University of Richmond Law Review

Volume 7 | Issue 1 Article 9

1972

Constitutional Law-Loyalty Oaths-The United States Supreme Court Relaxes Its Stringent Safeguards

Constitutional Law—Loyalty Oaths—The United States Supreme Court Relaxes Its Stringent Safeguards—*Cole v. Richardson.*

Loyalty oaths have long been imposed upon citizens of both monarchies[1] and republics[2] as conditions precedent to the granting of certain governmental favors[3] or to the withholding of certain punishments.[4] But whether the oath is taken to gain a benefit or to avoid a criminal sanction, the aftermath of refusing to take a loyalty oath is that the citizen is penalized.[5] This is not to suggest that a loyalty oath is dangerous per se, although some Justices of the United States Supreme Court have taken this view.[6] Certainly a governmental body should not be denied the power to protect itself from those who would destroy it;[7] nor should it be denied the right to withhold benefits from those who would use them against the government.[8] An oath system is an efficient, quickly administered, and self-executing means of preventing the enemies of a government from taking advantage of the programs and opportunities[9] offered to the public. It allows the probe of an

---

1 4 W. Blackstone, Commentaries *123-24.

2 H. Hyman, To Try Men's Souls—Loyalty Tests in American History (1959).

3 *E.g.*, Speiser v. Randall, 357 U.S. 513 (1958) (property tax exemption); Adler v. Board of Educ., 342 U.S. 485 (1952) (teaching in the public schools); Garner v. Board of Pub. Works, 341 U.S. 716 (1951) (public employment); American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (privilege to petition the N.L.R.B.); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866) (admission to the Bar); Peters v. New York City Housing Authority, 307 N.Y. 519, 121 N.E.2d 529 (1954) (public housing); State v. Hamilton, 92 Ohio App. 285, 110 N.E.2d 37 (1951) (unemployment compensation). *See generally* Annot., 18 A.L.R.2d 268 (1951).

4 4 W. Blackstone, Commentaries *124, *376-77.

5 The citizen is penalized in the sense that he is denied the opportunity to enjoy a benefit which is within his grasp for the sole reason that he has refused to subscribe to the oath. "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact." Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866). The Court in Adler v. Board of Educ., 342 U.S. 485, 492 (1952), held that deprivation of public employment, particularly in the schools, is not a penalty because such employment is a privilege and not a right. This position was specifically overruled in Keyishian v. Board of Regents, 385 U.S. 589 (1967).

6 These have been chiefly Justices Black and Douglas in their dissenting and concurring opinions. "Test oaths are notorious tools of tyranny. When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people." Wieman v. Updegraff, 344 U.S. 183, 193 (1952) (Black, J., concurring). *See also* Cole v. Richardson, 92 S. Ct. 1332, 1343 (1972) (Marshall, J., dissenting).

7 American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

8 Speiser v. Randall, 357 U.S. 513 (1958).

9 *See* Note, *Loyalty Oaths*, 77 Yale L.J. 739 *passim* (1968).

individual's allegiance to his sovereign with a minimum of effort on the part of public officials;[10] its violation is punishable as perjury;[11] and the refusal to swear allegiance automatically bars the individual from assuming a status or position in which he might threaten the existence of government.[12] The hazard inherent in any oath system is that it fails to distinguish between those who truly menace the existence of government and those who, in good faith, do not wish to compromise their first amendment freedoms.[13] Both groups are subject to the same penalties for refusing to take the oath,[14] and both may be criminally liable[15] for violating the terms of the oath if they do take it.

The first loyalty oaths reviewed by the United States Supreme Court[16] were aimed at testing the affiant's *past* loyalty[17] and were struck down[18]

---

10 The only burden placed upon an administrator of an oath is to extend the oath to the intended affiant, orally or in writing. When this has been done, his duty as a loyalty investigator is ended.

11 False swearing is punishable by the criminal law, but violations of oaths may also result in discharge from employment. Note, *State Loyalty Programs and the Supreme Court*, 43 IND. L.J. 462 (1968).

