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Constitutional Law - Self-Incrimination - Relation to Loyalty Discharge from Government Service

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CONSTITUTIONAL LAW—SELF-INCRIMINATION—RELATION TO LOYALTY DISCHARGE FROM GOVERNMENT SERVICE—A doctor, drafted into the Army as a private by authority of the Doctors Draft Law,¹ exercised his constitutional privilege against self-incrimination in refusing to complete a loyalty certificate required for a military commission.² The Army refused to grant the commission. In a prior habeas corpus proceeding,³ he had been ordered discharged unless granted the commission. Since the Army intended to grant the discharge under conditions other than honorable,⁴ the doctor sought an injunction to compel prompt honorable discharge. *Held*, injunction granted. Exercise of the constitutional privilege in refusing to complete a loyalty certificate could not be considered a confession of guilt of subversive association or activities, and, in absence of other grounds, the doctor was entitled to an honorable discharge. *Levin v. Gillespie*, (D. C. Cal. 1954) 121 F. Supp. 726.

The original Doctors Draft Law⁵ was interpreted by the Supreme Court in *Orloff v. Willoughby*⁶ to allow the Army to refuse discharges to and withhold commissions from doctors who refused to answer questions concerning possible subversive associations. After the 1953 amendment required the commissioning of qualified doctors,⁷ the Fourth Circuit in *Nelson v. Peckham*⁸ held that such doctors must be released from service unless accorded appropriate rank or grade. The present case is the first in which the nature of the discharge has been at issue. To answer the contention that an exercise of the constitutional privilege against self-incrimination was tantamount to a confession of guilt of subversive activities, the court quoted from *Spector v. United States*.⁹ "The privilege is for the innocent as well as the guilty and no inference can be drawn against the person claiming it that he fears that he is 'engaged in doing something forbidden

¹ 64 Stat. L. 826, §4(i)(1) (1950), 50 U.S.C. App. (1952) §454(i)(1). See *Bertelsen v. Cooney*, (5th Cir. 1954) 213 F. (2d) 275, where the constitutionality of this statute was upheld.

² The required form, "Loyalty Certificate for Personnel of the Armed Forces," specifically allows the exercise of the federal constitutional privilege.

³ *Levin v. Gillespie*, (D.C. Cal. 1954) 121 F. Supp. 239.

⁴ An enlisted man may receive one of the following types of discharge: honorable, general, undesirable, bad conduct, dishonorable. The last three are granted under conditions other than honorable. A.R. 615-360.

⁵ 64 Stat. L. 828, §4 (1950), 50 U.S.C. App. (1952) §454a provided that a drafted doctor "... may ... be promoted to such grade or rank ... commensurate with his medical or dental education, experience, and ability."

⁶ 345 U.S. 83, 73 S.Ct. 534 (1953), noted in 67 HARV. L. REV. 102 (1953).

⁷ 67 Stat. L. 87, §3 (1953), 50 U.S.C. App. (Supp. I, 1954) §454a changed "may" to "shall." See note 5 *supra*.

⁸ (4th Cir. 1954) 210 F. (2d) 574, followed in *Peck v. Carpenter*, (D.C. Cal. 1954) 120 F. Supp. 560.

⁹ (9th Cir. 1952) 193 F. (2d) 1002 at 1006.

by federal law.’”¹⁰ The court may well have been influenced by plaintiff’s assertion that an undesirable discharge would seriously impair his reputation and civilian professional status. The decision in the present case seemingly ignores an applicable Army regulation adverse to plaintiff,¹¹ thereby indicating a definite acceptance of the doctor’s position. The *ratio decidendi* of the present case is opposed to recent trends in federal and state loyalty dismissals.¹² Witnesses under oath in criminal prosecutions and before congressional committees, grand juries and certain administrative agencies may properly claim the privilege against self-incrimination if the requested testimony would furnish a link in the chain of evidence needed for a later criminal prosecution.¹³ However, refusal to testify upon this ground before a congressional committee regarding charges of alleged disloyalty is officially considered in determining whether the retention of a federal employee is “clearly consistent with the interests of the national security.”¹⁴ Federal loyalty dismissals without the safeguards of a judicial trial have been upheld¹⁵ in accordance with the principle that government employees have no constitutionally protected property rights to their positions.¹⁶ The governmental interest in eliminating possible disloyalty has overcome the argument that a federal loyalty dismissal with its stigma to reputation and prejudice to earning power amounts to unconstitutional punishment.¹⁷ It is also well established that a state may require a loyalty oath as a condition of

¹⁰ Principal case at 727. See 8 WIGMORE, EVIDENCE, 3d ed., §§2250, 2251 (1940) for a full discussion of the history and policy of the self-incrimination privilege.

