

Supreme Court of the United States

October

TERM, 1969

1970

In the Matter of:

----- X
 SARA BAIRD, :
 : Petitioner, :
 : :
 vs. :
 STATE BAR OF ARIZONA, :
 : Respondent. :
 ----- X

Docket No. 53

15

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 Date December 9, 1969

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ORAL ARGUMENT OF:

P A G E

Mark Wilmer, Esq. on behalf
of Respondent 2

IN THE SUPREME COURT OF THE UNITED STATES

October

TERM 1969

December 9, 1969

SARA BAIRD,)	
)	
Petitioner)	
)	
vs)	No. 53
)	
STATE BAR OF ARIZONA,)	
)	
Respondent)	
)	

The above-entitled matter came on for argument at 10:58 o'clock a.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

APPEARANCES:

PETER D. BAIRD, ESQ.
 114 West Adams Street
 Phoenix, Arizona
 Counsel for Petitioner

MARK WILMER, ESQ.
 400 Security Building
 Phoenix, Arizona 85004
 Counsel for Respondent

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P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We will now proceed
3 where we left off yesterday, Counsel. I think, Mr. Baird, you
4 had one minute left and I take it you are reserving that for
5 rebuttal.

6 Mr. Wilmer, you may proceed.

7 ORAL ARGUMENT BY MARK WILMER, ESQ.

8 ON BEHALF OF RESPONDENT

9 MR. WILMER: Mr. Chief Justice and may it please
10 the Court: I think at the outset it might be appropriate and
11 serviceable to the Court if we would first put in proper re-
12 lationship, proper context, the record in the court below.

13 I would say at the outset that the position of the
14 Respondent is not one of an advocate either way, so far as this
15 question of finality is concerned. As we view our responsibility
16 here, it is simply to bring to the Court the facts, with respect
17 to this question and proceed onto as best we can to explain the
18 other proceedings in the court below.

19 I think the best way to put the record in proper
20 relationship to the actual facts is perhaps to begin with the
21 response that was filed by the Committee in the Supreme Court
22 of the State of Arizona.

23 Now, it is my understanding, from reading the rules
24 of this Court, that papers that are certified by the Clerk of
25 the lower court are part of the record and subject to being in

1 this case. I say that for this reason: that the appendix,
2 which is part of the Petitioner's filing with this Court, ex-
3 cerpts from the Committee's response to our Supreme Court cer-
4 tain portions of that response, necessarily when this matter
5 was brought to the attention of the Committee, the full impact;
6 the full exposure of this case in this Court was not readily
7 understood. And, accordingly, we did not enlarge upon the
8 printed portions of the response of the Arizona Committee on
9 Examinations to the Arizona Supreme Court. The original of it
10 is in the record and I would like, briefly, to refer to that,
11 with the Court's permission.

12 I thought for this reason that we have indicated
13 our position is one of: simply, here are the facts; we may as
14 well decide the case now as any other time, if, in fact, this
15 Court has jurisdiction.

16 The Court will recall that it has been brought to
17 the Court's attention that the proceeding in the Arizona Supreme
18 Court was initiated by a petition for an order to show cause,
19 directed to the Committee on Examinations and Admissions. I
20 refer you to the appendix before I move on. The prayer of that
21 petition read as follows: The Arizona Supreme Court;

22 "Wherefore, your Petitioners pray that this Court
23 make and enter its order requiring the Committee on Examinations
24 and Admissions of the Supreme Court of the State of Arizona,
25 be and appear before this Court at a date and a time certain,

1 then and there to show cause of any it may have, why
2 Petitioner should not forthwith be recommended to admission
3 to the State Bar, or in the alternative, show cause why
4 Petitioner's application should not be processed by the Com-
5 mittee without requiring of Petitioner, any further answer to
6 27 of Applicant's questionnaire and affidavit."

7 The Court will recall this is the question which
8 asks: Have you ever been a member of the Communist Party or
9 any organization which supports the overthrow of the Government
10 of the United States by force and violence.

