

Supreme Court of the United States

October
 TERM, 1969
1970

In the Matter of:

Docket No. 75
18

APPLICATION OF: :
MARTIN ROBERT STOLAR, :
 : Petitioner :

RECEIVED
SUPREME COURT, U.S.
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Place Washington, D. C.
Date December 9, 1969

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STATEMENTS OF:

P A G E

Leonard B. Boudin, Esq., on behalf of
Petitioner

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Robert D. Macklin, Assistant Attorney General
of Ohio, on behalf of Respondents

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* * * *

1 IN THE SUPREME COURT OF THE UNITED STATES

2 *October*

TERM 1969

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4 In the Matter of the Application)

5 of MARTIN ROBERT STOLAR,)

6 Petitioner)

) No. 75
)

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8 Washington, D. C.
9 December 9, 1969

10 The above-entitled matter came on for argument at
11 11:28 o'clock a.m.

12 BEFORE:

- 13 WARREN E. BURGER, Chief Justice
- 14 HUGO L. BLACK, Associate Justice
- 15 WILLIAM O. DOUGLAS, Associate Justice
- 16 JOHN M. HARLAN, Associate Justice
- 17 WILLIAM J. BRENNAN, JR., Associate Justice
- 18 POTTER STEWART, Associate Justice
- 19 BYRON R. WHITE, Associate Justice
- 20 THURGOOD MARSHALL, Associate Justice

21 APPEARANCES:

22 LEONARD B. BOUDIN, ESQ.
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 25 New York, N. Y.
 Counsel for Petitioner

ROBERT D. MACKLIN,
 Assistant Attorney General
 State House Annex
 Columbus, Ohio 43215
 Counsel for Respondents

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 75. The application of Martin Robert Stolar.

Mr. Boudin, you may proceed whenever you are ready.

ORAL ARGUMENT BY LEONARD B. BOUDIN, ESQ.

ON BEHALF OF PETITIONER

MR. BOUDIN: Mr. Chief Justice and may it please the Court: This is a petition seeking review from an order of the Ohio Supreme Court, denying the Petitioner the right to take the bar examination there, which is a condition to admission to the Bar.

The Petitioner was denied that right because of his refusal to answer three questions; a refusal based upon both First Amendment and Fifth Amendment grounds. Those questions appear at the bottom of Page 5 and the top of Page 6 of the Petitioner's brief.

Question 12(g): "State whether you have been, or presently are, a member of any organization which advocates the overthrow of the Government of the United States by force. If your answer to any section of the above question is 'yes' set forth the facts in detail."

Question 13: (These are on two questionnaires) says "List the names and addresses of all clubs, societies or organizations of which you are or have been a member."

And Question 7, at the top of Page 6, asks: "List

1 the names and addresses of all the clubs, societies or
2 organizations of which you are or have been a member since
3 registering as a law student."

4 I should say that the Petitioner had been admitted
5 to the New York Bar; was then in Ohio working for a branch of
6 the Office of Economic Opportunity and applied for admission
7 to the Ohio Bar.

8 MR. JUSTICE STEWART: Well, what he applied for was
9 permission to take the examination for the Ohio Bar; isn't
10 that correct?

11 MR. BOUDIN: Precisely.

12 MR. JUSTICE STEWART: If he had been a member of the
13 Ohio Bar for a certain number of years, he could have been ad-
14 mitted on motion, I think. Is that still true?

15 MR. BOUDIN: No. When he appeared before -- when
16 he got these questions he declined to answer all those ques-
17 tions on the application form, on the ground of what he said
18 was the Fifth Amendment; and all of us have assumed that that
19 meant at that stage the privilege against self-incrimination.

20 Subsequently, in meetings with the Character Com-
21 mittee Members, he indicated that he was also relying upon the
22 First Amendment and that he regarded the questions that were
23 put as not pertinent to his qualifications as a member of the
24 Bar. And when the Character Committee, or the members of the
25 committee, eventually wrote their report, they praised very

1 strongly the impression that this young man had made on them
2 in their interrogation and one of them said that if the rest
3 of the committee would not mind the fact that he hadn't
4 answered these questions, I would have recommended his admis-
5 sion. -- But the committee decided not to recommend his admis-
6 sion -- that is, his admission to the examination.

7 And at that stage while the matter was appearing,
8 was before the Ohio Supreme Court, he retained counsel. And
9 counsel wrote to the Ohio Supreme Court, pointing out that the
10 Petitioner has raised First and Fifth Amendment grounds and
11 that a recent decision of Judge Friendly, in what we call the
12 LSCRRC case, the Law Students Civil Rights Council case, now
13 pending in this Court at 696.