12 *See* Note, *Loyalty Oaths*, 77 YALE L.J. 739 (1968).

13 *Id.* at 766. *See also* Elfbrandt v. Russell, 384 U.S. 11 (1966) and Wieman v. Updegraff, 344 U.S. 183 (1952).

14 Conscientious, but loyal, employees who refuse to take an oath are more likely to be penalized than those who actually intend to sabotage the government, because the latter group will swear falsely with impunity. This result is discussed in Note, *State Loyalty Programs and the Supreme Court*, 43 IND. L.J. 462, 483 (1968), wherein it is stated:

> A statute which allows subversives, trained to commit perjury, to take the oath and thereby qualify, and which at the same time disqualifies those who refuse to take the oath for reasons other than disloyalty, does not accomplish any legitimate objective. The injury to the conscientious cannot be justified by any state interest.

15 Punishment is normally reserved for wilful and knowing falsehoods. Cole v. Richardson, 92 S. Ct. 1332, 1337-38 (1972); American Communications Ass'n v. Douds, 339 U.S. 382, 413 (1950). It is improperly imposed by an oath statute which demands a greater duty of the affiant than the Constitution allows. Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964).

16 Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) and a companion case, *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866). In *Cummings*, the Missouri constitution required those engaged in certain avocations in the State to disavow any associations with the Confederate cause. In *Garland*, a Congressional enactment required a similar disavowal as a condition precedent to the practice of law before the Supreme Court.

17 Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 318 (1866) and *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1866).

18 *See* U.S. CONST. art. I, § 9.

as bills of attainder[19] and ex post facto laws.[20] Subsequent cases[21] involved oaths directed at present and future loyalty;[22] these were upheld,[23] during the McCarthy era, due to the Court's emphasis upon the overriding interests of public safety and governmental self-preservation.[24] Although the oath decisions of the late 1950's and 1960's[25] did not expressly overrule precedent,[26] they did exhibit an increasing concern for the protection of first amendment civil liberties.[27] In extending old safeguards[28] and establishing

[19] "A bill of attainder is a legislative act which inflicts punishment without a judicial trial." Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866). *See also* United States v. Lovett, 328 U.S. 303 (1946).

[20] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325-26 (1866):

> [A]n ex post facto law is . . . one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.

[21] Wieman v. Updegraff, 344 U.S. 183 (1952); Adler v. Board of Educ., 342 U.S. 485 (1952); Gerende v. Board of Supervisors, 341 U.S. 56 (1951); Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Osman v. Douds, 339 U.S. 846 (1950); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[22] In Garner v. Board of Pub. Works, 341 U.S. 716 (1951), an ordinance required the affiant to disaffirm any advocacy of violent governmental overthrow within five years of its enactment. Although the oath was retrospective in nature, it was enacted persuant to the terms of a City Charter which had been amended some seven years before. Within the terms of the Charter, then, the oath was prospective.

[23] In Wieman v. Updegraff, 344 U.S. 183 (1952), however, the oath was held unconstitutional due to the lack of a scienter requirement.

> [T]he fact of association alone determines disloyalty and disqualification [according to the terms of the oath in question]; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of the chief sources. *Id.* at 191.

But cf. Garner v. Board of Pub. Works, 341 U.S. 716 (1951), which held that scienter was implied in each clause of a strikingly similar oath.

[24] *See, e.g.*, American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950).

[25] Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Nostrand v. Little, 362 U.S. 474 (1960); Speiser v. Randall, 357 U.S. 513 (1958).

[26] *But see* Keyishian v. Board of Regents, 385 U.S. 589 (1967), *overruling in part* Adler v. Board of Educ., 342 U.S. 485 (1952).

[27] The Vinson Court had been heavily criticized by its dissenting members for its failure to take adequate consideration of freedoms guaranteed by the first amendment. Adler v. Board of Educ., 342 U.S. 485 (1952) (6-3 decision) (Frankfurter, Black & Douglas, JJ., dissenting); Gardner v. Board of Pub. Works, 341 U.S. 716 (1951) (5-4 decision) (Frankfurter, Burton, Douglas & Black, JJ., dissenting); American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (3-3 decision) (Frankfurter, Black & Jackson, JJ., dissenting). It should be noted that Justices Frankfurter, Black, and Douglas joined with the majority in the Warren Court oath decisions.

