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# CONSTITUTIONALITY OF ADMINISTRATIVE OR STATUTORY SANCTIONS UPON THE EXERCISE OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

## I. INTRODUCTION

In light of the recent Supreme Court decisions in *Garrity v. New Jersey*<sup>1</sup> and *Spevack v. Klein*,<sup>2</sup> serious questions have been raised as to the validity of state constitutional, statutory or administrative provisions which require a public official, when called before an investigatory body, to testify or be discharged from employment.<sup>3</sup> Some states require a public official to sign a waiver of immunity and testify when called before a grand jury.<sup>4</sup> Statutes<sup>5</sup> requiring an individual, partnership or corporation doing business with the state to waive immunity and testify before a grand jury investigating the circumstances of government contracts or to be barred from bidding on such contracts also may be affected by these decisions.

The fifth amendment<sup>6</sup> guarantees the right of an individual against self-incrimination. The Supreme Court has said that the privilege "would be reduced to a hollow mockery"<sup>7</sup> if a presumption of guilt were to be drawn from its exercise and that there should be no penalty for the exercise of the privilege.<sup>8</sup> From the first reported case that discussed this question in 1892,<sup>9</sup> however, it has been considered settled that a state could require its employees to waive their constitutional privilege against self-incrimination as a condition of employment. This comment will explore some of the problems raised by *Garrity*<sup>10</sup> and *Spevack*<sup>11</sup> and their effect on public employees, contractors and the fifth amendment.

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1. 385 U.S. 493 (1967).

2. 385 U.S. 511 (1967).

3. See Annot., 44 A.L.R.2d 789 (1955).

4. See, e.g., La. Const. art. 14, § 15(P)(1); N.J. Stat. Ann. § 2A:81-17.1 (Supp. 1966); N.Y. Const. art. I, § 6.

5. E.g., La. Rev. Stat. Ann. § 38.2182 (1951). N. Y. Gen. Munic. Law § 103-b; N.Y. Pub. Auth. Law § 2602; N.Y. State Fin. Law § 139-b.

6. U.S. Const. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

7. *Slochower v. Board of Educ.*, 350 U.S. 551, 557 (1956). There can be no inference of guilt from the claiming of the privilege against self-incrimination. If there were such an inference, any protection afforded by the privilege would be "illusory." Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. Chi. L. Rev. 472, 473 (1957).

8. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). "[T]he privilege must protect an individual not only from punishment for refusing to answer an incriminating question but also from punishment for invoking the privilege." (footnote omitted). Ratner, *supra* note 7, at 495.

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

10. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

11. *Spevack v. Klein*, 385 U.S. 511 (1967).

## II. HISTORY

The privilege against self-incrimination first appeared during the Middle Ages in England.<sup>12</sup> From there it was introduced in the American colonies. Though never included in written English law, the privilege was incorporated in the fifth amendment to the United States Constitution.<sup>13</sup> Though the privilege was originally limited to criminal cases, it was later extended to civil cases by decisional law.<sup>14</sup>

Until 1964 the federal constitutional privilege applied only to federal courts and federal agencies,<sup>15</sup> but the privilege was interpreted as being "as broad as the mischief against which it seeks to guard."<sup>16</sup> In 1964 *Malloy v. Hogan*<sup>17</sup> extended the federal guarantees to the states and thus abolished the differences between state and federal application of the privilege. The Court said, "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."<sup>18</sup>

The federal policy which "reflects . . . our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt"<sup>19</sup> now "protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law."<sup>20</sup> It is important to note that the privilege against self-incrimination is a personal one. It applies only to individuals, not to corporations, partnerships, labor unions or other organizations.<sup>21</sup>

12. An "ex-officio" oath was required by those called to testify before the ecclesiastic courts. Those called were forced to testify; no privilege existed. Torture and other forms of coercion were used on recalcitrant witnesses. There gradually developed a distaste for these methods of forcing a man to accuse himself. Beginning with Lilburn's case, the privilege against self-incrimination gradually became recognized by the English courts. 8 J. Wigmore, Evidence § 2250 (McNaughton rev. 1961).

13. See generally 8 J. Wigmore, Evidence §§ 2250-51 (McNaughton rev. 1961); C. McCormick, Evidence § 120 (1954); Clapp, Privilege Against Self-Incrimination, 10 Rutgers L. Rev. 541 (1956); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1 (1949). A history of the privilege also appears in *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

14. 8 J. Wigmore, Evidence § 2252, at 325 (McNaughton rev. 1961). Where a party to a civil suit claims his privilege, he has, in effect, refused to answer the evidence put forth by the opposing party.

