

Public Employees and the Privilege Against Self-Incrimination

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has once again been effected.¹⁰⁷ The result is further encroachment upon rights reserved to the states¹⁰⁸—a trend which has characterized recent decisions of the Supreme Court¹⁰⁹—thus driving another “vital blow to the very heart and framework of our constitutional republic.”¹¹⁰



PUBLIC EMPLOYEES AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

Introduction

“. . . [T]he privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized.”¹ The realization of this privilege was the outgrowth of the long conflict between those who championed the spirit of individual liberty on the one hand and the advocates of the “collective power” of the state on the other.² Though, by its terms, the applicability of the constitutional provision was limited to criminal cases,³ it was not long before the courts held that it could be invoked in any federal government proceeding where the evidence thus secured might later be used to convict the witness of a federal crime.⁴ Thus, today, the privilege, if properly invoked, will excuse one from answering questions posed in civil cases,⁵ before grand juries⁶ and in depositions,⁷ and also from

¹⁰⁷ See POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 28-33 (1956); Vaught, *Amending the Constitution by Judicial Decree*, 9 OKLA. L. REV. 249 (1956).

¹⁰⁸ “It will be said that this latest development [the report of the *Ullmann* case at trial level] is a dangerous usurpation of state's rights. The accuracy of this statement will not be disputed, but in view of the past decisions of the Supreme Court it would seem clear that the constitutional validity of this amendment to the statute will also be upheld by that court.” 9 SW. L.J. 474, 476 (1955).

¹⁰⁹ See, e.g., *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

¹¹⁰ Cook and Potter, *The School Segregation Cases: Opposing the Opinion of the Supreme Court*, 42 A.B.A.J. 313, 391 (1956).

¹ GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955).

² See *Brown v. Walker*, 161 U.S. 591, 637 (1896) (dissenting opinion).

³ “. . . nor shall any person . . . be compelled in any *criminal case* to be a witness against himself. . . .” U.S. CONST. amend. V (emphasis added).

⁴ See McCORMICK, *EVIDENCE* 259 (1954); Finkelhor and Stockdale, *The Professor and the Fifth Amendment*, 16 U. PITT. L. REV. 344, 352 (1955); see also cases cited notes 5-9 *infra*.

⁵ See *McCarthy v. Arndstein*, 266 U.S. 34 (1924).

⁶ See *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *United States v. Monia*, 317 U.S. 424, 427 (1943) (dictum).

⁷ See *Phleps v. Phleps*, 133 N.J. Eq. 392, 32 A.2d 81, 83 (Ct. Err. & App. 1943) (dictum).

refusing to furnish testimony in hearings before legislative committees⁸ and administrative boards.⁹ Of equal import, as a factor in elevating this constitutional safeguard to the lofty status it enjoys today has been the oft repeated, though tenuous, utterances of judges in explanation of the privilege. Two corollary views have ensued; first, that the privilege serves to protect not only the guilty but the innocent;¹⁰ secondly, that no presumption of guilt or perjury arises from its invocation.¹¹ Together with the expanded scope attributed to the privilege,¹² these two views have served to make it an effective shield against the inquisitorial powers of the state.

That the significance of the privilege has reached gigantic proportions in contemporary society may properly be attributed to the increased use of the investigative power by modern legislatures. Since 1939 there has been an increasing concern about the possible presence of disloyal personnel in government employment.¹³ The zealous efforts of the House Committee on Un-American Activities and the Senate Sub-Committee on Internal Security set off a drive to purge the federal service of disloyal and subversive officers and employees. In recent years, however, the work of these committees has been impeded by the long chain of witnesses called before them who have exercised their privilege against self-incrimination.¹⁴ Aside from this problem, however, the frequent invocation of the privilege by government employees hinders the exercise of three important governmental functions. The gathering of information by legislative committees and grand juries is made more difficult; the prosecution of public employees for crimes committed during their employment is impeded; and the removal of corrupt and disloyal personnel from the public service is less easily accomplished. In answer to these problems, government has devised four methods of discouraging the exercise of the privilege. The granting of immunity from prosecution in return for compelled testimony has perhaps enjoyed the most widespread use among these methods.¹⁵ The theory of the immunity statute is that

⁸ See *United States v. DiCarlo*, 102 F. Supp. 597 (N.D. Ohio 1952).

⁹ See *Smith v. United States*, 337 U.S. 137 (1949).

¹⁰ See, e.g., *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 557-58 (1956); *Ullmann v. United States*, 350 U.S. 422, 426 (1956); *Burdick v. United States*, 236 U.S. 79 (1915); GRISWOLD, *THE FIFTH AMENDMENT TODAY* 9 (1955).

¹¹ See, e.g., *Slochower v. Board of Higher Educ.*, *supra* note 10; *Ullmann v. United States*, *supra* note 10; *Davis v. University of Kansas City*, 129 F. Supp. 716, 718 (W.D. Mo. 1955); *Faxon v. School Comm.*, 331 Mass. 531, 120 N.E.2d 772, 774 (1954); *In re Fenn*, 235 Mo. App. 24, 128 S.W.2d 657, 664 (1939) (per curiam).

¹² See Pittman, *The Fifth Amendment: Yesterday, Today and Tomorrow*, 42 A.B.A.J. 509 (1956); Comment, 1955 U. ILL. L. FORUM 611, 612.

¹³ See *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 126 (1951).

¹⁴ See Brownell, *Immunity from Prosecution Versus Privilege Against Self-Incrimination*, 28 TUL. L. REV. 1 (1953); Finkelhor and Stockdale, *The Professor and the Fifth Amendment*, 16 U. PITT. L. REV. 344, 344-45 (1955).