14 In a recent decision by a statutory court, headed
15 by Judge Friendly, questions of this very type were found by
16 the statutory court to be improper and to impinge upon First
17 Amendment rights. And I will develop shortly the respects in
18 which Judge Friendly found questions of this kind to be
19 improper.

20 And Counsel suggested the desirability of appearing
21 before the Ohio Supreme Court to argue the matter; instead the
22 Supreme Court upheld the Committee and entered an order,
23 appearing at Page 56-A of the appendix, denying the application
24 of Mr. Stolar to appear before the Bar -- to take the examina-
25 tion.

1 Now, we, as I indicated before, I am reasonably
2 satisfied, to the extent that counsel can ever be, could pre-
3 vail in this Court on the grounds indicated by Judge Friendly
4 in the LSCRRRC case. And I will turn those when I address
5 myself specifically to the questions put by Ohio to Mr. Stolar.

6 We think, however, that there are more important
7 problems -- more fundamental problems, relating to the entire
8 question of political qualifications, if I may use that term
9 for the moment, to admission to the bar and it is for that
10 reason that our first point in our submission is that political
11 beliefs and political associations and political advocacy of
12 any kind, are not proper conditions or grounds for disqualifica-
13 tion to the admission of the practice of law.

14 As I say, I realize the burden that I am faced
15 with in presenting that proposition in light of several cases
16 in the Court for the assumption underlying those cases. But I
17 want to address myself to that before I begin my argument on the
18 second and third points, which are that the tests and the
19 questions and the procedures followed by Ohio, in this par-
20 ticular case, violate the rule with precision which has been
21 set down by this Court in a large series of cases in the last
22 five or ten years, where First Amendment rights may be impinged
23 upon.

24 And my third argument is going to be very brief and
25 that will relate to the right to assert a privilege against

1 self-incrimination in answers to questions put by a character
2 committee.

3 MR. CHIEF JUSTICE BURGER: Well, do you link those
4 two propositions together in any way --

5 MR. BOUDIN: I think these are completely inde-
6 pendent, Your Honor; the last two.

7 MR. CHIEF JUSTICE BURGER: The last two.

8 MR. BOUDIN: The last two are completely independent.

9 MR. CHIEF JUSTICE BURGER: You're not suggesting
10 the assertion of the privilege against the question directed
11 to the inquiry about the Communist Party?

12 MR. BOUDIN: I am suggesting that, too, and I will
13 come to that as the last phase; but I am suggesting the right
14 to assert the privilege there.

15 I want to suggest very briefly that we have
16 elaborated in our brief and it will require, we hope, a recon-
17 sideration by the Court of some reassumptions in *Konigsberg*
18 and *Anastaplo*, despite the fact that they are factually dis-
19 tinguished by the element of the question of Communist Party
20 membership, which, for one reason or another, have been regarded
21 as *sui generis* in this court.

22 I want to take the first proposition, which is that
23 it seems to us that a political test, and I may suggest even
24 of conduct which is unlawful, although obviously, we don't have
25 to go that far here, is not related to the proper functions of

1 the bar.

2 Now, yesterday it was suggested by some members of
3 the Court that the fact that some political activities might
4 be protected against criminal prosecution -- Mr. Justice
5 Stewart, I think, made the point -- citing when Brandenburg
6 against Ohio was mentioned, does not necessarily mean that the
7 persons engaging those activities protected against criminal
8 prosecution are proper for admission to the bar.

9 And I wish to suggest that a reading of Keyishian
10 and of Elfbrandt and Robel and Schneider and Smith, which we
11 have cited and quoted from in our brief, suggests the contrary;
12 that those cases emphasize the point and in dealing with what
13 we think, with all due respect, as least as sensitive and more
14 sensitive occupations than membership in the bar, namely,
15 work in a defense plant, work as a teacher with the young, work
16 in the Merchant Marine; and in all of those cases the Court has
17 said that these are constitutionally-protected activities and
18 that constitutionally-protected activities cannot be a ground
19 for disqualification from employment.

20 Now, our submission here, and I don't think it has
21 been fully argued, obviously, on this argument, I can't argue
22 it fully, either, is that the profession of the law is a pro-
23 fession where these standards are less applicable, for the
24 following reasons:

25 First, it is, of course, not an employee of the

1 state, and whatever powers the state has over the employees
2 should not be applied to the lawyer, and we think, to the
3 aspirant lawyer.

4 The second is it is very difficult to conceive of
5 there
6 precisely what function/is as a lawyer that would be adversely
7 affected by a political viewpoint, or to go further, political
8 activity, seems to us that there is a difference between the
9 question of a good private character, to go back to the ex
10 parte Garland phrase, which we quote in our brief, and the
11 question of a public character, which is involved in questions
12 of conception of whether or not the state should be overthrown
13 by force and violence to take the extreme situation.

