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94 S.Ct. 316
Supreme Court of the United States

Louis J. LEFKOWITZ, Attorney
General of New York, et al., Appellants,
v.
M. Russell TURLEY et al.

No. 72—331.
|
Argued Oct. 10, 1973.
|
Decided Nov. 19, 1973.

Synopsis

Action was brought by licensed architects seeking declaration of unconstitutionality of New York statutes precluding award of government contract to any person who fails to waive immunity or answer questions when called to testify concerning his contract with the state or any of its subdivisions. A three-judge District Court, 342 F.Supp. 544, declared the statutes unconstitutional under the Fourteenth and Fifth Amendments, and the state appealed. The Supreme Court, Mr. Justice White, held that statutes were unconstitutional as violative of privilege against compelled self-incrimination, that waiver sought by state, under threat of loss of contracts, would have been no less compelled than a direct request for the testimony without resort to waiver device and that under a proper accommodation between the interests of the state and the Fifth Amendment the state can require employees or public contractors to respond to inquiries but only if it offers them immunity sufficient to supplant their Fifth Amendment privilege.

Affirmed.

Mr. Justice Brennan filed separate qualifying opinion in which Mr. Justice Douglas and Mr. Justice Marshall joined.

Procedural Posture(s): On Appeal.

West Headnotes (16)

[1] **Criminal Law**
Compelling Self-Incrimination

New York statutes requiring insertion in government contracts of clause providing that on refusal of a person to testify before a grand jury, to answer any relevant questions or to waive immunity against subsequent criminal prosecution such person shall be disqualified for five years from contracting with the government and that any existing contract may be cancelled without penalty are unconstitutional as violative of privilege against compelled self-incrimination; state's legitimate interest in maintaining the integrity of its civil service and of its transactions with independent contractors, like other state concerns, can not override the requirements of the Fifth Amendment. General Municipal Law N.Y. §§ 103–a, 103–b; Public Authorities Law N.Y. §§ 2601, 2602; U.S.C.A.Const. Amend. 5.

184 Cases that cite this headnote

[2] **Witnesses**
Proceedings to which privilege applies

Fifth Amendment privilege against compelled self-incrimination not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. U.S.C.A.Const. Amend. 5.

521 Cases that cite this headnote

[3] **Witnesses**
Constitutional and statutory provisions

Object of Fifth Amendment privilege against compelled self-incrimination was to insure that a

person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself has committed a crime. U.S.C.A.Const. Amend. 5.

44 Cases that cite this headnote

[4] Criminal Law
Compelling Self-Incrimination

Witnesses
Proceedings to which privilege applies

Be it in a statutory inquiry or a criminal prosecution a witness protected by constitutional privilege against compelled self-incrimination may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant; absent such protection, if he is nevertheless compelled to answer, his questions are inadmissible against him in a later criminal prosecution. U.S.C.A.Const. Amend. 5.

198 Cases that cite this headnote

[5] Witnesses
Grand jury investigation

Fifth Amendment privilege against compelled self-incrimination is available to witnesses called before grand jury. U.S.C.A.Const. Amend. 5.

58 Cases that cite this headnote

[6] Witnesses
Grand jury investigation

Constitutional privilege against compelled self-incrimination was available to licensed architects, who were summoned to testify before grand jury investigating various charges of conspiracy, bribery, and larceny. U.S.C.A.Const. Amend. 5.

9 Cases that cite this headnote

[7] Witnesses
Sufficiency of statutory protection

Price for incriminating answers from third-party witnesses is sufficient immunity to satisfy imperatives of Fifth Amendment privilege against compelled self-incrimination. U.S.C.A.Const. Amend. 5.

17 Cases that cite this headnote

[8] Witnesses
Effect of Statutory Protection of Witness from Use of Evidence Against Himself

Immunity is required if there is to be rational accommodation between imparatives of constitutional privilege against compelled self-incrimination and the legitimate demands of government to compell citizens to testify. U.S.C.A.Const. Amend. 5.

8 Cases that cite this headnote

[9] Witnesses
Waiver of Privilege

Where waiver of constitutional privilege against compelled self-incrimination is secured under threat of substantial economic sanction, such waiver cannot be termed voluntary. U.S.C.A.Const. Amend. 5.

