

North Carolina Central Law Review

Volume 1
Issue 1 *Spring 1969*

Article 8

4-1-1969

A Survey of Loyalty Oath Test

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Recommended Citation

Villareal, Diego L. (1969) "A Survey of Loyalty Oath Test," *North Carolina Central Law Review*: Vol. 1 : Iss. 1 , Article 8.
Available at: <https://archives.law.nccu.edu/ncclr/vol1/iss1/8>

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the likely result will be for state court judges to move in the direction of imposing maximum sentences in all cases where appeal is likely.

It is the personal opinion of the writer that in every case the defendant is entitled to credit for time served. On a second trial, it is permissible to impose a harsher sentence than imposed at the original trial provided the court, in imposing such a sentence, states for the record the reasons for the excess sentence and clearly indicates that the mere exercise of the right of appeal or of post-conviction relief was not the reason for the excess sentence.¹

JAMES H. POU BAILEY*

A Survey of Loyalty Oath Tests

Introduction

One of the most significant developments in freedom of political expression in the period following World War Two has been the establishment of loyalty qualifications for employment. Major emphasis on loyalty requirements has been in government employment and defense plants, but programs have been established and proposed in a wide area of private employment as well.

One form of loyalty qualification has been the requirement of taking a loyalty oath or completing a loyalty affidavit as a condition of employment. By constitutional and statutory requirements, public officials and employees have customarily been required to take oaths to support the U.S. and state constitutions and laws. The issue arises as to oaths and affidavits which go beyond the traditional scope. The significance for freedom of political expression lies both in the restrictions imposed by the requirement of taking the oath and in the enforcement of the oath through perjury or similar proceedings. Another major form of loyalty qualification has been the requirement that persons meet certain standards of loyalty as a condition of obtaining or retaining employment. Justification for oaths and other loyalty requirements comes mainly from the needs of national security.

The initial and major emphasis on employee loyalty came from the Federal Government in the period following the establishment of the Com-

¹ Certiorari granted on January 13, 1969. Argument before the United States Supreme Court scheduled during last week in February, 1969.

* Resident Judge of Tenth Judicial District.

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mittee on Un-American Activities in 1938. Before that time no loyalty program had existed in the Federal Government. There was, in fact, a requirement in Civil Service Rule I, issued in 1884, that no inquiry could be made of the political or religious opinions or affiliations of any applicant.¹ In 1939, Congress passed the Hatch Act² which made it unlawful for any person employed by the Federal Government "to have membership in any political party or organization which advocated the overthrow of our constitutional form of government in the United States."³ In 1941, Congress began to incorporate a provision into almost all appropriation acts that none of the funds could be used to pay the salary or wages of "any person who advocates, or who is a member of an organization that advocates the overthrow of the Government of the United States by force or violence." These provisions also made it a criminal offense for any such person to accept employment in the Federal Government. The Civil Service Commission interpreted the language of the Hatch Act and the appropriation riders to exclude from government employment members of the Communist Party, the German Bund, or any other Communist, Nazi, or Fascist organization.⁴

Throughout the war years administration of loyalty measures remained largely uncoordinated and somewhat haphazard. Then in 1947, President Truman promulgated a program, through executive order,⁵ which served as the principal basis for the federal employee loyalty program until 1953, when the Eisenhower Administration reviewed and revised the loyalty program with the purpose of making it more effective. The new executive order⁶ transformed the program into the loyalty-security program.

Meanwhile, Congress passed measures to up date the nation's security programs with the Smith Act in 1940,⁷ the Internal Security Act of 1950,⁸ the Communist Control Act in 1954,⁹ and other legislation.

Before World War II, state legislation imposing loyalty qualifications as a condition of state employment mainly took the form of teachers'

¹ Thomas I. Emerson and David Haber, *Political and Civil Rights in the United States* (Buffalo, N.Y.: Dennis & Co., Inc., 1958), p. 555.

² 53 Stat. 1147, Aug. 2, 1939, 5 U.S.C. § 118; *et seq.* (1964).

³ *Ibid.*

⁴ *Id.*, p. 556.

⁵ No. 9835, 12 F.R. 1935, March 21, 1947.

⁶ No. 10491, 18 F.R. 6583, Oct. 16, 1953.

⁷ 54 Stat. 670, June 28, 1940, 18 U.S.C. §§ 2385, 2387 (1964).

⁸ 64 Stat. 987, Sept. 23, 1950, 50 U.S.C. § 781 *et seq.* (1964).

⁹ 68 Stat. 775, Aug. 24, 1954, 50 U.S.C. § 841 *et seq.* (1964).

oath laws. Since the War, however, there has been a rapid development in state laws requiring loyalty oaths or tests for employees generally. In 1958, thirty states had such laws; five other states had laws applying only to teachers, and thirty-two states had loyalty requirements for Civil Defense Workers.¹⁰

These laws may take the form of test oaths or administrative programs or a combination of the two. The oaths usually require the employee to swear that he does not advocate the overthrow of the government by force or belong to an organization that does. Sometimes they cover past and often future conduct. Others go farther.