15. *Adamson v. California*, 332 U.S. 46 (1947); *Twining v. New Jersey*, 211 U.S. 78 (1908). Although all states except Iowa and New Jersey had similar constitutional provisions, they were permitted to interpret them as they saw fit. 8 J. Wigmore, supra note 12, § 2252, at 319.

16. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

17. 378 U.S. 1 (1964).

18. *Id.* at 8.

19. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

20. *Id.* at 78.

21. See *United States v. White*, 322 U.S. 694 (1944); 8 J. Wigmore, supra note 12, § 2259a, at 353.

There has been criticism of the need for the privilege from time to time.<sup>22</sup> Justice Cardozo said that "[j]ustice . . . would not perish if the accused were subject to a duty to respond to orderly inquiry."<sup>23</sup> It has been said that the need to protect people from torture and coercion is gone and that as administered today, the fifth amendment serves only to protect the guilty, not the innocent.<sup>24</sup> Arguments favoring retention of the privilege include protection of the privacy of the individual, the danger of blackmail and oppression, stimulation of more efficient prosecution, the reluctance of witnesses to testify at all or undue pressure on them to commit perjury.<sup>25</sup>

It is settled that an individual has a duty to testify.<sup>26</sup> The privilege against self-incrimination is an exception to this rule. To overcome the problem created by the state's right to know as opposed to the individual's personal privilege to remain silent, the states and the federal government have passed immunity statutes,<sup>27</sup> which "have as their purpose not a gift of amnesty but the securing of testimony which because of privilege could not otherwise be procured."<sup>28</sup>

Because the privilege against self-incrimination is a personal privilege it can be waived. For example, New York has a constitutional provision<sup>29</sup> which requires public employees to waive immunity when called before a grand jury investigating the conduct of their office. Failure to waive immunity results in dismissal from office. The New York City Charter contains a similar provision.<sup>30</sup>

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22. See Williams, *Problems of the Fifth Amendment*, 24 *Fordham L. Rev.* 19 (1955).

23. *Palko v. Connecticut*, 302 U.S. 319, 326 (1937).

24. 8 J. Wigmore, *supra* note 12, § 2251.

25. C. McCormick, *supra* note 12, § 136, at 288-90.

26. 8 J. Wigmore, *supra* note 12, § 2192.

27. *Ullmann v. United States*, 350 U.S. 422 (1956) upheld the validity of the Federal Immunity Act of 1954, 18 U.S.C. § 2486. The New York immunity act was upheld in *People v. Steuding*, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

28. C. McCormick, *supra* note 12, § 135, at 286 (footnote omitted). Under immunity acts, a witness who claims his privilege against self-incrimination may be granted immunity against subsequent criminal prosecution and ordered to testify. If he refuses to testify after a grant of immunity, he is in contempt of court. *People v. Laino*, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961).

29. N.Y. Const. art. I, § 6 states: "No person shall . . . be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office . . . or the performance of his official duties . . . refuses to sign a waiver of immunity against subsequent criminal prosecution . . . 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 be removed from his present office by the appropriate authority . . ."

30. N.Y. City Charter § 1123 states: "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 to answer any question regarding the property, government or affairs of the city . . . or official conduct of any officer or employee of the city . . . 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 . . . his term or tenure of office or employment shall terminate and such office or employment shall be vacant . . ."

New York also has enacted statutes which require persons doing business with the state,<sup>31</sup> a public authority,<sup>32</sup> or a municipality<sup>33</sup> to waive immunity when called before a grand jury investigating the circumstances of a contract or to lose the right to bid on public contracts for five years. Do these provisions impose a penalty or forfeiture upon an individual who claims the privilege? If this be a penalty or forfeiture, is it justified by the overriding needs of the public?

### III. PUBLIC EMPLOYEES

#### A. *Policemen*

The Supreme Court has never directly ruled on the constitutionality of firing a public employee who claimed his privilege against self-incrimination. The question was presented in *Stevens v. Marks*,<sup>34</sup> but the Court avoided the issue and based its decision on other grounds. Before *Malloy*<sup>35</sup> no federal question was raised, and state courts had unanimously upheld these firings whether they were based on a statute or on other grounds.<sup>36</sup> In *Drury v. Hurly*<sup>37</sup> an Illinois court said:

It is significant that there appears to be no reported case in any jurisdiction upholding the right of a policeman to refuse to sign an immunity waiver or to refuse to testify when called to do so in a criminal case. All the decisions heretofore cited are consonant with the principle that a police officer, by reason of his special status, duties and responsibility, may not invoke his constitutional privilege against self-incrimination in matters touching upon his occupation without being guilty of a breach of duty on his part by reason of such refusal.<sup>38</sup>