¹⁵ E.g., 18 U.S.C. § 3486 (Supp. II 1954); N.Y. PEN. LAW §§ 381, 584, 2447.

if the threat of prosecution is removed the justification for the exercise of the privilege ceases, and thus the witness must legally answer. A second device is the requiring of a waiver of immunity as a condition of continuing employment.¹⁶ Closely resembling it is the proposed requirement that an applicant for a government job waive his constitutional privilege against self-incrimination.¹⁷ Waiver provisions have been used widely in many jurisdictions and appear to present no serious constitutional question. The fourth means used by state and local governments to facilitate the performance of the governmental functions discussed above is the dismissal of the employee for refusing to answer self-incriminatory questions. This method forms the basis of the problems discussed in this note, and will be explained more fully below.

Government Employment

Nearly 2,500,000 civilians work for the federal government.¹⁸ In 1947 the Census Bureau reported that 6,000,000 men and women were employed by our federal, state and local governments.¹⁹ From a standpoint of policy as well as law the status and rights of such a large number of persons has posed many problems. Because of their relation to the government, these employees are subject to limitations not applicable to other citizens.²⁰ It has been held repeatedly that a government job is not the property of the holder,²¹ but rather, it is a privilege conferred upon such holder by the state.²² The state may impose reasonable conditions upon the privilege of public employment.²³ Statutes in various jurisdictions have set up certain

¹⁶ *E.g.*, N.Y. PEN. LAW § 2446 (waiver of immunity); N.Y. CONST. art. I, § 6; N.Y.C. CHARTER § 903 (Tanzer 1937) (make waiver a condition of employment).

¹⁷ See Note, *Claim of Immunity From Self-Incrimination by Public Officers*, 64 U.S.L. REV. 561, 561-62 (1930).

¹⁸ FUND FOR THE REPUBLIC, DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES 39 (1955):

¹⁹ CUSHMAN, LEADING CONSTITUTIONAL DECISIONS 95 (10th ed. 1955).

²⁰ See CUSHMAN, *op. cit. supra* note 19; Note, 38 J. CRIM. L., C. & P.S. 613, 616 (1948); 54 MICH. L. REV. 126, 127 (1955).

²¹ See, *e.g.*, Taylor v. Beckham, 178 U.S. 548 (1900); Crenshaw v. United States, 134 U.S. 99 (1890); *In re Sawyer*, 124 U.S. 200 (1888); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951).

²² See Board of Educ. v. Wilkinson, 125 Cal. App. 2d 100, 270 P.2d 82 (1954); Note, 101 U. PA. L. REV. 1190, 1196 (1953).

²³ Cantelino v. McClellan, 282 N.Y. 166, 25 N.E.2d 972 (1940); Lerner v. Casey, 2 A.D.2d 1, 154 N.Y.S.2d 461 (2d Dep't 1956); Steinmetz v. California State Bd. of Educ., 271 P.2d 614 (1954), *aff'd*, 44 Cal. 2d 816, 285 P.2d 617 (1955), *cert. denied*, 351 U.S. 915 (1956); McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). "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

qualifications on the holding of government office and provide for vacatur of office in the event these conditions are broken.²⁴ Thus, where the public officer accepts another office during his term of office,²⁵ or refuses to file the official oath required by statute,²⁶ automatic dismissal results. Similarly, other statutes provide for vacatur where the office holder is adjudicated insane²⁷ or convicted of a felony.²⁸ The apparent reasonableness of these qualifications is perhaps responsible for their failure to raise any serious constitutional questions.

More controversial have been governmental attempts to restrict the constitutional rights of public employees. The first such attempts took the form of restrictions on the ownership of property.²⁹ In *Ex parte Curtis*,³⁰ the Supreme Court upheld the validity of a federal statute which punished by dismissal the requesting, giving to, or receiving of money or property for political purposes from any other federal officer by an officer of the United States. Some years later, the same Court upheld the constitutionality of a state statute which imposed the penalty of discharge upon a state railroad commissioner, who, in violation of the statute, acquired the stocks or bonds of any railroad company.³¹ The Court said:

' . . . [I]t could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course . . . but that is not the test. The plaintiff . . . must have been deprived of one of those fundamental rights,

him. On the same principle the city may impose any reasonable condition upon holding offices within its control." *McAuliffe v. New Bedford*, *supra* at 517-18. "It is a question of *power*. The People had the power to accomplish that which in plain words they said they wished to accomplish. They are sovereign. . . . They have the power, by a constitution, to set *conditions*, with which there must be compliance, if one is to be or continue to be a public officer." *Canteline v. McClellan*, *supra* at 171, 25 N.E.2d at 974.

²⁴ *E.g.*, N.Y. PUB. OFFICERS LAW § 30 (Supp. 1956); *id.* § 35-a; N.Y.C. CHARTER § 895 (Tanzer 1937); ARIZ. CODE ANN. § 70-138 (Supp. 1952); CAL. EDUC. CODE ANN. § 12601 (West 1955); CAL. GOV. CODE ANN. §§ 1020, 1021, 1028 (West 1955); LA. REV. STAT. § 14:362 (Supp. 1955).

²⁵ *E.g.*, N.Y.C. CHARTER § 895 (Tanzer 1937).

²⁶ *E.g.*, N.Y. PUB. OFFICERS LAW § 30(h) (Supp. 1956).

²⁷ *Id.* § 30(f).

²⁸ *Id.* § 30(e), *Davis v. Impelliteri*, 197 Misc. 162, 94 N.Y.S.2d 159 (Sup. Ct. 1950) (construing the predecessor statute); CAL. GOV. CODE ANN. § 1028 (West 1955).

