Self-incrimination—Witness—Loss of Employment by Asserting the Privilege against Self-incrimination: A Professor’s Dilemma

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SELF-INCRIMINATION—WITNESS—LOSS OF EMPLOYMENT BY ASSERTING THE PRIVILEGE AGAINST SELF-INCRIMINATION: A PROFESSOR'S DILEMMA

During recent months many college professors have been subpoenaed before congressional investigating committees. The questions and answers at some of these investigations were similar to the following:

Q: Are there any instructors on the faculty who are members of the Communist Party?
A: I refuse to testify on the grounds that I may tend to incriminate myself.

Q: Have you attended any Communist meetings?
A: I refuse to testify on the same grounds.

Q: Are you a member of the Communist Party?
A: I refuse to testify on the same grounds.

After considerable dissent from organized professor groups, at least thirty of these professors were discharged. With the exception of cases in New York City, where the city charter specifically provides that the exercise of the privilege automatically

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1 The investigation of Communist infiltration into colleges is not of recent origin. See Countryman, Un-American Activities in the State of Washington (1951).

2 In 39 American Association of University Professors Bulletin 95-96 (1953), the professors took the position that assertion of the privilege was not sufficient grounds for dismissing a professor. See a similar position taken by the faculty of Columbia University, School and Society, July 11, 1946, p. 11.

3 A survey completed in July, 1953 showed that of seventy-one professors and teachers who declined to answer questions before the House Un-American Activities Committee in the previous ten months, thirty had been dismissed; dismissal action had been started against two; eight had resigned; nine had been suspended; twelve cases were pending; and only ten had been retained. N.Y. Times, July 22, 1953, p. 13, col. 1.

4 Professors were discharged from the following universities: University of Vermont, N.Y. Times, Aug. 30, 1953, p. 27, col. 3; Rutgers University, Ohio State University, and New York University, Committee Report, Association of American Law Schools Bulletin 91-93 (1953). Harvard University and Massachusetts Institute of Technology have retained professors who asserted the privilege. They admit that detailed inquiry should be made to determine the reason of the professor in asserting the privilege, Ibid.
In \textit{Faxon v. School Committee of Boston} an instructor, while before an investigating committee, asserted the privilege against self-incrimination when asked questions concerning his affiliation with the Communist Party. Because of his assertion of the privilege, the school district discharged him. The court affirmed the action of the school district.

No doubt this case will stimulate substantial adverse comment since many writers have argued that an instructor should not be discharged for asserting the privilege.\textsuperscript{7} It is the purpose of this note to explore the other side of the argument and to present arguments which justify the discharge of a professor who asserts the privilege against self-incrimination.

\textsuperscript{5}Shlakman v. Board of Higher Education, 282 App. Div. 718, 122 N.Y.S.2d 286 (2d Dep't 1953); Koral v. Board of Higher Education, 197 Misc. 221, 94 N.Y.S.2d 378 (Sup. ct. 1950). In Goldway v. Board of Higher Education, 178 Misc. 1023, 37 N.Y.S.2d 34 (Sup. ct. 1942), the court made the distinction that loss of employment through exercising the privilege against self-incrimination did not abrogate the privilege since the employee had a constitutional right to refuse to answer incriminating questions, but did not have a constitutional right to a job. Art. 1, Sec. 6 of the New York Constitution provides that a public employee must waive his privilege or forfeit his job. See this provision upheld in Canteline v. McCellan, 282 N.Y. 166, 25 N.E.2d 972 (1940).

\textsuperscript{6}The federal government has been faced with a similar problem. President Eisenhower in Exec. Order No. 10491, 18 Fed. Reg. 6583 (1953), amending Exec. Order No. 10450, 19 Fed. Reg. 2489 (1953) ordered that an inquiry should be made as to whether a government employee had asserted the privilege against self-incrimination before a congressional committee in determining his eligibility to keep a government job. See further comment on this order by Attorney General Brownell in \textit{N.Y. Times}, Oct. 15, 1953, p. 23, col. 3.

There are very few analgous cases. See Christal v. Police Commission of San Francisco, 33 Cal. App.2d 564, 92 P.2d 416 (held that a policeman had a duty to relate all facts, and the assertion of the privilege was contrary to his duty). Contra: In Re Consolidated Western Steel Corp., 13 Labor Arbitration Reports 721 (1949) (employee could not be discharged for asserting the privilege).

