

4-1-1967

## An Appraisal of Security Legislation in Education in Light of Keyishian: A Proposed Solution

David R. Pfalzgraf

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Administrative Law Commons](#), and the [Constitutional Law Commons](#)

---

### Recommended Citation

David R. Pfalzgraf, *An Appraisal of Security Legislation in Education in Light of Keyishian: A Proposed Solution*, 16 Buff. L. Rev. 781 (1967).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol16/iss3/15>

This Comment is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

## COMMENTS

Other relevant factors are the law applicable to a suit, "the availability of evidence in the state, . . . the relationship between the state or the defendant's property in the state and (1) the transaction or occurrence which gave rise to the suit, or (2) the objective of the action."<sup>92</sup> In other words, it is possible that the present categories of in personam, in rem and quasi-in-rem jurisdiction are too arbitrary and self-limiting.<sup>93</sup> Traditional notions of jurisdiction couched in terms of power do not provide proper fairness to all parties involved. It would perhaps be better to base jurisdiction on a more flexible concept, such as "forum conveniens" or "competency to adjudicate" which would be more in tune with modern jurisdictional needs.<sup>94</sup> In any case, it has been suggested that with the advent of long-arm statutes used to assert in personam jurisdiction over a non-resident defendant, quasi-in-rem jurisdiction is an outmoded and unfair procedure.<sup>95</sup>

MICHAEL NELSON

### AN APPRAISAL OF SECURITY LEGISLATION IN EDUCATION IN LIGHT OF KEYISHIAN: A PROPOSED SOLUTION

*Give us the child for 8 years, and it will be a Bolshevik forever. . . .  
He who has the youth, has the future.*

—V. I. Lenin

*Absolute security is achieved only in a graveyard.*

—Justice Holmes

On January 23, 1967, the Supreme Court announced the decision in *Keyishian v. Board of Regents*.<sup>1</sup> The subject of the decision is loyalty legislation; the conflicting interests evidence a balancing of academic and constitutional freedoms against public demand for legitimate state control of "subversive" activity in a state educational system. Initial reactions to this decision are both vehement and varied. Protagonists acclaim the decision a landmark for personal

---

92. *Ibid.*

93. See generally von Mehren & Trautman, *supra* note 88.

94. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956); Homburger & Laufer, *supra* note 73, at 78 (The authors suggest a "functional approach to the problem of jurisdiction, broadly rooted in reasonableness, fair play and substantial justice."). *Cf.* Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), *appeal dismissed and cert. denied sub. nom.* Columbia Broadcasting System v. Atkinson, 357 U.S. 569 (1958), 46 Calif. L. Rev. 637 (1958); see 28 U.S.C. § 1397 (1964) (federal interpleader statute).

95. See Carrington, *supra* note 61; *contra*, Currie, *Attachment and Garnishment in the Federal Courts*, 59 Mich. L. Rev. 337 (1961); *cf. supra* notes 36-37 and accompanying text. See also Traynor, *Is This Conflict Really Necessary?*, 37 Texas L. Rev. (1959).

However quasi-in-rem jurisdiction may have continuing viability where it is used to prevent an absconding resident from selling or taking his property with him, thus avoiding his creditors. Here it is used as a security device over a resident, rather than as a means to exercise jurisdiction over a non-resident as in *Seider*.

1. 385 U.S. 589 (1967) [hereinafter cited *Keyishian*].

liberties and academic freedom; antagonists deem the decision to deprive the states of a legitimate power.

In *Keyishian*, the highest court struck down New York's complex of loyalty laws as being unconstitutionally vague and overbroad in their application to members of the faculty at the State University of New York at Buffalo.<sup>2</sup> Yet it is suggested that this latest Supreme Court decision restricting loyalty legislation<sup>3</sup> neither resolves the controversy as to the necessity and propriety of state loyalty oaths or disclaimers nor gives clear guidelines to state legislatures for future loyalty legislation. Indeed, even the dissent in the *Keyishian* case suggests that there may be no future at all for state loyalty legislation: "the majority has by its broadside swept away one of our most precious rights, namely, the right of self-preservation."<sup>4</sup>

#### THE HISTORY OF LOYALTY LEGISLATION

Although loyalty oaths are not fruits of an American culture, their roots have been in American soil since European settlers first set foot in America.<sup>5</sup> Yet with these roots sprang seeds of discontent with community standards of allegiance. From the Puritan societies which adopted plans requiring acknowledgment of subjection to their governments, to the formation of the colonies, and finally into the structures of state governments, mandates of loyalty were considered by many to be both necessary and desirable.<sup>6</sup> New York State provides an example of the movements toward control of citizens' loyalty and the discontent with it.

