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Constitutional Law - Government Personnel and Loyalty Oaths - Whitehill v. Elkins, 389 U.S. 54 (1967)

CURRENT DECISIONS

Constitutional Law—Government Personnel and Loyalty Oaths. After being offered a teaching position with the University of Maryland, appellant Whitehill refused to take the teacher's loyalty oath which demanded that he certify that he was not engaged in an attempt to overthrow the Governments of Maryland or the United States.[1] In a suit for declaratory relief, appellant challenged the constitutionality of the oath, but the Maryland District Court dismissed the complaint.[2] On appeal, the Supreme Court reasoned that the oath was to be construed with the alteration[3] and membership[4] clauses of the

1. In its entirety, the oath provides as follows:

"I, _____, do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them by force or violence.

I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)." Prepared by the Maryland Attorney General, the oath was approved by the Board of Regents. The Board had the authority to provide the oath under section 11 of the Subversive Activities Act of 1949 (Ober Act). This provides: "Every person and every board, commission, council, department, court or other agency of the State of Maryland or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulation or otherwise, procedures designed to ascertain before any person, including teachers and other employees of any public educational institution in this State, is appointed or employed, that he or she as the case may be, is not a subversive person, and that there are no reasonable grounds to believe such persons are subversive persons. In the event such reasonable grounds exist, he or she as the case may be shall not be appointed or employed. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. Ann. Code of Md. art. 85A, § 11 (1957).

2. Whitehill v. Elkins, 258 F. Supp. 589 (D. Md. 1966).

3. Ann. Code of Md. art. 85A, § 1 (1957). "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 Maryland, 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.

4. Ann. Code of Md. art. 84A, § 13 (1957). "Every person who on June 1, 1949 shall be in the employ of the State . . . shall be required . . . to make a written

Maryland Ober Act,[5] and found the oath invalid for vagueness.[6]

Civil loyalty oaths became the object of Supreme Court[7] concern and decision in the early 1950's.[8] In *Gerende v. Board of Supervisors*,[9] the Court found constitutional a Maryland oath[10] demanding of candidates for election a certification that they were not engaged "in one way or another in the attempt to overthrow the government by force or violence, and that he is not now a member of an organization engaged in such an attempt." [11]

After *Gerende*, membership clauses and the problem of scienter were the focus of vigorous attacks upon the constitutionality of various oaths.[12] What emerged from these attacks was the rule that knowledge

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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 . . . or [that he or she is not] a member of a subversive organization or a foreign subversive organization . . . ."

5. ANN. CODE OF MD. art. 85A (1957).

6. Whitehill v. Elkins, 389 U.S. 54 (1967). In a six to three decision, Justices Harlan, Stewart and White dissented.

7. At the time of the first Supreme Court determinations, three state courts had dealt or were dealing with the validity and constitutionality of civil loyalty oaths. In Imbrie v. Marsh, 3 N.J. 578, 71 A.2d 352 (1950), a New Jersey oath was found invalid because there was no statutory prohibition of the holding of a public office by subversives. *Accord*, Tolman v. Underhill, 39 Cal.2d 676, 249 P.2d 280 (1951). In determining the constitutionality of an oath authorized by the Maryland Ober Act and required of candidates for election, the court in Shub v. Simpson, 76 A.2d 332 (Md. 1950), distinguished *Imbrie* and provided the base for a later reconciliation with *Tolman* by recognizing the oath valid because it was expressly authorized by legislative enactment.

8. Gerende v. Board of Supervisors, 341 U.S. 56 (1951) (per curiam); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

9. 341 U.S. 56 (1951) (per curiam).

10. Although the oath was to be taken by candidates for election in compliance with section 15 of the Ober Act, the statements are the same as would have been prescribed for public employees under section 11 of that Act.

11. Gerende v. Board of Supervisors, 341 U.S. 56, 56-7 (1951) (per curiam). It is apparent that the Court, by choosing to accept the Maryland Attorney General's narrow interpretative view of the oath, avoided the constitutional problems presented by the enabling Ober Act. The Court did not pass upon or approve the definition of "subversive" or the validity of the membership provision, and accordingly, deprived the decision of the vitality and import which it might have enjoyed.

