LOYALTY TEST OR OATH:
Its Nature, Limits and Effects

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> Another fundamental right I then contended for, was that no man's conscience ought to be racked by oaths imposed, to answer questions concerning himself in matters criminal or pretended to be so.—HALLER AND DAVIES, *The Leveller Tracts*, 454 (1944).

History abounds with contrivances devised by men to ascertain truth, ranging from the barbaric processes of ordeal to the civilized judicial trial. But throughout these transmutations, the oath was invariably resorted to, which, as defined, is an appeal by a person to God to witness the truth of what he declares; it includes any form of attestation by which a party signifies that he is bound by conscience to perform an act faithfully and truthfully.[1] However, human ingenuity did not stop here. Loyalty test or oath came into the picture and this shocked the minds of the many and caused them to raise their voice in protest.

But the sad experience with loyalty oath is not circumscribed to one country or to one generation. Some of those who came to the American shores were Puritans who had known and hated the oath *ex officio*, used both by the Star Chamber and High Commission.[2] They had known the great rebellion of Lilburn, Cartwright and others against that instrument of oppression. Cartwright had refused to take the oath *ex officio* before the High Commission on the ground that "hee thought that hee was not bound by the laws of God so to doe." [3] Lilburn marshalled many arguments against the oath *ex officio*, among which, being the sanctity of conscience and the dignity of men before God:

> * * * as for that oath that was put to me, I did refuse to take as a sinful and unlawful oath, and by the strength of my God enabling me, I will never take it, though I will be pulled in pieces by wild horses, as the ancient Christians were by the bloody tyrants in the primitive church;

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* Recent Decisions Editor, *Philippine Law Journal* (1964-65).

1 67 C.J.S. 4.

2 See Maguire, Attack of the Common Lawyers on the *Oath Ex Officio* as administered in the Ecclesiastical Courts in England, *Essays in History and Political Theory*, (1936), c. VII.

3 Pearson, *Thomas Cartwright and Elizabethan Puritanism*, 1535-1603 (1925), 318.

> neither shall I think that man, a faithful subject of Christ's Kingdom, that shall at anytime hereafter take it, seeing the wickedness of it hath been so apparently laid open by so many, for the refusal whereof many suffer cruel persecution to this day.[4]

And history repeated itself. The United States, the very citadel and rampart of democracy, constituted no exception. Immediately after the civil war both federal and state governments enacted statutes providing for loyalty oaths.[5] In the Philippines, we are just in the incipient stage—the controversial Subido circular.

It is then in this light that I present this paper with the sole objective of delineating the constitutionally permissible confines within which loyalty test or oath may thrive in a democratic atmosphere, especially when it is imposed on elective officials and where it, as it inevitably does, clashes with academic freedom and other constitutional guaranties.

Loyalty oath for elective officials

It is a fundamental rule that all public officers and members of the armed forces shall take an oath to support and defend the constitution.[6] But where a statute requires every candidate to public office to take an oath that he does not believe in, advocate or advise the use of force or violence, or other unlawful or unconstitutional means to overthrow or make any change in the government established, one line of decisions holds that such is invalid on the ground that the oath to support the constitution, as required in the constitution, is exclusive.[7]

But in *Huntamer v. Coe*,[8] the Supreme Court of Washington upheld the requirement that a candidate for state and federal office shall file an affidavit that he is not a subversive person, upon the basis that the provision did not add to the qualifications for office prescribed by state and federal constitutions but merely implemented them. Likewise, the Maryland Ober law, containing a similar provision, was sustained as to candidates for state office but held invalid as to candidates for federal office, in the case of *Shub v. Simpson*.[9] And, a more extreme form of candidate's oath is that required in the Texas Election Code Ann. Article 6.02.[10]

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[4] The Trial of Lilburn and Wharton, 3 Hoow. St. Tr. 1315, 1332.
[5] Allison Reppy, *Civil Rights in the United States*, (1951), 47.
[6] Article XIV, Section 2, Philippine Constitution.
[7] Imbrie v. Marsh; In re Connor, 17 NY Suppl. 2d 758.
[8] 40 Wash. 2d 767.
[9] 196 Md. 177.
[10] See page 479, footnotes, Emerson and Haber, *Political and Civil Liberties in the United States*, 2d (1958).

