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Constitutional Law - Cole v. Richardson - Another Look at State Loyalty Oaths

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CONSTITUTIONAL LAW—COLE v. RICHARDSON— ANOTHER LOOK AT STATE LOYALTY OATHS

On September 30, 1968, Lucretia Richardson was hired as a research sociologist at the Boston State Hospital. After six weeks of employment Mrs. Richardson was asked to subscribe to the oath required of all public employees in Massachusetts.[1] The oath in part is as follows:

> I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method.[2]

Mrs. Richardson informed the personnel department of the hospital that she would not take the oath as ordered because of her belief that it was in violation of the United States Constitution. Approximately 10 days later Dr. Jonathan Cole, the superintendent of the hospital, personally informed Mrs. Richardson that, unless she subscribed to the oath, she could not continue as an employee of the Boston State Hospital. Again she refused and her employment was terminated on November 25, 1968. In March, 1969, Mrs. Richardson filed a complaint in the United States Dis-

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1. During belated employment processing on November 15, 1968, Ms. Brady, principal clerk of the personnel department at Boston State Hospital, advised plaintiff that she was required by statute to subscribe to the provisions of the oath required by MASS. GEN. LAWS ANN. ch. 264, § 14 (1970).

2. The full text of the two relevant statutes is as follows; MASS. GEN. LAWS ANN. ch. 264, § 14 (1970): "Every person entering the employ of the commonwealth or any political subdivision thereof, before entering upon the discharge of his duties, shall take and subscribe to, under the pains and penalty of perjury, the following oath or affirmation:—

" 'I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the Government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method.'

"Such oath or affirmation shall be filed by the subscriber, if he shall be employed by the state, with the secretary of the commonwealth, if an employee of a county, with the county commissioners, and if an employee of a city or town, with the city clerk or the town clerk, as the case may be.

"The oath or affirmation prescribed by this section shall not be required of any person who is employed by the commonwealth or a political subdivision thereof as a physician or nurse in a hospital or other health care institution and is a citizen of a foreign country."

trict Court of Massachusetts. The district court declared the oath unconstitutional and enjoined the appellants from applying the statute to Mrs. Richardson.[3] However, on appeal the United States Supreme Court deemed the oath constitutionally permissible. *Cole v. Richardson,* 405 U.S. 676 (1972).

The Massachusetts loyalty oath case is the most recent addition to a series of Supreme Court evaluations of loyalty oaths originating in Arizona, New York and Maryland.[4] Although these three oaths had been rejected on constitutional grounds, the Massachusetts oath was upheld. It appears, therefore, that the question of whether a loyalty oath imposed by a state is in violation of first amendment rights has been re-evaluated by the Supreme Court. The purposes of this note are: first, to examine the impact of the *Richardson* decision on the American populus; second, to trace the constitutional history of the loyalty oath; and third, to evaluate the change in direction that *Richardson* indicates.

Loyalty qualifications for employment have taken two main forms. One form is the loyalty program, in which numerous and varied loyalty qualifications are prescribed and an investigation is made to determine if the employee meets the specified requirements. The *Richardson* case deals with the second form, the loyalty oath, in which the prospective employee swears or affirms that he or she is not disqualified on various grounds. The issue of loyalty oaths in the United States today is one which touches the lives of millions of Americans. The latest available statistics show that there are approximately 3,000,000 federal government employees, all of whom have been subjected to loyalty oaths. Not included in this figure are about two-thirds of the 9,000,000 state and local government employees, who also are required to take loyalty oaths as a condition precedent to employment. Further, about 5,000,000 non-government employees are under federal loyalty programs and consequently must abide by their conditions. Thus, 14,000,000 Americans out of a total working force that approximates 70,000,000, or one in five, are

3. Richardson v. Cole, 300 F. Supp. 1321 (D. Mass. 1969). Upon her refusal, based on the assertion that the oath was unconstitutional, she was paid for her services and told no further compensation could be made. She then brought suit under 28 U.S.C. § 2281 requesting the appointment of a three judge district court and a declaration of the statute's unconstitutionality. The district court upheld the "uphold and defend" clause, the first part of the oath, based on Knight v. Board of Regents, 269 F. Supp. 339 (S.D. N.Y. 1967), *aff'd,* 390 U.S. 36 (1968). But it found that the "oppose the overthrow" clause was fatally vague and unspecific and therefore in violation of the Constitution.

