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In the

Supreme Court of the United States

LOUIS J. LEFKOWITZ, ET AL.,)

Appellants,)

v.)

M. RUSSELL TURLEY, ET AL.,)

Appellees.)

No. 72-331

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SUPREME COURT, U. S.

Washington D. C.

October 10, 1973

Pages 1 thru 22

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IN THE SUPREME COURT OF THE UNITED STATES

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LOUIS J. LEPKOWITZ, ET AL., :

Appellants, :

v. :

No. 72-331

M. RUSSELL TURLEY, ET AL., :

Appellees. :

-----:
Washington, D. C.
Wednesday, October 10, 1973

The above-entitled matter came on for argument
at 10:34 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BRENDA SOLOFF, ESQ., Assistant Attorney General of
New York, New York City; for the Appellants

RICHARD O. ROBINSON, ESQ., 606 Liberty Bank Building,
Buffalo, New York 14202; for the Appellees.

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* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-331, Lefkowitz v. Turley.

Miss Soloff, you may proceed whenever you are ready.

ORAL ARGUMENT OF BRENDA SOLOFF, ESQ.,

ON BEHALF OF THE APPELLANTS

MISS SOLOFF: Thank you. Mr. Chief Justice and may it please the Court:

At issue in this case is the ability of the state, in this case New York, and its subdivisions, here Erie County, to provide themselves with some reliable assurance that in committing public funds to independent contractors, the contractors will deal with them openly and candidly when information is sought about those contracts.

Two related sets of New York statutes were struck down by the District Court. The first, which is New York's general municipal law, section 103(a), is an example, requires each public contract to contain a provision that if a person who is called before a grand jury or other agency which is authorized to subpoena and swear witnesses, if such a person is called to testify in an investigation concerning a public contract and he refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning that contract or transaction, then that person and any business organization of which he is a member or

officer shall be disqualified from public contracting for five years and his existing contracts may be cancelled. That is the first set of statutes involved.

The second group of statutes struck down below, and which New York municipal law, section 103(b) is an example, is directed at already completed contracts and transactions, and establishes a five-year disqualification from future contracting for a similar refusal to cooperate under similar circumstances.

Both of these statutes and related statutes which are similar in other sections of New York law were struck down by the District Court.

The two appellees in this case are licensed architects and members of a partnership which, according to the complaint, had various contracts with Erie County. The only one of these contracts which is specifically mentioned in the complaint concerns the construction of a domed stadium in Erie County, similar to the Astrodome in Houston.

In answering the complaint in the District Court, the Erie County Attorney admitted the existence of various contracts and of the stadium contract. This is the only information in the record about contracts between appellees and any public agency in New York.

On February 8, 1971, while under public contract, the two appellees and another member of the partnership were

subpoenaed to testify before an Erie County Grand Jury respecting transactions and contracts that they had with the county. All three were presented with waivers of immunity which they were asked to sign. All three refused. The third member of the partnership then was granted immunity and testified. The other two did not and did not testify.

The appropriate authorities were informed of the refusals and the instant action followed in the United States District Court for the Western District of New York. Claiming that they had in the passed and wished in the future to contract with the state and its agencies, the appellees claimed that the statutes violated their privilege against self-incrimination.

A three-judge District Court, in what must be regarded as an over-extension of the decisions of this Court in *Gardner v. Broderick*, and its companion cases, agreed, and the statutes were enjoined.

However, in seeking to protect the public interest, the state has not acted unreasonably toward its contractors. The state and the businessmen enter not only into a business arrangement but into something of a social contract as well. The state begins with a premise that public money must be well and carefully spent. Neither cost nor quality must be tainted by graft, bribery, the use of inferior materials, or any other unseen impermissible factor.

Q Is that the same statute that government employees -- that the taxpayers are going to get their honest performance of their labor in return for the compensation paid for them, isn't it?

MISS SOLOFF: That's right, Your Honor.

Q So why is this different from the Gardner case?