14 Always the history of life in this country, and in
15 the world generally, has shown that the most honorable persons
16 have had conceptions and have sometimes attempted to carry out
17 those conceptions into actions in the political field, without,
18 in the slightest way reflecting upon their good character,
19 except when they have failed, I suppose. And without there
20 being any suggestion of the question of moral integrity. And I
21 think back, specifically, to the case of ex parte Garland,
22 where it is true, the Court based its decision on the rubric --
23 on a principle of a bill of attainder and ex post facto law;
24 and yet in that case and in Cummings against Ohio, we were
25 dealing with the most serious of political crimes; we were
dealing with matters described by -- I think it was Mr. Justice

1 Miller in his dissent, as treasonable activities by Mr.
2 Garland, who after engaging in the fight against the Union on
3 behalf of the Confederacy, was admitted to the bar here, or
4 retained his membership in the bar, I should say, and eventually
5 became Attorney General of the United States.

6 MR. JUSTICE WHITE: Would you think it were at all
7 permissible for a committee to ask an applicant if he ad-
8 vocated assassination to right social wrongs?

9 MR. BOUDIN: I think when we get to an extreme
10 question of assassination, Your Honor, it's always one of those
11 extreme problems that are very hard to answer.

12 MR. JUSTICE WHITE: Well, then, make it more
13 general. Do you advocate the general use of violence, violent
14 means to achieve social and economic ends.

15 MR. BOUDIN: I think my answer would be consistent
16 with the point of view I suggested, the committee could not ask
17 that kind of question.

18 MR. JUSTICE WHITE: That is is wholly irrelevant
19 to the --

20 MR. BOUDIN: I think it is irrelevant to the prac-
21 tice of law.

22 MR. JUSTICE WHITE: You mean the advocacy of
23 violence -- I suppose you would say, then, that it would be
24 wrong to ask a person: Are you now engaged in violent activities
25 to right social wrongs?

1 MR. BOUDIN: I would consider that, too -- Of course,
2 we are really dealing here at the moment, with three kinds of
3 things: belief, association and advocacy and --

4 MR. JUSTICE WHITE: How about the last -- my last
5 question.

6 MR. BOUDIN: I would even feel that as far as
7 conduct were concerned, that would be an improper question.

8 MR. JUSTICE WHITE: And certainly, a fortiorari
9 this advocacy of violence.

10 MR. BOUDIN: That is quite right, Your Honor.

11 Now, I would say that there is -- in other words,
12 I would not base as matters which may reflect upon -- matters
13 which should be handled where we reach the point of danger to
14 the community, handled in the ordinary manner of due process by
15 trial. I don't regard those as bearing upon the functioning
16 of the lawyer as a lawyer in the process. I think this is a
17 very different situation from the policeman who is given a gun.
18 This is the question put, yesterday, I think, also, and whom
19 one would expect, because he is given a gun, to have respon-
20 sibility with respect to the use of it.

21 But I think that there must be a distinction between
22 the function of the lawyer in his private capacity and the
23 lawyer and his function as a lawyer.

24 MR. JUSTICE WHITE: Well, a lawyer then -- there is
25 nothing inconsistent with being a lawyer and advocating the

1 breaking of the law; even laws against violence?

2 MR. BOUDIN: Well, the difficulty is -- I'm going
3 to answer your question directly, I hope, but the difficulty
4 is, Mr. Justice, that we really are not dealing in reality in
5 this field if we analyze the last 20 years, with the questions
6 of anarchism or questions of actual violence. We are really
7 dealing --

8 MR. JUSTICE WHITE: Well, I'm not trying to deal
9 with politics, but with questions about violence.

10 MR. BOUDIN: I would say that even questions with
11 respect to violence, when one is talking about advocacy of
12 violence -- I'm not talking about conduct yet. Conduct, I
13 think, if it reaches a point where it is punishable; where it
14 is outside the First Amendment protection, and most conduct is,
15 of course --

16 MR. JUSTICE WHITE: So, lawyers -- applicants
17 should be admitted even though they say they would advise
18 clients to break laws --

19 MR. BOUDIN: Now we are coming to the question of
20 what a lawyer would advise a client. I think we are moving
21 into a different area. I was dealing with the law as a citizen
22 and as I was about to say -- it's very hard if I say to hit
23 the extreme situation -- I think we have to recognize that
24 what we are dealing with here, we are dealing with this whole
25 question of membership in organizations having political

1 philosophy, because that's what these questions are dealing
2 with. We really aren't dealing with the extreme situation.

3 MR. JUSTICE WHITE: What if they overlap? I mean,
4 where part of a political philosophy might be to use violent
5 means and break the laws against violence to achieve what
6 might be called, political ends?

