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Constitutional Law - Loyalty Oath - Specific Intent Required for Validity

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Court to pass on what is permissible conduct within freedom of press. By stating "the courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences,"[39] the Supreme Court is giving judicial approval to a trial court initiative in this area. Whether the trial courts will provide an effective deterrent to prejudicial publicity is still conjectural. However, one must remember that there are some desirable effects of criminal publicity. It is the watchdog of the judicial system,[40] and an effective weapon against corruption of police, prosecutors, and other law enforcement personnel.[41] Also, pretrial publicity reduces community anxiety where the arrest of key suspects is made known to the public.[42] Though the Court has opened the door to further restraints on the press, it remains to be seen to what extent a court may actually curtail the dissemination of news.

Robert Kopple

[39] *Ibid.*

[40] *Supra* note 32; See Powell v. Alabama, 287 U.S. 45 (1932), the first of the "Scottsboro Cases," where publicity insured ultimate justice for nine Negroes put on trial in the South.

[41] Jaffe, *Trial by Newspaper,* 40 N.Y.U. L. REV. 504, 512 (1965).

[42] See CAPOTE, IN COLD BLOOD (1966), to illustrate arousal of anxiety in the community where a sensational crime is unsolved.

CONSTITUTIONAL LAW–LOYALTY OATH–SPECIFIC INTENT REQUIRED FOR VALIDITY

Petitioner, a school teacher, refused to take the loyalty oath required of all public officers and employees of the state of Arizona. The oath, together with an accompanying statutory gloss,[1] proscribed knowing

[1] ARIZ. REV. STAT. ANN. § 38-231(e) (Supp. 1965) reads as follows: "Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be

membership in the Communist Party or in any other organization which advocated the violent overthrow of the government. Following her summary dismissal, petitioner sought to have the loyalty oath requirement declared invalid. The statute was upheld in the trial court and on appeal the Supreme Court of Arizona affirmed.[2] On certiorari to the United States Supreme Court the holding was reversed. The Court declared that a statute which penalized mere knowing membership without requiring a specific intent to further illegal designs, did violence to the commands of the first amendment. *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

The importance of the *Elfbrandt* decision is readily apparent in that it represents a marked departure from the former rule that knowing membership in a subversive organization was sufficient to justify the rejection of an applicant for a public position, or to warrant the discharge of those already employed.[3] A profound change has resulted through the requirement that a specific intent be shown in those cases where civil sanctions alone are normally invoked. The Court has, in effect, embraced a requirement which has long obtained in the area of criminal anarchy, syndicalism, and subversion.[4]

Basic to any meaningful understanding of *Elfbrandt* is a working knowledge of those decisions of the High Court which deal with the subject of loyalty. Considering first the fruitful area of criminal sanctions, perhaps the most logical point of departure is viewed in the "clear and present danger" doctrine enunciated by Justice Holmes in *Schenck v. United States*.[5] Defendant was appealing his conviction under the Espionage Act[6] for attempting to cause insubordination in the armed forces of the United States. Defendant's contention was that though his circulars might tend to obstruct the draft, since he committed no act, but only spoke, this conduct was protected by the first amendment. Though this might be true in normal circumstances, it was held that the character of every act must be judged according to the circumstances in which it was done. Justice Holmes declared:

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entitled to any additional compensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment."

[2] Elfbrandt v. Russell, 94 Ariz. 1, 381 P.2d 554 (1963). Judgment was vacated by the Supreme Court, 378 U.S. 127 (1964), for reconsideration in light of Baggett v. Bullitt, 377 U.S. 360 (1964).

[3] Wieman v. Updegraff, 344 U.S. 183 (1952).

[4] Civil loyalty oaths usually involve a major sanction of discharge or rejection from public office or employment, but oftentimes include a minor sanction of perjury. Criminal tests are those whose major sanction is incarceration and/or fine.

[5] 249 U.S. 49 (1919). See also Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).

[6] 18 U.S.C. § 2388 (1964).

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[7]

Here clear and present danger is seen as the test of speech where the Espionage Act did not, in itself, designate what types of speech were offensive.

But of even greater importance for the purposes of this analysis was the Court's concern with the requirement of intent. For as the Court stated: "If the act, (speaking or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."[8] In this, the first important free speech case decided by the Supreme Court, intent is included as a necessary prerequisite for conviction on the grounds of disloyalty.

