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CASES:

TEXTS:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 656

BARBARA ELFBRANDT,

Petitioner,

vs.

IMOGENE R. RUSSELL, *et al.*

PETITIONER'S BRIEF

a) Reference to the Official and Unofficial Reports of the Opinions Delivered in the Courts Below:

Elfbrandt v. *Russell,* 397 P. 2d 944 and 381 P. 2d 554.

b) Concise Statement of Grounds on Which the Jurisdiction of This Court Is Invoked:

The jurisdiction of this Court is invoked by reason of fact that the petitioners allege that the statute in question violates the United States Constitution for various reasons hereinafter set forth and that the Supreme Court of the State of Arizona erred in affirming the Constitutionality of such statute as it applies to the petitioners and others similarly situated.

(i) The original judgment in the Supreme Court of the State of Arizona was May 1, 1963. Petitioner filed a Motion for Rehearing and the State Supreme Court denied same on May 28, 1963.

(ii) The petitioner then filed an original Application for Writ of Certiorari in the United States Supreme Court, which was submitted on August 16, 1963, and was given No. 553 Misc. October Term, 1963. The United States Supreme Court granted the Writ of Certiorari and on June 15, 1964, remanded the case back to the Arizona State Supreme Court for review of its original decision in light of the U.S. Supreme Court case in the matter of *Baggett* v. *Bullitt,* 12 L. Ed. 2d 377. This action on the part of the United States Supreme Court was reported in 378 U.S. 127, 84 S. Ct. 1658 and 12 L. Ed. 2d 744.

Thereafter, the Petitioner filed her second brief in the State Supreme Court, with the State filing responsive brief. Oral argument was heard before the State Supreme Court and on December 30, 1964, the State Supreme Court issued its Opinion affirming its prior decision and denying Petitioner relief. On January 29, 1965, Petitioner filed a Motion for Rehearing before the State Supreme Court of Arizona and this Motion was denied on February 17, 1965.

Within the 90-day time period set forth in Rule 22 of the Rules of the Supreme Court of the United States, to-wit: On May 10, 1965, Petitioner filed Application for a Writ of Certiorari and for leave to proceed in forma pauperis. On October 11, 1965, the Court entered its Order granting leave to proceed in forma pauperis and the petition for Writ of Certiorari was granted.

c) Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Which the Case Involves:

The statutory provision believed to confer upon this Court jurisdiction to review the judgment in question by Writ of Certiorari is Article III, Par. 1, United States Constitution, 28 U.S.C.A., Par. 1257:

> "Final judgments or decrees rendered by the highest court of a state in which a decision would be made be reviewed by the Supreme Court as follows: . . .
>
> (3) By Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question on the grounds of its being repugnant to the Constitution, treaty, or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Constitutional provisions involved are the First Amendment to the United States Constitution, Fifth Amendment to the United States Constitution, Sixth Amendment, and Fourteenth Amendment, Article I, Section 10. Texts of these provisions of the United States Constitution are set forth verbatim in appendix annexed hereto. 38-231, Chap. 2, Title 38, A.R.S. 1956, set forth hereafter in the appendix.

d) Questions Presented for Review:

Re the Sixth Amendment to the U.S. Constitution:

Is the Arizona statute (38-231, Chap. 2, Title 38, A.R.S. 1956) a statute defining a crime within the purview of the meaning of the Sixth Amendment to the U.S. Constitution, by reason of its providing:

a) A penalty for false swearing;

b) A necessity for an oath and the danger of being placed in jeopardy for purported false swearing;

c) A statute providing a standard of conduct on the part of the employees of the State of Arizona and other gov-

ernmental agencies of the State, subject to administrative regulation?

And, if the statute comes within the purview of the mandate of the Sixth Amendment to the U.S. Constitution, is its language so vague:

a) That men of common intelligence must necessarily guess at its meaning?, or

b) That it fails to unequivocally warn the prospective State employee of the type of conduct which can be the occasion for depriving him of his liberty or property?, or

c) That the definition of the standard of conduct which is the subject of administrative regulation is so indefinite as to not provide a standard of conduct, by reason of its wording: calling upon the employee to not "knowingly", "willfully", "commit or aid", "advocate the overthrow", or "knowingly or willfully become or remain a member of the Communist Party" or a "successor organization of the Communist Party" or "a subordinate organization of the Communist Party" or have "knowledge of unlawful purpose"—all terms of this statute with which one must be familiar and on the basis of which terms one must swear.

Bill of Attainder (Article I, Section 10, U.S. Constitution):

Whether or not the statute is a Bill of Attainder and forbidden under Article I, Section 10 of the U.S. Constitution, in that as the statute demands of any public employee within the State, before he may receive remuneration, that he sign an oath negating his affiliation at that point and for the future with the proscribed organizations; and automatically, upon the failure to sign the oath, the particular employee is proscribed and without salary.

Violation of the Fifth Amendment to the U.S. Constitution:

Whether or not the statute, in not granting a person a trial or hearing and, where he is already employed, having him sign an oath for continued remuneration, is not in effect a method of forcing the person to incriminate himself and therefore violative of the Fifth Amendment to the U.S. Constitution.

Equal Protection of the Laws Guaranteed Under the Fourteenth Amendment:

Whether or not the statute, by making its provisions applicable only to public employees or State employees of one type or character, and not applicable to all citizens, and therefore placing a higher burden unjustifiably on one part of the citizenry than another, therefore violates the Equal Protection of the Laws guaranteed by the Fourteenth Amendment to the U.S. Constitution;

And if it does so discriminate unequally, whether or not there would appear to be legally sufficient distinction between the danger to the State from subversion by its general citizens as opposed to danger to the State from subversion by its public employees, as to warrant the distinction in treatment as provided for by the statute,

And therefore whether it does not in effect violate the equal protection of the laws guarantee of the Fourteenth Amendment to the U.S. Constitution?

Due Process under the Fourteenth Amendment to the U.S. Constitution and *Freedom of Speech and Assembly* under the First Amendment to the U.S. Constitution:

Whether or not the statute, by not providing any form of hearing on the issue of loyalty, and denying to public em-

ployees remuneration upon failure to take the oath, is a violation of the Due Process guarantees of the Fourteenth Amendment to the U.S. Constitution as:

1. A taking of property;

2. A violation of Freedom of Speech and Assembly as guaranteed by the First Amendment to the U.S. Constitution.

Violation of Freedom of Speech and Assembly:

That, whereas there were no legislative findings, or inadequate legislative findings, to justify the Legislature's infringing upon the rights of the petitioners to Freedom of Speech and Assembly under the First Amendment to the U.S. Constitution; and

Whereas the legislation would appear to be ineffectual for any of the purposes that it would purportedly answer and the damage arising by its application to the Petitioner and all persons similarly situated would, to the body politic, be so great;

The Legislature did not and does not have sufficient legislative reason to invade the Constitutional rights of Freedom of Speech and Freedom of Assembly of the Petitioners.

Whether or not the definition of illegal advocacy as being proscribed under the State statute is so broadly worded as to constitute a violation of Freedom of Speech and Assembly and to deny that type of advocacy of forceful overthrow of the Government which is Constitutionally protected under the pertinent provisions of the United States Constitution, with particular reference to the definition of the Constitutional protection of certain forms of advocacy

of the forceful overthrow of the Government as set forth in *Baggett* v. *Bullitt, supra.*

e) Concise Statement of the Case:

This is an action brought by the plaintiff, Barbara Elfbrandt, for herself and for all others similarly situated; in other words, a class action on behalf of all persons subject to the effect of the pertinent statute, to-wit: 13-707 A.R.S., 13-707.1 A.R.S. and Section 38-231 A.R.S. The complaint was brought in the Superior Court of the State of Arizona in and for the County of Pima. An original Petition for Temporary Restraining Order and Orders to Show Cause and Injunction was requested and each denied by subsequent court action. (See Transcript of Record, U.S. Supreme Court, pages 2-13.) The trial of the action on the complaint was determined by the trial court upon a Transcript of Stipulations and Statement of Fact. (See Transcript of Record, U.S. Supreme Court, pages 36-37.)

