Washington and Lee Law Review

Volume 27 | Issue 2 Article 11

Fall 9-1-1970

The Public Employee Under An Immunity Statute

however, he apparently is considering the now defunct "character of the overall action" approach rather than the nature of each individual issue to be tried. By determining that there was an issue which was legal in nature, the Court was able to ensure the right to a jury in situations where the only reason advanced for not using the jury had been that such a right did not exist in 1791.

JOHN THOMAS PROVINCE

THE PUBLIC EMPLOYEE UNDER AN IMMUNITY STATUTE

When a wrongdoing public employee is called to testify before a grand jury under an immunity statute[1] he is placed in a most difficult position. If he refuses to respond to questions he may be held in contempt of the grand jury.[2] If he answers untruthfully, he is subject to criminal prosecution for perjury.[3] Most important of all, if he accepts the immunity offered him and testifies, he may be dismissed from his

---

[1]An "immunity" statute is typified by FLA. STAT. ANN. § 932.29 (1944) which reads:

> No person shall be excused from attending and testifying, or producing any book, paper or other document before any court upon any investigation, proceeding or trial, for a violation of any of the statutes of this state against bribery, buglary, larceny, gaming or gambling, or of any of the statutes against the illegal sale of spirituous, vinous or malt liquors, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

For a thorough compilation of state immunity statues see 8 J. WIGMORE, EVIDENCE § 2281 (McNaughton rev. 1961). For an illustration of how some state courts have treated their immunity statutes see Note, *State Immunity Statutes in Constitutional Perspective*, 1968 DUKE L.J. 311.

[2]*See* People v. De Feo, 284 App. Div. 622, 131 N.Y.S.2d 806 (1954), *rev'd on other grounds*, 308 N.Y. 595, 127 N.E.2d 592 (1955); *cf.* Park v. Johnson, 86 Iowa 475, 53 N.W. 285 (1892). *See also* United States v. Bryan, 339 U.S. 323 (1950).

[3]Cameron v. United States, 231 U.S. 710 (1914); Glickstein v. United States, 222 U.S. 139 (1911); United States v. Cason, 39 F. Supp. 731 (W.D. La. 1941); Gordon v. State, 104 So. 2d 524 (Fla. 1958); State v. Nolan, 231 Minn. 522, 44 N.W.2d 66 (1950); People v. Berger, 197 Misc. 915, 100 N.Y.S.2d 278 (Sup. Ct. 1950); State v. Cox, 87 Ohio 313, 101 N.E. 135 (1913).

job.[4] This loss of job with its concomitant deprivations may exceed the damage he would have incurred due to a criminal conviction.[5]

The conflict is one of two competing interests. On the one hand, the public employee (assuming civil service status) has both a statutory right[6] not to be removed from his job except for legal cause[7] and a constitutional privilege against self-incrimination.[8] Competing with the employee's individual rights is the public's desire for honest government and the need to question their public servants regarding the execution of duties connected with the public trust.[9] The problem comes into sharper focus when immunity statutes are enacted which give effect to this public policy by granting immunity from penalty or forfeiture in return for limited deprivation of the individual's

---

[4]Headley v. Baron, 228 So.2d 281 (Fla. 1969). *See also* Gardner v. Broaderick, 392 U.S. 273 (1968); Uniformed Sanitation Mens' Ass'n v. Comm'r of Sanitation, 392 U.S. 280 (1968); Spevack v. Klein, 385 U.S. 511 (1967); *In re* Addonizio, 53 N.J. 107, 248 A.2d 531 (1968).

[5]*E.g.*, N.Y. PENAL LAW § 195.00 (McKinney 1967) provides that "official misconduct" is a class A misdemeanor. This misdemeanor is punishable by no more than one year's imprisonment. N.Y. PENAL LAW § 70.15 (McKinney 1967). The losses which could flow from dismissal from public employment could easily exceed this penalty in terms of financial and reputational losses. This section of the New York Penal Laws defines "official misconduct" as follows:

> A public servant is guilty of official misconduct when, with intent to obtain a benefit or to injure or deprive another person of a benefit:
>
> 1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or
>
> [2]He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

[6]Whoriskey v. City & County of San Francisco, 213 Cal. App. 2d 400, 28 Cal. Rptr. 833 (Dist. Ct. App. 1963); *see* Johnson v. Trader, 52 So. 2d 333 (Fla. 1951); Kluth v. Andrus, 91 Ohio App. 1, 101 N.E.2d 310, *appeal dismissed*, 156 Ohio St. 286, 102 N.E.2d 18 (1951), *affirmed*, 157 Ohio St. 279, 105 N.E.2d 579 (1952).

