

5-1-1962

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Taylor Mattis

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Recommended Citation

Taylor Mattis, *Constitutional Law -- Self-Incrimination -- Timeliness in Raising the Question*, 16 U. Miami L. Rev. 483 (1962)

Available at: <https://repository.law.miami.edu/umlr/vol16/iss3/8>

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CONSTITUTIONAL LAW — SELF-INCRIMINATION — TIMELINESS IN RAISING THE QUESTION

Just two months after the passage of the Subversive Activities Control Act of 1950,¹ the Attorney General filed a petition with the Subversive Activities Control Board charging the Communist Party of the United States with being a Communist-action organization. The purpose of the charge was to compel the registration of the Party with the Attorney General. The Board ruled in favor of the government. After ten years of hearings, remands and rehearings,² the Board's conclusion received final affirmation by the Supreme Court. *Held, inter alia:*³ the Communist Party is a Communist-action organization required to register under the Subversive Activities Control Act. All aspects of the Party's contention that the registration requirement violates the fifth amendment by compelling self-incrimination were found to be premature for constitutional adjudication. *Communist Party of United States v. Subversive Activities Control Bd.*, 81 Sup. Ct. 1357 (1961).

In order to discuss this complicated litigation, some of the provisions of the act must be set forth. As part of the most comprehensive legislation ever adopted by the United States to deal with a threat to its internal security, the Subversive Activities Control Act⁴ seeks to regulate Communist activities by means of public disclosure through registration.⁵ This purpose is implemented by provisions that require Communist-action organizations,⁶

1. 50 U.S.C. §§ 781-810 (1958).

2. It was predicted when the charges were filed that the prosecution of this case would take a long time. Sutherland, *Freedom and Internal Security*, 64 HARV. L. REV. 383, 412 (1951). Senator Douglas had estimated that each administrative hearing together with judicial review would take three or four years. 96 CONG. REC. 14596 (1950). The Attorney General himself estimated that registration litigation would take two to four years. N.Y. Herald Tribune, Nov. 23, 1950, p. 1, col. 1.

3. It was also held that the registration provisions of the act do not offend the first amendment freedoms, nor are they unconstitutional as a bill of attainder.

4. The Internal Security Act of 1950, 64 Stat. 987 (codified in 50 U.S.C. §§ 781-98 and other scattered sections) is divided into two titles; the short name of title I is the "Subversive Activities Control Act of 1950." Internal Security Act of 1950, § 1(a), 64 Stat. 987. [Hereinafter title I of the Internal Security Act of 1950 will be cited as ISA.]

5. *Communist Party of United States v. Subversive Activities Control Bd.*, 81 Sup. Ct. 1357, 1440 (1961). The act, couched in terms of "Communist organizations," was apparently designed more specifically for the regulation of the Communist Party itself. Four years after its passage, another statute, which is clearly in juxtaposition with it, was passed. The Communist Control Act of 1954, 68 Stat. 775 (codified in scattered sections of 50 U.S.C.) states that the Communist Party, although purportedly a political party, is actually an instrumentality of a conspiracy to overthrow the government. Anyone who knowingly and wilfully becomes or remains a member of the Communist Party is subject to all of the provisions and penalties of the Internal Security Act of 1950, as a member of a Communist-action organization. Chase, *The Libertarian Case for Making It a Crime To Be a Communist*, 29 TEMP. L.Q. 121, 126 (1956).