7 MR. BOUDIN: I think it is a closer question when
8 we get to the overlapping end of the conduct, but I really
9 think that all of these questions, Your Honor, if we are talk-
10 ing within the framework of reality, are questions that are
11 concerned with membership of organizations which have particular
12 political points of view. We are really never coming down to
13 the question -- nobody ever asks: "Did you engage in violence,"
14 the kind of question put by Your Honor, but all we are dealing
15 with is: "Are you a member of an organization which has for
16 its purpose, which has the literature behind it, advocating
17 the overthrow of the government by force and violence?"

18 MR. JUSTICE WHITE: Your arguments have not reached
19 my question.

20 MR. BOUDIN: My question is a difficult one when I
21 get down to the question of actual conduct.

22 MR. CHIEF JUSTICE BURGER: Didn't I get the impres-
23 sion, Mr. Boudin, that you thought some of these types of
24 questions might be appropriate to ask a candidate for the police
25 force but inappropriate for the lawyer?

1 MR. BOUDIN: Yes, I did think so, Your Honor,
2 because I thought that he had a particular responsibility and
3 a particular danger and it was his job to enforce the law.

4 MR. CHIEF JUSTICE BURGER: Then it would seem to
5 follow that you place the policeman's responsibility on a higher
6 or lower plane?

7 MR. BOUDIN: No; just different. That is: the
8 policeman has the duty of law enforcement and I consider the
9 lawyer, as a matter of fact, very often a bulwark between his
10 clients and the government, in reality. There is no point in
11 my giving Your Honor the history of the thing. I think it's a
12 difference of function; not one that's higher or lower.

13 But I would like, because I recognize the difficulty
14 of part of this argument when we move to the point suggested by
15 Mr. Justice White, pertaining to the particular questions here,
16 because the questions here, I think, clearly fall under what
17 this Court has called the "rule of precision" in First Amend-
18 ment cases. And, clearly, are in conflict with the decision
19 of the statutory court which, while we felt it had far enough,
20 as witnesses by jurisdictional statement in the LSCCRC case,
21 we agree with the dissenting opinion of Judge Motley, in a
22 concurring opinion.

23 I nevertheless, want to call the Court's attention
24 to this particular case. The questions that we have in this
25 case, Questions 2 and 3, those dealing with all organizations

1 are questions which the Court has really called improper in
2 Shelton against Tucker. It is held that they go so far as to
3 discourage all political association -- political association
4 that is completely legitimate.

5 And Judge Friendly pointed out, as Your Honors will
6 see in the appendix in this case, Judge Friendly pointed out
7 that New York Courts -- I think Justice Harlan probably was
8 aware of that, from the questions he put earlier -- had with-
9 drawn such sections with respect to membership to all organiza-
10 tions and had redrawn them because of what Judge Friendly said:
11 "The awareness of the need to bring them inline with develop-
12 ing concepts of First Amendment rights." And he referred
13 specifically to Shelton versus Tucker and Schneider against
14 Smith.

15 Now, Question Number 1, a question relating to
16 membership in an organization advocating the overthrow of the
17 government, has defects that I think will recognize some of the
18 questions here, and that Judge Friendly pointed out -- they
19 omit the absence of knowledge concerning the purposes of the
20 organization; they omit the absence of congruence, that is
21 membership at the same time that the organization had these
22 purposes.

23 In addition to the two points made by Judge Friendly,
24 which resulted in New York changing its questions to import,
25 to include these two elements, we suggest that the elements

1 involved in Brandenburg against Ohio, or suggested by that,
2 namely: a specific intent to advance the purposes of the
3 organization of which one is a member, are elements that also
4 should be called for in a question of this kind.

5 And our concern, of course, is the fact --

6 MR. JUSTICE HARLAN: Am I not right in thinking
7 that Judge Friendly upheld the question insofar as the absence
8 of any aspect of knowledge with respect to the Communist Party?
9 He upheld that question; didn't he?

10 MR. BOUDIN: The question of the Communist Party
11 was not involved in the New York questionnaire.

12 MR. JUSTICE HARLAN: Oh, wasn't it?

13 MR. BOUDIN: And as I say, this Court has made its
14 decision, which we would hope it would reconsider --

15 MR. JUSTICE HARLAN: Of course, Konigsberg sustains
16 that kind of a question. The real question there is whether
17 with the passage of time and so forth, the elements you are
18 arguing for, that the Court held was unnecessary. That there
19 is something that ought to be modified, that's what the essence
20 of it is.

21 MR. BOUDIN: Exactly. I'm also suggesting one more
22 thing with respect to Communist Party questions, which, of
23 course, is not the question put here. A Communist Party ques-
24 tion is a much more pointed question.

