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Dismissal of Government Employees Under Federal and New York Security Risk Laws

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This provision minimizes the dangers inherent in defense counsel's inability to see the entire statement, by subjecting the trial court's excisions to appellate scrutiny.

It should be noted that the statute, in providing alternative courses of action for the trial judge, does not adopt the strict ruling of the majority opinion which requires dismissal of the criminal action when the government elects not to produce a statement or report for the inspection and use of the defendant.[45] The course of action to be pursued by the trial judge must depend upon the importance of the testimony, the documents to be produced, and other facts and circumstances.

Conclusion

There has developed, in recent years, a strong tendency to allow liberal discovery in civil actions. However, this tendency should be strongly controlled in criminal prosecutions. The highest court of the State of New Jersey recently stated:

> In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence.[46]

It is submitted that it is far easier for a perjured witness or a fabricated defense to instill only a reasonable doubt in the minds of a jury, than it is to balance the weight of a civil plaintiff's evidence.

DISMISSAL OF GOVERNMENT EMPLOYEES UNDER FEDERAL AND NEW YORK SECURITY RISK LAWS

Introduction

There is general agreement that no disloyal citizen should be employed in government. How to achieve this end, however, is one of the great controversies of our time. Some have criticized the current loyalty and security programs as infringements on civil liberties; others claim that by them, our system of government is being under-

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[45] "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in the possession of government witnesses touching the subject matter of their testimony at the trial." Jencks v. United States, *supra* note 41, at 672.

[46] State v. Tune, 13 N.J. 203, 98 A.2d 881, 884 (1953).

mined. The problem presented to the courts of maintaining the balance between the rights of the individual and the interests of government forms the basis of this discussion.

In approaching the problem it must be remembered that there is a fundamental difference between the disloyal employee, who is seeking the destruction of our government, and the loyal, but unreliable, employee. It should also be remembered that government employment is a privilege which should be extended only to those meeting all the requirements as determined by the government.[1] It is important that legislation in this area provide the employee with the fullest measure of procedural protection, while not relinquishing any part of the protection accorded to government.[2]

The Lloyd-La Follette Act of 1912 [3] lays down the procedure to be followed for dismissals from the federal service. It prohibits suspension or removal except for such cause as will promote the efficiency of the service. The Act provides for notification of the charges; reasonable time in which to answer; and a hearing within the discretion of the removing officer.[4] Broader protection is granted to veterans employed by the government by Section 14 of the Veterans Preference Act,[5] passed in 1944, which requires a thirty-day waiting period prior to any suspension and appeal in all cases to the Civil Service Commission.[6] These two Acts dealing with tenure and discharge provide the basis of dismissal in the suitability program of the Civil Service Commission.[7]

The loyalty and security programs, for the most part, began with the Hatch Act of 1939 [8] although loyalty problems date as far back as the Civil War.[9] Prior to Section 9A of this Act, questions into political beliefs were considered beyond the proper scope of inquiry.[10]

Since 1939 and throughout World War II, loyalty acts of limited nature were enacted and executive orders,[11] also operating in a limited way, were issued; but no uniform system as to standards of loyalty or procedures to effect removal was established.

In 1947, Executive Order 9835 [12] grouped many of these smaller programs together into what was later known as the Loyalty Program.[13] The order made a loyalty investigation mandatory for

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[1] See Adler v. Board of Educ., 342 U.S. 485 (1952); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

[2] Exec. Order No. 10450, 18 FED. REG. 2489 (1953).

[3] 37 STAT. 555 (1912), 5 U.S.C. § 652 (1952).

[4] *Ibid.*

[5] 58 STAT. 390 (1944), 5 U.S.C. § 863 (1952).

[6] *Ibid.*

[7] REPORT OF COMMISSION ON GOVERNMENT SECURITY 20, 81-82 (1957).

[8] 53 STAT. 1148 (1939), 5 U.S.C. § 118j (1952).