²⁹ In 1789 the first session of Congress passed a statute which made it unlawful for certain officers of the Treasury Department to own a vessel, purchase public lands or the public securities of the state or federal governments or to otherwise engage in any trade or commerce. A similar provision was enacted in 1791. Similarly, an act prohibiting members of Congress from having any interest in contracts with the United States was enacted in 1868. See *Ex Parte Curtis*, 106 U.S. 371, 372-73 (1882); CUSHMAN, LEADING CONSTITUTIONAL DECISIONS 95 (10th ed. 1955).

³⁰ 106 U.S. 371 (1882).

³¹ See *Wilson v. North Carolina*, 169 U.S. 586 (1898).

the observance of which is indispensable to the liberty of the citizen, to justify our interference.³²

Another instance in which the rights of government employees have been restricted, is in the area of political activities. Ever since Mr. Justice Holmes pointed out that "the petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,"³³ it seems to be well settled that a government may reasonably restrict the political activities of its employees as a condition of employment.³⁴ This principle was recently reinforced in *United Public Workers v. Mitchell*.³⁵ There, certain employees of the executive branch of the federal government sued to enjoin the Civil Service Commission from enforcing against them Section 9(a) of the Hatch Act and for a declaratory judgment that the section was unconstitutional. Section 9(a) forbids such employees from taking "any active part in political management or in political campaigns"³⁶ at the risk of loss of employment. The Court, in upholding the constitutionality of the Act, pointed out that:

. . . [The] fundamental human rights [guaranteed by the first, fifth, ninth and tenth amendments] are not absolute . . . [and] this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government.³⁷

Furthermore, since the holding of a government office is neither "life, liberty or property" within the meaning of the due process clause, a quasi-judicial hearing would appear to be unnecessary in affecting a dismissal for a condition broken.³⁸ Indeed, the Lloyd-La Follette Act,³⁹ in effect since 1912, provides that "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer . . . directing the removal. . . ." ⁴⁰ Neither is the mere dismissal of a government employee "punishment," ⁴¹ which can lawfully be inflicted only by complying with the provisions of the sixth

³² *Id.* at 594.

³³ *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).

³⁴ See *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *McAuliffe v. New Bedford*, *supra* note 33; *McCrorry v. Philadelphia*, 345 Pa. 154, 27 A.2d 55 (1942).

³⁵ *Supra* note 34.

³⁶ 18 U.S.C. § 61(h) (Supp. V 1947).

³⁷ *United Public Workers v. Mitchell*, *supra* note 34, at 95-96.

³⁸ See *Bailey v. Richardson*, 182 F.2d 46, 57 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951).

³⁹ 37 STAT. 555 (1912), 5 U.S.C. §§ 631-79 (1952).

⁴⁰ *Id.* § 652.

⁴¹ *Bailey v. Richardson*, *supra* note 38, at 55-56. See Finkelhor and Stockdale, *The Professor and the Fifth Amendment*, 16 U. PITT. L. REV. 344, 345-46 (1955); cf. Blackwell, *When Lawyers Plead the Fifth Amendment—The ABA Position*, 27 N.Y. BAR BULL. 247, 248 (1955). *But see* *United States v. Lovett*, 328 U.S. 303 (1946).

amendment.⁴² Thus, it would seem, that an employee in a dismissal proceeding is neither entitled to trial by jury, confrontation of witnesses or the assistance of counsel as guaranteed by this amendment.⁴³ As pointed out by a federal court in *Bailey v. Richardson*,⁴⁴ "to hold office at the will of a superior and to be removable therefrom only by constitutional due process of law are opposite and inherently conflicting ideas."⁴⁵

Dismissal for Refusal to Testify—Generally

Before considering the problem of dismissing public employees on the ground of refusal to testify it may be worthwhile to point out that disbarment of attorneys for the same reason presents an excellent analogy. Though not strictly a public employee, an attorney is an officer of the court and as such subject to its discipline.⁴⁶ Invocation of the privilege against self-incrimination in response to charges regarding the attorney's loyalty is said to be in conflict with the oath taken by an attorney upon admission to the bar.⁴⁷ Thus, disbarment has resulted by viewing the refusal to testify both as an inference of guilt⁴⁸ or as sufficient cause in itself for revocation of his license.⁴⁹ That an attorney's invoking of the privilege presents considerations similar to the manifestation of like conduct by public employees has recently been rejected, however, in *Sheiner v. State*.⁵⁰ There, a Florida court pointed out that an attorney's ". . . position is not in the class with that of the teacher, the police officer, the security risk or others in public employment,"⁵¹ and thus refused to discipline an attorney who had refused to testify before a federal congressional committee.

In various jurisdictions, courts have upheld the dismissal of policemen⁵² and public school teachers⁵³ without any express statu-

⁴² *Bailey v. Richardson*, *supra* note 38, at 55-56; *accord*, *Wilson v. North Carolina*, 169 U.S. 586 (1898).

⁴³ U.S. CONST. amend. VI.

⁴⁴ 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951).

⁴⁵ *Bailey v. Richardson*, 182 F.2d 46, 58 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951).

⁴⁶ See *Cohen v. Wright*, 22 Cal. *293, *314-15 (1863); *Welanko's Case*, 99 N.H. 413, 112 A.2d 50 (1955) (*per curiam*).

⁴⁷ See Note, *Use of the Fifth Amendment by an Attorney as Grounds for Disbarment*, 31 NOTRE DAME LAW. 465, 466-67 (1956).

⁴⁸ See *In re Fenn*, 235 Mo. App. 24, 128 S.W.2d 657 (1939) (*per curiam*).

⁴⁹ See *Welanko's Case*, *supra* note 46.

⁵⁰ 82 So. 2d 657 (Fla. 1955).

