Right of an Employer to Discharge an Employee for Refusal to Testify Before a Congressional Committee on the Ground of Self-Incrimination

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RIGHT OF AN EMPLOYER TO DISCHARGE AN EMPLOYEE FOR REFUSAL TO TESTIFY BEFORE A CONGRESSIONAL COMMITTEE ON THE GROUND OF SELF-INCRIMINATION

The ever increasing tendency of witnesses called before Congressional investigating committees to invoke the Fifth Amendment's privilege against self-incrimination in order to avoid answering questions as to Communist party membership or activity has posed numerous problems. Not the least of these is the problem facing both government and private employers. Is a refusal by an official or employee to testify as to Communist party membership or activity because of the privilege against self-incrimination a sufficient ground to warrant his discharge?

It is the aim of this article to examine briefly the nature of the privilege against self-incrimination, the propriety of invoking the privilege before a Congressional investigating committee to avoid answering questions as to Communist party membership or activity, the inference to be drawn from such invocation, and more particularly, whether an employer may properly discharge an employee or an official for such invocation or refusal to testify.

NATURE OF THE PRIVILEGE

While considerable controversy has raged over the applicability of the privilege against self-incrimination, it has never been seriously doubted that the privilege does exist. The Fifth Amendment of the Federal Constitution provides:

". . . no person . . . shall be compelled in any criminal case to be a witness against himself."¹

It is well settled that the self-incrimination clause of the Fifth Amendment is not made applicable by the Fourteenth Amendment² as a protection against state action, for the freedom from "testimonial compulsion" is neither a right of national citizenship nor a privilege or immunity secured by the Bill of Rights.³ However, the privilege has been made available to witnesses in state proceedings by provisions in the majority of state constitutions.⁴ The remaining states recognize the privilege as part of their common law.⁵

¹ U.S. CONST. AMEND. V.
² U.S. CONST. AMEND. XIV.
⁴ 46 states have incorporated the privilege in their constitutions. For case illustration see cases cited in 8 Wigmore, EVIDENCE 2252 n.3 (3rd ed. 1940).
Originally developed in order to put an end to the practice of extorting incriminating statements from accused persons, the privilege finds further justification because it stimulates the police and prosecutors to search for the most dependable evidence procurable. Without the privilege there would be a tendency to rely upon less dependable coerced admissions that might be the result of compulsory interrogation.

Though in general conflict with the principle that in criminal cases the government (in private litigation the parties thereto) is entitled to the testimony of every competent person who may have knowledge of the material facts pertinent to the litigation, the privilege is sustained because:

"... the immediate and practical evils of self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime."

In availing oneself of the privilege, the individual claiming it must do so personally. However, the mere fact that he asserts that the answer may incriminate him is not, in and of itself, sufficient to excuse him from answering. It is for the court to decide whether his fear is well grounded. As the Supreme Court pointed out in the Rogers case:

"... Since the privilege against self-incrimination pre-supposes a real danger of legal detriment arising from the disclosure, petitioner cannot invoke the privilege where a response to the specific question in issue would not further incriminate him ... as to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a real danger of further incrimination."

If the court decides that the question would not incriminate, the witness cannot refuse to answer. It is not proper to refuse to answer, "for a purely fanciful protection ... against an imaginary danger."

While the court can require a witness to respond if it clearly appears that the witness is mistaken in his right to refuse to answer; a witness cannot be forced to disclose the basis of his refusal nor in any way be compelled to justify his use of the privilege. Nor is it essential that the answer sought be in and of itself an admission of guilt before

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10 Mason v. United States, 244 U.S. 362 (1917); Hoffman v. United States, 341 U.S. 479 (1951).
14 Supra, note 11.
one is entitled to invoke the privilege. The Supreme Court has held that
the privilege is subject to "a very liberal construction" and has
sustained its use even where the information sought would merely lead
the authorities to incriminating evidence. As pointed out in Hoffman v.
United States, the privilege

"... applies not only to answers which would support a con-
viction under a criminal statute of the United States, but also
to answers which would furnish a link in the chain of evidence
needed to prosecute a witness for a federal crime ... to sustain
the privilege, it need only be evident from the implication of the
question, in the setting in which it is asked, that a responsive
answer to the question or an explanation as to why it cannot
be answered might be dangerous because injurious disclosure
could result. The trial judge in appraising the claim must be
governed as much by his personal perception of the peculiarities
of the case as by the facts actually in evidence."\(^{16}\)

CONGRESSIONAL COMMITTEES AND QUESTIONS DEALING WITH
COMMUNISM

Although the Fifth Amendment literally extends the protection
against compulsory self-incrimination only to witnesses in criminal
cases, the privilege as judicially interpreted is equally applicable to all
manner of proceedings where testimony is compelled by legal sanction.
As the Supreme Court has pointed out:

"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 against himself. It
would doubtless cover such cases but it is not limited to them.
The object was to insure that a person should 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."\(^{17}\)

Thus the courts have held that the privilege may be asserted in
criminal or civil proceedings, before a court, grand jury, administrative agency, or legislative body. While no cases have reached the
Supreme Court challenging the applicability of the privilege to hearings before either House of Congress or a Congressional committee, the
lower courts have sustained the use of the privilege by witnesses called

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15 Counselman v. Hitchcock, 142 U.S. 547 (1892).
17 Supra, note 15.
19 Supra, note 15.
in Congressional investigations. State courts, construing similar provisions in state constitutions, have held the privilege to be applicable to hearings before legislative committees.