I. THE SCOPE OF THE PRIVILEGE

The Fifth Amendment of the Federal Constitution and the constitutions of forty-six states⁸ provide that no person shall be compelled to give evidence against himself in any criminal case. By judicial construction the privilege has been extended to encompass legislative hearings⁹ and many other similar investigations.¹⁰

II. RIGHTFUL USE OF THE PRIVILEGE

A person may only assert the privilege when in fact his answer may tend to incriminate him.¹¹ The ultimate issue then becomes whether a question such as, "Are you a member of the Communist Party?" is an incriminating question.

Although a recent act has been passed which outlaws the Communist Party,¹² these professors fall within the province of the Smith Act.¹³ In a prosecution under the Smith Act the following three component facts have to be shown: (1) the Communist Party taught or advocated overthrow of the government by force or violence; (2) the professor was a member of the Communist Party; (3) the professor knew the Communist party had the objective of overthrowing the government by force and violence. If the professor is compelled to admit his membership in the Party, he will give the prosecution a link in a chain of evidence needed for a conviction under the Smith Act and other similar laws.¹⁴ Therefore, questions as to membership in the Communist Party have been held to be incriminating.¹⁵

A. What Inferences May be Drawn when the Privilege is Asserted in Response To Such Questions?

It would seem that an inference may be drawn that the professor is a Communist; if he is not a Communist, then the question would not be incriminating and an assertion of the privilege

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⁸ Collection of state constitutional provisions in 8 Wigmore, Evidence § 2252 n. 3 (3d ed. 1940). In New Jersey and Iowa the privilege is a part of the common law. See State v. Miller, 71 N.J.L. 527, 60 Atl. 202 (1905); State v. Height, 117 Iowa 650, 91 N.W. 935 (1902).
¹⁰ McCarthy v. Ardnstein, 262 U.S. 355 (1923) (bankruptcy proceedings); Counselman v. Hitchcock, 142 U.S. 547 (1892) (grand jury); Boyd v. United States, 116 U.S. 616 (1886) (statutory proceeding for forfeiture of goods); Estes v. Potter, 183 F.2d 865 (5th Cir. 1950) (inspections before immigration officials).
¹⁵ Healey v. United States, 186 F.2d 164 (9th Cir. 1950).
would be unlawful. In a disbarment proceeding the refusal of
the defendant to take the witness stand and deny the allegations
created a presumption of the defendant's guilt. A similar re-
sult is reached in civil proceedings. Wigmore argues that an
inference of the truth of the answer sought is a proper inference
to draw when a witness invokes the privilege. He argues:

'Logic is logic,' ever since the days of the one-hoss shay; and it
is on that score impossible to deny that the very claim of the
privilege involves a confession of the fact. 'Were you assisting
the defendant at the time of the affray'?; this may be answered
'yes' or 'no'; if 'no' the fact is not incriminating and the privilege
is not applicable; if 'yes', the fact is incriminating and the privi-
lege applies. The inference, as a mere matter of logic, is not
only possible but inherent and cannot be denied.

Some will argue that an inference of guilt is not the only
inference which may be drawn from a rightful assertion of the
privilege. They will argue that the following alternative infer-
ences may be drawn:

(1) Fear of Prosecution

There is dicta in a Supreme Court decision that an inference
of the truth of the answer sought is not the only inference that
may be drawn, arguing that the witness, although innocent, may
have asserted the privilege solely because of his fear of prosecu-
tion and a wrongful conviction. Recently, the court of appeals
in Healey v. United States amplified the "fear of prosecution" argu-
ment with a hypothetical case similar to the following:

X has made threats against the life of Y. When X is walking
along a road, he sees Y's body with a knife sticking in it. He pulls
the knife from Y's body and is seen clutching it.