25 I'm suggesting that Your Honor's opinion in

1 Barenblatt, Mr. Justice Harlan, and the opinion in Gibson, and
2 perhaps the sound reasons because we are in the First Amendment
3 area now, would indicate that that's -- assuming that the
4 Communist Party membership question can ever be put, that is,
5 if the Court should reconsider whether it should be put, that
6 frame of the question should not be put in the absence of a
7 foundation, some reason to believe that there is cause to make
8 that particular inquiry of an individual.

9 Your Honors stated that view in dealing with the
10 question of a dragnet inquiry in Barenblatt, in a different
11 context.

12 But, we're suggesting that the deterrent effect upon
13 association here is one which would require that if even that
14 question could be put, it should be put --

15 MR. JUSTICE HARLAN: You are taking on an awful
16 sweep of constitutional baggage here that you don't need to pre-
17 vail in this case.

18 MR. BOUDIN: I must admit it; I think that my case
19 could be won very easily on the basis of --

20 MR. JUSTICE HARLAN: Well, why don't you argue your
21 lawsuit?

22 MR. BOUDIN: Well, because I think that the public
23 problems are quite important and I know that the Court is con-
24 cerned, not only with the case I'm bringing here, but with the
25 general impact upon members of the bar. And my concern is that

1 the large amount of activities which the Court knows the young
2 law students are engaging in today -- activities in the south,
3 activities with the poor, activities with minority groups, a
4 panoply of activities, are going to be discouraged and are dis-
5 couraged if questions of this kind are permitted to be put.

6 MR. JUSTICE HARLAN: Do you really think that?

7 MR. JUSTICE HARLAN: I reall do think so, Your
8 Honor.

9 When I argued this matter before the statutory
10 court, Judge Bonsal raised the question. He sounded skeptical,
11 also.

12 If Your Honor will see the immediate opinion in
13 this case, the Court eventually recognized that what I have
14 said -- what the realities are of we who stand here and you who
15 stand there, are not as close to these young law students who
16 are engaged in work in the vineyards, and even I, who have been
17 involved in so many of these cases in the decade, am now
18 regarded as old hat; as conservative.

19 MR. CHIEF JUSTICE BURGER: What does the work in the
20 poverty program, or the Office of Economic Opportunity got to
21 do with organizations advocating the overthrow of the government
22 by force and violence?

23 MR. BOUDIN: Well, I think one of the --because,
24 Your Honor, the distinction is the people who work among the
25 poor, who work for minority groups are often fighting against

1 authority. I'm using the word "fighting" in a general sense.
2 They are regarded as dissidents; they are regarded as radicals;
3 and if I could suggest, Your Honor, what I had forgotten to
4 mention here, Your Honor will notice in our brief what happened
5 when Mr. Stolar appeared before the committee and what the
6 committee said to him.

7 After having gone through -- after they had per-
8 suaded him to answer the generalized questions of dissective
9 nature, Your Honors will see on Page 6 of my brief that the
10 committee pressed him into specific questions and answers, and
11 that eventually he answered. And these are the words of the
12 committee: "That he is not now, and has never been a member of
13 the Communist Party or any Socialist Party, or of the Students
14 for a Democratic Society and that he has signed the standard
15 United States pre-induction Army oath with respect to a list of
16 organizations on the Attorney General's list.

17 In other words, the people who are engaged in work
18 generally, and who are members of one student organization after
19 another, are met by this kind of specific inquiry under Ohio's
20 programs and what reason is there that they should be asked --
21 that a student should be asked whether he is a member of any
22 Socialist Party. All of this arises, as I say, in the context
23 of Ohio's programs and all of this is bound to discourage young
24 men from joining organizations, from joining student groups and
25 what we are doing, ultimately, is we are letting the decisions

1 to be made in these things, as they must be made, I suppose,
2 by character committees who make forays into First Amendment
3 protected activities here, and who live in a milieu which is
4 so different from young men who are in the law schools today,
5 and I have felt that recently in the law schools, and I have
6 been amazed in the differnt quality of the law students who
7 exist today than those who existed, even ten years ago.

8 And these students should not be discouraged by
9 questions of this kind that are put by Ohio, as to whether they
10 are members of Students for a Democratic Society, assuming that
11 there is such a single organization today.

12 They should not be discouraged by asking whether
13 they are members of a Socialist Party. All of this arises, and
14 arises in the context, Your Honors will note, that nobody has
15 made any determination as to what the Court suggested is a
16 different context, and I think, applicable here, enjoined Anti-
17 Fascist against McGrath, a determination that an organization
18 is an organization which one should not belong to. It gives a
19 free-wheeling sweep to the committee to make this inquiry.