15 Cases that cite this headnote

[10] Criminal Law
Compelling Self-Incrimination

Fact that a state employee may be entirely dependent on public employment for his livelihood while an independent contractor may not depend entirely on transactions with the state for his livelihood is a distinction without a difference as regards determination whether waiver of contractor's privilege of self-incrimination under threat of loss of contracts and without any grant of immunity is any less compelled than a direct request for the testimony without resort to the waiver device; there is no difference in constitutional magnitude between

threat of a job loss to an employee of the state and a threat of loss of public contracts to a contractor. General Municipal Law N.Y. §§ 103–a, 103–b; Public Authorized Law N.Y. §§ 2601, 2602; U.S.C.A.Const. Amend. 5.

34 Cases that cite this headnote

[11] Witnesses

Self-Incrimination

A significant infringement of constitutional rights, such as right against compelled self-incrimination, cannot be justified by the speculative ability of those affected to cover the damage. U.S.C.A.Const. Amend. 5.

3 Cases that cite this headnote

[12] Criminal Law

Compelling Self-Incrimination

Although due regard for the Fifth Amendment privilege against compelled self-incrimination forbids a state to compel incriminating answers from its employees and public contractors that may be used against them in criminal proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use; the accommodation between the interest of the state and the Fifth Amendment requires that the state have means at its disposal to secure testimony if immunity is supplied and testimony is still refused. U.S.C.A.Const. Amend. 5.

85 Cases that cite this headnote

[13] Witnesses

Punishment of disobedience to subpoena as contempt

A court may compel testimony, after a grant of immunity, by use of civil contempt and coerced imprisonment. U.S.C.A.Const. Amend. 5.

5 Cases that cite this headnote

[14] Public Contracts

Validity and Sufficiency of Contract

States

Validity and sufficiency of contracts

Given adequate immunity, the state may insist that employees either answer questions under oath about the performance of their job or suffer loss of employment; by like token, the state may insist that public contractors either respond to relevant inquiries about the performance of their contracts or suffer cancellation of current relationship and disqualifications from contracting with public agencies for an appropriate time in the future. U.S.C.A.Const. Amend. 5.

18 Cases that cite this headnote

[15] Criminal Law

Compelling Self-Incrimination

A state may not insist that public employees or government contractors waive their Fifth Amendment privilege against compelled self-incrimination and consent to use of the fruits of the interrogation in any later proceedings brought against them. U.S.C.A.Const. Amend. 5.

49 Cases that cite this headnote

[16] Criminal Law

Compelling Self-Incrimination

Answers elicited from public employees or government contractors on threat of loss of employment or government contracts and without grant of immunity from future use of compelled answers in criminal proceedings are inadmissible in evidence. U.S.C.A.Const. Amend. 5.

87 Cases that cite this headnote

West Codenotes

Held Unconstitutional

McKinney's General Municipal Law §§ 103-a, 103-b

***70** ****318** Syllabus [*]

New York statutes require public contracts to provide that if a contractor refuses to waive immunity or to testify concerning his state contracts, his existing contracts may be canceled and he shall be disqualified from further transactions with the State for five years, and further require disqualification from contracting with public authorities upon a person's failure to waive immunity or answer questions respecting his state transactions. Appellees, New York-licensed architects, when summoned to testify before a grand jury investigating various criminal charges, refused to sign waivers of immunity, ****319** whereupon various contracting authorities were notified of appellees' conduct and had their attention called to the applicable disqualification statutes. Appellees thereafter brought this action challenging the statutes as violative of their constitutional privilege against compelled self-incrimination. A three-judge District Court declared the statutes unconstitutional under the Fourteenth and Fifth Amendments. Held:

1. The Fifth Amendment privilege against self-incrimination is not inapplicable simply because the issue arises in the context of official inquiries into the job performance of a public contractor. The ordinary rule is that the privilege is available to witnesses called before a grand jury as these appellees were, and the State's legitimate interest in maintaining the integrity of its civil service and of its transactions with independent contractors, like other state concerns, cannot override the requirements of the Fifth Amendment. Pp. 322—323.