This paper will attempt to trace the rulings of the Supreme Court on cases concerned with loyalty oaths in an effort to see how the Court has changed from a willingness to allow some restrictions to be imposed on individual freedoms to opinions which afford more freedom of political expression and association.

In *American Communications Association v. Douds*¹¹ in 1950, the Supreme Court was asked to decide the question whether, consistently with the First Amendment, Congress may by statute exert pressures upon labor unions to deny positions of leadership to certain persons who are identified by particular beliefs and political affiliations.

Section 9(h) of the Taft-Hartley Act,¹² commonly referred to as the non-Communist affidavit provision, provides that no investigation shall be made by the National Labor Relations Board of any question unless all officers of the labor organization concerned in the dispute sign an affidavit that they are not members of the Communist Party and that they do not believe in, or support any organization that believes in or teaches the overthrow of the United States government by force or by any illegal or unconstitutional methods.

The union challenged Sec. 9(h) as a violation of First Amendment guarantees and contended that the "clear and present danger" test should apply.

The Court held that the freedoms of speech, press or assembly, established in the First Amendment are dependent on the power of constitutional government to survive. If it is to survive the government must have the power to protect itself against unlawful conduct. Thus freedom of speech does not include the unlimited right to speak on any subject

¹⁰ *Id.*, p. 655.

¹¹ 339 U.S. 382 (1950).

¹² 61 Stat. 136, June 23, 1947, 29 U.S.C. §§ 141, 150 (1964).

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at any time. Also, this is not merely a matter of speech, but the Government's interest here is not in preventing the dissemination of communist doctrine or the holding of particular beliefs because it fears that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the product of speech at all. Sec. 9(h), in other words, does not interfere with speech and free political expression because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs.

Congress may under its constitutional power to regulate commerce among the several states attempt to prevent political strikes and other kinds of direct action designed to burden and interrupt the free flow of commerce.

The union also challenged Sec. 9(h) as being vague and broad and as being a bill of attainder.

The charge of vagueness is inapplicable because the only punishment specified is the application of Sec. 35(A) of the Criminal Code¹³ which covers only those statements made knowingly and willfully; neither is it a bill of attainder because the law is intended to prevent future action rather than to punish past action.

The union complained that Sec. 9(h) violated the Constitution because it is in oath form; they claimed it was comparable to a "religious test." But the Court said this oath is not in that category. The Constitution permits the requirement of oaths by office holders to uphold the Constitution; the Framers thought that the exaction of an affirmation of minimal loyalty to the Government was worth the price of whatever deprivation of individual freedom of conscience involved. The casting of Sec. 9(h) in the mold of an oath does not invalidate it, if it is otherwise Constitutional.

*Gerende v. Board of Supervisors of Elections of Baltimore*¹⁴ is a case in which the decision of the state court was upheld. A decision by the highest court of Maryland upholding the validity of a Maryland law, construed as requiring that, in order for a candidate for public office in that State to obtain a place on the ballot, he must take an oath that he is not engaged "in one way or another in the attempt to overthrow the

¹³ 18 U.S.C. § 35(A) (1964).

¹⁴ 341 U.S. 56 (1951).

government by force or violence,” and that he is not knowingly a member of an organization engaged in such an attempt, was affirmed on the understanding that an affidavit in those terms would fully satisfy the requirement.

Garner v. Board of Public Works of Los Angeles affirms the decision of the state court upholding ordinance requirements for an oath and an affidavit of loyalty for a person to hold office or employment in the service of the City of Los Angeles.¹⁵ In 1948, the City passed an ordinance requiring each of its officers and employees to take an oath that he has not within the five years preceding the effective date of the ordinance, does 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 or Federal Government or belong to an organization which does so or has done so within such five-year period. The ordinance required every employee to execute an affidavit stating whether or not he is or ever was a member of the Communist Party of the United States of America or of the Communist Political Association, and if he is or was such a member, stating the dates when he became, and the periods during which he was such a member.

Petitioners attack the ordinance as violative of the provision of Art. I, Sec. 10 of the Federal Constitution that “No State shall . . . pass any Bill of Attainder (or) *ex post facto* Law. . . .” They also contended that the ordinance deprived them of freedom of speech and assembly and of the right to petition for redress of grievances.

The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. The Federal Constitution does not forbid a municipality to require such an affidavit from its employees. The Court reasoned that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to 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.

The ordinance is not a bill of attainder; no punishment is imposed

¹⁵ 341 U.S. 716 (1951).

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by a general regulation which merely provides standards of qualification and eligibility for public employment. It is not *ex post facto*, since the activity covered by the oath had been proscribed by the Charter in the same terms, for the same purpose, and to the same effect over seven years before, and two years prior to the period covered by the oath.

The Court assumes here that the oath will not be construed as affecting adversely persons who during their affiliation with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent, or those who were affiliated with organizations which were not engaged in proscribed activities at the time of their affiliation; and that, if this interpretation of the oath is correct, the City will give those petitioners who heretofore refused to take the oath an opportunity to take it as interpreted and resume their employment. As thus construed, the requirement of the oath does not violate the Due Process Clause of the Fourteenth Amendment. The Court assumes that scienter is implicit in each clause of the oath.