While it is well established that being a Communist is not in and of itself a crime, the question remains whether answering questions as to membership or activity in the Communist party would so "tend to incriminate" as to present a proper occasion to warrant invocation of the privilege. Several relatively recent cases appear to justify refusal to testify before a grand jury as to Communist affiliation on the ground that an admission "of intimate knowledge of or close connection with the Communist party may tend to incriminate a witness under that part of the Smith Act which makes it a violation of Federal law to advocate a forceful overthrow of the government."

The Blau case arose out of a series of contempt prosecutions initiated by the Federal government upon the refusal of several witnesses to testify before a Federal grand jury as to Communist party membership and activities. At the time the case arose, twelve national leaders of the Communist party were being prosecuted and were subsequently convicted under the Smith Act for conspiracy to overthrow the United States government. Referring to their prosecution, Patricia Blau refused to testify because her answers would associate her with the leaders of the Communist party and thereby tend to incriminate her under the same act. In reversing a lower court's conviction for contempt, the Supreme Court, referring to the Smith Act, said:

"These provisions made future prosecution of petitioner far more 'than a mere imaginary possibility'... she reasonably could fear that criminal charges might be brought against her if she admitted employment by the Communist party or intimate knowledge of its workings. Whether such admissions by them-

23 Henry Emery's Case, 107 Mass. 172 (1871); In re Hearing Before Joint Legislative Committee, 187 S.C. 1, 196 S.E. 164 (1938); Dale v. Hofstader, 237 N.Y. 244, 177 N.E. 489 (1931); Commonwealth v. Prince, 313 Mass. 223, 46 N.E.2d 755 (1943), aff'd, 321 U.S. 158 (1944); State v. King, 342 Mo. 107, 119 S.W.2d 322 (1938); Matter of Doyle, 257 N.Y. 244, 177 N.E. 489 (1931).
25 (Patricia) Blau v. United States, supra, note 20; (Irving) Blau v. United States, supra, note 11.
27 (Patricia) Blau v. United States, supra, note 20.
selves would support a conviction under a criminal statute is
immaterial."

The court, noting its reasoning in (Patricia) Blau v. United States, likewise reversed a contempt conviction of Patricia's husband, who was convicted for refusing to answer questions before a Federal grand jury concerning the activities and records of the Communist party of Colorado. The Rogers case, although affirming a contempt conviction because the witness had waived the privilege against self-incrimination, reaffirmed the reasoning presented in the Blau cases.

Though the above mentioned cases sustained the invocation of the privilege because the witnesses possessed intimate knowledge of the workings of the Communist party, it is believed that the privilege could be justifiably invoked even as to questions dealing with mere membership in the Communist party. The facts that witnesses called before Congressional committees have availed themselves of the privilege when asked as to membership in the Communist party and that no contempt prosecutions have been initiated against them, would seem to bear out this contention.

**Inference to be Drawn from Invocation of the Privilege**

Once it is established that it is proper to invoke the privilege against self-incrimination in refusing to answer questions before Congressional investigating committees as to present or past membership in the Communist party, the question arises: what inference, if any, can be drawn from an invocation of the privilege? Here, two things must be distinguished: the nature of the privilege itself, and the policy behind its adoption.

It is well established by the courts and text writers that there is nothing in the nature of the privilege itself which prevents the inference that the witness invoking the privilege is guilty of the particular matter in question. Rather, it is admitted that "the inference, as a mere matter of logic is not only possible, but is inherent and cannot be denied." The truth of this is apparent from the very method of claiming the privilege. It is available to a witness when the question asked is such as would, if answered, incriminate or tend to incriminate by leading to information of the witness' participation in a crime. If the witness is honest with himself and the court in claiming the privilege, the only possible conclusion is that he is, or believes himself to be,

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30 (Patricia) Blau v. United States, supra, note 20.
31 Ibid.
32 (Irving) Blau v. United States, supra, note 25.
33 Supra, note 11.
34 Adamson v. California, 332 U.S. 46 (1946); 8 Wigmore, Evidence, §2251, 2263 (3rd ed. 1940) and case cited therein.
35 8 Wigmore, Evidence, §2272 (3rd ed. 1940).
guilty of the particular crime or activity as to which he is being questioned.

In view of the policy considerations behind the adoption of the privilege, the general rule has been that this inference of guilt should not be used in convicting the person claiming the privilege. To this end—recognizing that there is nothing in the nature of the privilege itself to prevent the inference—several legislatures have provided that no comment upon the use of the privilege, or a complete refusal to testify, is to be made by the judge or opposite counsel. Nor is the jury to give any weight to the inference in deciding the case.

However, several states, notably California, again recognizing that there are no restrictions inherent in the privilege itself, allow the judge as well as opposing counsel to comment upon the accused's failure to testify. Moreover, such comment, as well as the inference itself, may be considered by the jury in determining the guilt of the person refusing to testify by invoking the privilege. The Supreme Court, in approving a conviction under a California statute allowing such comment, said:

"However sound may be the legislative conclusion that an accused should not be compelled in any criminal case to be a witness against himself, we see no reason why comment should not be made upon his silence. It seems natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon the defendant's failure to explain or deny it. The prosecution's evidence may be of facts that may be beyond the knowledge of the accused. If so, his failure to testify would have little, if any, weight. But the facts may be such as are necessarily in the knowledge of the accused. In that case a failure to explain would point to an inability to explain."

