The Burger Court Opinion Writing Database

Hazelwood School District v. United States

433 U.S. 299 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 25 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-260

Louis J. Lefkowitz, Attorney General of the State of New York, Appellant, *v.* Patrick J. Cunningham et al.

On Appeal from the United States District Court for the Southern District of New York.

[May —, 1977]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This appeal presents the question whether a political party officer can be removed from his position by the State of New York and barred for five years from holding any other party or public office, because he has refused to waive his constitutional privilege against compelled self-incrimination.

(1)

Under § 22 of the New York Election Law,[1] an officer of a political party may be subpoenaed by a grand jury or other

[1] "If any party officer shall, after lawful notice of process, wilfully refuse or fail to appear before any court or judge, grand jury, legislative committee, officer, board or body authorized to conduct any hearing or inquiry concerning the conduct of his party office or the performance of his duties, or having appeared, shall refuse to testify or answer any relevant question, or shall refuse to sign a waiver of immunity against subsequent criminal prosecution, his term or tenure of office shall terminate, such office shall be vacant and he shall be disqualified from holding any party or public office for a period of five years." New York Election Law § 22.

New York Election Law § 2 (9) defines a party officer as "one who holds any party position or any party office whether by election, appointment or otherwise."

J

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 31, 1977

Re: 76-260 - Lefkowitz v. Cunningham

Dear Potter:

Thank you for your note. I am quite willing to amend the final sentence in the last full paragraph of the opinion to read as follows:

> "Once proper use immunity is granted, the State may use its contempt powers to compel testimony concerning the conduct of public office, without forfeiting the opportunity to prosecute the witness on the basis of evidence derived from other sources."

I have also numbered the final substantive paragraph on page 7, to facilitate Bill Brennan's identifying his position.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 2 1977

3,6-7,8

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-260

Louis J. Lefkowitz, Attorney General of the State of New York, Appellant, *v.* Patrick J. Cunningham et al. | On Appeal from the United States District Court for the Southern District of New York.

[May —, 1977]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

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(1)

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New York Election Law § 2 (9) defines a party officer as "one who holds any party position or any party office whether by election, appointment or otherwise."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 25, 1977

RE: No. 76-260 Lefkowitz v. Cunningham

Dear Chief:

I can join all of your opinion in the above except the first full paragraph on page 7. I would appreciate it if you would number this paragraph separately, because I would like to address it with the following:

Mr. Justice Brennan, concurring in part.

I join the Court's judgment, for the reasons stated in Parts (1), (2) and (3) of its opinion. I cannot, however, join Part (4), because I continue to believe that "the Fifth Amendment privilege against self-incrimination requires that any jurisdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony." Piccirillo v. New York, 400 U.S. 548, 562 (1971)(Brennan, J., dissenting). See also Kastigar v. United States, 406 U.S. 441, 462 (1972) (Douglas, J., dissenting); id. at 467 (Marshall, J., dissenting). Moreover, even on the Court's assumption that a lesser immunity is sufficient to satisfy the requirements of the Fifth Amendment, I question the propriety of the Court's suggestion that the New York legislature's decision to grant additional protection to the Fifth Amendment rights of grand jury witnesses was somehow contrary to the State's best interests.

Sincerely,

The Chief Justice

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 5/26/77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-260

Louis J. Lefkowitz, Attorney General of the State of New York, Appellant, *v.* Patrick J. Cunningham et al. | On Appeal from the United States District Court for the Southern District of New York.

[May —, 1977]

MR. JUSTICE BRENNAN, concurring in part.

