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Earl R. Pfeffer

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ENFORCING LOYALTY

Ideas are not always free in America

Earl R. Pfeffer

Loyalty is an American obsession. For several generations, American schoolchildren have been required to pledge allegiance to this country and its flag on a daily basis, as if each sunrise brings with it new temptations and opportunities for acts unfaithful to the Republic. If an American citizen is vocal in his or her criticism of governmental policy, his or her loyalty to the nation is immediately suspect and "national security" dictates that governmental surveillance of that individual is in order. In the end, the secrecy which surrounds those national security measures reduces loyalty to a kind of blind faith in the decisions of those individuals who formulate national policy.

Bumperstickers proclaiming "America, love it or leave it" are familiar reminders that acquiescence to state policies is generally viewed as the highest form of patriotism. To "leave" the country in a time of crisis, an act normally viewed as traitorous, is the recommended course for those persons who are unwilling to accept conditions as they are. It is as if treason and political dissent are equivalent acts.

Although American history has seen the periodic emergence of patriotic citizens organizations, such as the American Protective League during World War I or the America First Committee in the 1930s, each created to enforce its particular view of loyalty, the government has consistently been its own best watchdog. It has sought to control the political ideologies of its employees by instituting oaths and by conducting inquiries into their political backgrounds.

People will argue that the watchful concern with loyalty is justified in light of the freedoms we have of speech, association, and the press. But if protecting those freedoms requires that those who speak differently be silenced and that those who associate differently be denied employment opportunities with the government, then it is only chosen opinions and particular political alliances which are being protected.

During the past one hundred years, there has been a tension between what the government would like to do in order to accomplish its goal of enforcing loyalty and what the courts have permitted it to do in furtherance of that purpose. In the aftermath of the Civil War, for example, when divided loyalties still threatened the Union's control

over the Confederacy, both the federal and many of the state governments sought to eliminate perceived subversion against the victorious North by requiring citizens in particularly influential positions to take oaths to the effect that they had never supported the South. In two 1867 cases, the Supreme Court ruled that laws requiring individuals to take loyalty oaths as a precondition to their continuing employment as teachers, preachers, or government officials could not be enforced. Since the laws were legislative inflictions of punishment without judicial trial and since they sought to punish individuals for acts that were not punishable at the time the acts were committed, the statutes were found to have violated the Constitution (*Ex parte Garland*, 71 U.S. 333; *Cummings v. Missouri*, 71 U.S. 277).

However, the Supreme Court, in deciding these cases, left unanswered the ultimate question of whether speech or nonspeech could ever constitute a sufficient threat to the national interest so as to warrant governmental restriction. Fifty years later, in 1919, the Court addressed this issue in three cases of dubious merit: *Schenck v. United States*, 249 U.S. 47; *Frohwerk v. United States*, 249 U.S. 204; and *Debs v. United States*, 249 U.S. 211.

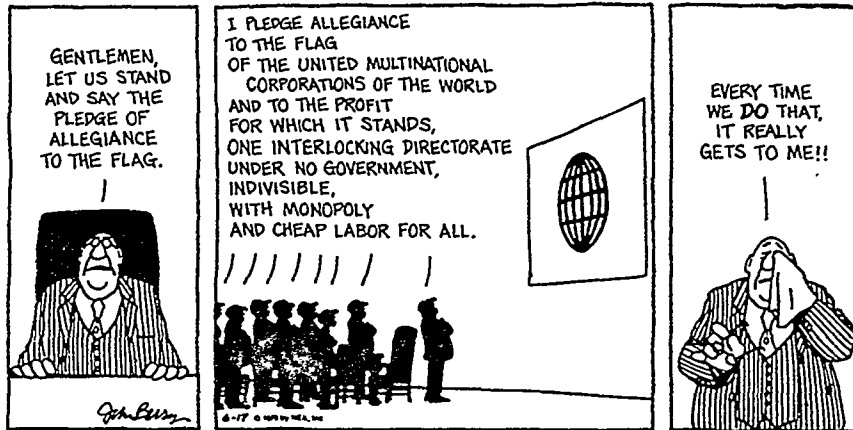
In one of these cases, *Schenck*, Justice Holmes, writing for the majority, established the vague principle of "clear and present danger" as the basis for determining the extent to which the government has an interest in limiting free speech:

The question in every case is whether the words used are used in such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. [emphasis added]

There was strong criticism at the time that the clear and present danger doctrine could punish ideas alone, merely because they were perceived as dangerous. This, in fact, appears to have transpired in the case of *Gitlow v. New York*, 268 U.S. 652 (1925), in which the Supreme Court upheld a criminal anarchy charge against Mr. Gitlow because he published two revolutionary pamphlets. The Court reasoned that the state's police power won out over First Amendment protections of speech and of the press because "utterances advocating the overthrow of organized government by force, violence, and unlawful means, are so inimical to the general welfare and involve such danger of

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substantive evil that they may be penalized [by the state] in the exercise of its police power.”