In the case of *Adler v. Board of Education of the City of New York* the Court held in 1952, that the state may set requirements for employees to meet in order to hold positions, that the state has the right to inquire of its employees relative to their fitness and suitability for public service.¹⁶ This case also indicated the importance of determining whether a rule based on association applies to innocent as well as knowing activity. The Court, in upholding the legislation, expressly noted that the New York courts had construed the statute to require knowledge of organizational purpose before Sec. 3022 of the statute concerning membership could apply.

Wieman v. Updegraff was decided by the Supreme Court in 1952.¹⁷ This case was an appeal from the decision of the Supreme Court of Oklahoma upholding the validity of a loyalty oath¹⁸ prescribed by Oklahoma statute for all state officers and employees. Appellants, employed by the State as members of the faculty and staff of Oklahoma Agricultural and Mechanical College, failed, within the thirty days permitted, to take the oath required by the Act. Appellee Updegraff, as a citizen and taxpayer, thereupon brought this suit in the District Court of Oklahoma County to enjoin the necessary state officials from paying further com-

¹⁶ 342 U.S. 485 (1952).

¹⁷ 344 U.S. 183 (1952).

¹⁸ Oklahoma loyalty oath: Oklahoma Statutes Annotated, 51 § 36.2.

pensation to employees who had not subscribed to the oath. The appellants, who were permitted to intervene, attacked the validity of the Act on the grounds, among others, that it was a bill of attainder; an *ex post facto* law; impaired the obligation of their contracts with the State and violated the Due Process Clause of the Fourteenth Amendment. They also sought a mandatory injunction directing the state officers to pay their salaries regardless of their failure to take the oath. The court upheld the Act and enjoined the stated officers from making further salary payments to the appellants. The Supreme Court of Oklahoma affirmed, and the U.S. Supreme Court took the case on an appeal from that court. They read the highest state court's decision as limiting the organizations proscribed by the Act to those designated on the list or lists of the Attorney General which had been issued prior to the effective date of the Act. Although this interpretation discarded clear language of the oath as surplusage, the state court denied the appellants' petition for rehearing which included a plea that refusal of the court to permit appellants to take the oath as so interpreted was violative of due process.

The State said the purpose of the Act was to make loyalty a qualification to hold public office or be employed by the State. During periods of international stress, the extent of legislation with such objectives accentuates our traditional concern about the relation of government to the individual in a free society. The perennial problem of defining that relationship becomes acute when disloyalty is screened by ideological patterns and techniques of disguise that make it difficult to identify. Democratic government is not powerless to meet this threat, but it must do so without infringing the freedoms that are the ultimate values of all democratic living. In the adoption of such means as it believes effective, the legislature is therefore confronted with the problem of balancing its interest in national security with the often conflicting constitutional rights of the individual.

With the decision of *Garner* before it the Oklahoma Supreme Court refused to extend to appellants an opportunity to take the oath. A petition for rehearing which urged that failure to permit appellants to take the oath as interpreted deprived them of due process was denied. This is viewed as a holding that knowledge is not a factor under the Oklahoma statute. This raises the question whether the Due Process Clause permits a state, in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership, regardless

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of their knowledge concerning the organizations to which they had belonged. Under the Oklahoma Act the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. The Supreme Court held that indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power, and thus held the oath offends due process.

The Court does not consider whether an abstract right to public employment exists, but it suffices to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

In *National Labor Relations Board v. Dant*¹⁹ a U.S. Appeals Court set aside an order of the National Labor Relations Board requiring an employer to cease and desist from unfair labor practices on the ground that Sec. 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act, had not been complied with. The Supreme Court granted certiorari, and decided the case in February of 1953. The Court held that Section 9(h) of the Act does not preclude issuance by the National Labor Relations Board of an unfair-labor practice complaint under Sec. 10(c) after the required non-Communist affidavits have been filed, even though they had not been filed when the union filed the charge with the Board, and the Court of Appeals decision was therefore dismissed.

*Speiser v. Randall*²⁰ reached the Supreme Court on appeal from the Supreme Court of California, and the case was decided in June of 1958. The appellants were denied tax exemptions provided for veterans by the California Constitution. The exemptions were denied because the appellants refused to subscribe to oaths that they do not advocate the overthrow of the Federal or State Government by force, violence or other unlawful means, or advocate the support of a foreign government against the United States in event of hostilities. The filing of such an oath was required by California statute as a prerequisite to qualification for the tax exemption, in order to effectuate a provision of the Stated Constitution denying any tax exemption to any person who advocates such actions. This was construed by the State Supreme Court as denying

¹⁹ 344 U.S. 375 (1953).

²⁰ 357 U.S. 513 (1958).

tax exemptions only to claimants, who engage in speech which may be criminally punished.

The Court held that enforcement of this provision through procedures which place the burdens of proof and persuasion on the taxpayers denied them freedom of speech without the procedural safeguards required by the Due Process Clause of the Fourteenth Amendment. Since free speech is involved, due process requires in the circumstances of this case that the State bear the burden of showing that the appellants engaged in criminal speech.

The rule for this case follows that when a State undertakes to restrain unlawful advocacy, it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights. Due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition.