In New York, in late September 1776, a rebel convention headed by John Jay set forth a resolution that "a committee be appointed for the express purpose of inquiring into and detecting all conspiracies which may be formed in this state against the liberties of America."<sup>7</sup> Since that early date, New York has legislated extensively with respect to "loyalty." Although the emphasis has switched from the historical control of anti-Federalist plots to modern control of subversive (for the most part, Communist) activity, the basic interests involved have remained unchanged.<sup>8</sup> The continuing state interest in controlling individual

2. *Id.* at 604, 609-10.

3. See, e.g., recent cases dealing with federal legislation: *Apthecker v. Secretary of State*, 378 U.S. 500 (1964); *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957); and state legislation: *Elfbrandt v. Russell*, 384 U.S. 11 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Shelton v. Tucker*, 364 U.S. 479 (1960).

4. *Keyishian*, 385 U.S. 589, 628 (1967). Justices Clark, Harlan, Stewart, and White, in addition to questioning the appellants' standing and exhaustion of remedies (*Id.* at 621), vigorously questioned the very legality of the majority opinion: "No court has ever reached out so far to destroy so much with so little." *Id.* at 622. The dissent saw the case as being controlled by *Beilan v. Board of Educ.*, 357 U.S. 399 (1958), *Garner v. Board of Pub. Works*, 341 U.S. 716 (1951), and *Adler v. Board of Educ.*, 342 U.S. 485 (1952) (in which substantially the same statute as involved in *Keyishian* withstood constitutional attack).

5. See Hyman, *To Try Men's Souls* ch. I, 1-22 (1960).

6. See Douglas, *Freedom of the Mind* 71-72 (1962).

7. Hyman, *op. cit. supra* note 5, at 88.

8. See generally Gellhorn, *The States and Subversion* (1952); Chafee, *Free Speech in the United States* (1954).

and group action when such activity is determined by the legislature to present a threat to the very foundation of the state government has been evidenced by several New York investigating committees and statutes since World War I, such as the Lusk Committee,<sup>9</sup> the Ives Loyalty Oath Law,<sup>10</sup> the McNabb Investigation,<sup>11</sup> the Devany Law,<sup>12</sup> and the Rapp-Coudert Investigations.<sup>13</sup>

In 1949, the New York legislature passed the "Feinberg Law"<sup>14</sup>: loyalty legislation enacted to implement and enforce two earlier statutes. The constitutionality of the statute was challenged and upheld by the Supreme Court in *Adler v. Board of Education*.<sup>15</sup> In 1953 an amendment to the law brought within the scope of the statute the requirement that all state university teachers sign a "Feinberg Certificate." A constitutional challenge by four professors and one civil service employee at the State University of New York at Buffalo was upheld by the Supreme Court in *Keyishian* on the grounds that the statute was overbroad and vague.<sup>16</sup>

To resolve the problems of the scope of the majority's opinion in *Keyishian*, an explanation of the history of the statute is essential. If the New York Legislature is to draft and adopt a constitutional replacement for the Feinberg Law, the constitutional infirmities in the former substantive and procedural statutes must be clarified to avoid future unconstitutional enactments.

#### THE FEINBERG LAW: A HISTORY

The Feinberg Law<sup>17</sup> was a 1949 amendment to the New York State Education Law, providing the means by which the Board of Regents could effect the pre-existing substantive laws of the State Education Law section 3021 as well as the Civil Service Law section 12-A.<sup>18</sup> Section 3021 of the State Education Law entitled "Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances" provides:

A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treason-

9. See Gellhorn, *op. cit. supra* note 8, at 232.

10. *Id.* at 241.

11. *Id.* at 242.

12. *Id.* at 245.

13. *Id.* at 247.