Ironically, Justice Holmes, who had coined the phrase “clear and present danger,” voiced alarm about the ramifications of the *Gitlow* decision. In the dissent, he wrote:

It is said that this manifesto was more than a theory, that it was an incitement. It offers itself for belief, and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. . . . But the indictment alleges the publication and nothing more. [emphasis added]

Gradually the doctrine began to change; today it essentially conforms with Holmes' dissent in *Gitlow*. In *Dennis v. United States*, 341 U.S. 494 (1951), a case in which prosecution of a leading communist under the Smith Act was upheld by the Supreme Court, the requirement of *actionable intent* was established as the criterion which could trigger

the state's police power in First Amendment cases. *Dennis* illustrates, however, that a narrowing of the doctrine will not always provide increased guarantees of free speech. The federal courts were left with considerable discretion to determine exactly what “actions” constituted an “intent” to “overthrow” or “destroy” the government.

Later, free speech was given fuller protection by the requirement that actions must threaten “imminent” danger before they are held to be illegal. Curiously, those increased free speech protections grew out of a case in which the government was prosecuting the Ku Klux Klan. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In that decision, the Court overturned the conviction of an Ohio Klan leader for advocating crime, violence, and unlawful methods of terrorism to accomplish political reform. The Court reasoned that the state may not forbid advocacy of force or lawlessness “except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to produce such action.” [emphasis added]

THE FIGHT AGAINST COMMUNISM: ENFORCING LOYALTY BY EMBRACING THE KLAN

This protection afforded to militant racists advocating violence against blacks and Jews was never afforded to communists and other leftists. Presumably our highest tribunal has found that the Communist Party, as an organization “substantially dominated or controlled by foreign powers controlling the world communist movement,” *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1

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(1961), is less deserving of judicial protection than groups that for one hundred years have organized and performed lynchings and have wielded power by intimidation, harassment, and other violent means. While judicial protection of free speech rights of hate groups is arguably justified in that it establishes principles through which all people's civil rights are protected, it is abhorrent that our government has, at times, gone beyond the protection of these groups and has actually collaborated with the Klan or the Nazi Party in their efforts to fight labor organizing and black-white unity.

In November 1979, a group of Klansmen and Nazis killed five men who had played prominent roles as union and community organizers in Greensboro, North Carolina. These murdered men also happened to be members of the Communist Workers Party.¹ The attack might not have occurred but for the efforts of one Bernard Butkovitch, an agent of the federal government's Bureau of Alcohol, Tobacco, and Firearms (BATF).

During the months preceding the murders, Butkovitch had served as a National Socialist (*sic*)² (Nazi) Party member, working toward the formation of an alliance between North Carolina's Klan and Nazi groups, each of which alone was numerically weak. Not only did this federal agent help plan the ambush on the communist demonstrators, but according to the testimony of Nazis, Butkovitch had suggested that the attackers should buy equipment that would convert firearms into automatic weapons, and had offered to obtain grenades and explosives with which the KKK-Nazis could burn down one of their own houses

1. The Communist Workers Party is one of many leftist political organizations calling itself communist. Differences between these and other socialist organizations are sometimes great and sometimes parochial. Anyone interested in a brief survey of the many left organizations in America should refer to G. Vickers, "Guide to the Sectarian Left," *The Nation*, 230:591-596, May 17, 1980. In most cases, when reference is made to communists, it is to the Communist Party U.S.A., an organization having its historical roots in the Socialist Party of Eugene V. Debs. In 1920, it split off from the latter organization for complex reasons, which included a belief that socialist revolutions in the industrialized countries would quickly follow the Bolshevik Revolution and that a revolutionary socialist party was necessary to provide the American working class with leadership when the anticipated tide of change reached North American shores. The Communist Party later played a vital role in the CIO organizing of the 1930s and 1940s. By the 1950s the Party was broken, a result of its inability to provide continued leadership to American workers after the revelations of the Stalinist purges and the subsequent shattering of utopian images with which workers the world over had viewed the Soviet state. But of equal importance, the Party declined because of harassment and persecution of its leaders, its members, and its friends.

and then put the blame on the Communist Workers Party (see *Monthly Review*, Vol. 33, No. 6, November 1981; *Guild Notes*, Vol. X, No. 4, July/August 1981).