4. *See, e.g.,* Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1966); Elfbrandt v. Russell, 384 U.S. 11 (1966).

directly affected by loyalty oaths in the United States.[5] The potential impact upon freedom of expression can scarcely be exaggerated. Thus, it is imperative to determine what loyalty qualifications are compatible with the right to freedom of expression. Further, it is imperative to determine what rules of law governing loyalty oaths can reach the often elusive middle ground that will insure protection of state functions as well as full protection of individual first amendment rights. The issue in the *Richardson* decision turns upon qualifications for employment that are affected by beliefs, associations and opinions of the potential employee and as such can be labeled "expression." The case is restricted and defined by these limits and does not extend to action or activity.[6]

The majority in *Richardson* stated that a loyalty oath may not in-

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5. R. BROWN, LOYALTY AND SECURITY ch. 6 (1958). *See generally* Asper, *The Long and Unhappy History of Loyalty Testing in Maryland*, 13 AM. J. LEGAL HIST. 97, 104 (1969); Jahoda and Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 YALE L.J. 295 (1952); Morris, *Academic Freedom and Loyalty Oaths*, 28 LAW AND CONTEMP. PROB. 487 (1963); Note, *Loyalty Oaths*, 77 YALE L.J. 739 (1968).

6. The potential implications and ramifications of a case such as *Richardson* can be extended beyond the issue of first amendment rights to encompass the matters of bill of attainder and due process of law. Both of these issues were presented to the Court in *Richardson*.

A bill of attainder is a legislative act directed against a designated person without any conviction in the ordinary course of judicial proceedings. The plaintiff, Richardson argued that MASS. GEN. LAWS ANN. ch. 264, § 14 (1970), subjected her to loss of her employment position without the requisite judicial procedure. The bill of attainder clause, U.S. CONST. art. I, § 9, cl. 3, was implemented to ensure separation of powers among the three branches of government by guarding against the legislative exercise of judicial power, United States v. Brown, 381 U.S. 437 (1965), but the Court rejected the argument.

In Cummings v. Missouri, 76 U.S. (4 Wall.) 277, 327 (1866), the Supreme Court renounced as an attainder the test oath provision contained in Article II of the Missouri Constitution of 1865, which required that every voter should execute an oath that he had never given aid to alien enemies. Further, if any person had not complied with the requirements, then he was forbidden to vote, hold office, practice law, preach, teach or solemnize marriages. The Supreme Court in *Cummings* struck down a legislative enactment that would, in effect, deprive a citizen of the ordinary safeguards to insure administration of justice by the established judicial tribunals. *See also* United States v. Lovett, 328 U.S. 303 (1946); Duncan v. Kahanamoku, 327 U.S. 304 (1946); United States v. Dickerson, 310 U.S. 554 (1940).

The majority opinion in *Richardson* dealt briefly with the allegation of denial of due process: "The purpose of the oath is clear on its face. We cannot presume that the Massachusetts legislature intended by its use of such general terms as 'uphold,' 'defend' and 'oppose' to impose obligations of specific, positive action by oath takers. Any such construction would raise questions whether the oath was so vague as to amount to a denial of due process." 405 U.S. at 685-86. *See also* Connally v. General Construction Co., 269 U.S. 385 (1926); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

fringe upon rights guaranteed by the first amendment because of the political beliefs of the individual, as determined by the Court in *Baird v. State Bar of Arizona.*[7] The petitioner in *Baird*, who had recently passed the Arizona bar examination, was refused admission to the bar because she refused to respond to a question as to whether she was a member of the Communist Party or any organization "that advocates overthrow of the United States Government by force or violence."[8] The Supreme Court in *Baird,* through the decision of Justices Black, Brennan, Douglas, and Marshall, concluded that such views and beliefs of an applicant are immune from inquisition by a bar committee. The *Baird* Court held:

