

Supreme Court of the United States

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OCT 22 1970

In the Matter of:

Docket No. 18

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MARTIN ROBERT STOLAR, :

Petitioner :
----- X

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Place Washington, D. C.

Date October 15, 1970

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IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1970

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In the Matter of the Application of :

No. 18

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MARTIN ROBERT STOLAR :

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Washington, D. C.

8

October 15, 1970

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The above-entitled matter came on for oral argument,

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pursuant to recess, at 10:07 a.m.

11

BEFORE:

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HON. WARREN E. BURGER, Chief Justice

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HON. HUGO L. BLACK, Associate Justice

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HON. WILLIAM O. DOUGLAS, Associate Justice

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HON. JOHN M. HARLAN, Associate Justice

16

HON. WILLIAM J. BRENNAN, Jr., Associate Justice

HON. POTTER STEWART, Associate Justice

HON. BYRON R. WHITE, Associate Justice

HON. THURGOOD MARSHALL, Associate Justice

HON. HARRY A. BLACKMUN, Associate Justice

17

APPEARANCES:

18

(As heretofore noted.)

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 18, in the matter of Stolar. Mr. Boudin, you may proceed whenever you are ready.

ARGUMENT OF LEONARD B. BOUDIN, ESQ. (resumed)

ON BEHALF OF PETITIONER

MR. BOUDIN: Thank you, Your Honor.

Mr. Chief Justice and may it please the Court:

I indicated yesterday three policy considerations to our thought and programs of this kind in declaring his advocacy and membership in advocating organizations were not dangerous and nonetheless there were restrictive means that might be used.

I would add one thought. That is the great question as to whether there is really predictability in determining whether people who had membership in organizations like this were advocating -- will turn out actually as becoming members of the Bar would be deleterious or delinquent in their duties.

Now these four considerations that I have mentioned have led me to two conclusion which I submit to the Court. The first is whether there should be any screening program of any kind and whether there shouldn't be certain safeguards in order not to have the widespread, wide-ranging inquiries. And I suggest two safeguards to the Court if we are to continue with a screening program.

The first is that the organizations concerned with the

1 inquiries made is an organization which has been sound, judi-
2 cially sound. I think in Konigsberg "to be an organization
3 engaging in unlawful activities." Of course there is a wide
4 contrast in the questions involved in this case, where the ques-
5 tions are wide-ranging and vague.

6 And the second consideration I suggest to the Court
7 is that there should be some foundations, some reasons to believe
8 before this kind of inquiry is made that the individual involved
9 has heretofore participated in unlawful activities of such an
10 organization.

11 But of course our principal point has suggested this
12 middle ground, a ground that we prefer not to have as against
13 the next one, is the question of whether there should be any
14 screening program at all. And we suggest that in the case of
15 Rouss there are peculiar susceptibilities to the controls of the
16 courts makes the alternative the least less-restricted means
17 preferable to the question of the screening program with the
18 dangers that I have indicated.

19 Q You don't think there should be any screening
20 program at all. I don't understand what ---

21 A I mean there should be ---

22 Q There would be Bar examinations?

23 A Oh, yes, I meant the questions of the kind with
24 which we are dealing here. I don't mean Bar examinations to
25 be excluded obviously.

4
1 And the fourth point, Your Honors, which I am suggest-
2 ing as available as very strong, but less restrictive in this
3 sense, I reflect upon First Amendment rights are these: The
4 lawyer himself is subject as an officer of the court, as well as
5 his clients, with the contempt power with regard to whatever he
6 may do in the courtroom or with respect to the cases.

7 The lawyer alone is subject to the very powerful dis-
8 ciplinary proceedings ending in the dreaded disbarment, which is
9 ruinous. The lawyer in special cases is subject to, of course,
10 a malpractice suit by his client and, finally, as we approach
11 the criminal activities with which we are concerned, the lawyer
12 is, of course, subject to criminal prosecution.

