*,<sup>50</sup> has answered in the affirmative:

One's associates, past and present, as well as one's conduct, may properly be considered in determining *fitness* and *loyalty*. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state

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<sup>44</sup> 113 F. Supp. 56, 60 (S. D. N. Y. 1953) presently on appeal. This language was cited directly from *Spector v. United States*, note 33 *supra*, which concerned a criminal prosecution under the Smith Act.

<sup>45</sup> Note 44 *supra* at 60.

<sup>46</sup> *Carlson v. Landon*, 342 U. S. 524 (1951).

<sup>47</sup> U. S. CONST., VIII AMENDMENT; Federal Rules of Criminal Procedure 46a (1) and (3).

<sup>48</sup> The United States Supreme Court disposed of a similar case without reference to an inference, *Stack v. Boyle*, 342 U. S. 1 (1951).

<sup>49</sup> *Ikeda v. Curtis*, note 40 *supra*. To the same effect, Cf. *United States ex rel. Zapp v. District Director*, 120 F. 2d 762 (2nd Cir. 1941).

<sup>50</sup> Note 24 *supra*.

may very properly inquire into the company they keep, and we know of no rule, *constitutional or otherwise*, that prevents the state, when determining the *fitness and loyalty* of such persons, from considering the organizations and persons with whom they associate.<sup>51</sup> (Italics added.)

Moreover, the Supreme Court in the *Adler* case upheld the New York Feinberg Law<sup>52</sup> which provided that membership in a listed subversive organization constituted *prima facie* evidence of disqualification from the New York public schools. The Court decided that employees have no right to work for the State on their own terms. It is a privilege. If the employees do not choose to work on the reasonable terms laid down by the proper authorities, "they are at liberty to retain their beliefs and associations and go elsewhere."<sup>53</sup> However, in *Weiman v. Updegraff*, the Court softened this language by holding that "Constitutional protection does not extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."<sup>54</sup> The Oklahoma Act, which created a *conclusive* presumption of disqualification, was declared unconstitutional on the ground that "a state servant may have joined an organization unaware of its activities and purposes" and *scienter* was not made an element of the statutory offense.

It appears in light of the *Weiman* decision that even should an employee refuse to state whether he *knowingly* attended Communist Party meetings on the ground of self-incrimination, he would be entitled to a subsequent hearing at which he had an opportunity to explain any mitigating circumstances of such association.<sup>55</sup>

The case of *Shalkman v. Board of Higher Education*,<sup>56</sup> presently on appeal, appears destined to reach the United States Supreme Court. Six professors protested the termination of their employment which resulted directly from their exercise of the privilege against self-incrimination before the Jenner Subcommittee. The New York Appellate Court held that the discharge was proper under Section 903 of the New York City Charter,<sup>57</sup> and that the Charter

<sup>51</sup> *Id.* at 493. The Supreme Court also held that the New York Statute had not deprived the employees of any right of freedom of speech or assembly. Cf. The Washington Tenure Cases, COMMUNISM AND ACADEMIC FREEDOM (University of Washington Press, 1949). Academic freedom carries with it the affirmative obligation of "diligence and loyalty in citizenship" as well as rights and no professor must be allowed to violate these duties under the pretext of exercising his freedom. This view was adopted by thirty-seven colleges which comprise the Association of American Universities, *The Present Danger*, Atlantic Monthly, June, 1953, p. 44. To the same effect, Cf. the statement in the Report of the Jenner Subcommittee, note 34 *supra*, and the conclusions of the Subcommittee therein. Also Cf. the evidential findings concerning Communism in the McCarran Internal Security Act, note 10 *supra*, and in the Report of the Subversive Activities Control Board, No. 51-101, (1952).

<sup>52</sup> N. Y. LAWS, ch. 360, § 12-a (1949).

<sup>53</sup> Note 24 *supra* at 492.

<sup>54</sup> *Weiman v. Updegraff*, note 26 *supra* at 192.

<sup>55</sup> This would appear to overrule, as unconstitutional, the decision of *Koral v. Board of Education*, note 23 *supra*, which held that Section 903 is self-executing and where an employee invokes the privilege against self-incrimination, there is no necessity of notice or hearing.

