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Vagueness - The Crippler Of Loyalty Oaths - Baggett v. Bullitt

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Vagueness — The Crippler Of Loyalty Oaths

Baggett v. Bullitt[1]

Members of the faculty, staff, and student body of the University of Washington instituted a class action, challenging the validity of two loyalty oaths required of teachers and other employees of the university. The first oath, required of faculty members only, incorporated various provisions of 1931 legislation which demanded that the signer swear to support the constitution and laws of both the United States and the State of Washington and to promote respect for their flags and institutions.[2] The second part of the oath dealt with subversive activities. This section embodied the requirements of 1951 legislation, which generally provided that no "subversive person" as defined in this Act could be eligible to hold any position as a state employee.[3] The second oath, established in 1955, was applicable to all state employees and was incorporated as the second part of the oath required of faculty members.[4]

The district court decided that the oath requirements of the 1955 Act and the statutory provisions upon which it was based were not unconstitutionally vague and did not contravene any of the freedoms guaranteed by either the first or fourteenth amendments. The court abstained from ruling on the claim that the 1931 legislation was vague, favoring the possibility that a state proceeding might resolve the constitutional issue.[5]

The Supreme Court confined its consideration to the question of vagueness, which it found dispositive of the case. In dealing with the 1951 legislation, which was the basis for the oath established in 1955, the Court found that the portion concerned with the definition of a

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1. 377 U.S. 360 (1964).

2. Wash. Laws 1931, ch. 103 (full text of Act).
"I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." Wash. Laws 1931, ch. 103, § 1, at 295.

3. Wash. Rev. Code § 9.81.060 (1961). Definition given *infra*.

4. Baggett v. Bullitt, 377 U.S. 360 (1964).
"I certify that I have read the provisions of RCW 9.81.010(2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and
"I do solemly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.
"I understand that this statement and oath are made subject to the penalties of perjury." *Id.* at 364–65 n.3.
This above provision is the only oath taken by state employees other than teachers, and it is also incorporated into the original oath taken by teachers as the last section thereof. Thus in effect all state employees are subject to the oath provisions dealing with subversive activities. Wash. Laws 1955, ch. 377.

5. The 1955 act had been attacked in the Washington State courts and its validity had been upheld. One section of the act was held unconstitutional, but severable from the rest of the act. Nostrand v. Balmer, 53 Wash. 2d 460, 335 P.2d 10 (1959).

"subversive person" was vague. The term "subversive person" was defined as follows:

> " 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization."[6]

The Court felt that the wording of the oath was too vague for a teacher or other employee of the state to be able conscientiously to sign it and be sure of what he was permitted or forbidden to do. Mr. Justice White warned of some of these dangers by stating:

> "A person is subversive not only if he himself commits the specified acts but if he abets or advises another in aiding a third person to commit an act which will assist yet a fourth person in the overthrow or alteration of constitutional government."[7]

The Court also found that the 1931 legislation was unconstitutionally vague.[8]

Loyalty oaths seem to appear whenever fear and suspicion pervade the atmosphere. They appeared in abundance in this country during the intense period of adjustment following the Civil War. In 1865, Missouri adopted a new constitution which required an oath of past loyalty to the United States from those wishing to teach, vote, or hold office.[9] A similar law was enacted by Congress for those wishing to practice law in the federal courts.[10] In *Cummings v. Missouri*[11] and *Ex Parte Garland*,[12] the Supreme Court struck down these laws

6. Wash. Rev. Code § 9.81.010(5) (1961).

7. 377 U.S. 360, 369 (1964).

8. In dealing with the 1931 legislation the Court was faced with the problem of abstention because the 1931 act had never been interpreted by the state courts of Washington. The Supreme Court, however, felt that a state construction of the oath would do very little in the way of eliminating its infirmities and remanding the case would merely protract the litigation. For an analysis of the Court's use of vagueness in its decision-making process, see, Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

9. Mo. CONST. art. II, §§ 3, 6 (1865).

10. 13 Stat. 424 (1865).

11. 71 U.S. (4 Wall.) 277 (1866). For a discussion of this case, see HYMAN, ERA OF THE OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION (1954).

