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Constitutional Law - Judicial Determination of Constitutional Questions - The Necessity of Explicit Authorization of Administrative Officers to Take Actions Which Limit First Amendment Freedoms

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RECENT DECISIONS

CONSTITUTIONAL LAW — JUDICIAL DETERMINATION OF CONSTITUTIONAL QUESTIONS — THE NECESSITY OF EXPLICIT AUTHORIZATION OF ADMINISTRATIVE OFFICERS TO TAKE ACTIONS WHICH LIMIT FIRST AMENDMENT FREEDOMS — Appellant applied for renewal of his radio operator's license but refused to complete an FCC form relating to past and present affiliations with the Communist Party and other organizations which advocate the violent overthrow of the United States Government. At that time, and later in a hearing granted by the FCC, appellant relied upon the first amendment to justify his refusal. Subsequently the FCC denied his application. On appeal to the Court of Appeals for the District of Columbia, *held,* affirmed, one judge dissenting. Pursuant to its power to grant licenses in the public interest,[1] the FCC may impose a loyalty oath as a qualification for a license. Such qualification does not abridge appellant's rights under the first amendment. *Borrow v. FCC,* 29 U.S.L. Week 2011 (D.C. Cir. June 30, 1960), *cert. denied,* 364 U.S. 892 (1960).

Although the Supreme Court has at times elevated the first amendment to a "preferred position,"[2] it has recognized that freedom of speech is not absolute. The Court has formulated various tests to apply to statutes which appear to infringe on freedom of expression.[3] When, in the Court's view, a statute infringes "indirectly" on the freedom of expression, the Court has tested its validity through a judicial balancing of an individual's right to free speech[4] against the public need for order and security.[5] The question of the constitutional validity of the imposition of a loyalty oath or examination is subject to the balancing test.[6] The Court has explained that loyalty tests may be valid in cases concerning "a limited class of persons in or aspiring to public positions by which they could, if evilly motivated,

1 Communications Act of 1934, § 303, 48 Stat. 1082 (1934), as amended, 47 U.S.C. § 303 (1958): "Except as otherwise provided in this act, the Commission from time to time, as public convenience, interest, or necessity require, shall . . . *(l)* Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified. . . ."

2 See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Thomas v. Collins, 323 U.S. 516 (1945). See also Kauper, *The First Ten Amendments,* 37 A.B.A.J. 717 (1951). *But see* Justice Frankfurter's criticism in Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (concurring opinion).

3 See, *e.g.,* Schenck v. United States, 249 U.S. 47 (1919); Gitlow v. New York, 268 U.S. 652 (1925). See also Antieau, *The Rule of Clear and Present Danger—Its Origin and Application,* 13 U. DET. L.J. 198 (1950); Antieau, *The Rule of Clear and Present Danger: Scope of Its Applicability,* 48 MICH. L. REV. 811 (1950).

4 This formulation of the interests to be balanced has been criticized because it fails to take into account the interest that society has in the individual's freedom of expression. See, *e.g.,* Barenblatt v. United States, 360 U.S. 109, 134 (1959) (dissenting opinion).

5 American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Barenblatt v. United States, *supra* note 4. *Cf.* Dennis v. United States, 341 U.S. 494 (1951).

6 See Gerende v. Board of Supervisors, 341 U.S. 56 (1951); Garner v. Board of Public Works, 341 U.S. 716 (1951); Adler v. Board of Educ., 342 U.S. 485 (1952); Lerner v. Casey, 357 U.S. 468 (1958); Nelson v. County of Los Angeles, 362 U.S. 1 (1960).

create serious danger to the public safety."[7] There is a notable paucity among recent cases in the loyalty-security area of cases in which the Court has struck the balance in favor of the individual.[8] Indeed, those cases in this area in which the Court has struck down government regulation of freedom of expression have been placed on narrow grounds.[9]

Perhaps a balancing of interests in the principal case would necessitate denial of appellant's license. It would seem, however, that the dissenting judge's reliance on the rule of *Greene v. McElroy*[10] is well placed. In the *Greene* case the Supreme Court found it unnecessary to pass upon what it conceived to be a serious constitutional issue because the procedure followed by administrative officers in "areas of doubtful constitutionality" must be explicitly authorized by either the Congress or the President.[11] There was no such authorization in that case. In the principal case the extent of the discretion granted the FCC appears to be questionable. The statute is framed in broad terms, and there is no mention of loyalty-security measures.[12] As a matter of fact, some members of Congress have doubted the FCC's power to undertake loyalty examinations, and legislation has been sponsored on the theory that this power is lacking.[13] Although the proposed legislation has failed to pass, the FCC now claims these disputed powers.[14] The case seems an appropriate one for the application of an approach similar to that of the *Greene* case.