In addition to the distinction between the privilege itself and the policy considerations forbidding comment upon its invocation, one additional factor should be noted. Assuming that the rule were universal that no inference or comment upon the invocation of the privilege against self-incrimination could be made, the rule is applicable only to the courts and those seeking to convict the witness of a criminal charge. It has no effect upon the action taken by individuals or governmental agencies other than when they endeavor to use the inference to convict the person invoking the privilege of a crime. As the Supreme Court pointed out at a very early date:

"The design of the constitutional privilege is not to aid the

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36 Ibid., at note 2, 3.
37 Ibid.
38 Adamson v. California, supra, note 34.
39 Ibid.
witness in vindicating his character, but to protect him against being compelled to furnish evidence of a criminal charge. If he secures legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good.  

Therefore, even though questions as to membership or activity in the Communist party would so tend to incriminate a witness as to allow him to refuse to testify before a Congressional committee, it would seem that the inference of his membership or activity in the Communist party, not only could, but will realistically be made. Moreover, a governmental or private employer, since he is not seeking to convict the witness of a criminal charge, could freely avail himself of such inference in determining the existence of sufficient ground for discharge.

**Discharge of Governmental Personnel**

The only provision for the removal of governmental officers made by the constitution refers to the power of impeachment of "civil officers of the United States." Therefore, the propriety of removing a Federal officer or employee from his position must depend upon the manner in which he was appointed or chosen for the position, the authority the appointing officer maintains over him and the duty owed by the particular official or employee.

Except the President and the Vice-President, all persons in the civil service of the Federal government fall into one of three categories: those appointed by the President "with the advice and consent of the Senate"; inferior officers whose appointment Congress has vested by law "in the President alone, in the courts of law, or in the heads of the departments"; and employees.

**Officials Appointed by the President with the Advice and Consent of the Senate**

The Constitutional history of the United States is marked by considerable difference of opinion as to the nature and limits of the President’s power to remove officers appointed by him "with the advice and consent of the Senate." It was first believed that while generally the removal power was inherent in the power to appoint, the approval of the Senate was necessary for the discharge of any officer appointed by the president "with the advice and consent of the Senate." In *Ex parte Hennen*, decided

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40 *Supra*, note 12.
41 U.S. Const. Art. I, §3.
45 *Supra*, note 42.
46 See THE FEDERALIST, No. 77 (Hamilton); KENT COMMENTARIES, 310; 2 Story, COMMENTARIES, 1539, 1544.
in 1839, the Court was of the opinion that where Congress had not provided a set term of office for the official, he could be discharged in the discretion of the President. The Court based its decision upon the fact that it had become

"... a settled and well understood construction of the Constitution that the power of removal was vested in the President alone, in such cases, although the appointment of the officer was by the President and the Senate."\(^{47}\)

However, the removal power was believed to be subject to certain Constitutional and statutory provisions. Under the Constitution, the judges of the Federal courts hold office “during good behavior” and cannot be discharged by the discretionary act of the President. Though the issue was not raised in the *Hennen* case, the Court was of the opinion that Congress could limit the President's removal power by providing express terms of office and requiring proof of certain specified grounds before an official could be discharged.

Though the *Hennen* case left many questions undecided, the Supreme Court, until its decision in the *Meyer* case\(^ {48}\) in 1928, “contrived to side-step every occasion for a definite pronouncement regarding the removal power, its extent and location.”\(^ {49}\) Condemning, in the *Meyer* case, an attempt by Congress to limit the removal power, the Court held that it is not within the power of Congress to deny or limit the President's right of removal by requiring the advice and consent of the Senate, even though the officers were appointed by him in that manner. It pointed out that the Constitution endows the President with unlimited power to remove all officers in whose appointment he has participated, with the exception of judges of the United States.\(^ {50}\)

The reasoning behind the President's power of removal is twofold. First, the President as head of the Executive department, is required by the Constitution “to take care that the laws are fully executed”;\(^ {51}\) as a matter of political and administrative efficiency, the duty imposed upon the President could not be effectively carried out without the right to appoint capable, trustworthy individuals or to remove them from office at his discretion. Second, while the legislative powers given to Congress are specifically enumerated—and its implied powers limited to the making of laws which are necessary and proper for carrying into execution powers therein given and other powers vested in the government or in any of its departments—the executive power is granted to the President in general terms without qualification or enumeration of

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\(^{47}\) *Ex parte Hennen*, 13 Pet. (U.S.) 230 (1839).


\(^{49}\) *Corwin, The President—Office and Powers* 162 (1948).

\(^{50}\) *Supra*, note 48.

\(^{51}\) U.S. Const. Art. II, §3.
specific powers. Since the executive power includes as one of its essentials the power to remove executive officials, such power must be unlimited except as the Constitution expressly otherwise provides.\textsuperscript{52}

In \textit{Humphry v. United States},\textsuperscript{53} the Supreme Court qualified the \textit{Meyer} ruling, solving the last major problem surrounding the removal of appointive officials. In the past, the Court had sanctioned removal by the President of appointive officials, despite the provisions of Congress that causes for discharge be specific and terms of office be definite. The Court, in the \textit{Humphry} decision, ruled that the President would prevail over the power of Congress to condition his power of removal only where the officer to be removed occupied a purely executive position. Quasi-legislative or quasi-judicial officers,\textsuperscript{54} though appointed by the President, could not be removed "... during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute."