The situation has not changed since *Drury* was decided. In New York, some procedural changes have taken place and others have been proposed. The policeman has been given the right to consult counsel before appearing at a grand jury,<sup>39</sup> and an administrative hearing must be held before discharge.<sup>40</sup> The draft of the New York State constitution that was defeated at the polls in November, 1967 included provisions for a mandatory hearing when a public em-

31. N.Y. State Fin. Law § 139-b.

32. N.Y. Pub. Auth. Law § 2602.

33. N.Y. Gen. Munic. Law § 103-b.

34. 383 U.S. 234 (1966). In this case a policeman after signing a waiver of immunity attempted to withdraw it and was not permitted to do so. He refused to testify and was jailed for contempt. The Supreme Court held that it was an error to refuse to allow the withdrawal of the waiver.

35. *Malloy v. Hogan*, 378 U.S. 1 (1964).

36. See note 45 infra.

37. 339 Ill. App. 33, 88 N.E.2d 728 (1949), cert. denied, 339 U.S. 983 (1950).

38. *Id.* at 48, 88 N.E.2d at 735.

39. *Conlon v. Murphy*, 24 App. Div. 2d 737, 263 N.Y.S.2d 360 (1st Dep't 1965).

40. *Gardner v. Murphy*, 46 Misc. 2d 728, 260 N.Y.S.2d 739 (Sup. Ct. 1965). In a companion case, *Koutnik v. Murphy*, 25 App. Div. 2d 197, 268 N.Y.S.2d 265 (1st Dep't 1966), where the officer submitted his resignation immediately upon receiving his subpoena, the court held that summary dismissal was proper to avoid vesting of petitioner's pension rights.

ployee refused to sign a waiver of immunity and deleted provisions for mandatory dismissal.<sup>41</sup> There is still no reported case where a court has ordered permanent reinstatement of a policeman discharged for refusing to testify or sign a waiver of immunity.

The first and most influential case<sup>42</sup> to consider the dismissal of a policeman did not involve a refusal to testify, but concerned a policeman who violated regulations by participating in political activity. In this case, *McAuliffe v. Mayor of New Bedford*,<sup>43</sup> Mr. Justice Holmes, then writing for the Supreme Judicial Court of Massachusetts, stated, "He has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights . . . . The servant cannot complain, as he takes the employment on the terms which are offered him."<sup>44</sup>

Holmes' philosophy has influenced the reasoning in cases where policemen have been discharged either for refusing to sign a waiver of immunity or refusing to testify.<sup>45</sup> In some of these cases the reason given for dismissal has not been refusal to testify, but the actual cause of the dismissal was indeed such refusal. In one case, for example, where a police officer refused to explain the source of his wealth, he was dismissed for "conduct unbecoming an officer."<sup>46</sup> A refusal to disclose pertinent information, whether or not incriminating, has been held a "violation of duty"<sup>47</sup> and refusal to testify has resulted in dismissal for "cause."<sup>48</sup> No statute mandated dismissal in these cases. In *Callahan v. New Orleans Police Department*<sup>49</sup> the Louisiana Court of Appeals said that the right of the public

41. Proposed New York Const. art. VII, § 3 (Supp. 1967): "If a person [public employee] refuses to execute a waiver of immunity against subsequent criminal prosecution or to testify pursuant thereto when called to testify before a grand jury concerning the conduct of his present public office or employment . . . the appropriate authority . . . shall conduct a hearing into the fitness of such person to serve in public office or employment. If as the result of such hearing, it is determined that the person's refusal substantially impairs his fitness to serve in public office or employment then such person shall be disqualified from holding any public office or employment for five years . . . and shall be removed from his public office or employment, if any. The immunity from subsequent prosecution, if any, obtained by a person called to testify before a grand jury shall not preclude an inquiry into the fitness of such person to hold public office or employment."

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

43. *Id.*, 29 N.E. at 517.

44. *Id.* at 220, 29 N.E. at 517-18.

45. See, e.g., *Christal v. Police Comm'r*, 33 Cal. App. 2d 564, 92 P.2d 416 (1939); *Moretti v. Civil Serv. Bd.*, 2 Ill. App. 2d 89, 118 N.E.2d 615 (1954); *Drury v. Hurly*, 339 Ill. App. 33, 88 N.E.2d 728 (1949), cert. denied, 335 U.S. 938 (1950); *Callahan v. New Orleans Police Dep't*, 171 So. 2d 730 (La. Ct. App. 1965); *Fallon v. New Orleans Police Dep't*, 238 La. 531, 115 So. 2d 844 (1959); *Gardner v. Broderick*, 20 N.Y.2d 227, 229 N.E.2d 184, 282 N.Y.S.2d 487 (1967); *Canteline v. McClellan*, 282 N.Y. 166, 25 N.E.2d 972 (1940); *Souder v. Philadelphia*, 305 Pa. 1, 156 A. 245 (1931).