MISS SOLOFF: This is different from the Gardner case in a number of respects. A contractor, when he enters into a contract, understands at the beginning what is expected of him. He hasn't committed his life, his career, his ability to earn a living to this contract. He is seeking profit from an episodic source. He knows at the time that he enters it, enters the contract, that this kind of information will be required of him.

Q I wonder if the New York City policemen in Gardner knew about section 1123 of the New York City Charter. Does that appear in the case?

MISS SOLOFF: It does not appear in the case, Your Honor. Section 1123 of the City Charter is undoubtedly a harder thing to find. That is one thing that can be said about it. Beyond that, contractors typically enter into contracts with attorneys. They have typically knowledge, they have the advice of counsel at the time they enter contracts, and the contract itself is for a limited span of time. A policeman doesn't consider perhaps every possible ramification of his

employment at the time he takes that Civil Service examination, doesn't have the advice of counsel, typically, and the section 1123 was very different from the statutes that we have in this case.

The statutes in this case request information concerning any transaction or contract. Section 1123 of the City Charter talks about any kind of activity in city government -- much broader than the scope of the duties of a policeman. It involves local elections, it involves any aspect of city government which might possibly occur to an investigating agency. It isn't limited to the scope of the employment of the policeman.

Q But in each case, each basic situation is that the contractor in the one case and the employee in the other case, when called before a grand jury, must waive his immunity? Correct?

MISS SOLOFF: He either waives -- the agreement that he makes is either to -- that the contractor makes, I think that there is a much closer question as to whether the public employee makes such an agreement. The agreement he makes is not to waive immunity. The agreement he makes is that if he does not waive immunity, then certain economic consequences will follow.

Q i.e. termination.

MISS SOLOFF: i.e. termination.

Q Suspension of the contractor for a period of

years; termination of the policeman --

MISS SOLOFF: That's right.

Q -- from his employment.

MISS SOLOFF: That's right, termination of this particular contract is discretionary, and disqualification for a limited period of time. The consequences to a contractor are far less devastating than they are, of course, to an employee.

Q Then do I understand you correctly that this case, the question in this case is whether a contractor is sufficiently different from an employee, so that the rule of the Gardner case does not apply? Is that really what it comes down to?

MISS SOLOFF: I think that is what it comes down to, Your Honor, although I think that the Court need not reach the issue of reconsideration of the Gardner principle itself --

Q Otherwise, we would have to reach the Gardner principle, the Gardner constitutional principle, would we not?

MISS SOLOFF: Yes, Your Honor, I think that is perfectly correct.

Q All right.

MISS SOLOFF: But that the consequences of what happens to a contractor have to be considered from the point of view -- at the point in view of what he bargained for, what was it that he bargained for at the time he went into the contract, what was his understanding. I think one thing that is perfectly

clear is that the interests of the state are both urgent and vital in the public contractor and in the public employee situation.

It is also clear that a contractor has a higher obligation than the ordinary citizen to provide information with respect at least to the relationship which he has with the state. If he is unwilling to provide the information, then the relationship should not continue.

So that the businessman understands when he goes after a contract and in which he is seeking to make the substantial amount of money, but before that money and even perhaps public safety will be committed to him, he must be willing to accept certain preventive measures and to cooperate in any necessary detection of wrongdoing. Because typically in a situation involving contracts, detection of wrongdoing will be difficult.

So that he enters into the special relationship with the state and he agrees that notwithstanding any possible consequences, should the time come he will be open and honest, even if it means that evidence will be used against him and that he will be brought to justice.

Obviously, a principal benefit of this understanding is prevention. Corruption may well be nipped in the bud. The public not only is protected, but it has some sense of confidence that the contractors can be called to account, that the

execution of contracts is an open book, and that the public is not being had.

Q The agreement in the contract is in the form of a waiver of immunity?

MISS SOLOFF: The statute provides that the contract should contain a clause that in the event the contractor refuses to waive immunity with respect to transactions or contracts had with the state, or to answer relevant questions respecting the contracts, then the economic consequences follow.