Therefore, upon the refusal of an executive officer, occupying a purely executive position, to testify as to Communist party membership or activity, it would seem that the President can, in his discretion, remove him from office. Nor would it be necessary for the President to justify his action on the basis of the weight to be assigned the inference that the officer is or was a Communist. Officials occupying quasi-legislative or quasi-judicial positions could be removed only if the specific refusal to testify fell within one of the specific causes for discharge given in the applicable statute.

There have been no cases at the Federal level involving a discharge under specific cause provisions for a refusal to testify because of the privilege against self-incrimination. However, it would seem that the Federal courts would follow State court decisions involving similar situations. These will be considered later in the article.

\textbf{Inferior Officers}

The Constitution provides that "Congress may vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."\textsuperscript{55} No definition of the term "inferior Officers" is supplied by the Constitution. However, the term would seem to include all officers whose appointments are not provided for by the Constitution and who are appointed by the President, Courts of Law or Department Heads by virtue of Con-

\begin{footnotes}
\footnote{52 \textit{Supra}, note 48.}
\footnote{53 \textit{Humphry v. United States}, 295 U.S. 602 (1935).}
\footnote{54 See \textit{e.g.}, Federal Trade Commission, 15 U.S.C.A. 41, "Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."}
\footnote{55 \textit{Supra}, note 42.}
\end{footnotes}
gressional authorization but without the advice and consent of the Senate.\textsuperscript{56}

The Constitution has been interpreted to grant to Congress in the case of inferior Officers the power to "limit and restrain the power of removal as it deems best for the public interest."\textsuperscript{57} Under this interpretation—prior to the Meyer case—it was well established that Congress, in delegating the appointment of inferior Officers to the President, Courts of Law or to the Heads of Departments, could prescribe rules governing their appointment and removal.\textsuperscript{58} However, the broad powers of the President recognized in the Meyer\textsuperscript{59} and Humphry\textsuperscript{60} decisions would seem to indicate that the President, as head of the Executive department, could discharge inferior Officers occupying purely Executive positions despite Congressional attempts to provide definite terms of office or specific causes for discharge. Though the Congressional power over the appointment of inferior Officers by the Courts or Department Heads remains unaffected, the exact status of the presidential power seems uncertain.\textsuperscript{61} In any event, the removal of inferior Officers occupying quasi-legislative or quasi-judicial positions can only be effected if a refusal to testify because of the privilege against self-incrimination falls within one of the specific causes provided by statute.

As a practical matter, where the appointment of inferior Officers is vested in the heads of particular departments, their discharge for refusal to testify poses no problem. Such officers are normally removable only on proof (subject to judicial review) of one of the specific grounds provided by statute.\textsuperscript{62} However, Congress, on August 26, 1950, provided the heads of several departments with authority—withstanding the provisions of any other law—to suspend without pay any civilian officer or employee of his department, where, in the "absolute discretion" of the department head, it should be deemed necessary in the interests of national security.\textsuperscript{63} The President was further authorized to extend these provisions to all other departments of the government. This he did on April 27, 1953.\textsuperscript{64} Inasmuch as the department heads are dependent upon the President for their appointment and continuation in office, there seems little doubt that they "in their sole discretion" will follow the President's executive order\textsuperscript{65} of October 15,

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\item[56] Supra, note 47; United States v. Germaine, 99 U.S. 508 (1879); Ex parte Siebold, 100 U.S. 371 (1880).
\item[57] United States v. Perkins, 116 U.S. 483 (1886).
\item[58] Supra, notes 48 and 57.
\item[59] Supra, note 48.
\item[60] Ibid.
\item[61] Supra, note 44.
\item[62] Supra, note 55.
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1953, and consider a refusal to testify because of the privilege against self-incrimination as a ground justifying discharge from office or employment.

**Federal Employees**

Though ordinarily the term "employee" refers to one who stands in a contractual relationship to his employer, the term as applied to Federal government personnel signifies all subordinate officials of the Federal government receiving their appointments from officials not specifically recognized by the Constitution as being capable of being vested by Congress with the appointive power.

At a very early date, 1871, Congress authorized the President to prescribe regulations to govern the admission of civilian employees into government service. In 1883, Congress authorized by statute the appointment of a Civil Service Commission to aid the President in the preparation of a classified Civil Service program. Since then, the President with the aid of the Commission, and in furtherance of his responsibility "to take care that the laws be faithfully executed" has, by his appointments and directives to the Civil Service Commission, determined the rules governing the qualifications, procurement and discharge of Federal employees. Thus, various loyalty programs covering Civil Service personnel have been initiated in the past.

In addition to the efforts of the Executive department, Congress has also taken an active part in the field of personnel loyalty, particularly since the Korean situation. In 1950, increasingly concerned about the loyalty of Federal employees, Congress authorized the heads of several departments to dismiss without pay any Federal employee when the department head should, in his absolute discretion, deem it "necessary in the interests of national security." As has been previously noted, the President was authorized to extend this regulation to all departments of the government. In so extending it, on April 27, 1953, the President outlined a rather detailed program to guide the department heads. On October 15, 1953, the loyalty program was modified to provide that:

"Refusal by the witness upon the ground of constitutional privilege against self-incrimination, to testify before a Con-

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67 United States v. Germaine, supra, note 56; Auffmalt v. Hedder, 137 U.S. 310 (1890); Nishimura Ekiu v. United States, 142 U.S. 651 (1892).
70 Supra, note 31.
72 Supra, note 63.
73 Supra, note 64.
gressional committee regarding charges of alleged disloyalty or other misconduct..." was to be considered in determining whether the retention of the employee was clearly consistent with the interests of national security. If the retention of the employee was not considered to be consistent with the interests of national security, he should be discharged.

