# LOYALTY OATHS, CONSCIENCE, AND THE CONSTITUTION

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Loyalty oaths have been used in America since the time of the Revolutionary War and the hunt for "Royalists."[1] During the Civil War, Southern civilians were required to take an oath that they had not given, and would not give, aid to the South.[2] Congress, at that time, even required attorneys, officeholders, and voters to take the same oath.[3]

The problem which has been recently brought forth in the Arizona case of *Elfbrandt v. Russell*,[4] is therefore not new to our country. In the *Elfbrandt* case, the plaintiff school teacher brought an action for a declaration that the Arizona Officers and Employees Loyalty Oath[5] deprived her of rights guaranteed under the state and federal constitutions, the most significant of which were her rights to freedom of speech, association and belief. The Arizona Supreme Court held that notwithstanding the protection afforded these freedoms by the First and Fourteenth Amendments, the oath was not unconstitutional because the government's interest in self-preservation was sufficient to subordinate the individual's interest in the constitutional freedoms.[6]

In 1961, the state legislature amended Arizona Revised Statutes § 38-231 to provide that all public officers and employees must take an oath that they will not aid or advocate forcible overthrow of the state government, and will not become or remain a member of the Communist Party or any organization which proposes to overthrow the government of Arizona by force or violence.[7] Violation of the oath is made a felony subject to the penalties of perjury and the termination of compensation.[8] It is this statute which Mrs. Elfbrandt sought to have declared unconstitutional.

The United States Supreme Court has sustained loyalty oaths as

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[1] DOUGLAS, FREEDOM OF THE MIND 21 (1962).

[2] *Ibid.*

[3] DOUGLAS, FREEDOM OF THE MIND 21 (1962); CHAFEE, THE BLESSINGS OF LIBERTY (1956).

[4] 381 P.2d 554 (Ariz. 1963).

[5] ARIZ. REV. STAT. ANN. § 38-231 (1956).

[6] Elfbrandt v. Russell, 381 P.2d 554, 560 (Ariz. 1963).

[7] Ariz. Session Laws 1961, Ch. 108 § 5.

[8] ARIZ. REV. STAT. ANN. § 38-231 E (1956).

a general rule.[9] But certain circumscribing principles have been established to which oath requirements must adhere. A state has the power to establish qualifications for public employment if they are relevant to fitness. Loyalty to the state may be made one of these qualifications.[10] Conduct, or the particular interest of a group of which the employee is a member, may determine loyalty. The advocacy of, or attempted forcible overthrow, of state or national governments manifests disloyalty. Therefore it has been determined that one who advocates or is a member of a group which advocates forcible overthrow is unfit for public employment.[11]

The restrictions placed on First and Fourteenth Amendments freedoms by loyalty oaths have not been denied. But it is a well-established principle that such freedoms are not absolute. Where there is a conflict between government and individual interests, it is the court's duty to balance the two and determine which, under the particular circumstances, demands the greater protection. If the government can show a sufficiently substantial interest in restricting freedom outweighing the individual's interest in free exercise of a constitutional right, the balance is struck for restriction.[12] The subordinating governmental interest protected in the loyalty oath cases is that of self-preservation, by guarding against internal weakening through subversion of employees and officers.[13]

Loyalty oaths have been made invalid where the requirement of "scienter" was not made part of the provisions excluding persons from employment who were members of the proscribed organizations. In order for membership to disqualify one from public employment it must have been membership with knowledge of the purpose and intent of the organization to advocate and bring about forcible overthrow. To classify, indiscriminately, innocent with knowing membership is an arbitrary assertion of power contrary to due process of law.[14]

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[9] Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Gerende v. Board of Supervisors, 341 U.S. 56 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[10] Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951). The exercise of the state's police power with regard to teachers is supported by the state's vital concern in preserving the integrity of schools since they play an important part in shaping the attitudes of the young towards society.

