## INDEX OF CITATIONS

Page

CASES:

Page

ARIZONA CONSTITUTION AND STATUTES:



UNITED STATES CODE:



TEXT:

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

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No. 553 Misc.

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BARBARA ELFBRANDT, *Petitioner,*

v.

IMOGENE R. RUSSELL, GEORGE B. MORSE, RICHARD J. DOWDALL, LAWRENCE E. BOOL and MARTHA L. ELLIOTT, Members of the Board of Trustees of Amphitheater Elementary School District No. 10, of Pima County, State of Arizona, *Respondents.*

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**On Writ of Certiorari to the United States Supreme Court**

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## BRIEF FOR THE RESPONDENTS

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The Respondents are satisfied that the reference to the Official Report of the Opinion in the lower Court, the Statement of grounds on which jurisdiction of the Court is involved, Questions presented for review, Constitutional provisions which the case involves,

Statement of the case containing fact material to the consideration of the question presented and Statement of the stage in the proceedings in the lower courts the Federal questions were raised are substantially correct. Respondents will not repeat the foregoing and will commence with the Summary of the Argument in response.

## ARGUMENT

Loyalty to the State and Federal Government may be a prescribed qualification for the holding of public employment.

### I

The Legislation referred to in Petitioners Application for Writ of Certiorari is not a violation of the Guarantee of Procedural due process and there is no legitimate issue of procedural due process contained in Petitioners Application for Writ of Certiorari.

The Petitioner claims that the statute in question is unconstitutional as it is too vague. This argument states that certain words in the statute, if viewed by themselves as words, and with sematic and philosophical concern, might not be subject to exact definition. Our attention is particularly drawn to "unknowingly," "willful," "member," "advocates the overthrow," and a few others.

It is not difficult to pick one word out of a statute and around that word develop a theory which will show that the word might not be capable of mathematical exactitude. However, statutes have to be expressed in words. We have not yet been able to draft a code in binary mathematical form so as to enable a computing machine to try cases.

However, courts for a number of years have held that the meaning of words as used in statutes is to be found in the common understanding of men. Petitioner herself points out many definitions of the word "unknowingly." It is submitted that this word has been defined sufficiently so that adequate instruction can be given to a jury and that the word itself carries a common sensible meaning for mankind. The Petitioner contends that this word does not necessarily carry with it any connotation of evil intent. This is correct. However, it never has been a criterion of a criminal statute that a violation of the statute must always be accompanied by a specific independent criminal or evil intent. Where the act involved is merely malum prohibitum the courts have often required a specific evil intent as in *People* v. *Campobello,* (1959) 193 N.Y.S. 2d 266. However, this is not true where the act is malum in se. I doubt that no one can seriously argue that the overthrow of our government by force or by violence is merely malum prohibitum.

The Petitioner further contends along this line of thinking that a person might be criminally responsible even though he performs an act under a deep and sincere religious belief, that the performance is not only his right, but his duty. Even assuming the somewhat unbelievable thought that a religion might require perjury, the argument is untenable. In our State of Arizona, we have had an example of a sincere religious belief which advocated an act made criminal by law. But polygamy is still punishable and the statutes prohibiting same have been upheld. In our country we have fortunately no history of religious fanatics whose salvation is attained only through assassination, but even in those countries where it has existed, the rite is still treated as murder.

The Petitioner complains about the word "willful," Respondents submit, however, that this word has been sufficiently defined through our courts of criminal law history to preclude all reasonable doubts as to its common meaning. Would the Petitioner argue that a person convicted of first degree murder could hold the Constitution unconstitutional because his definition of "willful" is different from that held by all courts of law? Similar questions as to the meaning of other words such as "advocacy" have been raised and answered before by the high courts of our land. In none of these cases has the statute containing these words been stricken for unconstitutionality. *Yates* v. *United States,* (1957) 354 U.S. 298. This Court has considered the language, arrived at its true constitutional meaning and the statute now before us reaps the benefit of these decisions and stands free from any vagueness or doubt as to meaning or effect.