[9] See Commonwealth v. Nelson, 377 Pa. 58, 104 A.2d 133 (1954).

[10] REPORT OF COMMISSION ON GOVERNMENT SECURITY 5 (1957).

[11] *Id.* at 6.

[12] 12 FED. REG. 1935 (1947).

[13] See Cole v. Young, 351 U.S. 536, 543 (1956).

all those entering service as well as those already serving the government.[14] A finding of disloyalty was originally required as a test for dismissal and for denial of employment, but was modified to a finding of "reasonable doubt" as to loyalty.[15] It is from this background that the present security program stems.[16]

Federal Security Risk Law

The Federal Security Risk Law,[17] enacted in 1950, is the latest security act directed at federal employment. This Act is aimed at the elimination of security risks whether they be disloyal or merely careless in their employment.[18] The Act authorizes the summary suspension of a federal officer or employee ". . . when deemed necessary in the interest of national security" [19] and is the basis for the present security program.[20] The Act applies to eleven agencies [21] and was intended originally to supplement the then existing loyalty program.[22] The head of the agency or department is given complete discretion to suspend summarily without pay any employee deemed a security risk. Within thirty days after suspension, the agency must send written notice of the charges, within the limits of security, to the employee.

The suspended employee has the right to a hearing by the agency concerned, and, in the event the decision is adverse, a review of the decision by the agency head.[23] Further provisions of the Act allow the employee dismissed as a security risk to seek employment in other government agencies provided the Civil Service Commission first determines his fitness.[24]

This law acts as a limitation on the existing civil service laws providing for the dismissal of federal employees.[25] Section 3 of the Act permits the Executive to extend the provisions of the statute to

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[14] Exec. Order 9835, 12 FED. REG. 1935 (1947).

[15] Exec. Order 10241, 16 FED. REG. 3690 (1951).

[16] In 1955, by Public Law 304, Congress established the Commission on Government Security whose duty it was to study the present security program in an effort to render it effective for the protection and maintenance of national security. See REPORT OF COMMISSION ON GOVERNMENT SECURITY (1957).

[17] 64 STAT. 476 (1950), 5 U.S.C. § 22-1 (1952).

[18] S. REP. No. 2158, 81st Cong. 2d Sess. (1950).

[19] See note 17 *supra.*

[20] REPORT OF COMMISSION ON GOVERNMENT SECURITY 53 (1957).

[21] 64 STAT. 476 (1950), 5 U.S.C. § 22-1 (1952). They are: the Secretary of State; Commerce; Defense; the Army; the Navy; the Air Force; the Treasury; Attorney General; Atomic Energy Commission; the Chairman, National Security Resources Board; the Director, National Advisory Committee for Aeronautics.

[22] S. REP. No. 2158, 81st Cong. 2d Sess. (1950).

[23] 64 STAT. 476 (1950), 5 U.S.C. § 22-1 (1952).

[24] *Ibid.*

[25] See text at notes 3 to 7, *supra.*

any department or agency when he deems it necessary in the interests of national security.

In 1953, by executive order,[26] the Federal Security Risk Law was extended to *all* departments and agencies. The order directs the head of each department or agency to adopt an effective program to insure ". . . that the employment and retention in employment of any civilian officer or employee . . . is clearly consistent with the interests of national security." [27] Under the extension *all* departments and agencies of the government are declared security agencies and are granted the power of summary suspension.[28]

The executive order establishes a new procedure to protect the government from infiltration of subversives. All employees are investigated in varying degrees—relative to the effect their position could have on national security.[29] The loyalty program created by Executive Order 9835 is revoked [30] by the new executive order thereby removing the stigma of disloyalty from future dismissals. The government can now remove employees who, although loyal, constitute security risks.

Section 8 of the executive order establishes the criteria for determining whether an employee is a security risk.