The question provided by the complaint and the stipulations was whether or not Section 38-231, Chapter 2, Title 38 A.R.S. was constitutional under the pertinent Constitutional guarantees of the Federal and State Constitutions. The trial court determined the issue adversely to the plaintiff and decided that the pertinent statutes were in fact Constitutional. From this decision, the plaintiff appealed to the Supreme Court of the State of Arizona.

After submission to the Supreme Court of the State of Arizona, by brief and oral argument, that Court affirmed the Constitutionality of the statute against all attacks raised by petitioner on all U.S. Constitutional grounds raised.

Subsequent to the decision of the State Supreme Court, petitioner filed a Motion for Rehearing which was denied.

Subsequently, petitioner applied for an original Writ of Certiorari to the U.S. Supreme Court, which Writ was granted. The United States Supreme Court remanded the matter to the Supreme Court of the State of Arizona for review by that court of its decision in light of a subsequent Constitutional ruling in the area of the contested matter, as set forth in the United States Supreme Court's decision in *Baggett* v. *Bullitt, supra.* (See Transcript of Record, U.S. Supreme Court, page 68.)

In compliance with the Order of the United States Supreme Court, the Arizona State Supreme Court requested counsel, including the American Civil Liberties Union, to file briefs. The briefs were filed by the Petitioner and by the American Civil Liberties Union and by counsel for the State of Arizona; oral argument was held before the State Supreme Court; and the State Supreme Court affirmed its previous decision denying all attacks of lack of Constitutionality of the statute in question and affirming its previous decision. (See Transcript of Record, U.S. Supreme Court, page 71.) Petitioner then filed a timely Motion for Rehearing before the State Supreme Court and on February 17, 1965, the Arizona State Supreme Court denied Petitioner's Motion for Rehearing. From this course of decisions, Petitioner renewed her application for Writ of Certiorari, filing same on May 10, 1965. Certiorari was granted by this Court on October 11, 1965.

f) Argument and Conclusion:

In 1961, the 25th Legislature of the State of Arizona passed Arizona Revised Statute 38-231, demanding that every employee of every board, commission, agency and independent office of the State and any of its cities, towns,

school districts and public institutions should from that point on not pay any more salary to any employee who failed or refused to sign a disclaimer oath, in the following words:

"State of Arizona, County of .....

I, (type or print name) do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God (or so I do affirm).

.....

(Signature of officer or employee)"

However, the *meaning* of the oath is set forth in Section E of the particular statute, to-wit:

"Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly

> and wilfully becomes or remains a member of the Communist Party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the State of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment."

When faced with this legislation, Barbara Elfbrandt, a teacher and Quaker, joined together with other teachers and other public employees to discuss whether in good conscience she or they could sign such an oath, given such a meaning and interpretation by the Legislature. The statute provided for no hearing or any method to get a hearing to determine whether one was loyal or not loyal. With the attendant legislation passed at the same time, to-wit: "The Communist Control Act", Title 14, Chap. 2, Art. 1, A.R.S. 1956, 16-205 and 16-206 (see Appendix for statement), it was clear that in good conscience a great number of people could not sign the oath, with the interpretation provided by the Legislature: not on the basis of a conscionable belief that they were members of any organization that could

clearly be defined as "Communist", but on the basis that as intelligent persons they could not know what the Legislature intended to cover. To submit to a possible perjury prosecution before an unknown jury in a State whipped by Barry Goldwater right-wing Birchite "hard-core" Americanism, would leave one to the gentle mercies of such "juries" in defining "membership", "knowing membership", "affiliated membership", "acts to aid or abet the overthrow by force of the government". One could not in good conscience put oneself in such jeopardy.

This Court should declare the Arizona Statute unconstitutional for the first and prime reason that the Arizona statute, as presently constituted, is a denial of procedural Due Process as guaranteed by the Fourteenth Amendment to the U.S. Constitution, in that no hearing is provided before termination of a public employee's salary upon his refusal, for any reason, to sign the oath demanded by the Legislature. This legislation was adopted without any public hearing.

The Legislation Is a Violation of the Guarantee of Procedural Due Process

> The concept of due process cannot be expressed in precise terms. Broadly speaking, it denotes our sense of what constitutes fairplay in the legal procedures under which a man is tried. *Galvan* v. *Press,* 1954, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911. Expressed in terms of the relief provided by the writ of habeas corpus it is said that the scope of the writ 'is largely a reflection of our contemporary attitudes towards an ideal of fairness in the administration of justice.' Note, 61 Harv. L. Rev. 657 (1948), quoted in the case of *Brooks* v. *Gladden,* 358 P. 2d at p. 1059 (1961).

"In the recent case of *Slochower* v. *Board of Higher Education of New York City,* 1956, 350 U.S. 551, 76 S. Ct. 637, 638, . . . In setting aside the dismissal, Mr. Justice Clark, who delivered the opinion of the Court, pointed out that dismissal under the section was automatic, with no right to charges, notice, hearing or opportunity to explain, and thus lacking in due process." *Board of Public Ed.* v. *Beilan,* 125 A. 2d 327 (1956), at p. 332.

The questioned statute makes it mandatory for the affected State employee, County employee and all others defined to either sign the Oath or be denied effectively employment or in the contingency they are already employed, remuneration. Fair play demands that a man be given an opportunity to explain as well as to defend his position. The hard mailed fist of this legislation affords no such opportunity. The association with a "contaminated" organization may be for any number of reasonable reasons each of which would be in the public interest, viz. a university professor studying the organizational character of a so-called 'Communist Subordinate organization.'

In *Lerner* v. *Casey,* 357 U.S. 468, 2 L. Ed.2d 1423, at page 1435 L. Ed. Justice Douglas said:

> Our legal system is premised on the theory that every person is innocent until he is proved guilty. In this country we have, however, been moving away from that concept. We have been generating the belief that *anyone who remains silent when interrogated about his unpopular beliefs or affiliations is guilty. *(357 U.S. 414). I would allow no inference of wrongdoing to flow from the invocation of any constitutional right. I would not let that principle bow to popular passions. For all we know we are dealing here with citizens who are wholly innocent of any wrongful action. That must

indeed be our premise. When we make the contrary assumption, we part radically with our tradition . . .

(At page 1437 L. Ed.) When we make the belief of the citizen the basis of government action, we move toward the concept of *total security*. Yet *total security* is possible only in a totalitarian regime[2]—the kind of system we profess to combat.

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[2] In an analogous situation, Judge Pope stated the problem for the Court of Appeals in *Parker* v. *Lester* (C.A. 9 Cal.) 227 F. 2d 708, 271.