⁵¹ *Sheiner v. State*, 82 So. 2d 657, 662 (Fla. 1955).

⁵² See *Christal v. Police Comm'n*, 33 Cal. App. 2d 564, 92 P.2d 416 (1939); *Souder v. Philadelphia*, 305 Pa. 1, 156 Atl. 245 (1931); *accord*, *Drury v. Hurley*, 339 Ill. App. 33, 88 N.E.2d 728 (1949).

⁵³ See *Davis v. University of Kansas City*, 129 F. Supp. 716 (W.D. Mo. 1955); *Board of Educ. v. Eisenberg*, 129 Cal. App. 2d 732, 277 P.2d 943 (1954); *Board of Educ. v. Wilkinson*, 125 Cal. App. 2d 100, 270 P.2d 82 (1954); *Faxon v. School Comm.*, 331 Mass. 531, 120 N.E.2d 772 (1954).

tory authority. In the case of policemen, a refusal to testify has been viewed both as "conduct unbecoming an officer"⁵⁴ and a breach of duty,⁵⁵ thus justifying a discharge. In the leading case of *Christal v. Police Commission*,⁵⁶ the petitioning police officers had refused to produce records or testify before a grand jury investigating their alleged taking of bribes. Pursuant to a departmental rule they were discharged for "conduct unbecoming an officer" and immediately instituted court action claiming that their removal had been both unconstitutional and unjustified. In the light of both the departmental rule and the constitutional privilege the court viewed the situation as giving rise to a voluntary choice. The court pointed out that whereas duty required them to answer, privilege permitted a refusal. The exercise of the privilege, however, was wholly inconsistent with their duty as police officers. In affirming their right to exercise the privilege, the court rejected the notion that they could, at the same time, insist upon retaining their positions.⁵⁷

Very recently, the Supreme Court of the United States appears to have adopted this view. In *Orloff v. Willoughby*,⁵⁸ that Court had before it for decision a case involving the withholding of an officer's commission by the Army to one who had been inducted as a physician under a special conscription statute because he had invoked the privilege in refusing to answer questions regarding alleged Communist Party membership. The physician claimed he was being punished for exercising a privilege which the constitution guarantees and sought to compel the Army to either discharge him or grant him a commission. The Court, denying the petition, stated:

No one, at least no one on this Court which has repeatedly sustained assertions by Communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on this ground. No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a

⁵⁴ *Christal v. Police Comm'n*, *supra* note 52; *Souder v. Philadelphia*, *supra* note 52.

⁵⁵ *Christal v. Police Comm'n*, *supra* note 52; *Drury v. Hurley*, *supra* note 52, at 735 (dictum); *Scholl v. Bell*, 125 Ky. 750, 102 S.W. 248, 261-62 (1907) (dictum).

⁵⁶ See *Christal v. Police Comm'n*, 33 Cal. App. 2d 564, 92 P.2d 416 (1939).

⁵⁷ This principle was clearly stated by the trial judge in the *Sheiner* case (see text at note 50) where a Florida attorney was disbarred for refusing to testify in regard to charges affecting his loyalty. The court pointed out that *Sheiner* ". . . emerged from the court room with the right guaranteed him by the Fifth Amendment unimpaired, but he left divested of the privilege to practice law. . . . He has protected himself by invoking the Fifth Amendment, we shall protect ourselves by invoking the State's right to withdraw from him the privilege which he has abused." Quoted in Blackwell, *When Lawyers Plead the Fifth Amendment—The ABA Position*, 27 N.Y. BAR BULL. 247, 251 (1955). On appeal, the *Sheiner* case was reversed. See *Sheiner v. State*, 82 So. 2d 657 (Fla. 1955).

⁵⁸ 345 U.S. 83 (1953).

post of honor and trust. We have no hesitation in answering that question 'No.'⁵⁹

The dismissal of public school teachers who invoke the privilege seems to be a product of the extensive loyalty investigations inaugurated in recent years. In addition to "conduct unbecoming a teacher"⁶⁰ and breach of duty,⁶¹ the exercise of the privilege by a teacher in response to questions relating to Communist Party membership has been held "adequate cause"⁶² for discharge. It has been said that "the public will . . . and . . . ought not . . . stand, for such reticence or refusals to answer by the teachers in their schools."⁶³ A refusal to answer questions touching upon a teacher's loyalty to the country which permits him to teach tends to weaken the confidence placed in him by his students and the institution which employs him. In addition, it disparages the whole profession in the eyes of the public and thus, would seem to justify his dismissal.⁶⁴ Certainly, the inconsistency between a public school teacher's duty and his right not to incriminate himself with respect to membership in disloyal organizations is at least as great as in the instance of a policeman who asserts similar rights in regard to other activities.⁶⁵

If public employees may be removed from office for refusing to testify before legally authorized bodies in regard to their official conduct in the absence of statute, express enactments clearly defining the conduct which will result in discharge would appear to be all the more justified. At least four jurisdictions have enacted such statutes.⁶⁶ The Louisiana statute⁶⁷ is patterned after Section 903 of the New York City Charter. It is applicable to all employees of the cities of Louisiana as well as employees of the state or political subdivisions thereof. Under it, a refusal to testify regarding the affairs or government of the city or the conduct of any city officer before any court or body authorized to conduct any hearing or inquiry will subject the offender to a forfeiture of his government office. However, unlike

⁵⁹ *Id.* at 91.

⁶⁰ Board of Educ. v. Wilkinson, 125 Cal. App. 2d 100, 270 P.2d 82 (1954); Faxon v. School Comm., 331 Mass. 531, 120 N.E.2d 772 (1954).

