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Constitutional Law - Discharge of a Public School Teacher Because of a Refusal to Testify

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and dignified manner, and that proper decorum is maintained in the court room while a trial is under way.[7]

The hearing judge concluded that with the aid of modern devices in the fields of photography, radio and television, court room proceedings can be publicized in such manner without the slightest amount of disturbance. He recognized that: photographs may be obtained without flashbulbs or excessive equipment; television cameras can be placed outside the court room with only the lens appearing through the wall or through a closed booth in the rear of the court room; ordinary lighting of the court room is sufficient; microphones could be placed inconspicuously so as not to distract a witness who is testifying.

Protection against non-use or misuse of modern equipment is found in the discretionary power to prohibit which is left in the hands of the judge.

The provisos required by the hearing judge appear to give adequate protection to witnesses and jurors who might in some manner be so disturbed by court room photographing, broadcasting or televising that justice would be affected.

The Colorado attitude will certainly give wider publicity to the defendant and his predicament. Possibly the defendant can complain, but Canon 35 does not seem primarily designed to protect the privacy of a defendant.

The qualifications of Canon 35 which Colorado is willing to sanction do not seem likely to detract from the dignity of court proceedings, distract witnesses and jurors or create misconceptions in the mind of the public.

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Constitutional Law — Discharge of Public School Teacher Because of a Refusal to Testify — On September 24, 1952, the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate held open hearings in New York City. The investigation, conducted on a national scale, related to subversive influences in American education. The appellant, Harry Slochower, a member of the faculty of Brooklyn College, stated before the Committee that he was willing to answer all questions relating to his associations and political beliefs since 1941. He did, however, refuse to testify concerning his association memberships in 1940 and 1941 on the ground that his answers might tend to incriminate him. As a result he was suspended from his teaching position and three days later his position was declared vacant "pursuant to the provisions of Section 903 of the NEW YORK CITY CHARTER." This section provides, in

[7] *In re* Greene, 160 F.2d 517 (3d Cir. 1947).

part, for summary dismissal for any City employee who refuses to testify before a legislative committee on the grounds of self incrimination.[1] The Court of Appeals of New York affirmed the lower court's decision that the appellant's behavior fell within the scope of Sec. 903 and upheld its application to Slochower. *Held:* Reversed: The New York City Charter provisions terminating employment of any city employee who utilizes the privilege against self-incrimination to avoid answering questions relating to his official conduct violates the Fourteenth Amendment's due process clause. Mr. Justice Reed, with whom Mr. Justice Burton and Mr. Justice Minton join, dissenting, while agreeing that the duty to respond may be refused for personal protection against prosecution, states that such avoidance of public duty to furnish information can properly be considered to stamp the employee unfit to hold certain official positions. Mr. Justice Harlan, in a separate dissent, maintains that the Statute bears reasonable relation to New York's interest in insuring the qualifications of teachers. *Slochower v. Board of Higher Education of City of New York* 350 US 551, 100 L. Ed. 692, 76 S. Ct. 637 (1956).

The majority opinion, written by Mr. Justice Clark, affirms the well established rule that a person engaged in government employment must comply with reasonable standards laid down by the proper authorities. Two recent decisions: *Adler v. Board of Education* and *Garner v. Los Angeles Board,*[2] involving the loyalty of school teachers are cited with approval by the Court. *Adler v. Board of Education* held valid the New York Feinberg Law which authorized school authorities to dismiss employees after notice and hearing who were found to have violated the Civil Service Law which condemns those who "willfully and deliberately advocate, advise or teach the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means"[3] or who were not able to satisfactorily explain

[1] The full text of Sec. 903 provides:
"If any councilman or other officer or employee of the city shall, after lawful notice or process, willfully 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 to answer any questions 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 this 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 maybe 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."

[2] Garner v. Board of Public Works, 341 U.S. 716, 95 L.Ed. 1317, 71 S.Ct. 909 (1950); Adler v. Board of Education, 342 U.S. 485, 96 L.Ed. 517, 72 S.Ct. 380, 27 A.L.R. 472 (1951).

