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Constitutional Law - Due Process - Summary Dismissal of a State Employee Who Invokes Fifth Amendment Before a Congressional Committee

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CONSTITUTIONAL LAW—DUE PROCESS—SUMMARY DISMISSAL OF A STATE EMPLOYEE WHO INVOKES FIFTH AMENDMENT BEFORE A CONGRESSIONAL COMMITTEE—While employed as a social worker by the County of Los Angeles, Globe was subpoenaed to appear before a subcommittee of the House Un-American Activities Committee. California law imposed a duty on public employees to appear before certain tribunals and answer questions within specified categories, including an inquiry by a committee of the United States Congress as to past or present membership in the Communist Party.[1] Failure to comply with the statute constituted insubordination, which would result in dismissal "in the manner provided by law." Because Globe had not yet acquired tenure, he was not entitled under civil service rules to a hearing as a condition to dismissal. When Globe refused to answer questions by invoking the First and Fifth Amendments, he was dismissed in accordance with the statutory provisions. In an action for reinstatement, a superior court order in favor of the employee was reversed by the District Court of Appeal of California.[2] On certiorari to the United States Supreme Court, *held,* affirmed, three justices dissenting.[3] At least where a public employee is not seeking a hearing before his employer, the due process clause of the Fourteenth Amendment permits summary dismissal of that employee when he invokes the Fifth Amendment before a congressional committee in response to questions dealing with membership in the Communist Party. *Nelson and Globe v. County of Los Angeles,* 80 S. Ct. 527 (1960).[4]

Despite the misleading but widespread notion that public employment is a privilege but not a right,[5] it is now quite clear that government employers cannot impose unreasonable or arbitrary conditions on public

1 Cal. Govt. Code Ann. (Deering, 1949) §1028.1.

2 163 Cal. App. (2d) 595, 329 P. (2d) 971 (1958).

3 Justice Brennan dissented, joined by Justice Douglas. Justice Black dissented in a separate opinion joined by Justice Douglas. Chief Justice Warren did not participate.

4 In the case of Nelson, the dismissal of a permanent employee who refused to take advantage of a hearing to discuss invocation of the Fifth Amendment before a congressional committee was affirmed by an equally divided court. In accordance with Court custom, no opinions were rendered.

5 One of the most frequently-cited sources of this approach is the famous statement of Judge Holmes that an individual "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. New Bedford, 155 Mass. 216 at 220, 29 N.E. 517 (1892).

employment.[6] Within this context, most litigation in recent years has been prompted by the limitations imposed by governments as a reaction to the threat of internal subversion. The courts have struggled to balance the legitimate public interest in self-preservation of our society with the traditional rights of the individual as secured by the Constitution. In *Slochower v. Board of Higher Education of New York City*,[7] the Supreme Court invalidated the summary dismissal of a municipal college professor who invoked the Fifth Amendment before a Senate Internal Security subcommittee. The principal case highlights the widely-noted[8] failure of the Court in *Slochower* to identify with reasonable precision the specific feature of the dismissal proceedings which violated due process. In the principal case, Justice Clark, who delivered the opinion of the Court in both cases, purports to distinguish *Slochower* on the ground that the California statute provided for dismissal upon the "failure of the employee to answer" while the provision of the New York City Charter involved in *Slochower* was directed toward the "invocation of [a] constitutional privilege."[9] However, since the same act was committed in both cases, it would seem quite irrelevant that the California statute avoids direct reference to the Fifth Amendment but conceals the forbidden action under the label "insubordination."[10] Furthermore, the majority in the principal case read *Slochower* as involving a dismissal predicated on a "built-in" inference of guilt from invocation of the Fifth Amendment.[11] Although the Court in *Slochower* appeared to be reacting to the statements in the brief filed by New York City Corporation Counsel,[12] the entire record raised serious doubts whether impermissible inferences should have been decisive in determining the constitutionality of the dismissal proceedings.[13] Thus the Court in the principal case has concluded in effect that the due process defects of *Slochower* have been cured by comparative discretion in the preparation of the government brief and

[6] Wieman v. Updegraff, 344 U.S. 183 (1952); Slochower v. Board of Higher Education of New York City, 350 U.S. 551 (1956).

[7] 350 U.S. 551 (1956).

[8] Note, 70 HARV. L. REV. 83 at 120 (1956); note, 30 So. CAL. L. REV. 346 (1957); McCloskey, "The Supreme Court Finds a Role: Civil Liberties in the 1955 Term," 42 VA. L. REV. 735 at 749 (1956).

[9] Principal case at 531. But see 533, n. 1 (dissenting opinion).

[10] See note 1 supra.

[11] Principal case at 531.

[12] The Board of Higher Education argued that one who invokes the Fifth Amendment is either guilty of a crime or has committed perjury by stating that the answer would tend to be incriminating. Brief for Appellee, pp. 15, 20, Slochower v. Board of Higher Education of New York City, note 7 supra.