⁶¹ Faxon v. School Comm., *supra* note 60.

⁶² Davis v. University of Kansas City, 129 F. Supp. 716 (W.D. Mo. 1955); Board of Educ. v. Eisenberg, 129 Cal. App. 2d 732, 277 P.2d 943 (1954).

⁶³ Davis v. University of Kansas City, *supra* note 62 at 718.

⁶⁴ See Wyman, *The Fifth Amendment: The Case of the Three Professors*, 41 A.B.A.J. 801, 803-04 (1955).

⁶⁵ See Faxon v. School Comm., 331 Mass. 531, 120 N.E.2d 772, 775 (1954).

⁶⁶ N.Y. CONST. art. I, § 6; N.Y.C. CHARTER § 903 (Tanzer 1937); CAL. GOV. CODE ANN. § 1028.1 (West 1955); LA. REV. STAT. § 33:2426 (1950). In addition, under an Executive Order issued in 1953, the exercise of the privilege by any employee of the executive department may be considered as a factor in determining whether the employee constitutes a "security risk." Exec. Order No. 10450, 18 FED. REG. 2489 (1953), as amended, Exec. Order No. 10491, 18 FED. REG. 6583 (1953).

⁶⁷ LA. REV. STAT. § 33:2426 (1950).

its New York City counterpart, which bars the holding of office permanently, it proscribes the holding of any city⁶⁸ job for a period of *only* two years.⁶⁹ On the other hand, the California statute⁷⁰ is much more limited. It appears to be applicable only before administrative boards and legislative committees though it does contain an express provision extending its applicability to refusals to testify before federal legislative committees. The most distinguishing feature of the California statute, however, is that dismissal is predicated on a refusal to answer questions relating to only four activities specified therein. All these questions relate to past and present disloyal advocacy or membership in subversive organizations.⁷¹ In *Steinmetz v. California State Board of Education*,⁷² the court upheld the constitutionality of the statute. There, the court pointed out that the dismissal had not been predicated on a presumption that the activity inquired of was true, but on a refusal to answer questions relating thereto. It was further held that the fact that the questions asked might tend to incriminate if answered, did not divest the state of the power to require an answer as a condition of employment.

Section 903—New York City Charter

Pursuant to legislative authorization,⁷³ the New York City Charter was adopted by the people of that city at the general election held in 1936 and became effective January 1, 1938.⁷⁴ Section 903⁷⁵

⁶⁸ Though the statute purports to apply to state and county as well as city employees, it inconsistently purports to bar the offender from holding any *city* job for 2 years. *Ibid.*

⁶⁹ Compare LA. REV. STAT. § 33:2426 (1950), with N.Y.C. CHARTER § 903 (Tanzer 1937).

⁷⁰ CAL. GOV. CODE ANN. § 1028.1 (West 1955).

⁷¹ The statute directs the employee to answer questions relating to
“(a) Present personal advocacy by the employee of the forceful or violent overthrow of the Government of the United States or of any state.

(b) Present knowing membership in any organization now advocating the forceful or violent overthrow of the Government of the United States or of any state.

(c) Past knowing membership at any time since September 10, 1948, in any organization which, to the knowledge of such employee's, during the time of the employee's membership advocated the forceful or violent overthrow of the Government of the United States or of any state.

(d) Questions as to present knowing membership of such employee in the Communist Party or as to past knowing membership in the Communist Party at any time since September 10, 1948.” *Ibid.*

⁷² 271 P.2d 614 (1954), *aff'd*, 44 Cal. 2d 816, 285 P.2d 617 (1955), *cert. denied*, 351 U.S. 915 (1956).

⁷³ Laws of N.Y. 1934, c. 867.

⁷⁴ TANZER, NEW YORK CITY CHARTER 1 (1937).

⁷⁵ “If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or

was included as a measure aimed at the elimination of graft and corruption as a result of recommendations made in the Seabury Report.⁷⁶ The section is applicable to all officers and employees of New York City. The conduct proscribed includes the failure or refusal to appear, testify or waive immunity *before any court, grand jury, legislative committee or administrative body*. The questions asked or the investigation undertaken, however, must relate to either the government, property and affairs of the city, or the official conduct of any employee thereof. Violation of the statute results in vacatur of office plus permanent proscription from holding any other city office by appointment or election, *i.e.*, the employee is not only automatically dismissed from his present position but becomes thereafter ineligible to hold any other city job.

Though framed in broad language, the statute is limited in a few important aspects. Thus, it has been held that Section 903 is inapplicable where the conduct proscribed is not engaged in *before* the body conducting the investigation.⁷⁷ Similarly, the section is not applicable where the employee is guilty of perjury.⁷⁸ Finally, the fact that admissions of guilt in answer to the questions posed do not give rise to an operation of the statute⁷⁹ points up the purpose of the statute, which is to induce answers to pertinent questions in order to supply needed information to legally authorized bodies.

Similar in purpose and effect to Section 903 is Article I, Section 6 of the New York State Constitution.⁸⁰ This provision, however,

to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency." N.Y.C. CHARTER §903 (Tanzer 1937).

⁷⁶ See *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 564-65 (1956) (dissenting opinion); see also Waldman, *The Fifth Amendment—Shield or Sword*, 7 BROOKLYN BARR. 113, 115 (1956).

⁷⁷ *Crane v. Monaghan*, 124 N.Y.S.2d 26 (Sup. Ct. 1953).

⁷⁸ *Daniman v. Board of Educ.*, 306 N.Y. 532, 538, 119 N.E.2d 373, 377 (1954) (dictum), *appeal denied*, 348 U.S. 933 (1955). See *People v. Schappes*, 291 N.Y. 575, 50 N.E.2d 821 (mem. opinion), *cert. denied*, 320 U.S. 790 (1943), where a city employee was convicted of perjury for falsely testifying in regard to his official conduct.