The issues concerning possible confusion over the meaning of "member" or "membership" was decisively answered in *Scales* v. *United States,* (1961) 367 U.S. 203. The statute at issue was the so-called membership clause of the Smith Act, 18 U.S.C. 2385. The law was similar to ours in that it made a person who became or remained "a member of, . . . . any such society, group or assembly of persons, knowing the purpose thereof . . . ." subject to conviction for a felony. This Court upheld the conviction under this statute despite every conceivable unconstitutional objection, along with a specific and direct attack on the word "member" as being too vague. The court upheld that membership must be more than "nominal" it must be reasonable "active" citing previous cases to that effect at pages 222 and 223 of the *Scales* Case, *supra,* 367

U.S. 203. As Justice Frankfurter pointed out the court had no hesitancy in adopting such a position and interpretation to protect the constitutionality of the statute and this court should find no difficulty in deciding the same once again.*

Under the issue of vagueness the Petitioner contends that a person might sign an oath and trap himself if he were a member of an organization that might later be found communistic. She states that the words "subordinate organization" of "other organization" are too vague for the understanding of man. However, the statute itself resolved the problem by making the test not only the nature of the organization, but the individual knowledge of that nature. Thus a person cannot be convicted and runs no danger unless the state can show that she actually knew and actively was a member of an organization which she knew was dedicated to the overthrow of our government by force or violence.

The Petitioner further contends that the administration of the act is somewhat vague. The law itself in Title 38 A.R.S. 38-231(A) 1956 as amended states who shall prepare the oath and in A.R.S. 38-233, 1956 as amended states where it shall be filed. We have a great many boards and agencies in our state and further exactitude would impossibly lengthy and cumbersome. We have heard no specific complaints and a statement that there might be some doubt and some unspecified or unknown circumstance is hardly enough to invalidate the act.

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* In the *Scales* case, *supra,* 367 U.S. 203, Warren, D.J. and Brennen, J. dissented on the grounds not present herein, to wit, the possibility of conflict with or implied repeal by a later federal statute.

Finally, on this issue, it is submitted that the *Scales* Case, *supra,* 367 U.S. 203, the *Yates* Case, *supra,* 354 U.S. 298, and the *Dennis* v. *United States,* (1951) 341 U.S. 494, clearly answer all the issues of vagueness. And in an area apart from the Smith Act we have *The American Communication Association* v. *Douds,* (1950) 339 U.S. 382, and *Garner* v. *The Board of Public Works,* (1951) 341 U.S. 716, to show clearly that such statutes are not vague within the meaning of the due process clause of the Constitution of the United States.

## II

The Petitioner then claims that the Legislation violates Article I, Section 10, of the U. S. Constitution (Bill of Attainder). This is not so.

A bill of attainder is a legislative act which inflicts punishment without judiciary trial and includes those acts which take away the life, liberty or property of a particular named or easily ascertainable person or group of persons for the reason that the legislature believes them guilty of conduct which deserves punishment. *United States* v. *Lovett,* (1946) 328 U.S. 303; *Bauer* v. *Acheson,* (C.D.C. 1952) 106 F. Supp. 445; *The Communist Party* v. *Subversive Activities Control Board,* (1961) 367 U.S. 1. However, to constitute such a bill the legislature must punish a past act and a statute imposing standards of qualifications and operating prospectively does not come within this class. *Peters* v. *New York City Housing Authority,* (1953) 128 N.Y.S. 2d 224; modified 128 N.Y.S. 2d 712 (App. Div.), rev'd on other grounds, 307 N.Y. 519, 121 N.E. 2d 529; *National Maritime Union of America* v. *Herzog,* (C.D.C. 1948) 78 F. Supp. 146; *Communist Party* v. *Subversive Activities Control Board, supra,* 367

U.S. 1. It is obvious that the statute in question operates prospectively only. The only mention made of past conducts, associations or vocations is that they cannot be used against a person to bring an action under this act.

In addition, there are certainly no named persons and the only "group" named therein is the entire body of public employees in this state, in numbers somewhat in excess of 40,000. The bill is no more a bill of attainder than a statute defining and setting forth the punishment for burglary. The argument of the bill of attainder has been raised and rejected in the *Scales* Case, *supra,* 367 U.S. 203, the *Garner* Case, *supra,* 341 U.S. 716; and the *Dennis* Case, *supra,* 341 U.S. 494.

As to the contention of Petitioner that such oaths amount to a bill of attainder, the Supreme Court has repeatedly held that they do not amount to a bill of attainder where they are used to a reasonable standard of qualifications for certain public employment. *American Communications* Case, *supra,* 339 U.S. 382.