[11] Scales v. United States, 367 U.S. 203 (1961); Adler v. Board of Educ., *supra* note 10; Garner v. Board of Pub. Works, *supra* note 10; Gerende v. Board of Supervisors, 341 U.S. 56 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[12] Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961); Wieman v. Updegraff, 344 U.S. 183 (1952); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[13] Barenblatt v. United States, 360 U.S. 109 (1959); Elfbrandt v. Russell, 381 P.2d 554 (Ariz. 1963).

[14] Wieman v. Updegraff, 344 U.S. 183 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951).

If the required oath is too vague, there is also a violation of the due process clause. An oath requirement may be too vague where there is a possibility for prosecution of guiltless knowing behavior, such as the representation by an attorney of a communist client. Under the vagueness rule, a statute is void if it is necessary for men of average intelligence to have to guess at the meaning and application of the statute. Such vagueness makes the statute arbitrary and discriminatory.[15]

Nor may one be required to furnish a list of every organization to which he has belonged. To force disclosure of associational ties, such as religious or social memberships, which are completely unrelated to occupational competence or fitness, would be an unjustified restriction on freedom of association.[16]

When the loyalty oath falls within the boundaries of these rules, it has been upheld as a constitutional qualification for determining fitness for public employment. Anyone refusing to take the the oath could be justifiably excluded from employment for failing to meet the qualifications.[17]

*Traditional Attacks*

One of the prime contentions against the loyalty oath is that it is a Bill of Attainder because it imposes punishment without a trial. The attack is premised on the argument that exclusion from employment is punishment imposed for refusal to take the oath. But the Supreme Court has countered with the argument that the oath regulation provides only a reasonable standard of qualification and eligibility for employment, and, therefore, does not inflict punishment of a criminal nature so as to violate the constitutional commands.[18] To the laymen, however, it might seem to be as much a punishment to forbid employment in one's chosen profession as to imprison him. What type of work can one do that is as compensating when he has spent his life in training to be a teacher? The studied years and degrees are made worthless overnight. Such a reality is not so easily distinguished by the citizen as it is by the Court.

Accompanying the Bill of Attainder approach is the argument that the oath statute is an Ex Post Facto Law because it imposes

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[15] Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).
[16] Shelton v. Tucker, 364 U.S. 479 (1960).
[17] Adler v. Board of Educ., 342 U.S. 485 (1952).
[18] Garner v. Board of Pub. Works, 341 U.S. 716 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950). The attack is based on the Civil War Cases, Cummings v. State of Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867), and the case of United States v. Lovett, 328 U.S. 303 (1946), all of which are distinguished by the Court. The distinction is between "infliction of punishment" in a criminal law sense and the power to prescribe qualifications for public employment. Garner v. Board of Pub. Works, *supra* at 913.

a punishment for an act not punishable at the time it was committed. The reasoning is that a loyalty oath refusing employment because of past membership or activity punishes by preventing the following of one's profession. Again the Supreme Court has said that the Constitution[19] did not intend to preclude legislative definition of employment standards and that the failure to qualify is not a criminal punishment.[20]

Another standard protest is that the oath unconstitutionally restricts freedom of speech, association, and belief. The Supreme Court has not denied that these freedoms are limited by oath statutes. But because such freedoms are not absolutes, the restrictions are justified as being within the government's power to protect itself.[21]

The loyalty oath has also been attacked on the theory that the requirement of taking the oath violates the privilege against self-incrimination. It is alleged that the requirement of signing is the performance of an act which might tend to incriminate the signer. But the courts are quick to dispose of this argument. The lack of a requirement that testimony be given, the absence of any inquiry into conduct of the distant past, and the necessity of "scienter" relieve the potential danger of self-incrimination. The freedom of choice to take the oath or not to take it gives additional assurance against violation of the privilege.[22]

Based upon the case of *Pennsylvania v. Nelson*,[23] it has been argued that Congress has preempted the field by its legislation on sedition, making state legislation against subversion unconstitutional. But *Uphaus v. Wyman*[24] destroyed this supremacy clause argument by pointing out that the *Nelson* case did not deprive the states of the right to protect their own security. Statutes protecting the state's interest in self-preservation, and not involving a race to the court house door with the federal prosecutor in cases of subversion against the nation, are not preempted by the federal statutes. Under this construction, the Arizona loyalty oath is valid since expressly limited to threats against "this state or any of its political subdivisions."[25]

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[19] U.S. CONST. art. I § 10.