[28] In Garner v. Board of Pub. Works, 341 U.S. 716, 724 (1951), the Court held that

new ones,[29] the Warren Court took a much harsher view toward loyalty oaths,[30] in general.

Recently the Bar has been given its first opportunity to determine how the Court, as presently constituted, will decide loyalty oath cases in the future on facts which differ somewhat from those of recent years.[31] Massachusetts imposes a loyalty oath upon all of its employees which requires them to support the Constitution and to *oppose* the overthrow of the government by force, violence, or by any illegal or unconstitutional method.[32] In *Cole v. Richardson*,[33] Mrs. Richardson had been hired as a research sociologist at the Boston State Hospital.[34] After approximately six weeks on the job, she was summarily dismissed for her refusal to swear to the prescribed oath.[35] In accord with prior decisions,[36] the Court did not find

scienter could be implied in the oath. Justice Frankfurter assailed this conclusion on the ground that oath statutes are non-criminal in nature. *Id.* at 727. In Wieman v. Updegraff, 344 U.S. 183 (1952), the Court identified scienter as knowing or wilful participation in the conduct proscribed by the oath and held that it was a necessary element of the oath in order to avoid branding the affiant as guilty by mere association. The Warren Court extended this doctrine in Elfbrandt v. Russell, 384 U.S. 11 (1966) to require that, to be punished for a violation of an oath, the affiant must also have had the 'specific intent' to further the unlawful aims of his associates.

[29] *See, e.g.*, Whitehill v. Elkins, 389 U.S. 54 (1967) (overbreadth); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961) (vagueness); Nostrand v. Little, 362 U.S. 474 (1960) and Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) (not an oath case) (due process hearing requirement); Speiser v. Randall, 357 U.S. 513 (1958) (mere refusal to swear allegiance cannot raise a presumption of disloyalty).

[30] The Vinson Court considered that its duty was limited to balancing the interests of governmental security against the interest of the individual in maintaining his first amendment freedoms. American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950). The Warren Court, on the other hand, subjected loyalty oaths to careful scrutiny while applying traditional tests of constitutionality. *See, e.g.*, Baggett v. Bullitt, 377 U.S. 360, 367 (1964) (vagueness and overbreadth).

[31] The Court's criticism of loyalty oaths, in the past, has been directed largely at 'negative' oaths which require a disavowal of certain conduct and speech activities. Cole v. Richardson, 92 S. Ct. 1332, 1343 (1972) (Marshall, J., dissenting). *Cole* involves an affirmative oath which requires duties of support and opposition.

[32] *Id.* at 1334.

[33] 92 S. Ct. 1332 (1972) (4-3 decision) (Douglas, Marshall & Brennan, JJ., dissenting) (Powell & Rehnquist, JJ., not participating).

[34] *Id.* at 1334.

[35] *Id.*

[36] Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971); Bond v. Floyd, 385 U.S. 116 (1966); Ohlson v. Phillips, 304 F. Supp. 1152 (D. Colo. 1969) *aff'd* 397 U.S. 317 (1970); Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967) *aff'd* 390 U.S. 36 (1968); Hosack v. Smiley, 276 F. Supp. 876 (D. Colo. 1967) *aff'd* 390 U.S. 744 (1968). These cases involve oaths which are very similar to the Virginia loyalty oath contained in VA. CONST. art. II, § 7 (1971) and VA. CODE ANN. § 49-1 (1950). In view of the Court's approval of all of these oaths, it is unlikely that

fault with the 'support' clause of the oath, which was a paraphrase of the oath required of elected officials by the Federal Constitution.[37] Arguing that the "oppose" clause was a mere negative reiteration of the "support" clause,[38] the Court held that it too was constitutionally permissible. Because the oath itself was constitutional, Mrs. Richardson's summary dismissal was proper.[39] She was not entitled to a due process hearing at which she might state her objections to the oath and force the Commonwealth to present extrinsic evidence of her disloyalty.