¹¹ A.R. 615-370 indicates that enlisted personnel are not entitled to an honorable discharge if they have “failed to divulge any material detail relative to [subversive] activity or association . . . prior to entry on active duty.”

¹² The present case is distinguishable from most loyalty dismissals where the employee desires to continue his employment. It is possible that some doctors or dentists not desiring to serve in the army could take advantage of this method of avoiding their military obligations.

¹³ *Blau v. United States*, 340 U.S. 159, 71 S.Ct. 223 (1950); *Hoffman v. United States*, 341 U.S. 479, 71 S.Ct. 814 (1951). This privilege is subject to the operation of the waiver doctrine, *Rogers v. United States*, 340 U.S. 367, 71 S.Ct. 438 (1951); and to the Witness Immunity Act of 1954, P.L. 600, 16 U.S.C. Cong. and Adm. News (1954) 5114.

¹⁴ Exec. Ord. 10450, §8(a)(8), 18 Fed. Reg. 2489 (Apr. 29, 1953), as amended by Exec. Ord. 10491, 18 Fed. Reg. 6583 (Oct. 16, 1953).

¹⁵ *Bailey v. Richardson*, (D.C. Cir. 1950) 182 F. (2d) 46, aff’d. by an equally divided Court, 341 U.S. 918, 71 S.Ct. 669 (1951). *Kutcher v. Gray*, (D.C. Cir. 1952) 199 F. (2d) 783. See Gardner, “*Bailey v. Richardson and the Constitution of the United States*,” 33 Bosr. UNIV. L. REV. 176 (1953).

¹⁶ *Taylor v. Beckham*, 178 U.S. 548 at 577, 20 S.Ct. 890 (1900); *Crenshaw v. United States*, 134 U.S. 99 at 108, 10 S.Ct. 431 (1890), 99 A.L.R. 336 at 341 (1935). But see Dawley, “The Governor’s Constitutional Powers of Appointment and Removal,” 22 MINN. L. REV. 451 at 474 (1938).

¹⁷ *Bailey v. Richardson*, note 15 supra. *United States v. Lovett*, 328 U.S. 303, 66 S.Ct. 1073 (1946), had held that a congressional attempt to compel dismissals of designated federal employees was equivalent to criminal punishment and unconstitutional as being a bill of attainder and ex post facto. On the federal loyalty program, see Emerson and Helfeld, “Loyalty among Government Employees,” 58 YALE L.J. 1 (1948), and Richardson, “The Federal Employee Loyalty Program,” 51 COL. L. REV. 546 (1951).

employment,¹⁸ or dismiss educators who invoke the self-incrimination privilege in response to congressional or state inquiry as to subversive associations.¹⁹ However, there is some judicial recognition of the "badge of infamy . . . visited upon a person excluded from public employment on disloyalty grounds."²⁰ If the principles of the present case were applied broadly in loyalty dismissals based on the assertion of the self-incrimination privilege, the result might be to require the dismissing agency to indicate the specific reason for dismissal, and to require a statement that the use of this constitutional privilege is not tantamount to proven disloyalty. This might mitigate the possible stigma to reputation and prejudice to future employment resulting from loyalty dismissals. However, such principles are not likely to be adopted because of the present world situation and because of the popular view that this privilege would not ordinarily be claimed by a patriotic citizen with nothing to hide.

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¹⁸ *Adler v. Board of Education*, 342 U.S. 485, 72 S.Ct. 380 (1952); *Garner v. Board of Public Works*, 341 U.S. 716, 71 S.Ct. 909 (1951). See also *Barsky v. Board of Regents*, 347 U.S. 442, 74 S.Ct. 650 (1954).

¹⁹ *Danisman v. Board of Education*, 306 N.Y. 532, 119 N.E. (2d) 373 (1954); *Faxon v. School Committee of Boston*, (Mass. 1954) 120 N.E. (2d) 772; *Steinmetz v. California State Board of Education*, (Cal. 1954) 271 P. (2d) 614.

²⁰ *Wieman v. Updegraff*, 344 U.S. 183 at 190, 73 S.Ct. 215 (1952), which indicates that an unfair loyalty oath requirement results in the *arbitrary* dismissal of state employees, and that arbitrary dismissal is a denial of due process. It might be argued that a dismissal based on the exercise of the privilege is also arbitrary. See also *Hamilton v. Brennan*, 203 Misc. 536, 119 N.Y.S. (2d) 83 (1953).