Determination of the problem therefore hinges on the interpretation whether the constitutional provision which requires the taking of oath to support and defend the constitution is exclusive or not. And, if it turns out that it is, then any additional statutory requirement would be stricken down as invalid because to make additions to constitutional requirements, particularly where they are extraneous, is in effect amending the constitution and such may be made only, in order to be valid, through the constitutional process of amendment.[11] But where the addendum does not require anything further but merely implements the constitutional mandates, then the statute should be held to have no constitutional infirmity. Granting that it is exclusive, does this be taken to mean that the very wordings of the provision be the ones to be employed? Does this rule out any other word or phrase, far more expressive and definite, designed to no other purpose but to render effective the constitutional provision?

An affirmative response to these queries would only leave the constitutional provision a hollow phrase. Subversion and adherence to the constitution are two direct antithesis. To allow both is an absurdity, if not ridiculous. The reasonable test therefore would be whether the further requirement is new and foreign or whether it merely implements. If it is the former, then it is invalid, but if the latter, then otherwise.

Loyalty test vis-a-vis academic freedom and other constitutional warranties

The constitution provides that "Universities established by the State shall enjoy academic freedom." [12] According to Arthur Lovejoy, academic freedom is "the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political or ecclesiastical authority or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics." [13] The framers of our constitution, as it appears, unlike those of the American constitution, strongly felt the need of universities, in order to enable them to perform their functions, to enjoy and exercise academic freedom, beyond any external encroachments, politically or

[11] Article XV, Section 1, Philipppine Constitution.
[12] Article XIV, Section 5, Philippine Constitution.
[13] Ency. of Social Sciences, 384.

otherwise. At least, as far as state colleges and universities are concerned, the constitution has an express provision to that effect.

But what is a university? What role does it play in the society? In a free country, like the Philippines, a university is the institutional embodiment of an urge for knowledge that is basic in human nature and as old as the human race. It is inherent in every individual. Men vary in the intensity of their passion for the search for knowledge as well as in their competence to pursue it.[14] Like its precursors in Medieval Europe and America, it is a conglomeration of individual scholars whose effectiveness, both as scholars and teachers, requires the capitalization of their separate passions for knowledge and their individual dexterity and competence to pursue and communicate it to others. They are one in their loyalty to the ideal of learning, to the code of morals and ethics, to the country, and, above all, to its form of government. They represent variegated spheres of learning; they expound many points of view.

Its pervading spirit requires scrutiny, criticism, probe and manifestation of ideas in an environment of freedom and mutual confidence. This is the real import of academic freedom. It is essential to the achievement of its ends that the faculty of a university be guaranteed this freedom by its governing board, and that the rationale of the warranty be comprehended by the populace. To enjoin uniformity of outlook upon a university faculty would shackle learning at its source.

For these reasons a university does not and should not take any official stand or make any commitment in any debatable questions of scholarship, political questions or matters of public policy.[15]

The scholar's mission requires the evaluation and examination of unpopular ideas, of ideas considered abhorrent or even dangerous. For, just as in the case of a virulent disease, it is only through intensive investigation and research that the nature and extent of the hazard can be understood and the necessary precaution perfected. Timidity must not constrain a scholar to remain silent when he ought to speak, particularly in the area of his specialty. In matters of conscience and when he has truth to espouse the scholar has no obligation, legal or otherwise, to be silent in the face of popular disapproval. Some of the great passages in the annals of truth have involved the open challenge of popular prejudices in hectic times such as these in which we live.

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[14] Emerson and Haber, *supra*, 1071.
[15] *Op. cit.*, 1072.

As long as an instructor's observations are scholarly and germane to his subject, his freedom of expression in his classroom should not be curbed. The university student should be exposed to competing opinions and beliefs in various fields, so that he may learn to weigh them and gain maturity of judgment. In teaching as in research, he is limited by the requirements of citizenship, of professional competence and good taste. Having met these standards, he is entitled to all protection the full resources of the University can provide.[16]

There is a line, however, at which freedom or privilege commences to be qualified by legal duty and obligation.[17] During periods of international stress, the extent of legislation with such objective accentuates our traditional concern about the relation of government to the individual in a free society. The perennial problem of defining that relationship becomes acute when disloyalty is screened by ideological patterns and techniques of disguise that make it difficult to identify. Of course, a democratic government is not powerless to meet this threat, but it must do so without unnecessarily infringing the freedoms that are the ultimate values of all democratic living. In the adoption of such means, as it believes effective, the legislature is therefore confronted with the problem of balancing its interest in national security with the often conflicting rights of the individual.[18]

In one case,[19] Justice Black made a concurring opinion summarizing the feeling of many who deplore the spreading growth of laws to force disclosure of beliefs. Governments, he said, need and have ample power to punish thought and speech as distinct from acts. Our own free society should not forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven.

