NOTES

CONSTITUTIONAL LAW—DUE PROCESS—CONDITIONING INDIGENT'S DISCHARGE IN BANKRUPTCY UPON PAYMENT OF FILING FEES HELD CONSTITUTIONAL

In *United States v. Kras*,[1] the United States Supreme Court held that the requirement of a $50 filing fee for a discharge in voluntary bankruptcy does not deny an indigent of his rights to equal protection and due process of law, as there is no constitutional right to obtain a discharge of one's debts in bankruptcy. Furthermore, the right to a discharge in bankruptcy is not a "fundamental right" demanding a compelling governmental interest as a precondition to regulation, but in the case of a filing fee in bankruptcy, only a rational basis for the requirement exists.

Robert William Kras presented his voluntary petition in bankruptcy to the United States District Court for the Eastern District of New York. His petition was accompanied by a motion for leave to file and proceed in bankruptcy without payment of the filing fees as a condition precedent to discharge. Kras included an affidavit to support his motion, showing his impoverished condition.[2] Kras was adjudged bankrupt but discharge was withheld due to nonpayment of the required filing fees.

Kras challenged the fees on due process grounds.[3] Upon receiving notice of the constitutional issues in the district court, the government moved to intervene as of right.[4] Leave to intervene was granted. The district court held the fee to be unconstitutional as applied to Kras,[5] and the government appealed to the Supreme Court.

Generally, the in forma pauperis statutes enacted by the federal govern-

1. 409 U.S. 434 (1973).

2. The affidavit showed that Kras, along with his wife, two children, (one of whom suffers from cystic fibrosis), mother, and mother's daughter, reside in a two and one-half room apartment. He has been unemployed since 1969, at which time he was dismissed from his regular employment with Metropolitan Life Insurance Company, when premiums he had collected were stolen from his home and he was unable to repay them to the company. The affidavit further maintained that Kras had diligently sought employment in New York City, but because of unfavorable references, had been unsuccessful. He and his family lived on public assistance of $210 per month paid to him, plus $156 per month paid to his mother. He owned no automobiles and had no non-exempt assets. *Id.* at 437-38.

3. It should be noted that although Kras relied on due process grounds, much of the Court's decision is couched in equal protection terms such as "compelling governmental interest," "rational basis," and "area of economics and social welfare."

4. 28 U.S.C. §2403 (1970).

5. 331 F. Supp. 1207 (E.D.N.Y. 1971).

ment,[6] and by many of the states,[7] allow a person to institute a suit or action without prepayment of required fees or costs, upon filing an affidavit that he is unable to pay such fees and costs.

Under the Bankruptcy Act of 1898,[8] a pauper's petition was granted in bankruptcy proceedings; but in 1946, Congress dropped the provision and added in its place a provision allowing a bankrupt to pay the fees in installments.[9] In addition, there have been recent court decisions holding that with this 1946 provision, Congress intended to eliminate in forma pauperis petitions in bankruptcy proceedings.[10] While the application of in forma pauperis petitions to bankruptcy proceedings has been declining, the general elimination of fee requirements has been simultaneously expanded in recent years, under the concepts of due process and equal protection. The Supreme Court has held that an indigent has a constitutional right to a free transcript of the trial for the purposes of preparing an appeal;[11] a similar right to counsel at trial;[12] counsel on appeal;[13] and the right to vote without the payment of a poll tax.[14] All of these have been found to be "fundamental rights" which cannot be denied a person merely because he does not have sufficient funds.

A significant extension of the elimination of fee requirements by the Supreme Court occured in *Boddie v. Connecticut*,[15] where a Connecticut law requiring a filing fee as a prerequisite to divorce was held to be unconstitutional as applied to indigents. Recognizing that the only avenue open to the parties in pursuit of divorce was the courts, the Supreme Court held that due process requires that, absent countervailing state interest of overriding significance, persons forced to settle their claims through the courts must be given a meaningful opportunity to be heard. The Court found the state's refusal to admit the plaintiffs to its court is equivalent to denying them an opportunity to be heard upon their claimed right to dissolve their marriage. The state maintained that the fee requirement acted to prevent

6. 28 U.S.C. §1915(a) (1970) provides:
Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefore, by a person who makes affidavit that he is unable to pay such costs or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and the affiant's belief that he is entitled to redress.

7. *See generally* Annot., *Proceeding in Forma Pauperis—Costs*, 98 A.L.R.2d 292 (1964).

8. Bankruptcy Act of 1898, ch. 541, §§40(c), 51(2), 30 Stat. 544 (1898).

9. 11 U.S.C. §68(c)(1) (1970).