Q So if he refuses to sign a contract with that condition in it, then he is not going to get the contract?

MISS SOLOFF: That is correct.

Q So there is a condition or barrier to doing business with the state which amounts to a waiver of immunity?

MISS SOLOFF: No, I don't think that that --

Q Well, eventually it will amount to that, because he can't get the next contract if he breaches that provision.

MISS SOLOFF: At the time that he enters the contract, he is under no impermissible coercion to take that contract. He is after something --

Q That's right.

MISS SOLOFF: -- the state is after something. Yes, he can at that point take it or not take it. But there is no -- this kind of hard choice is not unknown and is not --

Q Unless he is going to waive immunity, he can't

get more than one contract?

MISS SOLOFF: That's right, unless he is going to --

Q So sooner or later it amounts to a -- he either waives immunity or he doesn't do business with the state.

MISS SOLOFF: He either agrees that should it become necessary he will waive immunity or he will not for a limited period of time be able to do business with the state.

Q When a business does enough business with the state or perhaps when he is informed enough and you can expect him to have advice of counsel and what not, you should sustain a state's insistence upon a waiver in advance? Let's don't quibble about whether it is or isn't -- you say it isn't, I look at it as sooner or later an enforced waiver. You just say that a contract ought to uphold an advance waiver by a well enough informed person.

MISS SOLOFF: Where the interests are so severe on the part of the public, where the contractor is well enough informed, where -- I'm sorry, where the consequences are not the devastating kind of consequences which occur to a public employee, then the balance -- and this is always a question of balancing -- shifts back toward the interest of the public in being able to know what has happened with its money and being able somehow to prevent corruption, to have an extra tool in preventing corruption in cases where public interest is so vitally concerned.

Q Well, you can't concede, can you, that there was a violation of the provision of the Fifth Amendment that has been held to be incorporated in the 14th, and then say last we should just overlook it in the interests of the taxpayers of the State of New York, that is hardly -- you can't concede a violation, can you?

MISS SOLOFF: I don't concede a violation.

Q And just to balance that out, in the interests of the taxpayers?

MISS SOLOFF: No, no. I'm sorry if I even gave that impression. What I am saying is that the balancing process which takes place in determining whether or not --

Q There was a violation.

MISS SOLOFF: -- there was a violation, is what is at stake here, because the question really is are you compelling testimony by impermissible means.

Q Will this be a question of immunity or waiver? If there is a waiver, there is no violation.

MISS SOLOFF: But the validity of the waiver depends on whether or not it is impermissibly compelled.

Q Was there anything in the written contract that referred to this?

MISS SOLOFF: There is nothing in the record which indicates one way or the other. There is an allegation in a memorandum of law filed by the appellees after the pleadings

were filed that this was not in this particular contract. I have since read the contract and the clause is not in the contract. It is not in the Erie County contract. I don't know about other contracts.

Q So you are simply relying on the presumption of knowledge of the law on the part of everybody, plus the fact that this was presumably a sophisticated contractor with good legal advice?

MISS SOLOFF: I am relying on that, as well as the fact that I have never heard a claim in the pleadings that he didn't know what the consequences were.

Q My question is, is there any real dispute about this at all?

MISS SOLOFF: I don't believe so.

Q About what?

MISS SOLOFF: About whether or not the contractor actually knew that he was subject to termination and disqualification for failure to waive immunity. And the answer as far as I can derive it from the record is he was under no such -- he was not ignorant of the fact; notwithstanding the fact that the clause was not in the contract, the complaint below attacked the contract clause statute and the District Court struck it down.

Q Now, is there -- I asked you before -- what is it, section 1123 of the New York City Charter that was involved

in the Gardner case, there is no indication in that opinion, I just read it, as to knowledge on the part of the policeman. Do we know the chronology, if that was part of the city charter at the time that policeman got his job?

MISS SOLOFF: We don't know that chronology.