> The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs.[9]

In a manner reminiscent of *Baird*, the majority in *Richardson* states emphatically that

> employment [may not] be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities such as the following: criticizing the institutions of government; discussing political doctrine that approves the overthrow of certain forms of government. . . .[10]

Chief Justice Burger agreed with and extended the majority opinion analysis to the extent that "the oaths under consideration often required individuals to reach back into their pasts to recall minor, sometimes innocent, activities."[11] Here the first amendment right was not to be preempted. However, the majority distinguished *Richardson* from the cases that had preceded based on the following reasoning. The *Richardson* Court stated that "[s]everal cases recently decided by the Court stand out among our oath cases because they have upheld the constitutionality of oaths, addressed to the future, promising constitutional support in broad terms."[12] Thus, the majority in *Richardson* cited the decision of *Bond v. Floyd*[13] to establish the new standard of constitutional validity. In *Bond*, state legislators were required by a Georgia statute to swear to

7. Baird v. State Bar of Arizona, 401 U.S. 1 (1971). Question No. 27 on the *Applicant's Questionnaire and Affidavit on the Application to be Admitted to the Arizona Bar* read: "Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?" *See* ARIZONA SUPREME COURT RULE 28(c). *Accord, In re* Stolar, 401 U.S. 23 (1971).

8. 401 U.S. 1, 4-5 (1971).

9. *Id.* at 6.

10. Cole v. Richardson, 405 U.S. 676, 680 (1972).

11. *Id.* at 681.

12. *Id.*

13. Bond v. Floyd, 385 U.S. 116 (1966).

support the constitution of the state and of the United States.[14] The Court held that the Georgia oath called only for an acknowledgement of a willingness to abide by "constitutional processes of government."[15] The Court concluded that the first amendment did not undercut the validity of the constitutional oath provisions. The *Richardson* majority contrasted the *Baird* and *Bond* cases in order to define specifically what loyalty oath would be constitutionally acceptable. The *Richardson* Court in its conclusion stated that "[s]ince there is no constitutionally protected right to overthrow a government by force, violence, or illegal or unconstitutional means, no constitutional right is infringed by an oath to abide by the constitutional system in the future."[16]

The majority in *Richardson* relies upon the dissenting opinion of Justice Marshall in *Law Students Civil Rights Research Council v. Wadmond*.[17] In that case Justice Marshall stated: "The oath of constitutional support requires an individual assuming public responsibilities to affirm . . . that he will endeavor to perform his public duties lawfully."[18] It may be questioned, however, if simple affirmation of an oath is adequate assurance that an employee will "perform his public duties lawfully."[19] The *Richardson* majority apparently accepts the loyalty oath as adequate assurance of loyalty to the state.

The majority decision in *Richardson* distinguishes a chain of evolutionary decisions in the past two decades of Supreme Court rule regarding loyalty oaths. During that period an awareness of individual rights had come to balance the interest of the state. Prior to this recognition of individual rights the state interest had been diligently protected by a post World War II Court that reflected the mood of a country seeking to control subversive activity. The majority decision in *Richardson* is best understood by an analysis of the Supreme Court decisions of *Bailey v. Richardson*,[20] *Garner v. Board of Public Works of Los Angeles*[21] and *Adler v. Board of Education*.[22]

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14. *Id.* at 135.

15. *Id. See also* Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); Ohlson v. Phillips, 397 U.S. 317 (1970).

16. 405 U.S. 676, 686 (1972).

17. Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1970).

18. *Id.* at 192.

19. *Id.*

20. 182 F.2d 46 (D.C. Cir. 1950), *aff'd mem.*, 341 U.S. 918 (1951).