> "It cannot be said that in view of the large problem of protecting the national security against sabotage and other acts of subversion we can sacrifice and disregard the individual interest of these merchant seamen because they are comparatively few in number. It is not a simple case of sacrificing the interest of a few to the welfare of the many. In weighing the considerations of which we are mindful here, we must recognize that if these regulations may be sustained, similar regulations may be made effective in respect to other groups as to whom Congress may next choose to express its legislative fears. No doubt merchant seamen are in a sensitive position in that the opportunities for serious sabotage are numerous. If it can be said that a merchant seaman notwithstanding his being on board might sink the ship loaded with munitions for Korea, it is plain that many persons other than seamen would be just as susceptible to security doubts. The enginemen and trainmen hauling the cargo to the docks, railroad track and bridge inspectors, switchmen and dispatchers, have a multitude of opportunities for destruction . . .
>
> It may be possible that we have reached an age when our system of constitutional freedom and individual rights cannot hold its own against those who, under totalitarian discipline are prepared to infiltrate not only our public services, but our civilan employments as well. In the event of war we may have to anticipate Black Tom explosions on every waterfront, poison in our water systems, and sand in all important industrial machines. But the time has not come when we have to abandon a system of liberty for one modeled on that of the Communists. Such a system was not that ordained by the framers of our Constitution. It is the latter we are sworn to uphold."

Justice Brennan in the same decision, at page 1438 L. Ed. says:

> Moreover, the States' actions touch upon important political rights which have ever warranted the special attention of the courts. It may be stated as a generality that government is never at liberty to be arbitrary in its relations with its citizens, and close judicial scrutiny is essential when state action infringes on the right of a man to be accepted in his community, to express his ideas in an atmosphere of calm decency, and to be free of the dark stain of suspicion and distrust of his loyalty on account of his political beliefs and associations.

In the case of *Alpert* v. *Board of Governors of City Hospital,* 145 N. Y. S. 2d 534 (1955), the Court held that a qualified physician could not be arbitrarily denied the use of the facilities of a City Hospital and at page 538 said:

> . . . (2) public or governmental action is limited by the constitutional requirement of due process of law.
>
> [2] In one sense, of course, there is no constitutional right to practice medicine in a public hospital, *Hayman* v. *City of Galveston,* 273 U.S. 414, 47 S. Ct. 363, 71 L. Ed. 714, any more than there is an absolute right to sell alcoholic beverages or to drive an automobile. Valuable privileges, however, are also entitled to the protection of law. *Hecht* v. *Monaghan,* 307 N.Y. 461, 121 N.E. 2d 421; *Wignall* v. *Fletcher,* 303 N.Y. 435, 103 N.E. 2d 728; *Elite Dairy Products* v. *Ten Eyok,* 271 N.Y. 488, 3 N.E. 2d 606 . . . There was in this case a lack of procedural due process in arriving at the determination.

Though the doctor in the case had no contractual or statutory right to practice at the City Hospital, that Court recognized the fundamental duty upon the State to act with fairness.

In *Rudder* v. *U.S.*, 226 F. 2d 51 (1955), the Court dealt with the attempted termination of tenancy in a municipal housing unit upon the refusal of the tenant to sign a certificate that they were not members of certain listed organizations to be unconstitutional. The Court said at page 53:

> The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process.

The Arizona Statute is arbitrary in that it does not afford a person an opportunity before placing himself in jeopardy of criminal prosecution or in jeopardy of severe economic loss to defend his association or to be informed as to the particular organization to which he may not belong.

Kenneth Culp Davis, Professor of Law, University of Minnesota Law School, in his article, "The Requirement of a Trial Type Hearing", 70 Harvard Law Review No. 2 commencing at page 193 in 1956, discusses the type and character of cases in which there was a requirement of a trial type hearing. In discussing the usual type of argument that public employment is a privilege, he points out that

> The plain fact is that the Courts often give legal protection to what they persist in calling 'privileges'. In doing so they commonly rely upon one or more of three ideas or on a fourth method which involves the lack of

> an idea. The three ideas are: (1) that constitutional principles of substantive and procedural fairness apply even when only a privilege is at stake and even when the privilege itself is not directly entitled to legal protection; and (2) that when a privilege is combined with another interest the combination may be a right and accordingly entitled to legal protection. The remaining method is (3) to cast logic to the winds in discussing right and privilege or to provide legal protection to a privilege without mentioning the problem of privilege.
>
> (I) The essence of the first idea is that the government is still the government even when it is dispensing bounties, gratuities, or privileges, that we want the government to be fair no matter what its activities may be, and that often the best way to assure governmental fairness is by relying upon judicial enforcement of the usual concepts of fairness. Therefore, the basic constitutional limitations having to do with fairness often apply even though the privileges as such are not entitled to legal protection.
>
> In tort law, the accident victim has no right to be helped by the (p. 226) passer-by who volunteers to help. Like the passer-by, the government may refuse altogether to help applicants for gratuities, but it cannot provide the help improperly; it cannot grant or withhold on the basis of racial or religious discrimination.

At page 227 he continues and says:

> Confronted with its own previous statement that persons seeking employment in the New York public

schools have "no right to work for the State in the school system on their own terms," [121]

[121] *Adler* v. *Board of Educ.*, 342 U.S. 485, 492 (1952).

the Court responded:

To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.[122]

[122] 344 U.S. at 191-92.

At pp. 229, 230:

A New York Court has stated a proposition which any other court is free to use as a tool for justice: "Valuable privileges . . . are . . . entitled to the protection of law." [127]

[127] *Alpert* v. *Board of Governors of City Hospital*, 286 App. Div. 542, 547, 145 N.Y.S. 2d 534, 538 (4th Dep't 1955).

At page 229:

Even if working for the government is regarded as no more than a privilege, a discharge for disloyalty or for doubt about loyalty may involve such legal rights as those in reputation and in (p. 230) eligibility for other employment. The Supreme Court has specifically recognized this. In holding that the Constitution was violated by excluding certain persons from employment at a state college, the Court declared:

> 'There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when "each man begins to eye his neighbor as a possible enemy." '[128]

[128] *Wieman* v. *Updergraff,* 344 U.S. 183, 190-91 (1952), quoting an address by Judge Learned Hand.

At pp. 240-241:

> The Supreme Court in *Cole* v. *Young*[173] has already shown that it is willing to make the private interest paramount when the employee's position is not a sensitive one. Even though procedure was (at p. 241) not directly involved, the Court pointed out that the statute called for summary action and declared:
>
> > 'Indeed, in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets.[174]

[173] 351 U.S. 536 (1956).
[174] Id. at 546-47.

In addition, in *Nostrand* v. *Little,* 386 U.S. 436, 7 L. Ed. 2d 436, this Court's dismissal of the appeal from that case in the State of Washington, 361 P. 2d 561, is interesting in that as reported in the briefs of counsel at page 954, 7 L. Ed., U.S. Supreme Court Reports, and in particular

the abstract of the brief filed by the Attorney General from the State of Washington, set forth at page 950,

> "The procedure prescribed in the rules and regulations for the hearing before discharge of a professor is substantially the same as for an accused person in a court of law, except for a jury trial."

It would appear, then, that in the dismissal, this court was indicating that unless there was some form of hearing to allow a party an opportunity to explain his position, a State could not either under procedural Due Process guaranteed by the Fourteenth Amendment to the U.S. Constitution, or Freedom of Speech and Assembly as guaranteed by the First Amendment to the U.S. Constitution, arbitrarily deny employment or the substance of employment, deny salary.

This case is not foreclosed by the court's decision in *Beilan* v. *Board of Education,* 357 U.S. 399, for the issue there was that the teacher was dismissed for incompetency, arising from her refusal to answer questions directed to her for the purpose of obtaining information that might bear on her competency as a teacher. Nothing per se in that decision would suggest that a person might be fired as a teacher because of membership in the Communist Party. In any event, the teacher was afforded a hearing in the *Beilan* case, and procedural due process was therefore satisfied.