11 The opening portion of the memorandum which the
12 Committee filed with the Arizona Supreme Court, reads as
13 follows:

14 "Applicant in the main treats the posture of her
15 application to the Committee, as rejected by the Committee, and
16 from this false premise, enlarges upon the proposed constitu-
17 tional rights of the Applicant. Nothing could be truer from
18 the true facts."

19 MR. JUSTICE STEWART: I am reading, Your Honor
20 -- I'm sorry, this is not in the printed appendix; it is in the
21 original of the response to the Clerk of the Arizona Supreme
22 Court to this Court.

23 MR. JUSTICE STEWART: And why isn't this in the
24 appendix?

25 MR. WILMER: Well, Your Honor, I must say, frankly,

1 I didn't suppose it would be needed at the time when I read
2 the appendix as certified.

3 In other words, we did not have a complete view of
4 the qualification of this Court as to what would or would not
5 be material. As I read your rules, and I assume I am correct,
6 even though it is not printed in the appendix, nevertheless,
7 it is part of the certified record. It may be referred to
8 before this Court. Of course, if that is not true, I should
9 not do so.

10 MR. JUSTICE STEWART: Is the paper actually,
11 physically in the Clerk's office.

12 MR. WILMER: It should be.

13 MR. JUSTICE STEWART: Thank you.

14 MR. WILMER: This would be the response of the
15 Committee to the Petitioner's order to show cause, if it please
16 the Court, in the Arizona Supreme Court.

17 MR. JUSTICE STEWART: Would you start reading that
18 again, since we don't have it before us?

19 MR. WILMER: I am sorry; if I had realized the role,
20 the material would be here; that is, it would have been
21 printed.

22 "Applicant in the main treats the posture of her
23 application to the Committe, as rejected by the Committee, and
24 from this false premise, enlarges upon the proposed constitu-
25 tional rights of the Applicant. Nothing could be further from

1 the true fact. As is apparent from the letter of April 24,
2 1968, attached to the affidavit of Robert H. Allen" -- who,
3 the Court will recall, is Chief Counsel for the Petitioner --
4 "the Committee has not rejected the application of Sara Baird
5 and does not intend to do so, unless and until further facts
6 appear which would warrant this rejection."

7 I would say in this context, if it please the Court, that
8 this letter to Mr. Robert H. Allen antedated the application of
9 the Petitioner for an order to show cause for the Arizona
10 Supreme Court. In other words, this was the discussion of
11 counsel to this proceeding.

12 Q Could I ask a question? Assume this litigation
13 never had been brought and Mrs. Baird had simply persisted in
14 her view that she didn't have to answer the question. What
15 would have happened to her application to the Bar, for
16 admission to the Bar?

17 MR. WILMER: Her application would still, as it is today,
18 be sitting on our shelves waiting for her to complete the
19 processing of it, or something else would have happened.

20 I might say this briefly, the Committee in Examinations
21 and Admissions is a hand-maiden of the Arizona Supreme Court.
22 We have no authority other than that which the Court gives us.

23 I might say the entire rules of the Arizona Supreme
24 Court are in Volume 17 of West Statutes. They govern, they
25 limit, they set the extent of our authority. We have no

1 inherent authority of any kind, no rights, other than those
2 given us by the rules.

3 Therefore, when the Court says to us, "Ask these questions "
4 and they are set out verbatim, "Get an answer to them and
5 proceed to certify to this Court your opinion," we have no
6 choice. As far as we are concerned, we are stymied. We
7 can reject it. I suppose we could, and perhaps we should.
8 I don't know.

9 But the facts are, unless and until that question is
10 answered, or someone else tells us that we must do something
11 else, the case matter will stay as it is.

12 Q Is it fair to say in practical effect, as far as
13 her position is concerned, your continuing dissent on it, on
14 the hypothetical premise no litigation would be brought here,
15 would be the equivalent of your saying, "You are required to
16 answer that question. Since you won't cooperate, we won't
17 permit you to the Bar?" Is that accurate?