10. *In re* Garland, 428 F.2d 1185 (1st Cir. 1970), *cert. denied*, 402 U.S. 966 (1971); *In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971).

11. Griffen v. Illinois, 351 U.S. 12 (1956).

12. Gideon v. Wainwright, 372 U.S. 335 (1963).

13. Douglas v. California, 372 U.S. 353 (1963).

14. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

15. 401 U.S. 371 (1971).

frivolous litigation, and that the state's interest was substantial. The Court refused to accept this argument, holding that those considerations were insufficient to override the interests of the plaintiffs in having access to the only available means of dissolving an untenable marriage. Furthermore, the Court stated that there was no connection between a litigant's assets and the seriousness of his motives in bringing a law suit. In summary, the Court held in *Boddie* that the right to a divorce was a fundamental right[16] which could only be obtained through the judicial system, and that the state did not have a sufficient interest to constitutionally justify excluding indigents from the divorce court because of their inability to pay the required fees and costs.

The cases previously noted,[17] including *Boddie*, dealt with state limitations on fundamental rights. They all relied to a great degree on the equal protection requirement of the fourteenth amendment.[18] However, *Boddie* also rested very heavily on the due process requirement,[19] and thus provided the basis for a fifth amendment attack[20] on the federally legislated Bankruptcy Act.[21]

The question of whether or not an indigent's right to adjudication of his petition in bankruptcy falls within the class of fundamental rights was considered twice prior to *Boddie* and the principal case, with opposite results.[22]

The court in *In re Garland*[23] took the approach that bankruptcy was an administrative proceeding and not litigation in the normal use of the word.[24] Thus, bankruptcy being merely a service provided to debtors,[25] discharge is a privilege[26] rather than a fundamental right,[27] and to that

16. The sighificance of the Court's holding that the right to a divorce is a "fundamental right" is that it increases the burden of the state in that the state must show a "compelling governmental interest" in order to significantly regulate a fundamental right. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

17. *See* notes 11,12,13, and 14 *supra*.

18. The fourteenth amendment to the U.S. Constitution provides: ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisidiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

19. In *Boddie*, the Court specifically held that the fee requirement was unconstitutional as a denial of due process. 401 U.S. at 380-81.

20. The fifth amendment to the U.S. Constitution provides: ". . . nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

21. *But cf.* Shapiro v. Thompson, 394 U.S. 618 (1969), which suggests that the fifth amendment also contains equal protection principles.

22. *In re* Garland, 428 F.2d 1185 (1st Cir. 1970), *cert. denied*, 402 U.S. 966 (1971); *In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971).

23. 428 F.2d 1185 (1st Cir. 1970), *cert. denied*, 402 U.S. 966 (1971).

24. *See also* St. Regis Paper Co. v. Jackson, 369 F.2d 136 (5th Cir. 1966).

25. 428 F.2d at 1187.

26. For cases concurring in this view, *see In re* Solari Furs, 263 F. Supp. 658 (E.D. Mo. 1967); *In re* Feinberg, 287 F. 254 (E.D. Pa. 1923).

27. For cases viewing discharge as a "right", *see In re* Cheval, 386 F.2d 127 (3d Cir. 1967); *In re* Neiderheiser, 45 F.2d 489 (8th Cir. 1930).

privilege Congress may attach reasonable conditions.[28]

A somewhat different approach was taken in *In re Smith*.[29] There the court, although admitting that bankruptcy was not as fundamental as voting or as the right to an appeal of a criminal conviction, still saw a fundamental issue of "access to court." Although the court never reached the ultimate issue of whether or not there was a fundamental right to a discharge, it did decide that there was a fundamental right to be heard in court. Since bankruptcy involved the functioning of the court, then it followed that there was a fundamental right to access to that court, and that to condition that right on the prepayment of fees was an interference with due process of law.[30]

In *Kras*, the Court reached its decision on two principal grounds. First, the Court reasoned that bankruptcy was not on the same constitutional level as marriage, free speech, or other rights which the Court has come to regard as "fundamental rights" that demand a compelling governmental interest before they may be significantly regulated. Instead, reasoned the Court, bankruptcy is in the area of economics and social welfare, and thus may be regulated by laws having a rational basis.[31] The Court found that although Kras' alleged interest in the elimination of his indebtedness, and in obtaining a new start in life was important, it was not as important as the right to free speech or the other rights that have been found by the Court to be "fundamental." Thus, having reduced the constitutional requirement from a compelling state interest to a rational justification, the Court greatly lightened the burden of the government in justifying the fee requirement.[32] The Court found this "rational basis" to be "readily apparent" in that Congress sought to make the system self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large.[33] The Court further found that if Kras was not given a discharge in bankruptcy, his position would not be constitutionally altered, as there is no fundamental interest gained or lost depending on the availability of a discharge in bankruptcy.[34]

Secondly, the Court reasoned that since bankruptcy is not the only

28. 428 F.2d at 1188.

