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Administrative Law—Standing to Challenge Constitutionality of Loyalty Oath

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temporarily stayed. The net effect of such a legislative provision would be that, in most instances the individuals who had received fair treatment at the administrative level would not appeal, and those drivers with a special hardship or with an improper suspension could, with a small amount of danger to the public, continue to drive until they had had an opportunity to be heard. Texas has adopted this approach in the licensing area.[27]

In *Gnecchi* the Washington court has continued to follow the privilege doctrine in the licensing area. It is suggested that the privilege doctrine should have been rejected and at the same time the Director's action could have been sustained. The court should have adopted the position that once the state has issued the license a valuable interest attaches and that the license holder cannot be deprived of his interest without receiving fair treatment. Immediate suspension of a driver's license, subject to speedy and complete judicial review such as is provided in Washington, affords fair treatment when viewed in terms of the pressing public necessity which is involved. This, rather than the conclusion that a driver's license is a privilege for which any procedure will satisfy due process, should be the basis for upholding the immediate suspension of a driver's license without a prior hearing.

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Standing to Challenge Constitutionality of Loyalty Oath. In *Nostrand v. Little*,[1] the Washington State Supreme Court had an opportunity to pass on the much publicized loyalty oath required of certain state employees. Against a charge that procedural due process was violated because the statute calls for immediate dismissal upon non-compliance, the court found that the oath abridged no constitutional rights of the plaintiffs, two University of Washington professors.

The background of the case is both interesting and complex. In 1959, the professors asked for a declaratory judgment[2] to determine the constitutionality of the statute requiring them to take an oath and sign an affidavit in which they disclaimed any present association with the Communist Party or any other subversive organizations. They

[27] Dep't of Public Safety v. Gillaspie, 254 S.W.2d 180 (Tex. Civ. App. 1952) *aff'd on rehearing*, 259 S.W.2d 177 (Tex. Sup. 1953), *cert. denied*, 347 U.S. 933 (1954).

[1] 58 Wn.2d 111, 361 P.2d 551 (1961), *cert. denied*, 368 U.S. 436 (1962).

[2] Nostrand v. Balmer, 53 Wn.2d 460, 335 P.2d 10 (1959), *remanded*, 362 U.S. 474 (1960).

challenged the statute[3] on the grounds that it was a bill of attainder,[4] that it abridged freedom of speech and association,[5] that only the federal government had the power to enact subversive activities statutes,[6] and that the oath forced one to be a witness against himself.[7]

The professors were required to swear,

> That I am not a subversive person or a member of the Communist Party or any subversive organization, foreign, or otherwise, which engages in or advocates, abets, advises, or teaches the overthrow, destruction, or alteration of the constitutional form of government of the United States, or of the State of Washington, or of any political subdivision of either of them, by revolution, force or violence; . . . .[8]

Failure to take the oath was made "cause for immediate termination of such employee's employment."[9] There was no finding at the trial court level that the professors ever refused or intended to refuse to sign the affidavit or take the oath. The Washington Supreme Court upheld the oath and construed it only as imposing a qualification for employment on the state's employees. The professors then applied for a rehearing, raising the issue of lack of procedural due process, because the statute required immediate dismissal with no opportunity for a hearing in which they could defend their positions. This issue had not been presented to the court at the first argument, so a rehearing was denied.[10] The professors then appealed to the United States Supreme Court,[11] which remanded the case, ordering the Washington court to answer the charge that there was no hearing. On remand, the court found that, although the statute provided no hearing for the professors, they had tenure rights under the University of Washington Regulations,[12] including the right to hearing before the University's

[3] RCW 9.81.070.

[4] U.S. CONST. art I, § 9, "No bill of attainder or ex post facto law shall be passed." WASH. CONST. art. I, § 23, "No bill of attainder . . . shall ever be passed."

[5] U.S. CONST. amend. I, "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble."

[6] Pennsylvania v. Nelson, 350 U.S. 497 (1956). The Court held that the Smith Act superceded the Pennsylvania sedition act and the federal government had pre-empted the field of sedition. The Washington court distinguished this case on the grounds (1) it did not prevent states from passing laws designed to suppress sedition against the state, and (2) it did not affect a state's right to prescribe qualifications for its employees.

[7] U.S. CONST. amend. V, "No person . . . shall be compelled in any criminal case to be a witness against himself." WASH. CONST. art. I, § 9, "No person shall be compelled in any criminal case to give evidence against himself . . . ."