In the case of *Wieman* v. *Updegraff,* (1952) 344 U.S. 183, one of the cases in which this Court held loyalty oath provisions to be unconstitutional; a defect not present in the Arizona oath was involved in the oath construed by this Court. The Arizona statute does not rest on any implications of knowledge regarding the character of the organizations involved since any sanctions involved in the Arizona statute are predicated solely on knowledge. Therefore, Respondents respectfully urge upon the court that the validity of such oaths when used as a test of fitness and where knowledge of the nature of the prescribed organizations is

required, is proper as it unquestionably is under the legislation enacted in Arizona.

## III

The Petitioner then claims that the Legislation is a violation of the Fifth Amendment to the United States Constitution.

It is attacked as procedurally defective in that notice and hearing are essential in order to discharge an employee for loyalty reasons and that automatic operation of such a statute violates due process. This ground was relied on in *Slochower* v. *Board of Higher Education of New York City,* (1956) 350 U.S. 551, where a professor was fired for refusal to answer a Senate Subcommittee's questions concerning his communist affiliations, and also relied on in *Adler* v. *Board of Education of The City of New York,* (1951) 342 U.S. 485, and the *Garner* Case, *supra,* 341 U.S. 716, in which provisions were made for hearing and review. The answer to this contention is that in the *Slochower* Case, *supra,* 350 U.S. 551, no hearing was needed because no substantial relationship existed between pleading the Fifth Amendment before an outside committee and the disqualification for public employment. In the *Adler* Case, *supra,* 342 U.S. 485, and the *Garner* Case, *supra,* 341 U.S. 716, hearings were necessary only because the particular statutes involved did not expressly require knowledge, and a hearing was therefore needed to establish "knowing" membership under those statutes. Notwithstanding that hearings were given for the above reasons in the *Garner* Case, *supra,* 341 U.S. 716, the main ground for discharge was the employee's refusal to sign the oath, rather than the results of the inquiry.

Further reason for dispensing with a hearing lay in the fact that such statutes prescribe a standard of eligibility of fitness rather than imposing a penalty and therefore a hearing is not required.

For a second ground, it is contended that the use of such oaths is not a reasonable attempt to avert a substantial danger; asserting that withholding pay without discharging the parties involved averts no danger, but is only arbitrary limitation set down denying equal protection under the law, since it is contended that both the loyal and the subversive can continue to work. The fallacy of this contention is that it is founded on the illogical position that which discharge is constitutional, the lesser penalty (loss of pay) is a violation of fundamental rights. As was so pointedly concluded in an article in 32 Notre Dame Law Review, 527,

> "... *whether loyalty oaths basically are wise or unwise, remains a question for the legislature and not for the courts to answer.*" (emphasis supplied)

If the measures taken by a state to screen itself against erosion from within result in a curtailment of liberties and privileges ordinarily enjoyed by a citizen, the state must be prepared to justify its actions.

An excellent judicial analysis of the lengths to which the state may go under a given set of circumstances is to be found in the remarks of this Court in the *American Communications* Case, *supra,* 339 U.S. 382. This Court stated:

> "Although the First Amendment provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been es-

> tablished that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts."

In discussing the regulation requiring a non-communist affidavit in the *American Communications* Case, *supra,* 339 U.S. 382, it was stated:

> "The 'reasons advanced in support of the regulation' are of considerable weight, as even the opponents of Section 9 (h) agreed. They are far from being '(m)ere legislative preferences or beliefs respecting matters of public convenience (which) may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.' It should be emphasized that Congress, not the courts, is primarily charged with determination of the need for regulation of activities affecting interstate commerce. This Court must, if such regulation unduly infringes personal freedoms, declare the statute invalid under the First Amendment's command that the opportunities for free public discussion be maintained. But insofar as the problem is one of drawing inferences concerning the need of regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the necessity or desirability of the statute for that of Congress. Cf. United Public Workers v. Mitchell, supra (330 US at 95, 102, 91 L ed 770, 774, 67 S. Ct 556). In Bridges v. California (US) supra, we said that even restrictions on particular kinds of utterances, if enacted by a legislature after appraisal of the need, come to this Court 'encased in the armor wrought by prior legislative deliberation.' "

Of further special interest is the opinion concurring and dissenting each in part of Justice Jackson in the *American Communications* Case, *supra,* 339 U.S. 382, in which he sets forth five cardinal reasons why the Communist Party and its successor organizations or those similarly devoted to the violent overthrow of the government through other than Constitutional means is to be distinguished from the treatment afforded and preserved by our Constitution to other political parties. These five objectives or characteristics are set forth by Justice Jackson as follows:

> 1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate.
>
> 2. The Communist Party alone among American Parties, past or present, is dominated and controlled by a foreign government.
>
> 3. Violent and undemocratic means for the calculated and indispensable methods to obtain the Communist Party's goal.
>
> 4. The Communist Party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement.
>
> 5. Every member of the Communist Party is an agent to execute the Communist program.