13 Now this would be my general observation, generally
14 unrelated unnecessarily to the peculiar facts in our case. But
15 in our case, in the circumstances in this case, we think there
16 is neither obstruction of the process of the kind that was found
17 that was found by the courts to exist in Konigsberg and Anastaplo,
18 nor a substantial court agent requiring this particular to answer
19 these questions.

20 Now I submit that because, as I submitted to Your
21 Honors in my original presentation, all of the specific questions
22 that were put to the petitioner, including those that were
23 involved in Konigsberg and Anastaplo, were answered by him and
24 there is not the slightest ~~indication of~~ committing the court
25 that he would not have answered any other specific questions.

1 It was the general ones to which he took exception.
2 And he took exception -- I think there is no question as to
3 the matter of basic principle, because the committee had before
4 it the answers to many of these questions -- the files were just
5 loaded -- that he had made in the New York Bar examination.
6 Obviously the changed position was due to the notoriety that was
7 given to our then-pending Listra case which was argued.

8 The second point with respect o substantial state
9 interest, whatever may be the theoretical interest of the state,
10 inasmuch again as in this case no explanation of the kind that
11 was given in Konigsberg by the state or by its statutes, or
12 in Anataplo, based upon a rule of the court, mainly the concern
13 about the nature of the organization, is answered in the state's
14 brief.

15 The state's brief did a complete resume, showing why
16 these questions are asked, and it said three things: We must
17 put out a case. Whatever organization he was a member of, we
18 could ask the other members of the organization whether they
19 might not have some information derogatory to the plaintiff.
20 And this is a kind of a census. They could just as well as said
21 to the particular, "Name every single person you ever knew in
22 your life."

23 And I submit that is not on our own brief a substantial
24 interest of the state in this case.

25 Now with respect to the Fifth Amendment, which is our

1 second point, the point has been made by Mr. Biard. I will not
2 repeat what he said except to add two things that he did not
3 mention:

4 The first thing is that we are dealing here with the
5 area of political inquiry, whatever it may be called, and we
6 have to remember that in questions of this kind, bearing in
7 mind the historic arrogance of privilege, which I certainly do not
8 seek to correct, that its religious and political persecutions,
9 that this is a peculiarly good case, an appropriate case, what-
10 ever they be in other situations, for the recession of the privi-
11 lege.

12 And the second is a point which was made, as I indi-
13 cated yesterday, in Baggett against Bullitt, that real questions
14 are vague. They present an appropriate reason for asserting the
15 privilege because of the danger of a perjury prosecution, even
16 though, generally speaking, obviously the refusal to answer a
17 specific question on the ground that it might invite a perjury
18 prosecution, is not a possible sense.

19 And last on this point, in addition to the cases that
20 I mentioned, to an opinion of the Court of Appeals for the
21 District of Columbia Circuit, which I failed to mention in my
22 brief, which is at 240 (2d) 405 -- 401, in which the Chief Jus-
23 tice participated as a member of the per curiam court, that dealt
24 with this problem of the dangers of perjury prosecution in con-
25 nection with a vague question. It was a contempt of Congress

1 case, Your Honor, the Chief Justice, as I remember, involving
2 Harvey O'Connor.

3 This, I think, is sufficient for our submission.

4 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Boudin.

5 Mr. Macklin, you may proceed whenever you are ready.

6 ARGUMENT OF ROBERT D. MACKLIN, ESQ.

7 ON BEHALF OF RESPONDENT

8 MR. MACKLIN: Mr. Chief Justice and may it please the
9 Court:

10 I think at the outset we would like to again emphasize
11 that we feel that this case should be considered with direct
12 reference to the circumstances of the case. I recall that the
13 petitioner refused to answer questions in the Supreme Court of
14 Ohio application form for admission to the Bar on the privilege
15 of the Fifth Amendment, that the answer might tend to incriminate
16 him.

17 On the face of this application this was the sole
18 basis for his refusal. We think it significant that after this
19 fact he consulted with counsel. He then commenced to talk in
20 terms of the protections of the First and the Fifth Amendments.
21 And then by the process of briefs and arguments, we now find
22 ourselves confronted with an attack on the action of the Supreme
23 Court of Ohio, which is almost entirely related to the First
24 Amendment rights. The basic issue, as raised by the petitioner,
25 is now relegated to a minor independent ground.