[8] Nostrand v. Balmer, 53 Wn.2d 460, 464, 335 P.2d 10, 12 (1959).

[9] RCW 9.81.070.

[10] State *ex rel.* Milwaukee Terminal Ry. v. Superior Court, 54 Wash. 365, 377, 104 Pac. 175 (1909). "We cannot sanction the practice of permitting new questions to be raised in petition for rehearing."

[11] Nostrand v. Little, 362 U.S. 474 (1960).

[12] FACULTY HANDBOOK, UNIVERSITY OF WASHINGTON § 2552 (1956).

Tenure Committee prior to dismissal; thus the professors were not denied due process.

Keeping in mind that these professors were not applying for teaching positions, but had tenure rights under their employment contracts, the case raises a number of interesting problems. The first pertains to the standing requirements for one who wishes to challenge state legislation under the Uniform Declaratory Judgment Act.[13] To obtain a declaratory judgment, a plaintiff must meet several conditions. Most important, a case or controversy within the meaning of article III of the federal constitution or article IV, section 1 of the state constitution must exist. In addition, the court in *Acme Finance Co. v. Huse*[14] developed other prerequisites to use of the declaratory judgment:

> [A] proper case for such relief is presented when a plaintiff alleges (1) that he will be directly damaged in person or in property by enforcement of a statute; (2) that the defendant is charged with the duty of enforcing the statute; and (3) is enforcing it or is about to do so; and claims, upon these allegations, that such enforcement will result in the infringement of his (the plaintiff's) constitutional rights.[15]

In the *Nostrand* case, the court indicated that the plaintiffs lacked standing because they had not refused or shown any intent to refuse to sign the loyalty oath and thus had suffered no injury.[16] The court said, "In the absence of such a showing it would seem premature, even in a declaratory judgment action, for a court to rule on a hypothetical situation."[17] In a subsequent part of the opinion, the court specifically denied standing to the professors,

> Were it not for the fact that this case has been remanded to this court by the Supreme Court with the request that we interpret the act with respect to the hearing issue, we would dismiss the professors' case as not being timely raised.[18]

The finding that the professors lacked standing is particularly odd in view of *Huntamer v. Coe*.[19] A statute required that prospective candi-

[13] RCW 7.24.010-.180.
[14] 192 Wash. 96, 73 P.2d 341 (1937).
[15] *Id.* at 107, 73 P.2d at 345.
[16] Immediately after the suit was commenced, the professors were quoted in the Seattle Post Intelligencer, Aug. 30, 1955, p. 4, col. 3, as saying this is "a friendly suit and not a protest against the University of Washington." Professor Nostrand said, "This has nothing to do with my personal past. I have not been a member of the 261 organizations named by the Attorney General." These statements were not brought out at the trial or appellate court level.
[17] Nostrand v. Little, 58 Wn.2d 111, 119, 361 P.2d 551, 556 (1961), *cert. denied*, 368 U.S. 436 (1962).
[18] *Id.* at 120, 361 P.2d at 557.
[19] 40 Wn.2d 767, 246 P.2d 489 (1952).

dates for the offices of governor, congressman, and state representative execute affidavits in which they declared that they were not subversive persons as defined by the act.[20] The plaintiffs refused to sign, and the court allowed them to challenge the statute, saying,

> Because of the particular circumstances of this case, involving, as they do, some questions of considerable public interest and importance, we think the trial court acted properly in assuming jurisdiction to adjudicate certain questions in the case under our declaratory judgment statute.[21]

The court took the position in *Huntamer* that when the public need is great enough, state legislation may be challenged even though no injury has been sustained. The court was fully aware of its action, since it cited numerous cases in which a declaratory judgment had been denied, but simply stated that it declined to follow those cases.

Because of *Nostrand* and *Huntamer,* confusion now exists about the extent of harm a plaintiff must suffer before he has standing to challenge state legislation dealing with civil liberties. In both cases the question of "loyalty oaths" was presented, and it seems that the court in *Nostrand* should be more willing to protect one whose job may be in jeopardy than one who merely aspires to a political office.[22]

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[20] RCW 9.81.100.

[21] Huntamer v. Coe, 40 Wn.2d 767, 770, 246 P.2d 489, 491 (1952).