12. Wieman v. Updegraff, 344 U.S. 183 (1952); Adler v. Board of Education, 342 U.S. 485 (1952); Garner v. Board of Public Works, 341 U.S. 716 (1951). The primary problem in each of these decisions was scienter, i.e., whether the individual must know of his membership in a questionable organization, or whether that individual must know of the aims and purposes of the organization. The oaths in both *Garner* (California) and *Adler* (New York) were determined valid, although the decisions were based on contra approaches. The *Garner* Court refused to raise a presumption of knowledge through membership and they reasoned: "We have no reason to suppose that the oath is or will be construed . . . as affecting adversely those persons who

of purpose, and not innocent association, be the foundation upon which membership clauses are drafted, applied, and interpreted.[13] Coupling this requirement with the precept that the statutes authorizing the oaths not be vague,[14] the Court, while finding the oaths of Pennsylvania,[15] New York,[16] and New Hampshire[17] constitutional, invalidated those of California,[18] Arkansas,[19] and Florida.[20]

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during their affiliation with a proscribed organization were innocent of its purpose . . . ." Garner v. Board of Public Works, *supra* at 723.

Although finding the questioned provision of the Feinberg Law constitutional, a presumption of scienter was raised in *Adler*. "Membership in a listed organization found to be within the statute and known by a member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion." Adler v. Board of Education, *supra* at 494-95.

In *Wieman*, an Oklahoma statute requiring each state employee to take an oath that he has not been a member of a subversive organization for the preceding five years was found to violate the due process clause of the fourteenth amendment. As construed by the Oklahoma Supreme Court, membership was the sole disqualifiying factor. In their demand that knowledge be evidenced, the *Wieman* Supreme Court refused the Oklahoma court's interpretation.

13. "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process." Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

14. *E.g.*, United States v. Cardiff, 344 U.S. 174 (1952); Stromberg v. California, 282 U.S. 359 (1931); Connally v. General Construction Company, 269 U.S. 385 (1926). Although these decisions did not deal with the validity of loyalty oaths, the vagueness rule is one which pervades the entire sphere of statutory construction and interpretation.

15. Beilan v. Board of Public Education, 357 U.S. 399 (1958). Upon petitioner's refusal to answer questions as to Communistic activities, the teacher was discharged on the ground that the refusal was tantamount to "incompetency" under the state tenure laws. The issue of due process was confusingly intermingled with the statutory questions, and the decision ultimately turned on the statutory construction. In a six to three decision, the dissenters were Warren, Douglas, and Brennan.

16. Lerner v. Casey, 357 U.S. 468 (1958). When the appellant refused to state that he was not a member of the Communist party, he was discharged. The Court affirmed and reasoned that a finding of doubtful trust and reliability could justifiably be based on appellant's lack of frankness . . . ." Id. at 476. In a six to three decision, Justices Douglas, Brennan, and Warren dissented.

17. Uphaus v. Wyman, 360 U.S. 72 (1959). In a five to four decision, Warren, Brennan, Black, and Douglas dissented.

18. In Speiser v. Randall, 357 U.S. 513 (1958), the Court held that enforcement of an oath provision requiring one to assert his loyalty as a prerequisite for tax exemptions denied the appellant his freedom of speech. As the statutory framework called for the individual to carry the burden of proof on whether he was a subversive, the Court determined that it is not within the province of a legislature to declare an

The eventual erosion of the *Gerende* oath began with the holding that Washington's loyalty oath statutes, patterned after the Ober Act,[21] were invalid for vagueness.[22] The basic statutory infirmity was the inability to objectively measure the "advocates, abets, advises, or teaches" [23] description of a subversive person.[24]

In *Elfbrandt v. Russell*,[25] the membership clause of the *Gerende* oath was impliedly invalidated.[26] The Court added to the scienter requirement a need to establish that the oath-taker was an active member "with a specific intent to further the illegal aims of the organization." [27]

In *Whitehill v. Elkins* the Court, by looking beyond the demands of the oath which did not jeopardize the appellant's freedom of speech or association to the enabling Ober Act, has adopted a seemingly novel approach in this first amendment area.[28] The ultimate solution, how-

individual guilty or presumptively guilty of a crime." *Id.* at 523-24. Justice Clark was the sole dissenter.