18 MR. WILMER: Only to this extent: The Committee has no
19 authority one way or the other to omit or reject anyone. We
20 only make a recommendation. I would say this, if it please
21 the Court: By interaction between the rules and the Committee's
22 action, for practical purposes, I would concede Mrs. Baird
23 is for the moment stymied.

24 But to call upon the Arizona Supreme Court to make an
25 effective ruling, that is not a matter within our province.

1 I would simply say that as of the moment at least, the Arizona
2 Supreme Court has been told by the Committee that we have not
3 made a decision. We are unable to make one and therefore the
4 Court has simply said, "We deny the petition. You should
5 complete the processing of this petition."

6 I might say for the purpose of my next statement to the
7 Court that this letter of April 24, 1968, which antedated
8 the beginning of this proceeding, to Mr. Allen, Chief Counsel
9 for the Petitioner, has, I believe, some validity and some
10 value in determining what in effect, what in fact, I should
11 say, is the actual position of the Committee and the Court
12 below, and the Committee here.

13 This letter said, "I also believe Mrs. Baird should
14 realize even though she answered the question, she had at one
15 time been a communist or otherwise associated with organiza-
16 tions not friendly to the United States Government, this would
17 not necessarily cause us to reject her application.

18 "We would want to ask her some questions as to her present
19 beliefs and as to other matters bearing upon the effect of
20 such membership would have on her qualifications to practice
21 law."

22 The Committee is aware that under present Supreme Court
23 decisions, mere membership in an organization is not sufficient,
24 necessarily, to disqualify anyone from positions of responsi-
25 bility and this would be the attitude of the Committee in this

1 matter.

2 Now, I say that for this reason: If it please the
3 Court, we have had here what I would term a somewhat rather
4 "fancy steps down the sideline," so to speak, of what words
5 mean. I believe that as we proceed we will find the
6 Committee made it unequivocally and plainly apparent to Mrs.
7 Baird. We were not concerned with what her beliefs were, as
8 such. We were not concerned with looking inside her heart
9 to see what she believed in, but concerned with finding out
10 did she have the qualifications which would make her a
11 lawyer, which would justify us in certifying to the Arizona
12 Supreme Court in fact she would be a lawyer that the Court
13 would be proud of having admitted?

14 Now, a fair reading, I believe, if it please the Court,
15 of the Committee's letter to Mr. Allen, the Committee's
16 response to the Arizona Supreme Court, and of our response
17 here, indicates simply one thing: Whether we use the word
18 belief, the word view, or whatever word we use, we are concerned
19 with one thing.

20 I heard yesterday the question asked, if Mr. Baird would
21 prefer the record be made in the Court below or here, and I
22 believe he said here. I have to confess surprise. I wrote
23 them both and really didn't think I was saying anything
24 different at one time than the other. I thought we were
25 saying to the Court below and this Court, that if Mrs. Baird

1 believes in the sense she would actively advocate and
2 assist and advance the overthrow of the Government of the United
3 States and the State of Arizona by force and violence, well,
4 we want no part of her, nor will we recommend her for admission
5 to our Supreme Court unless and until we are told to do so
6 by some higher authority.

7 Q The statement in your brief, you want to know
8 whether or not Sara Baird actively believes ---

9 MR. WILMER: That is right.

10 Q What does that mean?

11 A I meant by that was she preparing to go out and
12 walk up and down the street and take other steps ---

13 Q Let us take the first one. Suppose she is willing
14 to walk up and down the street?

15 MR. WILMER: Advocating the overthrow of the Government
16 by force and violence? I would say, if it please the Court,
17 No. 1, that would go against the Cannons of Ethics which say
18 you shall do nothing to bring it disrepute, the profession
19 of the law or the Courts. Therefore, I would say if Mrs. Baird
20 says, "I propose to walk up and down the streets after I am
21 admitted as a lawyer, proclaiming to the world that I, a lawyer,
22 believe we should blow up the Capitol, assassinate public
23 officials, and otherwise change the form of Government by force,"
24 we want no part of her.