Upon discharge, the issue of the employee's disloyalty—or whether in fact his discharge was “in the interests of national security”—would not be subject to judicial review. While one who is discharged pursuant to a government loyalty program is entitled to have the removal proceedings conform in substance to the requirements of the order,75 the final decision relating to grounds for removal rests with the official making the dismissal and is not subject to judicial review.76

It could not be claimed that such dismissal violates due process. It has been consistently held that government employment is not “property,”77 nor in that particular is it a contract.78 There being no property or contract in the employment the substantive terms of the due process clause do not apply to a holder of a Federal government position.79

Present regulations provide that an employee dismissed under the security program is eligible for re-employment by the same branch if the department head is satisfied that the “re-employment is clearly consistent with the interests of national security,” or by a different branch if the individual is cleared by the Civil Service Commission.80 Therefore, the Bill of Attainder problem presented in the Lovett case81 is avoided.

The Lovett case held a legislative enactment providing permanent proscription from government service as a punishment for those found guilty of disloyalty to be an infliction of “severe” punishment “without a judicial trial.” Because the legislative enactment made no provision for notice, hearing, or an opportunity to be represented by counsel, it was held to be a Bill of Attainder and, as such, a violation of the Sixth Amendment.

74 Supra, note 65.
75 Kutcher v. Gray, 199 F.2d 783 (1952).
77 Taylor v. Beckham, 178 U.S. 548 (1900) and cases cited therein; Ex parte Sawyer, 124 U.S. 700 (1888).
80 Supra, notes 63, 64.
81 United States v. Lovett, 328 U.S. 303 (1946).
Bailey v. Richardson extended the Lovett case, holding that in proscription for three years rather than for life, the "difference is merely one of degree and not of principle." Clearly, by avoiding proscription from government service for any set period, the present regulations avoid the Bill of Attainder problem.

The Court's attitude toward the right to remove Federal employees should make it apparent that Federal employees who invoke the privilege against self-incrimination to avoid testifying as to Communist party membership or activity may be properly discharged from Federal employment.

STATE AND MUNICIPAL PERSONNEL

Several states and municipalities, for example, Louisiana and New York, have initiated programs dealing with government personnel who refuse to testify because of the privilege against self-incrimination. The majority of states, however, rely upon the usual constitutional and statutory provisions to regulate and discharge such personnel. As is true in the Federal field, certain personnel may be discharged in the discretion of their superiors. The majority of state and municipal personnel can be discharged only upon proof of such grounds as neglect of duty, incapacity and misconduct specifically mentioned in statutes and constitutional provisions. To discharge such personnel, it would be necessary to equate a refusal to testify as to Communist party membership or activity, with one of the specific grounds for which they may be discharged.

STATUTORY "FOR CAUSE" AND SPECIFIC CAUSE PROVISIONS

The usual statutory provisions placing restrictions upon the right to discharge government personnel are of two types. The first provides that discharge may be only for such specific causes as incapacity, neglect of duty, malfeasance in office and gross misconduct. The second type provides that discharge may be only "for good and sufficient cause," "due cause" or "conduct unbecoming an officer."

There have been no cases under the first type of statute involving a discharge because of a refusal to testify based upon the privilege against
self-incrimination. Under the second type of statute the cases that have arisen have dealt primarily with police and law enforcement officials.

Several police discharge cases have arisen under statutory "for cause" provisions involving a refusal to testify. Typical of these are *Drury v. Hurley* and *Souder v. City of Philadelphia*. Both cases involved police officers who refused to testify before a grand jury because of the privilege against self-incrimination. When charged specifically with "conduct unbecoming an officer," the officers were discharged. Approving their discharge, the courts found that the refusal to testify was not only a breach of the officers' duty and responsibility, but also a breach of the confidence and trust the public had a right to impose in such officials.

Several other police discharge cases have arisen under express statutory and constitutional provisions requiring police officers to testify when called before grand juries. Typical of these are *Cantaline v. McCelllan* and *Christal v. Police Commissioner of the City and County of San Francisco*. Though decided under constitutional and statutory provisions requiring discharge for a refusal to testify before a grand jury, the reasoning as well as the express language of the court indicates, that even in the absence of such a requirement, a refusal to testify would be grounds for dismissal as "conduct unbecoming an officer." As the California court pointed out:

> "As we view the situation, when pertinent questions were propounded to the appellants before the grand jury, the answers to which questions would tend to incriminate them, they were put to a choice which they voluntarily made. Duty required them to answer. Privilege permitted them to refuse to answer. They...

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87 *Wieman v. Updegraff*, 344 U.S. 183 (1952) indicated that the due process clause in the Federal Constitution limits the right of state governments to deal with their employees. The case involved an Oklahoma loyalty oath statute forbidding the employment of persons who belonged to certain subversive organizations. Mere membership was grounds for denial of employment. The individuals did not need to know the nature of the particular organization. Holding that the statute violated due process because of an "indiscriminate classification of innocent with knowing activity" the Court ruled that "Constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory." However, it cannot be said that a discharge for a refusal to testify is the same as discharging an individual because of mere membership in an organization whose true nature is unknown to him. It must be assumed that Committee procedure is proper. If so, a witness, knowing that he would be given an opportunity to explain his innocent connection with the Communist party, would not refuse to answer. It would seem that he would only refuse to testify if he were unable to explain satisfactorily his activity without incriminating himself.