2. The State could not compel testimony that had not been immunized and the waiver sought by the State, under threat of loss of contracts, would have been no less compelled than a direct request for the testimony without resort to the waiver device, Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562; Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082; Uniformed Sanitation Men Assn., Inc., et al. v. Sanitation Comm'r, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089, and there is no constitutional distinction in terms of compulsion between the threat of job loss in those cases and the threat of contract loss to a contractor. Pp. 323—326.

***71** 3. Under a proper accommodation between the interest of the State and the Fifth Amendment, the State can require employees or contractors to respond to inquiries, but only if it offers them immunity sufficient to supplant their Fifth Amendment privilege. Kastigar v. United States, 406 U.S. 411, 92 S.Ct. 1653, 32 L.Ed.2d 212. Pp. 325—326.

342 F.Supp. 544, affirmed.

Attorneys and Law Firms

Brenda Soloff. New York City, for appellants.

Richard O. Robinson, Buffalo, N.Y., for appellees.

Opinion

Mr. Justice WHITE delivered the opinion of the Court.

New York General Municipal Law ss 103—a and 103—b, McKinney's Consol.Laws, c. 24, and New York Public Authorities Law ss 2601 and 2602, McKinney's Consol.Laws, c. 43—A, require public contracts to provide that if a contractor refuses to waive immunity or to answer questions when called to testify concerning his contracts with the State or any of its subdivisions, his existing contracts may be canceled and he shall be disqualified from further transactions with the State for five years.[1] In ****321** addition to ***72** specifying these contract terms, the statutes require disqualification from contracting with public authorities upon failure of any person to waive immunity or to ***73** answer questions with respect to his transactions with the State or its subdivisions. The issue in this case is whether these sections are consistent with the Fourteenth ***74** Amendment insofar as it makes applicable to the States the Fifth Amendment privilege against compelled self-incrimination.

***75** I

[1] Appellees are two architects licensed by the State of New York. They were summoned to testify before a grand jury investigating various charges of conspiracy,

***76** bribery, and larceny. They were asked, but refused, to sign waivers of immunity, the effect of which would have been to waive their right not to be compelled in a criminal case to be a witness against themselves. They were then excused and the District ****322** Attorney, as directed by law, notified various contracting authorities of appellees' conduct and called attention to the applicable disqualification statutes. Appellees thereupon brought this action alleging that their existing contracts and future contracting privileges were threatened and asserted that the pertinent statutory provisions were violative of the constitutional privilege against compelled self-incrimination. A three-judge District Court was convened and declared the four statutory provisions at issue unconstitutional under the Fourteenth and Fifth Amendments, 342 F.Supp. 544 (WDNY 1972). We noted probable jurisdiction, 410 U.S. 924, 93 S.Ct. 1353, 35 L.Ed.2d 585 (1973). The State appealed pursuant to 28 U.S.C. s 1253. We affirmed the judgment of the District Court.

***77** II

[2] **[3]** **[4]** The Fifth Amendment provides that no person 'shall be compelled in any criminal case to be a witness against himself.' The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. McCarthy v. Arndstein, 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924), squarely held that

> '(t)he privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.'

In this respect, McCarthy v. Arndstein reflected the settled view in this Court. The object of the Amendment 'was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.' Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110 (1892). See also Bram v. United States, 168 U.S. 532, 542—543, 18 S.Ct. 183, 186—187, 42 L.Ed. 568 (1897); Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896); Boyd v. United States, 116 U.S. 616, 634, 637—638, 6 S.Ct. 524, 534, 536—537, 29 L.Ed. 746 (1886); United States v. Saline Bank, 1 Pet. 100, 7 L.Ed. 69 (1828). This is the rule that is now applicable to the States. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 635 (1964). 'It must be considered irrelevant that the petitioner was a witness in a statutory inquiry and not a defendant in a criminal prosecution, for it has long been settled that the privilege protects witnesses in similar federal inquiries.' ***78** Id., at 11, 84 S.Ct., at 1495. In any of these contexts, therefore, a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution. Bram v. United States, supra; Boyd v. United States, supra.