25 Q Suppose she carried a sign which said, "I don't

1 like Colorado or the United States?"

2 MR. WILMER: I would have no problem with that at all.
3 I think that is her privelege.

4 Q Where is the line you are going to get on this?

5 MR. WILMER: The line I draw is when you talk about
6 destruction of this Government by force and violence.

7 Q Believe in it, or do it?

8 MR. WILMER: Pardon?

9 Q Just to believe in it?

10 MR. WILMER: The Committee's position was not just a
11 belief. The Committee's position was actively accepted and
12 actively advanced that philosophy, that position.

13 We couldn't care less what her beliefs are in any field
14 except that which impinges directly upon the validity and
15 utility of her services as a lawyer. As to those matters we
16 are critically concerned.

17 Q You do -- (inaudible)

18 MR. WILMER: Where the occasion is right, yes. I don't
19 believe that person should be a lawyer.

20 Q (Inaudible)

21 MR. WILMER: They would have been incorporated in the
22 questions asked.

23 Q You take the position this is preliminary?

24 MR. WILMER: Yes, sir.

25 Q (Inaudible)

1 MR. WILMER: Our rules provide that in making its
2 investigation, the Committee can conduct an informal or formal
3 investigation. It can interrogate a witness informally, with
4 the understanding that if that interrogation is to be made a
5 part of the decision, it must then become formal, go on the
6 record.

7 But, I have tried to say, numerous times, we would simply
8 call Mrs. Baird in and say, "What do you really believe about
9 it? Are you prepared, if you are admitted to practice, should
10 a crisis arise that the Government is threatened with violence,
11 are your hands completely free and are you as a citizen able
12 to stand behind the forces of the Government which you upheld
13 when you became a lawyer? Or will you retire and negate the
14 oath which you took?"

15 Q Could I ask you another question? How long has this
16 question in its present form been part of the processing
17 requirement for admission?

18 MR. WILMER: I can't answer that, other than to say it
19 has been there for at least 10 years, to my knowledge, and I
20 would assume many years prior to that.

21 Q Have there been any attempts to revise it?

22 MR. WILMER: No, As far as I know, these rules as they
23 stand are those that probably I answered 40 years ago, but I
24 can't swear to that. I don't remember. It has been a long
25 time.

1 MR. CHIEF JUSTICE BURGER: May I ask you another
2 question?

3 MR. WILMER: Yes, Your Honor.

4 MR. CHIEF JUSTICE BURGER: Does this application
5 require an applicant to state whether he or she has ever been
6 convicted of a criminal act?

7 MR. WILMER: It asks the usual question of whether
8 or not they have been involved in fraud; whether or not they
9 have had a bond claim made against them and have they been in-
10 volved in a criminal action.

11 MR. CHIEF JUSTICE BURGER: Now, suppose an appli-
12 cant refuses to answer that question; would that applicant be,
13 then, in the same posture that Mrs. Baird is in at the present
14 time, with reference to the Board's action?

15 MR. WILMER: Yes. I'm sure we are not going to
16 say, "You refused to tell us if you stole money somewhere, so
17 we are going to admit you anyway."

18 MR. CHIEF JUSTICE BURGER: If the answer to that
19 question might be: "Yes, when I was 14 years old I was found
20 guilty as a juvenile of some offense." Would that, in and of
21 itself bar her -- prevent her admission as a member of the Bar?

22 MR. WILMER: I can say this in all honesty, Your
23 Honor, we have admitted people that in their younger days had
24 committed burglary, statutory rape, what have you. It is a
25 question of having been rehabilitated; do they now measure up

1 to the standards of what a person should be if he or she
2 desires to be a lawyer.

3 MR. JUSTICE MARSHALL: If she answered "yes," to
4 Question 27 that would automatically bar her.

5 MR. WILMER: Twenty-seven? No; it would not bar
6 her; no. We would then endeavor to find out how deep did that
7 belief lie; and if it lay on the surface and was simply a
8 childish thing; a passing fancy, that's one thing; if it de-
9 scended to the depths of an embedded true fanatical feeling the
10 Government should be destroyed, I, for one, feel that a person
11 should not be admitted to practice law.