14. N.Y. Educ. Law § 3022 (Old § 3022 became § 3023.). The law was introduced by the then Senate Majority Leader on March 11, 1949. See S.I. 2624, Print 2977, 3101, N.Y. Legis., 172d Sess., N.Y. Leg. Record and Index (Albany, The Leg. Index Co., March 11, 1949), p. 192. The "Feinberg Law" became the popular name for this law, especially to the faculty at state universities. A legal memorandum describing the law and its consequences was distributed to the deans of the State University of New York at Buffalo in December, 1963.

15. *Adler v. Board of Educ.*, 342 U.S. 485 (1952).

16. *Keyishian*, 385 U.S. 589, 604, 609 (1967).

17. N.Y. Sess. Laws 1949, ch. 360, § 1.

18. N.Y. Sess. Laws 1939, ch. 547, amended by N.Y. Sess. Laws 1940, ch. 564; repealed by N.Y. Sess. Laws 1958, ch. 790, § 1 (now N.Y. Civ. Serv. Law § 105, as amended, N.Y. Sess. Laws 1958, ch. 503, § 2).

able or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.<sup>19</sup>

Section 12-A of the State Civil Service Law provided, in substance, that no person should hold employment in any state educational institution who, by word or by writing,

wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means. . . .<sup>20</sup>

Declaration of legislative policy was clear. The Feinberg Law—section 3022 of the State Educational Law—was enacted “to eliminate subversive persons from the public school system.”<sup>21</sup> The legislature declared that members of subversive groups, particularly members of the Communist Party and related organizations, had infiltrated into public employment in the public schools of the state.<sup>22</sup> That body announced that the consequence of this infiltration “is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority, and leadership.”<sup>23</sup> Since, admittedly, it is “difficult to measure the menace of such infiltration in the schools by conduct in the classroom,” in order to protect the children it was thought essential that the new laws enforcing the proscription of members of subversive groups be rigorously enforced.<sup>24</sup>

In its first subdivision, the Feinberg Law directs the Board of Regents to enforce the substantive requirements of both section 3021 of the State Education Law and section 12-A of the Civil Service Law.<sup>25</sup>

The second subdivision of the Feinberg Law provides the procedure by which the Board of Regents should comply with the intent and purpose of the two substantive laws: that is, the Board of Regents should, after inquiry, make a list of certain organizations which it finds to be “subversive” on the grounds set forth in section 12-A of the Civil Service Law.<sup>26</sup> Section 3022(2) further directs that the Board of Regents provide in its rules and regulations that “membership” in any one of the “subversive” organizations constitutes “*prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.”<sup>27</sup>

---

19. N.Y. Educ. Law § 3021. (Formerly N.Y. Educ. Law of 1910, § 568, added by N.Y. Sess. Laws 1917, ch. 416, § 3. Section unchanged.)

20. N.Y. Civ. Serv. Law § 12-A (now N.Y. Civ. Serv. Law § 105, amended by N.Y. Sess. Laws 1958, ch. 503, § 2).

21. See Declaration of Policy, N.Y. Educ. Law § 3022.

22. See Declaration of Policy, N.Y. Educ. Law § 3022.

23. See Declaration of Policy, N.Y. Educ. Law § 3022.

24. See Declaration of Policy, N.Y. Educ. Law § 3022. Such feeling was common in post World War II years. See, e.g., *Hearings Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary*, 83d Cong., 1st Sess. (1953).

25. N.Y. Educ. Law § 3022(1).

26. N.Y. Educ. Law § 3022(2).

27. N.Y. Educ. Law § 3022(2) (Emphasis added.).

In April 1949, pursuant to the Feinberg Law, the Board of Regents established a committee to effectuate the provisions of the law. Demands for public hearings on the merits of the law were at first denied on the theory that a hearing on the law's validity could have no useful purpose.<sup>28</sup> Subsequently hearings were allowed, however, and after unforeseen delays because of indecision as to the list of subversive organizations and disagreement as to a means of implementing the law, the rules were issued in July 1949.<sup>29</sup>