Q That would be the same case that you have, wouldn't it?

MISS SOLOFF: Yes. I don't --

Q On this issue.

MISS SOLOFF: I don't know the chronology in Gardner, Mr. Justice Stewart.

Q But if that were a similar predecessor provision a part of the city charter at the time the policeman in Gardner got his job, that would be the same situation as it is here, with no indication that he did not know about it.

MISS SOLOFF: I think that we may have here, there may be some failure in the pleadings, but I think that in common sense terms we have to assume it is much more likely that the contractor in this case knew the ramifications of the law than that the policeman in Gardner found section 1123 of the city charter.

Q It has been my impression that employees generally know the deal about the --

MISS SOLOFF: And also, as I have said, the kind of consequence which attaches in Gardner and the kind of scope --

Q Well, that is something else. That is a different part of it.

MISS SOLOFF: -- is very, very, very different from it here, much different from that.

Q Miss Soloff, suppose as a condition to getting the contract, along the lines that Mr. Justice White was discussing with you, the state presented the contractor, the would be contractor with half a dozen standard forms of waiver of immunity with the title of the grand jury and the date and all that left in blank, but just got these waivers signed in blank. Would you think that would pass muster?

MISS SOLOFF: No, I wouldn't, Your Honor.

Q How do you distinguish that from -- Justice White was suggesting that this was a de facto waiver of immunity.

MISS SOLOFF: Because what would bother me there is the scope of what is --

Q Yes, but if there is a blank waiver set in it covering only things having to do with his contracts with the state.

MISS SOLOFF: My reaction to that would be that we have to have involved here a genuine investigation, an on-going investigation into specific transactions and contracts being had with the state, and should that come to pass, then the contractor is requested either to waive immunity or to forego,

to cancel the special relationship that he has with the state for a period of five years.

Q So this is a -- the state is really taking a less severe approach than perhaps it could, it doesn't insist on a waiver but it might. It says really we don't insist that you waive in advance and appear before the grand jury and have your statements used against you, you can choose not to have your statements used against you at a later date, but the cost to you is you can't do any more business with us for a while.

MISS SOLOFF: But you can choose at a time when you haven't committed materials, you haven't committed your firm, you haven't committed yourself to a course of action involving that contract. At the time you make that choice, you are still a free agent, you haven't obligated yourself in any way, you haven't gone out and hired people to build the stadium, you haven't brought in subcontractors, you haven't done a number of things which would increase perhaps the pressure to sign a waiver. What you have done is, you have said I really want that contract, I will be open and honest, there is no problem whatsoever, I will sign. And then at the time when the provision is sought to be enforced, when there is a real problem, you say no, you balk. And the consequences, not specific enforcement of a waiver of immunity, but the promise has been broken and the business relationship is severed, just as the original understanding provided. But he did not testify and he

did not waive immunity.

Q Are you putting this in the same category as the contractor that used 80 percent of the cement instead of 81 percent?

MISS SOLOFF: I'm sorry, Mr. Justice Marshall.

Q The contractor uses 81 percent of the cement instead of 85 percent of the cement, so he is punished for it. Isn't that true?

MISS SOLOFF: I don't know --

Q Well, in this stadium, if he has got maybe -- if he doesn't live up to the specifications that he agrees to build the stadium, he is punished by the state court.

MISS SOLOFF: He has broken the contract.

Q So you put this in the same category.

MISS SOLOFF: No, I think this goes to a different thing and is --

Q Like what? You said that he breaks the contract, he knows all he is doing and he makes the contract and then he breaks it and therefore he severs. I think there is a difference.

