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CONSTITUTIONAL LAW-DUE PROCESS-BILL OF ATTAINDER-LOYALTY OATHS FOR CITY EMPLOYEE

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CONSTITUTIONAL LAW — DUE PROCESS — BILL OF ATTAINDER — LOYALTY OATHS FOR CITY EMPLOYEES—In 1948, pursuant to an amendment to its charter,[1] Los Angeles passed an ordinance which provided that all city employees must (1) take an oath that they did not espouse, and had not espoused within five years prior to the effective date of the ordinance, the forceful overthrow of the government; that they were not, nor had they been within the same period, affiliated with a group espousing such aims, and that they would not join any such group while in city employ, and (2) execute an affidavit relating whether they had ever belonged to the Communist Party, and if so the dates of their membership.[2] Two appellants took the oath but refused to execute the affidavit; the remaining fifteen appellants refused to comply with either part of the ordinance. All were discharged, and sued for reinstatement and back salaries. The California Court of Appeals denied relief;[3] certiorari was granted by the United States Supreme Court.[4] *Held,* affirmed, Justices Black and Douglas dissenting, and Justices Frankfurter and Burton dissenting in part. The ordinance was a reasonable regulation of its employees by the city; it did not constitute a bill of attainder, or deny the appellants due process of law. *Garner v. Board of Public Works of City of Los Angeles,* 341 U.S. 716, 71 S.Ct. 909 (1951).

Two major questions are involved in the present case—bill of attainder, and due process of law under the Fourteenth Amendment. As to the former, Justices Douglas and Black, dissenting, contend that the ordinance constitutes a bill of attainder, being a legislative act inflicting punishment without a judicial trial.[5] It is submitted that the Court is correct in upholding the ordinance on this point, for an essential element for a bill of attainder, punishment,[6] is lacking. Whether or not the deprivation of a privilege previously enjoyed amounts to punishment is dependent upon "the circumstances attending and the causes of the deprivation."[7] Government employment, either federal, state, or municipal, is a privilege and not a right;[8] and the legislature can generally regulate and define the

[1] Cal. Stat. (1941), c. 67, p. 3409, §432.

[2] Los Angeles Municipal Ordinance, No. 94,004 (1948).

[3] Garner v. Board of Public Works of City of Los Angeles, 98 Cal. App. (2d) 493, 220 P. (2d) 958 (1950). Discussed, 29 CHI.-KENT L. REV. 255 (1951).

[4] 340 U.S. 941, 71 S.Ct. 505 (1951).

[5] Principal case at 733, citing Cummings v. Missouri, 4 Wall. (71 U.S.) 277 (1866); Ex parte Garland, 4 Wall. (71 U.S.) 333 (1866); United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073 (1946).

[6] Cummings v. Missouri, supra note 5.

[7] Principal case at 722, quoting from Cummings v. Missouri, supra note 5, at 320. United States v. Lovett, supra note 5, is clearly distinguishable on its facts, for in that case the three government employees to be discharged were specifically named in the act; also, the act permanently proscribed those three from government employ, and that was held unreasonable. Bailey v. Richardson, (D.C. Cir. 1950) 182 F. (2d) 46, cert. granted 339 U.S. 977, 70 S.Ct. 1025 (1950); 36 VA. L. REV. 675 (1950); 18 GEO. WASH. L. REV. 541 (1950).

[8] Crenshaw v. United States, 134 U.S. 99, 10 S.Ct. 431 (1889); Butler v. Pennsylvania, 10 How. (51 U.S.) 402 (1850); McAuliffe v. The Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

qualifications for employment, either public or professional, as long as such regulations are reasonable.[9] Loyalty to the government would seem a proper and reasonable standard of fitness for public office,[10] especially in view of the increasing recognition by the courts of the paramount right in government to protect itself.[11] As to the due process question, Frankfurter objects to the oath provision of the ordinance because he perceives no requirement of scienter: thus many persons who innocently joined subversive organizations will be barred from city employment, along with many who will be unable to swear conscientiously that they have not been affiliated with such organizations.[12] Assuming for the minute that the oath does not require scienter, has there been a deprivation of life, liberty, or property so as to deny appellants due process of law under the Fourteenth Amendment? Clearly the appellants have not been deprived of their lives; nor has there been a deprivation of property, since municipal employment is a privilege and not a property right.[13] As to liberty, it is clear that freedom of speech and of assembly are covered by this word and protected under the Fourteenth Amendment.[14] In the present case, then, there would seem to be some infringement upon the appellants' liberty, for they are being penalized for their teachings and affiliations.[15] But the only penalty is a denial of municipal employment;