⁷⁹ *Slochower v. Board of Higher Educ.*, *supra* note 76, at 565 (dissenting opinion); *Daniman v. Board of Educ.*, *supra* note 78 (dictum).

⁸⁰ ". . . [A]ny 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 by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall

is limited to instances where a public officer invokes the privilege against self-incrimination before a grand jury only. Also, the state constitutional provision lacks the *permanent* proscription from office feature of its New York City Charter counterpart. The resulting weakness of a statute lacking such provision was demonstrated in *People v. Harris*.⁸¹ There, the New York Court of Appeals upheld the immediate reappointment to another office involving similar duties of a public employee who had violated the constitutional provision. This weakness was partly remedied, however, when the provision was amended to make a violator ineligible for office for a period of five years.⁸²

Pursuant to the provisions of Section 903 the New York courts have sustained the dismissal of firemen⁸³ and teachers⁸⁴ as well as other employees⁸⁵ found guilty of the conduct proscribed therein. The question of whether the charter provision is applicable to teachers in the New York City schools, however, has been subject to serious controversy.⁸⁶ It has been argued that teachers are not *city* but *state* employees, but since their salaries are paid out of funds in the city treasury, they are within the definition of the term as contained in the Administrative Code.⁸⁷ Thus, they have been held city employees by the New York courts.⁸⁸ Under the Education Law a teacher, after acquiring "tenure"⁸⁹ may only be removed from his position for four specified causes⁹⁰ and after notice and hearing.⁹¹ It has been

be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general." N.Y. CONST. art. I, § 6.

⁸¹ 294 N.Y. 424, 63 N.E.2d 17 (1945).

⁸² Laws of N.Y. 1949, p. 1951. Approved by vote of people November 8, 1949.

⁸³ *Crane v. Monaghan*, 283 App. Div. 785, 129 N.Y.S.2d 229 (1st Dep't 1954) (mem. opinion), *aff'd mem.*, 308 N.Y. 880, 126 N.E.2d 312 (1955).

⁸⁴ *Daniman v. Board of Educ.*, 306 N.Y. 532, 119 N.E.2d 373 (1954), *appeal denied*, 348 U.S. 933 (1955); *Goldway v. Board of Higher Educ.*, 178 Misc. 1023, 37 N.Y.S.2d 34 (Sup. Ct. 1942); *Withrow v. Joint Legislative Comm.*, 176 Misc. 597, 602, 28 N.Y.S.2d 223, 228 (Sup. Ct. 1941) (dictum).

⁸⁵ *Koral v. Board of Educ.*, 197 Misc. 221, 94 N.Y.S.2d 378 (Sup. Ct. 1950) (mechanical engineer); *accord*, *Lerner v. Casey*, 138 N.Y.S.2d 777 (Sup. Ct. 1955), *aff'd*, 2 A.D.2d 1, 154 N.Y.S.2d 461 (2d Dep't 1956) (dismissal of a subway conductor sustained on ground that Section 903 was expressive of the public policy of the state).

⁸⁶ See Waldman, *The Fifth Amendment—Shield or Sword*, 7 BROOKLYN BARR. 113, 114-15 (1956).

⁸⁷ The Administrative Code defines an employee as "Any person whose salary in whole or in part is paid out of the city treasury." N.Y.C. ADMIN. CODE § 981-1.0(7).

⁸⁸ *Daniman v. Board of Educ.*, *supra* note 84; *Goldway v. Board of Higher Educ.*, *supra* note 84; *accord*, *Koral v. Board of Educ.*, *supra* note 85.

⁸⁹ "Tenure" shall mean the right of a person to hold his position during good behavior and efficient and competent service, and not to be removed therefrom except for cause. . . ." N.Y. EDUC. LAW § 6206(1) (d).

⁹⁰ *Id.* § 6206(10).

⁹¹ *Ibid.*

held, however, that there is no conflict between these provisions and Section 903.⁹² It is reasoned that while the sections in the Education Law govern the removal of teachers for cause generally, the Charter provides for a forfeiture of office for a particular cause.⁹³

In defense to the application of Section 903 to teachers who invoke the privilege when asked questions regarding their membership in the Communist Party, it has been pointed out that other statutes specifically deal with the removal of disloyal teachers. For example, Section 3021 of the Education Law provides for the removal of a teacher found guilty of seditious conduct.⁹⁴ Section 12-a of the Civil Service Law disqualifies from public employment any person who advocates the overthrow of government by force or violence.⁹⁵ Section 3022 of the Education Law, which is part of the Feinberg Law, makes membership in any organization advocating the conduct proscribed by the two preceding statutes, *prima facie* evidence of disqualification for office.⁹⁶ Furthermore, Sections 25 and 26-a of the Civil Service Law forbid the asking of questions concerning the political beliefs and associations of Civil Service employees to determine their fitness to hold office.⁹⁷ Dismissing this argument, however, *Adler v. Wilson*,⁹⁸ held that these statutes do not affect a disciplinary proceeding brought against a teacher for failure to answer questions regarding Communist Party membership. The court there added, that the provisions in the Civil Service Law prohibiting the asking of questions regarding an employee's political beliefs and associations were not applicable to Communist Party membership.⁹⁹

Another argument on behalf of the teacher is that his automatic dismissal for exercising a constitutional right violates the basic principle of academic freedom. Under this principle, a teacher acquiring "tenure" is removable only if found to be incompetent, upon conviction of a serious crime, or so morally delinquent as to be unfit for association with students.¹⁰⁰ Academic freedom has been described as the "freedom to follow one's conscience within the law."¹⁰¹ Con-

⁹² *Daniman v. Board of Educ.*, 306 N.Y. 532, 119 N.E.2d 373 (1954), *appeal denied*, 348 U.S. 933 (1955); *accord*, *Koral v. Board of Educ.*, 197 Misc. 221, 94 N.Y.S.2d 378 (Sup. Ct. 1950).