In the United States, legislations requiring loyalty oaths from public school teachers were first passed during the Civil War period. Seven states enacted such laws at that time. But the practice did not become widespread until the First World War when a number of states passed laws imposing oaths or establishing loyalty qualification for teachers.[20] The most famous of these were the Lusk laws

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[16] *Op. cit.*, 1073.
[17] *Op. cit.*, 1074.
[18] Weiman v. Updegraff, 344 US 183 (1952).
[19] *Supra.*
[20] Emerson and Haber, *supra*, 1108.

of New York, enacted in 1921, one of which requires of the teachers the filing of certificate of loyalty.[21]

The passage of these laws led to widespread investigation of teachers. In New York city, a committee was set up to hear charges and pass upon suspected cases of disloyalty. Principals of schools were required to report on the loyalty of each teacher.[22] The laws inevitably turned the school system into a spying project. Regular loyalty reports on teachers must be made out. The principals become detectives; the students, parents, the community will be informers. What happens under these is typical of what befalls in a police state.[23]

Nonetheless, oath requirements have increased in leaps and bounds.[24] They become sort of an "unruly horse" that an author in contemporary American jurisprudence felt constrained to express observation that "oath laws typically fail to create confidence in the public service they were intended to purify, because they fail to uncover the dangerous plotters whose existence was assumed when the laws were passed. For the most part, the people who lose their jobs because of this type of statutes are not communist at all, but are persons whose conscience prevents their satisfying the new requirements." [25]

And yet, state courts, except in Tollman and Savelle cases,[26] have consistently upheld the teacher's loyalty legislation.

The more recent cases have reached the same conclusion. In *Thorp v. Board of Trustees*,[27] the New Jersey loyalty oath was upheld. The court, being aware of contrary decisions, distinguished the Imbrie case [28] which had invalidated the oath as applied to candidates to public office, on the ground that the teachers are not public officers and thus the oath required by the constitution for public officers did not exclude additional oaths for teachers. On the free-

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[21] Such certificate shall state that the teacher holding the same is a person of good moral character and that he has shown satisfactorily that he is loyal and obedient to the government of this state and of the United States; no such certificate shall issue to any person who, while a citizen of the United States, has advocated, whether by word or mouth or in writing, a form of government other than the government of the United States or of this state, or who advocates or has advocated, whether by word or in writing, a change in the form of government of the United States or of this state by force, violence or other unlawful means—New York Session laws, 1921, Chapter 666.

[22] People of New York v. American Socialist Society, 195 NY Suppl. 801.

[23] Justice Douglas, in his dissenting opinion in the case of Adler v. Board of Education, 342 US 485, 96 L. ed. 517, 72 S. Ct. 380.

[24] Walter Gellhorn, *American Rights* (1960), 105.

[25] *Ibid.*

[26] *Infra.*

[27] 6 NJ 498, 49 Atl. 2d 462 (1951).

[28] Imbrie v. Marsh, *supra.*

dom of speech and due process issues, the court, citing Douds case,[29] said:

> It is of the very nature of the social compact that the individual freedoms at issue here are subject to reasonable restraint in the service of an interest deemed essential to the life of the community.

It then found that the requirement of an oath is reasonably related to the "essential common security".

But where the statute did not charge a criminal offense but merely prescribed statement of eligibility, the procedural issue of lack of hearing is not fatal.[30] *A sensu a contrario,* where a criminal offense is chargeable, due process requires previous hearing, the absence of which is reversible error.

