time when the effects of patent abuse have been dramatized,[33] it is not too much to hope for an automatic rule remedying illegal extension of the patent franchise by declaring the abused patents unenforceable.

REFUSAL TO SIGN IMMUNITY WAIVER AS "CONDUCT UNBECOMING AN OFFICER"

Two police officers, Lieutenant Drury and Captain Connelly, assigned by the Chicago police department to investigate a shooting, were instrumental in securing signed statements from three persons who testified that they could identify the gunmen. The police officers testified fully before the grand jury, which subsequently returned indictments against suspects identified by the supposed eyewitnesses obtained by the officers. Two weeks later, however, two of the three witnesses repudiated their testimony. Once again the officers were called before the grand jury. This time they were asked to sign waivers of immunity, and thus relinquish, before being questioned, the constitutional privilege that "no person shall be compelled in any criminal case to give evidence against himself. . . ."[1] Apparently fearing indictment, Drury and Connelly refused to sign the waivers and were dismissed without questioning. An indictment was returned charging the two officers with conspiracy to procure a false indictment. Later it was nolle prossed by the State's Attorney. The Chicago commissioner of police, however, filed charges against them with the Civil Service Commission, which ordered the officers dismissed from the force for "conduct unbecoming an officer."[2] This order was reversed by the Superior Court of Cook County.[3] An appeal is now pending before the Supreme Court of Illinois.

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1 (1829); see United States v. Masonite Corp., 316 U.S. 265 (1942). See also Brief for the United States in United States v. National Lead Co., 67 S. Ct. 1634 (1947). It may be argued that the Government has no need of such relief since the patent is already effectively unenforceable under the doctrine of the Morton Salt and Mercoid cases. Private infringers themselves may raise the defense of the tying clauses. But see the clarifying opinion of Justice Roberts in Hartford-Empire Co. v. United States, 324 U.S. 570, 572 (1945). At the present time it may well be that a private infringer is in a worse position as a result of a successful antitrust action by the Government, since the decree is considered to have wiped out the past abuses. See Standard Oil Co.v. Markham, 61 F. Supp. 813 (N.Y., 1945).

33 During the war years, the popular press was filled with stories of patent abuse, cartelization, and the consequent sapping of our military potential. For a general account, see Berge, Cartels: Challenge to a Free World (1944); Reimann, Patents for Hitler (1942); No Peace with I. G. Farben, 26 Fortune 105 (Sept. 1942).

1 Ill. Const. Art. 2, § 10. Compare U.S. Const. Amend. 5: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

2 In Matter of Thomas E. Connelly, Civil Service Commission of the City of Chicago, Case No. H 4789 (1947); In Matter of William J. Drury, Civil Service Commission of the City of Chicago, Case No. H 4790 (1947).

3 Connelly and Drury v. Hurley, Superior Court of Cook County, Illinois, Case Nos. 47-S-17720, 47-S-17721 (1948).

The constitutional privilege of refusal to testify as to incriminating matters, incorporated into the United States Constitution in 1791,[4] has since been adopted in all but two of the state constitutions.[5] It may be asserted in grand jury proceedings,[6] but it will be allowed only where the witness shows that his testimony may subject him to criminal prosecution.[7] The Civil Service Commission found that Drury and Connelly had reasonable grounds for believing that their testimony might subject them to criminal prosecution; thus their exercise of the privilege was justified.[8] But assertion of this privilege may directly conflict with a police officer's duty, as a public servant, to assist in the prosecution of crime.

The Illinois Civil Service Act provides: "Any appointing authority may remove, discharge or demote any officer or employee in the classified civil service of the State for just cause. The term 'just cause' as herein used means any cause which is detrimental to the public service."[9] The assertion by a policeman of the privilege not to testify should be deemed sufficiently detrimental to the public interest to constitute just cause for removal from office.

The earliest case in which exercise of a constitutional right was held inconsistent with a public officer's duties was *McAuliffe v. Mayor of New Bedford.*[10] There a policeman sought reinstatement after removal from office, under a police department rule, for political canvassing and vote soliciting. The court upheld removal, saying through Justice Holmes: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him."[11] This doctrine was reasserted in *Christal v. Police Commissioner of San Francisco,*[12] where the petitioners had been discharged as police officers for refusal to testify before a grand jury on corruption charges. The California court pointed out that a public servant's

[4] U.S. Const. Amend. 5. Compare note 2 supra. For an excellent discussion of this privilege, see 8 Wigmore, Evidence §§ 2250–84 (3d ed., 1940).

[5] Iowa and New Jersey.

[6] United States v. Monia, 317 U.S. 424 (1943); Counselman v. Hitchcock, 142 U.S. 547 (1892); People v. Spain, 307 Ill. 283, 138 N.E. 614 (1923); People v. Argo, 237 Ill. 173, 86 N.E. 679 (1908).

[7] Graham v. United States, 99 F. 2d 746 (C.C.A. 9th, 1938); O'Connell v. United States, 40 F. 2d 201 (C.C.A. 2d, 1930), cert. granted 281 U.S. 716 (1930), cert. dismissed 296 U.S. 667 (1930).

[8] In Matter of William J. Drury, Civil Service Commission of the City of Chicago, Case No. H 4790, p. 7 (1947).