89 *Souder v. City of Philadelphia*, 305 Pa. 1, 156 A. 245 (1931).


chose to exercise the privilege, but the exercise of the privilege was wholly inconsistent with their duty as police officers. They clearly had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in face of their clear violation of the duty placed upon them.93

However, in cases involving the dismissal of individuals other than police and law enforcement officials, the courts have been reluctant to follow this reasoning. They have refused to accept the argument that a refusal to testify because of the privilege against self-incrimination is either a breach of the employee’s duty or that it renders him incompetent to perform the particular duties of his position. For example, an attorney’s failure to waive immunity from prosecution in testifying on incriminating matters before a board investigating unlawful and unethical practices did not constitute conduct so prejudicial to the administration of justice as to warrant discipline or disbarment.94 Nor did an attorney’s failure to waive the privilege when testifying constitute grounds for denying the reinstatement to the bar.95 In a similar manner, the failure of a judge to sign a waiver of immunity when testifying before a grand jury investigating a murder did not constitute such a violation of his duty as a lawyer and officer of the court to aid in the prosecution of crime to warrant disbarment.96

An approach to the problem, slightly different from the traditional one, has been taken by the New York courts.97 It must be noted, however, that the discharge cases considered by the New York courts have involved municipal personnel discharged under a section of the New York City Charter. This section provides for the automatic dismissal of municipal personnel who refuse to testify or give an immunity waiver when called upon to testify as to subversive activity.98 The New York court seems to indicate that a refusal to testify as to Communist party membership or activity because of the privilege against self-incrimination would be sufficient cause for discharge even in the absence of such a regulation. Enunciating the general principle that “a public employee’s official conduct must at all times conform to

93 For similar decisions involving police officials who invoke the privilege against self-incrimination, see, Scholl v. Bell, 125 Ky. 750, 102 S.W. 248 (1907); 8 Wigmore, EVIDENCE §2231 (3rd ed. 1940); McAuliff v. City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).
95 Ex parte Marshall, 165 Miss. 523, 147 So. 491 (1933).
96 In re Holland, 377 Ill. App. 346, 36 N.E.2d 543 (1941).
98 New York City Charter, supra, note 84.
the obligation of loyalty to the government," the court, even though no other evidence is presented as proof of actual disloyalty, sees in the refusal to testify a breach of the employee's duty of loyalty to the government.99

The New York viewpoint is based upon the philosophy that Communism poses a very distinct and unique danger to the welfare and security of our country. The philosophy takes recognition of the kind of thinking which Justice Jackson sets forth in his concurring opinion in the Dennis case where he said:

"The Communist party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected, dedicated, indoctrinated and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be secreted in strategic posts in transportation, communication, industry, government and especially, labor unions. It also seeks to infiltrate and control organizations of professionals and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion."

The New York position seems quite logical. As applied to our problem it would appear quite clear that the duty of loyalty to one's government, owed in a very particular sense by government personnel, cannot be fulfilled by one who is a Communist. If, as it has heretofore been said, one may logically infer that a person who refuses to testify as to Communist party membership or activity because of the privilege against self-incrimination is a Communist, then it may also logically be concluded that the person is disloyal.

It is submitted that the construction of the duty of loyalty owed by government personnel suggested by the New York court be applied to all government personnel called to testify as to Communist party membership or activity. If such personnel cannot satisfactorily explain their activity, or if they should refuse because of the privilege against self-incrimination, they should be considered, for purposes of further government employment, as being disloyal. Having thereby breached or neglected their duty, they may properly be discharged.

A refusal to testify because of the privilege against self-incrimination may also render the individual incapable of properly fulfilling the duties of his particular office or position. The inference that the witness is a Communist, and hence disloyal, may so affect his relationship with his fellow workers as to prevent him from effectively accomplishing his work. Moreover, the trust and confidence that the public in general, and his superiors in particular, have a right to place in

100 Supra, note 28.
government personnel would be destroyed. Rather than satisfying any
doubts as to his loyalty that may have occasioned his being called to
testify,\textsuperscript{101} the witness’ refusal to admit or deny Communist party
membership or activity gives rise to even more serious doubts. The
individual’s qualifications for continued government employment are
thereby proportionately reduced.

Whether the individual’s discharge is made under a “for cause” or
“specific cause” statute would seem to make little difference. It is
submitted that a refusal to testify as to Communist party membership
or activity because of the privilege against self-incrimination indicates
an incapacity for continued government employment and a breach of
the duty of loyalty owed in a very particular way by government
personnel.

\textbf{PRIVATE EMPLOYMENT}

In the absence of statute or contract, the private employer may
discharge any employee without cause.\textsuperscript{102} Therefore, the right of an
employer to discharge an employee for refusing to testify as to
Communist party membership or activity because of the privilege
against self-incrimination, must be examined in light of the modifica-
tions made by various state and federal statutes as well as collective
bargaining contracts.

