Michigan Law Review

Volume 56 | Issue 2

1957

Constitutional Law - Due Process - Limits on Investigative Power of State Legislative Committees

George E. Lohr
University of Michigan Law School

CONSTITUTIONAL LAW—DUE PROCESS—LIMITS ON INVESTIGATIVE POWER OF STATE LEGISLATIVE COMMITTEES—Defendant appeared before the New Hampshire attorney general, who was authorized by statute[1] to investigate violations of the state subversive activities law[2] and to determine if subversive persons, as defined therein, were present within the state. Defendant refused to answer certain questions about the contents of a university class lecture delivered by him and about his knowledge of other persons' activities in the Progressive Party, contending that such questions infringed an area protected by the First Amendment.[3] The state superior court conceded the infringement of defendant's rights, but found this to be justified by state interest in self-protection, and convicted defendant for contempt.[4] The New Hampshire Supreme Court affirmed.[5] On certiorari to the United

[1] N.H. Laws (1953) c. 307. Nelson v. Wyman, 99 N.H. 33, 105 A. (2d) 756 (1954), construed the statute to constitute him a one-man legislative committee for purpose of the authorized investigation.

[2] N.H. Rev. Stat. Ann. (1955) c. 588, §§1 to 16.

[3] The Court, without discussion, treated this as invoking the protection of the due process clause of the Fourteenth Amendment.

[4] Pursuant to N.H. Rev. Stat. Ann. (1955) c. 491, §§19 and 20

[5] Wyman v. Sweezy, 100 N.H. 103, 121 A. (2d) 783 (1956).

States Supreme Court, *held,* reversed, two justices dissenting. The investigation invaded defendant's rights of academic freedom and political expression protected by the due process clause of the Fourteenth Amendment. Because of the breadth of the resolution authorizing the investigation, no state interest was validly expressed, thus obviating any balancing of state and individual interests. *Sweezy v. New Hampshire,* 354 U.S. 234 (1957).

Freedom of speech is a fundamental right protected against state abridgment by the Fourteenth Amendment[6] and against federal abridgment by the First Amendment.[7] Witnesses before congressional committees have attempted to invoke the First Amendment as a limitation on the power of such committees to compel testimony,[8] contending that the freedoms guaranteed therein include a right of silence. Lower federal courts have recognized existence of a right of silence, primarily as an aspect of free speech, where congressional committee inquiries were directed toward the identity of bulk purchasers of books,[9] and the communist affiliations of an individual.[10] The Supreme Court, however, did not squarely rule on the question until the recent decision in *Watkins v. United States.*[11] The majority there recognized a First Amendment right of silence before a congressional committee. In neither *Watkins* nor the principal case, however, did the Court consider whether there is a negative freedom of remaining silent which is constitutionally protected. The right of silence recognized was put positively: an individual should be permitted to remain silent rather than be exposed or harassed because he had previously exercised the First Amendment freedoms of political and academic expression. The Court in *Watkins* indicated that this right was not absolute, but that it must be balanced against public need for the testimony, in order to determine if disclosure can be constitutionally compelled.[12] It did not attempt to define the areas of information to which this right applies or to state criteria for

[6] Gitlow v. People of New York, 268 U.S. 652 (1925); Stromberg v. California, 283 U.S. 359 (1931).

[7] U.S. CONST., Amend. I.

[8] E.g., United States v. Rumely, 345 U.S. 41 (1953); Quinn v. United States, 349 U.S. 155 (1955). For a general discussion see 22 GEO. WASH. L. REV. 741 (1954).

[9] Rumely v. United States, (D.C. Cir. 1952) 197 F. (2d) 166, affd. on other grounds 345 U.S. 41 (1953).

[10] Lawson v. United States, Trumbo v. United States, (D.C. Cir. 1949) 176 F. (2d) 49, cert. den. 339 U.S. 934 (1950), reh. den. 339 U.S. 972 (1950), where the right was held to be outweighed by the national interest. See also National Maritime Union of America v. Herzog, (D.C. D.C. 1948) 78 F. Supp. 146, affd. on other grounds 334 U.S. 854 (1948); but see United States v. Josephson, (2d Cir. 1947) 165 F. (2d) 82, cert. den. 333 U.S. 838 (1948), reh. den. 333 U.S. 858 (1948), motion for leave to file second petition for rehearing denied 335 U.S. 899 (1948).