46. *Souder v. Philadelphia*, 305 Pa. 1, 156 A. 245 (1931).

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

48. *Moretti v. Civil Serv. Bd.*, 2 Ill. App. 2d 89, 118 N.E.2d 615 (1954).

49. 171 So. 2d 730 (La. Ct. App. 1965).

to police protection transcends the individual right of an officer to employment.<sup>50</sup>

As recently as June, 1967, Judge Fuld, writing for the New York Court of Appeals, in *Gardner v. Broderick*,<sup>51</sup> was still paraphrasing Holmes when he wrote that policemen "have no constitutional right to remain in office when they refuse to discuss with frankness and candor whether they have faithfully performed their duties."<sup>52</sup> In *Gardner*, the appellant, a New York City policeman, was discharged after a departmental hearing for failing to sign a waiver of immunity when called before a grand jury investigating alleged bribery of police officers by gamblers. The appellant was summarily discharged pursuant to New York City Charter section 1123 but was granted a hearing when this dismissal was reversed.<sup>53</sup> The requirement for a hearing was read into the charter by the court, which based its reasoning on the earlier Supreme Court decision in *Slochower v. Board of Education*.<sup>54</sup> It is important to note that Judge Fuld also indicated that this once-settled area of the law may have been reopened by recent Supreme Court decisions.<sup>55</sup>

The recent decisions to which Judge Fuld referred are *Garrity v. New Jersey*<sup>56</sup> and *Spevack v. Klein*.<sup>57</sup> In *Garrity*, a policeman was called to testify in an investigation of traffic ticket fixing. He was informed that New Jersey law<sup>58</sup> requires a public employee in a criminal proceeding to waive immunity against self-incrimination or forfeit his office. Garrity signed the waiver of immunity and testified. Subsequently, he was indicted and convicted on the basis of his own testimony. The Supreme Court in a 5-4 decision reversed the conviction on the ground that the testimony obtained under the threat of dismissal was inadmissible in the subsequent criminal proceeding because it was coerced. The Court reasoned that "[t]he choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay

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50. Id. at 737.

51. 20 N.Y.2d 227, 229 N.E.2d 184, 282 N.Y.S.2d 487 (1967).

52. Id. at 231, 229 N.E.2d at 186, 282 N.Y.S.2d at 490.

53. *Gardner v. Murphy*, 46 Misc. 2d 728, 260 N.Y.S.2d 739 (Sup. Ct. 1965).

54. 350 U.S. 551 (1956).

55. *Gardner v. Broderick*, 20 N.Y.2d 227, 230, 229 N.E.2d 184, 186, 282 N.Y.S.2d 487, 489 (1967), prob. juris. noted, 36 U.S.L.W. 3308 (U.S. Jan. 30, 1968).

56. 385 U.S. 493 (1967).

57. 385 U.S. 511 (1967). Both *Spevack* and *Garrity* were decided on the same day.

58. N.J. Rev. Stat. § 2A:81-17.1 (Supp. 1967). "Any person holding or who has held any elective or appointive public office . . . who refuses to testify upon matters relating to the office . . . in any criminal proceeding wherein he is a defendant . . . or a witness . . . upon the ground that his answer might tend to incriminate him or compel him to be a witness against himself or refuses to waive immunity when called before a grand jury to testify thereon or who willfully refuses or fails to appear before any court, commission . . . or who, having been sworn, refuses to testify . . . upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself, shall . . . be removed . . . or shall thereby forfeit his office . . . . Any person so forfeiting his office . . . shall not thereafter be eligible for election or appointment to any public office . . . in this State."

the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent.<sup>59</sup> The *Garrity* decision failed, however, to determine whether or not the United States Constitution prohibits the forfeiture of public employment for claiming the privilege against self-incrimination.<sup>60</sup>

The *Spevack*<sup>61</sup> decision, which overruled *Cohen v. Hurley*,<sup>62</sup> also failed to decide this question. Both *Spevack* and *Cohen* were disbarment proceedings in New York where the attorneys involved refused to testify (and in *Spevack* to produce required records) at judicial inquiries on the ground that their testimony might be self-incriminating. Both cases were decided by 5-4 majorities. The Court upheld the disbarment in *Cohen* but reversed its position in *Spevack*. Intervening was the decision in *Malloy v. Hogan*,<sup>63</sup> which extended the federal privilege to the states. Justice Douglas, writing for the Court in *Spevack* said, "the Fifth Amendment has been absorbed in the Fourteenth, . . . it extends its protection to lawyers as well as to other individuals, and . . . it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it."<sup>64</sup> It is to be noted that the opinion specifically states that the validity of the discharge of a policeman who invokes his privilege was not determined.<sup>65</sup> Justice Fortas, emphasizing this point in his concurring opinion, stated: "This Court has never held . . . that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer . . . . But a lawyer is not an employee of the State . . . ."<sup>66</sup> The distinction between the lawyer and the state employee made by Justice Fortas, however, has been criticized by one commentator as "a distinction of dubious validity."<sup>67</sup>

