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Constitutional Law - Ex Post Facto Laws - Loyalty Oaths

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RECENT CASES

CONSTITUTIONAL LAW — EX POST FACTO LAWS — LOYALTY OATHS. — The petitioners, prospective candidates for governor, Congress, and the state legislature, sought a declaratory judgement that the Washington statute [1] requiring candidates for public office to swear that they are not subversives is unconstitutional. Stating that they would be precluded from candidacy because they could not or would not execute the required loyalty oath, the petitioners attacked the statute as being *ex post facto* in effect and a bill of attainder by nature. They claimed that the statute imposed disqualification for public office as punishment for acts not illegal at the time of their commission. The Washington court *held* that the statute required an oath of allegiance in a present and prospective sense and therefore was neither an *ex post facto* law nor a bill of attainder. *Huntamer v. Coe,* 246 P.2d 489 (Wash. 1952).

During the American Civil War, and later in the reconstruction period, several states enacted statutes and wrote provisions into their constitutions, requiring an oath of past loyalty as a qualification for voting, running for office, or pursuing specified occupations. These enactments were designed to exclude the adherents of the Confederacy from the designated activities. More recently, the legislatures and courts have been concerned with the activities of subversive groups and individuals.[2]

In a leading case,[3] the Supreme Court of the United States invalidated a provision in the Missouri constitution [4] that required a past loyalty oath [5] as a prerequisite to the following of a private avocation.[6] The court made it clear that qualifications having no relation to the fitness of the party to carry on the pursuit constituted punishment,[7] and were in the nature of *ex post*

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1. Wash. Laws 1951 c. 254 §16: "A candidate for any public office . . . shall file an affidavit that he or she is not a subversive person as defined in this act." Wash. Laws 1951, c. 254 §1 (e): " 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches . . . any act intended to overthrow, destroy or alter . . . the constitutional form of the government of the United States, or the State of Washington, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization."

2. For historical discussion of loyalty oaths see Note 18 A.L.R. (2d) 268 (1951).

3. Cummings v. Missouri, 4 Wall. 277 (U.S. 1867).

4. Id. at 279. "Sec 3. "No person shall be deemed a qualified voter, who has ever been in armed hostility to the United States, . . . or . . . this state; or has ever given . . . support to . . . such . . . hostility . . . nor shall any such person be capable of holding . . . any office of honor, trust, or profit . . . or acting as a professor or teacher. . . ." "Sec. 6. The Oath of Loyalty . . . shall be in the following terms: 'I . . . do solemnly swear that I am well acquainted with the terms of the third section . . . of the Constitution . . . and have carefully considered the same; that I have never, directly or indirectly, done any of the acts specified. . . . Sec. 9 . . . 'nor shall any person be competent . . . to teach or preach . . . unless such person shall have first taken . . . said oath'." Sec. 14. Provided fine and imprisonment for those who did not file the oath.

5. Black's Law Dictionary 1643 (4th ed. 1951): "Test Oath. An oath required to be taken as a criterion of of the fitness of the person to fill a public or political office; but particularly an oath of fidelity and allegiance (past or present) to the established government."

6. Cummings v. Missouri, 4 Wall. 277 (U.S. 1867). Reverend Cummings, a Catholic priest, was convicted of teaching and preaching without having first taken the oath. The conviction was reversed.

7. Id. at 320. "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."

facto[8] laws and bills of attainder.[9] All men have the inalienable right to follow the pursuit of their choice,[10] and legislative decrees of exclusion that inflict a penalty abridge this right.[11] The constitutional prohibitions of *ex post facto* laws[12] are aimed at criminal punishment,[13] and neither the states nor Congress can avoid this prohibition by giving the penalty a civil form.[14] However, it is established that state legislatures have the power to regulate occupations,[15] and may use past conduct as a standard if the statute represents a genuine attempt to determine the fitness of a party to engage in the specified calling.[16] This extension of legislative authority has not met unanimous judicial approval,[17] but a federal statute of the same nature has been upheld.[18]

State decisions have held that a test oath that was *ex post facto* in relation to private callings was not *ex post facto* in relation to public officers and voters.[19] These state decisions seem to be based on a distinction between natural rights and granted privileges. While doing the work of one's choice is a natural right,[20] holding office or voting is a privilege granted by duly constituted authority, and such authority may set the standards for conferring or withdrawing the privilege.[21] In determining the standard a state may use past conduct as a measure of present fitness, so long as the circumstances indicate a reasonable relationship between the past action and present qualifications.[22]

To date, the Supreme Court of the United States has not decided whether

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8. For definition see note 13 *infra*.

9. Cummings v. Missouri, 4 Wall. 277, 323, (U.S. 1867), "A bill of attainer is a legislative act which inflicts punishment without a judicial trial."