20 Now, with respect to the Communist Party, although
21 I have suggested that that should be reconsidered by the Court,
22 the Court has pointed out repeatedly: legislative farming,
23 legislative hearings, official hearings and so forth, but with
24 respect to matters other than the Communist Party, then it
25 certainly seems to me that somebody must have a hearing to

1 determine whether an organization should be on a list, if lists
2 are to be permitted, before we are to give committees the right
3 to ask questions concerning that.

4 And, of course, if we ask questions concerning any
5 organization, you are going beyond what the Court did in
6 Schneider against Smith when it talked about 250 organizations
7 and I refer to the concurring opinion in that case of Mr.
8 Justice Fortas and Mr. Justice Stewart.

9 MR. JUSTICE STEWART: Were these -- just one
10 question, Mr. Boudin, if I may -- were these questions formulated
11 by the Supreme Court of Ohio or by the Ohio State Bar Associa-
12 tions Committee, or by the Columbus Bar Association.

13 MR. BOUDIN: I do not know; perhaps Ohio can say.
14 So far as we know, these are the forms used and I suspect --

15 MR. JUSTICE STEWART: Statewide?

16 MR. BOUDIN: By the state -- and I suspect used by
17 the character committees in many states in the last 15 to 20
18 years or before.

19 This is something new.

20 (Whereupon, at 12:00 o'clock p.m. the argument in
21 the above-entitled matter was recessed until 12:30 o'clock p.m.
22 this same day)

AFTERNOON SESSION

12:35 o'clock p.m.

1
2
3 MR. CHIEF JUSTICE BURGER: Mr. Macklin, you may
4 proceed whenever you are ready.

5 ORAL ARGUMENT BY ROBERT D. MACKLIN,
6 ASSISTANT ATTORNEY GENERAL OF OHIO,
7 ON BEHALF OF RESPONDENTS

8 MR. MACKLIN: Mr. Chief Justice, and may it please
9 the Court; At the outset it should be understood that the
10 rules of the Supreme Court of Ohio with respect to administra-
11 tion of bar admissions, place no burden upon the applicant to
12 prove his good moral character. The procedure is actually one
13 of investigation performed by the admissions committees of some
14 89 bar associations throughout the state. Theirs is a service
15 to the profession, under the Ohio Supreme Court, and the
16 procedures of the bar association committees are provided for
17 by rule of the Supreme Court of Ohio.

18 The committees are responsible for investigating
19 the character, reputation and of all of the qualifications of
20 the applicant. And they report their findings and their recom-
21 mendation to the court, which, in the ultimate result, deter-
22 mines whether the candidate shall be, in the first instance,
23 registered as a candidate for admission to the practice of law,
24 or, in the second instance, whether he should be permitted to
25 take the bar examination. One process precedes the other.

1 Each step of the procedure requires on the part of the appli-
2 cant, submission of a character questionnaire, which is utilized
3 by the local bar committee in performing its investigation.

4 And on the face of the form the applicant is advised that the
5 information may be used as a guide to further investigation.

6 MR. JUSTICE STEWART: There are two, aren't they?
7 One beginning on Page 5-A in the record in the appendix, and the
8 second one, beginning on Page 49.

9 MR. MACKLIN: That's correct, Mr. Justice.

10 MR. JUSTICE STEWART: Now, who formulated this
11 questionnaire?

12 MR. MACKLIN: It is my understanding that this
13 questionnaire was formulated by the Supreme Court of Ohio.

14 MR. JUSTICE STEWART: By the Supreme Court of Ohio,
15 and for use throughout the state in all 88 counties?

16 MR. MACKLIN: Yes, Your Honor.

17 The various bar associations from time to time make
18 recommendations to the Supreme Court for a change in its rules
19 affecting these admission procedures, but to my knowledge there
20 has been no change in the format of the questionnaires, at least
21 for the past five years.

22 MR. JUSTICE STEWART: So, it's not incumbent upon
23 each one of the 88 or 89 committees to formulate its own
24 questionnaires to do the job.

25 MR. MACKLIN: No, Your Honor. It is incumbent upon

1 the committees to further the information that they obtain from
2 these questions.

3 As an applicant from out-of-state, the Petitioner
4 did not require registration as a law student. Petitioner
5 submitted both forms simultaneously, when he sought permission
6 to take the bar examination. And the reason for this, of
7 course, is that the second questionnaire is primarily desinged
8 merely to bring up to date the basic information provided for
9 in the first questionnaire.

10 The Petitioner refused to answer two questions:
11 one dealing generally with membership in organizations; the
12 other as to whether he was a member of an organization that
13 advocates the overthrow of the Government of the United States
14 by force. His refusal was based on his right, as guaranteed
15 by the Fifth Amendment of the United States Constitution.