The Court again had occasion to examine this problem in the case of *Gitlow v. New York*.[9] Here the defendant was convicted for the statutory crime of criminal anarchy[10] for publishing the "Left-Wing Manifesto," a Communist writing attacking capitalism and urging mass action against the government. The Court rejected defendant's contention that the statute punished mere speech without regard to the likelihood of unlawful substantive evil, holding that it was reasonable for a state to protect itself from violent overthrow.[11] The issue, according to the Court, was merely whether the evidence showed a violation of the statute. Although the Court did not apply the clear and present danger doctrine to the facts of this case, intent was still viewed as a necessary ingredient of the crime, for the Court charged the jury that they must determine the "intent, purpose and fair meaning of the Manifesto."[12]

In *Whitney v. California*[13] the defendant was appealing her conviction under the Criminal Syndicalism Act.[14] This action emanated from the defendant's representation of the Communist Labor Party at its founding convention. Notwithstanding the fact that a more radical platform was adopted than that advanced by the defendant, she continued to represent the party on two subsequent occasions. In defense, defendant contended

[7] Schenck, *supra* note 5, at 52.

[8] *Ibid.*

[9] 268 U.S. 652 (1925).

[10] N.Y. PEN. LAW §§ 160–161 (1958).

[11] The Court's holding was bottomed on the decision of Lochner v. New York, 198 U.S. 45 (1905), where the reasonable man theory found acceptance. An excellent discussion of the reasonable man theory may be found in PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 28–32 (1954).

[12] Gitlow, *supra* note 9, at 661.

[13] 274 U.S. 357 (1927).

[14] CAL. PEN. CODE § 11400 (1963).

that she could not be held responsible for the actions of the party since she had advocated a less extreme platform. The Court thought otherwise, holding that her continued membership was evidence of an intent to further the aims of the party as they were advanced at its convention. Thus, with *Whitney*, the Court seemed to say that it would question the statute itself, only upon the grounds of its reasonableness.

Recognizing that the foregoing decisions were rendered during the pre-war era, with the passage of the Smith Act,[15] the Court once more was confronted with a statute that met head-on with the dictates of the first amendment. *Dennis v. United States*[16] involved eleven leaders of the Communist party who had been convicted of conspiring to teach or advocate the overthrow of the government by force or violence. Rejecting the petitioners' contention that the Smith Act unconstitutionally infringed upon first amendment freedoms, the Court, through Chief Justice Vinson, adopted a further refinement of Holmes' clear and present danger test. The Court thus accepted in toto the clear and probable danger test which had been enunciated by Chief Judge Learned Hand in the Court of Appeals.[17] The issue according to this eminent authority was "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[18] Although a new rationale for upholding the loyalty test was thus forthcoming, the Court still required the element of intent. Concerning this the Court again stressed:

> We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence. . . . The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.[19]

Considering now the matter of civil loyalty oaths it is apparent that here the law has evolved at a slower pace than that in the criminal area. Here the cases have moved from a denouncement of mere membership, then to knowing membership, and finally, with *Elfbrandt*, to membership with the specific intent to further the organization's illegal aims.

The landmark case in which the United States Supreme Court first considered civil loyalty oaths was *American Communications Ass'n. v.*

[15] 18 U.S.C. § 2385 (1964). [16] 341 U.S. 494 (1951).

[17] Dennis v. United States, 183 F.2d 201 (2d Cir. 1950), *cert. denied*, 341 U.S. 494 (1951).

[18] *Id.* at 212. For more recent cases stressing the intent requirement see Noto v. United States, 367 U.S. 290 (1961) and Scales v. United States, 367 U.S. 203 (1961). In these cases both the constitutionality of the statutes and the requirement of intent continue to be upheld even if it had to be said that the intent was implied.

[19] Dennis, *supra* note 14, at 499–500.

Douds.[20] In this case the petitioners refused to comply with that provision of Section 9 (h) of the Taft-Hartley Act[21] which required that union officers file a non-communist affidavit as a condition precedent to receiving the benefits available under the Act. The Court rejected petitioners' contention that the Act violated the guarantee of freedom of association implied in the first amendment and held that through the Interstate Commerce clause there was ample justification for Congress to provide sanctions against "political strikes." In arriving at this conclusion the Court's reasoning was somewhat analogous to that advanced in *Dennis:*

> The fact that the injury to interstate commerce would be an accomplished fact before any sanctions could be applied, the possibility that a large number of such strikes might be called at a time of external or internal crisis, and the practical difficulties which would be encountered in detecting illegal activities of this kind are factors which are persuasive that Congress should not be powerless to remove the threat, not limited to punishing the act.[22]

Though the Court in *Douds* did not seek to construe the term "membership," two years later the Court addressed itself to this problem in *Garner v. Board of Public Works*.[23] In a 5–4 decision it was held that mere membership was not sufficient. What was required was "knowing membership" since the element of scienter was implicit in the statutory provision under consideration.

Adler v. Board of Education,[24] which involved a statute requiring "knowing membership" on behalf of public school employees, added weight to *Garner*. Here the Court reiterated:

> Past loyalty may have a reasonable relationship to the present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment.[25]

The Court's consideration of civil loyalty oaths entered its second stage of development in *Wieman v. Updegraff*.[26] In this landmark case the

[20] 339 U.S. 382 (1950).