The Supreme Court has not yet applied the authorization test to a case involving first amendment questions,[15] but it has not hesitated to strike

7 Speiser v. Randall, 357 U.S. 513, 527 (1958). See generally cases cited in note 6 *supra*.

8 Among the early cases striking a balance for the individual are De Jonge v. Oregon, 299 U.S. 353 (1937), and Herndon v. Lowry, 301 U.S. 242 (1937). In the more recent cases the concurring opinion in Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957), endorsed by the majority in Barenblatt v. United States, *supra* note 4, found the state interest insufficient.

9 Wieman v. Updegraff, 344 U.S. 183 (1952) (loyalty oath made no provision for lack of *scienter);* Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) (invocation of fifth amendment in relation to associations and belief did not support summary dismissal); Konigsberg v. State Bar, 353 U.S. 252 (1957) (invocation of the first and fourteenth amendments did not furnish "sufficient evidence" to support determination of lack of good moral character and loyalty); Yates v. United States, 354 U.S. 298 (1957) (running of statute of limitations, inaccurate instructions, and insufficient evidence); Speiser v. Randall, *supra* note 6 (loyalty oath required for tax exemption placed burden of proof on claimant).

10 360 U.S. 474 (1959). See also Peters v. Hobby, 349 U.S. 331 (1955); Kent v. Dulles, 357 U.S. 116 (1958). *Cf.* Watkins v. United States, 354 U.S. 178 (1957).

11 Petitioner lost his employment because of the revocation of his security clearance. The Court observed that, while security measures were authorized, the specific procedures involving non-confrontation of accusing witnesses were not involved. Greene v. McElroy, *supra* note 10, at 506-08.

12 48 Stat. 1082 (1934), as amended, 47 U.S.C. § 303 (1958), quoted in note 1 *supra*. Note that in the *Greene* case, some security measures were authorized.

13 See H.R. 3364, H.R. 10446, 76th Cong., 3d Sess. (1940); H.R. 5074, H.R. REP. No. 814, S. REP. No. 882, 77th Cong., 1st Sess. (1941), and debate in 87 CONG. REC. 6258-60, 9508-09, 9627-29 (1941).

14 See also Travis Lafferty, 23 F.C.C. 761 (1957).

15 In Graham v. Richmond, 272 F.2d 517 (D.C. Cir. 1959), the court, citing the *Greene* case, held that legislation and executive orders concerning security measures in the Merchant

down limitations on free expression which, although capable of being enacted, were for some reason technically invalid.[16] It would seem that the *Greene* "rule" should be applied whenever express authorization is totally lacking. A court's prejudgment of the constitutional issue should not foreclose an inquiry into the primary question of clear authorization.[17] The policy of the Supreme Court to avoid constitutional issues is well established,[18] and this policy is particularly marked in the loyalty-security area.[19] Although this policy of avoidance has been decried by many,[20] the approach of the *Greene* case may be seen as a valuable one. It serves as notice to the Congress and the President that loyalty-security measures will require their personal and explicit authorization in cases in which fundamental freedoms are concerned. It also serves as an admonition to administrative heads not to act without clear authorization in such cases. In light of the confusion resulting from some of the Court's previous decisions in this field,[21] these ends are indeed desirable.

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Marine did not clearly authorize the automatic rejection of an individual who refused, on the basis of first amendment rights, to answer questions relating to Communist affiliations.

16 *Compare* Slochower v. Board of Higher Educ., *supra* note 9, *with* Nelson v. County of Los Angeles, *supra* note 6; Wieman v. Updegraff, *supra* note 9, *with* Garner v. Board of Public Works, *supra* note 6.

17 It is settled, of course, that an administrative agency cannot act out of the bounds of its granted powers. See, *e.g.*, Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940).

18 *E.g.*, Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

19 See cases cited in note 9 *supra*.

20 See Bernard, *Avoidance of Constitutional Issues in the United States Supreme Court: Liberties of the First Amendment*, 50 MICH. L. REV. 261 (1951); Rauh, *Non-Confrontation in Security Cases: the Greene Decision*, 45 VA. L. REV. 1175 (1959).

21 See Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 312 (1952); Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325 (1952).