[20] Garner v. Board of Pub. Works, 341 U.S. 716 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Cummings v. State of Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867). Such an attack could not be made against the Arizona oath since the requirements relate only to future conduct.

[21] Wieman v. Updegraff, 344 U.S. 183 (1952); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[22] Baggett v. Bullitt, 215 F. Supp. 439 (W.D. Wash. 1963).

[23] 350 U.S. 497 (1956).

[24] 360 U.S. 72 (1959).

[25] Baggett v. Bullitt, 215 F. Supp. 439 (W.D. Wash. 1963). Other attacks: As a deprivation of property without due process of law, *Ex parte* Law, 35 Ga. 285

In *Imbrie v. Marsh*,[26] a typical loyalty oath was held unconstitutional as to public officers because the provision of the state's constitution, relative to the oath of office,[27] were construed to be exclusive and could not be supplemented by statute. The statutory loyalty oath was therefore deemed to be in conflict with the state constitution's oath of office in that it imposed further requirements. Such a challenge could not stand against Arizona's loyalty oath because the loyalty oath provisions are part of the oath of office, which is statutory. Consequently, there could be no conflict between the statute and the state constitution.[28]

### *Ambiguous Areas*

### I.

It has been said that the purpose of the loyalty oath is to keep disloyal persons from teaching positions and other public employment.[29] If this is true, what procedures are available to the person who refuses to take the oath? Is he forever branded with the mark of the disloyal? There is a constitutional right that one not be excluded from public employment for an arbitrary or discriminatory reason.[30] The question then arises, where an individual refuses to take the oath, whether or not he can be excluded or discharged from employment without a hearing to determine if he is disloyal. Refusal by itself cannot determine disloyalty because there may be other reasons for not taking the oath than being guilty of the proscribed conduct.[31] But the Supreme Court has never ruled directly on this issue.

In *Adler v. Bd. of Educ.*,[32] a statute made membership in listed organizations prima facie evidence of disloyalty. The Supreme Court said that the member was entitled to a hearing and review. There was no denial of procedural due process because the presumption could be rebutted at the hearing, and mere membership would therefore not be a sufficient basis for exclusion from employment. Furthermore, at the hearing, the burden of showing a "fair preponder-

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(1866); impairment of freedom to contract, *Re Baxter*, Fed. Cas. No. 1118 (C.C. Tenn. 1866); against right of suffrage, Clayton v. Harris, 7 Nev. 64 (1871); interference with rights of conscience, Fitzgerald v. City of Philadelphia, 376 Pa. 374, 102 A.2d 887 (1954).

[26] 3 N.J. 78, 71 A.2d 352, 18 A.L.R.2d 241 (1950).

[27] The oath was similar to that in ARIZ. REV. STAT. ANN. § 38-231 G (Supp. 1961).

[28] ARIZ. REV. STAT. ANN. § 38-231 (Supp. 1961).

[29] Elfbrandt v. Russell, 381 P.2d 554 (Ariz. 1963).

[30] Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Wieman v. Updegraff, 344 U.S. 183 (1952); Adler v. Board of Educ., 342 U.S. 485 (1952).

[31] Adler v. Board of Educ., 342 U.S. 485 (1952); Elfbrandt v. Russell, 381 P.2d 554, 561 (1963) (concurring opinion).

[32] 342 U.S. 485 (1952).

ance of the evidence" would be on the government. However, the *Adler* case[33] cannot be taken to stand for the proposition that a person excluded from employment because of refusal to take a loyalty oath is entitled to a hearing. The case can be distinguished on its facts. The statute involved expressly created a presumption and implied a hearing. A statute not drawn in terms of a presumption could conceivably be interpreted not to imply a hearing.

