Hastings Law Journal

Volume 8 | Issue 2 Article 3

1-1957

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COMMENT

CONSTITUTIONAL LAW: DUE PROCESS OF LAW RE-EVALUATED

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On July 5, 1955 the California Supreme Court in *Steinmetz v. California State Board of Education*[1] held that pursuant to section 1028.1 of the Government Code of California, a public employee could be dismissed from his employment for failing to answer certain questions put to him by the governing body of the state or local agency by which he was employed. Specifically, section 1028.1 of the California Government Code, which is part of a statute commonly known as the Luckel Act, provides that it shall be the duty of any public employee, when ordered to do so, to appear before the governing body which has employed him and answer, under oath, questions relating to:

> (a) Present personal advocacy by the employee of the forceful or violent overthrow of the Government of the United States or of any state.
>
> (b) Past knowing membership at any time since September 10, 1948, in any organization which, to the knowledge of such employee, during the time of the employee's membership, advocated the forceful or violent overthrow of the Government of the United States or of any state.
>
> (c) Present knowing membership in any organization now advocating the forceful or violent overthrow of the Government of the United States or of any state.
>
> (d) Questions as to present knowing membership of such employee in the Communist Party or as to past knowing membership in the Communist Party at any time since September 10, 1948.[2]

The section further provides that:

> Any employee who fails or refuses to appear or to answer under oath on any ground whatsoever, any such questions so propounded shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law.[3]

In the *Steinmetz* case, petitioner, Dr. Steinmetz was dismissed from his position as an associate professor at San Diego State College because of his refusal, at a hearing before the State Board of Education, to answer two questions as to whether he was or had been a member of the Communist Party. His petition for writ of mandate to compel his reinstatement was denied by the Supreme Court of California.

The Supreme Court of the United States denied writ of certiorari to Dr. Steinmetz.

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[1] 44 Cal.2d 816, 285 P.2d 617 (1955).

[2] CALIF. GOVT. CODE § 1028.1.

[3] *Ibid.*

Under a New York City municipal charter provision requiring the discharge, without notice or hearing, of a municipal employee utilizing the privilege against self-incrimination in refusing to answer legally authorized inquiries as to his official conduct, a New York City employee, a city college professor, was summarily discharged for his claim of the privilege in refusing, when appearing before a congressional committee investigating matters of national security, to answer questions regarding past Communist Party membership.

Five members of the United States Supreme Court, in *Slochower v. Board of Education of New York*,[4] held that the dismissal of Professor Slochower was improper and that the municipal charter provision as applied to the employee was a denial of due process of law.

The denial of the writ of certiorari by the United States Supreme Court in the *Steinmetz* case leaves to speculation the validity of the California statute in view of the court's decision in the *Slochower* case, a case presenting almost the same fact situation.

The question presents itself as to the reconcilability of the two cases. Were the fact situations so different as to make the action of the governing body of one state a denial of due process of law and the other not such a denial? Or is the California statute, in the light of the *Slochower* case, unconstitutional?

Before these questions can be answered, the basis for the two decisions must be examined to determine whether or not they are in conflict.

In the *Steinmetz* case, the California Supreme Court declared that Steinmetz had refused to answer two questions asked under subdivision (d) of section 1028.1 of the California Government Code, namely:
"(1) Are you knowingly a member of the Communist Party?", and
"(2) Have you at any time since September 10, 1948 knowingly been a member of the Communist Party?"[5] His discharge was based on this refusal.

The court further declared that in considering section 1028.1 as a whole, it shows on its face that the Legislature, in using the words "knowing membership" was referring to a person's knowledge of his membership rather than to his knowledge of the character of the organization.

