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# CRIMINAL LAW

## PUBLIC SERVICE: SELF-INCRIMINATION VS. THE PUBLIC'S RIGHT TO AN ACCOUNTING

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Can the fifth amendment privilege against self-incrimination so cloak a public employee that he can refuse to account for the performance of his official duties? In recent years this issue has become more significant as the number of investigations into the conduct of those entrusted with public responsibilities has increased.

The fifth amendment anti-incrimination privilege, which is applicable to the states through the fourteenth amendment,<sup>1</sup> protects an individual from being "compelled in any criminal case to be a witness against himself."<sup>2</sup> This protection underpins the accusatorial system of justice. "Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth."<sup>3</sup> The importance of the privilege and the policies which it serves are universally recognized.

The privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values. All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a fair state-individual balance, to require the government to shoulder the entire load, to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own inde-

pendent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right to remain silent "unless he chooses to speak in the unfettered exercise of his own will."<sup>4</sup>

The privilege may be asserted in any proceeding—civil or criminal, administrative or judicial, investigatory or adjudicatory<sup>5</sup>—in response to any question which the witness reasonably believes requires an answer which may be self-incriminatory.<sup>6</sup> As a mainstay of our legal system, the privilege must be accorded a liberal construction in favor of the right it was intended to secure.<sup>7</sup> A person's decision to testify or remain silent must be the result of an "unfettered exercise of his own will."<sup>8</sup> The invocation of the privilege cannot be discouraged by the imposition of any 'penalty' for its assertion.<sup>9</sup>

Special problems arise when a government employer suspects an employee of performing his official duties in a manner which is not only unsatisfactory but perhaps in violation of law. A public employer ordinarily would be able to compel an accounting from the employee, and if his suspicions are well founded, to discharge him.<sup>10</sup> However, if the employee is performing his duties

<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

<sup>5</sup> *Kastigar v. United States*, 92 S.Ct. 1653 (1972); *McCarthy v. Arndstein*, 266 U.S. 34 (1924).

<sup>6</sup> *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Blau v. United States*, 340 U.S. 159 (1950).

<sup>7</sup> *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

<sup>8</sup> *Malloy v. Hogan*, 378 U.S. at 8.

<sup>9</sup> *See, e.g., Griffin v. California*, 380 U.S. 609, 614 (1964), forbidding a prosecutor to comment on a defendant's failure to testify in a criminal case and eliminating the use of a jury instruction to the effect that such failure may be considered as evidence of the defendant's guilt. *See also Brooks v. Tennessee*, 92 S.Ct. 1891 (1972).

<sup>10</sup> *See Schlochower v. Board of Higher Education*, 350 U.S. 551, 555 (1956); *Adler v. Board of Education of City of New York*, 342 U.S. 485 (1952); *Garner v. Board of Public Works of City of Los Angeles*, 341 U.S. 716 (1951).

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The views expressed herein are not necessarily those of either the United States Department of Justice or the Attorney General of the State of Illinois.

<sup>1</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>2</sup> U.S. CONST. amend. V.

<sup>3</sup> *Malloy v. Hogan*, 378 U.S. at 8.

in violation of law, the fifth amendment privilege against self-incrimination would seem to preclude the employer from successfully demanding an accounting, because the employee could reasonably fear that information obtained from the accounting could later be used against him in a criminal proceeding.

Through a series of decisions, the Supreme Court of the United States has begun to evolve a workable procedure by which the interests of both the public and the employee are protected.

In *Spevack v. Klein*,<sup>11</sup> decided in 1967, Spevack, a New York attorney, refused to produce financial records and refused to testify in a disciplinary proceeding instituted against him for professional misconduct. His refusals were grounded solely upon the fifth amendment privilege against compulsory self-incrimination. Spevack was disbarred by the New York authorities on the theory that the fifth amendment privilege was unavailable to an attorney in a professional disciplinary proceeding.

The Supreme Court reversed the order of disbarment, concluding that the self-incrimination clause "extends its protections to lawyers as well as to other individuals, and that 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>12</sup> The Court concluded that disbarment constituted a penalty for the assertion of the privilege in that it rendered Spevack's decision to remain silent "costly."

The *Spevack* decision was accompanied by another opinion delivered the same day. In *Garrity v. New Jersey*,<sup>13</sup> Garrity and the other appellants were municipal police officers in New Jersey at the time the state supreme court ordered the New Jersey Attorney General to investigate alleged fixing of traffic tickets in the state's municipal courts. The appellants were questioned during this investigation. Prior to the questioning, each was warned that he had the right to remain silent and that anything which he said could be used against him in a criminal proceeding. Each was further warned that a refusal to answer the investigator's questions would subject him to dismissal. None of the men were granted immunity, but each answered the propounded questions. Their answers were then used to convict them of conspiracy to obstruct the administration of the traffic laws. These convictions were challenged on

the basis that the answers were the product of coercion, *i.e.* the threat of losing their jobs.