The Federal Supreme Court in the case of *Adler v. Board of Education,*[31] resolved another issue on due process. It was contended there that the provision of the Board of Regents that membership in any listed organization,[32] after notice and hearing, "shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the school system . . .", offends due process because the fact found bears no relation to the fact presumed. The court considered this untenable on the ground that legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact is but to enact a rule of evidence, quite within the general power of the government.[33] The court went on saying that,

> Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of the government by unlawful means. We can not say that the finding is contrary to fact or that "generality of experience" points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there a problem of procedural due process. The presumption is not conclusive but arise only in a hearing where the person against whom it may arise has full opportunity to rebut it.

But a Washington Superior Court held invalid the loyalty oath law of that state upon the ground that its incorporation of the

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[29] 339 US 382 (1950).
[30] Pickus v. Board of Education of the City of Chicago, 9 Ill. 2d 599.
[31] Adler v. Board of Education, *supra.*
[32] Organizations included in the list prepared from time to time by the United States Attorney-General and are considered as engaged in subversive activities.
[33] Mobile, J. & K. R. v. Turnispeed, 219 US 35.

United States Attorney-General's list constituted an invalid delegation of power.[34]

The loyalty oath required by the Board of Regents of the University of California was also held invalid in the *Tollman v. Underhill*,[35] for the reason that the oath prescribed by the California constitution for all state officers was exclusive. This constitutional defect was, however, remedied by the Levering Act and thus was upheld upon appeal. Finally, the loyalty oath became part of the constitution which also specifically made it applicable to University faculties.

In 1953, new California laws required state employees to answer questions by state agencies or legislative committees concerning past and present subversive connections and activities. These were held constitutional.[36]

Nevertheless, *San Francisco Board of Education v. Mass*[37] held that dismissal under the Education Code for refusal to answer questions before legislative committee was invalid under the Slochower case when done without full hearing of the full circumstances surrounding the use of the Fifth Amendment.

Issues under the loyalty program for teachers have frequently taken the form of whether a teacher can be dismissed for refusal to answer questions either before an outside body, such as legislative investigating committees or before the school board authorities.[38] *Faxon v. School Committee*,[39] held that teachers can be dismissed for "conduct unbecoming" for failure to answer after notice, charges and hearings; questions not one of guilt or innocence of the teacher but rather whether school committee could reasonably find the retention of teacher would undermine public confidence or bring about unfavorable reaction to the school system; the school committee has the rights of an employer in the selection and retention of employees. On the other hand, in the *Opinion of Justices*,[40] a bill providing for discharge of teachers in private and public schools for failure to respond to legislative inquiries was held unconstitutional interference with the privilege of self-incrimination especially in so far as it dealt with private schools with respect to which the state was not in a position of an employer.

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[34] Savelle v. University of Washington, Super. Ct. Washington, December 3, 1956, unreported.
[35] 229 Pac. 2d 447.
[36] Steinmetz v. California State Board of Education, 271 Pac. 2d 614.
[37] 17 Cal. 2d 494.
[38] Emerson and Haber, *supra*, 1109.
[39] 120 NE 2d 772 (1954).
[40] 332 Mass. 763, 126 NE 2d 100 (1955).

In the case of *Slochower v. Board of Education of New York City*,[41] the Supreme Court held in the case of an associate professor at Brooklyn College, that summary dismissal for invoking the Fifth Amendment in the testimony before a congressional committee violated due process.

The decision in *Laba v. Board of Education of Newark*,[42] followed the Slochower case in upholding the State Commissioner's reversal of the dismissal of a Newark teacher for refusal to answer questions before a legislative committee; but it also upheld the Commissioner's remand to a hearing before the local board and refused to order reinstatement on the ground that the school board may inquire into communist affiliations of the teacher and dismiss him if he is currently a party member or subject to its ideologies. And, in *Beilan v. Board of Education*,[43] the Supreme Court upheld the Philadelphia School Board in dismissing a teacher for "incompetency" when he refused to answer questions of the school authorities concerning his activities in allegedly subversive organizations.