It is arguable that the Supreme Court would reach the same result of requiring a hearing. In *Nostrand v. Little*,[34] the Court had before it an appeal from the Washington Supreme Court[35] in which the appellants contended the loyalty oath requirement violated due process because there was no provision for a hearing at which refusal to sign the oath could be explained or defended. Since a previous Washington case[36] had struck down a statute raising a presumption without opportunity for rebuttal, the Supreme Court felt that Washington should be given the first opportunity to pass on the issue, and so the case was remanded. On remand,[37] the Washington court declared that employees having tenure rights were entitled to a hearing to determine if there was "cause" for their dismissal according to their employment contracts. On appeal to the Supreme Court from this ruling, the case was dismissed for want of a substantial federal question.[39]

But it is also arguable that there is no necessity for a hearing to determine disloyalty. The mere fact of refusal to take the oath might be construed as a sufficient basis to conclude that one is unfit for public employment because of insubordination or lack of cooperation in refusing to make an affirmation of fitness for employment deemed by the state to be essential.[40] Based upon such a theory,

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[33] *Ibid.*

[34] 362 U.S. 474 (1960).

[35] Nostrand v. Balmer, 53 Wash. 2d 460, 335 P.2d 10 (1959).

[36] Seattle v. Ross, 54 Wash. 2d 655, 344 P.2d 216 (1959).

[37] Nostrand v. Little, 58 Wash. 2d 111, 361 P.2d 551 (1961).

[38] Nostrand v. Little, 368 U.S. 436 (1962).

[39] The lack of a federal question was probably due to the fact that the appellants had not exhausted their administrative remedies under the tenure statutes. But Justice Douglas, incident to his dissent on other grounds, felt that the question of a hearing had thus been decided in favor of the hearing. Nostrand v. Little, 368 U.S. 436, 436 (1962) (dissenting opinion).

The hearing issue as to *non-tenured* employees and prospective employees was presented in the subsequent Federal District Court case of Baggett v. Bullitt, 215 F. Supp. 439, 452 (W.D. Wash. 1963). The District Court said that it assumed the loyalty oath statute would "be applied in a constitutional manner," by the state, inferring that such employees must be given a hearing.

[40] Nelson v. County of Los Angeles, 362 U.S. 1 (1960); Lerner v. Casey, 357 U.S. 399 (1958); 6 U.C.L.A. L. REV. 698 (1959). However, Justice Bernstein aligned these cases in support of the argument for a hearing by comparing the emphasis of the cases that dismissal was not based on an unpermitted inference of

while the prime purpose of the loyalty oath would continue to be the keeping of disloyal persons from public employment, the procedure of excluding all persons refusing to take the oath would be the means of accomplishing this objective. If the loyalty oath as such is constitutional, it could be argued to be unreasonable to impose upon the state the burden of a hearing as to the loyalty of every individual refusing to take it.

Whether the *Elfbrandt* case,[41] now pending appeal to the Supreme Court, will present the hearing issue is highly questionable. If it were the only question presented by the case, then it would probably be given the *Nostrand*[42] treatment and remanded. The *Elfbrandt* case[43] could conceivably be dismissed for want of a timely issue because the plaintiff did not seek a tenure hearing.[44] The failure to exhaust her administrative remedies would therefore preclude her right to judicial objection. However, the Court might concern itself with the problem if there were other grounds for hearing the case.

II.

The majority opinion in the *Elfbrandt* case[45] suggests another ground upon which the oath might be challenged as unconstitutional, and an area in which the Supreme Court has not been specific as to loyalty oaths. The question arises as to passive and nominal memberships. The Arizona court construed the oath statute as proscribing *all* membership in the proscribed organizations, admitting of no exceptions for claimed passive membership or membership for claimed lawful purposes. The court decided that such memberships were precluded because "the insidious poison" may be here spread[46] and decided that such a risk cannot be assumed by society.

