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Article 8

Loyalty Oath Held Unconstitutionally Vague

Recent Decision: Loyalty Oath Held Unconstitutionally Vague

Members of the faculty and staff of the University of Washington brought an action in a federal district court to have declared unconstitutional several Washington statutes[1] requiring the taking of an oath by state employees as a condition of their continued employment.[2] Each employee was required to affirm that he was not, nor had he ever been, a "subversive person," defined as one who

> . . . commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow . . . the government of the United States or the State of Washington . . . by revolution, force or violence; or who with knowledge . . . becomes or remains a member of a subversive organization.[3]

Under this statute the Communist Party was designated as a subversive organization. The Supreme Court of the United States, in reversing the decision of the district court, *held* that this statute violated the due process clause because the text of the statute was unconstitutionally vague. *Baggett v. Bullitt,* 377 U.S. 360 (1964).

The device most frequently utilized by state and local governments for the purpose of securing their institutions against disloyal employees has been the loyalty oath.[4] The first cases testing the constitutional validity of loyalty oaths were decided by the Supreme Court in the early fifties at a time when cold war tensions were high and congressional investigation of subversive activity was at its peak.[5] During this period there was constant demand for loyalty oaths and other similar devices,[6] especially in the field of education.[7] States, in particular, felt the need for a better system of insulating this sensitive area against the forces of subversion. However, with the passage of time the American people have become acclimated to the pressures of the cold war. Many of the fears so prevalent in the early fifties have since diminished; as a consequence, one notices a marked decline in the popularity of many forms of internal security legislation. When analyzing the decisions of the Supreme Court in connection with this phenomenon, we perceive a definite parallelism.

In the initial loyalty oath cases, the constitutional validity of the statutes involved was upheld and the argument of unconstitutional vagueness was rejected.[8] In

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[1] WASH. REV. CODE §§ 9.81.010(2), 9.81.060, 9.81.070, 9.81.083 (1955).

[2] There was a second oath involved in *Baggett v. Bullitt* but it will not be treated here. The greater part of the Court's opinion regarding this oath involved a discussion of the applicability of the abstention doctrine, which is beyond the scope of this article.

[3] WASH. REV. CODE § 9.81.010(5) (1951).

[4] See BROWN, LOYALTY AND SECURITY 164-82 (1958); Morris, *Academic Freedom And Loyalty Oaths,* 28 LAW & CONTEMP. PROB. 496 (1963). For a thorough and enlightening treatment of the origin of loyalty programs see Emerson & Helfeld, *Loyalty Among Federal Employees,* 58 YALE L.J. 1 (1948).

[5] Rackow, *The Federal Loyalty Program: Politics and Civil Liberty,* 12 W. RES. L. REV. 701 (1961).

[6] Shub v. Simpson, 196 Md. 177, 183, 76 A.2d 332, 338 (1950).

[7] Adler v. Board of Educ., 342 U.S. 485, 493 (1952).

[8] A statute suffers from the defect of unconstitutional vagueness if it "either forbids or requires

Gerende v. Board of Supervisors,[9] the Court was confronted with a Maryland statute phrased in language identical to that of the statute in the instant case. Under the Maryland act, any person seeking to have his name placed on a ballot was required to swear that he was not a "subversive person," *i.e.,* one who

> . . . commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter . . . the constitutional form of government of the United States or of the State of Maryland . . . by revolution, force or violence.[10]

Although the opinion was stated with a qualification,[11] the Court, in affirming the judgment of the Maryland Court of Appeals, upheld the act's validity and rejected the argument of unconstitutional vagueness.[12]

In *Garner v. Board of Pub. Works,*[13] the Court upheld the validity of a Los Angeles ordinance over a plea of unconstitutional vagueness.[14] The statute required all city employees to subscribe to an oath stating that they have not, within the previous five years, do not now, and will not, while in the service of the city, "advise, advocate, or teach the overthrow, by force, violence or other unlawful means, of the State of California or the United States or belong to any organization which does so."[15] Similarly, in the landmark case of *Dennis v. United States,*[16] the Court declared a federal statute constitutional and rejected the challenge of unconstitutional vagueness. In this case petitioners, leaders of the American Communist Party, were convicted under Sections 2 and 3 of the Smith Act[17] for conspiring to overthrow the government by "force or violence." They argued that the wording of section 2 was unconstitutionally vague, *i.e.,* that it did not "sufficiently . . . [advise] those who would speak of the limitations upon their activity."[18]

In his majority opinion in *Dennis,* Mr. Chief Justice Vinson dismissed petitioner's complaint and took a realistic approach. He stated that "like all verbalizations," this statute was "subject to criticism on the score of indefiniteness," but he thought that it well served

> to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they, in full knowledge of what they intended and the circumstances in which their activity takes place, will appreciate and understand.[19]

Subsequent to its previous approach of upholding the constitutionality of loyalty oaths, the Court embarked upon the policy

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the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[9] 341 U.S. 56 (1951).