\textbf{A. State Statutes}

The only type of state statute which seems to bear upon the par-
ticular problem is that prohibiting interference with employees’ political
beliefs or right to vote.\textsuperscript{103} The leading case\textsuperscript{104} under the “political
interference” type of statute seems to give the employer wide discre-
tionary powers when it comes to discharging an employee because of
suspected disloyalty. In \textit{Lockheed Aircraft Corp. v. Superior Court of
Los Angeles County},\textsuperscript{105} the California court approved the discharge of
eighteen employees from the Lockheed Aircraft Corporation whose
loyalty to the United States had not been proven to the satisfaction of
the employer. At the time, the corporation was engaged in producing
vital war material. Though no precise ground for questioning the
employees’ loyalty was advanced, the court implied that the eighteen

\textsuperscript{101}\textit{Hearings Before the House Un-American Activities Committee on Communist
Methods of Infiltration}, 82d Cong., 2d Sess. 141 (1952). This indicates that
witnesses are called only when the investigation files of some governmental
agency or the testimony of some other witness has given cause for suspicion.

\textsuperscript{102}\textit{Odell v. Humble Oil Co.}, 201 F.2d 123 (1953); \textit{Harmon v. United Mine
Workers of America}, 166 Ark. 255, 266 S.W. 84 (1924).

\textsuperscript{103} Adopted by Calif., Colo., Conn., Fla., Kan., Ky., Md., Mass., Miss., Mo.,
Mont., Neb., N.Y., Ohio, Okla., Pa., S.C., N.D., S.D., Tex., Utah, Vt., Wis.,
Wyo.

\textsuperscript{104} \textit{Lockheed Aircraft Corp. v. Superior Ct. of Los Angeles County}, 28 Cal.2d

\textsuperscript{105} \textit{Ibid.}
were suspected of belonging to a group advocating the overthrow of the government by force and violence—presumably the Communist party. Deciding that such political activity was not the type of political activity intended to be protected under the statute, the court approved the discharge.

Were the attitude taken by the California court in the Lockheed case universally applied to similar statutes, employers would encounter little difficulty in discharging employees believed to be disloyal. All that would seem to be required would be a reasonable belief on the part of the employer that the employee's refusal to testify as to Communist party membership or activity raised serious doubts as to his loyalty.

B. Federal Statutes

The National Labor Relations Act,\(^{106}\) as amended by the Labor Management Relations Act of 1947,\(^{107}\) furnishes the principal Federal restraint upon the employer's right to discharge. While containing no reference to discharge because of subversive activities or a refusal to testify based on the privilege against self-incrimination, the act empowers the National Labor Relations Board to investigate charges of discrimination because of union activity arising out of labor-management disputes. Prior to 1950, the N.L.R.B. usually exhibited considerable suspicion and doubt as to the real reason for discharge where the discharge of union members was predicated upon suspected disloyalty.\(^{108}\) However, since the Korean situation the board has adopted a somewhat more receptive attitude toward discharges based upon suspected disloyalty.\(^{109}\)

This change in attitude was exhibited by two 1949 decisions.\(^{110}\) In both cases, evidence that the employer, acting in good faith, based his decision solely upon the belief that the employees discharged were Communists, was held to be sufficient grounds for discharge so as to allow the General Counsel to refuse to issue complaints alleging discriminatory suspension of employees. One decision is particularly note-

\(^{110}\) Ibid. (Grounds in Case No. 63 were that they were named as Communists in a libel suit and had in the past associated with Communist front organizations. Grounds in Case No. 72 were that the employee had signed a Communist Stockholm Peace Pledge and had added the union name to the signature.)
worthy in that while it affirms the discharge of the employee because he was reasonably suspected of being a Communist, the General Counsel carefully points out that:

"... the underlying reason for the discharge was the individual’s suspected Communist activity, which was resented by the employees and the union, and was a subject of great concern to the employer, if only for the reason that it caused considerable unrest among the employees."

The General Counsel’s remarks seem to indicate that if the activity involved were to cause considerable unrest among the employees, it may be termed sufficient “cause” to warrant discharging the employee concerned.

A similar attitude has been taken by the board where the employer’s action in discharging employees has been based upon Federal security regulations. For example, the board refused to require reinstatement of an employee discharged because of governmental refusal to consent to his employment on any work dealing with government contracts. While the grounds for the government’s disapproval of the particular employee were not advanced, the fact that the government has advanced a policy of discharging its own employees for refusing to testify to Communist party membership because of the privilege against self-incrimination, seems a good indication that it would refuse to approve for work under government contracts individuals who invoke the Fifth Amendment in refusing to testify.

The action of an employer in discharging two employees was likewise upheld where the employees refused to list upon a Federal security questionnaire the names of unions to which they belonged. Though the particular security regulation concerned did not require the employee to be discharged, and though the regulation requiring the listing of the worker’s unions was later changed, the action of the employer in discharging and failing to reinstate the employee was approved. In refusing to grant the complaint alleging the discriminatory discharging of employees, the board approved the employer’s contention that he did not wish, nor was he bound, to employ workers who had refused to cooperate with the government.

A witness’ refusal to testify as to Communist party membership because of the privilege against self-incrimination could very likely produce the same results as justified the discharge of the aforementioned employees. It could produce a good faith belief by the employer that the employee is a Communist, plant unrest due to an unwillingness

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111 Case No. 72, supra, note 110.
112 Reeves Ely Laboratories, Inc., 76 N.L.R.B. 728 (1948).
to work with a "Red," an employer's unwillingness to employ one who "refuses to cooperate with the government," and loss of public faith and confidence. Therefore it would seem that an employer could properly discharge an employee for so refusing to testify without violating any provisions of the National Labor Relations Act.

