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# Constitutional Law-First Amendment-Loyalty Oaths-Vagueness Standard Relaxed for Affirmative Oaths

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# RECENT DEVELOPMENTS

**Constitutional Law—First Amendment—Loyalty Oaths—Vagueness Standard Relaxed for "Affirmative" Oaths**

*Cole v. Richardson*, 405 U.S. 676 (1972)

The onset of the Cold War was accompanied by an increasing use of the loyalty oath as a condition of public employment.[1] Today about one fifth of the civilian work force is subject to some form of loyalty qualification.[2] The principal aim of these loyalty oath requirements is to guard against the occupation of sensitive positions by those who might adversely affect the public interest.[3]

Although the use of the loyalty oath raises a number of constitutional issues,[4] the Supreme Court has failed to mount a direct assault

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1 *See, e.g.*, Subversive Activities Control Act of 1950, ch. 1024, § 2, 64 Stat. 987 (codified at 50 U.S.C. § 781 (1970)). *See also Hearings on Subversion and Espionage in Defense Establishments and Industry Before the Perm. Subcomm. on Investigations of the Senate Comm. on Gov't Operations*, 83d Cong., 1st Sess. pt. 1 (1954); *id.*, 83d Cong., 2d Sess. pts. 2-6 (1954); *id.*, 83d Cong., 2d Sess. pts. 7-8 (1955); *id.*, 84th Cong., 1st Sess. pt. 9 (1956).

> The loyalty-oath requirement has been carried to ridiculous extremes. It has been required of college students receiving loans under the National Defense Education Act, of certain classes of applicants under the Medicare Act, and even of members of private organizations such as the motion pictures director's union. At one time Indiana required a loyalty oath from professional wrestlers.

C. Pritchett, The American Constitution 539-40 (1968) (footnotes omitted).

Loyalty oaths are not a new phenomenon. During the English Civil War the story was told of the helpless farmer who watched his fields destroyed by marching rebel and royal forces preparing for the confrontation near Marston Moor. Challenged to declare for king or parliament, he replied, "What, be they two at it again." H. Hyman, To Try Men's Souls 1 (1959).

The oaths demanded of the Tories during the Revolution and those required of Southerners following the Civil War have been well documented. *See* H. Hyman, *supra*, at 88-117, 251-66. *See generally* W. Gellhorn, The States and Subversion (1952); S. Stouffer, Communism, Conformity and Civil Liberties (1955).

2 T. Emerson, The System of Freedom of Expression 206 (1970).

3 The fear of such danger was present on the bench as well: "In the context of our time, [Communist Party] membership is . . . relevant to effective and dependable government, and to the confidence of the electorate in its government." Garner v. Board of Pub. Works, 341 U.S. 716, 725 (1951) (Frankfurter, J., concurring in part and dissenting in part). *See also* Comment, *The Loyalty Oath as a Condition of Public Employment*, 19 Baylor L. Rev. 479 (1967); Note, *State Loyalty Programs and the Supreme Court*, 43 Ind. L.J. 462 (1968).

4 *See* Note, *The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1173-76 (1972).

The two principal attacks which have been made against loyalty oaths per se are that they constitute bills of attainder and that they violate first amendment liberties.

Following the Civil War a few oaths were invalidated when labelled as bills of at-

upon such oaths, preferring to follow a balancing approach under which first and fourteenth amendment considerations are weighed against the government's interest in keeping sensitive positions free of "subversives."[5]

Under this approach, particular oaths have been found to violate rights of free association,[6] or to have a "chilling" effect on speech or

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tainder, *i.e.*, legislative action having the effect of punishing specific individuals, or easily ascertainable members of a group, without benefit of trial. *See* U.S. CONST. art. I, § 9, cl. 3. In Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866), a divided Court reversed the criminal conviction of a Catholic priest who refused to swear to a loyalty oath required by the Missouri constitution. In *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866), a former member of the Senate of Confederate Arkansas refused to take a loyalty oath required by federal legislation. Both oaths were found to be bills of attainder.

In modern times the device has been used sparingly. *But see* United States v. Lovett, 328 U.S. 303 (1946) (House Appropriations Committee barred from prohibiting Treasury Department from paying three federal employees because Committee considered employees "subversive"). *Compare* American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (oath required of union officials held valid as protection against communist subversion of labor movement), *with* United States v. Brown, 381 U.S. 437 (oath required of union officials held to constitute bill of attainder). The modern arguments against using the bill of attainder theory are that the loyalty oath was not designed to punish, that failure to sign such an oath results only in the loss of employment, and that any infringement of rights is merely an incidental result of the state's protection of security interests. Note, *Loyalty Oaths*, 77 YALE L.J. 739, 740-43 (1968).

It has also been argued that the loyalty oath is constitutionally defective because such an oath by its very nature stigmatizes and inhibits belief or association as well as conduct. Such a prohibition violates the theory of "absolute" first amendment rights.

> Loyalty oaths . . . tend to stifle all forms of unorthodox or unpopular thinking or expression . . . which [have] played such a vital and beneficial role in the history of this Nation. The result is a stultifying conformity which in the end may well turn out to be more destructive to our free society than foreigu agents could ever hope to be. The course which we have been following the last decade is not the course of a strong, free, secure people, but that of the frightened, the insecure, the intolerant. I am certain that loyalty to the United States can never be secured by the endless proliferation of "loyalty" oaths; loyalty must arise spontaneously from the hearts of people who love their country and respect their government.