12 Now, I would like to certainly say, then, Your
13 Honor, that we are told this belief that Mrs. Baird talks about
14 is a political belief; it's a political matter; it is something
15 which is protected by the decisions of this Court, therefore we
16 should not be permitted to inquire into thought processes in
17 connection with it.

18 I find it difficult, if it please the Court, to
19 believe that the notion of a bomb dropped at the appropriate
20 time in 17 different places in the United States in an attempt
21 to take over the Government, is a political matter. And that
22 is what I read into the notion of overturning this Government
23 by force and violence. I do not read into the notion of
24 assassination of public officials, members of the Congress or
25 other persons in positions of authority, for that purpose, I do

1 not read that as a political activity or as a political
2 belief which is subject to protection.

3 Some years back, unfortunately, we had, I suppose
4 what was then considered a form of the administration of
5 justice in the Western States and unfortunately other places,
6 commonly known as "necktie" parties.

7 Now, it is true, that when they had an unfortunate
8 individual strung up was suspected of having been a rapist;
9 suspected of having been a murderer, or whatever -- cattle
10 thief, whatever you want to term it, I suspect that you might
11 term that the administration of justice, but I don't believe
12 that you would term it the administration of justice in the
13 sense that we are speaking of the administration of justice
14 today; and by that token, I do not believe that the notion of
15 violence, or violent overthrow of the Government of this
16 country, for the very purpose of destroying it, is a political
17 belief. If so, someone smarter than I will have to convince
18 me of it.

19 Now, I shall deal briefly, if it please the Court,
20 with Spevack versus Klein, which of the courts is probably the
21 case that spawned many of these things that are now coming to
22 light.

23 MR. JUSTICE WHITE: Do you feel that the Fifth
24 Amendment claim is open in this case?

25 MR. WILMER: Incrimination?

1 MR. JUSTICE WHITE: Yes.

2 MR. WILMER: I would not raise the point that it
3 was not adequately raised; Your Honor. I would not raise that,
4 because I think, at least we are on notice of the fact that --

5 MR. JUSTICE WHITE: Was there any indication at
6 any time during these proceedings, at least until it got to the
7 Supreme Court, that there was a refusal to answer Question 27
8 on the grounds of self-incrimination?

9 MR. WILMER: The answer to the question as given on
10 the affidavit was not applicable. I, frankly --

11 MR. JUSTICE WHITE: Or any correspondence or any --

12 MR. WILMER: Yes; yes. I would have to say, Your
13 Honor, my recollection is that probably it was raised.

14 MR. JUSTICE WHITE: The Fifth Amendment was raised,
15 as her grounds for refusing to answer the question.

16 MR. WILMER: I think it was. Mr. Baird, I am sure,
17 can qualify my answer one way or the other, but my recollection
18 is that in discussions with Mr. Allen and in related matters,
19 at least it -- the point was brought up, that this amounted to
20 incrimination --

21 MR. JUSTICE WHITE: But it was urged in the Supreme
22 Court of Arizona?

23 MR. WILMER: Your Honor, the problem with that is
24 that there is a brief -- relatively brief petition filed; the
25 relatively brief response with the memorandum and the argument

1 was not reported.

2 MR. JUSTICE WHITE: Was there a memorandum supporting
3 the petition?

4 MR. WILMER: Yes; yes.

5 MR. JUSTICE WHITE: Did that mention the Fifth
6 Amendment?

7 MR. WILMER: I have to confess ignorance; I don't
8 know. It would be in the file but I don't have a sharp enough
9 recollection at the moment to answer Your Honor.

10 I would certainly say with respect to the Klein
11 case, which of course, says that a lawyer may not be disbarred
12 for refusing to answer a question on the ground of the Fifth
13 Amendment. I think that that case is not readily distinguish-
14 able, I would be a little optimistic to say that, but I would
15 say that, but I would say it is distinguishable and I think it
16 is distinguishable on adequate grounds, and that is the Fifth
17 Amendment situation, if it pleases Mr. Justice White.