[5] **[6]** Against this background, there is no room for urging that the Fifth Amendment privilege is inapplicable simply because the issue arises, as it does here, in the context of official inquiries into the job performance of a public contractor. Surely, the ordinary rule is that the privilege is available to witnesses called before grand juries as these appellee architects were. Hale v. Henkel, 201 U.S. 43, 66, 26 S.Ct. 370, 375, 50 L.Ed. 652 (1906).

It is true that the State has a strong, legitimate interest in maintaining the integrity of its civil service and of its

transactions with independent contractors furnishing a wide range of goods **323 and services; and New York would have it that this interest is sufficiently strong to override the privilege. The suggestion is that the State should be able to interrogate employees and contractors about their job performance without regard to the Fifth Amendment to discharge those who refuse to answer or to waive the privilege by waiving the immunity to which they would otherwise be entitled, and to use any incriminating answers obtained in subsequent criminal prosecutions. But claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well.

[7] In McCarthy v. Arndstein, supra, the United States insisted that because of the strong public interest in marshaling and distributing assets of bankrupts, the *79 Fifth Amendment should not protect a bankrupt during the official examinations mandated by the Bankruptcy Act. That position did not prevail. The bankrupt's testimony could be had, but only if he were afforded sufficient immunity to supplant the privilege. And long before McCarthy v. Arndstein, the Court recognized that without the compelled testimony of knowledgeable and perhaps implicated witnesses, the enforcement of the transportation laws 'would become impossible,' but nevertheless proceeded on a basis that witnesses must be granted adequate immunity if their evidence was to be compelled. Brown v. Walker, 161 U.S., at 610, 16 S.Ct., at 651. Similarly, the enforcement of the antitrust laws against private corporations was at stake in Hale v. Henkel, supra, but immunity was essential to command the testimony of individual witnesses. Also, it would be difficult to overestimate the importance of the interest of the States in the enforcement of their ordinary criminal laws; but the price for incriminating answers from third-party witnesses is sufficient immunity to satisfy the imperatives of the Fifth Amendment privilege against compelled self-incrimination. Finally, in almost the very context here involved, this Court has only recently held that employees of the State do not forfeit their constitutional privilege and that they may be compelled to respond to questions about the performance of their duties but only if their answers cannot be used against them in subsequent criminal prosecutions. Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968); Uniformed Sanitation Men Assn., Inc., et al. v. Sanitation Comm'r, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968).

III

In Garrity v. New Jersey, certain police officers were summoned to an inquiry being conducted by the Attorney General concerning the fixing of traffic tickets. *80 They were asked questions following warnings that if they did not answer they would be removed from office and that anything they said might be used against them in any criminal proceeding. No immunity of any kind was offered or available under state law. The questions were answered and the answers later used over their objections, in their prosecutions for conspiracy. The Court 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.' 385 U.S., at 500, 87 S.Ct. at 620. The Court also held that in the context of threats of removal from office the act of responding to interrogation was not voluntary and was not an effective waiver of the privilege against self-incrimination, the Court conceding, however, that there might be other situations 'where one who is anxious to make a clean breast of the whole affair volunteers the information.' Id., at 499, 87 S.Ct. at 619.

The issue in Gardner v. Broderick, supra, was whether the State might discharge a police officer who, after he was **324 summoned before a grand jury to testify about the performance of his official duties and was advised of his right against compulsory self-incrimination, then refused to waive that right as requested by the State. Conceding that appellant could be discharged for refusing to answer questions about the performance of his official duties, if not required to waive immunity, the Court held that the officer could not be terminated, as he was, for refusing to waive his constitutional privilege. Although under Garrity any waiver executed may have been invalid and any answers elicited inadmissible in evidence, the State did not purport to recognize as much and instead *81 attempted to coerce a waiver on the penalty of loss of employment. The '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 securing an accounting of his

performance of his public trust.' 392 U.S., at 279, 88 S.Ct., at 1916. Hence, the State's statutory provision requiring his dismissal for his refusal to waive immunity could not stand.