MISS SOLOFF: The difference lies in the scope of the public interest that you are protecting here. You are investigating in this situation criminal violations as well as break of contract. The real crux of the matter I think is coming down to why do we want a waiver of immunity, why not

grant immunity and get the candor that we are seeking. And I think that the answer to that comes down to the fact that it is not really that we are seeking to prosecute so much as the state, when it undertakes an investigation like this, is not willing at the outset to give up the possibility of prosecution because not enough is known about what is involved in the investigation. Immunity is not something lightly given or easily given, and it should not be, where here you have what I think the courts have acknowledged to be a higher obligation on the part of a contractor than on the part of an ordinary citizen. This willingness, this prestated willingness to give information without the possibility of immunity is a part of that higher obligation, otherwise you very much return to -- if you give immunity, then you are placing the contractor in the position of the ordinary citizen.

Q Miss Soloff, is there any legislative history on this state legislation indicating the kinds of evils to which you have addressed? Is it bribing public officials to award contracts, or is it substandard performance by contractors, or both or something else?

MISS SOLOFF: It is basically corruption, problems involving corruption, Mr. Justice Stewart. In our brief, at page 9 essentially, there is a statement by Governor Rockefeller stating what the legislation grew out of, and it was the problems that grand juries were having in getting information

relating to public contracts. And the Governor said --

Q It doesn't really explain very much.

MISS SOLOFF: There is another statement in the same volume which I did not set out in the brief dealing more specifically with the fact that in the Laino case, United States ex rel. Laino v. Warden, which is cited in our brief, there is a reference to the memorandum respecting the fact that the grand jury was having a lot of trouble getting information about public contractors.

Q Really it says there it would be appropriate to pass this legislation.

MISS SOLOFF: Yes. In the Laino case, as I said, Mr. Justice Stewart, there is I believe a quotation, a further quotation dealing with the fact that what is at issue is the fact that grand juries simply have been blocked in getting information.

Q So in the Gardner case you remember that language undertook to distinguish between the refusal to sign a waiver of immunity and the refusal to answer very specific questions relating to the performance of duties or contracts. Would the State of New York in your view not have adequate protection if this architect were called before the grand jury, asked the specific questions which the Gardner case purported to save, if that is still good law?

MISS SOLOFF: That is not really -- well, it is not

so easy to call somebody before the grand jury in New York or any place else, Mr. Justice Burger. What happens -- what happened, the state of the law of immunity at the time this case arose, it was forbidden to call a target of an investigation or a potential target of an investigation before a grand jury. If somehow -- without a waiver of immunity -- if somehow he were called, he received automatic use immunity.

Q This is under New York law?

MISS SOLOFF: This is under former New York law.

This was New York law at the time that this case arose. Should he testify and claim the privilege against self-incrimination, question by question, as New York law then required, he would receive transactional immunity. That is, without calling -- he could not be put into the grand jury either without a waiver of immunity or without immunity itself. Today the law is somewhat changed, although the impact is no different. Today New York gives automatic transactional immunity, and it has abandoned the target rule. That is, it gives automatic immunity before the grand jury.

Q To whom?

MISS SOLOFF: To any witness called before the grand jury.

Q Any witness called before the grand jury?

MISS SOLOFF: I believe so.

Q Even though he doesn't even claim the privilege?

MISS SOLOFF: That's right, he no longer need claim the privilege in New York under the new criminal procedure law.

Q That is extraordinary.

Q Does that affect the importance of this case then?

MISS SOLOFF: Well, the waiver -- the question -- there is a serious question of the scope of immunity being sought in this case. It was not explored by the District Court. Abatement was not raised as an argument. But the statute, of course, speaks about waiving immunity with respect to any transactions had with the state. It would be possible, of course, to waive transactional immunity which would occur in being called before the grand jury, or which could under the time that this contract was entered into, could have been claimed. It is possible to waive transactional immunity and still obtain use immunity, if that is not waived. We all know what New York would do with a case like this at this point.

There is a case in the New York Court of Appeals called *People v. Avant*, which has been pending decision now for some time. That is cited in our brief. The third department in the State of New York rejected a contractor claim basically on the sort of argument which we are presenting today, on the public interest involved and the fact that the contractor is essentially changing his mind. That case is still pending before the New York Court of Appeals. There is --

Q Well, that will turn on New York law, won't it?