18 I don't like to use this illustration, but I can
19 think of none more apt, and that is this: In Arizona,
20 Massachusetts, Florida, Washington, we have what is called
21 dog racing; and in that particular activity, which is a para-
22 mutuel betting situation, dogs that have never run before are
23 called "schooled." In other words, they are run through the
24 races as if it was a race; the time is recorded -- the whole
25 thing is recorded, just like any race track habituee would desire

1 to know about any dog or horse. And based on that, when they
2 do start running they are catalogued.

3 Now, the reason is, you have a track record; you
4 have something to go on, and those that are put on the track
5 and have run, have already established themselves. Now, I say,
6 therefore, that when someone comes who does not have a track
7 record, as to whom we have no background, then rightfully, a
8 different rule should apply than from a lawyer who has been
9 admitted to practice, has established his reputation or his
10 ability, rather, to practice; who has, in all things, carried
11 him such that the Bar may properly criticize him; and therefore
12 I say that when we say that a lawyer who has been admitted to
13 practice, who is a practicing lawyer, should be permitted to
14 take the Fifth Amendment. I would readily distinguish that
15 from the applicant who is a raw product, if I may use that
16 expression, whose qualifications and whose future ability is
17 , are the thing we must judge, and therefore, we are
18 entitled to ask many questions we probably should not and could
19 not ask an admitted lawyer.

20 Now, I would just say in closing, if it please the
21 Court, that there are some very sound reasons for the finality
22 of this affidavit and the application. I realize that it per-
23 haps seems burdensome, but without attempting, if it please
24 the Court, to appear critical of our law schools, I think one
25 of the biggest problems that is met by the Bar today, and by

1 the Administrative Committee, is a complete default in many
2 of the schools of any attempt to teach ethics at all; of any
3 attempt to teach professional responsibility. And it is only
4 when we bring these kinds of people up short, against an
5 application which indicates this is a mighty important thing,
6 this is the type of practice that is very, very important that
7 all these things be cleared before you may practice, we think
8 that tends to bring to your minds, perhaps, the importance of
9 this.

10 I might just say one other thing: seven or eight
11 years ago our Supreme Court, at the Committee's request,
12 adopted a rule that says you can't be admitted to practice
13 until you pass the examination of professional ethics; you
14 can't be admitted until you have passed that examination.

15 I will say this: that we no longer have applicants
16 who spell canons "c-a-n-o-n-s." They can spell it. We do
17 not catch anyone on the basis of that requirement. We teach
18 a lot of lawyers, if it please the Court, that this is an
19 important profession and that ethics is probably the most impor-
20 tant part of it. And, therefore, this type of

21 And, therefore, this type of an application, we
22 feel, is highly important as bringing home to the extent we can
23 to the applicant that this is a mighty important thing you are
24 going into; this is a very, very serious thing that you are
25 going into; these questions are necessary, because unless you

1 have led a relatively spotless life, you don't belong in our
2 profession.

3 MR. JUSTICE HARLAN: Could I ask you a couple of
4 questions, perhaps, here.

5 MR. WILMER: Certainly.

6 MR. JUSTICE HARLAN: Perhaps they are a little
7 outside the record, but I think it's appropriate to ask them,
8 notwithstanding that, for whatever they are worth.

9 In light of what you say your standards would be
10 if Mrs. Baird had answered this question, going further and
11 satisfying yourself that this was something more than belief
12 in the abstract sense, have you ever asked your court to change
13 the form of that question to incorporate those elements in it?

14 MR. WILMER: No, but I think perhaps this might be
15 an indication we should, Your Honor. As I say, these are old,
16 old questions. I am not at all here defending them; I am
17 simply saying that these are what we live with.

18 MR. JUSTICE HARLAN: The second question I wanted
19 to ask you is that this litigation pending, what is the fate of
20 that question in its present form now. Are applicants refusing
21 to answer it, or are you holding up or are they answer it; or
22 what's going on?