The rules adopted by the Board of Regents provided that the school authorities of each district should take all necessary action to effect the following procedures: Prior to the appointment of any employee, the nominating official should inquire of prior employers and others whether the candidate has been known to have violated the statutory provisions with respect to membership in a subversive organization—such a violation should bar employment; each year a state official must review the employment record of all teachers and if there is any evidence indicating a violation of any of the statutory provisions, the school authority should recommend that action be taken to dismiss such teacher; after such recommendation, school authorities must, within ninety days, either prefer formal charges or reject the recommendation.<sup>30</sup> Not until two months after these rules were issued was a list of “subversive” organizations finally agreed upon. The final list of “subversive” organizations, including the Communist Party of the United States, appeared in September 1949.<sup>31</sup>

The rules of the Board of Regents, as well as the whole Feinberg Law “complex,” were immediately challenged in 1949. Although the complex was determined to be unconstitutional as a bill of attainder,<sup>32</sup> three years later the Supreme Court upheld the law as being constitutional on its face and capable of constitutional application.<sup>33</sup> The question of whether the Feinberg Law was unconstitutionally vague was neither argued nor passed upon.<sup>34</sup>

By virtue of a 1953 amendment to the law, faculty members and employees of all state-owned and operated colleges or other institutions of higher education were explicitly included within the scope of the Feinberg Law.<sup>35</sup> Thereafter the Board of Regents listed the Communist Party of the State of New York and the Communist Party of the United States as subversive organizations. In 1956 the Board of Trustees Committee designed the “Feinberg Certificate.” Each

28. See Chamberlain, *Loyalty and Legislative Action* 195 (1951).

29. *Id.* at 196.

30. See Rules of N.Y. Board of Regents, art. XVIII, § 224 (adopted July 15, 1949).

31. See Chamberlain, *op. cit. supra* note 28, at 196, 199. Other “subversive” organizations listed were the Socialist Worker's Party, the Worker's Party, the Industrial Workers of the World, and the Nationalist Party of Puerto Rico.

32. *Lederman v. Board of Educ.*, 196 Misc. 873, 95 N.Y.S.2d 114 (Sup. Ct. 1949), *rev'd*, 276 App. Div. 527, 96 N.Y.S.2d 466 (2d Dep't), *aff'd sub nom.* *Thompson v. Wallin*, 301 N.Y. 476, 95 N.E.2d 806 (1950), *aff'd sub nom.* *Adler v. Board of Educ.*, 342 U.S. 485 (1952).

33. *Adler v. Board of Educ.*, *supra* note 32.

34. See *Keyishian*, 385 U.S. 589, 594-595 (1967). *But see* the dissent in *Keyishian* indicating that an examination of the briefs in *Adler* shows that the issue may have been before the *Adler* Court although not discussed in the opinion. *Id.* at 626.

35. N.Y. Educ. Law § 3022(1), as amended N.Y. Sess. Laws 1953, ch. 681.

person desiring an appointment or the renewal of an appointment in the state university system had to sign the "Feinberg Certificate" declaring that he had read the Regents' Rules and understood that the rules and the statutes constituted terms of employment; declaring further that he was not a member of the Communist Party; and that if he had ever been a member he had communicated that fact to the President of the State University.<sup>36</sup> The signing of this certificate by faculty members in the State University system was a necessary condition of employment—refusal to sign the certificate constituted grounds for dismissal for insubordination.

In 1958 section 12-A of the Civil Service Law became section 105(3), providing that:

A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean "treason" as defined in the penal law; a seditious word or act shall mean "criminal anarchy" as defined in the penal law.<sup>37</sup>

Finally, a new amendment was added to Civil Service Law section 12-A (c) providing,

for the purposes of this section, membership in the communist party of the United States of America or the communist party of the State of New York shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof.<sup>38</sup>

In 1965, the Feinberg Certificate was rescinded and it was announced that no person in the state's employ be denied further employment "solely" because of his failure to sign the certificate.<sup>39</sup> In lieu of the requirement of subscription, the employee was informed that he must be aware of, and accept as part of his contract, the conditions of sections 3021 and 3022 of the State Education Law and section 105 of the Civil Service Law.<sup>40</sup> Although a disclaimer of membership was no longer required, failure to answer any "relevant" question posed by an official was sufficient grounds to refuse to recommend or make an appointment.<sup>41</sup>