In re Anastaplo, 366 U.S. 82, and *Konigsberg* v. *Calif.,* 353 U.S. 252, do not apply to this case because they deal with membership in the Bar, which they held was a privilege; and, as noted in *Wieman* v. *Updergraff,* 344 U.S. 183, state employment is not within this privileged classification.

Adler v. *Board of Education,* 342 U.S. 485, does not foreclose the issues in this case, for again the facts in that case indicate a legislative investigation, a hearing for the purpose of determining information upon which the particular level of State government could act.

The Arizona statute merely labels and classifies oath-takers and non-oath-takers. No information is garnered by the State. No public benefit—except for red-baiting of the individuals—is obtained.

In general, this interpretation of the denial of procedural due process was adopted in the case of *Heckler* v. *Shepard,* 243 F. Supp. 841, decided June 19, 1965. It would appear that the Idaho State statute demanded that the State employee affirm his loyalty and swear non-participation in any organization that advocated the forcible overthrow of the Government. Upon the employee's refusal, he was to be summarily discharged.

The same result is obtained in Arizona, in that the employee is either denied employment forthwith or is substantially discharged by reason of termination of his salary. In contradiction of the opinion of the State Supreme Court of Arizona, the Federal Court held (and advisedly so):

> ". . . (The) unexplained refusal to take an oath of the kind prescribed by the Idaho statute may be as injurious to the state employee as a criminal conviction:"

All in all, to take by covert oath the ephemeral right to work elsewhere, the right of an American to know where he stands and to know what his responsibility is to his government, and to take away his "day in court", is no less a theft than the taking of his birthright.

As Mr. Justice Frankfurter said in *McNabb* v. *U. S.*, 318 U.S. 332 at page 347:

> "The history of liberty has largely been the history of observance of procedural safeguards."

THE LEGISLATION IS UNCONSTITUTIONAL IN THAT THERE IS NO LEGAL NEED TO INFRINGE UPON THE CONSTITUTIONAL GUARANTEES OF FREEDOM OF SPEECH AND ASSEMBLY

Without question, the compulsion to sign the loyalty oath provided for in the questioned statute and the premised limitation on the activities of governmental employees in the State of Arizona is a restriction on the constitutional rights to Freedom of Speech and Assembly of every such employee.

Assuming that the court could adopt the Relativist Doctrine of balancing the guarantees of the Bill of Rights against the social need of protecting the State of Arizona from the activities of subversive employees, it is the position of the petitioner herein that there has been no legal demonstration of any such need.

Like Freedom of Speech and a Free Press, the Right of Peaceable Assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry, a government dedicated to the establishment of justice and the preservation of liberty. It is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process of the Fourteenth Amendment from invasion by the State.

See

DeJonge v. *State of Oregon,* 299 U.S. 353, 364, 57 S. Ct. 255, 259, 81 L. Ed. 278;

NAACP v. *State of Alabama,* 357 U.S. 449, 460, 78 S. Ct. 1163, 1170, 2 L. Ed. 2d 1488; and *Bates* v. *City of Little Rock,* 80 S. Ct. 412 (1960).

In *Bates* v. *City of Little Rock, supra,* the court quoted with approval *NAACP* v. *State of Alabama, supra:*

> "This court has recognized the vital relationship between the freedom to associate and privacy in one's association. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

Again in *Bates* v. *City of Little Rock, supra,* Justice Black, concurring, said:

> ". . . First Amendment rights are beyond abridgement either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government. One of those rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right . . . "

In the case of *Killingsworth* v. *West Way Motors, Inc.,* 347 P. 2d 1098 (Ariz. 1959) the court said:

> ". . . The Legislature does have such powers even over a legitimate business even if it is of such a nature that it is susceptible to abuse so long as such legislation is reasonable and not arbitrary and has a reasonable relation to the purpose of its enactment. The measure of its police powers is always commensurate with public necessity." Citing *Edwards* v. *State Board of Barber Examiners,* 72 Ariz. 108, 231 P. 2d 450.

See also "Natural Rights and the Founding Fathers—the Virginians" by C. J. Antieau, Prof. Law, Georgetown U. v. 17 Washington & Lee Law Review p. 43 et seq.

In the case of *Village of Moyie Springs, Idaho* v. *Aurora Mfg. Co.,* 353 P. 2d 767 (1960), the court said at pp. 774-5:

> "(3) Neither can the legislature bind the courts by its declaration that the act shall not be construed to be in violation of certain provisions of the constitution. The limitations of the constitution are binding upon the legislature, and cannot be nullified or avoided by the simple device of declaring them inapplicable."

See also *Wynehamer against The People,* New York Reports, Cases in the Court of Appeals, V 13 (1888) p. 378; *Near* v. *Minn. ex rel. Olson,* 283 U.S. 697, 75 L. Ed. 1357 (1930); and *Gilbert* v. *Minnesota,* 254 U.S. 325, 41 S. Ct. 125.

Judge Leon Yankwich, U.S. District Ct. Judge, Southern California, in a long article in Hastings Law Journal, X, commencing at p. 250 in an article entitled "Social Attitudes as Reflected by Early California Law" points out that

> "More and more restraints on personal liberty are sought in the name of national security . . . reveals a pattern which is old in the history of freedom of expression in the English speaking world . . . The argument used is that inherent in every government is the right to defend its existence. But granted this to be so, it must do it by democratic means and not resort to the methods of totalitarianism."

He further points out that every time there is some scare, the old device of the use of the loyalty oath is brought out by the inflamed members of the legislature.

See also

Taylor, GRAND INQUEST (1955);
Mason, SECURITY THROUGH FREEDOM (1955);
Wiggins, FREEDOM OR SECRECY (1956);
Brown, LOYALTY AND SECURITY (1951).

A study of the foregoing authorities would indicate that the so-called legislative need is merely the hysteria of the public removed to the halls of the timid legislators.

The legislation in Arizona was adopted without public hearings, without affording the broad mass of the people the opportunity to discuss the danger of the slander promulgated in the City of Phoenix, Arizona by one of Dr. Schwartz's notorious "Anti-Communist Crusade" school sessions, which were meeting and picketing the capital city of the state at the same time that the State Legislature was meeting and adopting the legislation in question.

No opportunity was afforded the public employees of this state to challenge the completely unsupported public disparagement of them as being treasonable. No hearings; no findings; not even findings or reports by the House Committee on Un-American Activities of the Congress have ever made any findings within the State of Arizona.

One may also take Justice Holmes' dictum of "clear and present" or Judge Learned Hand's weakened and watered-down version. Taking either, where can the courts find any justification in concluding that there is a danger to the State of Arizona? The Federal Courts had the long (and somewhat infamous) hearings of the Federal Congressional Committees on Un-American Activities dating back to the rather colorful Martin Dies (circa 1938). There are no such rec-

ords of hearings in the State of Arizona. An examination of the voluminous material of the Federal Congressional Committee indicates that they have never held any hearings in the State of Arizona.

If the Arizona State Legislature has never held hearings and made report of subversion within our State, and the Federal Congress has held no hearings in this State, then, aside from the puffing of the hysterical legislators, do we find the necessary requisite fact situation demanding the infringement of our rights by this infamous statute?