Speiser v. Randall, 357 U.S. 513, 532 (1958) (Black, J., concurring). *See also* Linde, *Justice Douglas on Freedom in the Welfare State*, 39 WASH. L. REV. 4, 34-42 (1964). A majority of the Court, however, has never adopted the contention. *See generally* Garner v. Board of Pub. Works, 341 U.S. 716 (1951); *In re* Summers, 325 U.S. 561 (1945).

5 *See generally* Note, *supra* note 4, 85 HARV. L. REV. at 1173-76.

6 Although "freedom of association" is not mentioned in the Constitution, it has been recognized by the Court as protected by both the first and fourteenth amendments. *See* NAACP v. Alabama, 357 U.S. 449 (1958).

Freedom of association has been the constitutional right most often considered in the loyalty oath context. Because many of the oaths challenged during the 1950's and 1960's were specifically designed to keep members of the Communist party out of government positions, the Court had to consider both the interests of the government in keeping "agents of a foreign power" out of key positions and the right of individuals to join political groups. The Court thought it was wrong to assume disloyalty automatically from membership association with the Communist party. *See, e.g.*, Wieman v. Updegraff,

expression.[7] Other oaths have been considered ex post facto laws,[8] or

344 U.S. 183, 190-91 (1952) (state may not require disclaimer of membership in subversive organization as condition of employment). Moreover, as the challenges continued, the Court went further and held that loyalty oaths could only exclude members of subversive organizations who had the specific intent (scienter) to further the goals of such organizations. *See* Elfbrandt v. Russell, 384 U.S. 11, 17 (1966) (those not participating in organization's unlawful activities pose no threat, either as citizens or employees); Baggett v. Bullitt, 377 U.S. 360 (1964) (same). *Compare* Keyishian v. Board of Regents, 385 U.S. 589 (1967) (New York Feinberg Law requiring removal from employment for treasonable or seditious utterances too broad, vague, and complicated), *with* Adler v. Board of Educ., 342 U.S. 485 (1952) (Feinberg Law valid exercise of state police power over education). *See also* Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961) (oath lacking "terms susceptible to objective measurement" fails to inform oathtaker what state commands or forbids); 16 DEPAUL L. REV. 209 (1967); 18 SYRACUSE L. REV. 865 (1967).

The concern for scienter is an outgrowth of the Court's activities in the Smith Act cases. The Smith Act (Alien Registration Act of 1940, 18 U.S.C. § 2385 (1970)) made it a crime to belong to an organization subsequently found to advocate the overthrow of the government. After the peak of the McCarthy period had passed, the Court held that a Smith Act conviction would be affirmed only if the government had proved that a defendant had advocated the overthrow of the government to a large and cohesive group which is "sufficiently oriented towards action, and other circumstances are such as reasonably justify apprehension that action will occur." Yates v. United States, 354 U.S. 298, 321 (1957). *See* C. PRITCHETT, *supra* note 1, at 526-33.

The Court is willing to grant states considerable leeway to demand disclosure of membership in subversive organizations as a first step in determining if that membership is active. *See* Law Student Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971) (right of state to make inquiries of bar applicants); Konigsberg v. State Bar, 366 U.S. 36 (1961) (same); *cf.* Baird v. State Bar, 401 U.S. 1 (1971); Application of Stolar, 401 U.S. 23 (1971). *See also* Lerner v. Casey, 357 U.S. 468 (1958) (state may discharge subway employee for failure to answer questions on subversive activities if it has reasonable grounds to doubt employee's reliability); Beilan v. Board of Pub. Educ., 357 U.S. 399 (1958) (discharge of teacher on grounds of "incompetence" upheld because teacher failed to answer questions relating to subversive activities). The approach on this point has not changed since the early fifties. *See* Garner v. Board of Pub. Works, 341 U.S. 716 (1951) (discharge of employee who failed to take loyalty oath).

7 *See* cases cited in note 6 *supra*. *See also* Shelton v. Tucker, 364 U.S. 479 (1960) (broad inquiries into activities of nonsubversive character may not be made); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (loyalty oaths may conflict with academic freedom); Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) (per curiam) (requirement of oath for political candidate held valid); Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROB. 447 (1963); Comment, *Loyalty Requirements vs. Academic Freedom*, 52 MARQ. L. REV. 251 (1968); 18 CASE W. RES. L. REV. 1802 (1967).

The claim that a loyalty oath might chill rights of free association and the claim that a pledge might inhibit rights of speech and expression are really the same. The Court has simply said that a valid loyalty oath can serve only to keep active subversives out of government positions and that a state employee need not promise to refrain from any other type of activity. *See* Note, *Loyalty Oaths*, 77 YALE L.J. 739 (1968). The argument is buttressed in Elfbrandt v. Russell, 384 U.S. 11, 19 (1966), where the Court treats the two theories as interchangeable.

8 This theory might be raised in connection with an oath which demands that an affiant swear that he "has never been" a member of a subversive organization or partici-

barriers to freedom of assembly,[9] or the right to worship.[10] Furthermore, certain statutory oath requirements have been held violative of procedural due process.[11] This arsenal of constitutional theories has given the Court considerable flexibility in dealing with issues arising from specific loyalty oath statutes. Yet the Court has been reluctant to extend the theoretical bases for declaring particular loyalty oaths void.[12] *Cole v. Richardson*[13] represents the most recent example of this reluctance.