[22] In two excellent articles by Professor Jaffee, *Standing to Secure Judicial Review: Public Actions,* 74 HARV. L. REV. 1265 (1961), and *Standing to Secure Judicial Review: Private Actions,* 75 HARV. L. REV. 255 (1961), a possible basis is suggested for granting standing to those in a position similar to the plaintiffs' in *Nostrand.* Legal action initiated by citizens, who do not themselves suffer legal harm, is justified on the theory of self-government; *i.e.* a control of growing officialdom. *Id.* at 1282-1307. Such suits are viewed as providing protection for "special interest groups" as well as the general public. Professor Jaffee concludes that public action does have a place in our judicial system where other processes of government provide no adequate remedy.

Query whether standing should be granted on grounds less tangible than loss of income. If civil liberties are directed toward protecting and preserving the dignity of man, then degradation of dignity will provide a basis for standing. Perhaps interference with academic freedom, an activity basic to the democratic process, may be a violation of an intangible which would permit a plaintiff standing before the Washington court.

Subsequent to *Nostrand,* the United States Supreme Court in *Cramp v. Board of Public Instruction,* 82 Sup. Ct. 275 (1961), granted standing to a Florida school teacher to challenge a statute requiring state employees to execute a loyalty oath. Failure to subscribe to the oath resulted in immediate dismissal. The teacher stated in his complaint that he was not a member of the Communist Party and did not believe in the violent overthrow of the Government of the United States. Against the argument that these allegations were admissions of lack of injury, the Court felt that the oath was so vague that others, including the local prosecuting attorney, could misconstrue it, and the teacher might be subjected to criminal prosecution for perjury. The Court said at 279, "We cannot say that appellant lacks standing to attack this statutory oath as unconstitutionally vague simply because he now personally believes he could prevail in the event he were prosecuted for perjury." The *Cramp* decision makes the *Nostrand* case of questionable authority for denial of standing because the prospective oath challenger has showed no intention of refusing to subscribe to the oath.

A second problem raised by the *Nostrand* case concerns the conditions necessary to establish the right to a hearing. The underlying reason for a hearing is stated succinctly by Professor Davis:

> The true principle is that a party who has a sufficient interest or right at stake in a determination of government action should be entitled to an opportunity to know and to meet . . . unfavorable evidence . . . except in the rare circumstance where some other interest, such as national security, justifies the overriding of a fair hearing.[23]

The court never passed on whether the statute violated the due process clause of the fourteenth amendment; instead it took refuge in finding that the professors were adequately protected because University Regulations[24] allowed them a hearing before dismissal. In rendering this decision, the court continued its practice of avoiding constitutional questions whenever possible.[25] Numerous cases in the United States Supreme Court could have provided the foundation for an opinion dealing with the professors' right to a hearing prior to dismissal.

In *Joint Anti-Fascist Refugee Committee v. McGrath*,[26] the Court allowed three organizations to obtain review of the Attorney General's action in placing them on a subversive list. Mr. Justice Jackson in his concurring opinion stated,

> Unless a hearing is provided in which the organization presents evidence as to its character, a presumption of disloyalty is entered against its every member-employee, and because of it, he may be branded disloyal, discharged, and rendered ineligible for government service. I would reverse the decision for lack of due process in denying a hearing at any stage.[27]

It is difficult, if not impossible, to understand why such reasoning should not apply with even more force to one who is about to lose his job for not swearing an oath, where no hearing at which he can explain his refusal is provided. In this circumstance silence will be interpreted by many in the community as evidence of association with a subversive organization and will attach a stigma of guilt to the one who refuses to take the oath.

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[23] 1 DAVIS, ADMINISTRATIVE LAW 412 (1958).

[24] FACULTY HANDBOOK, UNIVERSITY OF WASHINGTON § 2552 (1956). The court's refuge in the University Regulations is interesting as they were neither included in the parties' briefs nor introduced at the trial.

[25] Townsend G. & E. Light Co. v. Hill, 24 Wash. 469, 64 Pac. 778 (1901); State *ex rel.* Campbell v. Case, 182 Wash. 334, 47 P.2d 24 (1935). *Cf.* State *ex rel.* Holcomb v. Armstrong, 39 Wn.2d 860, 863, 239 P.2d 545, 548 (1952): "There is no presumption in favor of the constitutionality of any regulation involving civil rights."

[26] 341 U.S. 123 (1951).

[27] *Id.* at 187.