Assume that before the grand jury X is asked the question,
"Did you make threats against the life of Y?" If X answers the
question truthfully by replying, "Yes," he will strengthen the
prosecution's case by providing them with strong evidence that
he killed Y. Instead, X invokes the privilege on the theory that a

16 In re Randel, 158 N.Y. 216, 52 N.E. 1106 (1899).
17 Ikeda v. Curtis, 43 Wash.2d 123, 261 P.2d 684 (1953); Stillman
Pond, Inc. v. Watson, 115 Cal. App.2d 440, 252 P.2d 717 (1953); Fross
v. Wotton, 3 Cal.2d 384, 44 P.2d 350 (1935); Ridge v. State ex rel. Tate,
208 Ala. 349, 99 So. 742 (1921); Morris v. McGeelland, 154 Ala. 639,
45 So. 641 (1908); Andres v. Frye, 194 Mass. 224 (1870). Contra: Master-
son v. Transit Co., 204 Mo. 507, 103 S.W. 48 (1907).
18 8 Wigmore, Evidence § 2272 (3d ed. 1940).
20 186 F.2d 164, 167, 168 (9th Cir. 1950).
truthful answer will compel him to be a witness against himself. It seems clear that an innocent witness could invoke the privilege in response to such questions solely from a fear of prosecution.

However, the court of appeals ignored the second question which logically arises from their hypothetical fact situation. Assume X is asked the question, "Did you kill Y?" X raises the privilege and refuses to testify. The court of appeals would argue that an inference that X killed Y couldn't be drawn because X raised the privilege solely because of his fear of prosecution. But the fallacy in the court's argument is the fact that X could not have possibly feared prosecution. All X had to do was truthfully answer, "No." How could he strengthen the prosecution's case by simply telling the truth?

Similarly, a college professor is asked, "Have you attended any Communist meetings?" He has attended Communist meetings but is not a Communist. He would rightfully invoke the privilege on the theory of a fear of prosecution since an affirmative answer would strengthen the prosecution's case in a subsequent action for violation of the Smith Act. Next the professor is asked the question, "Are you a member of the Communist Party?". Since he is not a Communist, a truthful answer in the negative would not in any way harm him and would not cause him to fear prosecution. As a result he would not have any reason for asserting the privilege.

It would seem that the "fear of prosecution" argument is only applicable when the innocent witness is asked to relate circumstantial evidence but inapplicable when he is asked the "sixty-four dollar" question.

But there is a fear that a clever examiner will follow this line of questioning: (1) "Are you a member of the Communist Party?" (2) "Have you attended any Communist Meetings?" This argument is based on the doctrine of the waiver of the privilege against self-incrimination. This rule prohibits a witness who voluntarily discloses facts from raising the privilege when he later is asked details concerning his voluntary disclosure. If the professor is compelled to give a truthful answer of "No" when he is first asked

22 Ibid.
whether he is a Communist, he will have made a voluntary disclosure and will waive the privilege as to all future questions concerning the details of that disclosure. Consequently, he will not be able to assert the privilege in response to the second question, "Have you attended Communist meetings?" since it is merely a detail concerning his voluntary disclosure. Therefore, the argument goes, the professor should be able to raise the privilege in response to the first question, even though he is not a Communist, so he can save the privilege for the second question.

However, the argument has an obvious fallacy. The waiver rule provides that where the witness makes an "'admission of guilt or incriminating fact'," the privilege cannot be later invoked to avoid disclosure of the details.\(^{24}\) If the professor truthfully answers "No" when he is asked, "Are you a member of the Communist Party?," he would not be admitting an incriminating fact, but, on the contrary, he would be denying an incriminating fact. Therefore, the waiver argument would be inapplicable.

But it is argued that a professor who is not a Communist but has attended Communist meetings may have asserted the privilege in response to both questions because of his fear of the "voluntary transaction rule."\(^{25}\) Foster v. People\(^{26}\) is an excellent example of the rule. In a bastardy proceeding a witness was called in behalf of the defendant and asked whether the plaintiff had sexual intercourse with other men during the month in which the child was begotten. He said she had intercourse with men other than the defendant. On cross-examination the witness was asked to name the men with whom the plaintiff had sexual intercourse. The witness refused to testify, asserting the privilege against self-incrimination. The court held that the witness had waived the privilege since he had opened the "transaction" and therefore had to answer all questions related to the "transaction." It is argued that if the professor truthfully answers that he is not a Communist, he opens the "transaction" and therefore must admit that he has attended Communist meetings.\(^{27}\)

The rule seems inapplicable to congressional investigations. The policy behind the rule is that a witness who voluntarily dam-


\(^{25}\) Supra note 21, at 876, 877.

\(^{26}\) 65 Mass. (11 Cushing) 473 (1853); see also State v. Nichols, 29 Minn. 357 (1882).