This was not an isolated incident of a federal agent acting as a provocateur to impede the efforts of groups working for social change. There was Gary Thomas Rowe who admitted that while he worked for the FBI he participated in beatings and bombings and in the killing of civil rights worker Violet Liuzzo in 1965. BATF agents were also implicated in the Charlotte Three and Wilmington Ten civil rights cases. In the latter case the BATF was so blatant in tampering with witnesses that the convictions were overturned by the courts.

The Greensboro murders occurred during an anti-Klan rally organized by the Communist Workers Party. The police knew that the protestors would be unarmed, as that was a condition of the permit. The Klan also knew that the demonstrators would be unarmed, because they had been told so by Edward Dawson, a former FBI informant who also worked for the Greensboro police department. Although the rally organizers had asked the police to keep the location of the rally secret, for they feared Klan and Nazi harassment, Mr. Dawson made this information known to his fellow Klansmen. What followed was an execution-style murder of the five most vocal CWP leaders.

The unprovoked and deliberate nature of the killings was captured on videotape which was shown at the trial. However, Dawson and Butkovitch were not called as witnesses by the unaggressive prosecutor.

The reaction of the press was predictable: the communists provoked or at least "welcomed" the attack (see *New York Times* editorial, November 20, 1980). The reaction of the jury was a foregone conclusion: all the defendants were acquitted of the murder charges on the grounds that they were acting in self-defense. An observer is left to conclude that anti-racist, socialist speeches by communists are provocation enough to justify murder.

It appears that the Klan and the Nazi Party make convenient allies of the government when it is confronted with the struggle of black people to form unions and fight racism. And the perceived danger of anything associated with communism continues to be reflected in the decisions of the nation's highest court, for whom the internationalism of communists and socialists is grounds for suspecting their loyalty and nationalism. But if the Court's view is correct, what

2. It is ironic that a group which opposes socialism so vehemently contains the word "socialist" in its party name. The roots of this charade can be traced back to Hitler's use of socialist symbols in order to draw support for his movement from the working class.

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about the modern multinational corporation whose investment policies and sales practices owe allegiance to no country—only to the profits of its shareholders? Twenty-eight years ago, scholar Henry Steele Commager asked a series of rhetorical questions which today are still relevant.

... what are we to say of the attempts by the National Association of Manufacturers and by individual corporations to identify loyalty with the system of private enterprise? Is it not as if officeholders should attempt to identify loyalty with their party, with their own political careers? Do not these corporations which pay for full-page advertisements associating Americanism with the competitive system expect, ultimately, to profit from that association? Do not these organizations that deplore, in the name of patriotism, the extension of government operation of hydroelectric power expect to profit from their campaign? (H. S. Commager, *Freedom, Loyalty, Dissent*, 1954, p. 144)

What could be more "American" than the accumulation of profits? Even when American businesses travel abroad, closing plants and abandoning communities in the process, the loyalty of their actions, much less the legality, has not been scrutinized and challenged by the courts (see S. Lynd, "What Happened in Youngstown?" *Radical America*, Vol. 15, No. 4, July/August 1981). But as inactive as our government has been in challenging the loyalty of corporations, it has been correspondingly active in questioning the loyalty of citizens who steadfastly challenge corporate prerogatives.

One way our government has traditionally sought to enforce loyalty has been by restricting public employment to those "safe" individuals who do not advocate "subversive" economic and political beliefs. For example, attorneys, in applying for federal jobs, must complete Standard Form 86, "Security Investigation Data for Sensitive Position." Questions twenty-one through twenty-three inquire about political associations which might raise suspicions about the applicant's commitment to constitutional principles of government.

There is a bias in these questions toward uncovering communist associations. By using the word *communist* and by specifically inquiring about membership in the Communist Party of the United States, the questions betray a belief on the part of our government that communists are not fit to serve in public positions. On the other hand, ultraright groups that do not share the Communist Party's commitment to economic equality and social justice are not subject to the same screening process.

"... patriotism is enforced in America by equating loyalty with a devotion to a particular economic system."