12. 71 U.S. (4 Wall.) 277 (1866). See Russ, Jr., *The Lawyer's Test Oath During Reconstruction*, 10 MISS. L.J. 154 (1938). For more modern cases dealing with the loyalty requirements of lawyers before they are admitted to the bar, see Konigsberg v. State Bar of California, 366 U.S. 36 (1961) and Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); 1 EMERSON & HABER, POLITICAL AND CIVIL LIBERTIES IN THE UNITED STATES 480–502 (2d ed. 1958).

as being *ex post facto* and bills of attainder. Although subversive statutes were, as might be expected, widespread during the Red Scare of the 20's, loyalty oaths were curiously absent. They reappeared in abundance, however, during the post World War II period and flowered in the "Age of McCarthy."

The restraints these oaths placed on the freedoms of speech and association brought forth a challenge to their constitutionality. In 1951, *Garner v. Board of Public Works*[13] reached the Supreme Court. The Supreme Court, in upholding the constitutionality of a Los Angeles loyalty oath, held that a municipal employer had the right to satisfy itself as to the loyalty and trustworthiness of its employees. Justice Frankfurter, in his concurring opinion, expressed the feelings of the Court on this point by stating: "The Constitution does not guarantee public employment. City, State and Nation . . . may . . . assure themselves of fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it."[14] Thus *Garner* has made it clear that loyalty oaths are not, at least at present, unconstitutional per se.

Loyalty oaths are, however, still subject to limitations imposed by the first, fifth, and fourteenth amendments. One of these limitations deals with the problem of scienter.[15] The Supreme Court has held that scienter or knowledge is a necessary ingredient in a loyalty oath case.[16] A person may not be denied a job for membership in an organization unless he has knowledge of the forbidden purposes or activities of the association. Scienter was held to be implicit in the loyalty oath in the *Garner* case, but in a later case [17]where scienter was found not to be required, the Court invalidated the oath and the state's procedure in administering it. The Court said in essence that one cannot be charged with forbidden activities when he has no knowledge of the evil purposes of the organization.[18]

Though loyalty oaths have been attacked for abridging free speech and due process,[19] they have been most vigorously challenged on the ground of unconstitutional vagueness. The question of vagueness of a loyalty oath involves the problems of fair notice and clear expression. In *American Communications Association v. Douds*,[20] the clarity of section 9(h) of the Labor Management Relations Act of 1947[21] was attacked. Under section 9(h), the facilities of the Labor Relations Board were not available to any labor organization whose officers did not

13. 341 U.S. 716 (1951).
14. *Id.* at 724–25.
15. "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." Wieman v. Updergraff, 344 U.S. 183, 191 (1952).
16. Garner v. Board of Public Works, 341 U.S. 716 (1951).
17. Wieman v. Updergraff, 344 U.S. 183 (1952).
18. *Supra* note 17, at 190–91.
19. See Speiser v. Randall, 357 U.S. 513 (1958) and First Unitarian Church v. County of Los Angeles, 357 U.S. 545 (1958). See also Parker v. County of Los Angeles, 338 U.S. 327 (1949), in which an oath was attacked on due process claims, but certiorari was dismissed for lack of ripeness.
20. 339 U.S. 382 (1950). For a review of this case see Barnett, *The Constitutionality of the Expurgatory Oath Requirement of the Labor Management Relations Act of 1947*, 27 ORE. L. REV. 85 (1949).
21. 49 Stat. 453 (1947).

sign an affidavit that they were not Communists and were not members of any organization that believed in or taught the overthrow of the government by force or other methods. In upholding this clause, the Court stated that it dealt only with the "objective of overthrow by force or by any illegal or unconstitutional methods. . . ."[22] The Court felt this was a sufficiently clear delineation of the activity which the statute forbade. The Court also adopted a standard that could be used in determining whether a statute was vague or not. "The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important."[23]

The Feinberg Law of New York, which establishes the criterion for elimination of subversive persons from the school system, was attacked in *Adler v. Board of Education*.[24] This act, which involved not a loyalty oath but the definition of what constituted a subversive person for purpose of removal, was attacked on vagueness grounds in the same manner as if it were an oath. The act defined a "subversive organization" as an organization that advocates the overthrow of the government by force or violence.[25] This definition was sustained as being sufficiently clear and definite so as not to violate due process.