\(^{27}\) Supra note 21, at 877.
ages a party litigant should be compelled to tell all the details so
the party litigant can contradict or disprove the testimony of the
witness. Such a policy does not exist in congressional investiga-
tions. Whom does the witness harm by first denying that he is
a Communist and then later refusing to state whether or not he
has attended Communist meetings? Secondly, although the rule
has applied frequently in jury trials in state courts, it has never
been applied by the federal courts in congressional investiga-
tions.  

(2) Fear of Prosecution for Perjury

To destroy the inference of guilt drawn from the lawful use
of the privilege, an argument, which has never been passed on by
the courts, has been made that an innocent witness would assert
the privilege solely for a fear of prosecution for perjury. Such
an argument may be explained by the following fact situation:

X, a professor of comparative government, has made statements
in the classroom to the effect that Communism has many outstand-
ing economic advantages over Capitalism, and it is the United
States and not Russia who is guilty of war mongering. In fact,
X abhors Communism but has merely talked the “Communist
Line” to motivate class discussion. Later X is brought before
an investigating committee and asked whether he is a member
of the Communist Party.

X could truthfully answer “No” to this question. However,
his statements in the classroom would seem to indicate that he
is a Communist. Therefore, a truthful negative answer would
seem to indicate a contradiction between his past attitude in the

28 Wigmore, Evidence § 2276 (3d ed. 1940).
29 The Supreme Court had the opportunity to apply the “transaction”
doctrine in McCarthy v. Arndstein, 262 U.S. 355 (1923). Arndstein, an
involuntary bankrupt, appeared before a special bankruptcy commission.
He voluntarily filed a schedule of his assets and liabilities, showing only
one item of property, namely, a bank deposit of $18,000. When questioned
about his other assets, he raised the privilege against self-incrimination.
The prosecution argued that he had waived the privilege because of his
voluntary disclosure of $18,000 assets. The court discussed Foster v.
Pierce, 65 Mass (11 Cushing) 473 (1853), and came to the conclusion that
the privilege was waived only when the witness admitted incriminating
facts. It would seem that the Arndstein case is contrary to the Foster
case. The Foster case argues that the questions do not have to be in-
criminating before the witness waives the privilege—all that is re-
quired is for the witness to voluntarily open the transaction. The Arndstein
case states that the question which the witness voluntarily answers must
be an incriminating question.
30 Dean Andrews of Syracuse University College of Law suggests this
3, 4, 5.
classroom and his present answer before the committee. Seeing this contradiction, the government would subsequently bring a criminal prosecution for perjury against him. By giving a truthful answer the professor would be giving evidence against himself, and the use of the privilege would be proper. If this argument were adopted by the courts, it would contain these weaknesses:

(1) The subpoena power of Congress would be substantially weakened. Many of the witnesses who are subpoenaed to appear before congressional committees have had some "shady conduct" in their past, otherwise they would not be summoned as witnesses. Instead of cooperating with Congress by relating names of Communists they know or explaining their own apparent connections with the Party, they could refuse to testify on the grounds that they feared a subsequent prosecution for perjury. The only witnesses who would inform Congress of the Communist menace would be those who knew little about the Party since only these persons would lack a fear of prosecution for perjury.

(2) Another difficulty with this argument is its assumption that courts and juries as a matter of habit find innocent men guilty. No doubt there have been a few extreme cases where a jury has found an innocent man guilty. However, under our present judicial system, this risk is inherent in all criminal prosecutions. There is no special reason to guard against such a risk in perjury prosecutions.

B. In What Type Of Proceedings May An Inference Be Drawn Without Destroying The Privilege?

(1) Inference in criminal proceedings

It seems clear that the federal government could not use the professor's assertion of the privilege as evidence of his membership in the Communist Party in a subsequent prosecution under the Smith Act. Using the inference in a criminal prosecution would be in derogation of the privilege and would relegate it to

31 Gardner, Court of Last Resort (1952).
32 Since the Supreme Court has held that the privilege does not run to the states infra notes 42 and 43, it would seem that a state could draw an inference from the assertion of the privilege on the federal level and use this inference in a criminal prosecution for violation of a state law relating to subversion.
33 Wilson v. United States, 149 U.S. 60 (1883).
the status of the historic "oath ex officio." A similar policy is behind the rule in the majority of jurisdictions which prohibit the prosecution or court from commenting on the defendant's failure to take the witness stand.

(2) Inference in civil proceedings

The right of a university to draw inferences from the professor's assertion of the privilege will be litigated only when the professor brings a civil suit against the university for damages after he has been discharged. Since the privilege only protects the witness from giving evidence against himself in a criminal proceeding, both state and federal courts hold that an adverse inference in a civil proceeding will not frustrate the purpose of the privilege.