In the cases on loyalty oath membership requirements, the Supreme Court was never required to distinguish between knowing active and knowing passive membership, assuming such a distinction is possible. The problem was always between knowing and inno-

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guilt arising from the refusal to answer with the effect of the loyalty oath in excluding persons from employment merely for refusal to sign, drawing the conclusion that refusal to sign the oath gives rise to an unpermitted inference of disloyalty with no opportunity to rebut it. Elfbrandt v. Russell, 381 P.2d 554, 565 (Ariz. 1963) (concurring opinion).

[41] 381 P.2d 554 (Ariz. 1963).

[42] Nostrand v. Little, 362 U.S. 474 (1960).

[43] 381 P.2d 554 (Ariz. 1963).

[44] The right to a tenure hearing is provided for by ARIZ. REV. STAT. ANN. § 15-254 (1956).

[45] 381 P.2d 554 (Ariz. 1963).

[46] Thus, membership for peaceful revolution through constitutional amendment or means would be a disqualifying factor also. Elfbrandt v. Russell, 381 P.2d 554, 560 (Ariz. 1963).

cent membership.[47] Where the Court has been concerned with "scienter,"[48] it has distinguished between innocent membership, that is, without knowledge, and "knowing activity."[49] The concept of "knowing activity" has never been fully defined as to whether it requires active rather than passive membership. The Smith Act cases[50] are not controlling on the loyalty oath cases,[51] but perhaps they can be used to give insight into the Court's concept of membership and "knowing activity."

In *Scales v. United States*,[52] the Court said that mere membership in the Communist Party was insufficient to constitute a violation of the Smith Act; that membership must be active rather than passive. The element of violation of the statute was found to be knowing active membership and so the constitutional requirement as to punishing passive membership was not decided. But, even if it would appear that the Court's constitutional requirements to sustain punishment of membership go beyond the nominal or passive if the element of "scienter" is present, it is debatable whether the Court could, or would, apply such an interpretation to loyalty-oath membership requirements.[53]

### *Social Criticism*

There has been considerable social criticism of loyal oaths in the texts,[54] law reviews,[55] and dissenting opinions of Justices Black and Douglas.

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[47] Wieman v. Updegraff, 344 U.S. 183 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951).

[48] Knowledge of an organization's purpose is "scienter."

[49] Wieman v. Updegraff, 344 U.S. 183 (1952).

[50] Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961).

[51] Baggett v. Bullitt, 215 F. Supp. 439 (W.D. Wash. 1963).

[52] 367 U.S. 203 (1961).

[53] An interesting problem arises as to the person who merely believes in the communist cause. According to the *Elfbrandt* case such a person could take the oath and be qualified for employment since the oath is not supposed to have anything to do with beliefs, 381 P.2d 554, 560 (Ariz. 1963). But should refusal to take the oath because of one's belief operate to disqualify? Again the problem of a hearing is involved. Since belief apparently could not be inquired into, such a person could prove his loyalty by proving nonaffiliation with subversive groups and the lack of advocacy. However, there is also the problem of whether the object of the oath is exclusion of the disloyal from employment or whether refusal to take the oath could be grounds for exclusion from employment on the theory of insubordination or incompetence. Note Justice Bernstein's approach in Elfbrandt v. Russell, 381 P.2d 554, 561 (Ariz. 1963) (concurring opinion). The fact that the refusal-to-speak cases, Nelson v. County of Los Angeles, 362 U.S. 1 (1960); Lerner v. Casey, 357 U.S. 468 (1958); and Beilan v. Board of Educ., 357 U.S. 399 (1958), were prosecuted on authority separate from a loyalty oath statute may have some bearing on this latter problem.

[54] CHAFEE, THE BLESSINGS OF LIBERTY (1956); DOUGLAS, FREEDOM OF THE MIND 21 (1962); DOUGLAS, THE RIGHT OF THE PEOPLE (1958); GELLHORN, THE STATES AND SUBVERSION (1952); KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE: RELIGION, SPEECH, PRESS, ASSEMBLY (1958); LAZARSFELD AND THIELENS, THE ACADEMIC MIND, (1958).