Douds and *Adler*, both dealing with the question of the vagueness of subversive activity provisions, reached the same result as to what may be forbidden and the terms that must be used. Thus organizations or persons that "advocate the overthrow of the government by force or violence" can be restricted in their activity, and restrictions framed in such terms are not vague and unconstitutional. The term "susceptible of objective measurement"[26] is the standard used by the Court in the Washington Loyalty Oath case, and *Douds* and *Adler* seem to meet this criterion.

In contrast to *Douds* and *Adler* is the case of *Cramp v. Board of Public Instruction*[27] decided in 1961. In that case, a Florida loyalty oath[28] which required a teacher to swear that he had never lent his "aid, advice, counsel or influence to the Communist Party" was invalidated. A close scrutiny of the actions prohibited indicates their indefiniteness. There is no concrete formulation of what "aid, advice, counsel or influence" can include within their meaning. Normally innocent activities may become forbidden activities under a literal interpretation of these words. The oath, speculative as to what is prohibited, suffers with the vice of vagueness. Unlike the forbidden activity in *Douds*, there is little concreteness and little chance of "objective measurement." Thus it can be reasoned that future statutes of the type found in the principal case and in *Cramp*, which leave too much

22. 339 U.S. at 407–08.
23. American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1950).
24. 342 U.S. 485 (1952).
25. N.Y. Education Law § 3022 (McKinney's Consol. Laws ch. 16).
26. 377 U.S. 360, 367 (1964).
27. 368 U.S. 278 (1961).
28. FLA. STAT. ANN. ch. 876, § 876.05 (Supp. 1964).

to the imagination, and give too little in the way of fair notice, will be invalidated for vagueness.[29]

The principal case is important in Maryland because of the similarity of Maryland's loyalty oath to the Washington oath. The Sedition and Subversive Activities Law of 1949,[30] generally known as the Ober Law, requires that all state employees and candidates for office must sign a loyalty oath. The oath states:

> "I do hereby certify that I am not a subversive person as defined by law, namely that I am not a person engaged in one way or another in an attempt to overthrow the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by force or violence, and I am not knowingly a member of an organization engaged in such an attempt."[31]

The validity of the oath was challenged in *Shub v. Simpson*[32] by candidates for local and federal office on the grounds that it was an extra oath of office, which is forbidden by the Maryland Constitution, and that it was vague. The Maryland Court of Appeals upheld the oath, and proclaimed that its purpose was,[33] "to prevent infiltration in our state, county, or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government *by force or violence*."[34]

In 1951, in *Gerende v. Board of Supervisors of Elections*,[35] the oath was once again attacked and upheld by the Court of Appeals. Appealed to the Supreme Court,[36] the judgment was affirmed on the stipulation that the actual oath to be applied would only require one to swear that he was not a person who was engaged "in 'one way or another in the attempt to overthrow the government *by force or violence*' and that he is not knowingly a member of an organization engaged in such an attempt."[37]

After the decision in *Baggett*, Attorney General Finan defended the constitutionality of the Maryland oath. In a press release, he stated, "This oath has been specifically upheld against attack on constitutional vagueness grounds by both the Maryland Court of Appeals and the Supreme Court of the United States in the *Gerende* case."[38]

The main point of controversy concerning Maryland's oath is that the definition of a "subversive person" as defined in the Ober

29. Mr. Justice White in the principal case pointed out the need for fair notice in loyalty oaths. "It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." 377 U.S. at 374, quoting Champlin Ref. Co. v. Corporation Commissioners of Okla., 286 U.S. 210, 243 (1932).

30. 8A MD. CODE ANN. art. 85a (1957).

31. This is the oath required of state employees, but local subdivisions within the state use other oaths. Attorney General Finan's Press Release (June 8, 1964).