Since the entire statutory procedure violated the requirements of due process by placing the burdens of proof and persuasion on them, the appellants were not obliged to take even the first step in such procedure as a condition for obtaining the tax exemption. The decision of the California court was reversed and the causes remanded.

*Shelton v. Tucker*²¹ came to the Supreme Court on an appeal from an Arkansas Federal District Court. An Arkansas statute required that every teacher, as a condition of employment in a state-supported school or college, file annually an affidavit listing without limitation every organization to which he had belonged or regularly contributed within the preceding five years. Teachers in state-supported schools and colleges were not covered by a civil service system, they were hired on a year-to-year basis, and they had no job security beyond the end of each school year. The contracts of the teachers involved in this case were not renewed because they refused to file the required affidavits. The Supreme Court held the statute invalid and reversed the district court decision. The Supreme Court held that the statute was invalid, because it deprived teachers of their right of associational freedom protected by the Due Process Clause of the Fourteenth Amendment from invasion by state action. The statute inhibited the freedom to associate with impunity.

The Court reasoned there can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, but to compel a teacher to disclose his every associa-

²¹ 364 U.S. 479 (1960).

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tional tie is to impair his right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. The unlimited and indiscriminate sweep of the statute here involved and its comprehensive interference with associational freedom go far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competence of its teachers.

The rule of this case would state that legitimate legislative goals cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

*Killian v. United States*²² concerns the case in which a union official was convicted in a Federal District Court of swearing falsely that he was not a member of, or affiliated with, the Communist Party, in an affidavit filed with National Labor Relations Board to enable a union of which he was an officer to comply with Sec. 9(h) of the National Labor Relations Act, as amended by the Taft-Hartley Act. The case came to the Supreme Court on certiorari from a U.S. Appeal Court. It was decided in December of 1961.

At the trial, petitioner moved under 18 U.S.C. Sec. 3500 for production, for use in cross-examination, of all statements given by two government witnesses relating to their testimony. All narrative statements of both witnesses which related to their direct testimony were produced and made available to petitioner; but notes made by an F.B.I. agent covering oral reports of one witness regarding his expenses and receipts signed by both witnesses for money paid to them for expenses were not produced, and they were not in the record before Court. In the Supreme Court, the Solicitor General represented that the notes covering oral reports of the witness regarding his expenses had been destroyed before the trial, that most of the receipts for expense money signed by the witnesses did not relate to anything mentioned in their direct testimony, and that, although some of the receipts contained information relating to the direct testimony of one of the witnesses, all such information had been made available to petitioner in the narrative statements of that witness.

The judgment was vacated and the cause was remanded to the District Court for a hearing and findings of fact on the issues raised by the Solicitor General's representations, with instructions for that court to find if his representations are true in all material respects, if this is found

²² 368 U.S. 231 (1961).

it shall enter a new final judgement based upon the record as supplemented by its findings, thereby preserving to petitioner an appeal to the Court of Appeals. If the District Court finds that the Solicitor General's representations are untrue in any material respect, it shall grant petitioner a new trial.

There is nothing new in the case itself, but in the dissent of Mr. Justice Douglas we may see some idea of a trend, in opinions which may be forthcoming. Quoting from Justice Douglas' dissent:

American Communications Assn. v. Douds, upheld the test oath requirement upon which this prosecution is based, resting its decision upon the ground that however obnoxious test oaths may be, they must be endured in the interest of interstate commerce. Eleven years have elapsed since that decision and I think it fair to say that this recent experience with test oaths in this country has done nothing to change the evil reputation they gained throughout previous centuries in other countries. The question before us now is thus no different from that originally presented to us in *Douds*: Can Congress, in the name of regulation of interstate commerce, circumvent the history, language and purpose of our Bill of Rights and impose test oaths designed to penalize political or religious minorities? I would overrule the decision in *Douds* and order this prosecution dismissed. Test oaths, whether religious, political, or both, are implacable foes of free thought. By approving their imposition, this Court has injected compromise into a field where the First Amendment forbids compromise.²³

The Chief Justice and Mr. Justice Black concurred with Justice Douglas in this dissent.

In December of 1961, the Supreme Court decided the case of *Cramp v. Board of Public Instruction of Orange County*.²⁴ The Court heard the case on an appeal from the Supreme Court of Florida. A Florida statute required every employee of the State or its subdivisions to execute a written oath in which he must swear that, *inter alia*, he has never lent his "aid, support, advice, counsel or influence to the Communist Party."²⁵ Under the law an employee's failure to subscribe to this oath would result in his immediate discharge.

The appellant had been employed as a public school teacher in Orange County for more than nine years when it was discovered that he had never been required to execute this oath. He was requested to take

²³ *Id.*, p. 260.

²⁴ 368 U.S. 278 (1961).

²⁵ Florida statute: Fla. Stat. § 876.05.