Considering employees of the State University of New York alone, these provisions affected many thousands of persons.<sup>42</sup> The *Keyishian* case, in strik-

36. The certificate was in the form of a negative disclaimer, not an affirmative oath.

37. N.Y. Civ. Serv. Law § 12-A (now N.Y. Civ. Serv. Law § 105, as amended, N.Y. Sess. Laws 1958, ch. 503, § 2).

38. N.Y. Civ. Serv. Law § 12-A(c) (now N.Y. Civ. Serv. Law § 105, as amended, N.Y. Sess. Laws 1958, ch. 503, § 2).

39. See *Keyishian*, 385 U.S. 589, 596. The majority in *Keyishian* did not consider the state's rescinding the oath as having an effect upon the standing of the appellants in any way: "The substance of the statutory and regulatory complex remains and from the outset appellants' basic claim has been that they are aggrieved by its application." *Ibid.*

40. *Ibid.*

41. *Ibid.*

42. See Brief for Appellant, p. 9, *Keyishian*.

## COMMENTS

ing down the complex of laws, obviated the "loyalty" problems of state faculty members at least temporarily.<sup>43</sup> Although the majority opinion in *Keyishian* is not completely clear, certain principles may be derived from it which may guide the legislature before hastily passing a new loyalty law.

### THE LIMITS OF LOYALTY LEGISLATION

Can there be a balancing between public and legislative demand for teacher control and academic freedom? What legitimate demands are relevant to this particular employer-employee relationship? What restrictions may a state place on a teacher which it may not impose on the general population? Does the very nature of the teaching position justify more rigorous interpretation of preferred freedom doctrines than the Supreme Court has been willing to recognize in criminal prosecutions under the Smith Act? These are a few of the difficult problems raised in the area of "loyalty" legislation.

This area of constitutional law brings into play the protections of the first, fifth, and fourteenth amendments. A proposed resolution demands an outlining of the constitutional contours of substantive statutes which condition employment upon specific legislative standards and which are commensurate with the protection of these amendments. What are the legitimate constitutional objects of and objections to such legislation? The hard case—the *Keyishian* case—best illustrates the war of the conflicting philosophies and the battles which each has won.

First one must examine the interests of the state and the values which it endeavors to protect. The area of employment with which *Keyishian* is concerned—the regulation of the activities of persons devoted to higher education—is most sensitive to all segments of the society. As evidenced by the history of New York legislation, the conviction that subversive persons should not be allowed in the classrooms to indoctrinate young men and women with Communist ideas is of paramount importance. Admittedly, some degree of teacher control is legitimate; as Mr. Justice Brennan stated, "There can be no doubt of the legitimacy of New York's interest in protecting its educational system from subversion."<sup>44</sup>

It has been argued that the justification for this popular proscriptive belief is the fact that government should not support those who oppose its fundamental principles, that only those who support its institutions should be employed by the state.<sup>45</sup> This contention does not relate to the fitness of the teacher for his position, but rather to his attitude toward the government. This is the belief,

---

43. Scarcely a month intervened before the New York Legislature proposed a new statute to replace the old complex. The Marchi-Lombardi Bill, S.I. 2736, A.I. 4317, Print 4471, 6513, N.Y. Legis., 190th Sess., N.Y. Legis. Record and Index (Albany, The Legis. Index Co., 1967), pp. S 244, A 409, was passed by the Senate on March 16, 1967. There is considerable doubt as to the constitutionality of the bill in light of *Keyishian*.

44. *Keyishian*, 385 U.S. 589, 602 (1967).

45. See Brown, *Loyalty and Security*, 223-37 (1958); Israel, *Elfbrandt v. Russell: The Demise of the Oath?*, 1966 Sup. Ct. Rev. 193, 220; see generally Linde, *Justice Douglas on Freedom in the Welfare State*, 39 Wash. L. Rev. 4 (1964).



however, that is at the heart of the objection to employing "subversives" in a state school system.<sup>46</sup> Part of the above rationale is based on the fear that these subversives will, when employed in state educational institutions, through innuendo or didacticism, adversely affect the minds of some students and make them bad citizens.