19. Shelton v. Tucker, 364 U.S. 479 (1960). A statute which required every teacher, as a condition of employment, to file an affidavit listing every organization to which he has belonged within the preceding five years was found invalid as depriving teachers of their right of associational freedom. The scope of the affidavit was completely unlimited, and it is on this ground that the decision can be reconciled with Beilam v. Board of Public Education, 357 U.S. 399 (1958). See note 15, *supra*. *Shelton* was a five to four decision, with Frankfurter, Harlan, Clark, and Whittaker dissenting.

20. Cramp v. Board of Public Instruction, 368 U.S. 278 (1961). In a unanimous decision, the Court found the statutory terms "aid, support, advise, counsel or influence" invalid for vagueness.

21. In the wake of *Gerende* Washington adopted the Maryland definitions of subversive person, subversive organization, and foreign subversive organization. 9 REV. CODE OF WASH. ANN. ch. 9.81.100 (1962).

22. Baggett v. Bullitt, 377 U.S. 360 (1964).

23. 9 REV. CODE OF WASH. ANN. ch. 9.81.100, para. 5 (1962).

24. The Court carefully explained its prior decision in *Gerende* by again reminding that it did not treat on the constitutionality of the subversive person definition. Although Justice Clark in his dissent laments the overruling of *Gerende*, it is apparent that *Gerende* stood only for the acceptability of a specific oath and not for the statutory framework from which the oath was issued. In *Baggett*, Justices Clark and Harlan dissented.

25. 384 U.S. 11 (1966). Justices Harlan, Clark, White, and Stewart dissented.

26. Both Garner v. Board of Public Works, 341 U.S. 716 (1951) and Wieman v. Updegraff, 344 U.S. 183 (1952) can be read as overruling the *Gerende* membership clause because of the introduction of the scienter requirement. *Elfbrandt* is but the final step in this overruling.

27. Elfbrandt v. Russell, 384 U.S. 11, 19 (1966).

28. The novelty, however, does not represent a sudden shift in the state of the law. In only one other case was the Court confronted with the problem of a strictly drawn oath issued from a vague and broad statute. That case was *Gerende*. In the other

ever, was expected.[29] It was demanded by *Baggett* and *Elfbrandt*.

In the case at bar, the Court impliedly conceded that the specific oath was not invalid for vagueness. Thus, while striking down the pertinent provisions of the Ober Act, it has answered its own demand that legislation authorizing loyalty oaths be narrowly drawn. That answer is for state legislatures to conform their loyalty statutes and oaths to the express provisions of the *Whitehill* oath.

Constitutional Law—Criminal Law—RIGHT TO COUNSEL AT PROBATION REVOCATION HEARINGS. On June 17, 1959, petitioner Mempa, following a plea of guilty in the Spokane County Superior Court, was convicted of larceny of an automobile[1] and placed on probation with the imposition of sentence deferred.[2] Five months later a probation revocation hearing was held pursuant to an allegation by the Spokane County prosecuting attorney that Mempa had been involved in a burglary on September 15, 1959. At this hearing Mempa, then 17, was not represented by counsel nor was inquiry made by the court as to whether the defendant desired assistance of counsel. When questioned by the court, Mempa affirmed his complicity in the burglary. The hearing was immediately terminated and the court revoked the defendant's probation, imposing sentence of ten years in the penitentiary[3] with the recommendation that the sentence be reduced to one year.[4] In 1966, Mempa filed a petition on his own behalf for a writ of habeas corpus claiming that he had been denied right to counsel at the probation revocation hearing. The Washington State Supreme Court dismissed the petition[5] and the United States Supreme Court granted certiorari.[6] In its decision,[7] the Court reversed, holding that the presence of counsel is necessary in probation revocation or deferred sentencing hearings.

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decisions the oaths expressly or by implication included the statutory terms of the enabling acts.

29. "If *Gerende* is ripe for final dispatch, the task is for the Supreme Court, not a subordinate court." Whitehill v. Elkins, 258 F. Supp. 589, 598 (D. Md. 1966). *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967) overruling *Adler*.

1. WASH. REV. CODE § 9.54.020 (1961).
2. WASH. REV. CODE § 9.95.200 (1961).
3. WASH. REV. CODE § 9.95.010 (1961).
4. WASH. REV. CODE § 9.95.030 (1961).
5. Mempa v. Rhay, 68 Wash. 2nd 882, 416 P. 2nd 104 (1966).
6. Mempa v. Rhay, 386 U.S. 907 (1967).
7. Mempa v. Rhay, 389 U.S. 128 (1967).