Chief Justice Burger's opinion in *Cole* bears closer resemblance to the decisions of the McCarthy era, than to those of the Warren Court in that he expressly rejected a definitional approach[40] which had been carefully established by the majorities of the 1960's. The Court in the early 1950's similarly refused to make careful examinations of the terms of the oaths before it.[41] Conceding that any loyalty oath tended to infringe upon the first amendment freedoms of the affiant, the Vinson Court proceeded to determine whether such an abridgement of civil liberties was justified to protect valid interests of the local, state, or federal government.[42] With regard to public employees, the Court found that because public employment was a privilege and not a right, no freedoms were abridged by imposing an oath as a condition precedent to employment; the reluctant affiant could assert his beliefs and look for a job elsewhere.[43] The sole safeguard required of an oath system was that it must only penalize those who willfully and knowingly engaged in the proscribed conduct or speech activity.[44]

The Warren Court adopted a much different approach. Beginning with

---

the Virginia oath will ever be overturned. *But see* Pedlosky v. Massachusetts Institute of Technology, 352 Mass. 127, 224 N.E.2d 414 (1967).

[37] U.S. CONST. art. II, § 1.

[38] 92 S. Ct. 1332, 1337.

[39] *Id.* at 1338.

[40] "[W]e are not charged with correcting grammar but with enforcing a constitution." *Id.* at 1337.

[41] In American Communications Ass'n v. Douds, 339 U.S. 382 (1950), the Court observed that significant constitutional questions would be raised if an oath were read literally to include all those who might be referred to by its explicit terms. But it refused to approach the oath literally. "It is within the power and is the duty of this Court to construe a statute so as to avoid the danger of unconstitutionality if it may be done in consonance with the legislative purpose." *Id.* at 407.

[42] American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950):

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.

[43] Adler v. Board of Educ., 342 U.S. 485, 492 (1952). See note 5 *supra*.

[44] Wieman v. Updegraff, 344 U.S. 183, 191 (1952) and Garner v. Board of Pub. Works, 341 U.S. 716, 723-24 (1951).

the assumption that first amendment freedoms were inviolate,[45] the Court looked askance at any oath which purported to require more than minimal loyalty to the constitutional system.[46] To protect an individual's right to speak and believe as he wished, the Court adopted a highly definitional interpretation of the terms of the oath[47] and asked itself whether constitutionally protected beliefs, conduct, and speech activities might be compromised by those terms.[48] If the terms were so vague that "men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application," [49] or so overbroad as to encourage the affiant to avoid engaging in constitutionally protected activities,[50] the oath was struck down. The tests of overbreadth and vagueness were familiar constitutional principles applied for the first time to render loyalty oaths fatally defective.[51]

The most significant restriction which the Warren Court placed on loyalty oath programs and which the Burger Court comes close to destroying is that no presumption of disloyalty should flow from the mere refusal to ascribe to the required vow.[52] The government carried the burden of prov-

---

[45] American Communications Ass'n v. Douds, 339 U.S. 382, 446 (1950) (Black, J., dissenting).

[46] Cole v. Richardson, 92 S. Ct. 1332, 1343 (1972) (Marshall, J., dissenting).

[47] Speiser v. Randall, 357 U.S. 513, 520 (1958):

> When we deal with the complex strands in the web of freedom which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

[48] Examples of the Court's "question and answer" analysis may be found in most of the cases listed in note 25 *supra*. The Court resorted to this method so often that Justice Clark was provoked to remark that "to conjure up such ridiculous questions, the answers to which we all know or should know are in the negative, is to build up a whimsical and farcical straw man which is not only grim but Grimm." Baggett v. Bullitt, 377 U.S. 360, 383 (1964) (Clark, J., dissenting).

[49] Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961) *quoting* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[50] Whitehill v. Elkins, 389 U.S. 54, 62 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967). *See also* N.A.A.C.P. v. Button, 371 U.S. 415 (1963).