While the questions also inquire about activities within "fascist," "totalitarian," or "subversive" organizations, which we might reasonably interpret to include membership in the Ku Klux Klan or the American Nazi Party, there is no legal basis for requiring individuals of those racist and para-military organizations to answer the inquiries affirmatively, as the responses to the questions depend on the applicant's personal definition of the terms *fascist* and *totalitarian*. Klan members or Nazis would in all likelihood answer all such questions in the negative, as they probably view their associations as democratically based and in pursuance of the principles of the Constitution as they see it.³ But because the questions specifically inquire about communist membership, a communist with no intent to overthrow the government or to make political changes through anything but democratic and majoritarian initiatives would nevertheless be required to answer the questions affirmatively, at risk of perjury. A militant racist is under no such constraint.⁴

Research into legal challenges to loyalty oaths and associational inquiries supports this observation. The vast majority of cases concern individuals whose "left-wing" associations and beliefs have led to some form of governmentally imposed restriction on their employment rights.

This raises a number of questions. First, can the government legally require applicants to divulge past political associations, particularly when that informant might erroneously incriminate them and close them off from government employment? Second, what is the justification for the process of equating political leftists with fascists? And, lastly, would the presence of communists in the public's em-

3. Indeed, when Representative John Rankin, chairman of the House Un-American Activities Committee was asked why his committee did not investigate the Ku Klux Klan, he answered that the Klan was not "un-American" but was "American"! (H. S. Commager, *Freedom, Loyalty, Dissent*, p. 152).

4. A similar bias can be found in federal civil rights legislation. Section 703(f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(f), permits "unlawful employment practices" to be committed against communists. Nazis and Klan members, however, are guaranteed full protection of the law.

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ploy really undermine the social fabric of our society?

DISCREDITING THE LEFT: THE EQUATION OF DISSENT AND DISLOYALTY IN AMERICA

For most of American history, during wars, rebellions, and times of national crisis, the oath was the means by which our government ascertained the loyalty of its citizens. Alexander Hamilton recognized the inherent conflict of the oath with our legal system when he wrote that it was

a subversion of one great principle of social security, to wit: that every man shall be presumed innocent until he is proven guilty. This was to invert the order of things, and, instead of obliging the state to prove the guilt in order to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty. (quoted in *Cummings v. Missouri*, 71 U.S. 277, 330, [1866])

Today, as oaths are seldom instituted, patriotism nonetheless is enforced in America by equating loyalty with a devotion to a particular economic system. This country, which has the longest history of freedom of expression of all modern nations, also has the narrowest definition of loyalty of all countries having a genuine democratic tradition.

Perhaps it is the revolutionary genesis of this society and its early rejection of feudal forms and class based loyalties which subjected it to, and continues to plague it with, an overriding paranoia about anything different.

In Europe, loyalty to one's class is not in conflict with nationalism and patriotism. Socialists head the governments of several countries and communists wield significant influence in Italy and France. In America, however, nationalism is not tied to ancient customs and traditional forms because it was founded on the initiative and strength of the individual entrepreneur. Economic growth was our manifest destiny, and allegiance was owed only to those forms and institutions that furthered the growth of private capital.

America's history has seen numerous periods of patriotic awakening. These generally followed wars and times of national crisis during which people challenged the social and economic order (see H. Hyman, *To Try Men's Souls*, 1959). The atmosphere of the early 1950s was a particularly good medium for the development of laws requiring oaths of loyalty. Past court decisions had never ruled on the constitutionality of loyalty oaths *per se*, only on the specific oaths being challenged by particular plaintiffs. Courts permitted loyalty oaths where the state carried its burden of proving a present and immediate danger to a legitimate gov-

ernment interest.

According to Justice Vinson, the Communist Party, for one, constituted such a danger. In the case of *American Communications Association v. Douds*, 339 U.S. 382 (1950), the Court upheld Section 9(h) of the Taft-Hartley Act, which required union officers to file affidavits to the effect that they were not members of the Communist Party. Failure to sign the affidavit meant that their unions could not receive the services of the National Labor Relations Board, which were necessary to secure the protections and guarantees that the law offered to organized labor. Justice Vinson wrote:

Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by party leaders.

... [There is sufficient evidence] that communists and others proscribed by the statute [Section 9(h)] had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action.

Justice Vinson's argument lacks merit on two counts. First, during the period in which Communist Party members had participated in strikes, such strikes were legitimate trade union tactics. Until 1947, many of the methods for exacting pressure on management which are now illegal were permissible under the Wagner Act. Apparently, Justice Vinson considered the Taft-Hartley Act a legal *ex post facto* law, rendering illegal those strikes which had been legally organized at the time.