See for cases and reviews dealing with the "clear and present danger" doctrine:

In re Albertson's Claim, 168 N.E. 2d 242 (1960);

Danskin v. *San Diego, UN. Sch. Dist.,* 171 P. 2d 885;

First Unitarian Church v. *Los Angeles,* 357 U.S. 545, 2 L. Ed. 2d 1484, 78 S. Ct. 1350 (1958);

DeJonge v. *Oregon,* 299 U.S. 353, 81 L. Ed. 278 (1937);

United States v. *Schneiderman,* 102 F. Supp. 87 (Calif. 1951);

Gilbert v. *Minnesota,* 254 U.S. 325, 41 S. Ct. 125;

American Civil Liberties Union of Southern California v. *Board of Education of City of Los Angeles,* 359 P. 2d 359 (1961);

29 Iowa L. Rev. 448 (1944) "Constitutional Liberties and Statutory Construction," by Frank E. Horack, Jr. (B.A. 1926, J.D. 1929, State Univ. of Iowa; LL.M. 1930, S.J.D. 1931, Harvard.) (Editor: Casebook on Legislation, 1940; Prof. of Law, Indiana U.), 5 UCLA L.R. 316 (1958);

"Case notes: Constitutional Law, Smith Act: Meaning of Advocate . . . " by Robert W. Vidor, Calif. Law Rev. V 47:930 Cons. Law Note.

Even assuming that the Communist Party now has a special status in American Law (see *Steinmetz* v. *California State Board of Education,* 271 P. 2d 614 (1954)), this questioned statute of the State of Arizona does not limit itself to that named party but puts under interdict all who belong to any organization which may advocate the forcible overthrow of this government, having knowledge thereof.

Because the petitioner in this case is a school teacher, the problem of this type of legislation regarding teaching becomes even more pertinent.

In considering the legislative need for this type of legislation, not only the effect on the violation of the Bill of Rights must be considered but also the effect of such legislation. Its effect must be thought of in terms of (1) the injury it does and (2) its effectiveness to answer the evil which it purports to cure.

The effect on government employees and particularly on the professional groups by all reports has been devastating. It has put them in a position of jeopardy, of fear, that has caused them to restrict their areas of inquiry with a resultant loss of knowledge.

(Historians have noted that an incalculable amount of damage was done to the exploration and accumulation of knowledge by reason of the direct and indirect fears of scholars that they would be put to THE INQUISITION for heresy; viz. Galileo and his struggle with The Inquisition; how many lesser men just gave up?)

The best study of this has been done by Lazarsfeld and Thielens, Jr., in a book called "The Academic Mind", published by the The Free Press Publishers, Glencoe, Illinois 1958, being a report of the University of Columbia Bureau of Applied Social Research. The entire book is quotable and should be read. It says in general that the effects of the present loyalty craze have been devastating to the academic world.

The Committee on Social Issues of the Group for the Advancement of Psychiatry (a society of more than 150 psychiatrists), published a Seminar October 1954 indicating the general conclusion that the effect of these loyalty oaths was deleterious in the extreme to the functioning of the academic world.

According to the bulletin of the American Association of University Professors, Summer Issue, June 1960, that august body disapproved the disclaimer affidavit requirement of the National Defense Education Act of 1958 by adopting a resolution to that effect at its 46th annual meeting. Universities such as Brandeis University, Massachusetts; Bryn Mawr College, Pennsylvania; Harvard University, Massachusetts; Yale University, Connecticut; Mount Holyoke, Massachusetts and numerous others have refused to participate or have withdrawn in whole or in part from NDEA program because of its demand that students and professors doing the work must file a disclaimer affidavit. The article also lists over a hundred institutions of higher education whose presidents or boards have publicly stated their disapproval.

The growing alarm as to the effect of this disclaimer oath on higher education in the United States is such that finally the Federal Congress in the last year abolished the dis-

claimer affidavit requirement of the National Defense Education Act of 1958.

In dealing with the effectiveness of the statute, all reports indicate its *ineffectiveness.* See "Report on the Los Angeles City and County Loyalty Programs" by Harold T. Horowitz, Asst. Dir. Grad. Program, School of Law USC, 5 Stanford Law Rev. 233; Clark Byse (Prof. of Law, Univ. of Pa. Law School), "A Report on the Pennsylvania Loyalty Act", V 101, Univ. of Pa. Law Rev. p. 480 et seq.; Alex Nelson member Illinois Bar, Chairman of Illinois State Bar Association's Committee on Civil Rights, Article "People, Government and Security", V 51 Northwestern Univ. Law Rev., p. 79; and John Lord O'Brien: "New Encroachments on Individual Freedom", 66 Harvard Law Rev. No. 1.

See also "The Great Historical Examination of Oaths" by Helen Silving in two issues of the Yale Law Journal. Most particularly, I refer you to the second part of the article entitled "The Oath: II" in V 68 of the Yale Law Journal commencing with page 1527. In closing her long dissertation, she concludes:

> "The democratic state must limit its claim to man's truth to instances of clear superior interest, and it must yield that claim in cases where disclosure of truth cannot be expected from the individual. Such cases include all those involving the accused or the suspect, as well as all persons closely connected with them. With or without oath, no man should be bound by law to make disclosures which would cause him or persons close to him substantial harm. Man should be held by law to average law abidance, not to the utmost self-sacrifice."

For cases dealing with the effect and need of this legislation, see the following cases and reviews:

Shelton v. *Tucker*, 81 Sup. Rep. 247 (1961);
Rockwell v. *Morris*, p. 25, New York Supplement, 2nd Series, V 211 #1, 1961;
Board of Public Ed. Sch. Dist. of Phila. v. *Intille*, 136 A. 2d 420;
The University of Chicago Law Review, V. 18, No. 4, 1951, Comments: pp. 757-816.

In summary: There is no need; the statute is ineffective; and it is gravely dangerous to our society.

In any consideration of the need for this type of legislation, without granting the petitioners a hearing, it would seem that the Legislature, by allowing parties to continue employment if they are wealthy "subversives", or so dedicated as to maintain this subversion without salary, would admit that there was no substantial danger to the public institutions of this State.

Note further: To the date of this brief, there has not been one prosecution initiated under these statutes in the State of Arizona.

In brief, the statute, by its hopeless complication of verbiage, is so vague as to be violative of the Sixth Amendment to the U.S. Constitution. It places the full burden upon the honest citizen employee to define in advance, at his peril, such words as "knowingly", "willfully", "does commit or aid", "advocates the overthrow", or "knowingly or willfully becomes or remains".

What can the word "remain" mean? The statute relates that if you remain a member after signing the oath, you

are guilty of a felony; but there is no legal procedure to have your name stricken from a private organization's roster.

What is a "subordinate organization of the Communist Party"? If one reads the newspapers, according to those who are now coming to be considered responsible people, such organizations as the American Civil Liberties Union, a goodly number of the members of the United States Supreme Court, and at least fifty percent of the State Department, are in effect members of a subordinate organization of the Communist Party!

There is no legislative definition of these terms, approved by judicial decision, which would allow the ordinary, reasonable employee of the State of Arizona or one of its cities —whether he is a garbage collector or a Doctor of Philosophy—to so reasonably guide his conduct, after taking the demanded oath, as to avoid the snares of unjust prosecution.

The fiendishness of this legislation is that it deprives the most honest man of the will to sign. The most conscionable man would be the first to notice its snares and refuse the oath. The net effect, of course, is to deny the State of Arizona the most qualified people for its service, and to that extent therefore to deny to the country as a whole the best administration of its government.

The statute is a Bill of Attainder in violation of Article I, Section 10 of the U.S. Constitution, as interpreted by the Supreme Court in *Cummings* v. *Mo.,* 18 L. Ed. 366 (1866). In this case, where test oaths for attorneys, priests, candidates for public office and others who may have aided the South during the Civil War, was the issue, they were held by the United States Supreme Court to be Bills of At-

tainder. In *Cummings, supra,* Mr. Justice Field defined a Bill of Attainder as:

> ". . . a legislative act which inflicts punishment without a judicial trial . . . (The legislature is) creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals."