Although retaining the criterion "evidence of disloyalty" [31] as a carry-over from the prior program, the *new* program's criteria include additional elements which apply to security. For example, this section provides *inter alia* the following standard: ". . . any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security." [32]

Some of the provisions of this section, however, are similar to the criteria established by the Civil Service Commission to determine suitability.[33] Thus, there exists an overlap into the suitability area. This overlap provides agencies with an opportunity to summarily dismiss an employee when his dismissal would be more proper under the provisions of the Civil Service Commission which provide him with greater safeguards.

The Supreme Court found in *Cole v. Young*,[34] decided in 1956, that the presidential extension of the Federal Security Risk Law to all federal employees was beyond the scope intended by Congress. In reversing the dismissal of an inspector with the Department of Health, Education and Welfare, the Court stated that since the test

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[26] Exec. Order No. 10450, 18 FED. REG. 2489 (1953).
[27] *Id.* § 2.
[28] *Id.* § 1.
[29] Exec. Order No. 10450, § 3, 18 FED. REG. 2489, 2491 (1953).
[30] *Id.* § 12, 18 FED. REG. at 2492.
[31] Exec. Order No. 10450, § 8, 18 FED. REG. 2489, 2491-92 (1953).
[32] *Id.* at 2491.
[33] 5 C.F.R. § 2.106 (Supp. 1957).
[34] 351 U.S. 536 (1956).

was employment consistent with national security, the government is required to show some relation between the position of the employee and national security. Justice Harlan declared:

> In view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets.[35]

The Court referred to the fact that only eleven agencies, all directly concerned with national security, were enumerated by Congress. Therefore, the Court reasoned that national security was used in the Act in the limited sense [36] and, consequently, that the President could not by executive order change the intent of Congress to "general security." The fact that the Act provided for the re-employment of persons discharged as security risks [37] by other government agencies indicates that Congress did not intend the Act to apply to *all* government agencies. If it did apply to *all* agencies, those who were security risks in one agency would of necessity be security risks in any other agency under the Act. The decision gravely affected the security program both as to new applicants and those already employed.[38]

The program is now limited only to those positions which in themselves can be related to national security and not to all the agencies and positions of the government. Legislation to fill this gap in the security program has been proposed.[39] But, until Congress acts, there are to be no proceedings against those in non-security positions.[40]

New York Security Risk Law

New York State, similarly concerned with the peril of subversive infiltration within the ranks of state employees, in 1951 enacted a Security Risk Law.[41] The purpose of the Act is to provide a means

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[35] *Id.* at 546-47.

[36] The act ". . . relates only to those activities which are directly concerned with the Nation's safety, as distinguished from the general welfare. . . ." *Id.* at 543.

[37] 64 STAT. 476 (1950), 5 U.S.C. § 22-1 (1952); S. REP. No. 2158, 81st Cong. 2d Sess. (1950).

[38] See N.Y. Times, June 15, 1956, p. 14, col. 1; REPORT OF COMMISSION ON GOVERNMENT SECURITY 35-40 (1957).

[39] H.R. 11721, 84th Cong. 2d Sess. (1956); H.R. 11841, 84th Cong. 2d Sess. (1956).

[40] N.Y. Times, June 15, 1956, p. 14, col. 1.

[41] Laws of N.Y. 1951, c. 233, as amended Laws of N.Y. 1953, c. 26, Laws of N.Y. 1954, c. 105. This act has been extended on a year-to-year basis. See Laws of N.Y. 1957, c. 176. There are 13 other states which have enacted various forms of security risk laws. See SPECIAL COMMITTEE OF THE ASSOCIATION OF THE CITY OF NEW YORK, THE FEDERAL-SECURITY PROGRAM 211 n.167 (1956).

whereby security risks may be removed from positions in which they may endanger national or state security. The New York Security Risk Law calls for summary suspension of all employees from security agencies and positions when, after proper investigation, ". . . reasonable grounds exist for the belief that, because of doubtful trust and reliability, the employment of such persons . . . would endanger the security or defense of the nation and the state." [42]

Prior to the enactment of the New York Security Risk Law subversion in government employment was combated through the use of the general procedure of Section 22 of the Civil Service Law.[43] This section makes provisions for notice, hearing and appeal prior to any removals.