Second, Justice Vinson's condemnation of the communists as undemocratic flies in the face of a significant amount of data to the contrary. Recent studies of the United Auto Workers and the National Maritime Union by James Prickett indicate that there was far greater democracy in those unions when communists were prominent members than after the post-war expulsions ("Communism and Factionalism in the United Auto Workers, 1939-1947" 32 *Science and Society* 257 [1968]; "Communism, Democracy, and the National Maritime Union," unpublished thesis, U.C.L.A. library).

Professor Summers of the University of Pennsylvania Law School has written that those communist-dominated unions expelled from the CIO continued to be vigorous and effective bargaining agents for their members. The United Electrical Workers Union (UE), one union thrown out of

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the CIO for being "communist," continues to be a model democratic labor organization. It is the one union in the country in which the officers earn no more than the members who work in the factories.

It is significant that the final expulsion of so-called "communist unions" from the CIO occurred when those unions refused to rally behind the other CIO unions in support of Harry Truman, choosing instead to support Henry Wallace. So much for democracy.

Nevertheless, Justice Vinson's view of communists was and continues to be the predominant one. As loyalty and anti-communism grew to be synonymous, employees of both the government and the private sector became subject to oath requirements and restrictions on their associations. Louis Weinstock, for example, was expelled from the Brotherhood of Painters because of communist affiliations, although for years he had steadfastly worked for unemployment insurance, doing as much as any "loyal" person to make it a reality for American workers. But loyalty to the working class was not considered a patriotic duty.

Communist associations were also legitimate grounds for dismissal from public employment. This policy persisted despite the fact that the Communist Party had twenty years earlier abandoned its call for revolution, seeking instead to work through coalitions and the electoral process. Moreover, communists were loyal to the American war effort against Hitler's Germany, supporting labor in its agreement not to strike during the years of conflict.

On the other hand, the record of the self-proclaimed patriots who were seeking to purge communists and "sympathizers" from public office on charges of disloyalty is not above reproach. The historical record raises significant questions about the anti-communists' claims of loyalty, let alone their ability to determine the criteria for assessing the loyalty of others. Most revealing is the story of American industry's romance with Adolf Hitler during the 1930s.

Among Hitler's first acts were a red scare and an attack on trade unions in Germany. Wages fell to new lows and hours of labor and requirements for speed-up reached new highs as the dictator readied Germany for his fantasized attack from the Soviet Union. American industrialists, admiring the growth of profits in Germany as well as Hitler's successful efforts at disciplining labor unrest, rendered eager support to the fascist state. Former National Association of Manufacturers president H. W. Prentiss commented that "American business might be forced to turn to some form of disguised fascist dictatorship" (Boyer and Morais, *Labor's Untold Story* [1955], p. 320ff).

American industrialists joined to form the powerful, pro-Hitler America First Committee, which set among its

"American industrialists, admiring the growth of profits in Germany as well as Hitler's successful efforts at disciplining labor unrest, rendered eager support to the fascist state."

priorities the linking of the New Deal and the CIO with communism. The National Association of Manufacturers produced booklets with such titles as "Join the CIO and Help Build a Soviet America."

One of the most prominent members of the pro-Nazi America First Committee was John Foster Dulles, our secretary of state during the McCarthy period and a primary policy maker during the height of the cold war. Dulles's law firm of Cromwell and Sullivan, representing New York banks, sent him to Berlin in 1933 to cancel \$1 billion of German debt and to provide the Nazis with new credit for rearmament.

Believing that Naziism was "dynamic," Dulles wrote, "We have to welcome and nurture the desire of the new Germany to find for her energies a new outlet." This "outlet" was military expansion into eastern Europe, a direction hardly alarming to the then senator from Missouri, Harry Truman, who, despite his distaste for Hitler, saw in the German leader a means to destroy the development of socialism in Russia. But when the Soviet Union became our ally against Germany, Truman acknowledged how the pro-Hitler sympathies of American business were hindering the American war effort, as when the Senate Committee he chaired concluded:

The work of the Office of Production Management and War Production Board has been hampered by the extent to which their personnel was predominantly drawn from big business groups. (Senate Report 480, June 18, 1942, of the Special Committee investigating the National Defense Program)

American business eventually supported the war against the Nazis. But what ultimately made the war against Germany palatable to American entrepreneurs was not only Hitler's record as a sadistic dictator with a monomaniacal hunger for power but also the promise that war contracts held for greater accumulation and consolidation of

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capital.