23 MR. WILMER: Your Honor, they are most of them
24 answering it. They are now raising the question of residency as
25 being -- a right to require any residency, in light of the

1 Shapiro case. We are now having a spat of objections to any
2 requirement of residency because of the Shapiro case. So that
3 -- but as to this one question, they seem to have become
4 reconciled to answering it.

5 MR. JUSTICE STEWART: As I understand it, even in
6 the full record that is here, we do not have Mrs. Baird's
7 answers to Question 25; is that correct?

8 MR. WILMER: No, Your Honor; but I would not make
9 a point of that, because my recollection is that Mrs Baird
10 did answer it; if she hadn't answered it we would have made a
11 point of it; I cannot recall in detail what her answer was, but
12 I know it satisfied us, or we would have pursued it further.
13 And my recollection is she did list quite a number of organiza-
14 tions, but it is not here and --

15 MR. JUSTICE STEWART: Would there be any objection
16 if we -- from either of you to supplementing this record, if
17 this is an admitted fact that she answered them, to submit the
18 answers? For myself, I'd like to see the record supplemented
19 that way.

20 MR. WILMER: No, if I had realized it, we would have
21 had it here, Your Honor; but we would be very happy to supply it
22 ourselves; Mr. Baird can supply it; whatever is convenient.

23 MR. JUSTICE BLACK: Would she have been required
24 in answering Question 25, to state that she had been a member
25 of the Communist Party if she had?

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MR. WILMER: Yes.

MR. JUSTICE BLACK: That was required by Question
25?

MR. WILMER: Well, obviously, the question --

MR. JUSTICE BLACK: But it was required, you say?

MR. WILMER: In my judgment, Your Honor, yes.

MR. JUSTICE BLACK: We can proceed on the assumption
that she has been asked if she belonged to the Communist Party
and has said "no."

MR. WILMER: We would accept it on its face value,
unless something had come up.

MR. JUSTICE HARLAN: Of course your question is a
little broader than that; it is not only the Communist Party,
but other subversive organizations.

MR. WILMER: Correct.

MR. JUSTICE HARLAN: And therefore, I suppose her
failure to answer the party wouldn't necessarily have set at
rest the relevancy, if this question is proper in 27, so that
you don't have to ferret through and find out which of the
organizations may be subversive and so forth.

MR. WILMER: I tried to make that point, Your Honor,
that we do not have the facilities to chase down each organiza-
tion and we feel that if someone knows it, they should tell
us, but we do / disagree with the notion that they are obliged to
research that matter. All they need to say is: "I don't know,"

1 if they don't know.

2 MR. JUSTICE BLACK: Now, I want to ask you a
3 question about that, in view of your answer to the query about
4 it.

5 When she was asked to state all the organizations
6 she belonged to since she had been 16 years old, was that
7 asking to state whether she had been a Communist, just the same
8 as 27 was?

9 MR. WILMER: My interpretation of that question,
10 Your Honor, is really that it is a duplication of 27.

11 MR. JUSTICE BLACK: That it is a duplication.

12 MR. WILMER: Yes;--

13 MR. JUSTICE BLACK: And that she did answer?

14 MR. WILMER: She did answer 25.

15 MR. JUSTICE BLACK: She stated the things she said
16 she belonged to.

17 MR. WILMER: I am sure that is right, Your Honor.

18 MR. CHIEF JUSTICE BURGER: I think you have just
19 one minute left, Mr. Baird.

20 MR. BAIRD: For one minute I'll take. I would like
21 to respond to Mr. Justice White's question about the Fifth
22 Amendment. It was raised in a letter to Mr. Wilmer and the
23 Committee. This is part of the record; it is in June 27, 1968
24 in the form of a letter where Spevack versus Klein was dis-
25 cussed and there was a memorandum attached to that where the

1 application of the Fifth Amendment to the Bar admission
2 process was discussed and in Mr. Wilmer's brief there was a
3 statement that she did not assert the right of self-incrimina-
4 tion, but this is in a letter dated July 31, 1969 that Mr.
5 Wilmer sent to Mr. Davis, the Clerk of this Court, saying that
6 that was an incorrect statement, that in fact, she has asserted
7 the privilege and --

8 MR. JUSTICE BLACK: Of what?

9 MR. BAIRD: Pardon me?

10 MR. JUSTICE BLACK: Privilege of what?

11 MR. BAIRD: Against self-incrimination; the Fifth
12 Amendment right.

13 MR. JUSTICE BLACK: Was it at the time she answered
14 this question a crime against the Federal Government to belong
15 to an organization which pledged to overturn the Government by
16 force?