[51] The Warren Court rejected loyalty oaths primarily for the vagueness and overbreadth which specific terms imparted to them. *See, e.g.*, Whitehill v. Elkins, 389 U.S. 54 (1967) ("in one way or another"); Keyishian v. Board of Regents, 385 U.S. 589 (1967) ("seditious," "advise"); Baggett v. Bullitt, 377 U.S. 360 (1964) ("subversive," "knowledge," "revolution," "promote respect, by precept and example," "institutions," "promote undivided allegiance to the government").

[52] In Speiser v. Randall, 357 U.S. 513 (1958), appellants were denied a tax exemption for refusing to take a loyalty oath included in the application. If the tax assessor disqualified any claimant based on the presence or absence of any facts in the application, the claimant was entitled to a judicial hearing at which *he* had the burden of proving that he qualified for the exemption. The Court held that *whether or not the oath was permissable*, it could not be enforced through procedures which placed the burden

ing disloyalty the same as if the recalcitrant employee were on trial for a crime. To ensure that the burden of proof always rested in its proper place, the Court provided that anyone who refused to take an oath, as a condition of employment or any other public benefit, was entitled to a hearing at which the state must go forward with evidence of disloyalty in order to sustain the penalty imposed for such refusal.[53]

Cole v. Richardson stands in contrast to the recent judicial history of loyalty oaths in the United States. In holding that the "oppose" clause of the Massachusetts oath requires no greater obligation upon the affiant than the "support" clause,[54] the Court has rejected the literal interpretation which the Warren Court commonly attached to oaths of allegiance. If the word "oppose" is given its ordinary meaning,[55] a conscientious oath-taker may seek the answers to two important questions. To what extent does he owe a duty of opposition?[56] At what stage of an attempted overthrow could he be called upon to exercise that duty?[57] The oath is unduly vague because it resolves neither question. Because an individual has the right to believe and to argue that the government should be overthrown,[58] the *Cole* oath is also

---

of proof and persuasion on the taxpayer. "[A]ppellants were not obliged to take the first step [of signing the oath] in such a procedure." *Id.* at 529.

53 In Slochower v. Board of Higher Educ., 350 U.S. 551 (1956), a college professor was dismissed without a hearing after he had refused to give self-incriminating testimony before a Senate Subcommittee on Unamerican Activities.

> The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law. *Id.* at 559.

Accord, Connell v. Higgenbotham, 403 U.S. 207 (1971) and Nostrand v. Little, 362 U.S. 474 (1960), applying the *Slochower* doctrine to loyalty oaths.

54 The Chief Justice argued that the word 'oppose' could be no more indistinct than the words 'preserve, protect and defend' which are authorized by the Federal Constitution. U.S. CONST. art. II, § 1. But the Presidential oath and similar affirmative oaths of support are permissable because they are underwritten by the Constitution, itself, and cannot be held to unduly infringe upon freedoms guaranteed in that document by the first amendment. 'Oppose,' on the other hand, is not sanctioned by the Constitution and cannot be automatically granted such preferential treatment.

55 Even a narrow construction of an oath must give "proper respect for the English language." Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

56 In the trial court, the Commonwealth lamely attempted to answer the question in this way:

> The ordinary citizen who has taken no oath has an obligation to act *in extremis*; a person who has taken the first part [the 'support' clause] of the present oath would have a somewhat larger obligation, and one who has taken the second part [the 'oppose' clause] has one still larger. Richardson v. Cole, 300 F. Supp. 1321, 1322 (D. Mass. 1969).

57 Cole v. Richardson, 92 S. Ct. 1332, 1342 (1972) (Marshall, J., dissenting).

58 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Noto v. United States, 367 U.S.

overbroad since it requires the affiant "to 'oppose' that which [he] has an indisputable right to advocate." [59] Of course, by the Chief Justice's narrow construction of the oath, a Massachusetts public employee who has a "conscientious regard for what he solemnly swears" [60] no longer needs to fear that his first amendment freedoms will be invaded by ascribing to the oath. But in achieving this result, the Court has left a decade and a half of loyalty oath decisions in doubt.

