Supreme Court of the United States

In the Matter of:

Docket No. 18

MARTIN ROBERT STOLAR,

Petitioner

Place Washington, D. C.

Date October 14, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

In the Matter of the Application of

MARTIN ROBERT STOLAR

No. 18

Washington, D.C.
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The above-entitled matter came on for reargument at 2:40 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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Counsel for respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We shall hear argument in Case No. 18 in the matter of the application of Martin Stolar.

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

ARGUMENT OF LEONARD B. BOUDIN

ON BEHALF OF PETITIONER

MR. BOUDIN: Mr. Chief Justice, may it please the Court: We seek review here of the order of the Ohio Supreme Court, denying the opportunity to the petitioner to take the Ohio bar examinations, because he refused, on ground of First Amendment right of association and belief and the Constitutional privilege under the Fifth Amendment against self-incrimination, both as incorporated in the Fourteenth, to refuse to answer three questions which appear upon page 5 of the petitioner's brief.

The first question was "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."

The second question is "List the names and addresses of all clubs, societies or organizations of which you are or have been a member."

And a third question, on a different questionnaire, was "List the names and addresses of all clubs, societies or

organizations of which you are or have been a member since registering as a law student."

The petitioner answered an entire series of questions on these questionnaires. He had been, shortly prior thereto, admitted to the New York Bar, and was seeking admission to the Ohio Bar, he being employed in Ohio in a community legal-service organization under the auspices of the O.E.O.

And he declined originally to answer these questions in writing, stating his Fifth Amendment objection.

When he had an interview with the two members of the sub-committee, the character committee, he persisted in his refusal relying either then or shortly thereafter by letter upon his First Amendment right of association.

Upon being pressed, however, in the oral examination that occurred between one young man and two not-much-older members of the character committee, he answered, as appears on page 6, all of the specific questions the committee appears to have put to him, and finally "that he is not now and has never been a member of the Communist Party, or any socialist party, or of the Students for a Democratic Society and that he has signed the standard U.S. Army pre-induction security oath, which has reference to the 'Attorney General's List'," the same list that was involved in Schneider v. Smith.

The committee, which the reports that are in the record here indicate, was very much impressed with his sincerity,

with his ability, his forthrightness, his reliance on principle.

And one of them indeed said that, but for the failure to answer on the record made, he would recommend the admission of the petitioner, provided that his colleagues would do so. But his colleagues refused to do so, stating that because the questions had been asked--and they regarded the Konigsberg case as authority for these more general questions--they would not recommend his admission to the Bar.

The matter went to the character committee as a whole. The chairman wrote to the petitioner, he again declined to answer, and when the matter came before the Supreme Court of Ohio, he then retained counsel, present counsel, who wrote to the Court pointing out that even under the decision of Judge Friendly's court, in the case next before your honors, which had just come down, each of these three questions violated the rule of precision.

While counsel took issue with Judge Friendly's decision, feeling that it had not gone far enough, as Mr. Dorsen will indicate in the next case, it seemed rather clear that, under Judge Friendly's decision, these questions were improper.

The Court, nevertheless, being obviously of a contrary view, denied petitioner admission to the Ohio Bar, and this lawsuit resulted.

Now, we make three points. The first is the

precision argument, an argument well-supported by the cases which I will develop, unlike my last argument here, most of the time, so that it can be presented clearly to the Court, because it involves this very case.

The second is the Fifth Amendment privilege argument, which has been adverted to by Mr. Baird, and I will simply add several distinctions in terms of points that can be made between this and Spevack.

And the third is the argument that there is no substantial State interest, either in the general inquiry with respect to advocacy and with respect to membership in organizations with political advocacy, regardless of what it is, that the First Amendment is also a bar to such questions, and, more specifically, that in this particular case, in this record, no substantial interest has been shown to justify the inquiry of the State.

Now, very briefly, because I went into a long line in my last argument here, let me state that these questions with respect to political advocacy and political association, are claimed to have some relationship to the question of moral fitness for admission to the practice of the law.

And we agree, of course, that the moral fitness is as important a consideration as technical ability. But the moral fitness that we think this is relevant to is that stated by Mr. Justice Frankfurter in Schware, where he said that from a

profession charged with responsibilities, there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility that have, throughout the centuries, been compendiously described as moral character.