[7]Greene v. McElroy, 360 U.S. 474 (1959); Cole v. Young, 351 U.S. 536 (1956); Solchower v. Board of Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952); Lancaster v. Hill, 136 Ga. 405, 71 S.E. 731 (1911); Smith v. Board of Educ., 264 Ky. 150, 94 S.W.2d 321 (1936); Carroll v. City Comm'n, 265 Mich. 51, 251 N.W. 381 (1933); State *ex rel.* Hart v. City of Duluth, 53 Minn. 238, 55 N.W. 118 (1893); State *ex rel.* Nagle v. Sullivan, 98 Mont. 425, 40 P.2d 995 (1935); Hagerty v. Shedd, 75 N.H. 393, 74 A. 1055 (1909).

[8]U.S. CONST. amend. V; Malloy v. Hogan, 378 U.S. 1 (1964); People v. Steuding, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

[9]*See generally* Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959 (1968); Note, *State Immunity Statutes in Constitutional Perspective*, 1968 DUKE L.J. 311. The terms "public trust" and "public office" are nearly synonymous and relate to duties and functions performed on behalf of the public. Commonwealth v. Albert, 307 Mass. 239, 29 N.E.2d 817 (1940); *In re* Olson, 211 Minn. 114, 300 N.W. 398 (1941); Wright v. City of Lorain, 70 Ohio App. 337, 46 N.E.2d 325 (1942).

right to remain silent.[10] Although prohibited from imposing criminal penalties based on immune testimony which reveals the malfeasance of a public employee, the authorities will want to remove that employee from his position of public trust. However, there is some controversy as to whether removal can be based on conduct revealed by the immune testimony.[11]

In *Headley v. Baron*,[12] the Supreme Court of Florida was faced with this problem. In overruling the trial and district court,[13] the court held that an immunity statute,[14] compelling testimony before a grand jury, protected the public employee only from criminal sanctions and not from loss of his job.[15] This decision expressly overruled previous holdings of Florida courts that had disallowed administrative penalties which flowed from immune testimony.[16]

The case under consideration was initiated by a mandamus proceeding brought by a police captain against the chief of police of Miami, seeking to compel him to revoke his order dismissing the captain from the police force.[17] Baron implicated himself in certain bribery transactions while testifying under an immunity statute that

---

[10]The scope of inquiry that may be invoked due to an individual's position of public trust has best been defined by Justice Fortas when he stated:

> ...I would distinguish ... a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties as distinguished from his beliefs or other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer.

Spevack v. Klein, 385 U.S. 511, 519 (1966) (concurring opinion); *see* Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959 (1968).

[11]Note, *State Immunity Statutes in Constitutional Perspective*, 1968 DUKE L.J. 311.

[12]228 So. 2d 281 (Fla. 1969).

[13]Headley v. Baron, 211 So. 2d 223 (Fla. Dist. Ct. App. 1968).

[14]FLA. STAT. ANN. § 932.29 (1944). The provisions of this statute are set out at note 1 *supra*.

[15]228 So. 2d at 286.

[16]Board of Architecture v. Seymour, 62 So. 2d 1 (Fla. 1952); Hotel & Restaurant Comm'n v. Zucker, 116 So. 2d 642 (Fla. Dist. Ct. App. 1959); Beverage Dep't v. State *ex rel.* Zucker, 116 So. 2d 640 (Fla. Dist. Ct. App. 1959). These cases do not treat the subject of public employees and to that extent did not represent a view opposite from *Baron*. They did represent an attempted disbarment, deprivation of a hotel license, and loss of a liquor license. These actions were taken pursuant to testimony given under the Florida immunity statute, set forth at note 1 *supra*, and were invalidated by the Florida courts. They were held to be penalties under the statute and as such were unconstitutionally imposed, according to these decisions prior to *Baron*.