32. 196 Md. 177, 76 A.2d 332 (1950).

33. For a contrary view on the question of the construction of the oath as an additional oath of office, see Imbrie v. Marsh, 3 N.J. 578, 71 A.2d 352 (1950), 18 A.L.R.2d 241, 268 (1951).

34. Shub v. Simpson, 196 Md. 177, 192, 76 A.2d 332, 338 (1950).

35. 197 Md. 282, 78 A.2d 660 (1951).

36. Gerende v. Board of Supervisors of Elections of Balto., 341 U.S. 56 (1951).

37. *Id.* at 56–57.

38. Attorney General Finan's Press Release, p. 3 (June 8, 1964).

Law,[39] is virtually identical with the definition ruled invalid in the principal case. However, there is one salient difference between the two oaths. This is the fact that the definition of a "subversive person" is not included in the Maryland oath while it was written on the back of the Washington oath and thus became incorporated into it. However, the Maryland oath does require that the signer swear that he is not a "subversive person as defined by law," which would seem to refer to the invalid definition contained in the Ober law. This reference is counterbalanced by the definition of a subversive person, which is in the oath itself. On balance it would seem the Maryland oath has followed the Supreme Court's decision in the *Gerende* case as to what would be allowed in the oath. Maryland's oath being in conformity with what has previously been held valid in other cases, plus the Supreme Court's earlier ruling in its favor, lends support to the belief that the oath remains constitutional.[40]

However irreproachable the constitutionality of a loyalty oath, its value may be seriously questioned. Two arguments are usually advanced in favor of the oath. One is that a loyalty oath is an effective device for keeping subversives out of the government. This is an illusion.

> "After one year of operation, the loyalty oath required of Detroit's municipal employees had claimed a single casualty — a member of the sect of Jehovah's Witnesses. The first effect of the Ober Act in Maryland was to scare three Quakers whose religious rather than political dogmas prevented their conscientious compliance with the statute. In California a number of academies lost their appointments because they were unwilling to assert their innocence of Communism, even though nobody as much as hinted that they were in fact guilty. In short, the bag has been a disappointing one."[41]

The other argument is "Why not?" Why should any loyal American object to swearing that he does not advocate the forcible overthrow of the government and that he is not and will not become a member of any organization so advocating? In response Alan Barth has said, "A prior and more apposite question is 'Why?' Why should public employees 'be singled out as a special class and be asked to profess their

39. 8A MD. CODE ANN. art. 85a, § 13 (1957):
"Every person, who on June 1, 1949 shall be in the employ of the State of Maryland or of any political subdivision thereof, other than those now holding elective office shall be required on or before August 1, 1949, to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this article, namely, any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by resolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this article."

40. On June 24, 1964, Joseph Allen, Baltimore City Solicitor, ruled that Baltimore City's oath was invalid under the ruling in the Baggett decision, and that the state oath would be used from now on. The Evening Sun (Baltimore) June 24, 1964, p. 26.

41. GELLHORN, THE STATES AND SUBVERSION 367–68 (1952).

innocence of an attitude which there is no good reason to suspect them of holding'."[42] On the other hand, the shortcomings of an oath requirement are overwhelming.

> "(1) it is not an effective means for accomplishing its objective of uprooting Communists and other subversives from public employment;
>
> "(2) it deprives the public of the services of able persons of conscience who are unwilling to take the oath;
>
> "(3) it causes understandable resentment on the part of those who are singled out to swear to their loyalty but also oppose being pushed around; and
>
> "(4) in questioning the loyalty of a sizable group of citizens, it creates an atmosphere of suspicion which is neither healthy nor traditional in democratic societies."[43]

The Maryland oath, as well as all other loyalty oaths, is subject to these shortcomings. Even though a loyalty oath may not infringe upon constitutionally protected speech and association, or be unconstitutionally vague, the fact remains that its value is highly questionable.

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42. BARTH, THE LOYALTY OF FREE MEN 288 (Cardinal ed. 1952).

43. Byse, *A Report on the Pennsylvania Loyalty Oath,* 101 U. PA. L. REV. 480, 486 (1953).