I join the Court's judgment, for the reasons stated in Parts (1), (2) and (3) of its opinion. I cannot, however, join Part (4), because I continue to believe that "the Fifth Amendment privilege against self-incrimination requires that any jurisdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony." *Piccirillo* v. *New York*, 400 U. S. 548, 562 (1971) (BRENNAN, J., dissenting). See also *Kastigar* v. *United States*, 406 U. S. 441, 462 (1972) (Douglas, J., dissenting); *id.*, at 467 (MARSHALL, J., dissenting). Moreover, even on the Court's assumption that a lesser immunity is sufficient to satisfy the requirements of the Fifth Amendment, I question the propriety of the Court's suggestion that the New York Legislature's decision to grant additional protection to the Fifth Amendment rights of grand jury witnesses was somehow contrary to the State's best interests.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 6/3/77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-260

Louis J. Lefkowitz, Attorney General of the State of New York, Appellant, *v.* Patrick J. Cunningham et al. | On Appeal from the United States District Court for the Southern District of New York.

[May —, 1977]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in part.

I join the Court's judgment, for the reasons stated in Parts (1), (2) and (3) of its opinion. I cannot, however, join Part (4), because I continue to believe that "the Fifth Amendment privilege against self-incrimination requires that any jurisdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony." *Piccirillo* v. *New York*, 400 U. S. 548, 562 (1971) (BRENNAN, J., dissenting). See also *Kastigar* v. *United States*, 406 U. S. 441, 462 (1972) (Douglas, J., dissenting); *id.*, at 467 (MARSHALL, J., dissenting). Moreover, even on the Court's assumption that a lesser immunity is sufficient to satisfy the requirements of the Fifth Amendment, I question the propriety of the Court's suggestion that the New York Legislature's decision to grant additional protection to the Fifth Amendment rights of grand jury witnesses was somehow contrary to the State's best interests.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

October 14, 1976

Re: No. 76-260, Lefkowitz v. Cunningham

Dear John,

Please add my name to your dissenting opinion in this case.

Sincerely yours,

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 25, 1977

Re: No. 76-260, Lefkowitz v. Cunningham

Dear Chief,

I agree generally with your opinion. You point out in the last paragraph, quite properly in my view, that the Constitution does not require New York to grant transactional immunity. I would also point out in the same paragraph that the Constitution does not require New York to follow the practice described in the second paragraph of footnote 3 in your opinion. New York could require a witness to assert his Fifth Amendment privilege in refusing to answer a specific question, and could refrain from granting him immunity until the validity of his refusal is upheld.

Finally, the final sentence of the last full paragraph of the opinion seems to me somewhat misleading. I would strike the phrase at the end of that sentence -- "for any corruption thus revealed." and either end the sentence with the word "witness" or add after that word language along the following lines: "on the basis of evidence from other sources."

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 2, 1977

Re: No. 76-260, Lefkowitz v. Cunningham

Dear Chief,

I am glad to join your opinion for the Court in this case, as recirculated today.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 25, 1977

Re: No. 76-260 - Lefkowitz v. Cunningham

Dear Chief:

Please join me.

Sincerely,

Byron

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 1, 1977

Re: No. 76-260 - Lefkowitz v. Cunningham

Dear Bill:

Please join me in your concurring opinion.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1977

Re: No. 76-260 - Lefkowitz v. Cunningham

Dear Chief:

Please join me.

I am sympathetic with Potter's comments in his letter of May 25 to you.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 25, 1977

No. 76-260 Lefkowitz v. Cunningham

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 14, 1976

Re: No. 76-260 - Lefkowitz v. Cunningham

Dear John:

Please join me in your dissenting opinion.

Sincerely,

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 25, 1977

Re: No. 76-260 - Lefkowitz v. Cunningham

Dear Chief:

Please show me as not participating in the consideration or decision of this case.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: 10/14/76

Recirculated: _____

Joined by Stewart Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK *v.* PATRICK J. CUNNINGHAM ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 76-260. Decided October —, 1976

MR. JUSTICE STEVENS, dissenting.