Section 12-a of the Civil Service Law, which disqualifies from public employment any person who advocates overthrow of government by force or violence, formed the basis for such removal. However, the procedure was slow in operation,[44] the basis of removal was difficult to prove,[45] and there were no provisions for the removal of the loyal employee, who still was a security risk. Another difficulty lay in the fact that Sections 25 and 26-a of the Civil Service Law prevented government authorities from asking an employee questions concerning his political beliefs as a test of fitness for office. In *Adler v. Wilson*,[46] however, the court held that these sections did not apply to questions concerning membership in the Communist Party. The New York Security Risk Law provides for a full, but expeditious hearing. Furthermore, under Section 5, any employee suspended under the Act must be informed of the reason for such action and of the source of any evidence, without violating confidences. The dismissed employee is then given thirty days to offer evidence or affidavits to the agency showing why he should be reinstated to duty.[47] After the thirty-day period, the agency finally determines whether he shall be transferred, removed, or returned to duty.[48] Any person believing himself to be aggrieved by the agency decision has the right to appeal within twenty days to the State Civil Service Commission which is given complete power to review the case.[49]

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[42] Laws of N.Y. 1951, c. 233, § 5.

[43] Removal of any civil service employee could be accomplished only through the procedure of Section 22 of the New York Civil Service Law.

[44] N.Y. CIV. SERV. LAW § 22(2). "The person whose removal is sought shall have written notice of such proposed removal and of reasons therefore . . . and shall be allowed a reasonable time for answering the same in writing." *Ibid.*

[45] Knowledge must be present before the statute will be applicable. Lederman v. Board of Educ., 276 App. Div. 527, 530, 96 N.Y.S.2d 466, 470 (2d Dep't), *aff'd sub nom.* Thompson v. Wallin, 301 N.Y. 476, 95 N.E.2d 806 (1950), *aff'd sub nom.* Adler v. Board of Educ., 342 U.S. 485 (1952).

[46] 282 App. Div. 418, 123 N.Y.S.2d 655 (3d Dep't 1953).

[47] Laws of N.Y. 1951, c. 233, § 5.

[48] *Ibid.*

[49] *Id.* § 6.

The Civil Service Commission determines what is a security agency or security position and this determination is subject to judicial review.[50] Among the evidence that may be considered to determine a security risk under Section 7 of the Act is "membership in any organization or group found by the Civil Service Commission to be subversive."

It was hoped that this Act would achieve its ends ". . . with the least possible encroachment upon the freedom of expression . . . with extensive safeguards to protect them [state employees] from possible abuse." [51]

The New York State Security Risk Law is modeled on the federal statute [52] but has some important differences. The most important distinction is the right of an aggrieved employee to appeal to the State Civil Service Commission from an agency's determination.

However, the Federal Act contains an underlying weakness in that the final decision in all cases is made by the *same* agency which initially suspended the employee as a security risk. This weakness is corrected by the New York Act which provides for a hearing before an impartial commission which will bring about a standardization of decisions, and, in addition, should provide greater safeguards for the employee.

Furthermore, the two Acts differ in their scope. The New York Act empowers the Civil Service Commission to determine that an agency is a security agency whenever its functions are ". . . necessary to the security or defense of the nation and the state . . ." [53] and permits judicial review of this determination. However, the Federal Act names the applicable agencies,[54] which later were extended by presidential order to include all federal agencies.[55] The application of this order to all federal agencies was later narrowed by the Supreme Court decision in *Cole v. Young* [56] which stated that it required more than a mere showing that the security risk was an employee of a government agency. It must also be shown that this position, which the employee holds, could directly affect national security.