21. 341 U.S. 716 (1951).

22. 342 U.S. 485 (1952).

State discretion in the choice of employees based on loyalty oaths emanates from such early cases as *Bailey v. Richardson*,[23] where a state employee was discharged from her position because "reasonable grounds exist[ed] for belief that [she was] disloyal to the Government of the United States."[24] The *Bailey* court determined that there is no prohibition against the dismissal of government employees because of their political beliefs, activities or affiliations.[25] The discretion of the government in choosing employees was considered to be analogous to the discretion of a private employer.[26] Consequently, the employee was discharged from her position for the beliefs and affiliations that she held.

The government as employer was again favored in *Garner v. Board of Public Works of Los Angeles*[27] where every employee of the city was required to take an oath that he had not "advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government. . . ."[28] The *Garner* Court held that the oath was valid as a "reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and to the United States."[29] Such an oath of allegiance places the burden and consequences upon the potential employee to determine if he is within the ill-defined boundaries. Commenting on this dilemma, Justice Frankfurter posed a question that reflects the difficulty in applying a loyalty oath to an employment spectrum that is marked by extreme mobility and fluidity: "How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of the government by 'unlawful means?' "[30]

Justices Black and Douglas voiced dissent in *Garner* that evolved into a twenty year majority rule: "Petitioners were disqualified from office . . . not because of any program they currently espouse. . . . They are

23. 182 F.2d 46 (D.C. Cir. 1950), *aff'd mem.*, 341 U.S. 918 (1951).

24. 182 F.2d at 61. *See* Greene v. McElroy, 360 U.S. 474 (1959); Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); Peters v. Hobby, 349 U.S. 331 (1955).

25. 182 F.2d at 59.

26. *Id.* at 60. *Compare* Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd mem.*, 341 U.S. 918 (1951), *with* United Public Workers of America v. Mitchell, 330 U.S. 75 (1947).

27. 341 U.S. 716, 720 (1950). *Accord*, Pickering v. Board of Education, 391 U.S. 563 (1968); Gerende v. Board of Supervisors, 341 U.S. 56 (1951).

28. 341 U.S. at 719.

29. *Id.* at 720-21.

30. *Id.* at 728.

deprived of their livelihood by legislative act, not by judicial processes."[31]

Justice Black again dissented in *Adler v. Board of Education*,[32] a case that tested the Feinberg Law of New York. The statute provided that no member of an organization advocating the unlawful overthrow of the government could be eligible for employment. *Adler* was pivotal in introducing the issue of individual first amendment protection. Justice Black stated in dissent that "public officials cannot be constitutionally vested with powers to select the ideas people can think about, censor the public views they can express, or choose the persons or groups people can associate with."[33]

Notwithstanding the rejection of loyalty oaths that was initiated by the dissents in *Garner* and *Adler*, the *Richardson* majority elected to revert to the majority reasoning in *Bailey* and *Garner*. Justice Douglas dissenting in *Richardson* as he had in *Garner*, directly attacked the majority in its definition of overthrow: "[a]dvocacy of basic fundamental changes in government . . . is within the protection of the First Amendment even when it is restrictively construed."[34] The *Richardson* majority has rejected this premise by claiming that if a state elicits a promise to abide by a state or federal constitution in the *future*, then no suppression of first amendment rights has occurred. Thus, the wording of the statute in question will determine its validity, dependent upon the negative or positive inference that it elicits.

In *Lerner v. Casey*,[35] a case subsequent to *Adler*, a subway conductor

31. *Id.* at 735-36. *See* Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 710-11 (1963); Losier v. Sherman, 157 Kan. 153, 156, 138 P.2d 272, 273 (1943); State v. Graves, 352 Mo. 1102, 1115, 182 S.W.2d 46, 54 (1944).

32. 342 U.S. 485 (1952). The *Adler* Court in 1951 claimed a person could be denied employment because of membership in a listed organization without violating his right to free speech and assembly. His freedom of choice between membership in a listed organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice.

