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Oaths as to Past, Present, and Future Loyalty

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OATHS AS TO PAST, PRESENT, AND FUTURE LOYALTY

The oath upon taking public office is a basic and respected feature of our American political philosophy. This oath includes a pledge to support the Constitution of the United States, and to support the particular state laws. An oath as to present and future loyalty is constitutionally[1] and morally right, since reasonable men cannot deny that the duties of allegiance to the United States and support of the Constitution are inherent in citizenship.[2] These oaths required of public employees as to their present and future loyalty have not often been contested, but when the issue has come before the courts, their constitutionality has been upheld.[3]

Today, the United States is facing shrewd and powerful enemies. Its survival depends upon the means by which it protects itself, and it is clear that infiltration of the governments of the free peoples with subversives functioning as effective fifth columns is an integral part of the plans of our enemies.

In the face of this grave challenge, our government must fully protect itself from its enemies engaged in internal espionage. This may be accomplished by swift and efficient police work provided for by existing state and federal legislation.[4] However, mainly because of uncertainty, ignorance of foreign affairs, and a popular mass hysteria, we have sought the panacea to our feeling of insecurity in loyalty oaths. The undisciplined public demand for a wholesale method of protecting the government from internal espionage has manifested itself in a "national network of laws aimed at coercing and controlling the minds of men."[5] These laws have taken the form of the respected and highly regarded loyalty oaths.

There has been a movement in recent years to require an oath of loyalty from all government employees, and such demand has been aimed

[1] The Constitution only requires oaths by the President, Article 2, § 1, and by Congress, Article 6. However, other oaths are not prohibited, except religious oaths.

[2] 18 A.L.R. 2d 241 (1951); see McCready v. Hunt, 20 S.C.L. 1 (1834) concerning the dual aspect of American citizenship.

[3] 18 A.L.R. 2d 304 (1951).

[4] Ill. Rev. Stat. (1949) c. 38, § 558; 62 Stat. 808, § 2385 (1948); 18 U.S.C.A. § 2385 (1950). "Whoever organizes or helps to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of or affiliates with, any such society, group, or assembly of persons, knowing the purpose thereof . . . shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both. . . ."

[5] Wieman v. Updegraff, 73 S. Ct. 215, 220 (1952).

especially at school teachers.[6] These loyalty oaths usually require the government employee to file an affidavit stating that he is loyal and not a member of any subversive organization. The lawfulness of oaths pertaining to one's present and future loyalty have been readily upheld by the courts.[7] It is those loyalty oaths which require the taker of the oath to swear to his past loyalty which have been attacked most bitterly and which are our primary concern. This comment is limited to the field of loyalty oaths required of public employees by the state governments.

Retrospective "test oath" provisions requiring an oath of past allegiance and loyalty, had their beginning in American history during the time of the Civil War.[8] Their purpose, at inception, was to exclude persons who supported the Confederacy during the war from certain activities. However, the United States Supreme Court held unconstitutional the requirement of an oath of past loyalty, ordained by the Missouri Constitution as a prerequisite to the pursuance of various vocations. The case involved an application of the requirement to bar a Roman Catholic priest from teaching and preaching.[9] Such provisions were held to be bills of attainder and ex post facto laws, which barred the pursuance of one of the ordinary vocations of life, and were thus prohibited by the Constitution of the United States.[10]

In recent times, these same retrospective loyalty oath provisions, in which one's past as well as present affiliations are within the realm of disclosure, have been held to be constitutional.[11] State oaths sometimes require the affiant to swear (or affirm) that he or she has not been a member of any subversive organization for a stated period of time.[12]

[6] For a sound and stimulating discussion of the problem as to school teachers, see: Marshall, Defense of Public Education from Subversion, 51 Col. L. Rev. 587 (1951).

[7] 18 A.L.R. 2d 304 (1951).

[8] For a complete history of oaths in general, see Imbrie v. Marsh, 3 N.J. 578, 71 A. 2d 352 (1950).

[9] Cummings v. The State of Missouri, 4 Wall 277 (1866).

[10] Cf. Ex parte Garland, 4 Wall 333 (1866); U.S. Constitution provides "No Bill of Attainder or ex post facto Law shall be passed." Art. 1, § 9; Art. 1, § 10, "No state . . . shall pass any Bill of Attainder or ex post facto Law . . ."; on bill of attainder, see 90 L. Ed. 1267.

[11] Adler v. Board of Education, 342 U.S. 485 (1952); Gerende v. Election Board, 341 U.S. 56 (1951); Garner v. Los Angeles Board, 341 U.S. 716 (1951); Parker v. County of Los Angeles, 337 U.S. 929 (1949).

[12] Typical example is 1 Deering's Calif. Code on Govt., p. 188 (1951), § 3103 (Levering Act). ". . . that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, except as follows: . . . ." Upholding constitutionality, see Pockman v. Leonard, 249 P. 2d 267 (Calif., 1952).

