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# Constitutional Law -- Loyalty Oaths -- Due Process

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little or nothing,[15] at least as to the 14th Amendment. Therefore, it is submitted that but one conclusion can be drawn — that double jeopardy is no longer a distinguishable element in this area of our federal rights. Rather, it is a vague concept to be considered in determining whether the defendant has been given a "fair trial" as that concept has been developed in the 14th Amendment.

F. Stewart Elliott

## CONSTITUTIONAL LAW—LOYALTY OATHS—DUE PROCESS

An Oklahoma statute required that state officers and employees take a loyalty oath swearing they are not now, and for five years prior to the taking of the oath have not been members of, or affiliated with, organizations listed by the United States Attorney General as Communist front or subversive.[1] Plaintiff seeks to enjoin payment of compensation to school teachers who refused to subscribe. *Held*, that the statute is an arbitrary assertion of power and offends due process because it fails to distinguish between innocent membership and knowing activity in a subversive organization. *Wieman v. Updegraff*, 73 S. Ct. 215 (1952).

A great majority of the attacks upon state and federal statutes prescribing loyalty oaths have been unsuccessful.[2] The courts have held that these statutes do not infringe upon the freedom guaranteed by the First, Fifth and Fourteenth Amendments.[3] Although the right to free speech carries with it the corresponding right to be silent,[4] either right may be denied if its exercise would present a "clear and present danger" that it

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15. Meador v. Williams, 117 Mo. 564, 92 S.W. 151 (1906) (four state's witnesses had been examined but material witness was absent); Pizano v. State, 20 Tex. 139, 54 Am. Rep. 511 (1894) (State's Att'y had not subpoenaed his witness). *Contra*: State v. Dove, 222 N.C. 162, 22 S.E.2d 231 (1942) (court ordered mistrial since evidence desired by state was not presently available).

16. *In re* Kemmler, 136 U.S. 436 (1890); United States v. Cruikshank, 92 U.S. 542 (1875); State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894); Article, 35 YALE L.J. 674 (1926).

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1. OKLA. STAT. tit. 51, §§ 37.1-37.8 (1951). "I....., do solemnly swear . . . that I am not affiliated directly or indirectly with the Communist Party, the Third Communist International, with any foreign agency, party, organization, association or group whatever which has been officially determined by the United States Attorney General or other authorized agency to be a communist front or subversive organization . . . that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, the Third Communist International, or of any agency, party, organization, association . . . ."

2. E.g., Garner v. Board of Public Works, 341 U.S. 716 (1950); American Communications Association v. Douds, 339 U.S. 382 (1950); Dworken v. Cleveland Board of Education, 94 N.E.2d 18 (Ohio 1950).

3. E.g., Garner v. Board of Public Works, 341 U.S. 716 (1950); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1949); National Maritime Union v. Herzogg, 78 F. Supp. 146 (D.D.C. 1948).

4. West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

will bring about the substantive evils Congress has a right to prevent.[5] The danger presented need not threaten the very existence of the government as long as the danger is "substantial" or "relatively serious."[6] Where the legislature has determined that such a danger exists, that determination is binding on the courts.[7] Loyalty oaths have been held not to be bills of attainder or *ex post facto* laws.[8]

Where subscribing to a loyalty oath is made a condition to public employment the "clear and present danger" formula is not the test of constitutionality, since courts have held that such employment is a "privilege" rather than a "property right" which is protected under the due process clauses.[9] Federal and state governments, as employers, have the right to fix *reasonable* qualifications for employment[10] and endeavor to insure self-protection against forces that would attempt to accomplish their overthrow by force or violence.[11] It has been held that statutes requiring school teachers to take loyalty oaths are valid because, although a school teacher may have a right to be a communist, he has no constitutional right to teach in public schools.[12] However, where a state constitution provides that a loyalty oath provision contained therein shall be exclusive, additional oaths enacted by the legislature have been held invalid.[13]

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5. Dennis v. United States, 341 U.S. 494 (1951) (statute making advocation of overthrow of government by force or violence a crime); American Communications Association v. Douds, 339 U.S. 382 (1950) (statute requiring labor union officials to sign loyalty oath); Schenk v. United States, 249 U.S. 47 (1919); National Maritime Union v. Herzogg, 78 F. Supp. 146 (D.D.C. 1948).

6. American Communications Association v. Douds, 339 U.S. 382 (1950). *But see* Bridges v. California, 314 U.S. 252, 263 (1941); Baltimore Radio Show v. State, 193 Md. 300, 67 A.2d 497, 508 (1949).

7. Gitlow v. People of N. Y., 268 U.S. 652 (1925); National Maritime Union v. Herzogg, 78 F. Supp. 146 (D.D.C. 1948). *But see* West Virginia Board of Education v. Barnette, 319 U. S. 624, 638 (1943); Whitney v. California, 274 U. S. 357, 374 (1927).