The Petitioner's discharge for the refusal as employees under the State to obey the legislative directive here violated no liberties secured by the Constitution and not forbidden thereby. *Taylor* v. *Beckham,* (1900) 178 U.S. 548, *Wilson* v. *North Carolina,* (1898)

169 U.S. 586, and *Snowden* v. *Hughes,* (1943) 321 U.S. 1.

The summary of the *Garner* Case, *supra,* 341 U.S. 716, is revealing as it pertains to the instant litigation. In that case, the City Charter barred from employment persons who advise, advocate or teach the violent overthrow of the government, or who are members of or become affiliated with any group doing so. A City Ordinance required every employee to take an oath that within a period subsequent to the enactment of the Charter provision he has not been a member of, or become affiliated with such a group, and also to execute an affidavit to the same effect. The affidavit, however, containing no time limitation. Some of the plaintiffs took the oath, but refused to execute the affidavit. The others refused to do both. All were discharged for such cause and sought reinstatement, raising various constitutional objections. Relief was denied in the state courts. In an opinion by Justice Clark, five members of this Court held that neither the affidavit nor the loyalty oath requirement violated the provisions of Article I, Section 10 of the Federal Constitution against bills of attainder and ex post facto laws nor deprived the employees of freedom of speech and assembly and of the right to petition for redress of grievances. A due process objection derived from the fact that the oath was not limited to affiliations known to the employee to be in the prescribed class was rejected and the judgment of the state court was affirmed on the assumption that scienter was implicit in each clause of the oaths.

Justice Frankfurter concurring in part and dissenting in part in the *Garner* Case, *supra,* 341 U.S. 716 at 724 said:

> "The constitution does not guarantee employment. City, State and Nation are not confined to make the provision appropriate for securing competent professional discharge of the functions pertaining to diverse governmental jobs. They may also assure themselves of fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it. No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence or are knowingly members of an organization engaged in such endeavor."

The doctrine of denying positions of public importance to groups of persons identified by business or other past associations has been long established as evidenced by Federal legislation forbidding persons engaged in stock underwriting to hold office as directors of national banks. *Board of Governors Federal Reserve System* v. *Agnew,* (1947) 329 U.S. 441.

In addition to the above, it is further urged upon the Court that even assuming that some doubt exists as to the legality of certain sections of this legislation, the oath itself is severable and its constitutionality would stand even against a finding that another portion of the Act is itself unconstitutional. This results from the long recognized rule of statutory construction that if a construction can be given which will impair only part of the legislation under attack, that such a construction should be adopted enabling the remainder to retain its validity. Adopting this construction, a cursory glance at Section 38-231(A) A.R.S. 1956 as amended, reveals that the oath, which is the sole and separate thing required to be affirmed or sworn to by the employee, is set apart and is distinct from the

other provisions of the Act. It would be difficult to imagine a more innocuous or non-committal averment of loyalty than that contained in the provisions of the oath itself. Indeed, with the exception of two words, it is identical with the oath of office long in effect in this state and is further virtually identical with the oath taken by Federal officers and the President as a prerequisite to assuming the duties of their offices. Thus, viewed it becomes crystal clear that the oath in and of itself, which is really the only thing subject to attack, is free from any of the impediments urged upon the Court in connection with the other portions of this legislation.

## IV.

The Petitioner's next claim is that the legislation is a violation of the Equal Protection of the Law guaranteed under the Fourteenth Amendment.

Petitioner assumes that the bill has placed state employees in a different class than other citizens of the state. This is true. However, it is uniform constitutional law that as long as classes are treated equally within themselves and as long as the classification is reasonable, there is no constitutional problem. Petitioner seems to doubt that placing municipal employees engaged in garbage collection in the same class as college professors is inherently unreasonable. This factual situation itself calls for some comment. An employee of a public waterworks, no matter how menial, might be in a position to discredit or pollute that system at an appropriate moment. See the detailed qualifications of communist party training contained in pages 235 through 255 in the *Scales* Case, *supra,* 367 U.S. 203. Even an employee in the sanitation system

might well have access to municipal garage facilities and thus be able to do damage in an emergency. Suffice to say that David Greenglass of Los Alamos notoriety was an enlisted man, a technical sergeant, a very low rank indeed in the complex of military stature and scientific genius at work on the Manhattan project.