⁹³ See *Daniman v. Board of Educ.*, *supra* note 92, at 539-40, 119 N.E.2d at 378.

⁹⁴ N.Y. EDUC. LAW § 3021.

⁹⁵ N.Y. CIV. SERV. LAW § 12-a.

⁹⁶ N.Y. EDUC. LAW § 3022.

⁹⁷ N.Y. CIV. SERV. LAW §§ 25, 26-a.

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

⁹⁹ *Adler v. Wilson*, 282 App. Div. 418, 123 N.Y.S.2d 655 (3d Dep't 1953).

¹⁰⁰ *Byse, Teachers and the Fifth Amendment*, 102 U. PA. L. REV. 871, 879 (1954). A University "... is not and must not become an aggregation of like-minded people all behaving according to approved convention. It is a temple of the open-minded. And so long as in his instruction, his scholarship, his relations with his associates and juniors a teacher maintains candor, and truth as he sees it, he may not be required to pass any other test." *Id.* at 882.

¹⁰¹ *Id.* at 879.

ceding that freedom, doesn't a teacher and his profession have at least as great an obligation to set an example of patriotism and loyalty to country, as to defend the right to freedom of thought and expression?¹⁰² As was pointed out by a New York court, "academic freedom . . . is the freedom to do good and not to teach evil."¹⁰³

Finally, it is claimed that a teacher may be morally justified in invoking the privilege.¹⁰⁴ Though he be innocent of any charge directed to him, the teacher may be unwilling to implicate others or may have exercised the privilege by mistake, inadvertence or because he followed erroneous legal advice. Assuming the validity of this argument, it is equally certain that the state is morally justified in dismissing him, since, when questioned regarding his loyalty, a teacher who invokes the privilege tends to weaken the confidence reposed in him by his students and to subvert the character of the whole profession in the eyes of the public.¹⁰⁵ Notwithstanding any of these arguments, however, the New York courts have consistently held Section 903 applicable to teachers.¹⁰⁶

The broad terms of the charter provision have provided an opportunity for the courts to hold it applicable to testimony before federal legislative committees.¹⁰⁷ Furthermore, the view has been taken that questions regarding alleged subversive activities of employees are inquiries into his official conduct.¹⁰⁸ As interpreted by the New York courts, the provision, insofar as it effects a termination of employment, is self-executing.¹⁰⁹ Thus, "the assertion of the privilege against self incrimination is equivalent to a resignation."¹¹⁰ Since the act which gives rise to the vacatur of office is either admitted or a matter of public record, it has been pointed out that there is no necessity for notice and hearing in effecting a dismissal.¹¹¹ In upholding Section 903 as a reasonable condition imposed by a city upon the holding of an office within its control, the New York courts have expressed the view that the charter provision violates neither the state nor federal constitution.¹¹²

¹⁰² See Life, May 21, 1956, p. 44.

¹⁰³ *Kay v. Board of Higher Educ.*, 173 Misc. 943, 951, 18 N.Y.S.2d 821, 829 (Sup. Ct.), *aff'd mem.*, 259 App. Div. 879, 20 N.Y.S.2d 1016 (1st Dep't 1940).

¹⁰⁴ See GRISWOLD, *THE FIFTH AMENDMENT TODAY* (1955); Byse, *supra* note 100; Life, May 21, 1956, p. 44.

¹⁰⁵ See Wyman, *The Fifth Amendment: The Case of the Three Professors*, 41 A.B.A.J. 801, 803-04 (1955).

¹⁰⁶ See note 84 *supra*.

¹⁰⁷ See cases cited note 92 *supra*.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Daniman v. Board of Educ.*, 306 N.Y. 532, 538, 119 N.E.2d 373, 377 (1954), *appeal dismissed*, 348 U.S. 933 (1955).

¹¹¹ See *Koral v. Board of Educ.*, 197 Misc. 221, 224, 94 N.Y.S.2d 378, 382 (Sup. Ct. 1950).

¹¹² See *Shlakman v. Board of Higher Educ.*, 307 N.Y. 806, 121 N.E.2d 629, *amending* 306 N.Y. 532, 119 N.E.2d 373 (1954), *rev'd sub nom.*, *Slochower v.*

The Slochower Case

But the Supreme Court of the United States is of a different view. In *Slochower v. Board of Higher Education*,¹¹³ the question of the constitutionality of Section 903 came before that Court for decision for the first time. Slochower was an associate professor at Brooklyn College, an institution maintained by the City of New York. He had invoked the privilege against self-incrimination before a committee of the United States Senate in response to questions concerning his past membership in the Communist Party. Shortly thereafter, his position was declared vacant pursuant to Section 903 of the Charter. Seeking reinstatement, Professor Slochower challenged the validity of the charter provision on the ground that it violated due process. The Court *held* that the summary dismissal of the petitioner, under the circumstances, violated due process of law.

Mr. Justice Clark, speaking for the majority, stated:

At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment.¹¹⁴

The Court construed the statute as converting an exercise of the privilege by city employees into a conclusive presumption of guilt and pointed out that "the privilege . . . 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."¹¹⁵ It was felt that summary dismissal of a public employee under these circumstances was arbitrary action of a kind which the due process clause was meant to prevent.