[17]228 So. 2d at 282.

promised to exculpate him from any "penalty or forfeiture"[18] arising from his compelled testimony. The City of Miami Civil Service Rules provided that any public employee who refused to testify would be dismissed.[19] Rather than treat the apparent constitutional question, the court relied on a "dictionary approach." It reached the desired solution to the problem by deciding that the statutory term "penalty or forfeiture" could not be defined or construed to include the employee's dismissal from his job. Although the result may have been consonant with a constitutional analysis, the court did not examine the constitutional question in arriving at its decision. Despite the court's statement that no constitutional issue was involved,[20] it seems that the major consideration in assessing the validity of penalizing an individual, based on compelled testimony, must be the constitutional impact.

Every citizen has a right against self-incrimination as guaranteed by the fifth amendment,[21] which has been held applicable to the states.[22] The courts have, however, upheld the right of state or federal authorities to abrogate an individual's right to remain silent if he is adequately protected from the consequences of his compelled testimony.[23] What constitutes adequate protection has been the source of

---

[18]FLA. STAT. ANN. § 932.29 (1944).

[19]Civil Service Rules and Regulations of the City of Miami, Rule XVI, § 12 reads in part:

> (a) Should any officer or employee in the classified service of the City of Miami appear before a Grand Jury or Juries and refuse to sign an immunity waiver in advance of testimony before such Grand Jury or Juries and/or refuse to testify fully on all matters concerning the property, government, or affairs of the City, that such conduct shall constitute a breach of duty and that said employee shall be dismissed from the classified service of the City of Miami.
>
> ....
>
> (c) No City employee shall be excused on plea of "self incrimination" or for any other reason, from giving information which may bear on his own fitness to hold a job; he shall be dismissed for refusing to give such information.

The Florida court dismissed the applicability of this Civil Service regulation because Baron had never been requested to sign an immunity waiver. 228 So. 2d at 283.

[20]228 So. 2d at 284.

[21]U.S. CONST. amend. V.

[22]Malloy v. Hogan, 378 U.S. 1, 3 (1964).

[23]Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968); Reina v. United States, 364 U.S. 507 (1960); Brown v. Walker, 161 U.S. 591 (1896); *Ex parte* Cohen, 104 Cal. 524, 38 P. 364 (1894); State v. Jack, 69 Kan. 387, 76 P. 911 (1904), *aff'd*, 199 U.S. 372 (1905); State v. Ruff, 176 Minn. 308, 223 N.W. 144 (1929); People v. Sharp, 107 N.Y. 427, 14 N.E. 319 (1887).

much litigation.[24] The leading early case of *Counselman v. Hitchcock*[25] held that the immunity must be coextensive with the forfeited privilege. This was initially applied only to the government issuing the immunity and hence left a witness exposed to prosecution by another jurisdiction.[26] Later decisions extended the immunity to state and the federal governments where either had granted immunity[27] and to the individual states where another state had granted immunity.[28]

The principal area of controversy involves the scope of immunity which must be recognized to satisfy the constitutional requisite that the immunity must be coextensive with the right. Clearly this is not an absolute standard as there is no right to remain free from loss of reputation or public ridicule.[29] The constitutional nexus lies at a point short of this unprotected loss. In *Garrity v. New Jersey*,[30] police officers had been convicted of criminal acts on the basis of their testimony given before a grand jury.[31] Pursuant to statute,[32] had they failed to testify, they would have lost their jobs. In overturning their convictions, the Supreme Court held that this choice to either forfeit their jobs or incriminate themselves was unconstitutional.[33] The Court saw the choice forced on appellants in *Garrity* as the antithesis of free choice to speak or remain silent as guaranteed by the fifth and fourteenth amendments.

The *Baron* court distinguished *Garrity*[34] because it involved the

---

[24]*E.g.*, Brown v. United States, 359 U.S. 41 (1959); United States v. Murdock, 284 U.S. 141 (1931); Brown v. Walker, 161 U.S. 591 (1896); Counselman v Hitchcock, 142 U.S. 547 (1892).

[25]142 U.S. 547 (1892).

[26]Mills v. Louisiana, 360 U.S. 230 (1959) (per curiam); Knapp v. Schweitzer, 357 U.S. 371 (1958); Feldman v. United States, 322 U.S. 487 (1944); United States v. Murdock, 284 U.S. 141 (1931); Jack v. Kansas, 199 U.S. 372 (1905); Brown v. Walker, 161 U.S. 591 (1896).