A state or private university has the power to draw an adverse inference when a professor asserts the privilege. The Supreme Court has held that the self-incrimination clause in the Fifth Amendment is not binding on the states either through the

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35 In the middle ages the ecclesiastical courts required the accused to take an "oath ex officio." The effect of this oath was to require him to answer truthfully all questions asked by the court. The refusal to take the oath or to answer questions while under it was a confession of guilt. Thus when asked whether he was guilty of the alleged crime, the accused was confronted with a dilemma: when under oath he was required to give a truthful answer to the question, and when he refused to take the oath, he confessed guilt. See Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1, 5 (1930).

36 At least five states permit comment on the defendant's failure to take the witness stand: California, Georgia, Iowa, Nevada and New Jersey. See the constitutionality of the California and New Jersey statutes upheld in Adamson v. California, 332 U.S. 46 (1947) and Twining v. New Jersey, 211 U.S. 78 (1908).

37 Constitutional or statutory provisions generally prohibit the court from commenting on the evidence. Note, 32 Neb. L. Rev. 461 (1952).

38 There has been much criticism of this rule. The Model Code of Evidence, Rule 201(3) (1942) permits comment. See Dunmore, Comment on the Failure of the Accused to Testify, 26 Yale L.J. 464 (1917).


41 United States ex rel. Zapp v. District Director of Immigration, 102 F.2d 762, 764 (2d Cir. 1941).
theory of the “privileges and immunity” clause42 or the “due process” clause43 of the Fourteenth Amendment. If a state is not bound by the self-incrimination clause, it seems quite clear that a private university also would not be bound.44

III. MEMBERSHIP IN THE COMMUNIST PARTY AS SUFFICIENT GROUNDS FOR DISCHARGE

Thus far it has been established that if a professor rightfully relies on the privilege, in that his answer will incriminate him, then a state or private university may draw the inference that he is a member of the Communist Party. The remaining question is whether a University may discharge a Communist professor.

Many professors have tenure contracts45 or are protected by state statutes46 which provide that they may be discharged for “cause”47 or conduct of a similar nature.48 There has been disagreement among professors49 and universities50 whether membership in the Communist Party is sufficient “cause” for discharging a professor. It has been argued that mere membership in the Party without actual indoctrination in the classroom is not

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44 Note, 4 Utah L. Rev. 141, 142 (1954) which reaches substantially the same conclusion.
45 “Tenure” is the bundle of rights a professor obtains after he remains on the faculty for a prescribed probationary period. A professor who does not have “tenure,” one who is dischargeable at will, could clearly be discharged for using the privilege. See Faxon v. School Committee of Boston, 120 N.E.2d 772, 773 (Mass. 1954) where the professor could be discharged at the “discretion” of the school district. See the 1940 statement of the American Association of University Professors in Emerson and Haber, Political and Civil Rights in the United States 818 (1952).
46 Normally, college professors in state colleges do not fall under state tenure laws. Some states have passed legislation for college professors comparable to the legislation for secondary school teachers. In absence of such legislation, the Board of Regents pass regulations giving tenure. See NEA, Committee on Tenure; Its Status Critically Appraised 1 (1942); Note, 25 B.U.L. Rev. 292 (1945); 21 Notre Dame L. Rev. 25 (1945); 8 U. of Pitt. L. Rev. 144 (1942).
47 See list of such phrases as used in tenure contracts in Emerson and Haber, Political and Civil Rights in the United States 380 (1952).
48 See other types of conduct which have been determined to constitute “gross misconduct” for teachers in Emerson and Haber, Id. at 882-886.
49 The American Association of University Professors, Bulletin of Atomic Scientists 1 (June, 1953), argue that under some circumstances a Communist professor could teach.
50 The Association of American Universities has argued that a professor who believes in Communism cannot fairly present issues in the classroom and should be discharged. N.Y. Times, March 31, 1953, p. 12, col. 5.
sufficient grounds for dismissing a professor. However, the courts have disagreed with this contention, arguing that mere membership in the Party is sufficient grounds for discharging an instructor. Also, if a professor remained in the Party after the date the new Communist law went into effect, there seems to be little doubt that the university has the right to discharge him for "cause."