6. The statute classifies those "Communist-organizations" required to register as Communist-action and Communist-front. ISA §§ 3(3), (4), 50 U.S.C. §§ 782(3), (4)

their officers and members, to be registered with the Attorney General, and specific information regarding their activities and internal business to be filed. Registration of a Communist-action organization might occur by either of two methods: (1) the organization may register voluntarily,⁷ or (2) the Attorney General may petition the Subversive Activities Control Board for an order that the organization register.⁸

In the latter situation, if the Board grants the order, the registration may be effectuated in the following manner: (1) within thirty days after the order becomes final, the *organization* must register, listing the partners, officers and directors in its statement;⁹ (2) if the organization fails to register, it becomes the duty of the officers to file the registration statement

(1958). A Communist-action organization is one which (1) is substantially directed, dominated or controlled by the foreign government or foreign organization controlling the world Communist movement, and (2) operates primarily to advance the objects of such world Communist movement. The "foreign control" reference obviously means the Soviet Union and the Cominform. See *Hearings on S. 1194 and S. 1196 Before a Subcommittee of the Senate Committee on the Judiciary*, 81st Cong., 1st Sess. 22 (1950).

7. ISA § 7(c), 50 U.S.C. § 786(c) (1958). It is the duty of the Attorney General to publish in the *Federal Register* the names of the organizations which register. ISA § 9(d), 50 U.S.C. § 788(d) (1958). A search of the *Federal Register* revealed that no organization has voluntarily registered thus far.

8. ISA § 13(a), 50 U.S.C. § 792(a) (1958). This was the procedure followed in the instant case. The Board, created by ISA § 12(a), 50 U.S.C. § 791(a) (1958), is the keystone of the operation of the act. Note, 51 COLUM. L. REV. 606, 621 (1951). A quasi-judicial tribunal, the Board is divorced from both the legislative and executive departments of government. It is not the investigator, prosecutor, nor administrator of the act; its function is solely judicial. The administration of the act is the duty of the Attorney General. Registration must be made with the Attorney General on a form prescribed by him. ISA § 7, 50 U.S.C. § 786 (1958). (Provisions concerning this form are found in 28 C.F.R. § 11.200 (1962). It is Department of Justice Form IS-51.) It is he who maintains the register, institutes proceedings before the Board in behalf of the government and makes the necessary investigation. ISA §§ 7(g), 9, 13, 50 U.S.C. §§ 786(g), 788, 792 (1958). Proceedings before the Board must be open, and all evidence must be subject to cross-examination by counsel. Judicial review is provided for an aggrieved party to the Court of Appeals for the District of Columbia. If it affirms the Board's order, or dismisses the petition for review, the order becomes a final order unless certiorari is granted by the Supreme Court, in which case the order becomes final ten days after the Supreme Court ruling or denial of certiorari. When the order becomes final, certain consequences ensue, other than the duty to register. The Party may not distribute publications through the mails or in interstate or foreign commerce, nor may it sponsor radio or television broadcasts without the required identification. ISA § 10, 50 U.S.C. § 789 (1958). Tax exemptions are denied the Party by ISA § 11, 50 U.S.C. § 790 (1958). Members may not apply for or use a United States passport. ISA § 6(a), 50 U.S.C. § 785(a) (1958). They may not hold government or labor union employment. 50 U.S.C. § 784(a)(1) (1958). Certain members are subject to definite disqualifications—if aliens, they may not enter the United States, may not be naturalized, may be deported, and may be denaturalized in some circumstances. Immigration and Nationality Act § 212, 8 U.S.C. §§ 1182, 1251, 1424, 1451 (1958). Employment by the Party is not "employment" for purposes of the Social Security Act, 42 U.S.C. § 410 (1958). Contributions to the Party are not tax deductible. ISA § 11, 50 U.S.C. § 790 (1958). Acts by third parties with regard to the Party or its members—the contributing of funds or services to the Party by government or defense-facility personnel, issuance of passports to Party members—are, under specified circumstances, prohibited. ISA §§ 5, 6, 50 U.S.C. §§ 784, 785 (1958).