[55] Byse, *A Report on the Pennsylvania Loyalty Act*, 101 U. PA. L. REV. 480 (1953); Fellman, *Academic Freedom in American Law*, WISCONSIN L. REV. 3

The strong plea for academic freedom found in the opinions of Justices Black and Douglas issues from the theory that the First and Fourteenth Amendments embody a governmental policy of intellectual encouragement and that the mind and spirit of man should therefore be left absolutely free.[56] They argue that: the effect of a loyalty oath is to import guilt by association; people consequently tend to avoid controversial association; this in turn prevents freedom of thought and expression; thought becomes standardized and dogmatism replaces the pursuit of knowledge; schools are converted into medieval graveyards where principals, students, parents, and the community may vent their fear and prejudice while "hunting the witch"; the search for competent teachers is thereby sacrificed for the false safety of a police state.[57]

It is the American ideal to combat hateful ideologies by education and tolerance, not force. The right of people to think, speak or write has been our historical foundation of freedom and escape from totalitarianism. History has been a competent witness to the reality that the strictures of surveillance upon the freedoms of the mind lead only to insurrection and rebellion.[58] The loyalty oath is not an insignificant step in this direction.

One criticism, advanced by Chief Justice Bernstein in a concurring opinion in the *Elfbrandt* case,[59] is that persons of unquestionable loyalty, but firm in their convictions and beliefs against oath-taking, are forced to an unfair choice. They may test their rights through costly litigatiton, abandoning their means of livelihood and becoming unemployed. They may abandon their life's vocation and procure employment in foreign fields. Or, they may abandon adherence to their convictions and sign the oath.[60] If they yield to the latter,

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(1961); Horowitz, *Report on the Los Angeles City and County Loyalty Programs*, 5 STANFORD L. REV. 233 (1953); O'Brian, *New Encroachments on Individual Freedom*, 66 HARV. L. REV. 1, 18, 22 (1952); Yankwich, *Social Attitudes as Reflected in Early California Law*, 10 HASTINGS L.J. 250, 264 (1959) ("Enforced worship stinks in God's nostrils").

[56] Wieman v. Updegraff, 344 U.S. 183, 192 (1952) (Justice Black's concurring opinion); Adler v. Board of Educ., 342 U.S. 485, 496 (1951) (Justice Black's dissenting opinion); American Communications Ass'n v. Douds, 339 U.S. 382, 445 (1950) (Justice Black's dissenting opinion).

[57] Adler v. Board of Educ., 342 U.S. 485, 508 (1951) (Justice Douglas' dissenting opinion); American Communications Ass'n v. Douds, 339 U.S. 382, 445 (1950) (Justice Black's historical approach, dissent).

[58] See Wieman v. Updegraff, 344 U.S. 183, 192 (1952) (concurring opinion); American Communications Ass'n v. Douds, 339 U.S. 382, 445 (1950) (dissenting opinion).

[59] 381 P.2d 554, 563 (Ariz. 1963) (concurring opinion).

[60] Adler v. Board of Educ., 342 U.S. 485, 508 (1951) (dissenting opinion).

the sacrifice of dignity subtracts from the very nature of man that which made us a free nation to begin with: the will to fight for what we cherish and believe. If the law destroys this shield of our freedom, it is only a matter of biding time until our downfall.

The effect of the compulsory loyalty oath, it is argued, is therefore not to punish subversives, who are seldom exposed under such laws, but to punish the religious, the idealists, and the nonconformists. Highly qualified, dedicated, and loyal persons become discouraged from seeking employment in a time when they are most needed to train our youngsters for leadership in the ceaseless struggle against communism.[61]

Another attack on the loyalty oath advances that the conditions inducive to communism are poverty, economic and political injustices.[62] The ultimate purpose of the oath is to contribute to the fight against communism. If the inducement to communism lies in economic and political conditions, the oath will be of no value since it does not seek to remedy, but only condemns. The oath does not prevent political dissatisfaction; it does nothing for the betterment of economic conditions. Therefore, it is fallacious to rely on the oath as an aid to halt communism. If conditions in America are conducive to the seed of communism, the law should seek to remedy them by more substantial means and not waste time with loyalty oaths. If America is immune to communism, there is no necessity for oaths.