10. Id. at 321.

11. Ex Parte Garland, 4 Wall. 333 (U.S. 1867).

12. U.S. Const. Art. I, §9 (3), §10 (1).

13. Calder v. Bull, 3 Dall. 385, 390 (U.S. 1798). Defined *ex post facto* laws: "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense. . . ." *Cf.* Harrisades v. Shaughnessy, 342 U.S. 580, 593 (1952) (deportation not subject to *ex post facto* obection).

14. See Cummings v. Missouri, 4 Wall. 277, 325 (U.S. 1867) (trial by jury not subject to indirect legislative abrogation).

15. Dent v. West Virginia, 129 U.S. 114 (1889) (practice of medicine).

16. Hawker v. New York, 170 U.S. 189 (1898) (past felony may be conclusive evidence of present unfitness where moral character is essential to professional competence).

17. Id. at 203, 204 (dissent considered disqualification punishment inconsistent with Cummings v. Missouri, see note 3 *supra*).

18. Cases v. United States, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943).

19. *Compare* State v. Woodson, 41 Mo. 228 (1867) (public officer removed for not filing oath), *and* Blair v. Ridgley, 41 Mo. 63 (1867) (denied vote), with Cummings v. Missouri, 4 Wall. 277 (U.S. 1867).

20. Cummings v. Missouri, 4 Wall. 277, 321 (U.S. 1867) "All men have certain inalienable rights . . . among these . . . the pursuit of happiness . . . in the pursuit of happiness all avocations, all honors, all positions are alike open to everyone. . . . Any deprivations or suspension of any of these rights for past conduct is punishment. . . ." See Blair v. Ridgely, 41 Mo. 63, 172 (1867) (natural rights: 1. personal security, 2. personal liberty, 3. the right to acquire property, 4. in America freedom of religion).

21. *See* Breedlove v. Suttles, 302 U.S. 277, 283 (1937) (voting is a state granted privilege, except as restrained by the U.S. Constitution, states may qualify voting).

22. *See Garner* v. Los Angeles Board, 341 U.S. 716, 720 (1951).

past activity in a disloyal group bears a reasonable relationship to present fitness for public office. If the court finds the relationship reasonable, past loyalty oath statutes are valid as merely setting a standard. But if no reasonable relationship is found, depriving a man of public office for past activity in disloyal groups is punishment, and renders the statutes void as *ex post facto* laws and bills of attainder.

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INSURANCE — CONSTITUTIONAL AND STATUTORY PROVISIONS — DIRECT ACTIONS AGAINST INSURANCE COMPANIES. — *A*, a resident of Texas, was injured in an automobile accident in Louisiana through the negligence of *B*, also a resident of Texas. *A* brought suit directly against *B's* insurance company, a Swiss corporation which had entered the insurance contract with *B* in Texas. In similar situations Texas permits no direct action against an insurance company, but a Louisiana statute allows a direct action if the accident occurs in Louisiana, even though the policy may contain a provision forbidding such action.[1] The court *held* that the Louisiana statute could not be applied to contracts consummated outside the state, without giving it extra-territorial effect and depriving the insurer of its property without due process of law. *Mayo v. Zurich General Accident & Liability Ins. Co.*, 106 F. Supp. 579 (W.D. La. 1952).

Statutory attempts to deal with the problem of compensation for automobile accident victims have taken three main forms: (1) the enactment of "Financial Responsibility Acts;"[2] (2) compulsory insurance requirements;[3] and (3) statutes permitting direct actions against insurers.[4] The

1. La. Acts 1950, No. 541. "No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment . . . against the insured for which the insurer is liable . . . shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained . . . against the insurer. The injured person . . . shall have a right of direct action against the insurer . . . in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer. . . . This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. . . ."

2. Such laws usually contain provisions: (1) Requiring proof of financial responsibility following a conviction of violation of certain motor vehicle laws. (2) Requiring proof of financial responsibility following non-payment of a motor vehicle accident judgment. (3) Suspending the right to operate a motor vehicle until satisfaction of such judgment. Braun, *The Financial Responsibility Law*, 3 Law & Contemp. Prob. 505 (1936).

3. Massachusetts, first in this field provided in 1925, that no motor vehicle or trailer could be registered unless an insurance company authorized to do business in the state certified that a liability insurance policy had been issued covering the vehicle in question. Braun, *supra* note 2, at 537. While compulsory insurance for all vehicles is a rarity, many states require it for common carriers. N.D. Rev. Code §49-1833 (1943). The Statute expressly forbids joinder of the insurer in the action so as to expose the fact of insurance to the jury. However, James v. Young, 77 N.D. 451, 43 N.W.2d 692, allowed such joinder under other statutes; *cf.* N.D. Rev. Code §28-0206 and §28-0703 (1943).

4. What Louisiana did by legislation other states have done by judicial interpertation. Kansas treats an automobile liability policy as a third party beneficiary contract creating a direct right against the insurer where the insured is a motor carrier;