Today, in spite of strong arguments that legislation requiring such oaths is legislation providing for bills of attainder or ex post facto laws, and thus within the prohibitory clauses of the federal Constitution, the constitutionality of such legislation has been upheld. The courts, in upholding such legislation, state that the oath requirements do not fall before the weight of these arguments, for the reason that no punishment is provided for failure to take the oath. They state that the oaths are mere regulation of standards of qualification and eligibility for employment.[13] The argument that such oath requirements impair the constitutional right to contract[14] has been held not to apply to parties dealing with a department of government.[15]

A few recent cases, however, seem to show a limit as to the amount of discretion the states will be allowed under the Constitution. *Garner v. Los Angeles Board*[16] involved a Los Angeles ordinance requiring all city employees to swear that they had neither in the past advocated the overthrow of the government by unlawful means nor belonged to any organization with such objectives. The attacks on the oath, proposing that it violates due process because its negation is not limited to organizations known by the employee to be within the proscribed class, were held invalid because the court assumed that scienter by the affiant was implied in the statute.

The oath in *Gerende v. Election Board*[17] was required of candidates for public office. This legislation was interpreted by the Maryland Court of Appeals as requiring that the affiant was not knowingly engaged in an attempt to overthrow the government by force or violence or was a member of an organization engaged in the promotion of such an end. The Supreme Court affirmed the decision on the grounds that scienter was again implied because of the interpretation given to the statute by the state court.[18]

The furthest the Supreme Court has gone in upholding retrospective loyalty oaths is in *Adler v. Board of Education*[19] in which membership in an organization found to be subversive by the Board of Regents was regarded as prima facie evidence of disqualification to continue in a

[13] Thompson v. Wallin, 301 N.Y. 476, 95 N.E. 2d 806 (1950).

[14] U.S. Const. Art. 1, § 10.

[15] Chicago, B. & Q. Railroad v. Nebraska, 170 U.S. 57 (1898); Board of Education v. Phillips, 67 Kan. 549, 73 Pac. 97 (1903).

[16] 341 U.S. 716 (1951); 38 A.B.A.J. 61 (1952); 50 Mich. L. Rev. 467 (1952); 29 Chi-Kent Rev. 255 (1951).

[17] 341 U.S. 56 (1951). This case was noted in 37 A.B.A.J. 604 (1951).

[18] Wieman v. Updegraff, 73 S. Ct. 215, 218 (1952).

[19] 342 U.S. 716 (1952), noted in 38 A.B.A.J. 924 (1952); 66 Harv. L. Rev. 95–97, 111–112, 121 (1952); 100 U. Pa. L. Rev. 1244 (1952).

teaching position.[20] The basic reason for allowing such statutes is the hornbook law proposition that there is *no constitutional right to a government job.* In other words, as Justice Holmes succinctly put it: "Everyone may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[21] Such a simple rule, however, does not deal with the dangers involved in empowering a single group to declare which organizations are deemed to be subversive. Some state legislation provides that the list of subversive organizations compiled by the Attorney General of the United States shall be used as the criterion to be applied by the courts and investigating bodies when questioning the group affiliations of government employees.[22] Such listings may prove to be very dangerous if used as a *conclusive determination* of improper conduct on the part of government employees who are or have been members of such listed groups. Condemnation of the retrospective loyalty oaths and this method of determining which organizations are subversive bases its validity on the protection of the rights of the innocent. History will point out the ease with which political opponents of those in authority and minorities holding contrary views may be condemned by capricious and arbitrary action.[23]

In the evolution of loyalty oaths, the presumption of scienter as found in the Feinberg Law[24] became a conclusive presumption of disloyalty in the Oklahoma loyalty statute which prescribed such oaths for all state officers and employees.[25] Thus the rule of scienter, promulgated by the highest court of the land, was disregarded, and guilt by association became the dictate in at least one state. The simple rule expressed time and again in upholding oppressive legislation against public employees—that such legislation does not violate constitutional due process because no person has a right to hold a government job[26]—was used again in this present-day threat, but with a more harmful effect than ever before.

The United States Supreme Court, in a unanimous decision,[27] held that

[20] N.Y. Education Law (McKinney, 1947), § 3021-22 (Feinberg Law). Thompson v. Wallin, 301 N.Y. 476, 95 N.E. 2d 806 (1950); 51 Col. L. Rev. 587 (1951).

[21] McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

[22] 1 Deering Calif. Code, Govt. 188, § 3103 (1951).

[23] The Federalist, No. 43 (Madison). As to the requirement of notice and hearing in accordance with constitutional due process before the Attorney General could list an organization as subversive, see Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951).

[24] N.Y. Educ. Law (McKinney, 1947), § 3021-22 (Feinberg Act).

[25] Okla. Stat. (1951) Title 51, § 37.1-37.8.

[26] People v. Crane, 214 N.Y. 154, 108 N.E. 427 (1915); Heim v. McCall, 239 U.S. 175 (1915).

[27] Justice Jackson not participating.

a statute which barred individuals from employment solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they belonged, violates the due process clause of the federal Constitution. In holding this statute unconstitutional the Supreme Court demonstrated that it will uphold the statute of one state while holding an identical statute of another state invalid, depending upon the interpretation and application given to the statute by the state court. The wording of the Oklahoma statute was practically identical[28] with the loyalty oath statute of California,[29] which has been upheld as constitutional by the United States Supreme Court.[30] The California statute was interpreted by the state supreme court to apply only to those individuals who joined subversive organizations knowing of their subversive activities. The Oklahoma Supreme Court interpreted their statute as not to imply scienter.[31] It was applied to those who had no knowledge of the subversive character of the organizations in which they became members.