The limitation on loyalty oaths noted by the Court in *Garner* and *Adler* resulted in the invalidation of an Oklahoma loyalty oath in Wieman v. Updegraff, 344 U.S. 183 (1952). The oath required employees of the state to swear they had not in the last five years been members of any organization seeking violent overthrow of the government. The Oklahoma Supreme Court declared the oath unconstitutional as disqualifying persons "solely on the basis of organizational membership." The United States Supreme Court upheld that decision.

33. 342 U.S. at 497. The dissents in *Garner* and *Adler* are important in that the arguments offered evolved to become the majority opinion for the next two decades.

34. 405 U.S. 676, 688 (1972).

35. 357 U.S. 468 (1958).

in New York City refused to tell the City Commissioner of Investigation if he was a member of the Communist Party. He was discharged from his position under the New York Security Risk Law. The Supreme Court upheld the dismissal based upon "untrustworthiness" and "unreliability," refusing to consider the question of a first amendment violation.[36] In his dissent Justice Douglas reiterated his argument of first amendment rights which he had initiated in *Adler*. Justice Douglas claimed:

> The fitness of a subway conductor for his job depends on his health, his promptness, his record for reliability, not on his politics or his philosophy of life. The fitness of a teacher for her job turns on her devotion to that priesthood, her education, and her performance in . . . the classroom, not on her political beliefs. Anyone who plots against the government and moves in treasonable opposition to it can be punished. Government rightly can concern itself with the actions of people. But it's time we called a halt to government penalizing people for their beliefs. To repeat, individuals and private groups can make any judgment they want. But the realm of belief—as opposed to action—is one which the First Amendment places beyond the long arms of government.[37]

One should note especially, in these remarks by Justice Douglas, the distinction made between belief and action, and the effect of that distinction on first amendment rights. In *Lerner*, as in *Richardson*, the only conduct of the petitioner under consideration by the Court were beliefs as opposed to actions.

It became apparent, as various loyalty oaths were reviewed by the Supreme Court, that specific guide lines had to be drawn to articulate the grounds for disqualification from an employment position. The Court sought in cases such as *Cole v. Young*,[38] *United States v. Robel*[39] and *Schneider v. Smith*[40] to implement such guide lines for the determination of what would constitute grounds for disqualification. In addressing itself to the dilemma, the Court, through Chief Justice Warren in *Robel* and Justice Fortas in *Schneider*, stated that it would be constitutionally permissible to establish and maintain a restrictive employment program if it were based on precise standards. The opinion of Chief Justice Warren in *Robel* determined the factors which had to be present for discharge:

36. *Id.* at 472.

37. The dissent of Justice Douglas was written in conjunction with another first amendment case, Beilan v. Board of Education, 357 U.S. 399 (1958), and appears at 357 U.S. 415-16. The *Beilan* and *Lerner* cases were reaffirmed in Nelson v. County of Los Angeles, 362 U.S. 1 (1960), as to a temporary employee. But the Court divided four to four in the same case on similar issues involving a permanent employee. Chief Justice Warren took no part in the consideration or decision of this case.

38. 351 U.S. 536 (1956).

39. 389 U.S. 258 (1967).

40. 390 U.S. 17 (1968).

(1) active membership; (2) specific intent to further the unlawful goals of the organization; and (3) that the employee holds a sensitive position.[41]

The requirements of active membership and specific intent to further the illegal activity of the organization had been firmly established by the Court in the middle and late 1960's. In *Elfbrandt v. Russell*[42] Justice Douglas explained the purpose for such requirements:

> [T]hose who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as this which are not restricted in scope to those who join with the "specific intent" to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization.[43]

In recognition of such decisions[44] the majority in *Richardson* stated that

> employment may not be conditioned on an oath denying past, or *abjuring future,* associational activities within constitutional protection; such protected activities include membership in organizations having illegal purposes unless one *knows* of the purpose and shares a *specific intent* to promote the illegal purpose.[45]

Therefore, "mere" membership without specific intent[46] to further the illegal aims of the organization is not enough to allow an employee to be discharged from a position.

