1966

Note on Elfbrandt v. Russell and Loyalty Oaths

Jethro K. Lieberman
New York Law School, jethro.lieberman@nyls.edu

CONSTITUTIONAL LAW--STATE LOYALTY OATH--
ARIZONA ACT INFRINGES ON FREEDOM OF ASSOCIATION.
Elfbrandt v. Russell, 384 U.S. 11 (1966).

Petitioner, an Arizona teacher and a Quaker, decided she could not in good conscience execute a loyalty oath required of all state employees, because she did not understand its meaning and could not obtain a hearing to determine its precise scope. The oath required the usual affirmation of support for federal and state constitutions, as well as the laws of Arizona. A statute subjected to prosecution for perjury and discharge from office any person taking the oath "who 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," if the employee has knowledge of such unlawful purpose of the organization. The Arizona Supreme Court sustained the oath in petitioner's class action for declaratory relief[1] and on appeal the Supreme Court remanded the case for reconsideration[2] in light of its holding in Baggett v. Bullitt.[3] The Arizona Supreme Court affirmed its original decision, but narrowly construed the meaning of the statute.[4] On certiorari, held, reversed. The statute is unconstitutional because it excludes from employment not only those who join with the "specific intent" to further the illegal aims of the subversive organization, but includes also those who join an organization without actively supporting, though aware of, its illegal aims; thus the oath is not "narrowly drawn to define and punish specific conduct as constituting a clear and present danger" and consequently unnecessarily infringes on the freedom of political association. The explicit rationale for this decision is that "those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees."[5]

The case at first glance would seem to be a further extention of the doctrine of Baggett, in which it was said that "the State may not require one to choose between subscribing to an 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.'"[6]

Yet Elfbrandt was a 5-4 decision, and Mr. Justice White, who wrote the majority opinion in Baggett (a 7-2 decision), dissented here. This turn-about is understandable if we assume from the somewhat confusing opinion of the Court that the case is not reversed because the statute is "unduly vague" (the Arizona court having narrowed it), but because it is "unduly broad" in its coverage. The Arizona Supreme Court construed the statute narrowly enough with respect to what kind of conduct was reached so as not to be vague, but its definition of proscribed conduct was unconstitutionally broad.

Freedom of Association

In Scales v. United States,[7] a violation of the membership clause of the Smith Act was sustained with the specific caveat that "the clause does not make criminal all associations with an organization which has been shown to engage in illegal advocacy. . . . [T]he member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute."[8] Because the Arizona Act embraces the person who is a member of a multi-purpose organization, even when he supports only the legal aims of the organization, the Court is making its language in Scales its holding in Elfbrandt.

"Those who join an organization but do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees."[9] Henceforth, only those who have knowledge of the organization's illegal purposes, who support these aims and take an active part in the organization's doings, can be discharged from public office and convicted of a felony under such a perjury statute.

Petitioner made much of the fact in her brief that no hearing was provided by law for her to explain why she refused to take the oath. "Laws such as this," says the Court, "which are not restricted in scope to those who join with the 'specific intent' to further illegal action, impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization."[10] In Scales, the Court said "there must be clear proof that a defendant 'specifically intends to accomplish [the aims of the organization] by resort to violence.'"[11] And the Court cites Speiser v. Randall[12] for the proposition that a state may not place the burden of proving noninvolvement in criminal advocacy on an applicant for a tax exemption. The parallel here is apt enough, since Arizona argued that because a government job is a privilege and not a right, the government

may condition it on a promise by prospective employees not to join certain organizations. In a time when the number of state and federal government jobs is burgeoning, the dangers of the "unconstitutional conditions" doctrine[13] are especially apparent.[14]

The statute with attached oath is a political-legal device by which those who are members of organizations which the state will not outlaw directly can be barred from earning a living as an employee of the public and possibly put in jail for perjury. This device gets at that band of activities which are too "subversive" to allow those who engage in them to hold any sensitive public office (i.e., any job on the public payroll).

Reading Elfbrandt and Scales together, it becomes apparent that unless the member actively supports the illegal aims of the organization, neither the perjury nor loss of job provisions can now operate.

Mr. Justice Douglas declares that those who join but do not "share its unlawful purposes" pose no threat. This seems wrong, given the assumption of Dennis v. United States[15] that the legislature may find that certain subversive organizations pose a threat; certainly a legislature could find that membership per se is a threat through the contribution of dues and the addition of a name to the organization's roster showing that it has public support.

The seeming contradiction between Elfbrandt and Dennis is not difficult to uncover. In Dennis under the guise of the "clear and present danger" test, the conspiracy to advocate was held not protected by the first amendment. If advocacy is dangerous, Mr. Justice Douglas' assertion that active membership is not a danger seems suspect. But significantly, if active membership per se is not dangerous without the intent to foster the illegal aims, as the Court now holds, then perhaps the result in Dennis becomes suspect.

Dennis relied on a result-oriented test. Clear and present danger purports to say that advocacy is bad because its result is bad. Elfbrandt says, however, that without the intention of supporting violent overthrow, membership is permissible (a fortiori, since a member cannot be dismissed from his job). Elfbrandt relies on an intention-oriented test.

So, following the requirement of Noto v. United States[16] that a person must "specifically intend to [accomplish the aims of the organization] by resort to violence," Elfbrandt provides a defense for the plaintiff

in cases like Adler v. Board of Education[17] if it does not overrule them outright.