In holding the Oklahoma statute unconstitutional the Supreme Court reasoned that one might join a proscribed organization while unaware of its subversive activities.

> They had joined (but) did not know what it was; they were good, fine young men and women, loyal Americans, but they had been trapped into it—because one of the great weaknesses of all Americans, whether adult or youth, is to join something.[32]

The indiscriminate classification of innocent members with guilty members of subversive organizations is both unjust and an assertion of arbitrary power.[33] Notwithstanding the edict that no one has a right to a government job, the Court has held that constitutional protection does extend to the public servant where exclusion pursuant to a statute is patently arbitrary or discriminatory. Legislatures cannot "enact a regulation providing that no Republican, Jew, or Negro shall be appointed to federal office. . . ."[34]

The analogy between the *actus non reum facit, sed mens*—the criminal act plus intention necessary to constitute any common law crime[35]—and the Supreme Court's edict that membership in a subversive organization,

[28] Okla. Stat. (1950) Title 51, § 37.1-37.8.

[29] 1 Deering Calif. Code, Govt. 188, § 3103 (1951).

[30] Garner v. Los Angeles Board, 341 U.S. 716 (1951).

[31] Wieman v. Updegraff, 75 S. Ct. 215 (1952).

[32] Testimony of J. Edgar Hoover, hearings before House Committee on Un-American Activities on H.R. 2122, 80th Cong., 1st Sess., 46.

[33] Wieman v. Updegraff, 75 S. Ct. 215, 219 (1952).

[34] United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947).

[35] People v. Fernow, 286 Ill. 627, 122 N.E. 155 (1919); Kilbourne v. State, 84 Ohio St. 477, 95 N.E. 824 (1911); Mills v. State, 58 Fla. 74, 51 So. 278 (1910).

along with knowledge of the organization's true purpose, is necessary before a teacher may be barred from public employ, is well justified, and the question warrants its further application. Perhaps such decision is a tacit recognition by the Court that the barring of teachers from public employment, though such employment is a privilege and not a right, is still a type of punishment. One may still recognize the right of the state to impose qualifications upon the exercise of various callings or privileges, but it should be emphasized that the state cannot be permitted, under guise of fixing qualifications, to inflict punishment for a past act not punishable at the time it was committed.[36]

It is true that in a time of "cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy' "[37] it is difficult to evaluate rational arguments for and against the legality of retrospective loyalty oaths, when interwoven with those arising from hot blood and passionate defenses of our personal liberty. When this is further confused by judicial comment upon the wisdom and effectiveness of legislative action, we have anything but a scholarly decision which may act as precedent for future cases.

It is time for the courts to analyze the differences between the cases and to distinguish between legislation enacted to protect our government from subversives and that the function of which is to guarantee that fit teachers be employed in our school systems. More arbitrary provisions are justifiable when applied to classified projects, such as the Atomic Bomb Project, in which a high degree of secrecy is needed. A reasonable suspicion of disloyalty should be sufficient to preclude any person from entering such service, while in other divisions of public employment, lesser safeguards should be required. Lack of such analysis may be the reason why the Supreme Court has rendered seemingly contradictory decisions in separate cases involving loyalty programs.[38]

Even though the decision in *Wieman v. Updegraff*[39] was a step in the right direction, the "decision" was rendered perhaps with the wrong reason or no reason at all appearing in the opinions. An example of the language used throughout the various opinions is: "Test oaths are notorious tools of tyranny. When used to shackle the mind, they are, or at least they should be, unspeakably odious to a free people."[40] This is strong

[36] Note 9 supra; Cf. United States v. Lovett, 328 U.S. 303 (1946), reaffirmed Cummings doctrine.

[37] Wieman v. Updegraff, 73 S. Ct. 215, 219 (1952).

[38] In reference to the contradictory holdings in Bailey v. Richardson, 341 U.S. 918 (1951), and Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951), see 1951 Annual Surv. Am. L., pp. 84–89, pp. 129–135.

[39] 73 S. Ct. 215 (1952).

[40] Ibid at 220.

and poetic language, but it fails to present legal grounds for invalidating the present legislation.

Worthy of quotation are these words voiced by Justice Miller in 1868:

> All oaths of an expurgatory character, especially when applied as a means of punishment for past acts not at the time recognized and known to the law as penal or criminal, have been regarded in all countries in modern times as odious and inquisitorial, and passed, as they usually are, in times of high excitement, upon the return of cool judgment and calm reason have been condemned and repealed. . . .[41]

If the time for cool judgment is returning, the people are looking to the Supreme Court of the United States to safeguard and protect their civil liberties in the exercise of its function as the supreme interpreter of the Constitution. Scholarly decisions, based upon sound theories of jurisprudence, are the bases upon which all adjudications involving our fundamental rights must be predicated.

[41] Green v. Shumway, 39 N.Y. 418 (1868).