<sup>56</sup> Note 23 *supra*.

<sup>57</sup> Note 22 *supra*.

provision does not contravene any constitutional guarantee, since there was no denial of the privilege against self-incrimination.

The *Adler* decision established that Communist association may be the basis for discharge on the grounds of fitness and loyalty. As previously substantiated, an inference from the invocation of the privilege against self-incrimination is admissible in a civil action. Therefore, there is little doubt that Section 903 as applied in the *Shalkman* decision, is constitutional.

The foregoing discussion bears solely on a case involving an appropriate state statute which, of course, is subject to the Due Process clause of the Fourteenth Amendment. The question remains whether the inference will constitute *sufficient* evidence to support the reasonable discharge of an allegedly disloyal employee, in the absence of statutory authority. It is quite evident that it would, since again no constitutional right of the witness would thereby be abridged.

The text previously quoted from the *Adler* case was paraphrased from *Garner v. Board of Public Works*<sup>58</sup> which concerned city employees. There is no reason why this *ratio decidendi* of the *Adler* and *Garner* decisions should not be extended to private institutions and employers. Justice Holmes, then Associate Justice of the Supreme Court of Massachusetts, made the statement which has become the classic standard for courts compelled to decide cases involving apparent conflict between a contractual obligation and a constitutional right.

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.<sup>59</sup>

In 1951, a Pennsylvania court upheld the dismissal of a teacher who was a member of the Communist Party, holding that the "qualification of loyalty is primary and more basic than any other qualification," such as academic training, which could be required of a teacher.<sup>60</sup> The same might be said of an employee in any occupation.

Thus, an employee or official may be subpoenaed by a congressional committee and at the hearing invoke the privilege against self-incrimination to several questions among which must be one similar to: "Are you a member of the Communist Party?" and "Have you *knowingly* attended meetings of the Communist Party in the last three years?" On the basis of this testimony, he is discharged. If the employee then contests his discharge in a civil action, the

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<sup>58</sup> Note 24 *supra*.

<sup>59</sup> *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N. E. 517, 518 (1892). Also Cf. *Christal v. Commission of San Francisco*, 33 C. A. 2d 564, 92 P. 2d 416 (1939).

<sup>60</sup> *Appeal of Albert*, 99 Pittsburgh Legal Journal 445 (1951). Also Cf. *McDowell v. Board of Education*, 104 Misc. 564, 172 N. Y. S. 590, 592 (1918); *Joyce v. Board of Education*, 325 Ill. App. 543, 60 N. E. 2d 431 (1945).

employer might well admit the existence and terms of the employment contract but set forth the affirmative defense of breach of contract on the grounds of lack of "fitness" and "loyalty."

At the trial, the employee may be called as a witness by the defense and, under the ruling of *Raffel v. United States*,<sup>61</sup> be required to explain his reasons for invoking the privilege before the congressional committee.<sup>62</sup> True, as he doubtless will do, the employee may again invoke the privilege to prevent criminal prosecution. Here, the inference arises. As a matter of law, it is this inference, this circumstantial evidence, that places the burden of going forward with the evidence upon the employee, if he seeks to prevail.

Although the privilege should be conscientiously respected by the courts to protect the witness from criminal prosecution, "its use should not be considered as affording the witness a certificate of good character."<sup>63</sup> This is manifestly true today in regard to Communism.

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<sup>61</sup> Note 41 and 42 *supra*. The insidious nature of Communist organization, recognized on numerous occasions by the Supreme Court, note 24 *supra*, should strengthen the holding that the witness himself must "explain evidence of incriminating circumstances of which he may have knowledge." This is especially significant, since the second proceeding is civil not criminal.

<sup>62</sup> There really would not be any necessity to secure a certified transcript of testimony from the congressional committee for the purpose of impeachment. The identical questions as to Communist affiliation could be asked on direct examination, since the lack of loyalty is part of the defense. If the employee denies any association with Communism under oath, he doubtless would be entitled to a directed verdict. Of course, he thereby may be subjecting himself to a perjury prosecution or citation for contempt by the congressional committee.

<sup>63</sup> Cf. *Scholl v. Bell*, 125 Ky. 750, 102 S. W. 248 (1907).