Based on the philosophy that the state should not employ persons who are "subversive" to the state, it is argued that such persons are not "fit" to teach in state institutions of higher learning. Again, this "fitness" does not relate to the teacher's *ability* to instruct, to convey ideas and to stimulate thought, but rather to subject matter of what the state presumes will be taught. Proponents of loyalty legislation point out that without such control, the doors of public education are open to subversive persons who would be paid for the opportunity to use the classroom as a forum to induce a favorable attitude toward their subversive goals.<sup>47</sup> Indeed the Feinberg proscription itself was aimed at those persons who "teach a proscribed party line or group dogma or doctrine without regard to truth or free inquiry."<sup>48</sup> In short, it is presumed that a person who is a "subversive" would perform in a subversive manner in the classroom.

Since the Supreme Court has recognized and endorsed "the power of the state to take proper measures safeguarding the public service from disloyal conduct,"<sup>49</sup> the legal objections to state loyalty legislation are directed against specific substantive and procedural state enactments for carrying out this legitimate purpose. Further objections are derived from the "philosophy" of academic freedom:<sup>50</sup> "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."<sup>51</sup>

Thus, the opponents of state loyalty restrictions in the area of teacher employment have attacked various "security" laws on the grounds that they are unconstitutional on their face; unconstitutional as applied, and void for vagueness in the area of the protected freedoms of speech and association; invalid as unconstitutional restrictions on future action; unconstitutional as bills of attainder; unconstitutional as ex-post facto amendments; and invalid inasmuch

46. The question may be raised whether the meaning of the word "subversive" refers to those who advocate violent overthrow of the government or to those who are opposed to the basic principles of the state. It is suggested that the former is the proper interpretation. The Supreme Court has never ruled upon the right of a state to deny employment to individuals who reject the basic principles of our constitutional form of government. See Israel, *supra* note 45, at 693.

47. See Israel, *supra* note 45, at 228-29.

48. See Declaration of Policy, N.Y. Educ. Law § 3022.

49. Shelton v. Tucker, 364 U.S. 479, 488-89 (1960). "Disloyal conduct" is not mere belief. The state's concern must be with *action*.

50. See *Keyishian*, 385 U.S. 589, 607-608 n.12 (1967) referring to Lazarsfeld & Thielens, *The Academic Mind* 92-112, 192-217 (1958); Jahoda & Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of the Loyalty and Security Programs*, 61 Yale L.J. 295 (1952); see generally MacIver, *Academic Freedom in Our Time* (1955); Konvitz, *Expanding Liberties* 86-108 (1966); Morris, *Academic Freedom and Loyalty Oaths*, 28 Law & Contemp. Probs. 478 (1963).

51. Shelton v. Tucker, 364 U.S. 479, 488-89 (1960).

## COMMENTS

as they are pre-empted by existing federal legislation.<sup>52</sup> Each of these assaults contains a myriad of variations when applied to specific statutory infirmities. The *Keyishian* case illustrates the fact that no matter how legitimate the state's concern, constitutional enforcement of substantive restrictions can only be attained through a narrowly drawn statute. Indeed the decision casts considerable doubt upon the ability of a legislature to draw any effective constitutional loyalty statute controlling employment of university teachers.<sup>53</sup> Even a statute which is constitutional on its face may be constitutionally defective or seriously ineffective in its application. These conclusions may be drawn from a study of the case law in this area, in which *Keyishian* is the latest, but not the last case in this developing area of the law.

### THE DEVELOPING CASE LAW IN LOYALTY LEGISLATION

The *Keyishian* case does not stand in solitude. It is only a further clarification of the power of a state to take effective measures to control its employees.<sup>54</sup> It falls into the latest class of Supreme Court cases which recognize the possibility of adverse social and economic results flowing from activity in the Communist Party and which prohibit these results when state action does not comply with

---

52. See e.g., Brief for Appellants, pp. 15-19, *Keyishian*. The primary non-legal attack against all loyalty legislation as it affects university teachers proceeds: (1) any "subversive" activity which a teacher carries on outside the classroom has no relation to his activities in the classroom insofar as his teaching abilities are concerned. An instructor may be an active Communist and still remain an excellent instructor; and (2) any "subversive" activity which a teacher carries on within the classroom may be proscribed by pre-existing legislation. Subversive activity in the classroom evidences an instructor's incompetency or absence of professional conduct for which he may be removed.