9. ISA § 7, 50 U.S.C. § 786 (1958). The act itself only specifies that names of these office holders must be "contained" in the registration statement. Department of Justice Form IS-51, issued by the Attorney General in 28 C.F.R. § 11.205 (1962), pursuant to the above cited section of the act, contains the following instruction: "It is desirable, but

within ten days after the expiration of the thirty-day period;¹⁰ (3) upon the failure of the officers to register, the members of the Communist-action organization must register individually.¹¹

In ruling that the Communist Party must register, the Supreme Court was confronted with the contention of the Party that the registration requirements were unconstitutional as violative of the fifth amendment self-incrimination clause.¹² According to one of the oldest maxims of the common law, a person may refuse to answer any question, the answer to which may render him punishable for a crime, or which in any degree may tend to establish a public offense with which he might be charged.¹³ The soundness of the principle has seldom been questioned.¹⁴ It has been incorporated among the guarantees of personal liberty in England, and in the federal and all state constitutions in the United States.¹⁵ It was early

not necessary that an officer of the organization *sign* immediately below." (Emphasis supplied.) If no officer signs, the person filing the registration statement must certify in writing that he has been authorized to do so by the Communist organization being registered.

10. ISA § 7(h), 50 U.S.C. § 786(h) (1958).

11. ISA § 8, 50 U.S.C. § 787 (1958). Criminal penalties are imposed upon organizations, officers and individual members who fail to register as required. Section 15 of the act, 50 U.S.C. § 794 (1958), provides for a fine of up to \$10,000, plus five years in jail for the individuals, for each day of non-compliance after the deadline for registration.

12. The Party's apprehension of incrimination arises primarily out of the fact that "active" membership in the Communist Party was made a crime by the Smith Act, 18 U.S.C. § 2385 (1958), providing for punishment for knowingly advocating the desirability of overthrowing the government by force and violence, or organizing or helping to organize any society or group which teaches, advocates, or encourages such overthrow of the government, or being or becoming a member of such a group with knowledge of its purposes. This latter provision was upheld the same day the instant case was handed down. In *Scales v. United States*, 81 Sup. Ct. 1469 (1961), the Court held that active membership in the Communist Party by one having guilty knowledge and intent is a sufficiently substantial relationship to the criminal activity of advocacy of the violent overthrow of the government to render a member criminally responsible without violation of the due process clause of the fifth amendment. The Court rejected the argument that the membership provision of the Smith Act had been repealed by § 4(f) of the Subversive Activities Control Act, 50 U.S.C. § 783(f) (1958), which states: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of . . . any . . . criminal statute."

13. *RAPALJE, CONTEMPT* § 73, at 92 (1887).

14. However, the wisdom of the maxim was questioned by Seymour D. Thompson, an eminent law writer and judge: "It is believed that the maxim (*nemo seipsum accusare tenetur*) originally meant that no one should be compelled, *by torture*, to criminate himself. It was applicable to a time when suspected persons were put to the rack for the purpose of extorting confessions from them . . . [C]ertainly, in such a state of the law, a maxim which allowed him to keep his mouth shut, was a humane maxim, and was justly prized. But such a maxim has no place in an enlightened and humane system of jurisprudence. We have outgrown it. . . . If a gang of thieves and counterfeiters were to meet together for the purpose of framing a code of laws for their own protection, this would be the first section of their code. The just view of the matter is that the purpose of all inquiry in courts of justice is to elicit truth, and that no privilege of not telling the truth ought to be accorded to him who, in nearly all cases, is best acquainted with the real facts of the case." Thompson, *Criminal Contempts*, 5 CRIM. L. MAG. 151, 182, 183 (1884).

As if in answer to Judge Thompson, Mr. Justice Douglas in his dissent said: "The privilege is often criticized as a shield for wrongdoing. But not every hostile silence which greets official interrogation has its beginning in wrongdoing." *Communist Party of United States v. Subversive Activities Control Bd.*, 81 Sup. Ct. 1357, 1454 (1961).