MISS SOLOFF: It may or it may turn on this case, depending on which is decided first.

Q Why wouldn't New York be satisfied with a rule that said that surely the state may question a contractor about his performance of a contract and vindicate its own interest in either terminating the contract or finding out what is going on, but that his answers may not be used against him in a criminal prosecution?

MISS SOLOFF: Because the contractor does have, as I said, this higher obligation that -- corruption cases are very difficult to prove without personally from a principal --

Q So you are asserting that you want to be free to use his answers in the criminal prosecution?

MISS SOLOFF: If it comes to that. What we are really saying is we don't know when we question him whether or not we are going to want to conduct a criminal prosecution, and that we don't want to give it away at this stage, we don't want to be placed in the position of having granted immunity to a principal figure in a very serious case.

Q Yes, but you also said that certain New York law is such that even if he waived immunity, you might still not be able to use his answers against him in a criminal prosecution.

MISS SOLOFF: If he waives immunity --

Q This would cover both use, would it?

MISS SOLOFF: It is a question which I cannot answer because I don't know what the New York courts would say. And if I may point out one further thing in connection with that question, the New York Court of Appeals decision in Gardner v. Broderick, which was reversed by this Court, specifically said -- it was a post-Garrity case, and it specifically said the waiver of immunity in this case after Garrity means that the evidence cannot be used in a criminal prosecution. This Court nevertheless held that that evidence was being sought for criminal prosecution, and I really don't know whether Gardner in the New York Court of Appeals is still the law of New York.

Q Well, this Court held in Gardner that he was being penalized for asserting a constitutional right, i.e., for refusing to waive immunity. That is what Gardner held.

MISS SOLOFF: Yes, but there was also the additional statement.

Q I did not join in the opinion so I may not be an authority as to what it held.

Q Miss Soloff, does New York have any statutory authority for interrogating contractors under oath about the performance of their contracts other than the grand jury?

MISS SOLOFF: This very statute refers also to heads of state agencies, heads of city agencies, and other, any agency which is empowered to swear witnesses and to -- to

subpoena and to swear witnesses. So there are other agencies. They do not give automatic transactional immunity, they are still under the old procedure.

Q You are not satisfied with utilizing that device and being able to question the contractor about the performance of his contract with the understanding that those answers would not be used in a criminal prosecution, you are not satisfied with that? You want to be able to use those answers perhaps?

MISS SOLOFF: Use immunity raises some of the same problems of being unable to prosecute, of being -- of having the public spectacle of --

Q But you are not satisfied with that?

MISS SOLOFF: Yes, I am not.

Q You are not trying to uphold the validity of the law that the New York Legislature passed, and maybe you might be satisfied with it but the New York Legislature has passed a different law, and that is the law involved here.

MISS SOLOFF: Well, the statute is much more carefully limited and any questions that go beyond the scope of the contracts would not be --

Q Well, underlying that position is that you can't really get to the bottom of what has happened unless you can get the information from the contractor himself?

MISS SOLOFF: That is correct. That is correct.

Q That is basically it, isn't it?

MISS SOLOFF: Yes. That is correct.

MR. CHIEF JUSTICE BURGER: Mr. Robinson.

ORAL ARGUMENT OF RICHARD O. ROBINSON, ESQ.,

ON BEHALF OF APPELLEES

MR. ROBINSON: May it please the Court --

Q Mr. Robinson, while the subject is fresh in your mind, as I am sure it is, from listening to the colloquy, I wonder if you would suggest what difference there is between that provision in the Gardner opinion of this Court, which the subject was all right to penalize policemen or someone else for exercising his constitutional privilege under the Fifth Amendment, but it wasn't all right, it wasn't constitutional to require someone who waived that in advance.