IV. WRONGFUL ASSERTIONS OF THE PRIVILEGE

A professor may only rightfully refuse to testify when his answer will tend to incriminate him. If he utilizes the privilege for any other reason, he is deemed to have unlawfully refused to testify. Therefore, some will argue that an inference that a professor is a Communist cannot be drawn when he invokes the privilege because all professors do not rightfully invoke the privilege. On the contrary many will assert the privilege when their answer will not incriminate them. The purpose of this section is to point out the wrongful uses of the privilege and the consequences of such wrongful uses. The following illustrate unlawful uses of the privilege:

(1) The professor may not wish to become a talebearer and disclose fellow faculty members who belong to the Communist Party. The courts reject this reason, arguing that the privilege against self-incrimination is solely a personal privilege and is not available to shield the guilt of third persons. But if the naming of third persons will also incriminate the professor, then its invocation is proper.

(2) The professor is a man of principle. He raises the privilege to register his protest against the committee's attempt

51 The late Robert A. Taft argued vehemently that mere membership in the Communist Party was not sufficient reason to discharge a teacher. N.Y. Times, Feb. 22, 1953, p. 29, col. 3.
53 See note 12 supra.
56 See the testimony of Jane Rogers in Rogers v. United States, 340 U.S. 367 (1950).
57 See note 54 supra. A similar rule has been applied when a witness refuses to turn over the records of a corporation. United States v. White, 322 U.S. 694 (1944); Hale v. Henkel, 201 U.S. 43 (1906).
58 United States v. Coffey, 198 F.2d 438 (3d Cir. 1952); Alexander v. United States, 181 F.2d 480 (9th Cir. 1950).
to abridge his freedom of thought.\textsuperscript{50} The privilege cannot be utilized for such a purpose. If the committee were confronted with many men of principle, it would be impossible for the committee to learn facts.\textsuperscript{60}

(3) The professor actually abhors the doctrine of Communism but will bring disrepute upon himself by admitting association with fellow faculty members who are Communists. Early in the history of constitutional law the privilege could be invoked for such a reason.\textsuperscript{61} However, in recent years the attitude of the courts has changed, and such a reason for refusing to testify is treated as a misuse of the privilege.\textsuperscript{62}

(4) The professor is not presently a Communist but joined and left the Party before the passage of the Smith Act.\textsuperscript{63} Disclosures of former Communist affiliations would not be incriminating without the existence of the Smith Act. Consequently, the usage of the privilege under such circumstances would be unlawful.\textsuperscript{64} But it could be argued that a state had a law prohibiting subversive activities\textsuperscript{65} during the time he was a Communist. Therefore, even though his answer would not be incriminating under federal law, it would be incriminating under state law.\textsuperscript{65} Courts, with one exception,\textsuperscript{67} have held that fear of prosecution

\textsuperscript{50} In Lawson v. United States, 176 F.2d 49 (D.C. Cir. 1949) and Barsky v. United States, 167 F.2d 241 (D.C. Cir. 1948) an attempt was made to refuse to testify, not on the basis of the Fifth Amendment, but on the First Amendment. The defendants argued that the questions concerning their affiliations with the Communist Party infringed their freedom of thought and speech. The court rejected this argument on the grounds that freedom of speech must yield to the national interest.

\textsuperscript{60} For an excellent discussion see Fulbright, Congressional Investigations: Significance for the Legislative Process, 18 U. of Chi. L. Rev. 440 (1952).


\textsuperscript{63} The Smith Act was passed in 1940.

\textsuperscript{64} Brunner v. United States, 190 F.2d 167, 169 (9th Cir. 1951).


\textsuperscript{66} Although the state statute of limitations would probably bar criminal prosecutions, many witnesses are unaware of the statute of limitations and still assert the privilege.

\textsuperscript{67} United States v. Di Carlo, 102 F. Supp. 597 (N.D. Ohio 1952) (where the committee is investigating violations of both federal and state law, invoking the privilege because of fear of prosecution under state law is proper).
for violation of state law is not proper grounds for relying on the privilege.65

(5) The professor feels that by testifying he may make some misstatement and commit perjury. If he were permitted to refuse to answer because he feared he would lie, he would have an unlimited right to determine whether he would or would not testify. Therefore, this reason for relying on the privilege has been rejected by the courts.69