The plaintiff in *Cole*, Mrs. Lucretia Peteros Richardson, was appointed as a research sociologist by the Boston State Hospital in late 1968. Soon after beginning work, she was routinely asked to take the loyalty oath required of all employees of the Commonwealth of Massachusetts. The oath read:

> I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Consti-

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pated in "subversive activities." *See, e.g.*, Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961). *But see* note 39 and accompanying text *infra*. The Court used the ex post facto theory in Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866), and *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866), to buttress its claim that the oaths involved were bills of attainder. Although the laws involved were not criminal according to the test of Calder v. Bull, 3 U.S. (3 Dall.) 269 (1798), they did exact "punishment" for acts which were not criminal when committed.

In American Communications Ass'n v. Douds, 339 U.S. 382 (1950), the Court implied that if the oath involved had prohibited past Communist party membership it would have been invalid. *See generally* Barnett, *The Constitutionality of the Expurgatory Oath Requirement of the Labor-Management Relations Act of 1947*, 27 ORE. L. REV. 85 (1949). The oath at issue in Elfbrandt v. Russell, 384 U.S. 11, 12-13 (1966), appears to have been carefully drafted so as to avoid an ex post facto problem.

9 *Cf.* Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) (per curiam).

10 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). The holding is based on other grounds as well. *See* note 43 and accompanying text *infra*.

11 Nostrand v. Little, 362 U.S. 474 (1960), *on remand*, 58 Wash. 2d 111, 361 P.2d 551 (1961), *aff'd per curiam*, 368 U.S. 436 (1962) (state must afford employee procedural due process by specifying charges and giving him opportunity to be heard). *See also* Speiser v. Randall, 357 U.S. 513 (1958) (state must bear burden of proof at administrative hearing in order to deny veteran special tax exemption on disloyalty grounds); notes 73-86 and accompanying text *infra*.

The requirement of a hearing logically follows from the necessity of proving scienter. *See* note 6 and accompanying text *supra*. *See also* note 76 and accompanying text *infra*.

12 *See, e.g.*, Connell v. Higginbotham, 403 U.S. 207 (1971) (oath provision requiring promise of support for federal and state constitutions constitutionally valid); Nelson v. County of Los Angeles, 362 U.S. 1 (1960) (county employees may be dismissed for refusing to answer questions of congressional committee); Ohlson v. Phillips, 304 F. Supp. 1152 (D. Colo. 1969), *aff'd mem.*, 397 U.S. 317 (1970) (oath requiring promise to uphold federal and state constitutions valid). *But see* Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

13 405 U.S. 676 (1972), *aff'g* Crim. No. 69-302-G (D. Mass., July 1, 1970), *on remand from* 397 U.S. 238 (1970), *vacating and remanding* 300 F. Supp. 1321 (D. Mass. 1969).

> tution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method.[14]

Mrs. Richardson refused to sign the oath and as a result her employment was terminated.

In March 1969, Mrs. Richardson brought suit in the United States District Court for the District of Massachusetts against the hospital superintendent and the Commonwealth of Massachusetts, contending that the oath violated her first and fourteenth amendment rights. Her complaint also prayed for damages[15] and injunctive relief against the continued enforcement of the Massachusetts loyalty oath statute.

A three-judge panel rejected the damage claim,[16] but held the oath to be unconstitutional and granted the injunctive relief sought.[17] Defendants appealed directly to the United States Supreme Court.[18] After some delay,[19] the Court noted probable jurisdiction[20] and then

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14 MASS. ANN. LAWS ch. 264, § 14 (1966). "Violation of section fourteen shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both." *Id.* § 15.

15 After the formal termination of her employment, Mrs. Richardson agreed to work full time at the hospital on a volunteer basis. She then demanded the back pay to cover her services during this post-termination period. 397 U.S. at 239.

16 Richardson v. Cole, 300 F. Supp. 1321 (D. Mass. 1969).

17 Actually, the lower court found that part of the oath passed constitutional muster. The first clause, reading "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts," was acceptable. *Id.* at 1322. *Accord,* Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd per curiam,* 390 U.S. 36 (1968). However, the second clause, reading "and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method," was held to be void for vagueness. 300 F. Supp. at 1323.

According to Massachusetts case law, the two clauses were not severable; thus, the entire oath fell. *See* Pedlosky v. MIT, 352 Mass. 127, 224 N.E.2d 414 (1967). *But see* Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961) (Court willing to sever two clauses of oath).

18 28 U.S.C. § 1253 (1970).

19 The district court entered its opinion on June 26, 1969. 300 F. Supp. at 1321. Defendant docketed an appeal with the Supreme Court on September 29, 1969. The plaintiff then filed a motion on October 25, 1969, appealing the failure of the lower court to grant her damage prayer, and asking the Supreme Court alternatively to affirm the district court's decision on the injunction or to dismiss the suit on mootness grounds. 397 U.S. 238, 239 (1969). The plaintiff claimed that her job was no longer in existence, and no doubt preferred a dismissal for mootness than one on the merits. The defendant resisted plaintiff's motion by introducing an affidavit from the hospital superintendent in which the administrator claimed to be holding Mrs. Richardson's job open for her if ouly Mrs. Richardson would sigu the oath. *Id.* at 242.