MR. ROBINSON: Your Honor, I cannot find any distinction. In fact, if anything, I think in the Gardner case, the statute in the proceeding which was involved was more restrictive and more related to the specific employment of the police officer. Now, that section 1123 stated at that time, if any councilman or other officer or employee of the city shall, after lawful notice of process, willfully refuse to appear before any court or judge or any legislative committee or body authorized to conduct such hearing or inquiry, or having appeared, shall refuse to testify or answer any questions regarding the property, government or affairs of the city or of any county included within its territorial limits -- so that in Gardner the law was

even more restrictive and more limited than it is under section 103-a and -b, of the general municipal law, section 2601.

Q I understand one paragraph in the Gardner case in which the court said that the appellant, the policeman had refused to answer questions specifically directed narrowly relating to the performance of his official duties without being required to waive immunity in advance, then the privilege against self-incrimination would not have been a bar to his dismissal. But still if that is the law and not just a view of a collateral question, it would mean that the policeman is penalized for exercising his constitutional right, isn't it?

MR. ROBINSON: There is no argument with that, Your Honor.

Q It says "without being required to waive his immunity." Of course, if he was granted immunity, then of course he could be asked any questions, a policeman or a bricklayer or a judge or anybody else, if he has been granted immunity, then he has no more constitutional privilege.

Q Under this paragraph, as still the law, he can still be penalized by being fired, however. I am simply saying that there are two different kinds of penalties, one of which the court said is all right to direct against the policeman, and the other is not.

MR. ROBINSON: I assume that to be the gist of the concurring opinion of Judge --

Q In the one case he is immune from criminal prosecutions for the conduct or whatever happens, but in the other case he can be fired from his job, so that there are just two different kinds of penalties directed at the same exercise of a similar constitutional privilege. Isn't that true?

MR. ROBINSON: Yes. And as I started to say, I assume that to be the gist of the concurring opinion of Mr. Justice Harlan and Mr. Justice Stewart in the Gardner case. They had dissented in the Spevak and the Garrity cases, and then --

Q We seized on this paragraph for whatever it was worth.

MR. ROBINSON: They seized on it and it may have in effect overruled Spevak in the process. But the Court also states that that was not necessarily in a criminal proceeding. I would like to point out to the Court that in this particular case, a grand jury had been empaneled and the two architects here were presented with waivers of immunity which stated that "I have been advised by District Attorney John J. Honan that the Grand Jury of the County of Erie, now in session, is investigating charges of Conspiracy...Bribery...Larceny...and other matters of every nature whatsoever appertaining thereto. I am further advised that such charge and investigation may involve me." So that they were directly there made targets of the investigation.

I should like to point out in regard to the previous remarks made in the argument that the law of the State of New York at the time of these proceedings was stated in *People v. Steuding* -- it is not cited in the brief, it is S-t-e-u-d-i-n-g -- at 6 New York 2d 214, where the Court of Appeals held that by virtue of the Constitution of the State of New York, a prospective defendant or one who was a target of an investigation might not be called or examined before a grand jury, and if he was his constitutionally conferred privilege against self-incrimination was deemed violated even though he did not claim or assert the privilege. Now, that was incorporated in Article 50 of the criminal procedure law.

So at the time this proceeding arose the targets, the architects, the appellees here, were presented with a waiver directing them to give up all constitutional rights which they had at the time and compelling them, attempting to compel them to testify against themselves obviously in a criminal proceeding.

Q Well, what is your explanation for why a contractor, a responsible contractor shouldn't be bound by his agreement in advance that if he refuses to answer questions about his contract, that he can't do any more business with the city for a period of time?

MR. ROBINSON: Well, first of all, there was no such provision in the contract. The state statute says that --

Q Are you suggesting that the contractor didn't know about it?

MR. ROBINSON: I am not suggesting there, Your Honor, that --

Q Let's assume he did.

MR. ROBINSON: I think we have to assume he did.

Q All right, you assume he did, and why shouldn't he be bound by that agreement that he must terminate business relations with the state unless he refuses to answer questions?

MR. ROBINSON: First of all, Your Honor, he made no such agreement. There was no such agreement.

Q Well, he signed the contract with the state, and the state law said that if you do that, there are certain consequences.