(6) The professor refused to testify on the grounds that the questions were not germane to the subject matter of the investigation70 or on the grounds that the committee lacked constitutional power to conduct such an investigation.71 Then, after the committee threatened to cite him for contempt for refusing to testify, he asserted the privilege as an indirect means of attacking the relevancy of the question or the committee's lack of constitutional power. The court has also rejected this reason for relying on the privilege.72

A. Consequences of Unlawfully Asserting the Privilege

An unlawful use of the privilege, such as its assertion for any of the previous reasons, is deemed by the courts73 to violate the federal contempt statute.74

B. Is Conduct Amounting to a Violation of the Federal Contempt Statute Sufficient Grounds for Discharging a Professor?

The Communists are well known for their technique of infil-

65United States v. Murdock, 284 U.S. 141 (1931); Graham v. United States, 99 F.2d 746 (9th Cir. 1938); Claiborne v. United States, 77 F.2d 682 (8th Cir. 1935); Perkins Oil Well Cementing Co. v. Owen, 293 Fed. 759 (D. Cal. 1923); cf. Hope v. Burns, 6 F.R.D. 556 (1947) (fear of civil suit not sufficient grounds for refusing to testify).

69Glickstein v. United States, 222 U.S. 139, 142 (1911); Claiborne v. United States, 77 F.2d 682, 690 (8th Cir. 1935); Edelstein v. United States, 149 Fed. 636, 644 (1906).

70Sinclair v. United States, 279 U.S. 262 (1929) (committee can only ask questions pertinent to the subject matter of the investigation); see United States v. Orman, 207 F.2d 148 (3d Cir. 1953).

71In McGrain v. Daugherty, 173 U.S. 135 (1927) the Supreme Court held that Congress can investigate only subjects upon which it may constitutionally legislate. However, Congress can investigate anything, whether or not it be included in the Tenth Amendment, on the theory that it is investigating for the purpose of a constitutional amendment.


trating into sensitive areas where they are not detected while they spread their doctrine. A university is a fertile field for spreading their propaganda. A Communist professor by slippery reasoning and planned inference can easily raise doubt in the student's mind as to the true value of a Capitalistic society. It is fair to assume that all universities place a clearly defined duty on every professor to report any knowledge he has about Communists on the faculty. A professor, who is not a Communist, violates this duty and the contempt statute when he refuses to give information to a committee on the grounds that he may tend to incriminate himself. It would seem that this breach of duty and a violation of the contempt statute is sufficient "cause" for discharging him.

However, many will argue that the university cannot determine whether he has actually violated the contempt statute until he has been tried on a contempt charge. But from the professor's refusal to testify, the university can draw one of two conclusions: (1) He is not a Communist. Therefore, he violated the contempt statute and breached his duty by refusing to testify. Violation of the contempt statute and breach of his duty to the school should constitute sufficient "cause" for discharging him. (2) He is a Communist and therefore rightfully relied on the privilege. But if he is a Communist, he should also be discharged.

Similarly, at a trial on the charge of contempt there is likely to be one of two findings: (1) That the professor is innocent of contempt because he is a Communist and therefore rightfully relied on the privilege. (2) That the professor is guilty of contempt because he is not a Communist, wrongfully relied on the privilege and thus violated the federal contempt statute. Consequently, a university should not be compelled to postpone the dismissal of a professor until after he has been tried for contempt.

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75 See excellent discussion of the problem by the President of Brooklyn College in American Magazine, July, 1948, p. 19.
76 100 Things You Should Know About Communism and Education, Committee on Un-American Activities (1948).
78 In Lowe's Inc. v. Cole, 185 F.2d 641 (9th Cir. 1950) it was held that the dismissal of an employee was proper even though he had merely been cited for contempt.
79 See note 40 supra.
when regardless of what result is reached in the trial there is sufficient grounds for discharging him.

CONCLUSION

No doubt many will argue that it is not fair to conclude that a professor's assertion of the privilege creates the dilemma of him either being a Communist or violating the contempt statute. It will be argued that some professors do not "willfully" violate the contempt statute since they sincerely believe that they may assert the privilege for some of the reasons declared unlawful by the courts.

In the first place "willfulness" is not a necessary element for the crime of contempt. Secondly, the argument assumes that these professors were unaware of the proper reason for asserting the privilege. Almost without exception witnesses before congressional committees have had the benefit of well-trained counsel to advise them prior to answering each question. Under such circumstances it would be unusual for a professor to be uninformed of the proper reason for asserting the privilege.

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