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the oath, and he refused to do so. He sued in a state circuit court for a judgement declaring the oath requirement unconstitutional, and for an injunction to prevent the Orange County Board of Public Instruction from requiring him to execute the oath and from discharging him for failure to do so. He stated that he had not done any of the things mentioned in the statute, as he understood it, but that its meaning was so vague as to deprive him of liberty or property without due process of law. The circuit court held the statute valid and denied the injunction. The Supreme Court of Florida affirmed the decision of the lower court; the higher court held that the State could stipulate qualifications for public employment and that such requirements did not infringe on the right of a citizen to speak or assemble peaceably, but “merely provided that when one speaks out to advocate the violent overthrow of the government of the United States, or assembles for that purpose, he cannot simultaneously work for and draw compensation from the government he seeks to overthrow.”²⁶ The state high court disposed of the claim that the oath requirement was unconstitutionally vague by ruling that the statute was perfectly clear and that anyone who could read English could understand it, both as to its requirements and the effect of failure to comply.

The U.S. Supreme Court ruled first as to the appellants’ standing to attack the stated statute in that Court. The argument was made that the self-exonerating sworn statements in the complaint showed that the appellant could not possibly sustain injury by executing the oath, and that he, therefore, lacked standing to question the constitutional validity of the state law. The Court held that this argument had no application to the appellant’s claim that the statutory oath was unconstitutionally vague. The Court next decided whether a State can constitutionally compel those in its service to swear that they have never “knowingly lent their aid, support, advice, counsel, or influence to the Communist Party,” or whether forcing an employee either to take such an oath, at the risk of subsequent prosecution for perjury, or face immediate dismissal from public service is consistent with the Due Process Clause of the Fourteenth Amendment.

The Court noted that the oath here, said nothing of advocacy of violent overthrow of the state or federal government, and it said nothing of membership or affiliation with the Communist Party either in the

²⁶ Note 24 *supra*, pp. 282-283.

past or at the present. It held that the provisions of the statute were written in extraordinarily ambiguous language and were completely lacking in any terms susceptible of objective measurement. The Court stated further that "a statute which either forbids or requires 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, violates the first essential of due process of law . . . and it appears . . . that these general words and phrases are so vague and indefinite that a penalty prescribed for their violation constitutes a denial of due process of law."²⁷

The Court held that "the vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution."²⁸ A statute which is so vague and indefinite that it permits the punishment of the fair use of the opportunity for political discussion is held by the Court to be repugnant to the guaranty of liberty contained in the Fourteenth Amendment. In this case it was reaffirmed that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. The judgement of the Supreme Court of Florida was reversed.

Mr. Justice Black and Mr. Justice Douglas joined in the Court's judgement and opinion, but also adhered to the view expressed in their dissents in the *Adler*, *Garner* and *Barenblatt* cases, and to their concurrences in the *Wieman* case.

Nostrand v. Little came to the Court on appeal from the Supreme Court of Washington; the case was remanded to resolve a question of local law.²⁹ After the remand, the State Supreme Court held that the appellants, who were professors at the State University, were entitled to hearings before they could be discharged for refusal to swear that they are not members of the Communist Party or any other subversive organization, as required by a state statute. The case came back to the U.S. Supreme Court on appeal in January of 1962; the appellants asked for a judgement to declare the statute unconstitutional as a violation of the First and Fourteenth Amendments, but the Court dismissed the appeal for want of a substantial federal question.

Mr. Justice Douglas and Mr. Justice Black dissented from the dis-

²⁷ *Id.*, p. 287.

²⁸ *Ibid.*

²⁹ 368 U.S. 436 (1962).

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missal of this case. They stated that in their view the case did contain questions on which the Court could decide.

The Washington oath required a teacher to swear that he was not a “subversive person.” The State law defined a subversive person as “. . . any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsection (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization.”³⁰

Mr. Justice Douglas considered that one aspect of the question which the Court did not answer here was very much akin to the one which they answered in the *Cramp* case. In that case the Court held that “the oath which required a teacher to say he had never knowingly lent his “aid” or “support” or “advice” or “counsel” or “influence” to the Communist Party was unconstitutional, because it brought or might bring into its net people who by parallelism of conduct, might be said to have given “aid” to the Communist Party though the cause they espoused was wholly lawful.”³¹

Mr. Justice Douglas further stated that this oath presented the question whether one who plans to alter the government by revolution or who knowingly belongs to a group that holds that aim can be disqualified as a teacher. He reminds that it could be argued that to alter the government by a revolution which operates through the route of constitutional amendments could be in keeping with our ideas of freedom of belief and expression, and that until recently the idea of revolution has been a concept that has been greatly revered in America.

The case of *Baggett v. Bullitt* came to the Supreme Court on an appeal from a U.S. District Court in the State of Washington.³² The action was brought by members of the faculty, staff, and students of the University of Washington for a judgement declaring unconstitu-

³⁰ See, RCW 9.81.010(2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083.

³¹ *Ibid.*

³² 377 U.S. 360 (1964).

tional 1931 and 1955 statutes requiring the taking of oaths,³³ one for

³³ Oath A for teaching personnel; oath B for other state employees.

"Oath Form A

"STATE OF WASHINGTON

*"Statement and Oath for Teaching Faculty
of the University of Washington*

"I, the undersigned, do solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the state of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the state of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

"I further certify that I have read the provisions of RCW 9.81.010(2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083, which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

"I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

"I understand that this statement and oath are made subject to the penalties of perjury.

.....
(SIGNATURE)

.....
(TITLE AND DEPARTMENT)

"Subscribed and sworn (or affirmed) to before me this
day of, 19....