The Court found, as in *Spevack*, that the threat of job forfeiture was coercive,<sup>14</sup> and held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."<sup>15</sup>

In *Spevack*<sup>16</sup> and *Garrity* the Court had been concerned primarily with the fifth amendment rights of public servants as private individuals and with fashioning a remedy for a violation of those rights. The Court concluded that public servants have no less standing under the fifth amendment than do private citizens. In two subsequent decisions, the Court directed its attention to the effect which these rights have upon the disciplinary powers of government employers.

In *Gardner v. Broderick*,<sup>17</sup> a former New York City policeman sought reinstatement and back pay alleging that he was dismissed for refusing to waive his fifth amendment privilege. Gardner had been subpoenaed and had appeared before a county grand jury investigating police corruption. He was advised that he would be questioned concerning the performance of his official duties and that the fifth amendment privilege was available to him. He was then asked to sign a waiver of immunity after being informed that his failure to sign the waiver would result in his dismissal. Gardner

<sup>14</sup> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self incrimination is the antithesis of free choice to speak out or remain silent.

*Id.*, at 497.

<sup>15</sup> *Id.* at 500.

<sup>16</sup> It should be noted that the *Spevack* decision involved proceedings to discipline a lawyer, while subsequent decisions of the Court have involved non-lawyers. There is some attempt to distinguish lawyers, who are licensed by the state but who owe a large measure of loyalty to persons other than the licensor, from other public officials whose loyalty should be undivided. See *Gardner v. Broderick*, 392 U.S. 273, 277-78 (1968); *Spevack v. Klein*, 385 U.S. 511, 516 n.3 (1967); *id.* at 519-20 (Fortas, J., concurring).

However, it should be noted that there is no apparent reason for failing to apply the same principles to lawyers as well as public servants, see *Spevack v. Klein*, 385 U.S. at 530-31 (White, J., dissenting), while keeping in mind that there may be alternative bases for a lawyer's silence, depending upon whether the information requested from him involves matters protected by the attorney-client privilege.

<sup>17</sup> 392 U.S. 273 (1968).

<sup>11</sup> 385 U.S. 511 (1967).

<sup>12</sup> *Id.* at 514.

<sup>13</sup> 385 U.S. 493 (1967).

refused to sign the waiver. He received an administrative hearing and was discharged solely for his refusal to waive immunity.<sup>18</sup> His petition for reinstatement was denied by the state courts.

The Supreme Court found the attempt to coerce Gardner into waiving his immunity by threatening to dismiss him from the police force to be an unconstitutional infringement of the fifth amendment privilege. In support of this conclusion, the Court noted that Gardner's grand jury testimony was demanded for subsequent use in a criminal prosecution of him and not solely for the purpose of demanding an accounting of the performance of his official duties.<sup>19</sup> In such a situation, the Constitution will not tolerate the attempt to secure, through the use of threats of dismissal as a tool of coercion, both an accounting of an employee's performance of his official duties and evidence to be used against the employee in a subsequent criminal prosecution. However, the Court did note that:

If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. State of New Jersey*, supra, the privilege against self-incrimination would not have been a bar to his dismissal.<sup>20</sup>

This conclusion was reemphasized in a decision rendered by the Court on the same day as the *Gardner* opinion. In *Uniform Sanitation Men Association v. Commissioner of Sanitation*,<sup>21</sup> the

<sup>18</sup> New York City discharged him for refusal to execute a document purporting to waive his constitutional rights and to permit prosecution of himself on the basis of his compelled testimony. Petitioner could not have assumed—and certainly he was not required to assume—that was being asked to do an idle act of no legal effect. In any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of loss of employment.

<sup>19</sup> 392 U.S. at 279.

<sup>20</sup> It is clear that petitioner's testimony was demanded before the grand jury in part so that it might be used to prosecute him, and not solely for the purpose of receiving an accounting of his performance of his public trust. If the latter had been the only purpose, there would have been no reason to seek to compel petitioner to waive his immunity.

*Id.* at 279.

<sup>21</sup> *Id.* at 278.

<sup>22</sup> 392 U.S. 280 (1968).

Court held that the fifth amendment privilege was violated by the discharge of city employees who refused to sign waivers of immunity when called to testify before a grand jury or who invoked the privilege in an administrative proceeding after being advised that their answers could be used against them in a criminal proceeding.

Petitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege.<sup>22</sup>

The Court reiterated its statement in *Gardner* that if an employee's right to immunity is not at stake he may be compelled to account for his performance of official duties upon pain of dismissal, and concluded:

[P]etitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.<sup>23</sup>

In *Gardner and Uniform Sanitation Men* it becomes evident that the Court, while adhering to its prior holdings in *Spevack* and *Garrity* with respect to the individual rights of a public employee under the fifth amendment, recognizes the need to protect the interests of his employer.

Under *Spevack* and *Garrity*, it is clear that the employer may not utilize the threatened loss of employment to coerce answers from an employee which later may expose him to criminal sanctions. Rather, the employee must be free to invoke the fifth amendment privilege to stand mute. Otherwise any statements which he makes under the compulsion of dismissal will be immunized from future use or derivative use in a subsequent criminal prosecution of the employee.

However, in *Gardner and Uniform Sanitation Men* the Court found that once the employee's rights are so protected, an employer is not powerless to protect itself from an employee who refuses to account for the performance of his official duties. Once a public servant asserts his right under the fifth amendment to refuse to answer his employer's demand for an accounting, the

<sup>22</sup> *Id.* at 283.

<sup>23</sup> *Id.* at 285.

employer may discharge the employee after proper administrative proceedings.

In light of these decisions, it would appear that a governmental employer has two options when confronted with a suspect employee. Which of these options is utilized depends upon the remedy which the employer chooses to extract from the individual. If the criminal sanctions are chosen as the appropriate remedy, the employer may proceed directly with a criminal prosecution without questioning the employee.<sup>24</sup> However, if purely administrative remedies such as suspension or dismissal are sought, the employer may proceed to demand an accounting of the employee's official performance. Under *Gardner* and *Uniform Sanitation Men*, the government may then dismiss an employee who refuses, upon the basis of the fifth amendment privilege against compulsory self-incrimination, to make the demanded accounting.

What remains is the question of whether an employee who does give an accounting upon pain of dismissal (and is thus immune from a criminal prosecution based upon that testimony or its fruits) can be discharged in an administrative proceeding upon the ground that his compelled testimony reflects an improper performance of his official duties which warrants dismissal.

While the Supreme Court has not yet rendered an opinion resolving this question, under the rationale of the Court's earlier decisions it would appear that the remedy of dismissal should be available. The United States Court of Appeals for the Seventh Circuit has adopted this position in upholding the Illinois Courts Commission removal of an Illinois Circuit Court judge.<sup>25</sup>

The judge had been summoned to appear as a witness before a county grand jury investigating alleged mismanagement of the Illinois State Fair. He appeared and refused to answer questions, asserting his fifth amendment privilege. He was granted full transactional immunity, reappeared before the grand jury and testified extensively

concerning his business dealings with the Fair. The grand jury later returned several indictments charging official misconduct and conspiracy and naming the judge an unindicted co-conspirator.

A complaint was filed with the Illinois Courts Commission by the state Attorney General charging the judge with impropriety and the appearance of impropriety in violation of the Judicial Canons of Ethics. Following a formal hearing at which the transcript of the judge's immunized grand jury testimony was admitted into evidence, the Commission removed him for his conduct while a member of the judiciary, for the circumstances surrounding his testifying and for the content of his testimony before the county grand jury.<sup>26</sup> The Supreme Court of the United States dismissed the appeal from this order for want of a substantial federal question.<sup>27</sup>

Reviewing the dismissal of the judge's federal civil rights suit,<sup>28</sup> the United States Court of Appeals for the Seventh Circuit rejected his contention that the use of his immunized grand jury testimony in a subsequent civil proceeding to remove him from office subjected him to a criminal penalty in violation of both the fifth amendment privilege and the grant of immunity. The Court found that the transactional immunity grant was coextensive with the fifth amendment privilege against compelled self-incrimination<sup>29</sup> and appropriately protected the judge's fifth amendment rights, and concluded:

It is clearly evident from the pertinent Court decisions that a state may require a public servant to account for the performance of his duties upon pain of dismissal, providing the judicial officer or state employee is accorded the full protection of the Fifth Amendment privilege against self-incrimination . . . Here appellant has been accorded every possible protection guaranteed by the Fifth Amendment. The hearing before the Illinois Courts Commission afforded him a fair hearing as required by law. He has suffered no criminal punishment resulting from his immunized testimony nor was

<sup>24</sup> If the employee is questioned, under *Spevack* and *Garrity*, the answers which he gives under the compulsion of job forfeiture will be immune from direct or indirect use in a subsequent criminal prosecution of the employee. While those decisions do not totally bar the future prosecution, it would appear that the government bears the burden of establishing that the prosecution is based upon evidence which is completely independent of the immunized statements of the employee. See *Kastigar v. United States*, 92 S.Ct. 1653 (1972).