The Supreme Court vacated the lower court judgment and remanded the case back

reversed the judgment below,[21] holding "that the Massachusetts oath is constitutionally permissible."[22]

## I

### THE AFFIRMATIVE OATH AND THE VAGUENESS TEST

Plaintiff first challenged the Massachusetts oath as void for vagueness under the due process clause of the fourteenth amendment.[23] This form of attack gave the Court an opportunity to reach fundamental first amendment issues.[24] Plaintiff argued that a vague oath does not impose a standard of conduct which can be objectively measured. The sincere oath taker might therefore refrain from forms of expression, criticism, or association protected by the first amendment because he mistakenly believes his oath requires that he do so.[25]

The Court had previously found merit in this contention.[26] Shortly before *Cole*, however, the vagueness doctrine came under closer scrutiny in the context of loyalty oath controversies.[27] Indeed, the result in *Cole* was foreshadowed by the Court's earlier actions in a number of cases,[28] most particularly *Knight v. Board of Regents*.[29]

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to the district court to determine the issue of mootness. *Id.* at 238. At that time, Mr. Justice Harlan, concurring, pointed out that the underlying reason for the "unusual disposition" was the hope of the Court that that issue would be settled below. "I am," he said, "content to acquiesce in the Court's action because of the manifest triviality of the impact of the oath under challenge . . . ." *Id.* at 240.

The litigation did not end on remand. In an unreported opinion dated July 1, 1970, the district court concluded that the issue was not moot. *See* 405 U.S. at 679. The case went back to the Supreme Court, although Mrs. Richardson abandoned her damage claim. *Id.*

20 403 U.S. 917 (1971).

21 405 U.S. 676 (1972).

22 *Id.* at 679.

23 300 F. Supp. at 1322; 405 U.S. at 685. This complaint has also been referred to as "overbreadth." *See* Note, *supra* note 4, 77 YALE L.J. at 748-50.

24 *See* notes 6-11 and accompanying text *supra*. The guarantees of the first amendment are applicable on the state level. *See* Gitlow v. New York, 268 U.S. 652 (1925).

25 *See* 405 U.S. at 689 n.3 (Douglas, J., dissenting); *id.* at 695 (Marshall, J., dissenting). *See also* Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

26 *See* Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961). *See generally* United States v. Cardiff, 344 U.S. 174, 176 (1952); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 242-43 (1932); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); Note, *Vagueness—The Crippler of Loyalty Oaths*, 25 MD. L. REV. 64 (1965); Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

27 *See* cases cited in note 12 *supra*.

28 *See* cases cited in note 12 *supra*.

29 390 U.S. 36 (1968), *aff'g per curiam* 269 F. Supp. 339 (S.D.N.Y. 1967).

In *Knight*, twenty-seven members of the Adelphi University faculty brought suit in federal district court to enjoin the enforcement of a New York loyalty oath statute applying to employees of tax-exempt private institutions.[30] The key part of the New York oath asked affiants to swear to "support the constitution of the United States of America and the constitution of the State of New York."[31]

A three-judge court rejected petitioners' claims that the New York oath was void for vagueness and found that the required pledge passed constitutional muster.[32] This oath, the district court indicated, merely required employees to affirm their loyalty to their country and did not infringe upon any of their first amendment rights. Thus, reasoned the court, it was "simple and clear in its import."[33]

The court made a novel distinction between the New York oath and those oaths previously declared unconstitutional by the Supreme Court.[34] The *Knight* oath was held to be "affirmative" in character.[35] Oaths found constitutionally defective in the past were characterized as "negative oaths"[36] which, the Court claimed, presented "a very different problem."[37]

A constitutional standard based on an affirmative/negative dichotomy is appealing in its simplicity. Yet closer examination reveals the

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30 It shall be unlawful for any citizen of the United States to serve as a teacher, instructor or professor in any school or institution in the public school system of the state or in any school, college, university, or other educational institution in this state, whose real property, in whole or in part, is exempt from taxation under section four of the tax law unless and uutil he or she shall have taken and subscribed the following oath or affirmation . . . .

N.Y. EDUC. LAW § 3002 (McKinney 1970).

31 The oath reads as follows:

I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position of . . . . to which I am now assigned.

*Id.*

32 269 F. Supp. at 340-41.

33 *Id.* at 341.

34 *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

35 269 F. Supp. at 341. The oath was compared favorably with one approved in Bond v. Floyd, 385 U.S. 116 (1966). In citing *Bond*, the court relied on Supreme Court dictum which implied that a state legislature had the right to require that its members take an oath before assuming office. The issue in *Bond*, however, was not the validity of the oath itself, but rather whether the Georgia legislature could exclude Julian Bond, a black civil rights leader, because it "felt" that as an opponent of the Vietnam War, he conld not sincerely swear to an oath of allegiance.

36 269 F. Supp. at 341.

37 *Id.*

weakness of such a distinction. The *Knight* opinion justifies the distinction by asserting that negative oaths "typically require an affiant to state that he is not now and has never been a member of certain organizations,"[38] implying that a negative oath might be defective as an ex post facto law.[39] However, not all oaths which the Supreme Court has struck down were couched in negative language,[40] nor could they all be classified as "ex post facto."[41] Moreover, even assuming that *Knight's* analysis of past cases is correct, it still does not reach the vagueness issue posed by the plaintiff in *Cole*.[42]

*Knight* also ignores at least one additional first amendment issue raised by an affirmative oath. In attempting to distinguish *West*

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38 *Id.*

39 *See* Note, *supra* note 4, 77 YALE L.J. at 759-60. *See also* note 8 and accompanying text *supra.*

The Court does not make this point clear. If it does not mean to say that negative oath statutes are invalid as ex post facto laws, however, it would seem that the affirmative/negative distinction must fail. No other ground on which a constitutional differentiation may rest is offered.