C. Collective Bargaining Contracts

The usual collective bargaining contract, in that it seeks to limit the grounds upon which an employee may be discharged, presents perhaps the most important restriction upon the employer's right to discharge employees. The courts and the arbitrators seem to have followed the pattern established by the N.L.R.B. when, prior to the Korean situation, they looked with suspicion upon discharges based upon suspected disloyalty or subversive activity;\(^{114}\) but in the post-Korean period they show a more lenient attitude toward such discharges based upon suspected disloyalty and subversive activity.\(^{115}\)

The arbitrators and the courts have uniformly held, despite the presence of a collective bargaining contract, that a refusal by the government to clear an employee for work upon government contracts will supersede the "due cause" provisions of the contract and allow the employee to be discharged.\(^{116}\) This is true even where the security regulation, under which the employee is denied work upon government contracts, does not require him to be discharged.\(^{117}\)

Of the pre-Korean decisions, the most sweeping was, perhaps, that involving Foot Bros. Gear and Machinery Corp. It was held that, since it is not a crime to belong to an organization listed by the Attorney General as subversive, an employee could not be discharged for membership in, or for being in sympathy with, the Communist party. In the absence of proof that there were acts of sabotage or that a special security problem arose from his continued employment, the fact that the man is within the law and has a right to earn a living requires that he be allowed to maintain his employment.\(^{118}\)

In another 1949 decision—much akin to our present problem—the

\(^{114}\) Foot Bros. Gear and Machine Corp., 13 LAB. ARB. REP. 848 (1949); Consolidated Western Steel Corp., 13 LAB. ARB. REP. 721 (1949); Curtis Wright Corp., 9 LAB. ARB. REP. 77 (1947); Spokane-Idaho Mining Co., 9 LAB. ARB. REP. 749 (1947); cf Jackson Industries, Inc., 9 LAB. ARB. REP. 753 (1948).


\(^{116}\) Firestone Tire and Rubber Co. of Cal., supra, note 116; Bell Aircraft Corp., 16 LAB. ARB. REP. 234 (1951); Curtis Wright Corp., supra, note 115; Sperry Gyroscope Co. v. Engineers Ass'n, 279 App. Div. 630, 170 N.Y.S.2d 800, aff'd, 304 N.Y. 382, 107 N.E.2d 78 (1951).

\(^{117}\) Ibid.

\(^{118}\) Foot Bros. Gear and Machinery Corp., supra, note 115.
arbitrator held that an employee could not be discharged merely for his refusal to testify before a grand jury investigating subversive activity, even though his employer, as a result of his refusal to testify, incurred considerable doubt as to the employee's loyalty. The decision as to the employee's loyalty was felt to be so difficult that the company was held not to be qualified to determine whether or not he was loyal.\textsuperscript{119}

Since 1950, the discharge of suspected subversives under general contract provisions has been more generally upheld. The most far-reaching of the post-Korean decisions is that involving the Los Angeles Daily News. Two members of the paper’s editorial staff were named by witnesses testifying before the House Un-American Activities Committee, as being one-time members of the Communist party. The employees refused to affirm or deny the charge; as a result, one was discharged, while the other who was on a rehire list but not working at the time, was not called back to work. Though admitting that neither employee was proved to be a Communist, and that neither had slanted his "copy," the arbitration board upheld the company's decision ruling that the newspaper has a "quasi-public responsibility" and that the "company has a right to expect its employees who are so accused to answer these charges." Because of their refusal to refute these charges the board felt that the paper would be subject to the censure of public opinion and would, as a result, lose a considerable sum of money if it did not move to instill faith and confidence in its publication by discharging the two writers.\textsuperscript{120}

The decisions have been too few to establish a hard and fast rule as to when an employee may be discharged because of questionable loyalty. However, the tendency seems to be that in any case in which the employer suffers actual financial injury, perhaps even potential injury, through retaining a person of questionable loyalty, "good cause" for discharge exists. Though the post-Korean cases advancing this position have dealt largely with newspaper publishers and their employees who are immediately and very definitely affected by any change in public opinion or feeling, it would seem that the "injury" rule should be applicable to all industries and employers.

It seems clear that injury to an employer might possibly result from retaining an employee who has refused to testify as to Communist party membership because of the privilege against self-incrimination. Unrest in the plant due to suspicion and "patriotic sentiments" on the part of fellow employees, loss of public confidence, loss of consumer patronage, and similar results would be very clear possibilities. Such a

\textsuperscript{119} Consolidated Western Steel Corp., \textit{supra}, note 115.
\textsuperscript{120} Los Angeles Daily News, \textit{supra}, note 116.
refusal to testify would constitute "due cause" warranting discharge under the usual collective bargaining contract.

CONCLUSION

It would seem that valid reasons exist for upholding the validity of the discharge of those who hide behind the Fifth Amendment's protection against self-incrimination when asked questions concerning Communist party membership or activity.

One caution seems in order. It is recognized that some witnesses may honestly fear to answer investigating committee questions because they feel that the committee procedure may be such as not to permit them to fully explain their present position and, as a result, incriminate them.

If the witness took such a position, it is recognized that much of what has been presented in this article might not have logical application. To properly deal with such an issue would require an analysis of Committee procedures and the making of suggestions for uniform reforms which would make unwarranted any fear on the part of the witness. Such analysis and suggestions are beyond the scope of this article. The propositions here presented should be read in light of an assumption that Committee procedures are wholly fair and proper.

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