In the end, the representatives of Wall Street were won over to the government's cause, but at a very high cost to the American public. In addition to \$117 billion in war contracts, business benefited from \$25 billion worth of new plants and equipment for which they later paid the government only 60 percent of the original cost. The profits accumulated by American industry during the war, an average of \$22 billion annually (twice as large as the profits of the previous high in 1929), were made possible by the publicly subsidized capitalization of industry.

The monumental profits continued after the war. From 1947 until 1951, American corporations reported net gains of \$113 billion, 1000 percent higher than any of the booming pre-Depression years. The battle between labor and capital for this wealth, most of it government subsidized, formed the basis for the red scare after the war, which, along with a war scare directed against the Soviet Union, served to justify the continued military priorities of government and industry; world markets and billions of dollars of profits were at stake (see H. Magdoff, *The Age of Imperialism*; Monthly Review Press, 1966).

It was against this background that the fear of leftists in our government was reborn. Even before Senator McCarthy initiated his witchhunt, the Chamber of Commerce produced two pamphlets entitled "Communists in the Government, the Facts and a Program" and "Communists Within the Labor Movement, Facts and Countermeasures." The definition of loyalty was being written by the very people who had supported Hitler ten years earlier.

LIBERALIZATION UNDER THE WARREN COURT

Although the Warren Court never questioned the classifications being used to determine who was loyal, it is a tribute to the majority of that Court that the use of oaths and the exclusion of people from jobs based on their beliefs never became firmly entrenched in our public employment policy.

In *Shelton v. Tucker*, 364 U.S. 479 (1960), the Court ruled that an Arkansas statute requiring teachers at state colleges and schools to file an annual affidavit listing all organizations to which they belonged violated the First Amendment right to associate (which it derived from freedom of speech). The Court did not question the "legitimate and substantial" purpose of the government in excluding certain individuals from state jobs, but it did direct the state to find "less drastic means" that did not "stifle funda-

mental personal liberties" in order to achieve its goals. The Court was not prepared to challenge the legitimacy of the red scare, but it did find a compelling interest in the protection of free speech.

The following year, a Florida school teacher challenged a "non-communist oath," which the Court ruled was so vague that it would lead people to guess at its meaning (*Cramp v. Board of Public Instruction of Orange County, Florida*, 368 U.S. 278 [1961]). To the extent that teachers would forever be uncertain of whether or not their activities violated the law, the Court ruled that they were deprived of due process rights.

In 1964, the Court used similar reasoning to strike down a series of oaths which two Washington statutes required of state employees (*Bagget v. Bullitt*, 377 U.S. 360). In other cases the Court ruled that loyalty oaths were "overbroad," tending to authorize "guilt by association" and creating penal laws "susceptible of sweeping and improper application."

Again, the Court never questioned the classifications being used, only the methods of control. Weeding communists out of government was considered a legitimate exercise, but the Court challenged the government to devise less obtrusive means for doing it. New techniques for regulating the beliefs of public officials eventually emerged, and in time the state and federal governments were successful in having them upheld by the Court.

In *Konigsberg v. State Bar*, 353 U.S. 252 (1957), the California Bar had rejected the petitioner's application for admission because he refused to answer the Fitness Committee's questions as to his present or past membership in the Communist Party. The first time his case went to the highest tribunal, Konigsberg won on the grounds that the Bar Committee could not treat his mere refusal to answer questions as a failure to demonstrate "good moral character." But in a confusing reversal of their 1957 decision, the Court, in 1961, ruled that Konigsberg's admission to the Bar could be denied because he had refused "to provide unprivileged answers to questions having a substantial relevance to his qualifications" (366 U.S. 36). The questions being challenged were inquiries into past political associations.

Although the *Konigsberg* decision established the government's right to certain information about a person's past activities, that right is subject to the proviso that continued employment not be conditioned on the substance of the information divulged. This proviso was upheld in two later cases in which the Court ruled that Communist Party membership or association is not *prima facie* evidence of disqualification from public employment.

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In *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), the Court ruled that a New York plan to prevent employment of "subversives" in the university system was unconstitutional. The case concerned the legality of two New York statutes. The first required a disavowal of Communist Party membership by all university employees. The second gave constructive notice of job loss to anyone who by word of mouth or otherwise deliberately advocated, advised, or taught the doctrine of forceful overthrow of the government.