17 MR. BAIRD: By a literal reading of the Smith Act,
18 I would say yes.

19 MR. JUSTICE WHITE: But she answered Question 25.

20 MR. BAIRD: Answered Question 25.

21 MR. JUSTICE WHITE: Why didn't she refuse to answer
22 that one?

23 MR. BAIRD: Because we were required, Mr. Justice
24 White, under Konigsberg and Anastaplo to answer that question
25 which calls for the names of organizations. She was specifically

1 directed by the mandate in those cases, we believe, to answer
2 that kind of a question.

3 MR. JUSTICE WHITE: Suppose Question 25 said,
4 "State whether you are a member of the Communist Party and also
5 state all other organizations of which you are a member; would
6 you have had the right to assert the privilege in any respect?"

7 MR. BAIRD: Not at that point, at all; no.

8 MR. JUSTICE WHITE: Because I think Konigsberg and
9 Anastaplo require, at the pain of --

10 MR. JUSTICE WHITE: Well, do you think you are
11 entitled to assert the privilege against self-incrimination
12 against the first part of Question 27?

13 MR. BAIRD: No, I believe the first part with
14 respect to the name of the Communist Party, she does not have
15 that right; however --

16 MR. JUSTICE WHITE: Would you say that the state
17 may, in spite of the privilege, ask Mrs. Baird: "Are you a
18 member of the Communist Party?"

19 MR. BAIRD: Under Konigsberg and Anastaplo --

20 MR. JUSTICE WHITE: But I want to know what you are
21 asserting here. Are you asserting the privilege against self-
22 incrimination to shield Mrs. Baird from having to answer the
23 question: Are you a member of the Communist Party?

24 MR. BAIRD: I would say we cannot stand on that
25 particular basis before this Court because of our answer to

1 Question --

2 MR. JUSTICE WHITE: Well, then with respect to
3 what are you asserting the privilege in this litigation?

4 MR. BAIRD: We are asserting the privilege to
5 Question 27, which requires us to make a determination of other
6 groups in that category that she has already listed --

7 MR. JUSTICE WHITE: Is that a Fifth Amendment claim
8 or a First Amendment claim?

9 MR. BAIRD: It's both.

10 MR. JUSTICE WHITE: Well, how is it a Fifth Amend-
11 ment claim? You said -- let's assume you had answered, "I am
12 a member of the Communist Party." Do you think, then, that even
13 though you had answered that question you could also assert the
14 privilege and say, "I am privileged not to characterize the
15 Communist Party?"

16 MR. BAIRD: Well, there may be other groups, Mr.
17 Justice White, such as maybe the SDS is considered subversive;
18 maybe they are in response to another question. Maybe there
19 are other organizations which she can draw the line on.

20 Question 27 is --

21 MR. JUSTICE WHITE: Yes, but Question 25 only refers
22 to the organizations that you listed in 25.

23 MR. BAIRD: Well, it, in effect, would have that
24 practical result; yes.

25 MR. JUSTICE WHITE: And so you look at those

1 questions -- those organizations you listed in 25 and ask your-
2 self: are any of these groups subversive? I have listed them.
3 Are any of these groups subversive. Do you think that is a
4 -- you have a Fifth Amendment right to refuse to answer that
5 question?

6 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Baird;
7 and thank you for your submissions, gentlemen. The case is
8 submitted.

9 (Whereupon, at 11:28 o'clock a.m. the argument in
10 the above-entitled matter was concluded)

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