#### B. Teachers and Other Public Employees

In the 1950s a series of cases appeared dealing with teachers who claimed their privilege against self-incrimination before legislative hearings or departmental proceedings investigating subversion.<sup>68</sup> With only one exception, *Slo-*

59. *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967).

60. *People v. Straehle*, 53 Misc. 2d 512, 515, 279 N.Y.S.2d 115, 119 (Westchester County Ct. 1967), followed *Garrity* by dismissing an indictment against a police officer based on his own coerced testimony. The court said: "It is to be noted that unanswered in the *Garrity* case specifically is the status of a public officer where criminal charges are dismissed against him on these constitutional grounds . . . ."

61. 385 U.S. 511 (1967).

62. 366 U.S. 117 (1961).

63. 378 U.S. 1 (1964).

64. *Spevack v. Klein*, 385 U.S. 511, 514 (1967).

65. *Id.* at 516 n.3.

66. *Id.* at 519-20 (concurring opinion).

67. Underwood, *The Fifth Amendment and the Lawyer*, 62 Nw. U.L. Rev. 129, 131 (1967).

68. See, e.g., *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952); *Steinmetz v. Bd. of Educ.*, 44 Cal. 2d 816, 285 P.2d 617 (1955); *Faxon v. School Comm.* 331 Mass. 531, 120 N.E.2d 772 (1954); *Daniman v. Bd. of Educ.*, 306 N.Y. 532, 119 N.E.2d 373 (1954).



*chower v. Board of Education*,<sup>69</sup> dismissals of the teachers claiming the privilege were upheld. In *Slochower*, where a professor at Brooklyn College was summarily dismissed without a hearing after refusing to testify, the Supreme Court held that there was a violation of the due process clause of the fourteenth amendment.<sup>70</sup> The Court pointed out that Slochower was not necessarily entitled to his job, but that he was entitled to the opportunity to explain his refusal to testify. To equate the exercise of the privilege against self-incrimination with guilt would be a "hollow mockery."<sup>71</sup> The Court distinguished *Slochower* from *Adler v. Board of Education*,<sup>72</sup> decided four years earlier, in which it upheld New York's "Feinberg Law,"<sup>73</sup> which provided for dismissal of teachers who were members of certain subversive organizations by the fact that the teachers in *Adler* were given an opportunity to explain their refusal to testify at an administrative hearing. The provision for mandatory hearings in the New York Constitution<sup>74</sup> that was rejected by the voters in November, 1967 apparently was an attempt to conform to the *Slochower* decision. It may also have been an attempt to circumvent *Garrity* since there was no longer a mandatory dismissal for failure to sign a waiver of immunity or failure to testify. The theory might have been that the degree of coercion would not have been so great as to render the testimony elicited by the threat of a hearing inadmissible in a subsequent criminal proceeding. No attempt, however, has been made to amend the provision for summary dismissal required in the New York City Charter<sup>75</sup> upon which the *Slochower* decision was based.

Two years after *Slochower*, a teacher in Pennsylvania who refused to answer questions put to him by his superintendent at a hearing was discharged. He had been told that this was an examination of his fitness to teach. The dismissal was upheld by the Supreme Court in *Beilan v. Board of Education*<sup>76</sup> on the ground that an employee has an obligation of frankness, candor and cooperation in an inquiry as to his fitness as a teacher.<sup>77</sup>

It is important to note that all of these cases were decided before *Malloy*. The philosophy of the Supreme Court is not the same as it was ten years ago. In *Keyishian v. Board of Regents*,<sup>78</sup> decided one week after *Garrity* and *Spevack*,

69. 350 U.S. 551 (1956).

70. U.S. Const. amend. XIV § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law . . ."

71. *Slochower v. Bd. of Educ.*, 350 U.S. 551, 557 (1956).

72. 342 U.S. 485 (1952).

73. N.Y. Educ. Law § 3022 states that "membership in any such organization included in such listing . . . shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state . . ." The "Feinberg Law" has recently been declared to be unconstitutionally vague by the Supreme Court in *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

74. Proposed N.Y. Const. art. VII, § 3 (Supp. 1967).

75. N.Y. City Charter § 1123.

76. 357 U.S. 399 (1958).