In the light of the foregoing, one may query: Is academic freedom, as understood in the legal world, really incompatible with loyalty test or oath that is required of teachers? If so, has academic freedom completely faded out, or has it, as expressed by an eminent jurist, ". . . reduced the constitutionally protected liberty of millions of citizens to less than a shadow of its substance?" [44]

Some constitutionalists, no less than Justice Black himself, are of the opinion that basically, these legislations providing for loyalty test or oath rest on the belief that the government should supervise and limit the flow of ideas into the minds of men. These made it dangerous for teachers to think or say anything except what a transient majority happens to approve at the moment. The tendency of such governmental policy is to mould the people into a common intellectual pattern. Quite a different governmental policy rests on the belief that government should leave the mind and spirit of man absolutely free. Such governmental policy encourages varied intellectual outlooks in the belief that the best views would prevail. This policy of freedom is embodied in the First Amendment and made applicable to the states by the Fourteenth Amendment. Because of this policy, public officials can not be constitutionally vested with powers to select the ideas people can think about, censor the public views they can express, or choose the group of persons people can

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[41] 350 US 551.
[42] 129 Atl. 2d 273.
[43] *Supra*.
[44] Justice Black, diss., United Public Workers v. Mitchell, 330 US 75.

associate with. Public officials with such powers are not public servants; they are public masters.[45]

History reveals that individual liberty is intermittently subjected to extraordinary perils. Even countries dedicated to government by the people are not free from such cyclical dangers. 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. Test oaths are made still dangerous when combined with bills of attainder which like the Oklahoma Statute[46] imposed pains and penalties for past unlawful associations and utterances.[47]

A sterner view on the matter and apparently in accord with reality was that enunciated by Justice Douglas. He premised his proposition on the fact that he cannot find for any example in the constitutional scheme the power of a state to place employees in the category of second-class citizens by denying them freedom of thought and expression. The constitution guarantees freedom of thought and expression to anyone in our society. All are entitled to it; and none needs it more than the teacher.[48]

The public school is in most respect the cradle of democracy. The present law (which imposes loyalty oath) proceeds on a principle repugnant to our society—guilt by association. A teacher is disqualified because of her membership in an organization found to be subversive.[49]

The very threat of such procedure is certain to raise havoc with academic freedom. Youthful indiscretions, mistaken causes, misguided enthusiasm—all long forgotten become the ghost of a harrowing present. Any organization committed to any liberal cause, any group organized to revolt against a hysterical trend, any committee launched to sponsor an unpopular program becomes suspect. These are the organizations into which communists infiltrate. Their pre-

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[45] Dissenting opinion in the case of Adler v. Board of Education, *supra*.

[46] This required the members of the faculty and staff of Oklahoma Agricultural and Mechanical College to take the oath, *inter alia*, ". . . That I am not affiliated directly or indirectly . . . with any foreign political agency, party, organization, or government, or with any agency, party, organization, association or group whatever which has been determined by the United States Attorney-General or other authorized agency of the United States to be communist front or subversive organization; . . . that I will take up arms in defense of the United States in time of War or national emergency if necessary; that immediately within five (5) years immediately preceding the taking oath (or affirmation) I have not been a member of . . . any agency, party, organization, or association or group whatever which had been officially determined by the US Attorney-General or other authorized agency of the United States to be a communist front or subversive organization.

[47] Weiman v. Updegraff, *supra*.

[48] Adler v. Board of Education, *supra*.

[49] *Ibid.*

sence infects the whole, although the project was not conceived in sin. A teacher caught in that mesh is always certain to stand condemned. Fearing condemnation, she will tend to shrink from any association that stirs controversy. In that manner freedom of expression is stifled.[50]

The law inevitably turns the school system into a spying project. Regular loyalty reports must be made out. The principals become detectives; the students, parents, the community will be informers. They cocked for tell-tale sign of disloyalty. The prejudices and predilections of the community come into play in searching out disloyalty. This is not the usual type of supervision which checks a teacher's competency; it is a system which searches for hidden meanings in a teacher's utterances.[51]

What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their past are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classroom. There can be no real academic freedom in that environment. Here suspicion fills the air, and holds the scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take the place of inquiry. A "party-line"—as dangerous as the "party-line" of the communist—lays hold. It is the "party-line" of the orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer stimulant to adventurous thinking; she becomes instead a pipeline for safe and sound information. A deadening dogma takes the place of inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.[52]

This system of spying and surveillance, with its accompanying reports and trials cannot go hand-in-hand with academic freedom. It produces standardized thought, not the pursuit of truth. A school system producing students trained as robots threatens to rob a generation of the versatility that has perhaps been our greatest contribution.[53]