In *Garner v. Board of Public Works,*[28] it was decided that a state could inquire into matters which related to the competency of its employees, including past and present affiliation with the Communist Party. If the employees failed to give the pertinent information, they could be dismissed. In *Wieman v. Updegraff,*[29] the Court held that an employee of the state (a university professor) could not be dismissed pursuant to a statute which classified membership in subversive organizations without regard to knowledge of the unlawful character of the organization.

> [T]he fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process.[30]

In *Slochower v. Board of Higher Education,*[31] which held that discharge of a teacher for exercising his constitutional privilege under the fifth amendment created an unreasonable inference of guilt and thus violated due process, the Court said,

> The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law.[32]

In both *Slochower* and *Wieman,* the Court recognized the principle that the individual must be protected by an opportunity to defend his position and that due process is violated if he is not. In *Wieman,* it objected to dismissal of those employees who had innocently joined "subversive organizations." In *Nostrand,* the Washington court was careful to point out that innocent membership would not be punished. The court, however, left open the problem that without even an informal hearing there is no way to determine whether membership is innocent. The result is that since silence may be construed by the community as guilt, the individual is a marked man although he has not had his "day in court." In short, by avoiding the constitutional issue, the Washington court in *Nostrand* apparently, tacitly implies that a statute which allows a man with vested tenure rights to be dis-

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[28] 341 U.S. 716 (1951).
[29] 344 U.S. 183 (1952).
[30] *Id.* at 191.
[31] 350 U.S. 551 (1956).
[32] *Id.* at 559.

charged without a hearing is in harmony with the spirit of the United States Constitution and, in particular, the due process clause of the fourteenth amendment.

It should be noted that the United States Supreme Court has indicated on several occasions that the state's interest does allow a certain degree of inquiry into the associations of its employees. In *Nelson v. County of Los Angeles*,[33] one Globe, a temporary county employee, was discharged for insubordination when he refused to answer an inquiry about his affiliations with the Communist Party. The Court carefully pointed out the the employee's dismissal, without a hearing, was not based on the claim of privilege of the first and fifth amendments, but rather upon his insubordination. Another example is *Beilan v. Board of Public Education*,[34] in which a school teacher declined to answer questions relating to his connection with the Communist Party. The court stated that although a teacher is not required to give up his right to free thought, speech, and association, he is required to cooperate with his superiors. Failure to reply to questions warrants dismissal on the basis of incompetency.[35] University of Washington Regulations[36] provide that faculty members with tenure rights may be removed for incompetency; thus by analogy to *Beilan*, it may be possible to justify the discharge of the professors for failure to subscribe to the oath on the basis of incompetency.[37]

From these cases it follows that the states have the power, within limits, to create qualifications and to make inquiry of their employees. One of these qualifications may be the swearing of a loyalty oath. Such oaths do not offend due process so long as they inquire into *knowing* membership in subversive organizations.

An interesting and related problem is posed by the Washington court's determination that the professors are entitled to a hearing before the University's Tenure Committee.[38] Under the Regulations,[39] the dean of the college or school in which the faculty member in question is employed is charged with the duty of issuing a petition against him.

[33] 362 U.S. 1 (1960).
[34] 357 U.S. 399 (1958).
[35] *Id.* at 408. The Court defines incompetency as failure to answer questions of an administrative superior which relate to fitness.
[36] FACULTY HANDBOOK, UNIVERSITY OF WASHINGTON § 2551 A 1 (1956).
[37] See Lerner v. Casey, 357 U.S. 468 (1958) in which failure to testify about communist activities resulted in discharge because of plaintiff's doubtful trust and reliability. Query whether such reasoning could not also be a *legal* justification for discharge of the professors in *Nostrand*.
[38] Nostrand v. Little, 58 Wn.2d 111, 132, 361 P.2d 551, 563 (1961), *cert. denied*, 368 U.S. 436 (1962).
[39] See FACULTY HANDBOOK, UNIVERSITY OF WASHINGTON § 2562 (1956).