77. *Id.* at 405.

78. 385 U.S. 589 (1967).

the Court, in another 5-4 decision, said that constitutional doctrine rejects the premise that "public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."<sup>79</sup> While *Keyishian* was not concerned with the privilege against self-incrimination,<sup>80</sup> the sweeping statement by the Court would seem to include this constitutional right too.

The courts have treated the cases of other government employees in the same manner as they have treated policemen and teachers. For example, in *Nelson v. County of Los Angeles*,<sup>81</sup> two social workers were dismissed for insubordination for refusing to obey an order from their supervisor to testify before a federal legislative committee investigating subversion. An equally divided Court upheld the dismissal but reaffirmed the principle that the exercise of the privilege against self-incrimination was not to be construed as admission of guilt. In another case, *Lerner v. Casey*,<sup>82</sup> a subway conductor in New York City was discharged for failure to answer the Commissioner of Investigation. His dismissal was upheld because there were grounds for "doubtful trust and reliability."<sup>83</sup> Here, the petitioner was said to have thwarted proceedings himself by his refusal to answer or to appeal the decision to dismiss him. The Court held that in view of these facts, he was not denied due process of law. Whether these cases would be decided in the same way today is an open question.

#### IV. PERSONS DOING BUSINESS WITH THE STATE

New York State has enacted three similar statutes<sup>84</sup> which provide that a person called before a grand jury to testify concerning a transaction or contract with the state, a local government or public authority and who refuses to sign a waiver of immunity or refuses to testify shall be disqualified from selling or bidding on contracts for five years. Louisiana has a similar statute<sup>85</sup> with a ten year disqualification, which has not been challenged in the courts. The constitutionality of the New York statutes has been challenged. The New York Court of Appeals held Public Authorities Law section 2602 constitutional in *George Campbell Painting Corp. v. Reid*.<sup>86</sup> A similar case involving General Municipal Law section 103-b, *Holland v. Hogan*,<sup>87</sup> is being appealed. Here, the district

79. *Id.* at 605:

80. The case was brought by a number of professors at a school being integrated into the State University for a declaratory judgment that the statute which required them to sign a loyalty oath was unconstitutionally vague.

81. 362 U.S. 1 (1960).

82. 357 U.S. 468 (1958).

83. *Id.* at 478.

84. N.Y. Gen. Munic. Law § 103-b; N.Y. State Fin. Law § 139-b (Supp. 1967); N.Y. Pub. Auth. Law § 2602.

85. La. Rev. Stat. Ann. § 38.2182 (1951).

86. 20 N.Y.2d 370, 229 N.E.2d 602, 283 N.Y.S.2d 31 (1967), prob. juris. noted, 36 U.S.L.W. 3308 (U.S. Jan. 30, 1968).

87. 272 F. Supp. 855 (S.D.N.Y. 1967).

court, while noting that a federal question was presented, decided to abstain from deciding the constitutionality of the statute until the New York courts had reached a decision in *Campbell*. Since *Campbell* has now been decided with no interpretation of the statute other than to declare it constitutional, it remains to be seen how the federal court will decide the question. Two years earlier this same federal district court said in another case that a contractor "possessed no inalienable right to contract with the state. His right in that regard could be tempered by reasonable conditions imposed upon him, one of them being the necessity of being candid with the authorities and giving full answers . . ." <sup>88</sup>

Is a contractor different from a lawyer or an employee of the state? Perhaps he can be distinguished in that he is not being prevented from carrying on his business or employment but is only being limited to business other than with the state. Is this limitation a reasonable (and therefore constitutional) regulation of doing business with the state or an unwarranted (and therefore unconstitutional) penalty for the exercise of the constitutional privilege against self-incrimination?

The argument advanced by the state in favor of the constitutionality of these statutes is that since the state is limited in its choice of business partners by bidding requirements, these statutes represent "a reasonable means to implement state and municipal policy for the protection of the public by enabling the state and local governments to ensure themselves of responsible bidders."<sup>89</sup> The validity of this argument hinges on the word reasonable. Is the surrender of the constitutional privilege against self-incrimination a reasonable price for the state to ask in exchange for the privilege of doing business with the state? The New York Court of Appeals has said yes. Will the Supreme Court agree?

#### V. ADMINISTRATION OF THE STATUTES TODAY

For the last two years New York City has been administering section 1123 of the City Charter as though a hearing was required before dismissal of a public employee. This was apparently done to conform to the New York Supreme Court decision in *Gardner v. Murphy*,<sup>90</sup> which held that article I, section 6 and section 1123 "are viewed, not as self-executing mandates for summary dismissal, but as affording petitioners the opportunity to explain . . . and the right to be heard."<sup>91</sup> This decision was a reaction, though somewhat delayed, to *Slochower*.