And, as Mr. Justice Black stated in Konigsberg, it is an absence of conduct constituting moral turpitude.

We think, and we shall leave it --- at this point, that, if one examines the questions of this nature that have been put to the members of the Bar in the 1920s, the period in which Mr. Chief Justice Hughes, later Chief Justice Hughes, defended the right of the Socialist lawyers to be members of the New York State legislature.

Or in the 1950s, the so-called Cold War period of the late 1940s, we see that this question which is directed to lawyers in a number of States, is a question that actually was directed to every conceivable occupation from the piano-tuners in the District of Columbia, discussed by Professor Gellhorn in the book we have cited, to teachers, people of the merchant marine and in the private sectors of motion pictures, television, radio--and that the objective is always the same objective, a general fear in 1920 and 1921 of the Russian Revolution, a fear in 1947 and 1948 of an international Communist movement threatening the foundations of society, as the Court indicated in Konigsberg, and was not really based upon any

concern that even Communist lawyers were a threat to the Bar.

As I indicated in my last argument, really when one looks at the record of those who we think--that is all we can say here--were Communist lawyers, there is no evidence at all that political affiliation, advocacy, even in that organization, pinpointed by Konigsberg, presented a threat to orderly judicial processes.

But, again, while I think that the important principle is one that ought to be established in this case, I think we can turn to our case, which does not involve the question of Communist Party membership, but involves the principle of the rule of precision, which this Court has laid down in repeated cases, some before Konigsberg--I think NAACP v. Alabama was one of those--and many of those after Konigsberg, such as this Schneider, and Baggett v. Bullitt, and the lot.

And in those cases the general principle is that, where freedom of association or of privacy may be involved, the State, even where it has a substantial interest, that State must use methods which will minimize the effect upon freedom of association.

The question is has that happened in the present case with these questions, not the Konigsberg questions and not anything else. Now, we suggest, your honors, that it does not and that this case is clearly governed by Schneider v. Smith and by Shelton v. Tucker, and that all three questions

constitute the unlimited indiscriminate search referred to in Shelton v. Tucker, because they call for, and in one case, all organizations within a certain category without naming them, leaving them to the individual to figure out which they are, and all clubs, societies and organizations in the second case.

So far as the second group of questions is concerned, your honors will see that Judge Friendly, at page 161 of the record in the next case, commended the Appellate Division in New York for having stricken out questions calling for that broad indiscriminate question of all organizations, societies, saying that they knew something in that respect about problems relating to the First Amendment.

And, of course, as I indicated before, you didn't have whatever objections we, standing on this side of the table, have to Konigsberg. You did not have the problem of precision, because there is no question that the Communist Party is a Communist party. Everybody knew what the question was related to. And while it might be argued that there is some question as to what membership is, this Court apparently, in Killian, did not feel any such difficulty.

And, of course, you also had in Konigsberg, as I will refer to later on, a specific finding made by all three branches of Government, and, as the majority opinion said in 361 or 366, the second case, findings of fact supported by this Court's decision.

Now, Judge Friendly in the New York case found two objections to Question 12(g). The first was that it lacked knowledge on the part of the applicant with respect to the purposes of the organization. And the second was that it lacked contemporaneity, that is, concurrence of knowledge of the unlawful advocacy of the organization.

And so, on that principle, these questions would be invalid, that is, Question 12(g).

In addition, we have urged, and this will be developed further by Professor Dorsen when he argues the next case, that he is directing his focus on the --- questions, that the elements which the Court has found to exist as taking something out of the protected area, the elements based upon --- and Brandenburg, of adherence to the purposes of the organization, not merely knowledge, a specific intent to advance them, the quality of the incitement and the advocacy, and possibly even, as Brandenburg held, and that was a criminal case, imminent danger to the community, that those elements should be embodied in a question, if questions at all are to be asked.

Now, we have ---

Q Was Judge Friendly overruling Brandenburg?

A I should add, Judge Friendly did not agree with those standards. He did not believe that it was necessary to apply the Brandenburg test, and I don't think he articulated his reasons for not deleting it.

Now, we have reasons why we think that even all those elements, Brandenburg, Konigsberg, ---, all of these questions, do not solve the problem, because they represent a restriction upon association, which is deleterious and which is not necessary to advance even the interests of the State, if they are regarded as substantial here.