8. American Communications Association v. Douds, 339 U. S. 382 (1950); Garner v. Board of Public Works, 341 U. S. 716 (1951); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied* 336 U. S. 960 (1949); National Maritime Union v. Herzogg, 78 F. Supp. 146 (D.D.C. 1948); Hirschman v. Los Angeles County, 231 P.2d 140 (Cal. 1951); Dworken v. Cleveland Board of Education, 94 N.E.2d 18 (Ohio 1950).

9. Bailey v. Richardson, 182 F.2d 46 (D.C.Cir. 1950); Joint Anti-Fascist Committee v. Clerk, 177 F.2d 79 (D.C. Cir. 1949); McAulife v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892); Thompson v. Wallin, 301 N. Y. 476, 95 N.E.2d 806 (1950).

10. International Worker's Order v. McGrath, 182 F.2d 368 (D.C. Cir. 1950); Friedman v. Schwellenbach, 159 F.2d 22 (D.C. Cir. 1946), *cert. denied* 330 U. S. 838 (1947); Steiner v. Darby, 88 Cal. App.2d 481, 199 P.2d 429 (1948). *But cf.* Tolman v. Underhill, 229 P.2d 447 (Cal. 1951); Imbrie v. Marsh, 3 N. J. 578, 71 A.2d 352 (1950).

11. American Communications Association v. Douds, 339 U.S. 382 (1950); Thorp v. Board of Trustees, 6 N. J. 498, 79 A.2d 462 (1951).

12. Adler v. Board of Education, 342 U. S. 485 (1952) (statute making membership in subversive organizations prima facie evidence of disqualification); Thorp v. Board of Trustees, 6 N. J. 498, 79 A.2d 462 (1951); Dworken v. Cleveland Board of Education, 94 N.E.2d 18 (Ohio 1950).

13. Tolman v. Underhill, 229 P.2d 447 (1951); Imbrie v. Marsh, 3 N. J. 578, 71 A.2d 352 (1950). *But cf.* Shub v. Simpson, 76 A.2d 332 (Md. 1950) (held not an

The Supreme Court in recent decisions has voiced the opinion that membership in or affiliation with subversive organizations, with *knowledge* of its subversive character is a necessary element which must be implicit in a loyalty oath,[14] but the instant case is the first in which such an oath has been held unconstitutional on that basis. Recognizing that membership in subversive organizations may be *innocent*, the Court held that constitutional protection does extend to arbitrary and discriminatory exclusion of public employees.[15] The Court reasoned that under the statute the fact of association, no matter how innocent, determines disloyalty and disqualification, and that the statute is therefore an arbitrary assertion of power which offends due process.

The writer feels that the instant case has established a requirement necessary to the practicability of loyalty oaths. Knowing membership in subversive orgainzations must be made implicit in loyalty oaths so that members ignorant of the real purpose of such organizations will be protected. It is not clear, under the instant case, whether a constitutional right to public employment exists, the Court having circumvented the problem. It is submitted that the decision is possibly a trend toward a view by the Supreme Court that public employment is "property" within the meaning of the due process clause.

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## EVIDENCE—PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT

Plaintiff claimed privilege against the testimony of the doctor who had examined her prior to accident. *Held*, the statute[1] forbidding doctors to furnish reports of mental or physical examinations to others does not create a physician-patient privilege in Florida. *Morrison v. Malmquist*, 62 So.2d 415 (Fla. 1953).

The patient's privilege against the testimony of his physician did not exist at common law.[2] It is an American statutory innovation orig-

additional oath since statute made persons who advocate overthrow of government by force or violence ineligible for public office). Loyalty oaths have been held unconstitutional in isolated cases. See, e.g., United States v. Schneider, 45 F. Supp. 848 (E.D. Wis. 1942) (non-communist oath required of applicants for employment); Danskin v. San Diego Unified School District, 28 Cal.2d. 506, 171 P.2d. 885 (1946) (loyalty oath required for use of school auditorium); Clayton v. Harris, 7 Nev. 64 (1871) (oath required as prerequisite to voting).

14. See Adler v. Board of Education, 342 U. S. 485, 494 (1952); Garner v. Board of Public Works, 341 U. S. 716, 723, 724 (1951); Cerende v. Board of Elections, 341 U. S. 56, 57 (1951).

15. See United Mine Workers v. Mitchell, 330 U.S. 75, 100 (1947).

1. FLA. STAT. § 458.16 (1951).

2. Florida Power & Light Co. v. Bridgeman, 133 Fla. 195, 182 So. 911 (1938); 8 WIGMORE, EVIDENCE § 2380 (3d ed. 1940).