Of course, the school system of the country need not become cells for propagandizing the Marxist Creed. But the guilt of the teachers should turn on overt acts. So long as she is a law-abiding citizen, so long as her performance within the public school system

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[50] *Loc. cit.*
[51] *Op. cit.*
[52] *Ibid.*
[53] *Loc. cit.*

meets professional standards, her private life, her political philosophy, her social creed should not be the cause of reprisals against her.[54]

It can not be gainsaid that the police state would be the death of universities, as our government. Universities are bound to deprecate special loyalty tests which are applied to their faculties but to which others are not subjected. Such discrimination does harm to the individual and even greater harm to the university and the whole cause of education by destroying the faith in the ideals of university scholarship.[55]

It is clear that such persons have the right under our law to assemble, speak, think and believe as they will.[56] It is however equally clear that they have no right to work for the state in the school system on their own terms.[57] They may work for the school system but upon the reasonable terms laid down by proper authorities. If do not choose to work on such terms, they are at liberty to retain their beliefs and associations and work elsewhere. Has the state then deprived them of any right to free speech and/or assembly? I, as others do, think not.

We must not lose sight of the fact that a school teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct may properly be considered in determining fitness and loyalty.[58] Past conduct may well relate to present fitness; past loyalty may have reasonable relationship to present and future trust.[59] Since time immemorial, one's reputation has been determined in part by the community in which he keeps.[60]

In the employment of officials and teachers of the school system, the state may properly inquire into the company they keep, and there is no rule, constitutional or otherwise, that prevents the state,

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[54] *Op. cit.*
[55] Emerson and Haber, *supra*, 1077.
[56] American Communications Association v. Douds, 339 US 382 (1950).
[57] United Public Workers v. Mitchell, *supra*.
[58] Adler v. Board of Education, *supra*.
[59] Garner v. Los Angeles Board, 341 US 716.
[60] Adler v. Board of Education, *supra*.

when determining the fitness and loyalty of such persons, from considering the organization and persons with whom they associate.[61]

The maintenance of the purity of the educational process against the corruption by subversive influences is of the concern of the society. It is in no sense a denial of academic freedom to require of a teacher, as a condition to employment, a sworn disavowal of allegiance to the doctrine of force or violence as a mode of overthrowing a government.[62] His freedom of choice between membership in a listed organization and employment in the school system might be limited but not his freedom of speech and assembly, except in the remote sense that limitation is inherent in every choice. Certainly, that limitation is not one the state may not make in the exercise of its police power to protect the school from pollution and thereby defend its existence.[63]

Loyalty to government and its free democratic institution is a first requisite for the exercise of the teaching profession. Freedom from belief in force or violence as a justifiable weapon for the destruction of government is of the very essence of a teacher's qualification. The apprehended danger is real and abiding. We have had evidence of the pressure here of a godless ideology ruthlessly fostered by a foreign power which has for its aim the violent overthrow of government and free society. And one of its weapons is the debasement of teaching as a softening measure in the consumation of the subversive process. The school system affords the opportunity and means for subtle infiltration. There is no intrusion upon personal freedoms when government intervenes, as it has here, to avert this peril to its very existence. A teacher, who is bereft of the essential quality of loyalty and devotion to his government and the fundamentals of our democratic society, is lacking in a basic qualification for teaching. The teacher is not obliged to take the oath; but if he refuses to do so he is not entitled to teach. In the current struggle for men's minds, the state is well within its province of insuring the integrity of the educational process against those who would pervert it to subversive ends.[64]

As stated above, there is a line at which freedom or privilege begins to be qualified by legal duty and obligation. The determination of the line is the function of the legislature and the courts. However, much the location of the line may be criticized, it can not be disregarded with impunity. Any member of the university who

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[61] *Ibid.*
[62] Thorp v. Board of Trustees, *supra.*
[63] Adler case, *supra.*
[64] Thorp case, *supra.*

crosses the duly established line is not excused by the fact that he believes that the line is ill-drawn. When the speech, writing, or other action of any member of the faculty exceeds lawful limits, he is subject to the same penalties as other persons. In addition, he may lose his university status.[65]