The Regulations are silent on the type of hearing to be conducted; *i.e.* whether or not the reasons for refusal may be proved. If the Tenure Committee were only to determine that the oath had not been taken and then discharged the professors, such a futile hearing would surely not satisfy due process. On the other hand, if the Committee were to allow the professors to justify their position and excuse them from swearing the oath, then an administrative agency (Tenure Committee) would be modifying the "loyalty oath" statute. The court's finding that the professors are entitled to hearing before the Tenure Committee does not solve the problem for other state employees who work for agencies which have no machinery for a hearing. The court's treatment of the hearing issue has not foreclosed future litigation on the point.[40]

A third problem posed in *Nostrand v. Little* concerns the state Administrative Procedure Act.[41] In refusing to apply the act, the court stated,

> There is nothing in the administrative code which indicates to us a legislative intent to amend or repeal the statutes relating to the operation of the University of Washington which have been in effect for fifty years.[42]

It is unfortunate that such a remark should have been made, as it takes much vitality from the pertinent sections[43] of the APA.

Since *Wong Yang Sung v. McGrath,*[44] the first case in which the Supreme Court had an opportunity to determine the scope of the federal Administrative Procedure Act, the Court has been liberal in its construction of the act. Statements such as, "Where the remedy of an evil is clear, the remedial provisions of the Administrative Procedure Act should be given full effect,"[45] are not uncommon. In future cases dealing with the scope of the state APA, it should be argued that the APA will not be used to interfere with the internal operation of the

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[40] The 1961 Civil Service Law, RCW 41.06, may provide the necessary machinery for administrative hearings of the "loyalty oath" cases; however, the statute, RCW 41.06.070 (3), exempts academic personnel at the University of Washington from its coverage.

[41] RCW 34.04.010-.930.

[42] 58 Wn.2d 111, 132, 361 P.2d 551, 564 (1961), *cert. denied,* 368 U.S. 426 (1962).

[43] RCW 34.04.090 (1), "In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice." RCW 34.04.010 (3) defines a contested case as "a proceeding before an agency in which legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."

[44] 339 U.S. 33 (1950).

[45] Pan-Atlantic Steamship Corp. v. Atlantic Coast Line R.R., 353 U.S. 436, 440 (1957).

University of Washington, but that the University itself is not exempt from the APA.[46]

In summary, the *Nostrand* case (1) creates confusion on the injury a plaintiff must suffer before having standing to challenge a state statute, (2) sanctions the discharge of state employees for refusal to swear a loyalty oath without an opportunity for a *statutory* hearing to explain the refusal, and (3) seems to exempt the University of Washington from the state Administrative Procedure Act. *Nostrand,* however, does put Washington in accord with a majority of states which allow creation of employment qualifications in the form of loyalty oaths.[47]

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Disciplinary Proceedings—Mental Competency. May mental irresponsibility be an effective defense in disciplinary proceedings brought against an attorney? The Washington court answered in the affirmative in the recent case of *In re Sherman,*[1] setting forth the requirements for such a defense.

In 1960 the Board of Governors of the Washington State Bar Association recommended[2] "the disbarment of Arthur Eber Sherman, Jr., for making false answers in his application for admission [by examination] to practice law in the state of Washington."[3] The board also recommended a reprimand for insulting and contemptuous petitions for

[46] Subsequent to *Nostrand,* the Washington Supreme Court determined that the state APA repealed, by implication, a long standing statute which required appeals involving the Public Service Commission to be filed within twenty days of judgment rather than thirty. See Herrett Trucking Co. v. Washington Pub. Serv. Comm'n, 58 Wn.2d 542, 364 P.2d 505 (1961). Query, if the court could find legislative intent to repeal such a long standing statute, why could it not find a similar intent to repeal statutes relating to the operation of the University of Washington?

[47] After this note was written, the plaintiffs' appeal to the Supreme Court was denied in a per curiam decision on the ground that there was no substantial federal question. 368 U.S. 436 (1962).

[1] 158 Wash. Dec. 399, 363 P.2d 390 (1961) (on rehearing). The first decision is reported in 156 Wash. Dec. 531, 354 P.2d 888 (1960).

[2] RCW 2.48.060. "Admission and disbarment. The said board of governors shall likewise have power ... to investigate, prosecute and hear all causes involving discipline, disbarment, suspension or reinstatement, and make recommendations thereon to the supreme court...."

[3] *In re* Sherman, 156 Wash. Dec. 531, 354 P.2d 888 (1960). In December, 1956, Sherman applied for permission to take the Washington bar examination. After falsely stating that he had never before taken another bar examination, he ignored the question, "If so, were you successful?" In fact, Sherman had twice taken, and failed, the California bar examination. He had twice taken, and failed once, the Oregon bar examination.