16 On the second questionnaire --

17 MR. JUSTICE STEWART: Well, I don't quite under-
18 stand why he had to fill out the first questionnaire. The
19 first questionnaire, as I think you have told us, is for law
20 students and it stated December of 1968 and he had been
21 graduated from law school in June of 1968.

22 MR. MACKLIN: That's correct, Mr. Justice Stewart.

23 MR. JUSTICE STEWART: Why was this applicable to
24 him at all?

25 MR. MACKLIN: This is applicable as a matter of

1 practice on the part of the Ohio Supreme Court itself, for
2 obtaining the basic information. If you will study the
3 questionnaire designed for admission to the bar you will find
4 that really this cupplements the basic information obtained in
5 the first instance. And the Ohio Supreme Court treats both
6 questionnaires as a complete application.

7 On the second questionnaire, the Petitioner refused,
8 for the same reason as on the first questionnaire, to answer
9 a question involving membership in clubs, societies or organi-
10 zations since the period he registered as a law student.

11 After being duly warned of the effect upon the
12 investigation of a failure to answer these questions, Petitioner
13 persisted in his refusal to answer, and based upon this refusal,
14 the Bar Admission Committee recommended to the Supreme Court
15 of Ohio that Petitioner's application for admission to the
16 bar examination be denied. The Supreme Court of Ohio approved
17 the recommendation of the Admission Committee and denied the
18 application of the Petitioner to be admitted to the March, 1969
19 bar examination.

20 The Petitioner has not raised in issue any quarrels
21 with the right of the Supreme Court of Ohio to determine the
22 broader cases of those whom it may admit to the bar, including
23 the moral fitness of such persons or such person is to be
24 entrusted with the fate of clients. It follows, therefore,
25 that the Supreme Court of Ohio does have a legitimate interest

1 in investigating the moral character of its applicants. The
2 consider it hand-in-hand, part and parcel, together with techni-
3 cal qualifications of admission to the bar.

4 It must be appropriate to allow the court to
5 inquire into associations to the extent that the information
6 acquired thereby may be an aid of such legitimate purpose.
7 The function of the -- both questionnaires, for that matter,
8 is to provide the basic information as a guide in conducting
9 the investigation of applicants; nothing more. There is no
10 political test involved; there is no oath of loyalty involved;
11 and there are no proscriptions to mere membership in any
12 organizations.

13 Now, the thrust of the Petitioner's argument is the
14 aggregate effect, really a conjecture as to what the Supreme
15 Court of Ohio might do with the kind of information that treats
16 on these questionnaires; not what it has done, but what it
17 might do. We submit that it would be unfair to determine this
18 case on the basis of the mere possibilities or potentialities
19 of action by the Supreme Court of Ohio.

20 Surely one may not presume that the Supreme Court
21 of Ohio is not acutely aware of the decisions of this Court
22 which have so carefully circumscribed areas of improper in-
23 fringement by the states upon the First and Fourteenth Amendment
24 rights.

25 MR. JUSTICE HARLAN: What would you say is the

1 question calling for all organizations from the standpoint of
2 -- specifically, what do you say -- how does this case differ
3 from Shelton and Tucker?

4 MR. MACKLIN: Well, Mr. Justice Harlan, we look
5 upon disclosure of these associations as simply an entry into
6 the ability to discuss with other members of these associations
7 whether or not there are aspects of this person's character or
8 his moral fitness, which may or may not have a bearing upon his
9 fitness for the bar. It's strictly a matter of inquiry investi-
10 gation and nothing more.

11 We have no history, to my knowledge, in the state,
12 whereby mere association, mere membership in an association has
13 resulted in an applicant being denied permission to take the
14 bar examination.

15 MR. CHIEF JUSTICE BURGER: Would you suggest that
16 this question is primarily directed to enabling inquiry about
17 the man at the organizations or among the members of the or-
18 ganizations that he was --

19 MR. MACKLIN: Either members of the organization or
20 the associates he may have worked with in the organization.

21 MR. CHIEF JUSTICE BURGER: Well, that may be a
22 fairly easy question for a man to answer when he's 25, but let's
23 say when he get to be 45 that gets to be a more difficult
24 question to answer. Even if his memory hasn't failed, by that
25 time he has joined so many that he can't remember them all.

1 Isn't that a pretty difficult burden to put on the process?

2 MR. MACKLIN: Well, it may be, but if there is no
3 intent to deceive on his part by excluding some organizations
4 with purposes to mislead bar associations in their examination,
5 I can't think that an exclusion would militate against his
6 acceptance.

7 I have been a member of this Admissions Committee
8 -- as a matter of fact, I am a former chairman and I can recall
9 that some applicants even included the Book-of-the-Month Club,
10 which I didn't think was necessarily a fad association.

11 MR. CHIEF JUSTICE BURGER: But the question, be-
12 cause of its breadth, has a tendency to elicit that kind of an
13 answer in the exercise of the care that would be due this kind
14 of an application.

