

# A CHALLENGE TO THE LOYALTY OATH

A court test for the loyalty oath may send state legislators back to the drawing board

Oklahoma's loyalty oath, which is a requirement for employment by the state, will be contested in the courts. Vincent Maefsky, a graduate assistant in philosophy who was refused payment and dismissed from his OU job and fellowship when he refused to sign the oath, plans to test its constitutionality.

The present oath is the state's second. The first oath passed by the legislature was declared unconstitutional in 1951 by the U.S. Supreme Court (*Wieman v. Updegraff*).

Said Maefsky when he was notified of the University's action, "I was hop-

ing the issue wouldn't be pressed. My primary purpose in coming here is to study philosophy. I am not a communist, but I feel whether I am or not is irrelevant and that the oath is unconstitutional."

Maefsky is not alone in his questioning of the oath. The U.S. Supreme Court has in recent years thrown out all of those brought before it for various reasons. An article by Stanton B. Pemberton in the Fall 1967 *Baylor Law Review* points to four concepts which appear to him to be the principal tools used by the high court in such loyalty oath cases. The one

which applies to Oklahoma's loyalty oath is:

"4. Such an oath cannot have *overbreadth* to the extent of infringing First Amendment freedoms by depriving them of adequate breathing space. A state or the federal government may regulate in this area only with narrow specificity. Therefore, an oath provision required as a condition of public employment may not indiscriminately group for penal purposes mere knowing membership with knowing active membership with specific intent to further the illegal aims of an organization."

It is on this concept that Oklahoma's oath appears most vulnerable. The 1966 Court decision which ruled that Arizona's loyalty oath was unconstitutional indicates that the same fate awaits Oklahoma's, for the two states' oaths are quite similar.

The testing process in the courts likely will require a long time, up to two years and possibly more. Maefsky has been approached by both the American Association of University Professors and the American Civil Liberties Union about assistance.

In the August issue of the *Oklahoma Law Review* Philip F. Horning, article and book review editor, wrote an article in which he examined Oklahoma's oath in an attempt to ascertain its ability to meet constitutionality as indicated by recent Supreme Court decisions, particularly the Arizona ruling. His article follows.

## OKLAHOMA'S LOYALTY OATH

I, \_\_\_\_\_, do solemnly swear (or affirm) that, consistent with my citizenship, I will support, obey and defend the Constitution of the United States and the Constitution of the State of Oklahoma, will not violate any of the provisions thereof, and will discharge the duties of my office or employment with fidelity.

I do further swear (or affirm) that I do not advocate by the medium of teaching, or justify, directly or indirectly, and am not a member of or affiliated with the Communist Party or the Cominform or with any party or organization, political or otherwise, known to me to advocate by the medium of teaching, or justify, directly or indirectly, revolution, sedition, treason or a program of sabotage, or the overthrow of the government of the United States or of the State of Oklahoma, or a change in the form of government thereof by force, violence or other unlawful means.

I do further swear (or affirm) that I will take up arms or render non-combatant service in the defense of the United States in time of war or national emergency, that is, if by valid law required.

I do further swear (or affirm) that during such time as I am \_\_\_\_\_ (explanation of association with the University) I will not advocate by the medium of teaching or justify, directly or indirectly, and will not become a member of or affiliated with the Communist Party or with any party or organization, political or otherwise, known to me to advocate through the medium of teaching, or justify, directly or indirectly, revolution, sedition, treason or a program of sabotage, or the overthrow of the government of the United States or of the State of Oklahoma, or a change in the form of government thereof by force, violence or other unlawful means.

## Another Unconstitutional Loyalty Oath?

By Philip Horning

The recent United States Supreme Court decision in *Elfbrandt v. Russell*, which holds unconstitutional an Arizona statutory loyalty oath, casts grave doubt on the validity of the present Oklahoma statutory loyalty oath. In this case, which promises to be a landmark decision in the loyalty oath field, an Arizona school teacher sought a declaration of invalidity of a statutory loyalty oath which state employees were required to sign. Subsection E of the same statute made any employee who signed the oath and knowingly became or remained a member of any organization having as "one of its purposes" the overthrow of the government of Arizona subject to prosecu-

tion for a felony and to discharge from employment. The Court held that the oath and subsection E infringed upon freedom of association, as protected by the First Amendment, because nothing in the oath, subsection E, or the construction given to both by the Arizona Supreme Court excluded membership by one who had knowledge of, but did not subscribe to the unlawful ends of such an organization. The Court stated that such a law rested on "guilt by association" and subjected the employee to the "hazard of being prosecuted for knowing but guiltless behavior."

An examination of the Oklahoma loyalty oath and accompanying subsection 6 reveals that they are open to the

same infirmities as the Arizona statute. Subsection 6 provides that any employee who subscribes to the oath and becomes a member of, or affiliated with, any organization which advocates "directly or indirectly" the overthrow of the United States or the state of Oklahoma will be guilty of a felony and must forfeit his employment. Clearly, there is no reservation or exclusion for the person who knows of the unlawful goals but does not subscribe to them. Therefore, the same flaw that was contained in the Arizona statute and pointed out by *Elfbrandt* is also present in the Oklahoma statute.

