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CONSTITUTIONAL LAW-DUE PROCESS-VALIDITY OF STATE STATUTE REQUIRING PUBLIC EMPLOYEES TO TAKE LOYALTY OATH

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CONSTITUTIONAL LAW—DUE PROCESS—VALIDITY OF STATE STATUTE REQUIRING PUBLIC EMPLOYEES TO TAKE LOYALTY OATH—A statute of Oklahoma[1] required public employees to take an oath that, among other things, they were not, for five years previous had not been, and would not become, affiliated with an organization which advocated the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means or which had been determined by the United States Attorney General to be a Communist front or subversive organization.[2] A citizen and taxpayer sought to enjoin payment of salaries to teachers at Oklahoma A. & M. College who had not taken the oath. The teachers intervened and asserted, inter alia,[3] that this part of the required oath violated the due process clause of the Fourteenth Amendment of the Federal Constitution. The Supreme Court of Oklahoma limited the proscribed organizations to those listed by the attorney general prior to the effective date of the statute, and upheld the constitutionality of the oath requirement.[4] However, the court refused to permit the teachers to take the oath as thus construed and also denied a petition for rehearing which included a plea that such refusal was violative of due process. On appeal by the intervenors,[5] *held,* the oath requirement violates the Fourteenth Amendment. The refusal to permit appellants to take the oath as interpreted constitutes a holding that knowledge of the purposes of the proscribed organizations is not a factor under the Oklahoma statute. Thus, since membership in such organizations alone disqualifies, the statute is an assertion of arbitrary power. *Wieman v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215 (1952).

Since the end of World War II, as in past periods of national or international stress,[6] laws have been passed on both the national and state level using test oaths

[1] 51 Okla. Stat. (1951) §§37.1 to 37.8.

[2] The oath is set out in full at pages 184-185 of the principal case.

[3] The Oklahoma statute was attacked as being a bill of attainder, an ex post facto law, an impairment of the obligation of the teachers' contracts, and a violation of the due process clause of the Fourteenth Amendment. This multiple attack is typical of the charges leveled against such legislation. The charges under the Fourteenth Amendment have generally been based upon an alleged deprivation of freedom of speech, belief and assembly and the assertion of arbitrary power.

[4] Board of Regents v. Updegraff, 205 Okla. 301, 237 P. (2d) 131 (1951).

[5] The Court's footnote 2 at p. 186 of the principal case reads: "The state officials named as defendants in Updegraff's suit took the position in the state courts that the statute was unconstitutional. Following a policy of the Oklahoma Attorney General not to appeal from adverse decisions of the state supreme court, these defendants are here only because they were made appellees by the appellant-intervenors."

[6] Similar attempts to test or secure loyalty can be traced back to the time of Henry VIII in England and to similar periods in continental countries. In this country, the earliest important examples of such legislation are the Alien and Sedition Acts, passed shortly after the Revolution. The latter part of the 1920's and the 1930's produced the well-known criminal syndicalism acts which were passed upon by the Supreme Court in Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925); Whitney v. California, 274 U.S. 357, 47 S.Ct. 641 (1927); and DeJonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255 (1937). A fairly dispassionate discussion of the history of the test oath will be found in Koenigsberg and Stavis, "Test Oaths, Henry VIII to the American Bar Association," 11 LAW. GUILD REV. 111 (1951).

or some other method to make loyalty to the present form of government a qualification for public employment.[7] Although such legislation has been attacked on numerous grounds, the principal case is the first one since the war in which the Supreme Court has found a measure of this kind unconstitutional. Heretofore the majority opinions have taken the position that there is no right to public employment on one's own terms[8] and has upheld loyalty legislation on the basis that it merely created reasonable terms of employment to protect and increase the efficiency of public service.[9] However, insofar as these laws have based disqualification upon affiliation with an organization whose purposes are deemed inimical or dangerous to our form of government, the Court has pointed out that the legislatures, or the courts by construction, have made knowledge of those purposes an essential element.[10] Of the earlier cases, the closest parallel to the principal case is *Garner v. Board of Public Works*.[11] Three factors were significant in the approval of the legislation in that case: (1) the California oath, like the Oklahoma oath, required an affirmation that one had not been affiliated with a proscribed group for the previous five years, but a statute passed seven years earlier barred from employment persons who, subsequent to its enactment, became associated with the same organizations covered by the later oath; (2) the oath was interpreted as meaning affiliation with knowledge of organizational purposes; and (3) the Court assumed that the California court would give the employees an opportunity to take the oath as interpreted. In the instant case, on the other hand, although the Oklahoma court did limit the proscribed organizations to those listed by the attorney general as of the effective date of the statute, it refused to allow the teachers to take the oath as thus interpreted. Since the Supreme Court felt this refusal meant knowledge was not required by the Oklahoma statute, it was presented for the first time with the question whether mere innocent association with such a group could be made a basis for disqualification.[12] In holding that it could not, the Court reached a conclusion that should

[7] Some of the postwar legislation is collected and discussed in 26 NOTRE DAME LAWYER 559 (1951); 5 VAND. L. REV. 822 (1952); Ober, "Communism Versus the Constitution: The Power to Protect Our Free Institutions," 34 A.B.A.J. 645 (1948); 7 LAW. GUILD REV. 57 (1947).