Although the federal and the state Acts are not identical, the State Civil Service Commission has nevertheless adopted the federal view in reviewing state dismissals. However, in 1953, the President of the Civil Service Commission, J. Edward Conway, had stated that the intent of the legislature, and the original interpretation of the commission, was merely to require that the employment be in a security agency or position, and he made no mention of the additional

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[50] *Id.* § 3.
[51] Governor's Memorandum, 1951 N.Y. LEGIS. ANNUAL 316, 317.
[52] *Id.* at 316.
[53] Laws of N.Y. 1951, c. 233, § 2.
[54] 64 STAT. 476 (1950), 5 U.S.C. § 22-1 (1952).
[55] Exec. Order No. 10450, 18 FED. REG. 2489 (1953).
[56] 351 U.S. 536 (1956).

requirement, that is, showing that the employment would endanger the security or defense of the nation and the state.

Recently, a stenographer employed by the New York City Department of Hospitals was discharged pursuant to Section 5 of the Security Risk Law. On appeal, the Civil Service Commission ordered that she be reinstated because the Department of Hospitals had not established that her employment in such position would endanger the security or defense of the nation and the state.[57] While the commission may be following the narrow road cut by the Supreme Court, a more restricted approach than that intended by the legislature, nevertheless the results reached are sound. It is reasonable to assume that if one is to be discharged in the interests of national security, some relation should exist between the position and national security.

Lerner v. Casey

The constitutionality of the New York Security Risk Law was tested recently in the case of *Lerner v. Casey*.[58] The New York Court of Appeals affirmed the dismissal under the Act of an employee of the New York City Transit Authority who, when asked if he was presently a member of the Communist Party, pleaded the fifth amendment. In 1953, the Transit Authority had been declared a security agency by the Civil Service Commission. In September, 1954, Lerner, a subway conductor, was directed by his superiors to appear before the Department of Investigation of the City of New York. At that time he refused to answer questions relating to his present membership in the Communist Party on the ground that the answers would tend to incriminate him. Later hearings were held at which petitioner, represented by counsel, continued in his refusal to answer.

Lerner was then suspended by the Transit Authority and given notice of the cause of his discharge as required by Section 5 of the New York Security Risk Law.[59] The thirty-day period, which was provided for the employee to show reasons why he should be restored to duty, elapsed without any statement having been received from the petitioner or his attorney. The Authority in reviewing the suspension found that reasonable grounds existed for the belief that Lerner was of doubtful trust and reliability. Therefore, the employment of Lerner as a subway conductor endangered the security of the nation and the state, and, as a result of this finding, he was discharged. Thereafter, the petitioner failed to appeal the Transit Authority's decision. Thus,

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[57] Miriam Reif, New York State Civil Service Commission Opinion (May 10, 1957), Order (June 13, 1957).

[58] 2 N.Y.2d 355, 141 N.E.2d 533 (1957).

[59] Laws of N.Y. 1951, c. 233.

the Civil Service Commission never had an opportunity to pass on Lerner's position in relation to national security.[60]

Lerner brought an Article 78 proceeding[61] against the Transit Authority to compel his reinstatement. The respondent's motion to dismiss was granted and subsequently affirmed by the Court of Appeals in a five-to-two opinion.

Preliminarily, the Court determined that the Transit Authority was properly subject to the New York Security Risk Law because of the vital function of the subway system in maintaining the welfare of both the city and the state.[62] Lerner's refusal to answer questions as to present membership in the Communist Party was held to be "evidence of doubtful trust and reliability" constituting grounds for discharge under the New York Security Risk Law. Pointing out that his discharge was due not to his refusal to answer but to the *doubt* created by his refusal to answer, the Court declared that merely pleading the fifth amendment should not erase this doubt. An employee owes a duty of trust and loyalty to his employer.[63] His refusal to respond when questioned concerning his conduct is inconsistent with this duty. An employee, invoking his constitutional privilege, destroys the confidence essential to such a relationship and creates a suspicion regarding his loyalty.