40 Baggett v. Bullitt, 377 U.S. 360 (1964). The *Knight* court distinguished *Baggett* as involving a negative loyalty oath. 269 F. Supp. at 341. This was technically correct since one of the statutes involved in *Baggett* required all Washington state employees, including teachers, to sign the following pledge: "I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization." 377 U.S. at 364. However, the court neglected to point out that the *Baggett* decision also rejected an additional oath applicable only to teachers employed by the state. That oath read:

> I, the undersigned, do 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 . . . .

*Id.*

Justice White, in his lengthy opinion, did not mention that the more widely used oath was couched in negative terms while the teachers' oath was affirmative in nature. Indeed, in voiding the affirmative oath on vagueness grounds, the Court relied heavily on Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961), a negative oath case. *See* 377 U.S. at 366-68.

*Knight* does not explain why the *Baggett* Court did not make the negative/affirmative distinction given a clear opportunity to do so, nor does it indicate why a Washington state teacher is not obliged to sigu an affirmative oath while a New York state teacher must. If *Knight* is to be viable, therefore, other grounds of support would seem essential.

41 Neither Baggett v. Bullitt, 377 U.S. 360 (1964), nor Elfbrandt v. Russell, 384 U.S. 11 (1966), could be classified as ex post facto cases. *See* note 8 *supra.*

42 Indeed, the affirmative/negative distinction makes the law even more confusing.

> [T]he *Knight* decision holds out the prospect that every "negative" loyalty oath —including the ones the Court has invalidated—may rise again in a new, constitutionally approved, "affirmative" aspect. A state so inclined could define "allegiance" to the government in just the terms of nonsubversive status and non-Communist Party membership that fell in the cases up to *Knight*. . . . Even if the Court pierces through the "affirmative" surface of such a statute to reach

*Virginia State Board of Education v. Barnette*,[43] the court did not consider the conclusion of Mr. Justice Jackson, writing for the majority, that free speech includes the right *not* to be compelled to state or discuss one's political beliefs.[44] In Jackson's view the first amendment does not force an individual "to utter what is not in his mind."[45] In contrast, the *Knight* court argues that a public pledge of loyalty is something which every citizen has always been "understood to owe his sovereign."[46]

Despite these seeming conflicts with prior law, the Supreme Court affirmed *Knight* without opinion.[47] In *Cole* the Court went one step further and explicitly[48] adopted the rationale of *Knight*.[49] In approving the first clause of the oath in *Cole*—the affirmative promise to "uphold" the Constitutions of the United States and the State of Massachusetts—Chief Justice Burger merely borrowed the *Knight* analysis. Any oath which does not force an affiant to "reach back . . . to recall minor, sometimes innocent, activities" is now constitutionally acceptable.[50]

The second clause of the Massachusetts oath, however, demanded

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its "negative" underpinnings, the *Knight* decision will have only precipated [*sic*] another round of litigation. . . .

Note, *supra* note 4, 77 YALE L.J. at 763-64.

43 319 U.S. 624 (1943).

44 "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

45 *Id.* at 634.

46 269 F. Supp. at 341.

47 390 U.S. 36 (1968) (per curiam).

48 The first clause in the *Cole* oath was indistinguishable from the comparable clause in *Knight*. No member of the Supreme Court objected to the first clause in *Cole*; in fact, eight members of the Court expressly approved of the first clause. Justice Douglas was silent on the matter, choosing to reject the Massachusetts oath on the basis of the second clause. *See* notes 58-62 and accompanying text *infra*.

49 The *Knight* reasoning employed in *Cole* can be summarized as follows: (*1*) a similar oath was affirmed in *Bond* (*but see* note 35 *supra*); (*2*) the *Cole* oath was "forward looking"—an allusion to the affirmative/negative/ex post facto reasoning in *Knight*; and (*3*) the oath was not vague. *See* note 70 *infra*.

The Chief Justice also compared the "uphold" portion of *Cole* oath to the oath which the President of the United States takes upon assuming office. *See* U.S. CONST. art. II, § 1, cl. 8. The Court did not, however, discuss the differing responsibilities of presidents and hospital sociologists. The difference is of constitutional siguificance.

Mrs. Richardson argued that her political *beliefs* have no relevance to her competence as a member of a hospital staff and that her dismissal for anything short of *activities* endangering the national security could not be tolerated nnder the first and fourteenth amendments. For a president or other high official, however, political beliefs do have a certain relevance to job qualifications. Indeed, it might be argued that "upholding" the constitution and "opposing" attempts to overthrow the established governmental structure are the essence of a high public official's professional responsibilities.