[8] The recent leading case upon the lack of a right to public employment is United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556 (1947). Cases involving loyalty legislation include Garner v. Board of Public Works, 341 U.S. 716, 71 S.Ct. 909 (1951), and Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380 (1952).

[9] Garner v. Board of Public Works, note 8 supra; Adler v. Board of Education, note 8 supra; cf. Gerende v. Board of Supervisors, 341 U.S. 56, 71 S.Ct. 565 (1951). This approach has generally answered both the argument that such legislation is arbitrary and that it is a deprivation of rights of free speech and assembly; see Adler v. Board of Education at 492, and cf. American Communications Association v. Douds, 339 U.S. 382, 70 S.Ct. 674 (1950), involving the non-Communist affidavit requirement of the Taft-Hartley Act.

[10] See cases cited in note 9 supra.

[11] 341 U.S. 716, 71 S.Ct. 909 (1951).

[12] This is one phase of the often decried possibility of guilt by association. Two earlier cases which touched this general problem were Whitney v. California, note 6 supra and DeJonge v. Oregon, note 6 supra.

meet with quite general approval. The trend of postwar legislation, and the apparent judicial acquiescence, has, with some justification, been severely criticized. For example, the judicial acquiescence itself[13] and the apparent departure from past decisions[14] have been questioned. Further, it has been felt that test oath legislation in particular, in view of its notorious history, violates at least the spirit of the First and Fourteenth Amendments,[15] and the very need for such measures has been challenged.[16] The position most often taken rests on a fear that such legislation will provide the intended security, if at all, only at the expense of suppressing the very freedoms it is designed to protect.[17] Perhaps the opinion in the instant case can be interpreted as meeting some of these criticisms and as a slight recession from the earlier position of the Court.[18] Justice Clark does seem to show concern over the recent extent of loyalty legislation and its threat to individual freedoms, and states that it would be improper to interpret the earlier cases as meaning there is no constitutionally protected right to public employment.[19] It is submitted, however, that such an interpretation would exhibit undue optimism. Although the opinion examines the foundations of the legislation somewhat more closely than did the earlier cases, the violation of the Fourteenth Amendment was found in the arbitrary assertion of legislative power rather than in the abrogation of the First Amendment freedoms.[20] Further, the decision rests upon a feature that marks a clear distinction from the earlier cases,

[13] 36 MINN. L. REV. 961 (1952); 4 ALA. L. REV. 286 (1952); but see Ober, "Communism Versus the Constitution," 34 A.B.A.J. 645 (1948). Judicial acquiescence was also prevalent during the earlier period of criminal syndicalism legislation; see, e.g., Gitlow v. New York, note 6 supra. Of the recent cases, the one which is most reminiscent of the Gitlow approach is American Communications Association, C.I.O. v. Douds, note 9 supra.

[14] The greatest apparent departure appears in answering the argument that such legislation constitutes a bill of attainder or is ex post facto; see Justices Black and Burton, dissenting, in Garner v. Board of Public Works, note 8 supra, and 5 VAND. L. REV. 822 (1952).

[15] 26 NOTRE DAME LAWYER 559 (1951); 100 UNIV. PA. L. REV. 1244 (1952); 7 LAW. GUILD REV. 57 (1947). But see Ober, "Communism Versus the Constitution," 34 A.B.A.J. 645 (1948). See Justice Jackson, dissenting, in American Communications Association, C.I.O. v. Douds, note 9 supra; Justices Black and Douglas, dissenting, in Garner v. Board of Public Works, note 8 supra; and Justices Douglas and Black, dissenting, in Adler v. Board of Education, note 8 supra.

[16] It is to be noted that such a consideration is primarily a matter for the legislature and not the courts, except insofar as the balance struck between the power of the state to meet a threat to its existence and the rights of the individual in a free society transcends constitutional limitations. See, however, Justice Douglas and Black, dissenting, in Adler v. Board of Education, note 8 supra.

[17] This consideration is also a matter primarily for the legislature. See note 15 supra and also 5 VAND. L. REV. 822 (1952); 51 COL. L. REV. 130 (1951).

[18] Justices Black, Burton and Frankfurter, who concurred in the opinion of the instant case, and Justice Jackson, who took no part in the consideration of the case but has dissented in the earlier cases, undoubtedly desire a more marked recession.

[19] Justice Clark adds, however, in the principal case at 192, "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

[20] Compare Justice Black's concurring opinion in the principal case at 192.

i.e., the retrospective character of the oath plus the fact that it disqualified a person who had been innocently associated with a proscribed organization. There is reason to believe the Court would not hesitate to reaffirm its holding in the *Garner* case when and if it is presented with a similar statute.

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