[27]Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Malloy v. Hogan, 378 U.S. 1 (1964).

[28]*Id.*

[29]Ullman v. United States, 350 U.S. 422, 432 (1956) (dissenting opinion); Smith v. United States, 337 U.S. 137 (1949); Halpin v. Scotti, 415 Ill. 104, 112 N.E.2d 91 (1953); State v. Rodrigues, 219 La. 217, 52 So. 2d 756 (1951); *In re* Kelly, 200 Pa. 430, 50 A. 248 (1901).

[30]385 U.S. 493 (1967).

[31]*Id.* at 495.

[32]N.J. STAT. ANN. § 2A:81-17.1 (Supp. 1969).

[33]385 U.S. at 500.

[34]"Baron did not testify before the grand jury because of the 'forfeiture rule.' His claimed protection here is the 'immunity statute,' not some benefit or amnesty promised by the 'forfeiture rule.' This distinguishes the instant case from Garrity v. New Jersey...." 228 So. 2d at 283.

"forfeiture"[35] type of statute which made job loss automatic where a public employee refused to testify. In *Baron* there was an "immunity"[36] type of statute which required individuals to testify in return for guaranteed freedom from penalty or forfeiture. It lacks the coercive element the Court found odious in *Garrity*.[37] It is worthy to note, although the Florida court denied it had any effect,[38] that the Miami Civil Service Regulations[39] somewhat embody the *Garrity* situation in that they provide for dismissal should a public employee fail to testify upon request. Had this regulation been invoked in *Baron*, there might have been enough to put the police officer in the "rock and whirlpool"[40] situation which is forbidden in *Garrity*.[41]

The regulation's provision which requires a "waiver of immunity"[42] prior to testimony may unconstitutionally infringe upon an employee's privilege against self-incrimination, but this does not necessarily invalidate the entire regulation.[43] Required testimony related to the employee's job may be permissible if adequate protection is afforded from criminal prosecution based on immunized testimony.[44]

---

[35]A "forfeiture" statute is one that provides that a public employee shall be removed from office if he fails to answer questions put to him by a competent body and relating to his official duties. See N.J. STAT. ANN. § 2A:81-17.1 (Supp. 1969).

[36]An "immunity" statute is one in which a witness is compelled to testify and his answers cannot be used in a subsequent criminal prosecution. By ermoving the possible criminal prosecution, the right against self-incrimination is not violated. *E.g.*, Brown v. Walker, 161 U.S. 591 (1896).

[37]Specifically, the Court stated:

> 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 to remain silent.

385 U.S. at 497.

[38]228 So. 2d at 283.

[39]Civil Service Rules and Regulations of the City of Miami, Rule XVI, §§ 12(a) & (c).

[40]This term is used to describe a situation where a person must choose the lesser of two undersirable choices. In the present context, choice of either cannot be voluntary as it does not possess the elements of a free choice. The term "rock and whirlpool" situation has been used to describe this choice made under duress in numerous previous cases. *E.g.*, Stevens v. Marks, 383 U.S. 234, 243-44 (1966); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593 (1926).

[41]385 U.S. at 496.

[42]Civil Service Rules and Regulations of the City of Miami, Rule XVI, § 12(a).

[43]*E.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1952); Lynch v. United States, 292 U.S. 571 (1934); Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210 (1932). While these cases pertain to severability of statutes, regulations are treated identically. 2 A. SUTHERLAND, STATUTORY CONSTRUCTION §§ 4001-04 (3d ed. F. HORACK 1943).

[44]Note 58 *infra*.

Since Baron did not waive immunity and proceeded to testify pursuant to the immunity statute,[45] the regulation seems not to have played a part in coercing his testimony. While it is true that he would have lost his job pursuant to the regulation had he not testified, he also would have been subject to contempt of the grand jury under the immunity statute, and may have gone to jail in addition to losing his job. The court's disclaimer of the regulation's effect seems to have been justified.