15. *RAPALJE, op. cit. supra* note 13.

articulated by John Marshall that not only direct evidence, but also those facts which would give information leading to the discovery of relevant evidence can not be compelled to be disclosed.¹⁶

This rule was specifically applied to the questions involving Communist activity in *Blau v. United States*.¹⁷ A federal grand jury sought information from the defendant about her employment by the Communist Party of Colorado. Her refusal to testify on the ground that the answers might tend to incriminate her led to a finding that she was in contempt of court. The Supreme Court reversed her conviction, reasoning that it was immaterial whether these admissions would in themselves support a conviction under a criminal statute. "Answers to the questions would have furnished *a link in the chain* of evidence needed in a prosecution of petitioner for violation of the Smith Act."¹⁸

The registration requirement for Communist Party members has been tested against the self-incrimination clause of a state constitution and found invalid. In *People v. McCormick*¹⁹ the defendant's demurrer to a charge of having failed to register as a member of a Communist organization was sustained. The ordinance involved was unconstitutional because "the protection intended applies even before the commencement of a criminal case and secures one who may reasonably be expected to be a defendant from furnishing ammunition to be used against him."²⁰

In the light of this reasoning regarding the importance of protection from self-incrimination, the Supreme Court considered another highly important constitutional principle, the rule that *potential* impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated. Mr. Justice Frankfurter, speaking for the five Justice majority, said: "No rule of practice in this Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.'"²¹

16. "Many links frequently compose that chain of testimony which is necessary to convict an individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself." *United States v. Burr*, 25 Fed. Cas. 38, 40 (No. 14692c) (C.C.D. Va. 1807).

17. 340 U.S. 159 (1950).

18. *Id.* at 161. (Emphasis added.) The *Blau* decision was the precedent for *Quinn v. United States*, 349 U.S. 155 (1955) and *Emspak v. United States*, 349 U.S. 190 (1955), both of which held that a witness might refuse to answer a congressional committee's question as to his alleged Party membership on the basis that his answer might tend to incriminate him.

19. 102 Cal. App. 2d 954, 228 P.2d 349 (Super. Ct. 1951).

20. *Id.* at 957, 228 P.2d at 351.

21. *Communist Party of United States v. Subversive Activities Control Bd.*, 81 Sup. Ct. 1357, 1397 (1961). Justice Frankfurter was quoting a prior case, *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners*, 113 U.S. 33 (1885). Perhaps the best way to deal with the prodigious output of the October Term, 1960, without passing a Solomonic judgment on it, is not to talk about what the Court did, but about whether it needed to do it. "It happens that a number of this Term's most celebrated cases were as significant

This principle is based upon the realization that, by the very nature of the judicial process, courts can most wisely determine issues precisely defined by the confining circumstances of particular situations.

Thus, the Court found it necessary to separate the contentions of the Party into two categories — those which were ripe for constitutional adjudication²² and those which were contingent. Into the latter classification fell all the self-incrimination issues presented by the Party. The plea directed against the provisions requiring designated *officers* to file a registration statement in default of registration by the Party was held to be premature. The challenge was conjectural because the Party itself might choose to register.²³ This reasoning applied *a fortiori* to the provisions of the act relating to the registration of *individuals*. Constitutional issues regarding alternatives two and three of the registration process²⁴ were summarily dismissed because they were premature.

The Party argued that the requirement for officers to execute and sign the statement on behalf of the Party was self-incriminatory *per se*. The Court's answer was that it could not yet be known whether the officers would actually claim their fifth amendment privilege, or whether the Attorney General would honor this claim.²⁵ The Court conceded that in asserting the privilege on the registration form the officers would necessarily reveal

for having brought into focus the uses and nonuses of techniques of withholding ultimate constitutional adjudication, as for having wrought changes in substantive law. It may be that questions of when, whether, and how much to adjudicate come as near as anything else to explaining the frequent divisions within the Court." Bickel, *Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