[13] The language of the statute authorizing dismissal does not lend itself directly to such inferences of guilt. New York City Charter §903, N.Y.C. CHARTER AND AD. CODE (1957). Moreover, the New York Court of Appeals expressly rejected such inferences in favor of the interpretation that dismissal for refusal to cooperate with such public tribunals was a reasonable condition of public employment. Daniman v. Board of Education of City of New York, 306 N.Y. 532 at 538, 119 N. E. (2d) 373 at 377 (1954).

a careful omission of a direct reference to the Fifth Amendment in the dismissal statute. Surely to distinguish *Slochower* on these grounds is to sacrifice substance for form.[14] In addition, the majority in the principal case rely on a line of authority which involves an important variation from the *Slochower* facts. In *Garner v. Board of Public Works,* the Court upheld a municipal ordinance which required as a prerequisite to continued public employment an affidavit of non-membership in organizations advocating overthrow of the government by force and an oath that the employee did not so advocate.[15] Broadly interpreted, *Garner* authorizes an investigation by the government employer into possible subversive activities of an employee, which are considered as relevant to the fitness of that individual for public employment.[16] This issue again came before the Court during the 1957 term when public employees were held to be properly dismissed upon failure to respond to questions of loyalty raised in a hearing by the government employer.[17] It has been argued that failure of the employee to cooperate in providing information to which the government is clearly entitled under *Garner* is a reasonable basis for dismissal. In the principal case, Justice Clark argues that this line of authority is controlling because it is not determinative whether a federal or state tribunal performs the function.[18] But such an approach is contrary to *Slochower,* where, in distinguishing *Garner,* emphasis was placed on the fact that the Senate subcommittee was limited to a broad consideration of national security problems for purposes of remedial legislation and not the evaluation of the qualifications of a particular person for public employment.[19]

These surface distinctions between the principal case and *Slochower* tend to obscure a significant defect which is common to the dismissal proceedings employed in both cases. Certainly, the fundamental notion of procedural due process is that a person who is to be deprived of life, liberty, or property is entitled to timely notice and a fair hearing. In each case, summary dismissal resulted without any attempt to relate invocation of the Fifth Amendment to the actual fitness of the individual

14 However, in two previous decisions upholding dismissals of state employees, the Court had stressed that the state courts had found the ground for dismissal to be the refusal, in itself, to answer questions concerning communist affiliations, and not disloyalty inferred from invocation of the Fifth Amendment. Beilan v. Board of Education, 357 U.S. 399 at 406 (1958); Lerner v. Casey, 357 U.S. 468 at 475-476 (1958). See note, 57 MICH. L. REV. 412 (1959).

15 341 U.S. 716 (1951).

16 Principal case at 4160.

17 Lerner v. Casey, note 14 supra; Beilan v. Board of Education, note 14 supra.

18 Principal case at 531. Underlying the majority assumption is a possible double standard for review of the activities of a congressional committee. For purposes of the principal case, the House Un-American Activities Committee assumes the role of interrogating a public employee as to his fitness for government employment while in Barenblatt v. United States, 360 U.S. 109 (1959), the same five justices rather generously attributed a proper legislative purpose to the same House committee.

19 See note 7 supra, at 553, 558. The distinction, adopted in Slochower, was reaffirmed in Lerner v. Casey, note 14 supra, at 477.

for public employment. Indeed, the majority opinion in *Slochower* carefully noted various explanations for uses of the Fifth Amendment which would not necessarily disqualify a person from public employment.[20] Since exercise of the right is an ambiguous act,[21] the employee is entitled to explain or justify its use. Unfortunately, the petitioner appears to have stipulated that the issue of a hearing was not involved in the case.[22] In other words, the petitioner by relinquishing the only substantial protection afforded by *Slochower* appears to have placed himself in a position analogous to the category of employees who have refused to cooperate in loyalty investigations conducted by their employer. In that sense, the majority's reference to the recent cases which upheld dismissals of such uncooperative employees seems appropriate.[23] However, even though the result in the principal case might be consistent with *Slochower*, the tangle of reasoning based upon technical distinctions jeopardizes the *Slochower* holding, and one may ask whether the Court will rely on similar distinctions to avoid the requirement of a hearing if and when the procedural due process issue is raised under a California-type statute.

John L. Peschel

[20] See note 7 supra, at 558.

[21] The proper use of the Fifth Amendment by an innocent person who fears prosecution but may not be able to marshal the evidence to prove his innocence should not be overlooked, particularly when the right has always been available in federal proceedings to the worst criminal. For a further development of this notion, see GRISWOLD, THE FIFTH AMENDMENT TODAY 14-22 (1955).

[22] Principal case at 531, n. 5, 535. Compare Brief for Appellant, pp. 21, 22, Slochower v. Board of Higher Education of New York City, note 7 supra.

[23] See note 17 supra and accompanying text.