It will be noted that it is the elimination of the adjudicatory process which offends the prohibition against the Bill of Attainder, not the fact that the attaint was *ex post facto.*

Mr. Justice Field continued:

> "We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty and property—as comprehending every right known to the law. . . . The deprivation of any rights, civil or political, previously enjoyed, may be punishment." 4 Wall. 320.

In *Ex parte Garland, supra,* Mr. Justice Miller, though dissenting, defined a Bill of Attainder (p. 388):

> "I think it will be found that the following comprise those essential elements of bills of attainder in addition to the one already mentioned (corruption of the blood), which distinguish them from other legislation and which made them so obnoxious to the statesmen who organized our government: I. They were convictions and sentences pronounced by the Legislative Department of government instead of the Judicial. II. The sentence

> pronounced and the punishment inflicted were determined by no previous law or fixed rule. III. The investigation into the guilt of the accused, if any such were made, was not necessary or generally conducted in his presence or that of his counsel and no recognized rule of evidence governed the inquiry."

This definition was clear and unequivocal. It was followed in *U. S.* v. *Lovett,* 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946). Congress denied pay to named government employees. Mr. Justice Black wrote the opinion of the court, striking down the legislation as a bill of attainder, "a legislative act which inflicts punishment without judicial trial" (p. 315). This Court held that *Garland* and *Cummings* stand for the proposition "that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

The instant case meets every test laid down by these cases. The Court in the cases cited—concerned with the fact that the adjudication was by the Legislature—made no issue as to whether past, present or prospective conduct was inhibited. The acts were held to be bills of attainder.

Justice Douglas, dissenting in *Flemming* v. *Nestor,* 80 S. Ct. 1367 (1960) at page 1382 et seq. characterizes the evil to be ended by the Constitutional prohibition of Bills of Attainder, as being the indiscriminate censure of citizens by legislative fiat. He quotes the address of Irving Brant on the proposition that James Madison won the fight in Constitutional Committee to extend the prohibition from

merely criminal penalties to that of public censure. To force a public employee to make a theoretical choice between signing The Oath or starving, with all the public censure aroused by "red-baiting" is to allow the Legislature the unconstitutional privilege of enacting a Bill of Attainder.

In *Heckler* v. *Shepard, supra,* the Federal Court has accepted as a matter of common knowledge, of which the Court may take judicial notice, that where public dismissal automatically follows failure to take and subscribe a test oath, the inevitable assumption of the community is that the employee failed the test.

A history of Bills of Attainder would indicate that they were not limited to providing a punishment for past acts alone, but included punishment in the event of future acts. (See 13 W.I.L.L. 3, c. 3 pub.) Bills of Attainder historically provided the penalty that unless by a certain date the individual or class undertook to change their conduct (see 19 Geo. 2, c. 26 pub.), the penalty of attainder would lie. The historical requirement of punishment was originally, in early decisions of our courts, restricted from the European concept of public censure to one demanding criminal incarceration or fine, to again a broader concept of punishment as expressed in the adoption by the U.S. Supreme Court that expatriation of a citizen is punishment. (See *Perez* v. *Brownell,* 356 U.S. 44, 1958.) This later doctrine of punishment is more nearly within the concepts laid down by the court in *Cummings* v. *Missouri, supra.*

Thus, in the instant case, though the activity sought to be proscribed is future in its application, and the party has an opportunity to change his conduct, and the punishment is not penal servitude or fine, and the loss is of employment or the substance of employment: salary—that statute meets

all the historical definitions of a Bill of Attainder, as is therefore prohibited. (See "The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause," Yale Law Journal, Vol. 72, 1962, pp. 330-367.)

The doctrine of *mens rea,* the Constitutional requirement of specificity in the terms of criminal statutes, and the prohibition against Bills of Attainder are fundamentally all aspects of the Founding Fathers' desire to maintain a separation of powers between the departments of government. The Legislature, with the very restrictive power of impeachment, may not become a Judiciary and impose either direct or indirect penalties upon an individual without affording him the full panoply of a judicial proceeding. The Judiciary may not act as a Legislature by applying legislation which by its terms is so general and vague as to allow them to in effect write legislation. The prospective defendant (citizen) must have such law so clearly expressed as to have acted in spite of his knowledge of its illegality.

In construing legislation that is subject to Constitutional attack, the Court must be loath to interpret it by adding Constitutional prohibitions, for two reasons:

1) It becomes encroachment on the legislative power of delineating its own legislation; and

2) It subjects the citizen to even more dangers of ultimate vagueness. The doctrine of *stare decisis* has not been known for its rigidity of application and most certainly not in more recent years. With the power of the court to change its Constitutional interpretation, the well-advised and legally-advised citizen is subjected to the possibility that his unknowing conduct may not be his defense to a charge of

membership in a subversive organization by the subsequent rationale of a later appellate court and without the protection of the Constitutional mandate of the prohibition against *ex post facto* law.

Thus, in the instant case, the statute is unconstitutional as being a Bill of Attainder.

Again, the statute is unconstitutional as an attempt by indirection to force a citizen to incriminate himself, in violation of the Fifth Amendment to the U.S. Constitution.

One might ask:

Against whom is one giving testimony, under the terms of the statute in question, when there is not the usual trial or hearing procedure? There is no court; there is no administrative body. But certainly there is the court of public opinion.

The legislation is a denial of Equal Protection of the Laws, provided by the Fourteenth Amendment to the U.S. Constitution, in that there has been no distinction supported by evidence, between the possible deleterious effects of subversion by the general members of the public of the State of Arizona and subversion by the garbage collector of the lowly City of Tucson.

In *People* v. *Felberbaum,* 199 N.Y.S. 2d 326 (1960), holding a statute unconstitutional which provided different standards of justice for the cities of more than one million population and cities with less, that court said:

> "While we realize that the legislature has a right to enact different laws affecting the smaller communities than those which affect the large cities, such right is limited to procedural regulations and not to substantive

> rights guaranteed to all citizens alike. **The right to** such constitutional guarantees is preserved to all citizens of the state, be they 'right or wrong', 'truthful or lying', 'good citizens or bad.'"

If the statute in question is "good" for the public employee, it should be given "more good" for the head of public utilities, whose activities might in times of emergency do more irreparable damage than any grade school teacher teaching "a subversive form of the A B C's."

This action having been referred back to the State Supreme Court by the United States Supreme Court for reconsideration in light of *Baggett* v. *Bullitt,* 12 L. Ed. 2d 377, it is the position of the Petitioner that the Arizona statute in question is unconstitutionally vague under the ruling of said case.

Referring to the *Baggett* case, *supra,* at page 382, Col. 2, at the last paragraph thereof, in the Lawyer's Edition report of the case, the Court says:

> "The oath required by the 1955 statute suffers from similar infirmities. A teacher must swear that he is not a subversive person: that he is not one who commits an act or who advises, teaches, abets or advocates by any means another person to commit or aid in the commission of any act intended to overthrow or alter, or to assist the overthrow or alteration, of the constitutional form of government by revolution, force or violence."

Abstracting by omitting some of the alternatives, the 1955 Washington Law will read as follows:

> "A teacher must swear that he is not a (knowingly*) subversive person: that he is not (knowingly*) one who . . . advocates . . . another person to commit or aid in the commission of any act intended to overthrow . . . the constitutional form of government by . . . force or violence."