The third criterion established by the Court in *Robel* has been the most difficult in its interpretation and application. What is a sensitive employment position? It has become readily apparent that the potential for

41. 389 U.S. 258, 261, 266 (1967).

42. 384 U.S. 11 (1966). *See* James v. Gilmore, 389 U.S. 572 (1968), in which the Supreme Court affirmed per curiam a decision of a three judge court holding invalid, based on *Elfbrandt,* a Texas loyalty oath. In addition, state loyalty oaths have been invalidated by lower federal courts or state courts in California, Colorado, Kansas, New Hampshire, and Oregon. Ehrenreich v. Londerholm, 273 F. Supp. 178 (D. Kan. 1967); Gallagher v. Smiley, 270 F. Supp. 86 (D. Colo. 1967); Vogel v. County of Los Angeles, 68 Cal.2d 18, 64 Cal. Rptr. 409, 434 P.2d 961 (1967); Opinion of the Justices, 108 N.H. 62, 228 A.2d 165 (1967); Brush v. State Board of Higher Education, 245 Ore. 373, 422 P.2d 268 (1966).

43. 384 U.S. at 17.

44. *See, e.g.,* Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967). The Court has consistently rejected disclaimer oaths that did not reach the standard tied to "force and violence." This criterion set by the Court is limited to the advocacy and discipline as described in *Keyishian* in which the fine line of distinction between expression is transcended into the realm of activity.

45. 405 U.S. 676, 680 (1972) (emphasis added).

46. Membership and specific intent are the first two requisites necessary under the *Robel* criteria to refuse employment to a potential employee based on a loyalty test.

subversive and disruptive influence certainly varies from one state position to another. The ability to reach the public mentality is certainly greater as a teacher than as a public service maintenance employee. A state employment position that could be readily used to espouse subversive ideology is one "sensitive" to the protection of the government security and thus a more critical examination should be made of a prospective employee to fill that position.[47] The scale and volume of loyalty programs today[48] has made it increasingly apparent, however, that the rulings in determination of a sensitive and non-sensitive position were not considered in *Richardson*. The difficulty is the determination of where the line of distinction should be drawn between a sensitive and non-sensitive position. In *Cole v. Young*[49] as well as *Robel* the Court emphatically stated the necessity of a distinction between a sensitive and non-sensitive position. However, the application of such standard is difficult. Employee positions and job titles do not always lend themselves to simple classification as exclusively sensitive or non-sensitive. For example, because appellee Richardson held the position of research sociologist, the simplistic dichotomy "sensitive or non-sensitive" deteriorates. It may be generally agreed that a research analyst is one with minimal public contact, and consequently less potential for influence. Conversely, by definition, a sociologist is one who is constantly engaged in the study of human social structures and relations and thus has tremendous potential for influence through such a position.[50] Now where is that line of distinction to be drawn? The difficulty in the application of the "sensitive position" test (*Robel* criterion number three) is not limited to the *Richardson* case but includes many employment positions today. The lines so carefully and rationally drawn in 1967 have been discarded five years later in the *Richardson* decision presumably because of the difficulty in the application of such a standard. In *Richardson*, how it could be proven by mere failure to comply with a loyalty oath that Mrs. Richardson was an active member in any subversive organization, had the specific intent to further the unlawful goals of that organization, and held a sensitive position, is difficult to ascertain.

Central to the dilemma the loyalty oath presents is that the interest to be protected is not one-dimensional. Both the interests of the state and that of the individual are of consequence and deserve to be protected. At least three different state interests are commonly advanced

47. United States v. Robel, 389 U.S. 258 (1967).

48. BROWN, *supra* note 5.

49. 351 U.S. 536 (1956).

50. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1226 (1969).

to justify disqualification of individuals from public employment positions. Included in this list are those: (1) who present a potential for sabotage or other activity directly injurious to national security; (2) who are untrustworthy or incompetent in the performance of their duties; and (3) who simply oppose the basic principles on which the government was founded.[51] The Court has defended the state interest in preventing the misuse of office as an appropriate basis for imposing loyalty restrictions on teachers[52] and lawyers.[53] However, this reasoning is limited. Again, the sensitive versus non-sensitive position argument is important. The vast majority of job titles do not allow the employee sufficient discretion to permit any significant manipulation to benefit the organization. Thus, the effect upon the state interest is negligible. Vagueness permeates the *Richardson* decision which states in conclusion that a loyalty oath does not infringe unnecessarily on protected interests of the individual.[54] The Court never clearly defined the "state interest" of which the infringement upon the first amendment right was deemed "necessary."[55] The Court may have been in agreement in realizing that the state has an interest in denying support to "disloyal" persons, but unless the statute is sufficiently related to that state interest, it must be denied. This balancing of interest requirement was recognized by Justice Harlan, writing for the majority in *Scales v. United States*.[56] He stated "a . . . blanket prohibition of association with a group having both legal and illegal aims, [would pose] . . . a real danger that legitimate political expression or association would be impaired. . . ."[57] Thus, the legitimate and necessary power of the state to inquire into the lives of potential employees must be limited. Such probing inquiry poses a significant threat to the individual's freedom of expression. Justice Stewart for the majority in *Shelton v. Tucker*[58] introduced a requirement that only questions relevant to the spe-

51. Israel, *Elfbrandt v. Russell: The Demise of the Oath?* 1966 SUP. CT. REV. 193, 219.

52. Adler v. Board of Education, 342 U.S. 485, 493 (1952). Justice Minton speaking for the majority claimed "[a] teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this the state has a vital concern."

53. Konigsberg v. State Bar of California, 366 U.S. 36 (1961). *See also* Brown and Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV., 480 (1953).

54. Cole v. Richardson, 405 U.S. 676, 686 (1972).

55. Israel, *supra* note 51, at 218.

56. 367 U.S. 203 (1961). *See also* Aptheker v. Secretary of State, 378 U.S. 500 (1964); Speiser v. Randall, 357 U.S. 513 (1958); Noto v. United States, 367 U.S. 290 (1961).

57. 367 U.S. at 229.

58. 364 U.S. 479 (1960).

cific position be asked of the employee. The Court realized that the state's interest, although legitimate, could not be infinitely extended.

The argument presented as a justification for a governmental intrusion into the beliefs of a potential employee is that such a process can eliminate in advance persons whose beliefs indicate that they are likely to cause harm in the future. The question presented is whether the first amendment precludes such preventive regulation.[59] Justice Jackson in *American Communications Association v. Douds*[60] stated that

> I know of no situation in which a citizen may incur civil or criminal liability or disability because a court infers an evil mental state where no act at all has occurred. Our trial processes are clumsy and unsatisfying for inferring cogitations which are incidental to actions, but they do not even pretend to ascertain the thought that has had no outward manifestations.[61]

Thus, what appears to be a mere requisite to comply with the "governmental process" in the future is in fact a suppression of the first amendment right to freedom of expression at the time the oath is administered.

It seems apparent by admission of the *Richardson* majority in upholding the loyalty oath that such a gesture is at best hollow. Chief Justice Burger stated:

> The time may come when the value of oaths in routine public employment will be thought not "worth the candle" for all the division of opinion they engender. However, while oaths are required by legislative acts it is not our function to evaluate their wisdom or utility but only to decide whether they offend the Constitution.[62]

It would seem that the central issue should not be the validity of the loyalty oath but rather its very existence.