22. See note 3 *supra*.

23. Mr. Justice Brennan in his dissent, said: "The possibility of 'voluntary' compliance by the officials should not be a bar to a decision now. Given the structure of the statute, compliance cannot indisputably be assumed to be a voluntary waiver of the privilege. The organization is under a duty by virtue of the order now before us to file a statement in accordance with the Attorney General's requirements, on penalty of prosecution for not filing a registration statement; the failure of the officials to complete, sign or file Form ISA-1 might subject it to such prosecution. And if the organization should not register within the 30-day period specified in § 7(c), the officials are duty-bound . . . to effect its registration, also on penalty of criminal sanctions. Plainly enough, then, the order generates pressure on the officials to complete, sign and file to avoid the possibility of prosecution either of the organization or themselves. The pressure may be increased by uncertainties which attend efforts to make an acceptable claim of the privilege. If we pass the opportunity for decision now, officials may well comply out of fear that a later effort to make an acceptable claim of privilege will fail." *Communist Party of United States v. Subversive Activities Control Bd.*, 81 Sup. Ct. 1357, 1462 (1961).

24. See notes 10 and 11 *supra* and accompanying text.

25. On November 10, 1961, the Communist Party, in a letter bearing the Party seal but no individual signature, formally notified the Justice Department that it refused to register as ordered. The refusal was based on a claim of each Party officer's constitutional privilege "not to be a witness against himself." Attorney General Robert Kennedy said the department replied in a telegram that "each and every claim of privilege in your letter of November 10 is hereby rejected." *Miami Herald*, Nov. 19, 1961, p. 9-A, col. 1 (A.P. Release). On December 1, the Party was indicted for failing to register as a Communist-action organization. Assistant Attorney General J. Walter Yeagley announced that the Justice Department would bring charges against individuals, presumably the top officers of the Party, for failing to register. *Miami Herald*, Feb. 18, 1962, p. 14-B, col. 1 (A.P. Release).

themselves to the government and thus admit the very fact they sought to conceal. But it advocated that these "novel and difficult" questions raised by this circumstance were all the more reason for delaying decision until the time that enforcement proceedings for failure to register might be initiated against the Party or its officers.²⁶

The judicial restraint exercised by the Court regarding the provisions of the act which apply to the registration of the *members themselves*, upon the organization's default, seems wise. No actual "case or controversy" under those provisions has yet arisen. However, it is submitted that the validity of the order requiring the Party to register was indeed ripe for adjudication. The question of the self-incrimination of the persons filing that registration was not contingent. It is obvious that an organization cannot register unless some individual or individuals execute the proper documents. The statute and regulations make it the duty of *designated* officials of the Party to complete and file the registration statement. In the very act of complying with the registration order, these officers would admit their status in the Party and also show knowledge of Party activities. Certainly, according to *Blau* and *McCormick*, as well as *Scales v. United States*,²⁷ the admission of officership could be vital as a "link in the chain" of evidence needed for conviction under the Smith Act.²⁸

26. In *People v. McCormick*, 102 Cal. App. 2d 954, 228 P.2d 349 (Super. Ct. 1951), the defendant was charged with failure to register as a member of the Communist Party. Justice Frankfurter indicated that that case illustrated the type of "standing" which must be obtained before the question here presented could be adjudicated.

In arguing that the issue of self-incrimination is not now premature, the Party relied heavily upon *Boyd v. United States*, 116 U.S. 616 (1886) for the proposition that, when a statute compelling the production of potentially incriminating information allows the exercise of the fifth amendment privilege only under circumstances which effectively nullify the amendment's protection, the statute may be held unconstitutional and void, not merely unenforceable in cases in which a proper claim of privilege is made. The statute involved in the *Boyd* case was a customs revenue law, which gave the government the power to order a person to produce in court his private books, invoices and papers, or to make the nonproduction of them a confession of the allegations which the government intended to prove. The government had brought a civil action to compel the production of the defendant's papers, not a criminal action to penalize the defendant. Under those circumstances the Court's opinion was that "though the proceeding in question is divested of many of the aggravating incidents," the result was to compel a man to be a witness against himself. The statute was declared unconstitutional. *Id.* at 635.