.....
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, RE-
SIDING AT

"(To be executed in duplicate, one copy to be retained by individual.)

"NOTE: Those desiring to affirm may strike the words 'swear' and 'sworn to' and substitute 'affirm' and 'affirmed,' respectively."

"Oath Form B

"STATE OF WASHINGTON

*"Statement and Oath for Staff of the University of Washington
Other Than Teaching Faculty*

"I certify that I have read the provisions of RCW 9.81.010(2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

"I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

"I understand that this statement and oath are made subject to the penalties of perjury.

.....
(SIGNATURE)

.....
(TITLE AND DEPARTMENT OR OFFICE)

"Subscribed and sworn (or affirmed) to before me this
day of, 19....

.....
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, RE-
SIDING AT

"(To be executed in duplicate, one copy to be retained by individual.)

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teachers and the other for all state employees, including teachers, as a condition of employment. The 1931 oath requires teachers to swear, by precept and example, to promote respect for the flag and the institutions of the United States and the State of Washington, reverence for law and order and undivided allegiance to the Government of the United States. The 1955 oath for state employees, which incorporates provisions of the state Subversive Activities Act,³⁴ requires an affidavit sworn to the effect that the employee is not a "subversive person": that he does not commit, or advise, teach, abet or advocate another to commit or aid in the commission of any act intended to overthrow or alter, or assist in the overthrow or alteration, of the constitutional form of government by revolution, force or violence. The statute defines "subversive organization" and "foreign subversive organization" in similar terms and the Communist Party is declared a subversive organization.

The District Court held that the 1955 statute and oath were not unduly vague and did not violate the First and Fourteenth Amendments; it abstained from ruling on the 1931 oath because it had never been considered by the state courts. The Supreme Court reversed this decision; it held as in *Cramp* that the 1955 statute and the 1931 act violated due process since they, as well as the oaths based upon them, were unduly vague, uncertain and broad. This case raised questions which also came before the Court in *Cramp*. "Does the statute reach endorsement or support for Communist candidates for office? Does it reach a lawyer who represents the Communist Party or its members or a journalist who defends constitutional rights of the Communist Party? The susceptibility of the statutory language to require foreswearing of an undefined variety of guiltless knowing behavior is what the Court condemned in *Cramp*."³⁵ The Washington statute suffers from additional difficulties on vagueness grounds; here, a person is subversive not only if he himself commits the specified acts but if he abets or advises another in aiding a third person to commit an act which will assist yet a fourth person in the overthrow or alteration of constitutional government. The oath goes far beyond overthrow or alteration by force or violence. It extends to alteration which could include any rapid or fundamental change. It might be construed to cover as subversive any organization or person

"NOTE: Those desiring to affirm may strike the words 'swear' and 'sworn to' and substitute 'affirm' and 'affirmed,' respectively."

³⁴ 54 Stat. 670, June 28, 1940, 18 U.S.C. §§ 2385, 2387 (1964).

³⁵ Note 32 *supra*, p. 368.

supporting, advocating or teaching peaceful but far-reaching constitutional amendments such as repeal of the Twenty-second Amendment or the participation by the United States in a world government. It would be hazardous to risk the interpretation of such a sweeping statute to a prosecutor's sense of fairness. The danger of prosecution for knowing but guiltless behavior would remain too great.

The Court ruled that a State cannot require an employee to take an unduly vague oath containing a promise of future conduct at the risk of prosecution for perjury or loss of employment, particularly where the exercise of First Amendment freedoms may thereby be deterred. It was held that the interests of the students at the University in academic freedom are fully protected by a judgement in favor of the teaching personnel, and there was therefore no occasion to pass on the standing of the students to bring this suit.

Concerning the 1931 statute, the Court ruled that federal courts do not automatically abstain when faced with a doubtful issue of state law, since abstention involves a discretionary exercise of equity power.

The Court did not question the power of a state to take proper measures to safeguard public service from disloyal conduct, but stated that "measures which purport to define disloyalty must allow public servants to know what is and is not disloyal."³⁶

Under Arizona law state employees were required to take an oath³⁷ to support the Federal and State Constitutions and state laws. The Legislature put a gloss on the oath³⁸ by subjecting to a prosecution for perjury and for discharge from public office anyone who took the oath and who "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 of the government of Arizona or any of its political subdivisions where the employee had knowledge of the unlawful purpose." This law was challenged in the case of *Elfbrandt v. Russell*³⁹ which came to the Supreme Court on certiorari from the Supreme Court of Arizona; the case was decided in April of 1966. Petitioner, a teacher and a Quaker, decided she could not take the oath in good conscience because she could not know what it meant, and she had no chance to get a hearing

³⁶ Note 32 *supra*, p. 380.

³⁷ Arizona oath: see Arizona Revised Statute § 38-231 (1965 Supp.).

³⁸ Legislative gloss: *ibid.*, § E.

³⁹ 381 U.S. 11 (1966).