Further consideration was given to administrative penalties in *Spevack v. Klein*,[46] where the Supreme Court decided that an attorney who invoked the fifth amendment could not have this operate to his detriment in a disbarment proceeding.[47] The important distinction is that *Spevack* did not deal with a public employee[48] as did *Garrity*. There was no strong countervailing interest on the part of the public to justify an encroachment on the individual's right.[49] In the concurring opinion it was specifically pointed out that it may be permissible to require public employees to testify regarding their official duties. Although this testimony may be invalid for purposes of criminal prosecution, there are indications that the employee could be dismissed where wrongdoing is divulged.[50]

Other recent Supreme Court cases have suggested that absolute immunity is not required where there is a *use* restriction complete enough to adequately protect the witness.[51] Where *Counselman* was concerned with the extent of privilege, a *use* restriction operates to limit the utility of the testimony. *Murphy v. Waterfront Commission*[52] required states to grant protection from prosecutorial use of the

---

[45]FLA. STAT. ANN. § 932.29 (1944).

[46]385 U.S. 511 (1967).

[47]*Id.* at 517-18.

[48]See Franck, *The Myth of Spevack v. Klein*, 54 A.B.A.J. 970 (1968) for a discussion as to the advisability of denigrating the attorney's position to the point that there is, allegedly, no public interest served by holding him to a "higher than normal" legal standard such as that of a public employee.

[49]385 U.S. at 520 (concurring opinion).

[50]"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." 385 U.S. at 519.

[51]Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Malloy v. Hogan, 378 U.S. 1 (1964). A "use" restriction on immune testimony and its fruits operates to prohibit prosecutors from exploiting the immunized testimony in subsequent criminal cases. It properly puts the onus on the prosecutor to show that the prosecution subsequent to an individual's testimony under an immunity statute is not based on the protected information. This differs from an absolute immunity which could be extended to cover non-prosecutorial aspects of the immunized testimony (*e.g.*, non-criminal aspects involving a penalty or loss of reputation).

[52]378 U.S. 52 (1964).

compelled testimony and its fruits.[53] This position was further buttressed in *Gardner v. Broderick*,[54] which involved a policeman who was discharged for refusal to sign a waiver of his rights against self-incrimination.[55] In that case, the Court stated that answers could be constitutionally compelled, regardless of privilege, if there is immunity from federal and state *use* of the testimony and its fruits in subsequent criminal proceedings.[56] The emergence of a *use* doctrine should not be interpreted as a relaxation of the protection afforded witnesses whose testimony is compelled. Although the information divulged may be in the prosecutor's mind as he accumulates evidence on related crimes, the heavy burden he must bear in showing that a subsequent prosecution did not result from the compelled testimony seems to be enough to adequately protect the witness and ensure that there has been no infringement of his right against self-incrimination.[57]

The essential thrust of *Garrity* and its corollary in *Baron* seems to be that it is permissible to fire a public employee when his wrongdoing comes to light as a result of testifying under an "immunity" statute. However, this dismissal cannot be formally embodied in statutory (and perhaps regulatory) form or it coercively violates the free choice to speak or remain silent.

The right of the individual has been infringed upon in the *Baron* situation but, upon a balancing of interests, it may be that the public's right to question their officials and to insure honest government outweighs this limited incursion into the right to remain silent. Every constitutional right is subject to limitation when it begins to encroach upon the welfare of the citizenry at large.[58] *Garrity* did not come to grips with the question of where an individual's rights must be subjugated in favor of the public interest. The New Jersey court in *In re Addonizio*[59] observed this when it noted that if *Garrity* were taken

---

[53]*Id.* at 79-80.

[54]392 U.S. 273 (1968).

[55]*Id.* at 274.

[56]*Id.* at 276; *see* Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967).

[57]Note, *State Immunity Statutes in Constitutional Perspective*, 1968 DUKE L.J. 311; Note, *Federal Immunity Statutes: Problems and Proposals*, 37 GEO. WASH. L. REV. 1276 (1969); Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959 (1968).

[58]Justice Holmes' famous quote, limiting the right of an individual to speak or to cry fire in a crowded theatre is an example of such limitation. Schenck v. United States, 249 U.S. 47, 52 (1919). *See* Adderly v. Florida, 385 U.S. 39, 40-48 (1966); Cox v. Louisiana, 379 U.S. 559, 574 (1965); Edwards v. South Carolina, 372 U.S. 229, 235-38 (1963).

[59]53 N.J. 107, 248 A.2d 531 (1968).