<sup>25</sup> *Napolitano v. Ward*, 457 F.2d 279 (7th Cir. 1972).

<sup>26</sup> *In re Napolitano*, Case No. M.R. 1324 (Ill. Cts. Comm'n. July 14, 1970).

<sup>27</sup> *In re Napolitano*, 401 U.S. 951 (1971).

<sup>28</sup> *Napolitano v. Ward*, 317 F. Supp. 83 (N.D. Ill. 1971). The suit was brought pursuant to title 42 U.S.C. § 1983 (1970).

<sup>29</sup> Prior to the decision in *Kastigar v. United States*, 92 S.Ct. 1653 (1972), the Seventh Circuit had held that only a grant of full transactional immunity would fully supplant the fifth amendment privilege. *In re Korman*, 449 F.2d 32 (7th Cir. 1971), *rev'd and remanded sub. nom.* *United States v. Korman*, 92 S.Ct. 2055 (1972).

the removal herein a penal aspect of criminal proceedings.<sup>30</sup>

The rationale of this decision would appear to provide the final step in establishing a workable procedure for protecting the interests of both the individual employee and the public. Under this procedure, the employee receives the full protection of the privilege against compulsory self-incrimination. At the same time, the public's interest in requiring the faithful performance of official duties by its officers and employees is safeguarded.

Under *Gardner* and *Uniform Sanitation Men* a public employee can be dismissed for refusing to testify after having been granted immunity. Likewise, if an employee who has been granted immunity testifies, rather than remaining silent, and his testimony reflects his unfitness to perform his duties, the fifth amendment privilege should not be a bar to his dismissal.

Although commonly referred to as the protection against self-incrimination, the fifth amendment literally provides that no person "shall be compelled in any criminal case to be a witness against himself."<sup>31</sup> Historically, the amendment has been construed as applicable only where the witness has reasonable grounds to fear future criminal charges. Once immunity has been conferred, the objective of the fifth amendment privilege has been achieved by eliminating the possibility that the witness might suffer some criminal sanction or penalty due to his own testimony.<sup>32</sup>

<sup>30</sup> *Napolitano v. Ward*, 457 F.2d 279, 284 (7th Cir. 1972).

<sup>31</sup> U.S. CONST. amend V (emphasis added).

<sup>32</sup> *Kastigar v. United States*, 92 S.Ct. 1653 (1972); *Zicarelli v. New Jersey Comm'n of Investigation*, 92 S.Ct. 1670 (1972); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964); *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

Removal from office, however, is not a criminal penalty involving the loss of an otherwise protected right such as liberty or property. An employee does not have a right to public office or employment. Indeed, the Supreme Court long ago held that such employment is a privilege granted by the state and is not a right secured by the federal constitution.<sup>33</sup>

In *Gardner* and *Uniform Sanitation Men*, the Supreme Court in effect has recognized that the remedy of dismissal is not a criminal penalty by allowing the discharge of an immunized employee who refuses to account for the performance of his duties. The same reasoning applies to an immunized witness who gives an accounting which reflects his official misconduct.<sup>34</sup> Such misconduct is a violation of the public trust for which there must be some remedy. Since criminal sanctions based upon the employee's testimony are barred, the appropriate remedy is dismissal. The employee thus receives the full protection of the fifth amendment while the public's interest is vindicated by the discharge of disloyal employees.

To force the public to accept and compensate the continued services of an employee who either refuses to account for his performance of his duties or who is admittedly unfit is totally without support in logic and should not be required by the Constitution.

<sup>33</sup> See *Snowden v. Hughes*, 321 U.S. 1, 7 (1944); *Cave v. Missouri ex rel. Newell*, 246 U.S. 650 (1918); *Taylor v. Beckham*, 178 U.S. 548 (1900); *Wilson v. North Carolina*, 169 U.S. 586, 589 (1898).

<sup>34</sup> This conclusion has been adopted and applied by New York as a reasonable and constitutionally permissible means of disciplining attorneys. See *In re Klebanoff*, 21 N.Y.2d 920, 237 N.E.2d 75, 289 N.Y.S. 2d 755 (1968); *Zuckerman v. Greason*, 20 N.Y.2d 430, 231 N.E.2d 718, 285 N.Y.S.2d 1 (1967), cert. denied, 390 U.S. 925 (1968); *In re Selig*, 32 App. Div. 2d 312 302 N.Y.S. 2d 94 (1969); *In re Ungar*, 27 App. Div. 2d 925, 282 N.Y.S. 2d 158 (1967).