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Recent Decisions

CONSTITUTIONAL LAW — DENIAL OF ADMISSION TO THE BAR DUE TO PRIOR COMMUNIST CONTACTS A DEPRIVATION OF DUE PROCESS

An applicant was denied admission to the California bar by the State Committee of Bar Examiners although he had passed the bar examination. Grounds for the denial were his failure to prove that he did not advocate overthrow of the government by violent means and that he did not show good moral character.¹ Affirmatively, petitioner Konigsberg introduced profuse testimony substantiating his good character, and vehemently denied that he advocated the overthrow of the government. However, at the hearing he objected to and refused to answer questions concerning his political beliefs, insisting that interrogatives of this nature constituted "an intrusion into areas protected by the Federal Constitution."² The committee weighed the testimony of a former Communist linking Konigsberg with the Communist party in 1941 together with his reputation as an outspoken critic of national political figures, including, ironically, the Supreme Court and found that the applicant had failed to sustain the burden of proof of moral character and loyalty.³ Petitioner's appeal to the California Supreme Court was denied *without opinion*. The United States Supreme Court granted certiorari and found, with three justices dissenting, that the evidence in the record of the hearing did not justify the finding and that the refusal to grant the applicant admission to the bar constituted a *deprivation of due process*.

Examination of precedent supporting the majority as well as the grounds of each of the dissenters indicates to the skeptical that past supporting decisions are no more than "tools of argument and persuasion."⁴ Justification for the decision of the majority can be found in previous Supreme Court conduct. Assuming the practice of law to be a right guaranteed by the Fourteenth Amendment, the decision of a state tribunal affecting the right is not accepted as final.⁵ The high court will review the record of the state proceeding, as was done in this case, to determine

¹ Konigsberg v. State Bar of California, 353 U.S. 252 (1957).

² *Id.* at 258.

³ CAL. BUS. & PROF. CODE §§ 6060 (c), 6064, 6064.1 (1937).

⁴ Llewellyn, *A Realistic Jurisprudence*, 30 COLUM. L. REV. 431 (1930); reprinted in COHEN AND COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, 473 (1953).

⁵ Adams v. Saenger, 303 U.S. 59, 64 (1938).

⁶ United Gas Public Service Co. v. Texas, 303 U.S. 123, 143 (1938) (*dictum*).

whether or not the evidence supports the denial of the right.⁶ Nor is even a doubtful right refused shelter under the encompassing canopy of due process. To Justice Frankfurter, speaking in an earlier opinion, due process was a "living principle . . . not confined within a permanent catalogue . . . (but drawn) by the gradual and empiric process of inclusion and exclusion."⁷ In expanding such a flexible concept, the Court has on many occasions shown itself unrestricted by past limitations.⁸

Although the majority is not without roots of authority to justify its conduct, the fulcrum precedents of the dissenting opinions are more specific and have greater attraction to the legal pedant, steeped as he is in the tradition of *stare decisis*. Justice Frankfurter strongly declares that the Supreme Court is without jurisdiction to hear the case. Deliberate avoidance of the usurpation of jurisdiction has been a cornerstone of Supreme Court procedure. It is settled beyond dispute that a case will not be considered by the Supreme Court unless it appears "by clear and necessary intendment that the (federal) question must have been raised, and must have been decided in order to induce the judgment."⁹ When, as in the instant case, the state court rendered a decision without opinion, the high court has not assumed that the basis of the ruling was the federal question.¹⁰ The accepted method of invocation of jurisdiction in such cases has been the procurement of a certificate from the state court attesting to the foundation of its decision on the constitutional issue.¹¹ Since this step was not taken, Justice Frankfurter was justified in asserting the court's want of jurisdiction.¹²

Justice Harlan, the second dissenter, with whom Justice Clark joined contended inferentially that no federal issue was raised since the selection of members of the practicing bar is a matter solely within the discretion of the state. Indeed, the question whether the practice of a licensed profession or occupation is a "right which cannot be destroyed in violation

⁷ *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

⁸ See *Smith v. Allwright*, 321 U.S. 649, 665 (1944); Citing 14 decisions overruled in the previous seven years, Justice Reed asserts, "In constitutional questions, where correction depends upon amendment and not upon legislative action, this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions."

⁹ *Commercial Bank of Cincinnati v. Buckingham Executors*, 46 U.S. (5 How.) 317, 341 (1847). Neither the presence of the federal question in briefs nor part of the record; *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934) nor the mere argument of a Constitutional issue; *Brown v. Atwell, Adm'r.*, 92 U.S. 327, 329 (1875), has been sufficient to invoke the jurisdiction of the Supreme Court.

¹⁰ *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934).

¹¹ *Whitney v. California*, 274 U.S. 357, 361, (1927).

¹² No earthly court exists from which a writ of prohibition directed at the Supreme Court might have issued.

of the due process clause,"¹³ or is a "mere temporary permit . . . to do that which otherwise would be unlawful" ¹⁴ has never been clearly settled¹⁵ and was not considered by the court in this case. The latter theory, however, seems supported by the case of *In re Summers*¹⁶ considered by the Supreme Court in 1945. A conscientious objector was refused license to practice law despite his willingness to swear to uphold the Illinois Constitution on grounds that his beliefs prevented his bearing arms in defense of the document. As the *Konigsberg* case reflects vestiges of the McCarthy scare, the *Summers* case¹⁷ seems prompted by the residue of World War II patriotism. While the Supreme Court found the applicant better qualified morally than many practitioners,¹⁸ the Justices refused to tamper with the state decision finding that "the responsibility for choice as to the personnel of its bar rests with Illinois."¹⁹ It is clear that equally persuasive legal dogma substantiates the majority as well as either dissenting opinion.

Whether judicially correct or incorrect, the *Konigsberg* case exposes a primary characteristic of Supreme Court justice, the cyclical vacillation of *ratio decidendi* in accordance with changing social attitudes and changing court personnel.²⁰ *Plessy v. Ferguson*,²¹ which afforded a legal basis for segregation, is indicative of a societal reaction against the violent reconstructionist exploitation of the South. Similarly, the Supreme Court revolution of 1937 resulting in the direct reversal of 14 previous decisions within a seven-year period represented the reaction against entrenched

¹³ *Smith v. State Board of Medical Examiners*, 140 Iowa 66, 69, 117 N.W. 1116, 1117 (1908).

¹⁴ *Darling Apartment Co. v. Springer*, 25 Del. Ch. 420, 428, 22 A. 2d 397 (1941); In which the court discusses a license to sell alcoholic liquor.

¹⁵ In *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 379 (1866), the court termed the right to practice law a "right . . . [that] is something more than a mere indulgence revocable at the pleasure of the court, or at the command of the legislature." However, *In re Summers*, 325 U.S. 521 (1945) held the practice of law a license granted by the state solely within their police power.

¹⁶ 325 U.S. 561 (1945).

¹⁷ *Ibid.*

¹⁸ *Id.* at 570 Justice Reed likened the applicant to the "Great Teacher of mankind who delivered the Sermon on the Mount. . . ."

¹⁹ *Ibid.*

²⁰ *United States v. Rabinowitz*, 339 U.S. 56, 86 (1950) *overruling* *Trupiano v. United States*, 334 U.S. 699 (1948), followed the replacement of Justices Murphy and Rutledge, with Justices Clark and Minton. Justice Frankfurter commented in this decision that the Court ought not to give, "fair ground for the belief that Law is the expression of chance — for instance, of unexpected changes in the Court's composition. . . ."

²¹ 163 U.S. 537 (1896).