MR. ROBINSON: The state law says that every contract shall contain such a provision, it does not state that every contract shall be deemed to contain such a provision, whether or not it is written into it. There is nothing in any of the briefs or arguments that --

Q Well, let's don't be technical. For purposes of this question, let's assume that it had the provision in it that said precisely what the law says.

MR. ROBINSON: All right. Well, assuming that to be true, I think we have to fall back on the loyalty oath case, this is the Slochower case, the Weiman v. Updegraff case, to

the effect that the state cannot require a public employee to waive his constitutional rights as a condition of public employment.

My argument here, the argument of the --

Q That is what you have to get to?

MR. ROBINSON: Yes. The argument of the --

Q And the reason is?

MR. ROBINSON: The argument of the appellees is that this statute is overbroad. We don't argue that the government might have less rights than any ordinary employer to inquire into the conditions of the contract, to inquire into relevant matters concerning the contract. What we argue here is that this goes well beyond that and in effect permits the government to employ its full powers of subpoena and reprobation to inquire into matters not necessarily related to the contract.

Q I thought overbreadth was a doctrine in the First Amendment area. Is your client asserting some sort of First Amendment right here?

MR. ROBINSON: It is usually asserted in the First Amendment area, however, I think in the last term in the case of *Brooks v. Tennessee* it was asserted -- I believe that was under the -- that was in the Fifth Amendment area. I believe that was an overbreadth case. I believe also that the recent decision concerning the rights of aliens to public employment would be in the overbreadth area. That is, there has to be

some reasonable relationship of a limiting statute, a government statute limiting constitutional rights.

Q You mean a narrowly drawn statute which required a waiver in advance of your rights or waiver of your -- of whatever it is you object to here; a narrowly drawn one, you wouldn't see any problem with in terms of the contractor?

MR. ROBINSON: Well, I would see a problem with it, but I do not believe it is an issue in this case. It's simply not an issue in this case. The issue in this case was very clearly stated by the lower court in that the statute goes well beyond limiting the limitations under constitutional rights to narrowly confined areas concerning the employment.

Q And even if the questions that the state wanted to ask in this case were the right kinds of questions, the statute might authorize other kinds of questions and therefore was invalid on its face?

MR. ROBINSON: That is absolutely correct.

Q Is that your argument?

MR. ROBINSON: That is our position.

Q That really is a straight overbreadth argument?

MR. ROBINSON: That is absolutely correct. And I believe that that is the gist of the Gardner and Uniformed Sanitation Men's cases, that the statutes went above and beyond narrowly confined limitations relating to the employment.

The only other issue presented in this --

Q My understanding indicated what is the difference between penalizing the man after the event and the threat of criminal prosecution. What is the constitutional distinction? I am well aware that one is a civil economic remedy, dismissal from employment, and the other is exposure to criminal prosecution. But they are both coercive in terms of the exercise of a constitutional right, are they not?

MR. ROBINSON: Your Honor, I cannot distinguish between a prior restriction and a restriction imposed subsequent to the commencement of a contract.

Q In other words, you would think what the court said in Gardner was probably doubtful --

MR. ROBINSON: Yes.

Q -- doubtful constitutional law?

MR. ROBINSON: Yes.

Q Well, that clears it up.

MR. ROBINSON: The only other point raised was the quantitative and qualitative one as to whether the threat of loss of contracting privileges by a public contractor is somehow less of a penalty than a direct employee of the government. All I can say is in that, as I pointed out in my brief, I can see no qualitative or quantitative difference between the firing of a laborer on a garbage truck who can go out and secure other laboring employment in the public sector, and the

termination of a contractor, or an architect's contract and restriction upon him for five years in future contracting.

If there are no other questions, I thank you.

MR. CHIEF JUSTICE BURGER: Very well. I think your time is all used up, Miss Soloff. Thank you very much. The case is submitted.

[Whereupon, at 11:19 o'clock a.m., the case was submitted.]

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