Subsection E of the Arizona law can be abstracted by omitting some of the alternatives, as follows:

> "Any . . . employee . . . having taken the . . . oath . . . and knowingly or wilfully at the time of subscribing the oath . . . or at any time thereafter during the term of office . . . does . . . advocates the overthrow by force or violence of the government of this state . . . shall be guilty of a felony."

In the *Baggett* case the quoted portion of the Washington Law was held unconstitutional. The Court said at page 383 of Lawyer's Edition:

> "The susceptibility of the statutory language to require foreswearing of an undefined variety of 'guiltless knowing behavior' is what the Court condemned in Cramp. This statute, like the one at issue in Cramp, is unconstitutionally vague."

We thus see that the Arizona Statute and the Washington Statute are quite similar and it would appear therefore that the ruling of the United States Supreme Court should be identical.

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* I have added the word *knowingly* on the basis of both the *Baggett* and *Gerende* cases that the words of scienter will be presumed.

Gerende v. *Board of Supervisors,* 341 U.S. 56, 95 L. Ed. 745, 71 S. Ct. 565, has been cited by the state as authority for the constitutionality of the Arizona statute. The *Gerende* case is no longer—if it ever was—authority in support of the constitutionality of the Arizona statute. It is interpreted by the majority opinion in *Baggett* v. *Bullitt, supra,* in footnote to the Court's opinion No. 7, as follows:

> "... under Maryland law requires one to swear that he is not a person who is engaged 'in an attempt to overthrow the government by force or violence' and that he is not knowingly a member of an organization engaged in such an attempt." (Note that scienter was read into the law by the Supreme Court in its original decision.)

The Court in the *Baggett* case, *supra,* thus distinguishes the Maryland law from the Washington statute, affirming in effect the *Gerende* case, *supra,* on the basis of the above interpretation. The Arizona statute does not come within the *Gerende* case because our statute says (see Subsection E): "... or advocates the overthrow by force or violence."

The word "engage", in its ordinary usage, is a word of action, such as "to engage the enemy." Whereas, the word, "advocate", as used in the Arizona statute, may mean just the words in a philosophical argument. Assuming, then, the *Gerende* case to still be the law, it does not apply to the Arizona statute, and by reference the *Baggett* case would hold the Arizona Statute unconstitutional.

Dennis v. *United States,* 341 U.S. 494, 95 L. Ed. 1137, 71 S. Ct. 857, and *Yates* v. *United States,* 354 U.S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064, have both been cited by the

State as authority that the proscription against advocacy of the violent overthrow of the government is not unconstitutional. If this was the previous understanding of the meaning of the *Dennis* and *Yates* cases, the majority opinion in the *Baggett* case now overrules these previous interpretations. The majority in its opinion, as set forth in its footnote 8, on page 383 of the Lawyer's Edition report of the *Baggett* case, points out that the *Dennis* case is only authority that,

> " . . . teaching and advocacy of action for the accomplishment of (overthrowing or destroying organized government) by language reasonably calculated to incite persons to sudden action . . . as speedily as circumstances would permit."

The *Dennis* decision does not allow the proscribing of advocating the forceful overthrow of the government.

The footnote further goes on to point out that the *Dennis* case does not uphold over a vagueness challenge (of constitutionality) that knowing and willful advocacy of the violent overthrow of the government is not protected by constitutional protection (Freedom of Speech—Freedom of Assembly).

Again, in the same footnote, the majority of opinion points out that *Yates* v. *United States,* 354 U.S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064,

> "The Smith Act reaches only advocacy of action for the overthrow of the government by force and violence."

The Arizona Statute in question proscribes all advocacy on the part of the public employees which advocates the

forceful overthrow of the government, without any limitation. To make the advocacy illegal, it must be "language reasonably calculated to incite persons to sudden action . . . as speedily as circumstances would permit," or advocacy of *action* for the overthrow of the government. Therefore, the *Baggett* opinion is authority that mere advocacy for the overthrow of the government by force and violence is protected by the United States Constitution under Freedom of Speech or Freedom of Association, and the Arizona Statute proscribing just such advocacy is therefore unconstitutional.

The concept of adequate forewarning before conduct could give rise to social punishment is envisioned in the *Talmud,* as set forth in a most interesting article by Helen Silving "The Origins of the Magnae Cartae", Harvard Journal of Legislation, Vol. III, No. 1, December, 1965, page 117, et seq.

> "However, the Talmud showed concern with the question of whether the children of Noah could be bound by a law that was not proclaimed at the time of their conduct. The Bible requires as a condition of punishment that the offender know the law in advance of the commission of the crime and not merely that he have an opportunity to learn it. These are all the elements of the maxim, *'nullum crimen, nulla poena sine lege praevia et scripta,'* statutory advance description, strict interpretation, and prohibition of analogy."

We are again involved in interpreting a statute with severe personal penalties, which acts prospectively, making the more sensitive man the most limited in his conduct. It

is not what reasonable men might or might not do in the way of prosecuting teachers or professors, but the very loose wording of the statute which puts the judgment on the individual as to what the possibilities of interpretation of such a word as *advocate* might mean at a future time and place.

The Court in the *Baggett* case, *supra,* points this out most convincingly:

> "Even if it can be said that a conviction for falsely taking this oath would not be sustained, the possibility of prosecution cannot be gainsaid. The State may not require one to choose between subscribing to any unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent loss of employment, and perhaps profession, particularly where 'the free dissemination of ideas may be the loser.' Smith v. California, 361 U.S. 147, 151, 4 L. Ed. 2d 205, 210, 80 S. Ct. 215. 'It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. Champlin Refg. Co. vs. Corporation Comm'n of Oklahoma, 286 U.S. 210, 243, 76 L. Ed. 1062, 1083, 52 S. Ct. 559, 86 ALR 403, cf. Small Co. v. American Refg. Co., 267 U.S. 233, 69 L. Ed. 589, 45 S. Ct. 295."

In considering the import of the *Baggett* case as it applies or may apply in the whole field of government loyalty oaths, it may be that the dissenting opinion of Mr. Justice Clark, joined in with Mr. Justice Harlan, more nearly points out the breadth of the majority's opinions than one might understand by just reading the majority opinion. The dis-

senting opinion states that the majority's decision does in fact overrule en toto the *Gerende* case, *supra* (*Garner* v. *Board of Public Works,* 341 U.S. 716, 95 L. Ed. 1317, and *Adler* v. *Board of Education,* 342 U.S. 485, 96 L. Ed. 517), and therefore knocks out the legal foundation of the state's position in this case of the constitutionality of the Arizona Statute. The dissenting opinion states that there is not sufficient difference between the wording, say in the *Gerende* case, of its loyalty oath and the wording of the loyalty oath in the Washington statute held constitutional by the majority opinion in the *Baggett* case to allow a reasonable distinction. If the dissent be right, then it is clear that what the majority in the *Baggett* case either did or is moving toward doing is to reverse the *Gerende* and other loyalty oath decisions and hold those loyalty oaths previously held constitutional, unconstitutional.