[3] N.Y. Laws 1949, Ch. 360, §12a.

membership in certain organizations found to have that aim. The case of *Garner v. Los Angeles Board* concerned a city ordinance which required all employees to execute an affidavit "stating whether or not he is or ever was a member of a Communist Party of the United States of America or of the Communist Political Association, and if he is or was such a member, stating the dates when he became, and during which he was, such a member. . . ."[4] The Court held the statute valid on the grounds that the city could "reasonably inquire of its employees as to matters that may prove relevant to their fitness and suitability for the public service."[5]

The Court distinguishes the case under review by finding that the requirements of Sec. 903, the ordinance in question, are not reasonable. The majority points out that there must be a compliance with due process which has as its basis "the protection of the individual from arbitrary action."[6] The Court sees "arbitrary action" in an automatic dismissal of one who shall refuse to testify or to answer any question before a legislative committee concerning his official conduct and notes that Sec. 903 falls squarely within the prohibition of *Wieman v. Updegraff*.[7] In that case a so-called "loyalty oath" was held invalid because it weighed employability on the fact of membership in certain organizations and did not recognize that membership might be innocent. The Court expressed the following opinion:

> "A state servant may have joined a prescribed organization unaware of its activities and purposes. In recent years many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged."[8]

In the instant case the Court finds a parallel situation. The use of Sec. 903 is interpreted to mean a "conclusive presumption of guilt." The court announces that "since no inference of guilt was possible from the claim (of the privilege) before the federal committee, the discharge falls of its own weight as wholly without support."[9] The latter statement finds support in the very recent case of *Ullman v. United States*,[10] where the Court without reservation announced that the claim of privilege was for the innocent as well as the guilty:

> "Too many, even those who should be better advised, view this privilege as a shelter for wrong doers. They too readily

[4] *Supra*, n. 1, 341 U.S. at p. 719.
[5] *Ibid.* at p. 720.
[6] 350 U.S. at p. 559. The Court here is quoting Mr. Justice Cardago in Ohio Bell Tel. Co. v. Public Utilities Comm. 301 U.S. 292, 302, 81 L.Ed. 1093, 1100, 57 S.Ct. 724.
[7] 344 U.S. 183, 97 L.Ed. 216.
[8] *Ibid.*, 344 U.S. at p. 190.
[9] *Supra*, n. 6 at p. 559.
[10] 350 U.S. 422, 100 L.Ed. 511, 76 S.Ct. 497.

> assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the CONSTITUTION by the ratifying States."[11]

If Slochower was dismissed on the basis of a conclusive presumption of guilt of his asserting of the privilege then there seems little question as to the invalidity of Sec. 903 when considered in light of the above mentioned recent decisions.

The four dissenting justices take a different view of the effect of the statute. The dissenters look upon the statute as a reasonable requirement to cooperate with any investigation concerning his official conduct. Mr. Justice Reed's dissenting opinion asserts that "the duty to respond may be refused for personal protection only, but such avoidance of public duty to furnish information can properly be considered to stamp the employee as a person unfit to hold certain official positions."[12] Mr. Justice Harlan in his separate dissent specifically agrees with the majority's position that no inference of membership in the Communist Party may be drawn from the assertion of one's privilege against self incrimination but finds that the statute bears a reasonable relation to New York's interest in ensuring the qualifications of its teachers. This writer finds the position expressed by Mr. Justice Harlan most persuasive:

> "This court has already held, however, that a state may properly make knowing membership in an organization dedicated to the overthrow of the government by force a ground for disqualification from public school teaching. *Adler v. Board of Education,* 342 U.S. 485, 96 L. Ed. 517, 72 S. Ct. 380, 2 N.A.L.R. 2d 472. A requirement that public school teachers shall furnish information as to their past or present membership in the Communist party is a relevant step in the implementation of such a state policy, and a teacher may be discharged for refusing to comply with that requirement. *Garner v. Board of Public Works,* 341 U.S. 716, 95 L. Ed. 1317. Moreover, I think that a State may justifiably consider that teachers who refuse to answer questions concerning their official conduct are no longer qualified for public school teaching, on the ground that their refusal to answer jeopardizes the confidence that the public should have in its school system. On either view of the statute, I think Dr. Slochower's discharge did not violate due process."[13]