The Board of Responsibility which has the power to disqualify bidders on New York City contracts has seemingly been proceeding cautiously along the same line, pending outcome of the litigation challenging the constitutionality of these statutes.<sup>92</sup> If the holding of a hearing turns out to be a mere formality before an employee is dismissed or a contractor is disqualified, it is, for the employee or

88. *United States ex rel. Laino v. Warden of Wallkill Prison*, 246 F. Supp. 72, 96 (S.D.N.Y. 1965).

89. *Holland v. Hogan*, 272 F. Supp. 855, 866 (S.D.N.Y. 1967).

90. 46 Misc. 2d 728, 260 N.Y.S.2d 739 (Sup. Ct. 1965).

91. *Id.* at 736, 260 N.Y.S.2d at 748.

92. *Holland v. Hogan*, 272 F. Supp. 855 (S.D.N.Y. 1967).

contractor, no more than academic exercise. The effect will be the same. He will be out of a job or disqualified from bidding. If the hearing officer has wide discretion, it might be a different matter. There is, of course, the additional problem of whether one should be called upon to explain his invocation of the privilege at all. Is this not in and of itself a violation of the privilege? It should be remembered that this discussion relates only to a situation where there is no other evidence of misdoing than the refusal to testify. If other conclusive evidence were presented, this problem would not arise. A problem occurs where there is some, but inconclusive evidence. But how much evidence would be necessary to sustain a dismissal by an administrative hearing? This is a very real problem in the cases of alleged bribery of public employees, such as *Gardner*, where it is difficult, if not impossible, to obtain testimony from the other party to the transaction. A way must be found, however, to protect the public interest in cases of this type.

## VI. CONCLUSION

### A. *Problems Facing the Supreme Court*

Unquestionably, a public employee or contractor doing business with the state has the right, as an individual, to claim his privilege against self-incrimination and no claim of the privilege can be equivalent to a confession of guilt. The problem raised is whether losing the right to bid on contracts or losing one's job for failure to waive immunity or failure to testify after claiming the privilege is an unconstitutional penalty.

The Court, in facing this problem, will have to weigh the state's need for all pertinent information about its employees and contractors with the individual rights of those employees and contractors not to contribute testimony to their own criminal convictions. "The individual's constitutional privilege against self-incrimination should not be abruptly snatched away simply because the needs of the government purport to require disclosure in a particular case . . . . What is required is a principled reconciliation between the individual's privilege and the needs of the government."<sup>93</sup>

It is conceded that "the state has a legitimate interest in excluding from office those who would impair efficiency and honesty in government operations."<sup>94</sup> Is the claim of the privilege against self-incrimination sufficient to impair efficiency and honesty in government operations in all, some, or a few cases? In the first case brought to the New York Court of Appeals under article I, section 6 of the New York Constitution,<sup>95</sup> the court said: "Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers."<sup>96</sup> In the latest case, *Gardner*, the court said: "We find no con-

93. 65 Colum. L. Rev. 681, 693 (1965).

94. *United States ex rel. Laino v. Warden of Wallkill Prison*, 246 F. Supp. 72, 94 (S.D.N.Y. 1965).

95. *Canteline v. McClellan*, 282 N.Y. 166, 25 N.E.2d 972 (1940).

96. *Id.* at 171-72, 25 N.E.2d at 974.

stitutional defect in the statute."<sup>97</sup> In all intervening cases the courts, both in New York and other jurisdictions, have had no difficulty in upholding the dismissal of public employees solely for claiming the privilege against self-incrimination. The Supreme Court has never faced the problem squarely<sup>98</sup> because before *Malloy* no federal question had been raised.

One writer has indicated that the discharge of the employees in these cases is "not because his use of the privilege indicates that he is more likely than not a criminal, but because his behavior interferes with the orderly investigation and control of public service."<sup>99</sup> This contrasts with another view of the problem which reasons that "penalizing a person for asserting the self-incrimination privilege in effect defeats the privilege. . . . Since deprivation of livelihood is a form of punishment, it would seem that neither the federal government . . . nor any state . . . could validly discharge a public employee for exercising the privilege."<sup>100</sup>

If the deprivation of livelihood in *Spevack*<sup>101</sup> is an unconstitutional forfeiture, cannot the same be said of the deprivation of livelihood of a state employee? *Spevack* was an attorney, a licensee of the state. Does he not have the same (and perhaps as an officer of the court, even more) duty to cooperate with orderly inquiry by the courts? Will the decision turn on the question of who signs the paycheck? An extension of the logic of the *Spevack* decision, despite the caveat in Justice Fortas' concurring opinion,<sup>102</sup> might render these statutes, which require dismissal of public employees, unconstitutional on their face. There is some question, therefore, as to the necessity for the statutes at all, if they cannot constitutionally mandate dismissal of public employees or disqualification of contractors since it is settled that a public employee or a contractor can be dismissed or disqualified after a hearing for breach of his duty of candor and frankness.