Five professors refused to sign any declarations of beliefs or association, contending that the law, as worded, proscribed not only the teaching of Marxism but the Declaration of Independence as well. The Court said:

... mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusions from such positions as those held by applicants.

This decision was consistent with a ruling one year earlier in which the Court struck down an oath binding a state employee not to become a member of the Communist Party if done with knowledge of the Party's unlawful purpose. *Elfbrandt v. Russell*, 384 U.S. 11 (1966). The Court said that: "... proscription of mere knowing membership without any showing of 'specific intent' would run afoul of the Constitution."

This decision represented the Court's growing awareness that mere membership in the Communist Party did not signify unconstitutional or illegal purposes.⁵ With this new approach, the Court was able to protect the First Amendment rights of individuals to believe and associate freely without ever moderating its established position that the Communist platform, if it ever materialized, would be illegal and unconstitutional.

The Court's failure to reevaluate the latter position proved to be significant in the later development of its doctrine on associational investigations. The Court's continuing belief in the dangers of communism was eventually used by the Burger Court as the reason for upholding the constitutionality of associational inquiries, undermining many of the Warren Court's protections.

What makes the Court's anti-communist position un-

5. As discussed earlier in the article, "specific intent" was subject to wide judicial interpretation. The requirement that danger to the government be "imminent" did not develop until three years after *Elfbrandt*.

tenable is the fact that the proclaimed "illegal" goals of the Communist Party—government overthrow by force or violence—were never the focus of Party activities, if they were goals at all. As Albert Maltz, one of the "Hollywood Ten" blacklisted in the 1950s because of Communist Party connections, has said:

... the Communist movement at that time [1930s and 1940s] stood for many good things. It was the Communist movement that was organizing the unemployed. It was the Communist movement that raised the slogan of "Black and White, Unite and Fight!" and that spoke out against world racial discrimination. It was the Communist movement that was very important in the organizing of the CIO and the industrial unions.

And, if you furthermore had read the Marxist classics, you found what I still think to be the noblest set of ideals ever penned by man. . . . [W]here else in political literature do you find thinkers saying that we were going to end all forms of human exploitation? [Quoted in V. Navasky, *Naming Names*, 1980]

If one disagrees with those goals, or even with the way the Communist Party was organized to achieve them, one still cannot attack them as illegal, un-American, and disloyal unless one believes that national loyalty is synonymous with a particular economic system.

Yet, the latter point of view has come to be the prevailing attitude in America today. The socialization of the means of production and the ideology of equality and collective responsibility have grown to be considered "un-American." Anything "socialistic" is against the national interest, and attempts to change social relations are perceived as attacks on American values (for example, the Equal Rights Amendment).

At the same time, our government has maintained a fairly apathetic response to ultra-right organizations which, while extremist, do not question the prevailing socioeconomic structures and ideologies. Moreover, groups such as the Ku Klux Klan have proven very useful to those whose interest it has been to divide the working class and to discredit alternative political philosophies.

THE BURGER COURT'S RETREAT

Although the Warren Court had repeatedly protected the right of individuals to associate freely (so long as there was no evidence of actionable intent to overthrow the government), the fact that it continued to cast communist princi-

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“ . . . the government may make employment contingent on information about a person’s past so long as it does not explicitly condition the employment on this information.”

ples in illegal tones provided the precedent for the present Court’s position on associational inquiries. In *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), the majority upheld a challenge to a question on a state bar application, which asked whether the applicant had ever belonged to an organization advocating the overthrow of the United States government by force or violence. The Court reasoned that “mere membership in an organization can never, by itself, be sufficient grounds for a state’s imposition of civil disabilities or criminal punishment.”

Yet, in a similar case decided the same day, the Court upheld the New York Bar’s right to inquire about applicants’ associations (*Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 [1971]). The Court reasoned that the state has a right to information about “knowing membership” in any organization advocating the overthrow by force or violence of the government, provided that the state simultaneously inquires if the applicant carries the *specific intent* to further the organization’s illegal goals.

This decision resulted from a misapplication of the law, for prior cases were very clear in holding that it is only *imminent danger* arising out of *active and purposeful membership* in certain “unlawful” organizations, which is contrary to the state’s interest. Previously, “knowing membership” in an organization had not constituted a sufficient danger to the state to justify abridgment of freedom of speech and association. Now, insofar as it might help the state to uncover a person’s “illegal purposes,” “knowing membership” in an organization is subject to inquiry by the government.