The court upheld the validity of section 1028.1 by declaring that statutes such as the one involved here, which merely compel disclosure of information concerning a public employee's membership in proscribed organizations, must be distinguished from those which provide discharge or disqualification because of membership or refusal to take an oath denying membership. Under the latter type of statute, the United States Supreme Court has held that a knowledge of the character of the organization is essential,[6] and the legislation has been sustained only when it expressly or

[4] 350 U.S. 551 (1956).
[5] 44 Cal.2d at 821, 285 P.2d at 620.
[6] Wieman v. Updegraff, 344 U.S. 183 (1952).

impliedly required such knowledge.[7] On the other hand, where the statutes provide merely for the disclosure of information, a requirement that the employee have knowledge of the nature of the organization is not necessary.[8]

The California Supreme Court also pointed out that Steinmetz's refusal to answer was not based upon a claim of the privilege against self-incrimination under the Fifth Amendment of the Federal Constitution or section 13 of Article I of the State Constitution, and that therefore he was precluded from relying on these constitutional provisions on appeal. The court observed further that:

> "A person may properly be required to disclose information relevant to fitness and loyalty as a reasonable condition for obtaining or retaining public employment, even though the disclosure, under some circumstances, may amount to self-incrimination."[9]

As authority, the court cited *Garner v. Board of Public Works*[10] and *Adler v. Board of Education*.[11] This seems to infer that even if Steinmetz had availed himself of the privilege, the court would have sustained his discharge.

Thus, it seems that the California Supreme Court upheld Steinmetz's dismissal on the grounds that he failed to answer certain designated questions and accordingly must be dismissed pursuant to section 1028.1 of the Government Code, that the Legislature had the authority in the public interest to pass such legislation, and that the constitutional privilege against self-incrimination was not relevant inasmuch as it was not claimed by Dr. Steinmetz.

In comparison, the Supreme Court of the United States, in the *Slochower* case, held that the summary dismissal of Slochower violated due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Section 903 of the Charter of the City of New York provides that whenever an employee of the city utilizes the privilege against self-incrimination to avoid answering a question relating to his official conduct, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.

Slochower invoked the privilege against self-incrimination under the Fifth Amendment before an investigating committee of the United States Senate, and was summarily discharged from his position as associate professor at Brooklyn College, an institution maintained by the City of New York.

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[7] Adler v. Board of Education, 342 U.S. 485, 494 (1952); Garner v. Board of Public Works, 341 U.S. 716, 723–24 (1951).

[8] 342 U.S. at 492–93; 341 U.S. at 719–20.

[9] 44 Cal.2d at 824, 285 P.2d at 621.

[10] 341 U.S. at 719–20.

[11] 342 U.S. at 492–93.

The United States Supreme Court, in holding that the mere claim of privilege under the Fifth Amendment does not provide a reasonable basis for the state to terminate an employee's employment, declared that to state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authority.[12]

The opinion then went on to reiterate the United States Supreme Court's position in the *Garner*[13] and *Adler*[14] cases to the effect that the city had power to discharge employees who refused to file an affidavit disclosing certain information to the proper authorities as to fitness for public employment.

> "But," said the court, "in each of these cases it was emphasized that the state must conform to the requisites of due process."[15]

The court further states that *Wieman v. Updegraff*[16] rests squarely on the proposition that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.[17] In the *Wieman* case the United States Supreme Court held unconstitutional a state statute which required state employees to take an oath, as a condition of employment, regarding, inter alia, their membership in or affiliation with certain proscribed organizations.

The decision in the *Slochower* case then expounds minutely on the history, purpose, and meaning of the privilege against self-incrimination, and declares that the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment must be condemned.[18]

The opinion also states that since no *inference of guilt* was possible from the claim before the federal committee, the discharge falls of its own weight as wholly without support:

> "There has not been the protection of the individual from arbitrary action which Mr. Justice Cardozo[19] characterized as the very essence of due process."[20]

At first glance one might be prone to say that the fact situations in the two cases are different, and that therefore the decisions are reconcilable. The basis of this conclusion would be the fact that in the *Steinmetz* case, Dr. Steinmetz failed to invoke his constitutional privilege against self-

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[12] 350 U.S. at 453.
[13] Garner v. Board of Public Works, 341 U.S. 716 (1951).
[14] Adler v. Board of Education, 342 U.S. 485 (1952).
[15] 350 U.S. at 454.
[16] 344 U.S. 183 (1952).
[17] *Id.* at 192.
[18] 350 U.S. at 454.
[19] The court here was citing Cardozo, J. and Ohio Bell Tele. Co. v. Public Utilities Com., 301 U.S. 292 (1937).
[20] 350 U.S. at 455.

incrimination, whereas in the *Slochower* case, the invocation of the privilege by Professor Slochower was the very issue involved.