The intention of the framers of the statutes requiring waiver of immunity or requiring testimony could not have been merely the desire for dismissal of public employees or to obtain information from public employees or contractors. If they had only wished to gain information, immunity could be granted and the witness would then be forced to testify or be held in contempt. Although immune to criminal prosecution, the testimony could be used in an administrative hearing as a basis for dismissal or disqualification. It would seem, then, that the statutes

97. *Gardner v. Broderick*, 20 N.Y.2d 227, 230, 229 N.E.2d 184, 186, 282 N.Y.S.2d 487, 489 (1967).

98. *Spevack v. Klein*, 385 U.S. 511, 516 n.3 (1967); see also dissenting opinion in *Stevens v. Marks*, 383 U.S. 234, 246 (1966).

99. Noonan, *Inferences from the Invocation of the Privilege Against Self-Incrimination*, 41 Va. L. Rev. 311, 335 (1955).

100. Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. Chi. L. Rev. 472, 495 (1957) (footnotes omitted).

101. *Spevack v. Klein*, 385 U.S. 511 (1967).

102. *Id.* at 519-20.

may have envisioned prosecution as well as dismissal.<sup>103</sup> In view of the decision in *Garrity* that such testimony is coerced and therefore inadmissible in a subsequent criminal proceeding, these statutes have become virtually meaningless. In fact, the very act of signing a waiver in the face of a threat of discharge confers immunity against the use of the coerced testimony and its fruits in a subsequent criminal proceeding. A waiver signed under a threat of an administrative hearing might also be deemed to be coercion. There is also some question whether it is permissible to use coerced testimony in an administrative hearing. It is possible that this testimony might be deemed to be unconstitutionally obtained, and such evidence has been held to be inadmissible in New York in any official proceeding brought to impose official forfeitures, penalties, or similar sanctions for violation of law or regulation.<sup>104</sup>

### B. Possible Solutions

The Supreme Court has the option of extending the logic of *Spvack* and declaring all such statutes unconstitutional. This would impose upon the states the burden of producing other evidence to prove that the employee or contractor is unfit to serve or do business with the state. The other extreme would be to follow the precedents of the state courts and declare the statutes constitutional. Precedent for such a position exists in *United Public Workers v. Mitchell*,<sup>105</sup> which upheld the Hatch Act,<sup>106</sup> prohibiting political activity by federal employees. Here the Court said that "for regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."<sup>107</sup> This was most surely a limitation of the individual rights of public employees.

The Court, of course, has other possible solutions available to it in an attempt to preserve a balance between the right of the state to demand candor and frankness and the right of the individual to remain silent. It might distinguish the cases of public employees from the cases of contractors. Contractors can still continue to do business even if barred from contracting with the state. It can be argued that public employees also can find other employment. The Court might also attempt to distinguish different classes of public employees and treat the cases of policemen or those dealing directly with the public as a special category.

Even if the Court were to decide that it is permissible to dismiss a public employee or disqualify a contractor for claiming the privilege against self-incrimination, the statutes as they appear on the books today should be amended to provide for a hearing rather than summary dismissal, as the courts have required.

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103. Note, 101 U. Pa. L. Rev. 1190, 1191 (1953).

104. *Leogrande v. Liquor Authority*, 25 App. Div. 2d 225, 231-32, 268 N.Y.S.2d 433, 440 (1st Dep't 1966), rev'd, 19 N.Y.2d 418, 280 N.Y.S.2d 381 (1967).

105. 330 U.S. 75 (1947).

106. 5 U.S.C. § 7324 (Supp. II 1965-66).

107. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 101 (1947).

An acceptable compromise might be reached if the statutes were amended to eliminate the requirement for signing a waiver of immunity and to provide that whenever a public employee or state contractor refuses to testify in an investigation relating to his official duties or to the circumstances of a contract, a hearing be mandated to determine his fitness for office or his qualifications to bid on contracts. If he refuses to cooperate at such a hearing, he could then be dismissed or disqualified. The dismissal or disqualification should not be mandatory. Eliminating the requirement of a waiver of immunity, would avoid the problem of coerced testimony raised in *Garrity*, and the elimination of the mandatory dismissal or disqualification, would meet the constitutional objections to the existing statutes while preserving to the state the right to dismiss employees or to disqualify contractors for lack of candor and frankness in their dealings with the state, thereby protecting the public interest.