Turning to the constitutionality of the New York Security Risk Act, the Court held the Act contained the necessary safeguards to insure due process and hence was constitutional. The majority opinion distinguished the facts from those in the case of *Slochower v. Board of Higher Educ.*[64] There the Supreme Court held unconstitutional Section 903 of the New York City Charter which provided for the dismissal of any city employee who invoked the fifth amendment to avoid answering any questions relating to his official conduct. Slochower, a Brooklyn College professor, pleaded the fifth amendment before a congressional committee investigating subversion and was summarily dismissed. The Supreme Court, in reversing the New York Court of Appeals, declared: "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury."[65] It is worthy to note that under the construction placed on Section 903 by the New York Court of Appeals there was no implied presumption of guilt in the refusal to

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[60] Lerner v. Casey, 2 N.Y.2d 355, 361, 141 N.E.2d 533, 535 (1957); see McKay, *Constitutional Law*, 31 N.Y.U.L. REV. 1358, 1360 (1956).

[61] The statutory proceeding against a body or officer which abolishes the classification, writs, and orders of certiorari to review mandamus and prohibition.

[62] See New York City Transit Auth. v. Loos, 2 M.2d 733, 738, 154 N.Y.S.2d 209, 214 (1956).

[63] See Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Christal v. Police Comm'n, 33 Cal. App. 2d 564, 92 P.2d 416 (1939).

[64] 350 U.S. 551 (1956).

[65] Slochower v. Board of Higher Educ., 350 U.S. 551, 557 (1956).

answer, but the exercise of the privilege itself was the basis for discharge.[66]

In the *Lerner* case the Court of Appeals noted that the questions concerned the petitioner's present loyalty before a city inquiry, whereas Slochower had been questioned concerning his 1942 activities by a federal committee. Furthermore, Lerner was afforded an opportunity for an agency hearing and appeal in contrast to Slochower's summary dismissal.[67]

The dissent argued that the exercise of a constitutional privilege can not be made the basis of discharge and declared that such a dismissal was arbitrary and violative of due process. The wording of the Act prescribed "evidence" of a security risk, but the dissent denied that remaining silent meets this requirement.[68]

The individual's privilege against self-incrimination is one of our fundamental civil liberties,[69] although often subject to grave criticism.[70] The individual's privilege of government employment, on the other hand, is one conditioned by a waiver of some of the rights granted under the Constitution.[71] To what extent a government employee waives his constitutional rights in regard to his privilege against self-incrimination is a question often before the courts.[72] The Supreme Court has held these rights and privileges granted under the Constitution are not absolute but must be balanced with the actions of government in order to protect a democratic society.[73]

It is generally held that an employee has the obligation to answer questions by his employer concerning his employment. The Supreme Court decided in *Garner v. Board of Pub. Works*[74] that an employee may be discharged for failing to execute an affidavit as to his past or present knowing membership in the Communist Party. It stated:

> Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are no less relevant in public employment.[75]

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[66] See Note, 31 ST. JOHN'S L. REV. 78 (1956).

[67] Lerner v. Casey, 2 N.Y.2d 355, 371, 141 N.E.2d 533, 541 (1957) (dictum).

[68] *Id.* at 373, 141 N.E.2d at 543 (dissenting opinion of Fuld, J.).

[69] See GRISWOLD, THE FIFTH AMENDMENT TODAY (1955); Williams, *Problems of the Fifth Amendment*, 24 FORDHAM L. REV. 19 (1955); Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1 (1930).

[70] See Knox, *Self Incrimination*, 74 U. PA. L. REV. 139 (1925).

[71] See Christal v. Police Comm'n, 33 Cal. App. 2d 564, 92 P.2d 416 (1939); Faxon v. School Comm., 331 Mass. 531, 120 N.E.2d 772 (1954).

[72] See Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Christal v. Police Comm'n, note 71 *supra*.

[73] See Adler v. Board of Educ., 342 U.S. 485 (1952); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

[74] 341 U.S. 716 (1951).

[75] Garner v. Board of Pub. Works, 341 U.S. 716, 720 (1951).

This position was affirmed in *Adler v. Board of Educ.*[76] wherein the Court stated that to determine one's fitness, past or present conduct may properly be considered.