This, of course, is factually true, but in the last analysis it is of little consequence, because the California statute calls for dismissal if the enumerated questions are not answered because of refusal on *any ground*. It appears from the California Supreme Court's language that even if Dr. Steinmetz had invoked the privilege he could have been discharged, for the court specifically says that:

> "A person may properly be required to disclose information relevant to fitness and loyalty as a reasonable condition for obtaining or retaining public employment, even though the disclosure, under certain circumstances, may amount to self-incrimination."[21]

This being dicta, it does not embody the resolution or determination of the court and in no way binds the court. Also, the procedure in reference to constitutional law prevents the court from considering a constitutional question that is not raised at the earliest possible moment[22] and also prevents the court from passing on the constitutionality of legislation in a friendly non-adversary proceeding and from anticipating a question of constitutional law in advance of the necessity for deciding it.[23] This prevented the California Supreme Court from actually determining the legal effect of a state employee invoking the privilege against self-incrimination, because Dr. Steinmetz did not in fact invoke the privilege.

This writer, not being restrained by these limitations, can question the constitutionality of the California statute from any possible avenue of attack. Indulging in this allowed speculation, it seems that the California Supreme Court's comment that a public employee may be properly required to disclose information relevant to fitness for public employment even though it may amount to self-incrimination, implies that even if Dr. Steinmetz had claimed the privilege against self-incrimination, he could have been dismissed, and although there was no evidence of wrong doing on his part, a sinister meaning would have been imputed from the exercise of his constitutional right. Such inference being expressly held a denial of due process in the *Slochower* case, it would seem that section 1028.1 of the California Government Code would be unconstitutional in this type of fact situation. Because of this, the writer does not hesitate to state that if the question of the invocation of the privilege against self-incrimination in a case involving section 1028.1 was properly presented before the California Supreme Court, the court would have no alternative, in the light of the *Slochower* case, but to hold the statute unconstitutional.

The foregoing would seem to indicate that the *Steinmetz* and *Slochower* cases are reconcilable, but the writer is far from ready to concede this and

[21] 44 Cal.2d at 824, 285 P.2d at 621.
[22] Herndon v. Georgia, 295 U.S. 441 (1935); Bryant v. Zimmerman, 278 U.S. 63 (1928).
[23] Ashwander v. T.V.A., 297 U.S. 288 (1936).

would like to carry his speculation one step further and propose that even under its present facts, the *Steinmetz* case works a denial of due process of law as set out in the *Slochower* case.

Dr. Steinmetz was discharged because he was found to have refused to answer two questions put to him pursuant to section 1028.1 of the California Government Code. In other words, Dr. Steinmetz chose to remain *silent* when certain questions were asked him. It has been held that the right to free speech includes the right to remain silent.[24] It would seem that under the California statute if a person refused to answer at all, he must be discharged from his position. But if he is discharged, isn't an inference of guilt or wrongdoing being drawn from his exercise of a constitutional right resulting in a denial of due process of law because there has not been the protection of the individual from arbitrary action by the state as the United States Supreme Court in the *Slochower* case says is necessary? Again it would seem that the California statute should have been declared unconstitutional.

It might be said that while it is true that a person may not be forced to incriminate himself or expound his political beliefs, when it comes to public employment he must choose between the exercise of a constitutional right and public employment, as he has no "right" as such to public employment. That a person has no "right" to public employment is true as the United States Supreme Court pointed out in the *Wieman* case, but the court also pointed out in that case that although a state has broad powers in the selection and discharge of its employees, and public employment is a privilege and not a right, even a privilege cannot be denied arbitrarily.