29. 323 F. Supp. 1082 (D. Colo. 1971).

30. Here, it should be noted that the court correctly decided the case before it on due process grounds rather than equal protection grounds. Had the Court in *Kras* taken the same approach, they would have had a much more difficult time in distinguishing *Boddie*, as their argument of different constitutional levels would be inapplicable to due process.

31. Again, this is equal protection language and reasoning and is not decisive of due process problems.

32. Once again the Court is attempting to apply an equal protection test to a due process challenge.

33. 409 U.S. at 447.

34. *Id.* at 445.

alternative open to the debtor, there is no denial of due process in denying him a discharge. The Court maintained that there need not be any *real* alternatives open to the debtor, so long as there exist *possible* alternatives.[35]

The decision of the majority is untenable on a number of grounds. First, the majority holds that unlike divorce, there are alternatives to a discharge in bankruptcy. What the majority overlooks is that in Kras' situation, there are no real or effective alternatives. As Justice Stewart points out in his dissent: "And in the unique situation of the indigent bankrupt, the government provides the only effective means of his ever being free of these government imposed obligations. As in *Boddie*, there are no 'recognized effective alternatives'. . . ."[36] Therefore, it is only in the case of a bankrupt with some assets that alternatives are available.[37] If Kras could not pay $1.28 a week for the filing fees, what could he offer to his creditors, and what would his creditors have to gain by compromising their claims? "Unless the government provides him access to the bankruptcy court, Kras will remain in the totally hopeless situation he now finds himself."[38]

The second untenable position of the majority is that *Boddie* is distinguishable as involving a "fundamental right," and is thus on a higher constitutional level than is a discharge in bankruptcy. That distinction is not convincing. Divorce and bankruptcy are similar in that both proceedings exist solely to afford release from the enforcement of obligations imposed by law. Justice Stewart recognized this similarity:

> Similarly, the debtor, like the married plaintiffs in *Boddie*, originally entered into his contract freely and voluntarily. But it is the government nevertheless that continues to enforce that obligation, and under our "legal system" that debt is effective only because the judicial machinery is there to collect it. The bankrupt is bankrupt precisely for the reason that the State stands ready to exact all of his debts through garnishment, attachment, and the panoply of other creditor remedies.[39]

Thus, as in *Boddie*, the refusal to give Kras access to his only effective legal means of relief is a clear violation of due process.

An equally untenable position of the majority is that a valid state interest exists, that is, an effort to make the bankruptcy system self supporting. The Court in *Boddie* clearly rejected a "pay as you go" argument, holding:

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35. *Id.* Furthermore, the Court observes that the fees, if paid over the installment plan, amount to only $1.28 a week, which is, as the Court points out: "[L]ess than the price of a movie and little more than the cost of a pack or two of cigarettes." *Id.* at 449.

36. *Id.* at 455.

37. The usual alternatives to bankruptcy are such creditor agreements as compositions, assignments and extensions.

38. 409 U.S. at 455 (Stewart, J., dissenting).

39. *Id.*

> In our opinion, none of these considerations [state's interest in keeping the costs at minimum] is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages.[40]

Likewise, there seems to be no justification here for having a self-supporting bankruptcy system at the price of denying due process to the poor.[41]

Finally, there is no justification for the majority's attack on the truth of Kras' affidavit that he was unable to pay the fees.[42] The majority improperly believes that it is not restrained by the traditional rule that judges are to accept unchallenged, credible affidavits as true.[43]

The majority has failed to consider that the basic purpose of the Bankruptcy Act is "to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh, free from the obligations and responsibilities consequent upon business misfortunes."[44] It holds out a promise to the debtor of "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."[45] In light of the noble ideals and principles which the concept of bankruptcy represents, it seems impossible that the majority of the Supreme Court has held that some people are too poor even to go into bankruptcy.

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40. 401 U.S. at 381.

41. *In re* Naron, 334 F. Supp. 1150, 1151 (D. Ore. 1971); *In re* Smith, 323 F. Supp. 1082, 1088 (D. Colo. 1971).

42. Such an attack is implicit in the majority's statements that Kras could have paid by installment, and that $1.28 a week is less than the price of a movie and little more than the price of a couple of packs of cigarettes.

43. First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253 (1968); Poller v. Columbia Broadcasting Sys., 368 U.S. 464 (1962).

44. Williams v. United States Fidelity and Guar. Co., 236 U.S. 549, 554-55 (1915).

45. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).