In Adler, under the so-called Feinberg law of New York, teachers who belonged to the Communist Party were barred from teaching in public schools. The law was held not to violate the fourteenth amendment. In the suit for declaratory judgment, the Court said, "[F]rom the fact found that the organization was one that advocated the overthrow of the government by unlawful means and that the person employed or to be employed was a member of the organization and knew of its purpose, to presume that such member is disqualified for employment is [not] so unreasonable as to be a denial of due process of law."[18] The Court in Elfbrandt disagrees, finding the presumption a denial of due process. Of course, there was no oath in Adler. Yet Elfbrandt is not, on balance, an oath case either. Arizona could have done what it did without the oath at all, by simply warning a prospective public employee that should he fail to quit his "subversive" associations or later join one, he will lose his job and be liable for criminal penalties.

Adler can be distinguished from Elfbrandt also by the fact that the former had no criminal penalty. But it is difficult to believe that this distinction is decisive. For Elfbrandt said that those who do not participate in unlawful activities, though members of organizations which do, "surely pose no threat, either as citizens or as public employees."[19] The Court is thus saying that even without criminal penalties (which makes the case like Adler), the employee still cannot be dismissed from his job, without proof of unlawful intent. On this exact point, in fact, Justice White dissents.[20]

So the seeming confusion and contradiction in the Elfbrandt opinion may be due simply to the fact that to get a majority to agree to a switch from a result test to an intention test (or to a result plus intention test) requires some fudging. The reason for the switch is clear: it is too easy to say a danger is clear and present when it is fuzzy and distant. Proof of intent makes it harder for the prosecutor to succeed and consequently restricts the interference with first and fourteenth amendment rights.

The question remains what bearing Elfbrandt has on future loyalty oath cases. The fact that the Court concentrated on the broadness of the statutory coverage suggests that the vagueness argument did not receive its full attention. At the very least, when a case comes up involving an oath not coupled to a statute,

as here, Elfbrandt does not preclude a further testing of how vague an oath must be before it falls.

The issue of what kind of conduct cannot be proscribed (vagueness) runs into the issue of who cannot do it (broadness of coverage). Ultimately, the penumbras splash together. The Court may simply be avoiding a full interpretation of vagueness, since cases testing more tightly written oaths may reach the Court this year or next.

The Purpose of Simple Oaths

In a time when superstition and fear of God were more pronounced than today, the oath of fealty to King or Lord made sense. It was uttered in a ceremony with mystic overtones and in a ritual of sometimes lavish pomp.

Today's public employee loyalty oath, by contrast, is conducted by bored officials in drab offices when it is given orally at all. Often the act of taking the oath simply consists of signing a slip of paper at home and mailing it back to the state where eventually it comes to rest in a filing cabinet.[21]

Since it is well known that those who would conspire to overthrow the lawful government by force and violence are capable of lying, and that many people who are not conspirators are deeply offended by loyalty oaths on purely moral grounds, the oath (not coupled with a statute making later knowing membership justification for dismissal and/or a crime), serves but one purpose.

It is a method by which the righteous can gain psychic satisfaction by making all those they can reach subscribe to their own views. "No passion is stronger in the breast of man," wrote Virginia Woolf, "than the desire to make others believe as he believes. Nothing so cuts at the root of his happiness and fills him with rage as the sense that another rates low what he prizes high."[22]

In view of the Court's willingness to let an intention test govern, even simple "I support the Constitution" oaths, calculated to satisfy the True Believers, may be invalid.[23] For the Constitution places no direct restraints on private citizens, except to forbid the keeping of slaves,[24] and the importation of liquor into a state in violation of the state's own liquor laws.[25] Thus a demand that an individual support the Constitution seems either unduly meaningless, or at the very least, vague.

Consequently, a teacher's belief that income tax is evil, or that a person ought to be able to sue a state in federal court in contravention of the eleventh amendment, or that school prayers ought to be allowed, should be irrelevant to his opportunity to teach under the Elfbrandt test.

The only permissible oath, then, would be one in which the declarant says something like this: "I do not, to my knowledge, belong to a group which incites its members or others to overthrow lawful government in the United States by force or violence, in order to establish its own government; or, if I do so belong or should in the future come to belong, I do not personally support the use of force or violence." The definition of "government" would most likely be constitutionally required to exclude "existing laws."

Let those who insist on oaths protest the fact that such an oath is practically self-emasculating. Such Elfbrandt may come to require. And even the above oath might fail insofar as it proscribes violation of laws in order to bring about social or economic change.[26]

In the light of the foregoing and of his opinion in Baggett, Mr. Justice White's dissent here is surprising. He starts--and some might say ends--with the proposition that nothing in the judicial history of the Supreme Court warrants the holding that a state loyalty oath is per se unconstitutional. This may well be the truth, but it is a non sequitur. To the restriction on freedom of association, the Justice does not address himself, except to cite precedents in line with his opinion without replying directly to the majority's argument. If precedents are now to be overruled or significantly distinguished and narrowed, it does not advance the contrary argument to point out that they are, after all, precedents.

The disagreement in Elfbrandt stems in part from the inability of the Court or any body of social scientists to measure the effect of law on social or political conduct. Until the day when this is possible, courts must continue to decide cases by means of guesses and hunches, generalized propositions like, "It will inhibit the freedom to associate," or, "It will not."

Where the first amendment is concerned, perhaps it is better to generalize in the direction of freedom.[27] After Elfbrandt, draftsmen should catch far fewer of the unwary in their nets.

-- Jethro K. Lieberman