But even if we do not wish to anticipate such a disasterous occurrence, Petitioner's argument must fail for another reason. Any state or any public body has an inherent right to place reasonable terms or conditions upon its employees. Every state in the United States places a requirement of citizenship upon the employees of that state (with certain exceptions in the teaching field similar to Article 18, Section 10 of the Arizona Constitution). Some states even require that persons working on public contracts, although not actual state employees, must be citizens; or in any event that citizens shall have first choice for public contract employment. These have been uniformly upheld and on no stronger a basis than the judicial holding that the communities' tax dollars should be returned to citizens of the community and not transients or citizens of foreign nations. *Heim* v. *McCall,* (1915) 239 U.S. 175; *People* v. *Crane,* (1915) 214 N.Y. 204, 108 N.E. 427; *Schrey* v. *Allison Steel Mfg. Co.*, (1953) 75 Ariz. 282, 255 P. 2d 604.

Similarly here the Arizona legislature felt that perhaps more than a hint of rationality that citizens' tax dollars should not be paid to those actively attempting to forceably or violently overthrow our government.

This Court has consistently upheld this position. See the *Garner* Case, *supra,* 341 U.S. 716, and particularly the language of Justice Minton in the *Adler* Case,

*supra,* 342 U.S. 485. In quoting from the *Garner* Case, *supra,* 342 U.S. at 492-493 he said:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment."

## V.

The Petitioner then claims that the legislation is a violation of freedom of speech and assembly.

The Petitioner attempts to state that the discrimination is unlawful as it infringes upon freedom of speech, assembly and association. She confuses her argument however. If the statute does so infringe then it is unconstitutional because of that fact, and not because the law applies to public and not private employees. If it is not an infringement of speech and the associated freedoms, then discrimination between public and private employees must be tested by the norm of whether or not it is arbitrary or capricious. As the cases and argument outlined above have noted it is not arbitrary or capricious to separate public employees from private employees.

If we turn then to the consideration of whether or not the act infringes on freedom of speech, assembly or association, we have a separate problem. The act itself

does not prohibit or punish any speech short of advocacy of the overthrow of the government by force or violence. The *Yates* Case, *supra,* 354 U.S. 298, has stated that such activities may be proscribed by law and has set forth the meaning of advocacy in this type of legislation. The mere fact that some speech may be restrained by some act does not in and of itself violate the Constitution of the United States. To give some obvious examples we have the Hatch Act, 18 U.S.C. 61, which prohibits political activities by federal employees. This directly interferes with the right of certain individuals to make speeches or actively support candidates of their choice. The constitutionality of this was upheld, *United Federal Workers* v. *Mitchell,* (1946) 330 U.S. 73. Similar laws against false advertising which prohibit freedom of writing have been upheld. *E. F. Drew & Co.* v. *Federal Trade Commission,* (1956) 235 F. 2d 735 (2d Cir.), certiorari denied, 352 U.S. 969. It is obvious that libel has never been a constitutionally protected area of free speech. *Caldwell* v. *Crowell-Collier Pub. Co.,* (1947) 161 F. 2d 333 (5th Cir.), certiorari denied 332 U.S. 766. Similarly the statutes relating to lobbying which also infringe directly on free speech have been upheld. *United States* v. *Harriss,* (1954) 347 U.S. 612. Must we once again bring back Justice Holmes' example that the shouting of "fire" in a crowded theatre rests on inherently different grounds than a speech denouncing vivisection. It would appear obvious that the suppression of a riot or the breaking up of a juvenile gang "rumble" is somewhat not quite the same as breaking up a meeting of the John Birch Society.

## CONCLUSION

In conclusion it seems unbelievable to say that a state can be prohibited from punishing those who are attempting to destroy it by force or violence. The attempt can appear in many ways. It can be as drastic as manning barricades in the street, as quiet as industrial sabotage, or it can consist in the active attempt to recruit others and to persuade them to willingly man barricades or perform acts of sabotage. This situation was before the court in the *Scales* Case, *supra,* 367 U.S. 203. This it what "advocacy" means. To hold otherwise and to say that the state cannot prevent this is to fly in the face of every Supreme Court decision in the last ten years.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

NORMAN E. GREEN
*County Attorney*

LAWRENCE OLLASON
*Special Deputy County Attorney*

October, 1963