[21] 61 Stat. 146 (1947), 29 U.S.C. § 159(h) (1958). In essence the act required the affiant to state that he did not believe in, and was not a member of or support any organization that believed in or taught the overthrow of the government by force or by any illegal or unconstitutional methods.

[22] Douds, *supra* note 20, at 406.

[23] 341 U.S. 716 (1951). [24] 342 U.S. 485 (1952).

[25] Garner, *supra* note 23, at 720. The Court summarily rejected petitioner's contention that the right of freedom of association was impaired holding that one could join any group he wished by simply resigning from his public position. However, in Torcaso v. Watkins, 367 U.S. 488 (1961), this concept was rejected, the Court holding that merely because a person is not compelled to hold public office cannot be an excuse for barring him on associational grounds.

[26] *Supra* note 3.

Supreme Court for the first time declared a contested oath unconstitutional, unanimously holding that the absence of scienter created a conclusive presumption of disloyalty by mere association and amounted to an indiscriminate classification of innocent with knowing activity.

Aptheker v. Secretary of State,[27] again stressed the unconstitutionality of prohibiting both knowing and unknowing membership. But this case also stresses that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broad and thereby invade the area of protected freedoms.

In the case of *Baggett v. Bullitt*,[28] the petitioner attacked an oath requiring employees of the University of Washington to swear they were not "subversive persons." A "subversive person" was defined as one who commits or attempts to commit, or aids, advocates, advises, or teaches the violent overthrow of the government. In declaring the oath unconstitutional the Court again turned to the scienter requirement holding that the act unjustly punished guiltless knowing behavior.[29] Thus, in essence, the Court was implying that a specific intent must be coupled with knowing membership to protect the guiltless knowing member.

Finally, in *Elfbrandt*, the Court explicitly embraced the specific intent requirement which had been implied in *Baggett*. Knowing membership was not sufficient to bring public employees within the purview of the statute. It was reasoned that:

> 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.[30]

Thus it is apparent that with the holding in the case at bar the status of the law concerning loyalty oaths has reached the position that has long obtained in the criminal subversion area. Criminal jurisprudence has always recognized the necessity of a mens rea, but, *Elfbrandt* today extends this requirement to the civil loyalty oath.

The real implications of *Elfbrandt* have yet to be seen in light of those jurisdictions which have similar oath requirements. Whether the instant case will give impetus to additional litigation will be determined in the future.[31] It is uniformly recognized that when dealing with first amend-

[27] 378 U.S. 500 (1964). [28] 377 U.S. 360 (1964).

[29] Morris, *Baggett v. Bullitt and Guiltless Knowing Behavior*, 1 LAW TRANS. Q. 185 (1964).

[30] Elfbrandt v. Russell, 384 U.S. 11, 17 (1966).

[31] For example, in Illinois the scope of the loyalty oath requirement extends at this time to mere knowing membership. See ILL. REV. STAT. ch. 127, § 166 (b) (1965).

ment freedoms the courts should strive to maintain the balance between individual rights and the rights of society. The thought which remains is whether a literal adherence to the dictates of *Elfbrandt* will tip the scale too heavily in favor of the individual at the expense of the public.

Hugo Scala

CONSTITUTIONAL LAW–MERE EVIDENCE RULE AS A CONSTITUTIONAL STANDARD

Defendant, a California physician, treated a number of patients whose medical care was paid for by the Bureau of Public Assistance of Los Angeles County. In order to receive compensation for such services, the physician was required to submit medical care statements certifying that he had performed the services described and that the amount due for such services had not been paid. Defendant had been submitting fraudulent statements to the Bureau and was convicted in the Superior Court of Los Angeles County, for violating Sec. 72 of the Penal Code of California.[1] At the trial, the state introduced certain of the doctor's medical files which proved that many of the services billed to the Bureau had never been rendered. These files had been seized under a valid search warrant. Defendant appealed, contending that the seizure of the records and their use in evidence was a denial of the constitutional protection of the fourth,[2] fifth,[3] and fourteenth amendments[4] of the Constitution of the United States. This contention was based upon the theory that the so-called "mere evidence" rule enunciated by the United States Supreme Court, under which objects of merely evidentiary value may not be seized in any manner,[5] is binding upon the states under the decision in *Mapp v. Ohio*.[6]

[1] CAL. PEN. CODE § 72 (West 1927).

[2] U.S. CONST. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[3] U.S. CONST. amend. V. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

[4] U.S. CONST. amend. XIV, § 1. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

[5] See Boyd v. United States, 116 U.S. 616 (1886); Gouled v. United States, 255 U.S. 298 (1921).

[6] 367 U.S. 643 (1961).