50 405 U.S. at 681.

a more extensive discussion by the Chief Justice. This clause required the affiant to "oppose" the overthrow of the United States and Massachusetts governments by violent or "unconstitutional" means.[51] The lower court had rejected this language as too vague because it might be interpreted as demanding affirmative conduct on the part of the affiant.[52] The Supreme Court disagreed, reasoning that the lower court's approach was too "literal" and that the court had failed to recognize that the second clause was merely a restatement of the first.[53] That this reading of the oath made the two clauses redundant was irrelevant: "Such repetition . . . seems to be the wont of authors of oaths. . . . [W]e are not charged with correcting grammar but with enforcing a constitution."[54]

Dissent was generated by the Chief Justice's treatment of the "oppose" clause. Only Mr. Justice Blackmun accepted the Chief Justice's reasoning.[55] Justices Stewart and White simply said that the second clause was no more "vagne" or "overbroad" than the first and, on that ground alone, concurred.[56] But Justices Douglas, Brennan, and Marshall would have affirmed the lower court's decision, striking the second clause and thereby invalidating the entire oath.[57]

In his dissent, Mr. Justice Douglas neither discussed the vagueness question nor attempted to respond to the specific points raised by the Chief Justice. He simply pronounced the oppose clause "plainly unconstitutional by our decisions"[58] and then commented in rather summary fashion on first amendment issues raised by loyalty oaths.[59] Such oaths, he indicated, were "aimed at coercing and controlling the minds of

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51 *Id.* at 683.

52 300 F. Supp. at 1322.

53 405 U.S. at 684.

54 *Id.*

55 Justices Powell and Rehnquist did not participate in either the consideration or decision of this case.

56 405 U.S. at 687. Justice White seems to have changed his position from the time he wrote the *Baggett* opinion. There he indicated that an oath would be invalid if its language made an affiant hesitate "to ally himself with any interest group dedicated to *opposing* any current public policy or law of the Federal Government, for if he did, he might well be accused of placing loyalty to the group above allegiance to the United States." Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (emphasis added).

57 This result is dictated by Massachusetts procedure. *See* note 17 *supra.*

58 405 U.S. at 687. Mr. Justice Douglas did not mention the "uphold" clause. *See* note 48 *supra.* Since the second clause was found defective and the court refused to sever the two clauses, the entire oath could be declared invalid.

59 Mr. Justice Douglas's rather cursory treatment of the first amendment issues in *Cole* perhaps results from his earlier lengthy treatment of the problems in Lerner v. Casey, 357 U.S. 468, 479 (1958).

men."[60] Even a restrictive interpretation of the first amendment allowed for advocacy, discussion, and teaching of obnoxious political views.[61] Therefore, since it required Mrs. Richardson to "oppose" what "she has an indisputable right to advocate,"[62] the Massachusetts oath must fall.

Mr. Justice Marshall's dissent, in which Mr. Justice Brennan joined, was not as philosophical in tone and attempted to discuss more fully the legal issues raised by the Chief Justice. While Marshall was willing to tolerate the uphold clause as a harmless "expression of 'minimal loyalty to the Government,' "[63] he found the oppose clause to be both vague and overbroad.[64] The clause was vague because it did not establish a clearly discernable standard of conduct for an affiant to follow;[65] it was overbroad because its ambiguous language could be interpreted as imposing unconstitutional infringements on an affiant's

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60 405 U.S. at 688.

61 Mr. Justice Douglas was quick to point out, however, that "[t]he views of Mr. Justice Black and me give the First Amendment a more expansive reading." *Id.* Under such an "absolute" interpretation of the first amendment, the dangers of loyalty oaths are even clearer.

62 *Id.* at 689.

63 *Id.* at 696. This statement offers a clue to Marshall's (and probably Brennan's) view of the oath in *Knight* as well as of the first clause of the oath in *Cole*. Whereas the *Knight* court saw the affirmative character of the oath as the feature which distinguished it from oaths previously rejected by the Supreme Court, Marshall does not see the affirmative/negative dichotomy as important per se. The *Knight* oath could be sustained on pragmatic grounds because it was, in the Chief Justice's words, an "amenity," imposing *de minimus* restrictions. *Id.* at 685. However, if an affirmative oath begins to infringe on protected liberties, then, by this view, it must fall like the negative oaths of the past. Marshall recognized, of course, that "[t]he Court's prior decisions represent a judgment that *simple* affirmative oaths of support are less suspect and less evil than negative oaths requiring a disaffirmance of political ties, group affiliations, or beliefs." *Id.* at 695 (emphasis added). However, he had been willing to accept these judgments because the particular affirmative oaths involved were "simple" and not because they were merely "affirmative." Once these oaths lose their simplicity, they "have odious connotations and . . . they present dangers." *Id.* Under Marshall's view the two clauses in *Cole* represent opposite poles of the simple/odious distinction.

64 *Id.* at 692.

65 The dissent argued that there are two different points of confusion in the second clause. First, the construction of the clause indicates that an affiant is under an obligation either to oppose, by peaceful means, violent attempts to overthrow the government, or to oppose, by violent means, all attempts to overthrow the government. Marshall contends that the second construction is more dangerous, but he appears to concede that it is also less plausible. *Id.* at 692-93.

Second, the oath does not indicate *how* an affiant is to oppose the overthrow of the government. *See generally* Cramp v. Board of Pub. Instruction, 368 U.S. 278, 286 (1961) (Stewart, J.).

speech and conduct.[66] Thus, Marshall considered merely possible an interpretation which Douglas had assumed to be automatic.