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at which its precise scope and meaning could be determined. She sued for declaratory relief; the Arizona Supreme Court sustained the oath; the U.S. Supreme Court vacated the judgement of the Arizona Court and remanded the case for reconsideration in the light of *Baggett v. Bullitt*. On reconsideration the Arizona Supreme Court reinstated its original judgement, finding the oath “not afflicted” with the many uncertainties found potentially punishable in *Baggett*. The U.S. Supreme Court granted certiorari, and reversed the judgement of the Arizona Court.

The U.S. Supreme Court held that:

“Political groups may embrace both legal and illegal aims, and one may join such groups without embracing their illegal aims, and those who join an organization without sharing in its unlawful purposes pose no threat to constitutional government, either as citizens or as public employees. It held further that to presume conclusively that those who join a “subversive” organization share its unlawful aims is forbidden by the principle that a State may not compel a citizen to prove that he has not engaged in criminal advocacy. The Arizona Act is not confined to those who join with “specific intent” to further the illegal aims of the subversive organization; because it is not narrowly drawn to define and punish specific conduct as constituting a clear and present danger, it unnecessarily infringes on the freedom of political association protected by the First Amendment and made applicable to the States through the Fourteenth Amendment. First Amendment freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.”⁴⁰

“Public employees of character and integrity may well forego their calling rather than risk prosecution for perjury or compromise their commitment to intellectual and political freedom. The communist trained in fraud and perjury has no qualms in taking any oath; the loyal citizen, conscious of history’s oppressions, may well wonder whether the medieval rack and torture wheel are next for the one who declines to take an involved negative oath as evidence that he is a True Believer.”⁴¹

The case of *Keyishian v. Board of Regents of The University of The State of New York*⁴² was decided by the Supreme Court in January of 1967. Appellants were members of the faculty of the privately owned and operated University of Buffalo, and became state employees when the

⁴⁰ *Id.*, p. 17.

⁴¹ *Id.*, p. 18.

⁴² 385 U.S. 589 (1967).

University was merged into the State University of New York in 1962. As faculty members and employees of the State University their continued employment was conditioned upon their compliance with a New York plan, formulated partly in statutes and partly in administrative regulations,⁴³ which the State utilized to prevent the appointment or retention of "subversive" persons in state employment.

Appellants Hochfield, Maud, Keyishian and Garver were faculty members; each refused to sign, as regulations then required, a certificate that he was not a Communist, and that if he had ever been a Communist, he had communicated that fact to the President of the State University of New York. Each was notified that his failure to sign the certificate would require his dismissal.

Appellant Starbuck was a non-faculty library employee and part-time lecturer; personnel in that classification were not required to sign a certificate but were required to answer in writing under oath the question, "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the Government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence or any unlawful means?" Starbuck was dismissed as a result of his refusal to answer the question.

Appellants brought this action for declaratory and injunctive relief, alleging that the state program violated the Federal Constitution in various respects. A three-judge Federal District Court held that the program was constitutional, and the U.S. Supreme Court heard the case on appeal from that decision.

The Court considered some aspects of the constitutionality of the New York plan fifteen years earlier in the *Adler* case in which it upheld some provisions of the teacher loyalty program. The *Adler* decision came before the extension of the program to state institutions of higher learning and was held as not controlling in the present case; also, the vagueness issue presented in this case involving Section 3021 and Section 105 was not decided in *Adler*, and the validity of the subversive organization membership provision of Section 3022 was upheld at that time for reasons which have subsequently been rejected by the Court.

Shortly before the trial of this case, the Feinberg certificate was

⁴³ New York Plan: *Id.*, p. 610.

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rescinded. In lieu of the certificate, it was provided that each applicant be informed that the statutes, Sections 3021 and 3022 of the Education Law and Section 105 of the Civil Service Law, would constitute part of his contract. The Court held that the change in procedure in no way changed the Constitutional question.

Mr. Justice Brennan delivered the opinion of the Court. It was held that Section 3021 of the Education Law and Section 105, subdivisions 1(a), 1(b), and 3, of the Civil Service Law as implemented by the machinery created pursuant to Section 3022 of the Education Law, are unconstitutionally vague, since no teacher can know from Section 3021 of the Education Law and Section 105, subdivision 3, of the Civil Service Law what constitutes the boundary between "seditious" and non-seditious utterances and acts, and the other provisions may well prohibit the employment of one who advocates doctrine abstractly without any attempt to incite others to action, and may be construed to cover mere expression of belief.⁴⁴

Subdivision 1(b) of Section 105 requires the disqualification of an employee involved with the distribution of written material "containing or advocating, advising or teaching the doctrine" of forceful overthrow. Mere advocacy of abstract doctrine here is apparently included. The prohibition of distribution of matter "containing" the doctrine could be used to bar histories of the evolution of Marxist doctrine or histories tracing the background of the French, American, or Russian revolutions.

The intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient *in terrorem* mechanism; the uncertainty as to the acts proscribed increases that caution in those who believe the written law means what it says. The result must be to stifle "that free play of spirit which all teachers ought especially to cultivate and practice."⁴⁵ That probability is enhanced by the provisions requiring an annual review of every teacher to determine whether any utterance or act of his, inside the classroom or out, came within the sanctions of the laws.⁴⁶

The Court held further that our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a

⁴⁴ Note 42 *supra*, p. 599.