1 I do not question the right of the petitioner to argue
2 this case on any reasonable relevant ground, but we do protest
3 that there is a kind of transfer of emphasis which detracts from
4 the focal point of the circumstances which resulted in denying
5 the applicant admission to the higher Bar examination.

6 In this instance the petitioner's assertion of the
7 Fifth Amendment privilege with the question of whether or not
8 he had been or was presently the member of any organization
9 which advocates the overthrow of the Government of the United
10 States by force and to the question asking for the listing of
11 all clubs, societies or organizations of which he had been a
12 member.

13 Clearly it raised in the minds of the Bar examiners
14 the questions, inferences, suspicions that had to be dispelled
15 before they in good faith could recommend him on the basis of
16 his character, his reputation -- and his moral character -- to
17 the Supreme Court.

18 Q Mr. Macklin, did I understand in your preliminary
19 remarks that it is your claim that the Bar examiners were not
20 given an opportunity to consider the First Amendment claims at
21 all, that they were confronted only with the Fifth Amendment
22 claim?

23 A No, Mr. Justice Stewart, what I am really saying
24 is that on the basis of the application itself, only the Fifth
25 Amendment was raised. Now it is quite true that in the course of

1 various communications thereafter the Fifth Amendment attack
2 was raised?

3 Q You mean the First Amendment?

4 A Yes, by the First Amendment.

5 Q And in time was considered by the Bar examiners?

6 A I believe that their consideration was based
7 almost exclusively on the fact that on the face of the applica-
8 tion there was this single reference to the Fifth Amendment
9 privilege which precluded them from further action.

10 Q Are you suggesting something in the nature of his
11 failure to adopt his administrative processes?

12 A No, I am not, Mr. Chief Justice. I am trying to
13 establish, if I can, the fundamental reason for the rejection
14 by the failure of recommendation by the Bar examiners, which we
15 think establishes the basis of the issue in this particular case.

16 Among the most prominent of the possibilities raised
17 by the petitioner's refusal is, certainly in the minds of attor-
18 neys and examiners, a specter at least of perjury. In addition
19 to that there are still questions in his application for admis-
20 sion to the New York Bar without any apparent equivocation.

21 The potential for incrimination in responding to simi-
22 lar question on the Ohio questionnaire could, at the very least,
23 raise a kind of unresolved ambiguity in the minds of the exami-
24 ners. Among those ambiguities there is the specter of perjury.
25 Certainly, however, among the general questions it goes to the

1 very heart of his moral character in the person of an attorney.

2 In propensity, therefore, we feel this to be an essen-
3 tial element of this qualification for the Bar before or after
4 admission. The refusal of the petitioner to answer on the par-
5 ticular ground stated not only raised the question, but it pre-
6 cluded the answer.

7 The Bar Commissioners -- or the Bar Committee, rather
8 -- under the clear direction of this Court, as provided in the
9 second Konigsberg case and in the Anastaplo case, based their
10 denial, and said so, that the refusal to answer obstructed a
11 further investigation. And I urge that your opinion relate to
12 this particular in what we consider to be a very single and
13 clear issue.

14 The problem of whether or not the Supreme Court of
15 Ohio had the constitutional right to raise these particular
16 questions is, however, relevant to the attack of the opposing
17 counsel. In Ohio we feel very strongly that inquiry into politi-
18 cal beliefs, that that belief may encompass illegal or criminal
19 acts to bring about the overthrow of the Government of the United
20 States by force is most emphatically important to the qualifica-
21 tion of an attorney. And we consider this to be very important
22 in the present circumstances, that the agencies, the agents, the
23 instrumentalities of state and Federal government are being
24 subjected at present by physical violence from groups which are
25 dedicated to forceful overthrow, whether they call it "Government

1 of the United States," a police department, or, in the more
2 general vernacular, simply the "establishment."

3 Courts throughout the country, including our own Ohio
4 Supreme Court, have found it necessary to obtain the services
5 of uniformed personnel to guard their persons in their lawful
6 sessions.