In considering the constitutionality of the Arizona Statute, the broad implications of the *Baggett* decision must be applied to all portions of the statute. Thus this Court should review whether the other terms of Section E are so vague as to be unconstitutional. Is the expression "remains a member of the Communist Party of the United States, etc." not too vague to be constitutional? What procedure will determine and show whether a person has disaffiliated? What criteria is established by the Statute to evidence such a termination of membership? In *NAACP* v. *Button,* 371 U.S. 432-433, 9 L. Ed. 2d 418, it states:

> "In appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. Thornhill v. Alabama, 310 U.S. 88, 97-98 (84 L. Ed. 1093, 1099, 1100,

> 60 S. Ct. 736); Winters v. New York (333 U.S. 507), 518-520 (92 L. Ed. 840, 851, 852, 68 S. Ct. 665). Cf. Staub v. City of Baxley, 355 U.S. 313 (2 L. Ed. 2d 302, 78 S. Ct. 277) . . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. Marcus v. Search Warrant, 367 U.S. 717, 733 (6 L. Ed. 2d 1127, 1137, 81 S. Ct. 1708). These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."

Again, what criteria are established in the statute for determining what is a subordinate organization or successor organization to the Communist Party?

In *Aptheker* v. *Secretary of State,* 12 L. Ed. 2d 992, p. 1001, the Court says:

> "In determining the constitutionality of Sec. 6, it is also important to consider that Congress has within its power 'less drastic' means of achieving the congressional objective of safeguarding our national security. Shelton v. Tucker, 364 U.S., at 488, 5 L. Ed. 2d at 237. The Federal Employee Loyalty Program, which was before this Court in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 95 L. Ed. 817, 71 S. Ct. 624, provides an example. Under Executive Order No. 9835, membership in a Communist organization is not

> considered conclusive but only as one factor to be weighed in determining the loyalty of an applicant or employee."

If it has not been felt necessary in the Federal Loyalty Program to automatically disbar from public employment membership in a Communist organization, this Court may appreciate the lessened need to invade the right of Freedom of Association and of Speech of the public employees of the State of Arizona.

Notice again, that as per footnote 9 of the majority's decision in the *Aptheker* case, *supra* (page 1000 of the Lawyer's Edition), the type of membership held to be permissively proscribed by the Federal Congress "was interpreted to include only 'active' members . . . " who have "knowledge of the organization's illegal advocacy." The Arizona Statute in question makes no such distinction as to the membership of the Communist Party proscribed, nor does it make any limitation on the type of advocacy proscribed.

In *Malloy* v. *Hogan,* 12 L. Ed. 2d 653, the United States Supreme Court has made certain the application of the Fifth Amendment guarantees against self-incrimination to the state through and by the Fourteenth Amendment to the United States Constitution. It thus becomes the Federal standard to the right against self-incrimination rather than the state interpretation of such right. It would therefore seem incumbent on this Court to review the Arizona State Loyalty Oath on the issue of self-incrimination. A reliance on any of the previous federal decisions in which State loyalty oaths were upheld, as against the right of self-incrimination, would now appear to be in jeopardy by reason of the collateral effect of *Malloy* v. *Hogan, supra.* Those

previous State Loyalty Oath cases, viz., *Garner* v. *Board of Public Works,* were decided at a time when only the state application of the doctrine against self-incrimination was considered. If our extant law is accusatory rather than inquisitional, which *Malloy* v. *Hogan* reconfirms, then to place the burden upon each employee of the State of Arizona to decide whether or not to sign the oath in question is in fact asking him to incriminate himself in the public mind as a Communist, and therefore is inquisitional rather than accusatory. For if he fails to sign the oath, he will be branded as a suspect person. He must take the financial burden that goes with the unofficial blacklist. The nature and horrible effects of the informal blacklist have been demonstrated publicly time and time again in the entertainment industry. How may a man decide what organization he may or may not belong to when the informal United States Attorney General's list varies from month to month and year to year, listing its purported Communist infiltrated organizations? (See Law in Transition Quarterly, Vol. 1, Fall 1964, #4, Aruel A. Morris, *Baggett* v. *Bullitt*: Scienter "Guiltless Knowing Behavior."

As Barbara Ward in her book, FAITH AND FREEDOM, Image Books, 1958, questions:

In an age of materialism, how can one expect the government to trust the untrammeled spirit of Man? The Legislature of the State of Arizona has voted its distrust of all the employees of government agencies of the State of Arizona. The Founding Fathers expressed their trust in the words of the Constitution. The then citizens of the colonies expressed their trust in themselves and their distrust in such legislators by their forcing the adoption of the Bill of Rights.

When one compares the overall strengths of the State of Arizona and of the United States of America in 1961 with the relatively undeveloped strength of the State of Arizona in 1931, and (even the more outrageous to the imagination) the poor and bedraggled signers of the Declaration of Independence with a runt of a country in mortal combat with the largest European power, how can we be so ashamed of ourselves and so fearful as to have so much less faith than they in our fellow citizen?

Freedom is like a delicate flower. Its blossom is subject to perish at the slightest exposure to an uncongenial environment, but its root is deep and strong and ever producing of that blossom which images the nature of each man and of all Mankind.

In conscience alone, this Court should declare the legislation unconstitutional.

Respectfully submitted,

this 8th day of January, 1966

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APPENDIX

APPENDIX

Constitution of the United States

ARTICLE I

Section 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male

inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

A.R.S. § 38-231 and § 38-233

As amended Laws 1961, Ch. 108, § 5 and § 6.

§ 38-231. Officers and employees required to take loyalty oath; form; penalty

A. In order to insure the statewide application of this section on a uniform basis, each board, commission, agency, and independent office of the state, and of any of its political subdivisions, and of any county, city, town, municipal corporation, school district, and public educational institution, shall immediately upon the effective date of this act completely reproduce § 38-231 as set forth herein, to the end that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers and employees of all boards, commissions, agencies and independent offices.

B. For the purposes of this section, the term officer or employee means any person elected, appointed, or employed, either on a part-time or full-time basis, by the state, or any of its political subdivisions or any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing.

C. Any officer or employee elected, appointed, or employed prior to the effective date of this act shall not later than ninety days after the effective date of this act take and subscribe the form of oath or affirmation set forth in this section.

D. Any officer or employee within the meaning of this section who fails to take and subscribe the oath or affirmation provided by this section within the time limits prescribed by this section shall not be entitled to any compensation unless and until such officer or employee does so

take and subscribe to the form of oath or affirmation set forth in this section.

E. Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment.

F. Any of the persons referred to in Article XVIII, Section 10 of the Arizona Constitution as amended, related to the employment of aliens, shall be exempted from any compliance with the provisions of this section.

G. In addition to any other form of oath or affirmation specifically provided by law for an officer or employee,

before any officer or employee enters upon the duties of his office or employment, he shall take and subscribe the following oath or affirmation:

State of Arizona, County of .....
I, ... do solemnly swear (or
(type or print name)
affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of .....
(name of office) ..... according to the best of my ability, so help me God (or so I do affirm).

.....
(signature of officer or employee)

§ 38-233. Filing oaths of record

A. The official oaths of state elective officers shall be filed of record in the office of the secretary of state. The official oaths of all other state officers and employees shall be filed of record in the office of the employing state board, commission or agency.

B. The official oaths of notaries public and of elective county and elective precinct officers shall be filed or recorded in the office of the county recorder, except the oath of the recorder, which shall be filed with the clerk of the board of supervisors. The official oaths of all other county and precinct officers and employees shall be filed of record in the office of the employing county or precinct board, commission or agency.

C. The official oaths of all city, town or municipal corporation officers or employees shall be filed of record in the respective office of the employing board, commission or agency of the cities, towns and municipal corporations.

D. The official oaths of all officers and employees of all school districts shall be filed of record in the office of the superintendent of public instructions.

E. The official oaths of all officers and employees of each public educational institution except school districts shall be filed of record in the respective offices of said public educational institutions.

F. The official oath or affirmation required to be filed of record shall be maintained as a permanent official record.