⁴⁵ *Id.*, p. 601.

⁴⁶ *Id.*, p. 602.

special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.⁴⁷

The rule here is that First Amendment freedoms need breathing space to survive, and government may regulate in the area only with narrow specificity. New York's complicated and intricate scheme plainly violates that standard.

The provisions of the Civil Service Law which made Communist Party membership, as such, *prima facie* evidence of disqualification for employment in the public school system were held by the Court to be overbroad and therefore unconstitutional. Mere knowing membership without a specific intent to further the unlawful aims of an organization was held by the Court as a constitutionally inadequate basis for imposing sanctions. Such a law infringes unnecessarily on protected freedoms; it rests on the doctrine of guilt by association; it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights.

The judgement of the District Court was reversed and the case was remanded for further proceedings consistent with this opinion.

The case of *Whitehill v. Elkins*⁴⁸ was heard by a three-judge Federal District Court for the District of Maryland and dismissed; the Supreme Court took the case on appeal and Mr. Justice Douglas delivered the opinion of the Court in November of 1967.

The suit sought declaratory relief that a Maryland teacher's oath required of the appellant was unconstitutional. Appellant was offered a teaching position with the University of Maryland, but he refused to take the required loyalty oath.⁴⁹

The question considered by the Court here was whether the oath was to be read in isolation or in connection with the Ober Act⁵⁰ which by Sections 1 and 13 defines a "subversive" as "... any person who commits, attempts to commit, or aids in the commission, or advocates, abets,

⁴⁷ *Id.*, p. 603.

⁴⁸ 389 U.S. 54 (1967).

⁴⁹ Maryland oath:

"I,, do hereby (Print Name—including middle initial) certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.

"I further certify that I understand the foregoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

⁵⁰ Art. 85A, Md. Ann. Code, 1957.

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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, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this article.” Section 1 defines the latter terms: “subversive organization” to mean a group that would, *inter alia*, “alter” the form of government by revolution, force, or violence; “foreign subversive organization” is defined as such a group directed, dominated, or controlled by a foreign government which engages in such activities.

The Court held that the oath must be read in the light of the Ober Act. The prescribed oath requires, under threat of perjury, a statement that the employee is not engaged “in one way or another” in an attempt to overthrow the Government by force or violence. The Court asks whether a member of a group that was out to overthrow the Government by force or violence would be engaged in that attempt “in one way or another” within the meaning of the oath, even though he was ignorant of the real aims of the group and wholly innocent of any illicit purpose? The Court held that it could not tell; nor could a prospective employee know, save as he risked a prosecution for perjury.⁵¹ The opinion stated further that in the First Amendment field the continuing surveillance this type of law places on teachers is hostile to academic freedom. Again the Court found the lines between permissible and impermissible conduct were quite indistinct; precision and clarity were not present; rather it found an overbreadth that made possible oppressive or capricious application as regimes changed.

This case, like others examined here, presents the classic example of the need for narrowly drawn legislation in this sensitive and important First Amendment area. The Supreme Court reversed the decision of the District Court and held the Maryland teacher’s oath to be unconstitutional.

By earlier vagueness tests the Maryland oath would have seemed acceptable. Thus, the Court’s invalidation of this oath on grounds of vagueness indicates the extremely exacting specificity standard that the Court is now disposed to require for disclaimer oaths. A rigorous vagueness standard in this area is justifiable. To require an individual to swear that

⁵¹ Note 48 *supra*, p. 57.

he will not commit certain acts, rather than simply to prohibit them by statute, may greatly heighten his sensitivity to the watchful presence of the state, and accordingly curtail his freedom of action; yet, the alacrity with which the Court has struck down disclaimer oaths in recent decisions suggests that vagueness may not be the principal reason for hostility to this regulatory technique. The state's concern here is with a means of identifying subversives. The disclaimer oath is really designed to deter conduct and enforce an outward appearance of conformity, but it does no more than a simple statutory disqualification to achieve that goal. Therefore, the Court may find the disclaimer oath an unnecessarily degrading type of regulation, especially as applied to members of the academic profession.⁵²

Thus, a properly drawn loyalty program, applicable only in areas where the danger of subversion is significant, could legitimately rely on conduct, overt acts and other direct evidence, as a means of identifying persons likely to be unacceptable for employment in positions formerly requiring loyalty oaths as a security measure.

African Public Law

In Colonial Africa, the term "African law" had a derogatory implication, as if the law of the Africans was not real law in the same way as the English, or other European law. The colonial powers introduced their own laws in every colonial territory as the general law in regulating the colonies, and their governments. But the so-called English law in Africa, was not the only law used in governing the colonial territories. There was the African customary law which was more effective in native administration. The African customary law, although used by the British in furthering their colonial administration, was left undeveloped and publicly ignored by the British for political reasons. Since the departure of the British from Africa, all of this has changed.

In recent times, indigenous legal system in Africa has been the subject of collective study on a comparative basis, because it is now in the power of African governments to modify or reject the colonial laws deriving from antiquity.

In an effort to stimulate African pride and self-consciousness, it

⁵² "Developments in the Law—Academic Freedom," 81 HARVARD LAW REVIEW 1069 (March, 1968).