7 Q Mr. Macklin, if you had the applicant answer the
8 exact question "no," would the other answers -- I think to
9 question 13 -- about all the clubs and the organizations that
10 he has been active in, would that bar him from taking the exami-
11 nation?

12 A Mr. Chief Justice, if he had answered that one
13 particular question "no," and then answered the other question
14 on a Fifth Amendment privilege, I think it would have still probab
15 resulted.

16 Q Well, what if the answer to that question was
17 "I can't recall all the organizations"?

18 A Well, sir, I feel very strongly that this would
19 not preclude a further questioning. I am sure that the Bar
20 examiners felt that by virtue of the Fifth Amendment they were
21 cut off from further investigation.

22 Q It is a pretty difficult matter to remember all
23 the organizations that you have been a member of.

24 A I quite agree, sir.

25 Q I suppose that it is reasonable that a man can't

1 remember his organizations after three years of law school
2 studies. That must not be absolute.

3 A Mr. Chief Justice, I quite agree with you that
4 this is a question which is a difficult one if you approach it
5 word for word. But may I ask a rhetorical question: Is it not
6 within the scope of the law that the Supreme Court of Ohio may
7 interpret and apply the responses to these questions liberally,
8 with justice and reason. I am quite certain this is what happens.

9 Q The attack on these questions, the attempt that
10 was made in many of these cases, it seems that they are over-
11 broad. The question might be acceptable if it said: "List the
12 names of the organizations you have belonged to to the best of
13 your recollection." Or they could permit that qualification.

14 A I believe this is the way the Supreme Court
15 interpreted it, Your Honor.

16 Q Of Ohio?

17 A Yes, sir. It must be, because I am virtually
18 certainly that within the history of this question that no appli-
19 cant -- well, maybe some applicants -- but very few applicants
20 are able to recall totally every organization or club. I think
21 that I myself may have neglected to indicate that I was a dues-
22 paying member of the Parent-Teachers Association, but I believe
23 that these are innocent oversights which certainly has not
24 applied the very letter of the question itself.

25 Q I suppose if we had, we could have ---

1 A I think it would require an intent, Your Honor.

2 Q A what?

3 A I think it would require a criminal intent.

4 Q Yes, but he could have been indicted for perjury,
5 couldn't he, if he failed to put to an end? They found it out
6 later and cited him for perjury.

7 A I would hate to ask the prosecutor where there
8 was ---

9 Q I would hate to think that every prosecutor would
10 do it, but there are some prosecutors that have great zeal in
11 that direction.

12 Q You are centering now, I take it, on the failure
13 to answer question 12?

14 A That is the one relating to associations and
15 organizations.

16 I am not exactly centering on it, Your Honor. I am
17 hoping to cover the entire area of inquiries.

18 We feel that their law is only associated with a group
19 dedicated to forceful overthrow of the government. We consider
20 it to be highly appropriate to inquire into whatever forms of
21 legal expertise, which held over into the interpretation of its
22 beliefs which may be exemplified by the ends and purposes of the
23 organization.

24 If you were to offer advice which could be construed
25 as a condonation of violence by a member of the legal profession,

1 this might stimulate rather than inhibit unlawful action. In
2 this I refer back to a comment made by opposing counsel yester-
3 day when he indicated that there must be an impact upon the
4 client by virtue of the chilling effect upon an attorney or a
5 prospective attorney in belonging to organizations.

6 I submit that there is an impact upon a client merely
7 by virtue of the position that somebody who has been qualified
8 for the practice of law, and I submit to this Court that the
9 functions of an attorney with such an organizations has a much
10 greater significance than the association of almost any other
11 professional man. I think that there are things that you do in
12 your life which change your status, and that thereafter people
13 look upon you by virtue of that status, if they are aware of
14 that status.

15 I think it is no consequence to say that there are
16 other means of punishing unprofessional conduct as an attorney.
17 But what I am concerned about here is a before-the-fact advocacy
18 rather than an after-the-fact problem of retribution. Mere
19 advocacy by one unqualified to advocate is to file a complaint
20 from the advocacy of one who is qualified in its qualifications,
21 as certified by a court, and has supposedly tested these quali-
22 fications.