[11] 354 U.S. 178 (1957), commented on, p. 272 supra. The existence of a First Amendment limitation on congressional investigating power was recognized in dicta in United States v. Rumely, note 8 supra. In a related area a right to freedom from state compulsion to render a flag salute was expressly recognized in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

[12] This is consistent with earlier holdings on the limitations of the freedom; e.g., Dennis v. United States, 341 U.S. 494 (1951).

determining what public need will justify compelling testimony. The Court indicated that, where compulsion of testimony infringes First Amendment liberties, it will not recognize the existence of any legislative need as a possible justification unless the authorizing resolution is so carefully drawn that pertinent questions asked by the committee can clearly be seen as important to the legislative purpose expressed therein.

On the basis of the *Watkins* case, the fundamental rights protected by the Fourteenth Amendment against state abridgment might be expected to include a right of silence, and the instant case crystallizes this proposition. The principal opinion found it unnecessary to balance state interest against infringement of defendant's rights because it treated the broad grant of authority to the attorney general as an absence of legislative authorization to ask the questions to which defendant objected.[13] It appears probable that, applying the reasoning of the *Watkins* case, the Court felt the state's authorizing resolution to be so broad that the importance of these questions to the legislative purpose in authorizing the investigation was unclear. It seems likely that this, rather than lack of legislative authorization of the attorney general to conduct the investigation, was the test applied to determine if the state legislature had expressed its opinion that there was a state interest in obtaining answers to these questions.[14] The result is that the authority of a state investigating committee must now be carefully defined by the legislature so that questions asked by the committee can be clearly related to the legislative purpose. This seems necessary before the Court will recognize the existence of a state interest which may be balanced against possible infringement of First Amendment freedoms to determine if such infringement is justified.[15] The state interests, if any, which will justify invasion of these freedoms, thereby destroying the right of silence before legislative committees, were undefined.[16] Also

[13] The concurring justices felt there was state authorization for the questions, but they held that, upon the facts, the defendant's right to political privacy and his right to academic freedom outweighed the state's interest in self-protection.

[14] The state supreme court had found the attorney general to be acting within the scope of his authority as a legislative committee. Wyman v. Sweezy, note 5 supra. Thus the analysis suggested is consistent with Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), 114 A.L.R. 1487 at 1500 (1938), where it was held that a state court determination of a question of state law is generally conclusive in the federal courts. The Court in the instant case also stated that the Fourteenth Amendment does not require separation of powers at the state level. *Accord,* Dreyer v. Illinois, 187 U.S. 71 (1902); but cf. Tenney v. Brandhove, 341 U.S. 367 (1951).

[15] The Court has often before expressed a particular solicitude for First Amendment liberties in their own right and as fundamental rights under the Fourteenth Amendment. E.g., Thomas v. Collins, 323 U.S. 516 (1945); Thornhill v. Alabama, 310 U.S. 88 (1940).

[16] It was suggested in Barsky v. United States, (D.C. Cir. 1948) 167 F. (2d) 241, cert. den. 334 U.S. 843 (1948), reh. den. 339 U.S. 971 (1950), that the danger to the national interest sufficient to warrant compulsion of testimony in a congressional inquiry need be less than that required to justify legislation limiting freedom of speech. This may provide some guidance to the states, though it has analogical value only, since sedition

undefined were the areas of expression protected by the individual's right of silence. Nor did the Court attempt to suggest what factors will ultimately control in balancing the interest of the state against the constitutional rights of the witness. The instant case and the *Watkins* case, however, indicate that in considering the constitutionality of a particular inquiry the Court may consider not only the effect upon the individual witness but the broader and more subtle influence which compulsion of testimony may have in suppressing expression by others. The present case only advises witnesses in a general way of the analysis which the Court will employ to determine the limits of their constitutional rights to remain silent before state legislative committees. Thus, the right of the state to compel testimony and the right of the witness to refuse to give testimony remain highly uncertain until given further judicial definition.

George E. Lohr

against the national government is an area which Pennsylvania v. Nelson, 350 U.S. 497 (1956), held to be pre-empted by Congress.