For one thing, the questions that are put, whether they had the elements or not, require the applicant to make a judgement as to whether the organization fits into one political category or another. And as the Court's opinions in Noto and --- and Dennis have indicated, it is very difficult to make such a judgement. There is a very thin line sometimes between unlawful advocacy and lawful advocacy, a line which at least should be made in a record before a court or a jury, under judicial procedures, and not --- to the subjective judgement of the applicant, --- by the subjective judgement of his interrogators, who may be --- or members of character committees, but normally taken from an area of society to which the applicant may not belong.

And to risk the perjury prosecution from the declaration here, something we think suggested in a different context in Baggett v. Bullitt, where you had vague questions, to risk that in this area is a reason for not using it and for searching a different method of interrogation.

We think also the consequences of asking these

questions are three. The question that was put last time when I argued the --- case before Judge B---, and that is the question of the "chilling effect."

A law student--not everyone, but many--who knows that he is going to be asked these questions not by a committee of his peers but by a committee of older, more conservative gentlemen, perfectly respectable ---, just as good as he, but with a different point of view, may very well be afraid to join organizations as a law student or college student.

Why should he take the chance? Why should he march in a peace parade, as one man did only to be held up in New York for several months while they casually speculated on why he marched in that peace parade?

And so a young man will have a tendency to say, let me be careful, let me clear out of this, if I am going to join anything, I will join it after I become a member of the Bar, if I want to take that chance.

The second is that we have to think of the independence of the Bar, which is much more than a phrase to all of us on both sides of this table. We want a Bar that is not colored politically, which does not have to pass a political test--it passes a test of conduct, but not a political test of associations, of beliefs, of advocacy.

And finally we have the problem, and a very important problem, of the impact on the clients.

There are minority groups--they are black, they are white. There are dissident gorups, there are radical groups. Many of them think, sometimes I think mistakenly, that they should have more confidence in a lawyer who thinks generally along their lines, that they will get a better assistance from such a lawyer. As I say, I am not sure they are right. But they feel that way.

And the question is whether we are going to say to the young groups, of minority groups, of dissident groups--and dissidence has a very wide range--we are going to screen out your lawyers, we are going to be sure that the lawyers you get are the kind that we think ought to be members of the Bar, and those who may very well be more sympathetic to your purposes are the lawyers we are not going to let you have.

Q Would you think that the Bar examiners could appropriately ask: Do you believe in the overthrow of the Government of the United States by force and violence? Not whether you are a member of any party or committee, but do you believe in it?

A I believe that a question concerning belief, your honor, is sacrosanct. I do not believe that such a question may be asked.

There are people, Justices on this Court, there are such eminent people as Professor Emerson, who believe that all advocacy is a form of protected expression. I believe that,

too.

But whatever may be the dispute with respect to advocacy, no one has ever suggested, whether in the political field or otherwise--and I think the political field is peculiarly delicate--that the --- of what writings you have read, that belief must be absolutely protected from inquiry.

The question that arises now, your honors, is whether, given the picture that I have given you of the reasons why we should have a more restricted means of inquiry--granted arguendo a substantial State interest here--isn't there a means which has a less chilling effect?

And I suggest to your honors that a less drastic means, to use a term used in innumerable decisions of this Court, would permit the elimination of screening of this kind, even one more specific, and would have a number of other tests.

(A) If you had to have any screening at all, you would have a screening which you could say would only be with respect to specific organizations, organizations found by judicial writ--take the Dennis, the --- v. CP, cases I obviously disagree with, but still cases in which the due process aspect, the judicial findings of fact cannot be attacked on Constitutional grounds.

Q Mr. Boudin, time is up, but as I recall it--I don't remember the name of the case--Mr. Justice Roberts, in an opinion for Jehovah's Witness stated many years ago other

things can be attacked, but beliefs are sacred and cannot be questioned. If you would find that, I don't remember the name of the case.

A I will find that by tomorrow morning, but I subscribe to it even now.

MR. CHIEF JUSTICE BURGER: Thank you.

(Whereupon, at 3:00 p.m. the argument in the above-entitled matter recessed, to reconvene at 10:00 a.m. the following morning.)