Academic freedom is not a shield for those who break the law. Universities must cooperate fully with law-enforcement agencies whose duty requires them to prosecute those charged with offenses. Appointment to a university position and retention after appointment require not only professional competence but also involve the affirmative obligation of being diligent and loyal in citizenship. Above all, a scholar must have integrity and independence. This renders impossible adherence to a regime as that of Russia and its satellites.[66]

It must be inculcated in mind that the universities owe their existence to legislative acts and public charters. A state university exists by constitutional and legislative acts, and an endowed university enjoys its independence by franchise from state and by custom. The state university is supported by public funds. The privately sustained university is benefited by tax exemptions. Such benefits are conferred upon the universities not as favors but in furtherance of the public interest. They carry with them public obligation of direct concern to the faculties of the university as well as to the governing boards.

Thus, legislative bodies from time to time may scrutinize these benefits and privileges. As the recipients, it is clearly the duty of universities and their members to cooperate in official inquiries directed to those ends. And when the powers of legislative inquiries are abused, the remedy does not lie in non-cooperation or defiance; it is to be sought through the normal channels of informed public opinion.[67]

Loyalty test or oath therefore should not by itself be viewed with distrust, scorn or derision. Indubitably, its purpose is laudable, designed to insure the well-being of all those concerned: National security under a regime of justice, liberty and democracy, on the one hand, and the university on the other. The latter can not possibly exist and be true to its ideals if the former should not be maintained, just as democracy can not reign supreme without a free and real university.

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[65] Emerson and Haber, *supra*, 1074.
[66] *Supra*, 1077.
[67] *Op. cit.*, 1075.

The legislature therefore is confronted with the problem of balancing its interest in national security with the often and inevitable conflicting constitutional rights of the individual.[68] Dean Roscoe Pound calls this methodology "social engineering." An equitable balancing of these interests must be realized and maintained in a way whereby the happiness be maximized and the misery reduced to the minimum.

Academic freedom and loyalty test impositions, as they appear, are direct and seemingly irreconcilable opposites. But this does not mean that they can not subsist hand-in-hand. Proper delineation of their bounds must be made as to minimize the friction that may be generated. Liberty does not mean unbriddled freedom but freedom under the law just as authority does not signify despotism but authority regulated by law. Where one clamors for freedom and another for national security, the problem should be resolved by proper balancing otherwise the government, to say the least, would be at a stand-still. There is a need and that must be satisfied.

Democracy is a primordial goal and it is only under its environs in which academic freedom, not to mention the others that compose the "bundle of rights," can survive. And this lends credence to a statement of constitutional writers[69] that, "this renders impossible adherence to a regime as that of Russia and its satellites."

And the legislature in its enthusiasm to safeguard democracy at its very foundation against subversion contrived loyalty tests and oaths to be required of teachers as a condition of their employment and, as to those who are already in the teaching profession, for the retention of the same. This was intended to safeguard and maintain the integrity of the educational process against the corruption and pollution of the subversive elements. The choice left to the state is limited: Either to infringe academic freedom, as understood in the traditional sense, and thereby preserve democracy and all its constitutive elements, among which is the former, or, let alone academic freedom unchecked and together with it allow the godless ideology to thrive with impunity thus place democracy *per se* in jeopardy. This jig-saw should not puzzle us but instead sharpen our minds and decapitate the Hydra of Error and thus remove ourselves from the muddy pedestals of hypocrisy and apparition.

There are more substantial and valid reasons to uphold loyalty oaths than against, without subverting the fundamental principle of government of laws and not of men. It is admitted that they are

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[68] Weiman v. Updegraff, *supra*.
[69] Emerson and Haber, *supra*.

effective potential weapons of tyranny because they afford prior censorship but it is upon the courts to decide in proper cases whether the imposition under the circumstances of the particular case is a valid exercise of the far-reaching police power of the state.

The constitutional guaranty of due process is not a hollow phrase, devoid of meaning or import vis-a-vis police power, but even then, such—

> * * * demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the subject sought to be attained * * *
>
> So far as the requirements of due process is concerned and in the absence of other constitutional restriction a state is free to adopt * * * whatever policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose.[70]

The loyalty oath as it was conceived meets all the requirements of due process as mentioned above.