Marshall was also concerned with the potential of turning a state employee who wishes to retain his job into a state-supported vigilante. According to the Massachusetts Attorney General:

> [I]n the event that a clear and present danger arose of the actual overthrow of the government, . . . the public employee [would] be required to use reasonable means at his disposal to attempt to thwart that effort. What he might do in such circumstances could range from the use of physical force *to speaking out* against the downfall of the government. The kind of response required would be commensurate with the circumstances and with the employee's ability, his training, and the means available to him at the time.[67]

This construction once again raised the problem of interpretation which had plagued the Court when dealing with the so-called negative oath: What must a sincere oathtaker do to keep his promise?

The Chief Justice merely found no ambiguity in the instant oath.[68] Ignoring the statement of the Massachusetts Attorney General, he contended that the Massachusetts legislature could not possibly have intended to impose a duty of affirmative conduct on affiants when the statute was passed in 1948.[69] Moreover, even if Massachusetts brought a criminal suit under this law,[70] a vigilant Supreme Court, protective of

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66 405 U.S. at 695.

67 *Id.* at 693 n.3 (emphasis in original). Massachusetts expanded on this argument in the course of its oral presentation below. It noted then that there were

> three standards of obligation to take active steps to "oppose" the overthrow of the government by force or violence. The ordinary citizen who has taken no oath has an obligation to act *in extremis*; a person who has taken the first part of the present oath would have a somewhat larger obligation, and one who has taken the second part has one still larger.

300 F. Supp. at 1322.

68 405 U.S. at 685.

69 *Id.* at 684-85.

70 The Chief Justice interpreted the Massachusetts statute as limiting criminal charges to perjury. This is a convenient way of sidestepping the scienter requirement. *See* note 6 *supra*; note 76 *infra*. According to this analysis a public employee could only be subjected to criminal prosecution if he took the oath while he was intentionally and knowingly engaged in illegal activities designed to overthrow the government. If an employee took the oath with a sincere desire to live up to its terms, only to later find himself involved in what the state considered to be a subversive activity, no prosecution could take place. 405 U.S. at 685. Thus, an affiant need not discern any standard of *loyalty* from the pledge, since only *honesty* is required of him.

Even assuming that Chief Justice Burger's interpretation is correct, it does not take into account the effect of the *Cole* oath on one who innocently believes that the pledge requires him to "steer far wider of the unlawful zone" (Speiser v. Randall, 357 U.S. 513, 526 (1958)) than is necessary on the mistaken belief that this oath requires him to do so. *See* note 25 and accompanying text *supra*.

first amendment rights, could prevent any "harassment." [71] This reply merely begs the question.

The significance of *Cole* is that it illustrates the tremendous opportunity for utilization of the affirmative oath concept introduced in *Knight*. States can now use "forward looking" or "positive" language to enact vague oaths inhibiting protected speech and conduct which once would have been found unconstitutional had they been drafted in negative terms. Moreover, the Chief Justice's opinion raises the possibility that an affirmative oath may legitimately require a citizen to prove his loyalty to the state by means of affirmative *acts*.[72]

## II

### Due Process Hearing Requirement

The plaintiff in *Cole* also attacked the Massachusetts oath procedure for its failure to provide a hearing prior to the termination of her employment.[73] In prior cases where the Court had upheld particular loyalty oaths, it had demanded that a person refusing to subscribe to such an oath be afforded an opportunity to explain his reasons for doing so.[74] Indeed, the hearing procedure became a prac-

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By interpreting the danger of criminal sanctions in this way, the plurality can then call the oath an "amenity." Indeed, the implication of the Chief Justice's entire opinion is that the oaths really are not important any more, so quibbling over language makes little difference and wastes considerable time. The Chief Justice also expressed what might be his own hope that "[t]he time may come when the value of oaths in routine public employment will be thought not 'worth the candle.'" 405 U.S. at 685 n.3.

71 The language of the Court is revealing:

> Those who view the Massachusetts oath in terms of an endless "parade of horribles" would do well to bear in mind that many of the hazards of human existence that can be imagined are circumscribed by the classic observation of Mr. Justice Holmes, when confronted with the prophecy of dire consequences of certain judicial action, that it would not occur "while this Court sits."

405 U.S. at 685-86, *quoting* Panhandle Oil Co. v. Knox, 277 U.S. 218, 223 (Holmes, J., dissenting).

72 This conclusion can be drawn from two factors. First, the Chief Justice failed to refute directly the interpretation of the oath by the Massachusetts Attorney General. Second, the Chief Justice took considerable pains to argue that *this* oath does not include a requirement of affirmative conduct. *See* notes 52-54 and accompanying text *supra*. But if the Court were to come upon an oath which did make such a demand, Burger indicated that such an oath would only "raise serious questions" (405 U.S. at 684-85), and that the Court's responsibility in such a situation would be limited to protecting an individual against "harassment." *Id.* at 685. The Court did not indicate what would constitute "harassment" or how those "serious questions" would be answered.

73 405 U.S. at 686.

74 *See, e.g.*, Adler v. Board of Educ., 342 U.S. 485, 495 (1952); Garner v. Board of Pub. Works, 341 U.S. 716, 723-24 (1951). The leading case in the area is probably Speiser

tical necessity when the Court developed its "scienter" requirement,[75] which, in effect, prohibited the dismissal of an employee unless it could be shown that he was willfully engaged in an attempt to overthrow the government.[76]

The Court was not impressed with the demand for a hearing and dealt with the issue only briefly.[77] The Chief Justice suggested that a hearing would be required only in those cases where an affiant was forced to swear to an "impermissible oath."[78] The Court cited no authority for this statement and failed to distinguish substantial precedent[79] to the contrary.