[9] Hawker v. New York, 170 U.S. 189, 18 S.Ct. 573 (1897); Bailey v. Richardson, supra note 7; Friedman v. Schwellenbach, (D.C. Cir. 1946) 159 F. (2d) 22, cert. den. 331 U.S. 865, 67 S.Ct. 1302 (1947); United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556 (1947). Note that the courts do not apply the traditional "clear and present danger" test in this situation; probably because of the historical acceptance of the "spoils system" in this country. Sherman, "Loyalty and the Civil Servant," 20 ROCKY MT. L. REV. 381 (1948). Moreover, it would seem that the "clear and present danger" test today requires no more than a clear and "probable" danger, and would give the same result in the principal case. Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857 (1951), discussed supra p. 451. For an excellent criticism of the "reasonable" standard, see BARTH, THE LOYALTY OF FREE MEN, c. 5 (1951); Emerson and Helfield, "Loyalty Among Government Employees," 58 YALE L.J. 1 (1948), answered by Donovan and Jones, "Program for a Democratic Counter Attack to Communist Penetration of Government Service," 58 YALE L.J. 1211 (1949).

[10] Gerende v. Board of Supervisors of Elections, 341 U.S. 56, 71 S.Ct. 565 (1951); Friedman v. Schwellenbach, supra note 9; L'Hommedieu v. Board of Regents, 301 N.Y. 476, 95 N.E. (2d) 806 (1950).

[11] American Communications Association v. Douds, 339 U.S. 382, 70 S.Ct. 674 (1950); Dennis v. United States, supra note 9.

[12] Principal case at 726. Although it is not absolutely clear, Justice Frankfurter's objection seems to be that this constitutes a deprivation of substantive rights protected under the Fourteenth Amendment due process clause. Justice Burton dissents to the oath provision on another ground, at 729: the oath requires no subversive affiliation within five years prior to the effective date of the ordinance, and thus will, in time, require that the affiant has never had such affiliations.

[13] Note 8 supra.

[14] Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666 (1937); DeJonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255 (1936).

[15] Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732 (1936); Lovell v. City of Griffin, supra note 14. The deprivation based on mere affiliation seems to impose "guilt by association." DeJonge v. Oregon, supra note 14; Bridges v. Wixon, 326 U.S. 135, 65 S.Ct. 1443 (1945). However, it is questionable whether this doctrine would protect the government employee; see note 8 supra. Moreover, if the oath requires actual knowledge of the

the appellants are left free to speak and join as they will. Opposed to this slight restriction is the very great interest of the State in establishing an efficient and trustworthy government service in time of national peril. The writer feels that the deprivation of liberty occasioned by the ordinance is justified by the overriding right of the public to a secure government, and can be upheld under the test of reasonableness applied to denials of government employ.[16] The Court, however, does not meet the due process question squarely; rather it is willing to "assume that scienter is implicit in each clause of the oath."[17] Furthermore, the Court assumes that the California courts will interpret the oath in the same way, and that it will be administered consistent with such construction.[18] These assumptions place the holding on very unsubstantial grounds. The California court has already upheld this oath as it stands; the Court should not now for the first time read into it a requirement of scienter, since the oath could properly have been upheld even without this requirement.

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organization's character, the doctrine would not appear applicable. Sutherland, "Freedom and Internal Security," 64 HARV. L. REV. 383 at 402 (1951).

[16] American Communications Association v. Douds, supra note 11; Bailey v. Richardson, supra note 9; United Public Workers v. Mitchell, supra note 9. The ordinance would also seem valid under the present day version of the "clear and present danger" test; see note 9 supra.

[17] Principal case at 724, citing Fox v. Washington, 236 U.S. 273, 35 S.Ct. 383 (1915).

[18] Citing People v. Steelik, 187 Cal. 361, 203 P. 78 (1921). But note, as Frankfurter points out, at 727, the Steelik case involved a criminal statute which read "is or knowingly becomes," and the Court only held that the word "knowingly" qualifies "is" as well as "becomes."