As stated previously, the state interest certainly merits protection, but one may well ask whether the state loyalty oath affords such protection. Without oversimplification of the issue, several objective factors should be measured in selecting a state employee. First, what is the degree of individual commitment to illegal goals of the organization to which the potential employee may belong? Second, what is the nature of the position involved? Third, what are the employee's past attitudes toward work? Fourth, what is the nature of the subversive activity?[63] It may be

59. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 33 (1970).

60. 339 U.S. 382 (1950).

61. American Communication Association v. Douds, 339 U.S. 382, 437 (1950). Such activity could also be viewed as an invasion of the constitutional right of privacy as determined in Griswold v. Connecticut, 381 U.S. 479 (1965). Under the provisions of MASS. GEN. LAWS ANN. ch. 264, § 15 (1970); violation of § 14 is also punishable by a fine of not more than ten thousand dollars, or imprisonment for not more than one year or both.

62. 405 U.S. at 685 n.3.

63. Israel, *supra* note 51, at 245.

generally accepted that these four factors must be considered and weighed. However, a loyalty oath is not flexible enough to sufficiently accomplish this objective.

[A]ssuming the state may utilize some form of loyalty test based upon certain classes of speech and association to serve the legitimate interests of protecting internal security and insuring employee reliability, the loyalty oath is invalid because it is a totally inappropriate means of serving those interests.[64]

The subtle distinctions that can be so carefully drawn by a Court of nine men can become misunderstood, misintended and finally discarded when an attempt is made to apply them equitably to the ranks of 14,000,000 employees.

If the test is aimed at those who advocate violent overthrow of the government, the investigators soon find themselves delving into questions of Marxism, Leninism, Stalinism and other ideologies; into attitudes toward violence in the civil rights movement; into problems of civil disobedience; and beyond. If the standard forbids membership in an organization, the questioning soon leads to matters of affiliation, front organizations, support to the organization, parallelism of ideas, and beyond. Even if the person interrogated is finally found "qualified," word of the interrogation spreads around and a depressing effect upon the individual can only be detrimental.[65]

It is difficult, if not impossible, to place limits upon the degree of loyalty that is required of a potential employee. The difficulty is extended to impossibility when a court attempts to set judicial boundaries upon such an intangible as a loyalty requirement. This difficulty is best realized by noting that the last two decades have in no way proven any relation between loyalty oaths and the prevention or detection of subversive activity in the United States.[66]

Seeking a definition of loyalty is a philosophical problem with endless difficulties.[67] The loyalty oath, like the sensationalism of the McCarthy Era that created it, should be laid to rest.

The starting point is to reject the proposition that the government is entitled to refuse employment to persons who are "disloyal" in the sense of being critical of American institutions, and therefore do not deserve to share in the benefits of government largess. For many people, loyalty oaths are built substantially on this premise. But such a social interest . . . has no constitutional weight. To give

64. *Id.* at 247.

65. EMERSON, *supra* note 59, at 208.

66. *See* Jahoda and Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs,* 61 YALE L.J. 295 (1952).

67. H. HYMAN, TO TRY MEN'S SOULS (1959). *See generally* D. LACY, FREEDOM AND COMMUNICATIONS (2d ed. 1965); H. WIGGINS, FREEDOM OR SECRECY (rev. ed. 1964); Reich, *Making Free Speech Audible,* THE NATION, Feb. 8, 1965, at 138.

it any effect would . . . violate the fundamental concept of the First Amendment. . . . No Court has ever supported such a proposition.[68]

The turmoil that surrounds the question of loyalty oaths is not recent. Justice Jackson described in *West Virginia State Board of Education v. Barnette*[69] the protection afforded by the first amendment.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act to their faith therein.[70]

The power of the state to safeguard the public services from disloyal and subversive activity should not be questioned. The measures that define disloyalty must allow public employees to know what is considered disloyal. A government policy that seeks to protect varied intellectual outlooks in the belief that the best views will prevail will insure both protection of the state interest and also safeguard first amendment rights.

Thomas Ahern

68. EMERSON, *supra* note 59, at 210.
69. 319 U.S. 624 (1943).
70. *Id.* at 642.