The companion case, Sanitation Men v. Sanitation Comm'r, supra, was to the same effect. Here again, public employees were officially interrogated and advised that refusal to answer and sign waivers of immunity would lead to dismissal. Here again, the Court held that the State presented the employees with 'a choice between surrendering their constitutional rights or their jobs,' 392 U.S., at 284, 88 S.Ct., at 1920, although clearly they would '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.' Id., at 285, 88 S.Ct., at 1920.

[8] These cases, and their predecessors, ultimately rest on a reconciliation of the well-recognized policies behind the privilege of self-incrimination, Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678 (1964), and the need of the State, as well as the Federal Government, to obtain information 'to assure the effective functioning of government,' id., at 93, 84 S.Ct., at 1611 (White, J., concurring). Immunity is required if there is to be 'rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify.' Kastigar v. United States, 406 U.S., at 446, 92 S.Ct., at 1657. It is in this sense that immunity ***82** statutes have 'become part of out constitutional fabric.' Ullmann v. United States, 350 U.S. 422, 438, 76 S.Ct. 497, 506, 100 L.Ed. 511 (1956). [2]

[9] We agree with the District Court that Garrity, Gardner, and Sanitation Men control the issue now before us. The State sought to interrogate appellees about their transactions with the ****325** State and to require them to furnish possibly incriminating testimony by demanding that they waive their immunity and by disqualifying them as public contractors when they refused. It seems to us that the State intended to accomplish what Garrity specifically prohibited—to compel testimony that had not been immunized. The waiver sought by the State, under threat of loss of contracts, would have been no less compelled than a direct request for the testimony without resort to the waiver device. A waiver secured under threat of substantial economic sanction cannot be ***83** termed voluntary. As already noted, Garrity specifically rejected the claim of an effective waiver when the policemen in that case, in the face of possible discharge, proceeded to answer the questions put to them. 385 U.S., at 498, 87 S.Ct., at 619. The same holding is implicit in both Gardner and Sanitation Men.

[10] The State nevertheless asserts that whatever may be true of state employees, a different rule is applicable to public contractors such as architects. Because independent contractors may not depend entirely on transactions with the State for their livelihood, it is suggested that disqualification from contracting with official agencies for a period of five years is neither compulsion within the meaning of the Fifth Amendment nor a forbidden penalty for refusing to answer questions put to them about their job performance. But we agree with the District Court that 'the plaintiffs' disqualification from public contracting for five years as a penalty for asserting a constitutional privilege is violative of their Fifth Amendment rights.' 342 F.Supp., at 549. We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor. [3]

[11] If the argument is that the cost to a contractor is small in comparison to the cost to an employee of losing his job, the premise must be that it is harder for a state employee to find employment in the private sector, than it is for an architect. An architect lives off his contracting fees as surely as a state employee lives off his salary, and fees and salaries may be equally hard to come by in the private sector after sanctions have been taken by ***84** the State. In some sense the plight of the architect may be worse, for under the New York statutes it may be that any firm that employs him thereafter will also be subject to contract cancellation and disqualification. [4] A significant infringement of constitutional rights cannot be justified by the speculative ability of those affected to cover the damage.

IV

[12] **[13]** **[14]** **[15]** **[16]** We should make clear, however, what we have said before. Although due regard for the Fifth Amendment forbids the State to compel

incriminating answers from its employees and contractors that may be used against them in criminal proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use. Kastigar v. United States, supra. Furthermore, the accommodation between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused. This is recognized by the power of the courts to compel testimony, after a grant of immunity, by use of civil contempt and coerced imprisonment. Shillitani v. United States, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966). Also, given adequate immunity, ****326** the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment. By like token, the State may insist that the architects involved in this case either respond to relevant inquiries about the performance of their contracts or suffer cancellation of current relationships and disqualification from contracting with public agencies for an appropriate time in the future. But the State may not insist that appellees ***85** waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them. Rather, the State must recognize what our cases hold: that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence. Hence, if answers are to be required in such circumstances States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity.

Affirmed.

Lefkowitz v. Turley, 414 U.S. 70 (1973)

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Lefkowitz v. Turley, 414 U.S. 70 (1973)

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