[10] MD. ANN. CODE art. 85A, § 1 (1949).

[11] In *Gerende* the Supreme Court accepted, as fulfilling the statutory requirement, a limited version of the actual oath prescribed.

[12] Baggett v. Bullitt, 377 U.S. 361, 382 n.* (1964) (dissenting opinion of Clark, J.).

[13] 341 U.S. 716 (1951).

[14] *Accord,* Adler v. Board of Educ., 342 U.S. 485 (1952).

[15] Los Angeles, Cal., Ordinance 94,004 (1948).

[16] 341 U.S. 494 (1951).

[17] 18 U.S.C. § 2385 (1948).

[18] Dennis v. United States, 341 U.S. 494, 515 (1951).

[19] *Id.* at 516.

of limiting their constitutional scope commencing with its decision in *Wieman v. Updegraff*.[20] This case involved an Oklahoma statute[21] requiring an employee to swear that he had never been a member of a subversive organization. This statute was declared unconstitutionally vague.[22] The Court found that the oath lacked the element of *scienter, i.e.,* it did not differentiate between "innocent" and "knowing" membership. In deciding this case the Court distinguished *Gerende, Garner* and *Adler* on the ground that the element of *scienter* was implicitly contained within the statutes there in question.[23]

The scope of loyalty oaths was further diminished in the 1960 case of *Shelton v. Tucker*.[24] There an Arkansas statute required teachers, as a condition of their employment, to file annually an affidavit listing every organization to which they had belonged or contributed within the preceding five years.[25] In setting aside the statute as vague and, therefore, violative of due process, the Court stated that its "unlimited and indiscriminate sweep . . . goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness . . . of its teachers."[26] Besides requiring *scienter,* it is now apparent that any loyalty oath must also be limited in its scope to a reasonable number of clearly designated organizations.

A third restriction was added to the constitutional purview of loyalty oaths in the 1961 case of *Cramp v. Board of Pub. Instruction*.[27] *Cramp* involved a Florida statute which required each state employee to swear in writing that he had never lent his "aid, support, advice, counsel or influence to the Communist Party."[28] The Court found these words lacking in "terms susceptible of objective measurement" and declared the oath unconstitutionally vague. We are not told what would constitute "terms susceptible of objective measurement," but the Court did point out that the statutory language said nothing about "advocacy of the violent overthrow of the government" or membership in, or affiliation with, the Communist Party.[29]

In the principal case the Court has once again found the wording of a loyalty oath unconstitutionally vague. In reaching this conclusion, the majority relied on an analysis of the statutory language and its decision in *Cramp*. Mr. Justice White, writing for the majority, stated that a person who swore to the oath would be justified in supposing that any advice or aid in the form of instruction that he would give, however innocently, to a member of the Communist Party, would make him a "subversive person" within the meaning of the statute. The rationale behind this was that at some future date his teaching might conceivably aid the activities of the Party.[30] Continuing, he stated that "one cannot confidently assert that his counsel, aid, influence or support which adds to the resources, rights and knowledge of the

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[20] 344 U.S. 183 (1952).

[21] OKLA. STAT. ANN. tit. 51, §§ 37.1-.8 (Supp. 1952).

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

[23] *Id.* at 191. See Nostrand v. Little, 362 U.S. 474 (1962), where the Court declared that in accordance with due process the employee must have a hearing to determine if the requisite element of *scienter* is present.

[24] 364 U.S. 479 (1960).

[25] ARK. STAT. ANN. § 80-1229 (1958).

[26] Shelton v. Tucker, 364 U.S. 479, 490 (1960).

[27] 368 U.S. 278 (1961).

[28] FLA. STAT. ANN. § 876.05 (1959).

[29] Cramp v. Board of Pub. Instruction, 368 U.S. 278, 286 (1961).

[30] Baggett v. Bullitt, *supra* note 12, at 368.

Communist Party or its members does not aid the Party . . . in furtherance of the stated purpose of overthrowing the government."[31] Citing the decision in *Cramp,* Mr. Justice White concluded that the oath in the instant case suffered from the same infirmities. Here, as in *Cramp,* "the susceptibility of the statutory language to require forswearing of an undefended variety of 'guiltless knowing behavior' " makes the oath unconstitutionally vague.[32]

The respondents, however, argued that the cases of *Gerende v. Board of Supervisors* and *Dennis v. United States* should control. They contended (1) that the definition of "subversive person" contained in the statute involved in *Gerende* was identical to the definition in the Washington act, and (2) that Sections 2 and 3 of the Smith Act, which were passed upon in *Dennis,* proscribed the same activity in the same language as did the Washington statute.