In *Wadmond*, the Court appeared to be harkening back to the reasoning of *Konigsberg*—that an inquiry, which by itself is judicially forbidden, will be permitted if it is a means for discovering other information to which the state is legally entitled. It appears, then, that, under current governmental practices and with judicial authority, belief can ultimately be grounds for the refusal to hire an individual or to

admit an attorney to the bar.

The Court made its position very clear in *Konigsberg* and *Wadmond*: that the government is entitled to any information with respect to beliefs and associations if it only intends to use that information to uncover an individual’s past conduct and present intents. In *Konigsberg*, Justice Harlan reasoned that the state’s interest in having lawyers devoted to the law, especially its “procedures for orderly change,” outweighed “the minimal effect upon free association occasioned by compulsory disclosure” of past associations. The Court held that past associations might reveal whether or not the applicant possessed any illegal intent.

Harlan added, however, that there is no possibility of exclusion because of mere membership in the Communist Party—a result which would be contrary to present-day law—because “judicial protection” would be available in cases of unconstitutional intrusion into rights of association. Unless job applicants have actively advocated illegal activities, the courts presumably will protect them.

It is difficult to share Harlan’s sanguine outlook. An applicant for a federal or state job who must answer questions about beliefs and associations does not have the judicial protection guaranteed in *Konigsberg*, a case involving a bar association applicant. Admission to a state bar is distinctly different from employment. The former is numerically open; the latter is restricted and closed. A judicial remedy is meaningful to one seeking admission to the bar, because an opening is always present. Jobs, however, get filled; positions are limited and are not available to every qualified applicant. Since many qualified individuals apply for every job, the government could reject an otherwise qualified individual for past or present political associations without being burdened to justify its decision.

It would never have to admit that the reason for not hiring the applicant was his or her past membership in some political organization, for action on applications is, to a large extent, discretionary. The government would only have to justify its decisions by saying that it believed that other applicants were more qualified. Therefore, an applicant for a federal job has no remedies against unconstitutional intrusions into his or her beliefs and rights of association. On these grounds, the present practice of screening prospective employees for their past associations may be unconstitutional.



It is by now a well-established principle that the state may compel a citizen to disclose his or her political beliefs or

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associations when that person is applying for legal positions, to the state bar, or for other high-level positions with the government. However, in doing so, the state carries a heavy burden of showing that the inquiry is necessary to protect one of its legitimate interests.

There are restrictions on the government's power to condition employment upon an applicant's avowal or disavowal of particular beliefs and associations. At the same time, there are judicial guarantees of the government's right to information about a person's past associations. The legal distinction between the Court's two positions on government hiring practices may be more a matter of form than substance, for in effect the government can legally accomplish by the use of pointed questions on job applications exactly what the courts for the past century have forbidden it to do through oaths and affidavits. The result is that the government may make employment contingent on information about a person's past, so long as it does not *explicitly* condition the employment on this information.

Through the kinds of questions and oaths discussed previously, our government has consistently sought to discourage communists and like-minded people from seeking public employment, even though the Communist Party has not advocated the forceable or illegal transfer of power in over fifty years. That Marxists or socialists believe that under certain conditions it is necessary to seize the reigns of power through popular resistance should not disqualify them from public office, because that belief is the very premise of the Declaration of Independence.

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. . . . *That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.* [emphasis added]

From a strictly legal standpoint, the cases on First Amendment rights make it inordinately clear that one's beliefs do not of themselves make one "disloyal" or subject to governmental action. Only actionable intent, evidenced by conduct, and producing imminent danger, can be regulated according to the state's perceived interest. As Justice Roberts wrote:

. . . [T]he First Amendment embraces two concepts: freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. (*Cantwell v. Connecticut*, 310 U.S. 296, 303 [1940])

The danger of the current doctrine is that the government could successfully regulate people's beliefs simply by asking certain questions on state bar or job applications. It is commonplace that people who share political ideas frequently associate together in an organized fashion. If the government ever decided that because such associations are so inimical to the public welfare it must inquire about them

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on job applications, individuals who organize on the basis of these beliefs may be effectively barred from participation in the government.

It may seem frivolously hysterical to be concerned about the treatment of communists in the United States, for at best they constitute the smallest of minorities at the

present time. But laws that restrict legitimate political activity, no matter how few people the laws effect, are to be condemned. How else will we guarantee that at some future time, under some other political leadership, our government will not expand its scrutiny of associations to include groups currently viewed as acceptable? **T**