15 MR. MACKLIN: It is quite likely it would.

16 In Ohio we think the application of the principle
17 of the second Konigsberg case is uniquely appropriate here.
18 The effect of that decision was pointed out to the Petitioner
19 when the investigating committee warned him of the consequence
20 of his refusal to answer.

21 More importantly, the investigating committee has
22 before it a similar questionnaire filled out by the Petitioner
23 in applying for admission to the practice of law in the State of
24 New York just a month before he made application to the Ohio
25 Bar. In that application he answered the following questions:

1 "State whether you have been or are a member of any party or
2 organization engaged in propagating or pledged to effect
3 changes in the form of government provided for by the constitu-
4 tion, or of advancing the interests of a foreign country. If
5 so, state the facts fully.

6 MR. JUSTICE BLACK: Where is that in the appendix?

7 MR. MACKLIN: I think that is contained, Your Honor,
8 in our brief in opposition for petition for writ of certiorari
9 on Pages 17-A and 18-A in the appendix thereto.

10 The Petitioner responded "no," to this question.

11 MR. JUSTICE HARLAN: Does New York have a require-
12 ment of listing all the organizations you have ever belonged
13 to in your entire life?

14 MR. MACKLIN: I don't know that it does; it touches
15 on a great many others. I don't believe that New York has the
16 type of question exactly like the one in Ohio in regard to the
17 associations.

18 We really felt in Ohio that where the applicant or
19 Petitioner had answered similar questions -- at least it had
20 similar elements in it, to those which he refused to answer in
21 Ohio, on the basis of his rights as guaranteed by the Fifth
22 Amendment, that he thereby created an area of, at least, let's
23 say, perplexity on the part of those who were charged with the
24 investigation of his moral character. The question, of course,
25 would be: had something occurred in the intervening month that

1 would cause his answers to the Ohio questionnaires to be possibly
2 incriminating. There may well be reasonable and logical
3 explanations but the refusal of the Petitioner to answer, left
4 a complete void in this particular area of the investigation
5 being performed by the admissions committee. The members of
6 the admissions committee were, literally, unable to complete
7 the full investigation and they could not logically make any
8 recommendations to the Supreme Court of Ohio as to the moral
9 qualifications of the applicant.

10 We contend that there was no reasonable alternative
11 to the action of the Supreme Court of Ohio in denying the
12 Petitioner's application. We submit that the circumstances of
13 this case, which offered inconsistent statements, bring the
14 fundamental issue squarely within the principles of the second
15 Konigsberg case.

16 MR. JUSTICE BLACK: Does the applicant have to
17 swear to this -- take an oath?

18 MR. MACKLIN: Yes, Your Honor, he does.

19 MR. JUSTICE BLACK: By which he could be punished
20 for perjury?

21 MR. MACKLIN: Yes, Your Honor.

22 MR. JUSTICE BLACK: Well, it might be a little
23 difficult, wouldn't it, for a man to be able to swear whether
24 some organization believed in overthrowing the government by
25 force. I don't think there have been many of them that advertise

1 it. Would that be an issue to be tried in a perjury case under
2 your questions? Would he declare he does not belong to any
3 organization that believes in overturning the government, or
4 advocating by force and violence. That would be an issue in a
5 perjury case; wouldn't it?

6 MR. MACKLIN: Mr. Justice Black, I think it
7 possibly would be, but I -- it could possibly be.

8 MR. JUSTICE BLACK: Well, it would be, wouldn't it,
9 if that's what he is swearing.

10 MR. MACKLIN: Yes, but I think in addition to this,
11 you would have to show that he had an intent to deceive or to
12 answer --

13 MR. JUSTICE BLACK: Well, I'm not talking about the
14 intention to deceive; I'm talking about whether he belongs to
15 any organization that believes in overthrowing the government
16 by force and violence and he swears to this, one of the issues
17 would be does he belong to an organization which did that, and
18 wouldn't that make that issue open in the case of trial by
19 perjury, or for perjury?

20 MR. MACKLIN: Yes, I would agree with you, sir.

21 But the fact pattern, we felt that this particular
22 case was even more appropriate to the principles in the
23 *Konigsberg* and *Anastaplo* cases. We would urge that this be a
24 controlling point from the standpoint of our state, and we
25 respectfully urge this Court to affirm the decisions of the

1 Supreme Court of Ohio.

2 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Macklin.

3 I think you have about -- I think your time has expired, yes.

4 Thank you, Mr. Boudin, for your submission; thank you, Mr.

5 Macklin. The case is submitted.

6 (Whereupon, at 1:08 o'clock p.m. the argument in
7 the above-entitled matter was concluded)

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