In *Wieman v. Updegraff*,[77] the Court declared unconstitutional an Oklahoma statute making membership in certain subversive organizations alone grounds for denying state employment. Without distinguishing between knowing and ignorant membership, the Court held that the statute denied the employee of due process. This case establishes that constitutional privileges would apply to government employees, whose exclusion pursuant to a statute is arbitrary. The *Slochower* case[78] adds that termination of employment without benefit of a hearing for invoking the privilege against self-incrimination at a congressional hearing violates due process.

Another recent Supreme Court decision, although not concerning public employment, can be compared to the *Lerner* case. The case of *Konigsberg v. State Bar*[79] concerned the denial of admittance to practice law in California courts for refusing to answer questions concerning moral character. The Court declared that, absent any previous statute requiring disclosure, the state may not impute disloyalty to mere silence. Further, it stated: ". . . it is our judgment that the inferences of bad moral character which the Committee attempted to draw from Konigsberg's refusal to answer questions about his political affiliations and opinions are unwarranted."[80]

The Supreme Court has granted Lerner a hearing on his application for certiorari.[81]

Conclusion

Mr. Justice Clark remarked in the *Slochower* case: "The problem of balancing the State's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one."[82] This problem of balance exists in the area of government employment on both the federal and state levels, and is a problem which extends to most activities of government. It is the duty of the courts to insure that the balance between the rights of the individual and the activities of government is maintained.

Many varying opinions have been given as to the significance of the Supreme Court's decision in the *Slochower* case.[83] Nevertheless,

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[76] 342 U.S. 485 (1952).
[77] 344 U.S. 183 (1952).
[78] Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).
[79] 353 U.S. 252 (1957).
[80] Konigsberg v. State Bar, 353 U.S. 252, 270-71 (1957).
[81] 26 U.S.L. WEEK 3116 (U.S. Oct. 15, 1957) (No. 165).
[82] See Slochower v. Board of Higher Educ., *supra* note 78, at 555.
[83] See Note, 31 ST. JOHN'S L. REV. 78 (1956); Note, 25 FORDHAM L. REV. 526 (1956); Note, 16 MD. L. REV. 259 (1956).

the decision is a reiteration of two principles of constitutional law: that the privilege against self-incrimination protects the innocent as well as the guilty, and that no inference of guilt may be drawn from its invocation.[84] In deciding the *Slochower* case the Supreme Court interpreted Section 903 as permitting a presumption of guilt from its invocation, and Slochower's discharge was based upon this presumption. It would seem the very question which existed in that case is present in the *Lerner* case. The New York Act requires that in order to suspend an employee a finding of "evidence of doubt" must exist. However, a dismissal using the fifth amendment privilege as evidence is precisely what the Supreme Court prohibited in the *Slochower* case. That the legislature intended the invocation of the fifth amendment be considered as evidence under the Act is doubtful, but if they did so, the Act is unconstitutional in this application.[85]

Due Process and the Right to Counsel in Administrative Proceedings

The administrative process is a necessary part of our modern government. The growth of modern society with all of the complexities of government, coupled with the cumbersome and dilatory procedures in our courts, has given rise to the extensive use of administrative agencies. Mr. Justice Frankfurter, discussing the distinction between the administrative and judicial process, stated:

> . . . that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.[1]

In another opinion, Justice Frankfurter commented:

> Unlike courts which are concerned primarily with the enforcement of private rights . . . administrative agencies are predominantly concerned with enforcing public rights although private interests may thereby be affected. To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures

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[84] See Grunewald v. United States, 353 U.S. 391 (1957); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

[85] If this Act imposed an absolute duty upon employees to answer questions relating to their official conduct by a proper authority it would probably be held constitutional. See Slochower v. Board of Higher Educ., note 84 *supra*, Garner v. Board of Pub. Works, 341 U.S. 716 (1951).

[1] United States v. Morgan, 313 U.S. 409, 422 (1941).