The position of the court in *Adler v. Board of Education* and *Garner v. Los Angeles*[14] seems to support the dissenting opinions. It is difficult to understand what basis could be used to distinguish

[11] *Ibid.,* 350 U.S. at pp. 426-27.
[12] *Supra,* n. 6 at pp. 562-3.
[13] *Ibid.,* n. 6 350 U.S. at p. 566.
[14] *Supra,* n. 2.

the reasonableness of a requirement which denies employment because of membership in groups known to be listed by the Attorney General as subversive or a requirement which denies employment because of a refusal to give information to school authorities concerning affiliations with Communist groups from the requirement in the instant case of cooperation with a properly authorized governmental body investigating official conduct.

There has been an analogous line of cases which has arisen in several different states which have dealt with police and law enforcement officials. Some of these cases such as *Drury v. Hurley*[15] and *Sounder v. City of Philadelphia*[16] involved police officers who were charged with "conduct unbecoming an officer" because of refusals to testify before grand juries. In both cases the officers' discharges were approved. The courts found "that the refusal to testify was not only a breach of the officers' duty and responsibility but also a breach of the confidence and trust the public had a right to impose in such officials."[17] Other police discharge cases have arisen under express statutory and constitutional provisions requiring police officers to testify when called before grand juries. Representative of these are *Cantaline v. McClellon*[18] and *Cristal v. Police Commission of the City and County of San Francisco.*[19] The California Court stated:

> "As we view the situation, when pertinent questions were propounded to the appellants before the grand jury, the answers to which questions would tend to incriminate them, they were put to a choice which they voluntarily made. Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of the privilege was wholly inconsistent with their duty as police officers. They clearly had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in face of their clear violation of the duty placed upon them."[20]

These cases seem, in this writer's view, to be properly decided. Under the reasoning of the majority in the case under review these decisions would seem to be incorrect unless the court would be willing to say that corruption in police circles is more dangerous to legally constituted government than Communism in teaching circles or that police have

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[15] Drury v. Hurley, 339 Ill. App. 33, 88 N.E.2d 728 (1949).
[16] Sounder v. City of Philadelphia, 305 Pa. 1, 156 Atl. 245 (1931).
[17] Comment: *Right of an Employer to Discharge an Employee for Refusal to Testify Before a Congressional Committee on the Ground of Self-incrimination,* 38 MARQ. L. REV. 8 at p. 21 (1954).
[18] Cantaline v. McClellen, 282 N.Y. 166, 25 N.E.2d 972, *Affirming* 258 App. Div. 314, 16 N.Y.2d 792 (1940).
[19] Cristal v. Police Commissioner of the City and County of San Francisco, 33 Col.App. 564, 92 P.2d 416 (1939).
[20] *Ibid.,* 92 P.2d at p. 419.

any greater duty to cooperate with and support proper inquiries than teachers do. These views seem patently false.[21]

The Communist danger is very real. Teachers are in an area where the influence of communistic ideologies could be most dangerous to our society. A public school teacher who refuses to cooperate with investigations into communistic activities in education, it would seem, breaches the confidence and trust which the public has a right to impose upon such teachers. The use of the privilege does not brand a teacher a communist per se but it certainly does brand him as a person who grossly disregards his country's best interests by refusing to cooperate with investigations into the Communist Party's attempts to infiltrate the teaching profession. It would seem that a community could reasonably make such cooperation a requirement for employment. This philosophy seems to be in accord with the courts position in *Adler v. Board of Education:*

> "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society can not be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty."[22]

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[21] The argument that these cases are not relevant because the forum was not a state body directly interested in employment qualifications does not seem to be in point to this writer who is in substantial agreement with the opinion of Mr. Justice Harlan expressed in the case under review, 350 U.S. at p. 567.
"Dr. Slochower cannot discriminate between forums in deciding whether or not to answer a proper and relevant question, if the State requires him to answer before every lawfully constituted body. Here the information sought to be elicited from Dr. Slochower could have been considered by State Authorities in reviewing Dr. Slochower's qualifications, and the effect of his claim of privilege on the public confidence in its school system was at least as great as it would have been had his refusal to answer been before a state legislative committee.

[22] *Supra,* n. 2, 342 U.S. at p. 494.