If a member of the Cabinet should refuse to waive his privilege against self-incrimination, the President could surely remove him from office. If the Executive has such power, it would seem equally clear that the Legislature may prescribe a similar waiver as a condition of holding an office whose occupant has a duty to inspire as well as to perform. Rules which have evolved to protect the rights of government workers whose jobs are not fundamentally different from positions in the private sector are not automatically applicable to policymaking officials of government.* The Court has not yet decided whether the rationale of a case such as *Uniformed Sanitation Men* v. *Sanitation Comm'r*, 392 U. S., 280, is applicable to policymaking officials, or, if not, whether the chairman of the state central committee of a major political party is such an official. Because I think those issues are worthy of this Court's attention, I would note probable jurisdiction and set this case for argument.

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*Cf. *Elrod* v. *Burns*, — U. S. —, slip op., at 19–20 (June 28, 1976); *Sugarman* v. *Dougall*, 413 U. S. 634, at 642–643; *United Public Workers* v. *Mitchell*, 330 U. S. 75, at 122 (Douglas, J., dissenting); *Indiana State Employees Assn., Inc.* v. *Negley*, 501 F. 2d 1239 (CA7 1974); *Mow Sun Wong* v. *Hampton*, 500 F. 2d 1031, at 1040 (CA9 1974), aff'd, *Hampton* v. *Mow Sun Wong*, — U. S. —, see slip op., at 7 (June 1, 1976); *Leonard* v. *Douglas*, 116 U. S. App. D. C. 136, 321 F. 2d 749 (1963).

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: MAY 31 '77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-260

Louis J. Lefkowitz, Attorney General of the State of New York, Appellant, *v.* Patrick J. Cunningham et al. | On Appeal from the United States District Court for the Southern District of New York.

[May —, 1977]

MR. JUSTICE STEVENS, dissenting.

The First Amendment protects the individual's right to speak and to believe in accordance with the dictates of his own conscience. But if he believes in peace at any price and speaks out against a strong military, the President may decide not to nominate him for the office of Secretary of Defense. If he already occupies a comparable policymaking office, the President may remove him as a result of his exercise of First Amendment rights. The fact that the Constitution protects the exercise of the right does not mean that it also protects the speaker's "right" to hold high public office.[1]

The Fifth Amendment protects the individual's right to remain silent. The central purpose of the privilege against compulsory self-incrimination is to avoid unfair criminal trials. It is an expression of our conviction that the defend-

[1] It is often incorrectly assumed that whenever an individual right is sufficiently important to receive constitutional protection, that protection implicitly guarantees that the exercise of the right shall be cost free. Nothing could be further from the truth. The right to representation by counsel of one's choice, for example, may require the defendant in a criminal case to pay a staggering price to employ the lawyer he selects. Insistence on a jury trial may increase the cost of defense. The right to send one's children to a private school, *Meyer* v. *Nebraska*, 262 U. S. 390, may be exercised only by one prepared to pay the associated tuition cost.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1977

Re: 76-260 - Lefkowitz v. Cunningham

Dear Chief:

As an addition to n. 11 of my dissent, I am adding the following:

"Respondent's removal from a statutorily recognized state political office does not deprive him of his right to associate for political reasons, see ante, at 6-7. The impact on this right is surely no more significant than the impact of the statute on his privilege against compulsory self-incrimination. For § 22 leaves respondent free to participate in Democratic Party political activities in all the capacities recognized as protected by our right to associate cases.

"Nor does this case present the question whether the imposition of the five-year ban on holding state office contained in § 22 may be invalid as a penalty."

When I talked to you yesterday, I thought I had already sent this around and just realized that I had not.

Respectfully,

The Chief Justice

Copies to the Conference

pp. 3, 5-6

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

2nd DRAFT

Recirculated: JUN 9 '77

SUPREME COURT OF THE UNITED STATES

No. 76-260

Louis J. Lefkowitz, Attorney General of the State of New York, Appellant, *v.* Patrick J. Cunningham et al. } On Appeal from the United States District Court for the Southern District of New York.

[June —, 1977]

MR. JUSTICE STEVENS, dissenting.

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