### *Conclusion*

If loyalty is to be made a qualification for public employment, we must be careful not to impose restrictions which destroy the objective. A standard must prevail which can be objectively applied to procure the desired result of excluding only the disloyal. Loyalty to the American cause is given only through a love of the freedom which has accompanied that cause and has been its main goal. We find ourselves in a paradox when we begin limiting freedom to inspire loyalty. Loyalty must be won; it cannot be forced.

The desirability of a loyalty oath rests in a consideration of whether its effect is to demand loyalty, or to exclude only the obviously disloyal. But where the loyal are excluded with the disloyal, the demand is for loyalty, and the effect is subjection of the will due to fear of losing the job. This fear is the seed of discontent and a blemish upon any true feeling of loyalty to the American system.

The exclusion of subversive persons from our school system is a desirable step in the direction of excluding persons traitorous to our way of life from positions of indoctrinating influence. The exclu-

[61] GELLHORN, THE STATES AND SUBVERSION (1952); Byse, *A Report on the Pennsylvania Loyalty Act*, 101 U. PA. L. REV. 480 (1953); Horowitz, *Report on the Los Angeles City and County Loyalty Programs*, 5 STANFORD L. REV. 233 (1953).

[62] Byse, *A Report on the Pennsylvania Loyalty Act*, *supra* n. 61.

sion of such persons does not result in hampering academic freedom if the teacher is left free to give instruction and inspire inquiry without fear of reproach from the strict conservator. But exclusion merely for failure to take an oath does not correspond to this ideal. It leaves room for the subversive to take the oath and become qualified while those of the strictest loyalty can become unqualified for reasons of conscience. Requirements of a hearing would alleviate this condition since one could establish that he was not disloyal by showing that he has never engaged in the forbidden activity and declines to subscribe to the oath solely for religious or other beliefs. Nor would the necessities of hearings be unduly burdensome since most people take pride in their loyalty and the chance to manifest it through taking the oath.[63]

Finally, we must note a peculiarity in the enforcement of Arizona's loyalty oath provisions which appears to defeat the whole purpose and intent of the statute. Arizona Revised Statutes § 38-231 D. provides that if a public officer or employee fails to take the oath he shall not be entitled to compensation. The result is that a teacher who refuses to take the oath may continue teaching without pay.[64] Subversive persons can therefore remain in vital positions and perpetuate their inquitous schemes, obtaining support from their sponsors, while the dedicated and conscientious are in effect discharged because of the termination of pay. Such a statute could not be more anomalous and self-defeating.

It is respectfully submitted that the Arizona statute could better accomplish its purpose if it were amended to provide clearly for an appropriate hearing for a person refusing to take the loyalty oath before permanent exclusion from his employment, or salary. Employment should be withheld or suspended pending a hearing to determine whether refusal to take the oath was predicated solely on conscientious objections to the loyalty oath, which alone would not disqualify one from employment, or whether the refusal related to actual disloyalty or uncooperativeness which would disqualify. The burden of proof as to justifiable reasons for refusal to take the oath, which would consist largely of proving the lack of participation in the activities proscribed by statute and a willingness to cooperate with the administrative system, should, of course, rest upon the employee. For conscientious employees who were found, after suspension and hearing, to be eligible to return to employment, provision should be made for restoration of pay which would have been payable during the period of suspension. In such a manner could the inherent inequity of the Arizona statute be rectified.

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[63] Elfbrandt v. Russell, 381 P.2d 554, 563 (Ariz. 1962) (concurring opinion).
[64] *Id.* at 561.