The Court indicated that the two cases cited by plaintiff in support of her prayer for a hearing, *Nostrand v. Little*[80] and *Connell v. Higginbotham*,[81] were distinguishable, although it did not offer any factual or legal grounds for such a distinction.[82] Indeed, the *Cole* Court's ap-

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v. Randall, 357 U.S. 513 (1958). In that case California refused to give two honorably discharged World War II veterans a property tax exemption to which they were otherwise entitled because they refused to sign the loyalty oath required by the California constitution. *Id.* at 516. Mr. Justice Brennan implicitly recognized the absolute right of these taxpayers to a hearing before they could be labeled disloyal. He went further, however, to require explicitly that the burden of proof at a hearing on the issue of the taxpayers' loyalty be placed on the state. The state cannot " 'declare an individual guilty or presumptively guilty of a crime.' " *Id.* at 524, *quoting* McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86 (1916). *See generally* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 328 (1866); 4 A. HAMILTON, WORKS 269-70 (H. Lodge ed. 1904).

75 *See* note 6 *supra*.

76 The Court has never questioned the right of the state to discharge disloyal employees. However, the Court has defined disloyalty to include the element of scienter, or actions done with the specific intent of attempting to overthrow the government. A loyalty oath which purports to put greater restrictions on an affiant would not, therefore, be valid. Moreover, mere refusal to sign a loyalty oath could not be proof of "disloyalty" when the term is defined to require scienter. *See* Adler v. Board of Educ., 342 U.S. 485, 490-91 (1952). Thus, a hearing is required to determine intent.

Of course, an employee who swears falsely to a loyalty oath could also be dismissed on security grounds. However, perjury must also be proven at a hearing—even after *Cole*. *See* 405 U.S. at 685.

77 405 U.S. at 686.

78 *Id.*

79 *See* Speiser v. Randall, 357 U.S. 513, 520-29 (1957); Adler v. Board of Educ., 342 U.S. 485, 495 (1952); Garner v. Board of Pub. Works, 341 U.S. 716, 723-24 (1951); *cf.* Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

80 362 U.S. 474 (1960).

81 403 U.S. 207 (1971).

82 405 U.S. at 686. In *Nostrand*, the Court remanded a declaratory judgment suit in order to allow the Supreme Court of the State of Washington to determine whether the state statute afforded an employee a hearing at which he could explain his refusal to take an oath. 362 U.S. at 475-76. The Court implied that without such a hearing the statute must fall. On remand the state court found that the statute did include procedure for a hearing (58 Wash. 2d 111, 361 P.2d 551 (1961)), and for that reason the Supreme Court sus-

proving description of the holding in those cases, "that the mere refusal to take [a] particular oath was not a constitutionally permissible basis for termination [of employment],"[83] was a precise statement of plaintiff's theory.

The hearing requirement has in the past insured procedural due process for those refusing to take a loyalty oath. It removes the "self executing" character of the pledges and bars the state from automatically preventing nonsubscribing citizens from enjoying some governmental benefit to which they would otherwise be entitled.[84] Moreover, "by insisting on a hearing the Court [has] forced the state to assume the administrative burdens of operating a security program rather than relying on the automatic effect of a refusal to swear allegiance."[85] In a few sentences the *Cole* Court penetrated these "defenses" and, in effect, returned to the loyalty oath its most odious quality: the presumption that anyone who refuses to take one is disloyal to his country.[86]

## CONCLUSION

The majority opinions in *Cole* signal the willingness of some members of the Supreme Court to sanction loyalty oaths which potentially conflict with first or fourteenth amendment rights. A neat twist of language has enabled the Court to relax the standards which states must meet in drafting constitutionally acceptable oaths. Moreover, the re-

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tained the oath when the suit came up again. 368 U.S. 436 (1962). The report of the case did not offer any peculiar factor present in *Nostrand* which would justify requiring a hearing there but not in *Cole*.

The *Connell* case offers an excellent example of the Court's different approaches to affirmative and negative oaths as well as of its flexible attitude with regard to hearings. In *Connell* the Court upheld the power of a state to demand from its employees an oath to support the national and state constitutions, but not an oath asking each employee to pledge that he did *not* believe in the overthrow of the state or federal governments by force or violence. "Justification for this gossamer distinction was based by the majority on the failure to provide a hearing system to determine whether there was more than mere belief involved in the second requirement." P. Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REV. 265, 292. As it did later in *Cole*, the Court in *Connell* failed to indicate why a hearing was unnecessary for the first clause. The first clause in the *Connell* oath might well fit under Justice Marshall's label of "simple" and thus be too trivial to demand a hearing. *See* note 63 *supra*. If so, this fact could also explain Justice Marshall's failure to mention the hearing issue in his *Cole* dissent. Like *Nostrand*, *Connell* does not appear distinguishable from *Cole* on the hearing issue.

83 405 U.S. at 686.

84 Note, *supra* note 4, 77 YALE L.J. at 739.

85 *Id.* at 747.

86 *Id.* at 764.

moval of the hearing requirement has given state legislatures a new incentive to pursue loyalty security programs with full vigor if political expediency again demands such programs. The controversies which had seemingly been settled—vagueness, overbreadth, due process, and scienter—can now be re-opened under the guise of an "affirmative" oath. The line of cases so painstakingly erected as a defense for constitutionally protected rights is proving to be a Maginot.

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