In *Adler v. Board of Education*,¹¹⁶ the Court had upheld a New York statute which authorized the school authorities to dismiss employees who, after notice and hearing, were found to advocate the forceful overthrow of government or could not satisfactorily explain membership in organizations with that purpose. It was said there that "one's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty."¹¹⁷ In *Garner v. Board of Public Works*,¹¹⁸ the Court upheld the power of a city to discharge employees who refused to file an affidavit disclosing past and present knowing membership in the Communist Party. In *Wieman v. Updegraff*,¹¹⁹ however, they struck down an

Board of Higher Educ., 350 U.S. 551 (1956); *Goldway v. Board of Higher Educ.*, 178 Misc. 1023, 37 N.Y.S.2d 34 (Sup. Ct. 1942).

¹¹³ 350 U.S. 551 (1956).

¹¹⁴ *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 557 (1956).

¹¹⁵ *Ibid.*

¹¹⁶ 342 U.S. 485 (1952).

¹¹⁷ *Adler v. Board of Educ.*, 342 U.S. 485, 493 (1952).

¹¹⁸ 341 U.S. 716 (1951).

¹¹⁹ 344 U.S. 183 (1952).

Oklahoma statute which required as a condition of employment, the furnishing of a "loyalty oath" by public employees in which a denial of membership in certain organizations for the preceding five years had to be included. The Court there pointed out that the statute did not distinguish between innocent and knowing membership and thus resulted in an arbitrary classification. That case established the proposition that ". . . constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."¹²⁰

In the *Garner* case Mr. Justice Frankfurter, concurring, remarked:

It would give to the Due Process Clause an unwarranted power of intrusion into local affairs to hold that a city may not require its employees to disclose whether they have been members of the Communist Party. . . .¹²¹

In *Slochower* the Court, pointing to the fact that the discharge had been based solely on events occurring before a federal congressional committee, distinguished the *Garner* case on the ground that there the city itself was seeking the information the employees refused to furnish. Mr. Justice Reed, who dissented, however, while conceding this fact, pointed out that Section 903 ". . . is directed at the propriety of employing a man who refuses to give needed information to appropriate public bodies."¹²²

Nevertheless, the result of the decided cases seems to be that while state or local governments may require their employees to furnish information regarding the employee's knowing membership in subversive organizations as a condition of employment, it may not summarily discharge an employee who refuses to furnish the same information to a body charged with the primary duty to elicit it.

Conclusion

The Supreme Court's conclusion that Professor Slochower's dismissal had violated due process of law appears to be based on the view that inherent in Section 903 is an implied presumption of guilt arising from the witness' refusal to testify. But the New York Court of Appeals had not placed this construction on the statute. In fact, it had expressly stated that it did not presume that Slochower, by his action, had ". . . shown cause to be discharged under the Feinberg Law . . . since no inference of membership in the Communist Party may be drawn from the assertion of one's privilege against self

¹²⁰ *Wiemann v. Updegraff*, 344 U.S. 183, 192 (1952).

¹²¹ *Garner v. Board of Public Works*, 341 U.S. 716, 725 (1950) (concurring opinion).

¹²² *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 562 (1956) (dissenting opinion).

incrimination.”¹²³ Therefore, as pointed out by Mr. Justice Harlan in dissent, “since § 903 is inoperative if even incriminating answers are given, it is apparent that it is the exercise of the privilege itself which is the basis for the discharge, quite apart from any inference of guilt.”¹²⁴ Thus, though it may well be that to punish by dismissal the exercise of the privilege by a public employee in response to questions relating to his official conduct violates due process, the Supreme Court never reached this question.

Furthermore, it is not clear from the opinion what the status of Section 903, from a constitutional point of view, is today. Either the Court meant to hold the charter provision invalid in all cases, or merely where the privilege is exercised before *federal* investigative bodies. Clarification of this question and the more fundamental one of whether a state may constitutionally use the invocation of the privilege as a basis for dismissal must await future consideration by the Court. In the meantime, the *Slochower* case has created confusion in this area of the law. As pointed out previously, the Court has upheld restrictions on the exercise by government employees of rights guaranteed by the first, fifth, and fourteenth amendments.¹²⁵ While it is not denied that the exercise of the fifth amendment privilege is a right which cannot be denied any citizen, is the privilege against self-incrimination more sacred than other analogous constitutional guarantees?¹²⁶



RECENT DEVELOPMENTS IN THE LAW OF MOTION PICTURE CENSORSHIP

The Mutual Cases

Censorship of motion pictures originated as the state's answer to an urgent need. During its infancy, the movie industry harbored many shoestring operations concerned with quick profits by means of

¹²³ *Daniman v. Board of Educ.*, 306 N.Y. 532, 538, 119 N.E.2d 373, 377 (1954), *appeal denied*, 348 U.S. 933 (1955).

¹²⁴ *Slochower v. Board of Higher Educ.*, *supra* note 122, at 565 (dissenting opinion). See also *Daniman v. Board of Educ.*, *supra* note 123; *cf.* *Steinmetz v. State Bd. of Educ.*, 271 P.2d 614 (1954), *aff'd*, 44 Cal. 2d 816, 285 P.2d 617 (1955), *cert. denied*, 351 U.S. 915 (1956).

¹²⁵ See text at notes 29-37.

¹²⁶ “As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion.” *Frankfurter, J., Ullmann v. United States*, 350 U.S. 422, 428 (1956). “. . . [I]t seems to us that the question [of restricting the constitutional rights of governmental employees] is practically settled in the Federal field by [the] *United Public Workers* . . . [case]. We do not see that the right not to incriminate oneself stands on any higher ground in a democracy than the right to take an active part in elections.” *Faxon v. School Comm.*, 331 Mass. 531, 120 N.E.2d 772, 775 (1954).