Dismissing the respondents' arguments, the majority stated that in *Gerende* the Court did not pass upon or approve the definition of "subversive person," but affirmed solely on the basis of the oath *actually* imposed.[33] Regarding *Dennis,* the Court stated that the respondents' contention was based upon a misreading of Section 2 of the Smith Act and also that the Court in *Yates v. United States*[34] had clearly defined what the sections "do and do not proscribe."[35]

Consequently, the above analysis of the instant case in light of the decisions previously discussed makes it difficult for one to concur with the opinion of the majority. In the instant case the Court has struck down a statute much narrower in scope than those previously considered. A reading of the Washington statute discloses the presence of the element of *scienter* as required by *Wieman.*[36] The statute is also in conformity with the ruling in *Shelton,* in that it proscribes membership in subversive organizations and specifically names the Communist Party.[37] Furthermore, it is difficult to see how the Washington oath suffers from the same infirmities of vagueness as the oath in *Cramp,* since it contains the very elements found lacking in *Cramp,* namely, advocacy of the violent overthrow of the Government and membership in the Communist Party.[38]

Likewise, it is hard to understand how the Court found the language of the Washington act so profoundly vague when they had no such difficulty with the identical language of the statute construed in *Gerende.*[39] In *Dennis* the Court upheld Sections 2 and 3 of the Smith Act against a charge of vagueness. In the instant case, however, the Court struck down language much clearer than that used in sections 2 and 3. "Where does this leave the constitutionality of the Smith Act?"[40]

The decision in *Baggett v. Bullitt* casts serious doubt upon the future of loyalty oaths in our society. This decision notwithstanding, if a state enacts a loyalty oath which is not susceptible to an attack of unconstitutional vagueness, will this fact alone be enough to sustain its existence?

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[31] *Ibid.*
[32] *Ibid.*
[33] *Id.* at 368 n.7.
[34] 354 U.S. 298 (1957).
[35] Baggett v. Bullitt, *supra* note 12, at 370 n.8.
[36] WASH. REV. CODE § 9.81.010(5) (1953).
[37] WASH. REV. CODE §§ 9.81.010, 9.81.083 (1953).
[38] *Ibid.*
[39] MD. ANN. CODE art. 85A, § 1 (1949).
[40] Baggett v. Bullitt, 377 U.S. 361, 384 (1964) (dissenting opinion of Clark, J.).

It has been and remains the concerted opinion of Mr. Justice Douglas and Mr. Justice Black that loyalty oaths and similar devices violate the first amendment guarantee of "free dissemination of ideas."[41] Mr. Justice Douglas, concurring in *Speiser v. Randall,*[42] stated that with the adoption of the Bill of Rights and the fourteenth amendment

> a rather broad range of liberties was newly guaranteed to the citizen against state action. Included were those contained in the First Amendment—the right to speak freely, the right to believe what one chooses, the right of conscience.[43]

Apart from the constitutional question, these Justices also consider such devices as opposed to our founding principles: they retard intellectual advancement, make second-class citizens out of those who must subscribe, and cast a pall of suspicion over the classroom. Mr. Justice Black, also concurring in *Speiser,*[44] stated that

> loyalty oaths as well as other contemporary "security measures," tend to stifle all forms of unorthodox or unpopular thinking or expression—the kind of thought and expression which has played such a vital and beneficial role in the history of this Nation.[45]

Because of the urgings of these Justices and the Court's interest in the area of civil liberties, it appears reasonable to predict that if the loyalty oath is ever again placed in issue it will be declared unconstitutional on first amendment grounds.

The result of such a decision would surely mean the total elimination of all loyalty oaths. Some in our society are certain to view such an event as opening the floodgates of subversion. However, following an examination of the workability of loyalty oaths it appears that such a result is quite unlikely. The loyalty oath fails in principle before it is ever put into practice. No one can dispute the fact that a communist will swear to any oath if it will help him achieve his purpose. The device is, therefore, totally ineffectual against those at whom it is directed. The person who *actually* feels the impact of such legislation is the conscientious objector who refuses, because of his principles, to take the oath.[46] As a result, persons of unquestionable loyalty and competency are eliminated from public service, something which no society can afford.[47]

Whether there will continue to be a place in our society for loyalty oaths depends, in great measure, upon the Supreme Court's attitude in future cases; if it continues its present tendency to regard first amendment freedoms as "absolute," then the loyalty oath cannot long endure.

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[41] See Adler v. Board of Educ., 342 U.S. 485, 508 (1952) (dissenting opinion of Douglas, J.); *cf.*, Carlson v. Landon, 342 U.S. 524, 555 (1952) (dissenting opinion of Black, J.); Dennis v. United States, 341 U.S. 494, 579 (1951) (dissenting opinion of Black, J.).

[42] 357 U.S. 513, 532 (1958) (concurring opinion of Douglas, J).

[43] *Id.* at 535.

[44] Speiser v. Randall, 357 U.S. 513, 529 (1958).

[45] *Id.* at 532.

[46] BROWN, LOYALTY AND SECURITY 95 (1958).

[47] For example, because of a California oath twenty-six members of the University of California were dismissed; thirty-seven resigned in protest. The sad fact is that there was absolutely no evidence that any of these men were communists. *Ibid.*