The language, "directly or indirectly," in subsection 6 of the Oklahoma statute corresponds to the language, "having for one of its purposes," in subsection E of the Arizona statute. An organization may have more than one purpose. Its primary purpose may be a commendable one, such as academic advancement through international cooperation in a specific field of study. However, if the organization were controlled by members from communist nations it might be said to have as "one of its purposes," although admittedly subordinate, the overthrow of the government. The same organization could then be said to "indirectly" advocate overthrow. In the language of both statutes lies the implicit danger that a person who joined an international organization, knowing of its unlawful subordinate purposes but only intending to pursue its primary, laudatory purpose, would be subject to prosecution. Consequently, the Oklahoma oath should be held unconstitutional at its first judicial testing on the same grounds as the Arizona oath was in *Elfbrandt*.

To understand how the Court reached its decision in *Elfbrandt*, it is helpful to review a series of loyalty oath decisions beginning with *Wieman v. Updegraff*, which held an Oklahoma loyalty oath unconstitutional. *Wieman*, reversing an Oklahoma Supreme Court decision, established that an oath which excluded persons from state employment solely on the basis of membership in a subversive organization, regardless of their knowledge of the organization's subversive activities and purposes, violated the due process clause of the Fourteenth Amendment. The Court stated that such an "indiscriminate classification of innocent without knowing activity" was an assertion of arbitrary power. Although previous cases had foreshadowed such a result, after *Wieman* it was essential that a valid loyalty oath embody the element of knowledge or "scienter."

Vagueness is another flaw which frequently invalidates a loyalty oath. The reasoning is that the uncertainty of the oath's meaning forces the oath-taker to "steer far wider of the unlawful zone" than is necessary, thereby inhibiting other protected freedoms, such as freedom of speech and freedom of association. In 1961, an oath which required a state employee to swear in writing that he had never lent his "aid, support, advice, counsel, or influence to the Communist Party" was held to be so vague as to deny liberty without due process of law. The Court stated further that the terms of the oath were not susceptible to objective measurement. In view of many prior decisions, it was not revolutionary that such an oath would fail due to vagueness.

The case of *Baggett v. Bullitt* introduced a new element into an action which challenged an oath on grounds

of vagueness. Besides holding the act to be a violation of due process because it was unduly vague, uncertain, and broad, the Court went on to say that the oath-taker was subjected to the "hazard of being prosecuted for knowing but guiltless behavior. . . ." This language is closely related to the basis of the *Elfbrandt* decision and was quoted by it. The significance of the language is that an oath drawn too broadly will proscribe activities which an individual may lawfully engage in, as well as those which are unlawful. This idea is not a new one, but the Court went on to establish a test which helps determine if, in fact, an oath is too broadly drawn. This test is a series of questions which, if affirmatively answered, will indicate that "guiltless knowing behavior" is encompassed by the statute.

"Does the statute reach endorsement or support for Communist candidates for office? Does it reach a lawyer who represents the Communist Party or its members or a journalist who defends constitutional rights of the Communist Party or its members or anyone who supports any cause which is likewise supported by Communists or the Communist Party?"

In addition to the above cases, several decisions construing non-loyalty oath statutes have a bearing on the *Elfbrandt* decision. In upholding the membership clause of the Smith Act, the Court stated that a blanket prohibition of association with an organization having both legal and illegal aims would be a real danger to legitimate expression. In holding section 6 of the Subversive Activities Control Act unconstitutional, although other sufficient grounds were present, the Court stated that section 6 of the act rendered both the member's degree of participation in the organization and his commitment to its purposes irrelevant.

In light of the above authorities, the result reached in *Elfbrandt* could not be considered unexpected. The "scienter" requirement of *Wieman*, the void for vagueness doctrine with the specifications of *Baggett*, and the related decisions construing other statutes, all point to the logical culmination in the *Elfbrandt* case.

As naturally as the decision in the instant case follows from prior authorities, it further restricts the standard language which may be used to condition public employment. It has been held that a state may establish qualifications for public employment, and loyalty to the state may be one of the qualifications. This is still true under *Elfbrandt*, but prior holdings entitled the state to require its employees to abstain from knowing membership in organizations advocating overthrow of the government. The restriction of *Elfbrandt* is that such required abstention is now narrowed to knowing membership with the intent to pursue and effectuate the unlawful or disloyal purpose of the organization. It is unclear from the majority opinion whether this restriction applies if there is no provision for criminal prosecution. The case does lend support to the position that it would not apply.

The *Elfbrandt* decision leaves the Oklahoma oath unconstitutional. It is a desirable decision because it precludes the possibility that one could be punished for innocent activity. It demonstrates that an effective, constitutional loyalty oath should be oriented to disloyal individual activity and not to organizational affiliation.

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