The most that the Court would draw from this argument in the case at bar was that "in a prosecution of the Party for failure to register, or in a prosecution of its officers for failure to register the Party, the Court would have to determine whether the Subversive Activities Control Act is a statute which, like the statute in *Boyd*, unconstitutionally circumscribes the effectual exercise of the privilege." *Communist Party of United States v. Subversive Activities Control Bd.*, 81 Sup. Ct. 1357, 1417 (1961). The *Boyd* case will probably be an important factor in litigating the constitutionality of the Subversive Activities Control Act when it is again tested by the Party and its officers, now under indictment for failing to comply with the registration order.

27. 81 Sup. Ct. 1469 (1961).

28. The Subversive Activities Control Act provides that the *fact of registration* shall not be received in evidence to prove an alleged violation of any criminal statute. ISA § 4(f), 50 U.S.C. § 783(f) (1958). Nonetheless, the filing of a registration statement will reveal the identity of Party officers and might thus lead to information which could

This cogent argument was dismissed simply as "novel and difficult." It is the duty of the officers to register the Party. If an officer must claim the privilege in his own behalf, either on the registration statement itself or on a separate form, he would thereby be forced to do more than merely arouse suspicion, but would actually admit an element of a crime, namely, his connection with the Party.²⁹

If the officers choose not to file a registration statement nor to claim the privilege for themselves, their only alternative is to default in complying with the Board's order. Default means the risk of criminal prosecution, possibly at the phenomenal degree of ten thousand dollars a day plus five years in prison for each day of that default. No person should be forced to violate the law or to risk self incrimination before his constitutional claims can be adjudicated.

TAYLOR MATTIS

MECHANIC'S LIENS — NOTICE OF PENDENCY NECESSARY TO ENFORCE LIEN

In an action to foreclose a mechanic's lien, the defendant moved to dismiss and to discharge the property for failure of the plaintiff to file a notice of pendency within a year according to the provisions of the Florida Mechanics' Lien Law.¹ The defendant had actual notice of the suit from its inception, and the suit was instituted less than one year from the filing of the claim of lien. The motion was denied. *Held*, reversed: a lien is discharged for failure of the claimant to file a notice of pendency within one year after the filing of the claim of lien as required by the unambiguous terms of the statute. *Trushin v. Brown*, 132 So.2d 357 (Fla. App. 1961).

Mechanic's lien laws, although they confer a right in derogation of the common law, are construed liberally in order to benefit the lien claimants.²

be the basis of future prosecution for offenses to which Communist activities relate. The immunity grant in the Subversive Activities Control Act is almost identical with that found insufficient in *Counselman v. Hitchcock*, 142 U.S. 547 (1892). The statute involved there was struck down with the ruling that an immunity provision, to be effective in such cases, must bar any subsequent criminal prosecution upon any information acquired directly or indirectly from the use of the declarant's statement.

29. This rationale was used by Justice Brennan in dissent. Chief Justice Warren concurred with him. *Communist Party of United States v. Subversive Activities Control Bd.*, 81 Sup. Ct. 1357, 1458 (1961). See also Note, 51 COLUM. L. REV. 606, 619 (1951).

1. FLA. STAT. § 84.21 (1961): "No lien provided by this chapter shall continue for a longer period than one year after the claim of lien has been filed unless within that time an action to enforce the lien is commenced in a court of competent jurisdiction and a notice of the pendency of such action is filed with the clerk of the circuit court of the county in which the claim of lien is filed" (Emphasis added.)

2. *Gallagher v. Campodonico*, 121 Cal. App. 765, 5 P.2d 486 (Super. Ct. 1931); *United States v. Griffin-Moore Lumber Co.*, 62 So.2d 589 (Fla. 1953); *Hendry Lumber Co.*