[9] Ill. Rev. Stat. (1947) c. 24½, § 14.

[10] 155 Mass. 216, 29 N.E. 517 (1892).

[11] Ibid., at 220, 517–18.

[12] 33 Cal. App. 2d 564, 92 P. 2d 416 (1939).

right to retain office should depend upon willingness to forego constitutional rights and privileges to the extent that their exercise would be inconsistent with the performance of official duties.

The *Christal* case also held that the refusal of a police officer to testify before a grand jury constituted "conduct unbecoming an officer":

> Such officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. . . . [I]t is a violation of such duties for any police officer to refuse to disclose pertinent facts within his knowledge even though such disclosure may show, or tend to show, that he himself has engaged in criminal activities.[13]

This conclusion is buttressed by the Pennsylvania Supreme Court in *Souder v. City of Philadelphia.*[14] There the court held that a police captain whose testimony before the grand jury was unsatisfactory, and who later refused to testify before the Civil Service Commission, was guilty of "conduct unbecoming an officer."

The Superior Court of Cook County attempted to distinguish the *Christal* case on the ground that the officers refused at all times to testify, while Drury and Connelly did testify before the Civil Service Commission and when first called before the grand jury.[15] But the policy requirements enunciated in the *Christal* case should not be considered completely satisfied by past or subsequent performance of duty. Moreover, Drury and Connelly had no reason to fear prosecution and were not asked to sign a waiver when they first appeared before the grand jury, since the witnesses had not at that time changed their testimony.

The court also sought to reconcile the present case with the *Christal* and *Souder* decisions by pointing out that neither of the earlier cases had involved the precise question of refusal to sign an immunity waiver, but rather a refusal to testify. This distinction seems to be without force. An individual might refuse to sign a waiver of immunity and still, when called upon to testify, choose not to assert his constitutional privilege. Thus the refusal to sign a waiver may be called not an exercise of the privilege but a reservation of the right to assert the privilege. But such a reservation by a public officer is as reprehensible as the

[13] Ibid., at 419, 567–68. See also Scholl v. Bell, 125 Ky. 750, 796, 102 S.W. 248, 261–62 (1907): "The principle under discussion is a rule of evidence, to protect the witness from criminal prosecution. . . . Its use should not be considered as affording a witness a certificate of good character. Here were police officers being interrogated as to the existence of crimes they were paid to prevent, if possible; if not to expose and punish afterwards; and yet they one and all refused to answer. . . . Suppose a secret murder had been committed, and the police on the beat, when asked about it, should say, 'I decline to answer for fear of incriminating myself.' This, under the rule invoked, would protect the witness from answering; but how long would it justify his retention on the roll of police?"

[14] 305 Pa. 1, 156 Atl. 245 (1931).

[15] Connelly and Drury v. Hurley, Superior Court of Cook County, Illinois, Case Nos. 47-S-17720, 47-S-17721 (1948).

exercise of the privilege itself, since he should be willing to make full disclosure of all matters concerning his office. If he refuses to sign a waiver he is, of course, manifesting a disinclination to testify fully.

The strength of the policy asserted in the *Christal* and *Souder* cases was recognized in New York by an amendment to its constitution in 1939:

> No person shall . . . be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall be removed from office by the appropriate authority. . . .[16]

This provision was held in *Canteline v. McClellan*[17] to apply to police officers who refused to sign an immunity waiver when called to testify before a grand jury as to their conduct in office.[18]

In rejecting the theory underlying the opposing authorities, the present court relied strongly on *In re Holland*,[19] where a municipal court judge refused to sign an immunity waiver when questioned about the murder of a former business associate. On recommendation of the Chicago Bar Association, an action was instituted to suspend his attorney's license for two years. But the Illinois Supreme Court held that the exercise of the privilege did not justify suspension. While the case is a strong precedent in Illinois for the view that failure to sign an immunity waiver is not sufficient grounds for removal, it should not determine the result in the instant case. In the *Holland* case, the action was brought against Holland as an attorney and not as a judge.[20] An attorney is not a public officer in the same sense as a policeman. The court itself made this distinction: "It can scarcely be said that the duty resting upon a lawyer to assist in the investigation of crime, a duty with which he is generally though not specifically charged, as is a policeman, outweighs . . . his moral as well as his legal right to claim the constitutional privilege. . . ."[21] In referring to the *Christal* and *Souder* cases, the court asserted that in those cases the officers were especially charged with a duty to disclose evidence which would assist in the apprehension of criminals.[22] It may thus be inferred that the *Holland* case will not preclude a decision by the Illinois Supreme Court that refusal of a policeman to sign an immunity waiver is a proper basis for his removal.

[16] N.Y. Const. Art. 1, § 6.

[17] 282 N.Y. 166, 25 N.E. 2d 972 (1940).

[18] In People v. Harris, 294 N.Y. 424, 63 N.E. 2d 17 (1945), however, it was held permissible for municipal officers to create a new office for an officer who had been removed pursuant to this constitutional provision.

[19] 377 Ill. 346, 36 N.E. 2d 543 (1941).

[20] Ibid., at 348, 545.

[21] Ibid., at 358, 549.

[22] Ibid., at 357, 548.