The most serious difficulty with the *Cole* opinion is its erosion of the due process hearing requirement established by the Warren Court. Chief Justice Burger argues that if an oath is *constitutionally permissible* and the employee refuses to swear to it, then the state is justified in presuming that the employee is or will be disloyal and is at liberty to discharge him solely on that basis.[61] Thus, the Court makes a distinction between unconstitutional oaths, to which a hearing requirement may be applied, and constitutional oaths, to which a hearing requirement is inapplicable. This distinction is unjustified and wholly unwarranted by precedent. Admittedly, all of the oath cases which barred a presumption of disloyalty from arising upon a refusal to take the oath[62] or required a hearing to determine disloyalty[63] involved oaths which were arguably unconstitutional on the basis of previous decisions. In each of those cases, however, the Court decided the due process issue apart from and to the exclusion of the question of the particular oath's constitutional permissibility.[64] In addition to the fact that the Chief Justice's conclusion lacks a foundation in judicial history, the presumption of loyalty and due process hearing requirements are the only safeguards, outside the

290, 297-98 (1961); Yates v. United States, 354 U.S. 298, 318 (1957); Dennis v. United States, 341 U.S. 494, 502, 505 (1951). Although wilful advocacy of violent governmental overthrow is a crime under the Smith Act, the Court has taken great pains to emphasize that criminal 'advocacy' is a term of art to be distinguished from the advocacy or teaching of forcible overthrow as an abstract principle.

59 Cole v. Richardson, 92 S. Ct. 1332, 1339 (1972) (Douglas, J., dissenting).

60 Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

61 Cole v. Richardson, 92 S. Ct. 1332, 1338 (1972).

62 Speiser v. Randall, 357 U.S. 513 (1958).

63 Connell v. Higgenbotham, 403 U.S. 207 (1971) and Nostrand v. Little, 362 U.S. 474 (1960).

64 In Connell v. Higgenbotham, 403 U.S. 207 (1971), the oath was divided into five parts. The district court had held three clauses unconstitutional. The appeal was taken on the remaining two clauses which had been upheld by the trial court. One of these clauses required the affiant to support the Constitution and was affirmed by the Court. See note 36 *supra*. The other clause required that the employee disavow belief in violent governmental overthrow. The Court held that this clause violated the due process hearing requirement but did not comment otherwise on its constitutionality. Justice Marshall, in fact, was dissappointed that the Court had not decided the first amendment question. Connell v. Higgenbotham, *supra* at 209 (Marshall, J., concurring).

appellate process, which allow an employee who is averse to oath-taking to affirm his allegiance to the government without abandoning his rights of inviolate free speech, belief, and association. These safeguards are tenuous indeed if he must pursue a Supreme Court mandate, which is often decided by the chance of a single vote, to secure them.

One may believe that the Burger Court is justified in construing loyalty oaths narrowly to avoid declaring them unconstitutional[65] or insensitive to civil liberties threatened by the very existence of such oaths. In either case, it is submitted that this Court has undone much of the efforts of the Warren Court to supervise and control the proliferation of loyalty oaths in this country. The efficiency and conclusiveness of oath systems give them an invidious character which has been bridled by the Court's due process requirements.[66] By substantially undermining these safeguards, the Burger Court has left unprotected those who revere their country but are unable to abide a compromise of their individual freedoms.

G. W. W.

---

[65] In almost every oath case, the Court has faced a choice between two conflicting principles of the judicial process. One is that statutes should be narrowly construed to avoid finding them unconstitutional. See note 41 *supra*. The other is that where a statute tends to infringe first amendment freedoms, the legislature should be compelled to draft it narrowly. Cantwell v. Connecticut, 310 U.S. 296, 311 (1940). The Warren Court adopted the latter principle in loyalty oath cases. The Vinson Court adopted the former principle and the Burger Court appears to have followed suit.

[66] See note 12 *supra*.