The basic question, it seems, is: What is arbitrary action by the state constituting a denial of due process of law? A long line of United States Supreme Court decisions has resulted in what could be said to be a formula for the determination of the answer to this question.

Generally, the first inquiry is whether the end sought to be accomplished is valid under the state or federal power involved.[25] In the *Steinmetz* case the end sought was to protect the state from the harmful consequences of Communist infiltration into state agencies and bodies. Hence, the end was a legitimate one, as from time immemorial a sovereign has had an inherent right to protect itself.[26]

The next step is, that assuming a valid end, are the means sought to accomplish this end reasonable and appropriate? In determining the reasonable of the means, such factors as the conditions existing prior to the legislation, the effectiveness of the statute to improve the conditions, and the deprivation of individual rights resulting from the legislation must be taken into consideration.[27] This last factor requires a balancing of individual

[24] Wieman v. Updegraff, 344 U.S. 183 (1952).

[25] Nebbia v. State of N.Y., 291 U.S. 502 (1934).

[26] Wieman v. Updegraff, 344 U.S. 183 (1952).

[27] Leggett Co. v. Boldridge, 278 U.S. 105 (1928); Burns Baking Co. v. Bryon, 264 U.S. 504 (1924); Smith v. Texas, 233 U.S. 630 (1914).

rights against the public benefits to be derived from the legislation.[28] It is at this point that a great difference of opinion has arisen. At one extreme we have those who would sacrifice individual rights as to life, liberty, and protection of property guaranteed by the United States Constitution so long as the safety of the State is preserved; while at the other extreme we have those who would let the State be damned so long as the individual is allowed to exercise his constitutional rights without restraint. It has been the United States Supreme Court's task to try to find the happy and just medium.

From the decision in the *Slochower* case holding the statute in question to be unconstitutional, it appears that the United States Supreme Court would hold the means adopted by the California Legislature to be unreasonable on the grounds that the deprivation of the individual's rights guaranteed by the United States Constitution is far greater than any public benefit to be derived from the legislation. The inference of guilt or wrong-doing which results from the exercise of a constitutional right is too great a price to pay for the alleged protection the California statute affords, especially in the light of the non-sensitive nature of the employment that the statute covers.[29] If the employment involved was of a highly sensitive nature, involved security or defense, it may be that the pendulum would swing in favor of submerging individual rights in favor of the public benefit to be derived, namely, the safety of the State.

Apply the same formula to the *Slochower* case: It appears that the end sought was a valid one also, to-wit: the protection of the state from those unfit to hold public employment. But here also the means to accomplish the end do not pass the test of reasonableness, as the legislation in question specifically calls for dismissal on the exercise of a constitutional right, namely, the exercise of the privilege against self-incrimination. This is so in light of the fact that the court held that the sinister meaning which the statute infers from the exercise of a constitutional right is far outweighed by the benefit to be derived by the public, so that the legislation must be held invalid as being a denial of due process of law.

It seems that the United States Supreme Court is aware of the fact that the country was founded on individual liberty and that it cannot be saved in the long run by submerging individual rights in the quest for absolute safety for the State.[30]

As for Dr. Steinmetz, he is in the unfortunate position of an individual who has had his constitutional rights infringed, but who has no recourse for redress. The United States Supreme Court in choosing the *Slochower* case to decide the issue presented by both cases, has left Steinmetz without a means to right the *"wrong"* committed against him in the light of the fact that he was discharged under a statute that ultimately must be declared unconstitutional.

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[28] Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Weaner v. Palmer Bros. Co., 270 U.S. 402 (1926).

[29] Peters v. Hobby, 349 U.S. 331 (1956).

[30] GRISWOLD, THE FIFTH AMENDMENT TODAY (1955).