But where the exclusion of a public servant pursuant to a statute is patently arbitrary and discriminatory, the constitutional protection extends to him.[71] This was best exemplified in the case involving the Oklahoma Statute[72] whereby mere membership is sufficient disqualification from public employment. The court summarizing the consequences visited on the excluded person on ground of disloyalty, stated: "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 eye his neighbor as a possible enemy." The oath in this particular case was held to offend due process because the indiscriminate classification of innocent with knowing activity is an assertion of arbitrary power.

The same holding was made in the case of *Cummings v. Missouri*[73] on the ground, among others, that the means employed had no real and substantial relation to the subject sought to be attained. The court stated:

> * * * there can be no connection between the fact that Mr. Cummings entered or left the state of Missouri to avoid enrollment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church.

In 1953, a Texas statute was passed requiring each applicant for a pharmacist license to swear that he is not a member of the

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[70] Nebbia v. New York, 78 L. ed. 940, 950, 957. cited in the Philippine case Ichong v. Hernandez, G.R. No. L-7995, May 31, 1957.

[71] Weiman v. Updegraff, *supra.*

[72] See Note No. 46.

[73] 40 Wall. 277 (1867).

communist party and does not believe in force or violence as a means to overthrow the government. There seems to be no reasonable connection between this oath requirement on the one hand and the public health on the other which is sought to be protected when a pharmacist seeks a license. An even more extreme example could at one time be found in the state of Washington, where would-be veterinarians were compelled to sign a non-communist oath before they were allowed to cure sick animals.[74]

Beyond much fuss and contradiction, requirements like these would be declared unconstitutional if ever they were ably challenged. The Supreme Court has never said that individuals must reveal their beliefs whenever directed to do so. The right of silence can not be destroyed at will. Before a man may be forced to state what is in his own mind, there must be a demonstrably strong public interest in what may be disclosed.[75]

Again, one of the primary requisites for a valid imposition of loyalty oath or check is that the authority seeking to proceed is properly empowered. But where a public officer, whatever may be his position, asserts such authority and tries to justify his actuation with a provision of law which is so vague in itself—a flimsy and dangerous basis, beyond much contradiction and doubt, such would fail the test of constitutionality in the light of the principle which enjoins the undue delegation of power or by the mere fact that he is not authorized so to do, particularly and with more reasons since such imposition cuts across the very foundation and integrity of those concerned.

Otherwise, this would invite the fate of the German and Italian universities under Fascism and the Russian universities under Communism. It would deny to our society one of its most fruitful sources of strength and welfare and represent a sinister change in our ideal of government.[76] It is indeed worthwhile to note that in all the cases brought to and decided by the state and federal courts of the United States the authority involved is the legislature itself. The courts are so zealous in guarding the rights of the individuals that in an unreported case,[77] the Supreme Court of Washington struck down the loyalty oath law of that state upon the sole ground that its incorporation of the US Attorney-General's list of subversive organizations constituted an invalid delegation of legislative power.

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[74] Walter Gellhorn, *supra*, 106.
[75] Beilan v. Board of Education, *supra*.
[76] Emerson and Haber, *supra*, 1073.
[77] Savelle v. University of Washington, *supra*.

Unless a faculty member violates a law, however, his discipline or discharge is a university responsibility and should not be assumed by political authority. Discipline on the basis of irresponsible accusation or suspicion can never be condoned. It is as damaging to the public welfare as it is to academic integrity.[78] The university is competent to establish a tribunal to determine facts and fairly judge the nature and degree of trespass upon academic integrity, as well as to determine the penalty such trespass merits.[79]

Removal can be justified only on the ground, established by evidence, of unfitness to teach because of incompetence, lack of scholarly objectivity or integrity, serious misuse of the classroom or of academic prestige, gross personal misconduct or conscious participation in conspiracy against the government.[80]

All cases, however, are not so clear-cut. In some situations, the compulsion to declare one's belief may have at least an indirect coercive effect upon freedom of thought or conscience. Adherents of particular religious faiths or political parties to wear indentifying arm-bands, for example, is obviously of this matter.[81] If exposure to ridicule, hostility, or oppression is the cost of holding belief, liberty becomes an illusion.

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[78] *Op. cit.* 1076.
[79] *Supra,* 1077.
[80] *Op. cit.,* 1080.
[81] American Communications Association v. Douds, *supra.*