23 Perhaps in the light of what you have heard me say,
24 you can understand our lack of comprehension. At page 9 of the
25 petitioner's brief, he says the only criterion of good moral

1 character is inapplicable to political activities, even if they
2 were to involve the commission of crime.

3 My question is what is this good moral character on
4 the part of a lawyer? Isn't this what this Court said in the
5 majority of decisions in the second *Konigsberg* case, as one
6 Justice said, "It would be indeed difficult to argue that belief
7 firm enough to be carried over into advocacy is the legal means
8 to change the form of state or Federal government is an unimport-
9 ant consideration in determining the fitness of the applicant
10 for membership in the profession in whose hands largely lies
11 the safety of this country's legal and political institutions."

12 I sincerely urge you to say it again.

13 MR. CHIEF JUSTICE BURGER: Thank you.

14 REBUTTAL ARGUMENT OF LEONARD B. BOUDIN, ESQ.

15 ON BEHALF OF PETITIONER

16 MR. BOUDIN: Mr. Chief Justice, may it please the
17 Court:

18 Our reply brief set forth very clearly that the peti-
19 tioner raised the question of the nonpertinency of the questions,
20 which is clearly in the Fifth Amendment area in his interview
21 with the committee members and thereafter before he ever retained
22 counsel. He was only a little more sophisticated as a young
23 member of the Bar. He asserted then his First Amendment rights
24 in his presentation to the chairman of the committee.

25 Secondly, the committee members did not have any

1 impression from his having made reference to the Fifth Amendment,
2 which in itself is a rather ambiguous term these days. It covers
3 any aspects -- due process, self-incrimination, and so forth.
4 It was not particularized in its original answer. They drew no
5 conclusion with respect to his character.

6 Your Honors will recall my reference to Mr. Snodgrass,
7 whether the committee members affirmatively found good character
8 on the part of the petitioner. And the only concern was whether
9 or not Konigsberg required that because the question was put, it
10 had to be answered. That is without regard to the nature of the
11 question.

12 It is only in the case of lèse majesté we put the
13 question Konigsberg has the right to ask questions. You have
14 to answer it or you are obstructed.

15 Now with reference to political activities referred to
16 in my brief, even involving crimes, is a reference to the language
17 in -- the decision in Cummings, which I won't take the time to
18 quote, Your Honors -- in Cummings against Missouri and in ex parte
19 Darlin, and the discussion of those cases in Dent against West
20 Virginia, which analyzed those cases. And those happened to be
21 cases, unlike the present situation, involving activity.

22 Here we are not dealing with activity, but we are
23 dealing with advocacy.

24 Now I submit, Your Honors, that this problem that was
25 touched upon by my friend here was mentioned yesterday by the

1 attorney in Arizona with respect to what all of us know, ques-
2 tions of law and behavior before a court. It is not a question
3 of accounting to which these questions -- these 1920, these 1950
4 questions -- were directed. They were concerned about the whole
5 question of doctrine, not about the behavior of laws in a par-
6 ticular place, and it is against that argument to try to connect
7 these two things which are not connected in the eyes of the law-
8 givers.

9 Those people who wrote these questions originally did
10 not face the problems which all of us know exist today.

11 Q You are referring now to the Ohio Legislature or
12 Bar examining committee?

13 A The Bar examining committee, presumably with the
14 approval of the Ohio Supreme Court, but it is not a legislative
15 inquiry.

16 Now we are all are concerned about the role of the ---

17 Q I have one question I would like to ask.

18 A Surely.

19 Q Do you know how far these questions go? Are they
20 back to 1920?

21 A I tried to check. I don't know about Ohio. I
22 know that the pattern was a 1950 pattern with some historical
23 background in the 1920s. Perhaps Ohio can tell you about that.

24 Thank you.

25 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Boudin.

1 Thank you, Mr. Macklin.

2 The case is submitted.

3 (Whereupon, at 10:30 the argument in the above-
4 entitled matter was concluded.)

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