The argument against such a theory is also twofold: (1) the sanction imposed by the state for activity outside the classroom is less than a criminal sanction and, as such, is a legitimate exercise of state power to discourage such activity; and (2) if there may be no legal first amendment challenge to the proscription, the prophylactic effect of the legislation is derived from a reasonable basis of legislative belief that outside activities of the subversive may be carried subtly into the classroom.

53. As will be pointed out below, the requirements of a constitutional statute, after *Keyishian*, may place a nearly impossible burden on the state. Perhaps active and knowing membership in a subversive organization may give rise to a rebuttable presumption that the active knowing member has the specific intent to carry out the illegal aims of the organization. If such a presumption is constitutional, the burden on the state would be less onerous.

54. Cases prior to *Keyishian* have upheld the power of a state to inquire into its employees' associations with allegedly subversive organizations as a legitimate means to determine qualification and fitness for public employment. See *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960) (dismissal by state of social worker for refusal to answer questions relating to subversive activity); *Beilan v. Board of Pub. Educ.*, 357 U.S. 399 (1958) (discharge by the state of a teacher who refused to answer questions relating to subversive activity on the grounds of incompetency); *Lerner v. Casey*, 357 U.S. 468 (1958) (discharge by the state of a subway conductor who refused to answer questions relating to subversive activities under a statute authorizing discharge when reasonable grounds existed for belief that employee was of doubtful trust and reliability); *Garner v. Board of Pub. Works*, 341 U.S. 716, *rehearing denied*, 342 U.S. 843 (1951) (discharge of a state employee who refused to take a statutorily required disclaimer oath). *But see* *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957) (Mere Party membership, even with the knowledge of the unlawful aims of the organization, may not warrant a finding of moral unfitness justifying disbarment.). See also *Barenblatt v. United States*, 360 U.S. 109 (1959). (Some questioning is characterized as procedural and a legitimate exercise of the government's investigatory powers. A balancing test is used.); *Dombrowski v. Pfister*, 379 U.S. 884 (1965). (The Court gives an extensive review of these and other "loyalty" cases.).

constitutional requirements: the cases concerning the Smith Act in which the federal government prosecutes persons for certain kinds of activity in subversive organizations;<sup>55</sup> *Elfbrandt v. Russell*,<sup>56</sup> in which a state attempted to impose criminal sanctions upon public employees who did not conform to the conditions of a required oath; and the *Keyishian* case where restrictions upon public employment by a state have no impending criminal result but rather possible economic and social stigma.<sup>57</sup>

The cases related to the "membership" clause of the Smith Act, e.g., *Scales v. United States*,<sup>58</sup> hold that federal prosecution for activity in the Communist Party, even if the member has knowledge of the illegal aims of the organization, will not withstand constitutional attack without proof of the "specific intent" of the particular member to carry out and effect the illegal aims of the organization. A statute which does not include the "specific intent" requirement, either explicitly or through interpretation by the state or the federal courts, is unconstitutionally overbroad.<sup>59</sup> The requirement of "specific intent" recognizes the possibility that an organization could have both legal and illegal aims and that a member, knowing both these aims, may intend to carry out only the legal aims of the organization.<sup>60</sup> Criminal prosecution of such a person under the Smith Act would be unconstitutional. Although it is arguable that convictions under the Smith Act are extremely hard to obtain (because of difficulties in proving mem-

55. See, e.g., *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961); *Yates v. United States*, 354 U.S. 298 (1957); *Apthecker v. Secretary of State*, 378 U.S. 500 (1964).

56. 384 U.S. 11 (1966). For an excellent analysis of *Elfbrandt*, see Israel, *op. cit. supra* note 45.

57. *Keyishian*, 385 U.S. 589, 601 (1967). Loss of tenure can have a disastrous effect upon the career of a professor: "Whether or not loss of public employment constitutes 'punishment', cf. *United States v. Lovett*, 328 U.S. 303 (1946), there can be no doubt that the repressive impact of the threat of discharge will be no less direct or substantial." *Id.* at 607 n.11.

58. 367 U.S. 203 (1961). Mere sympathizers with a group having as one of its aims the violent overthrow of the government pose no threat either as citizens or as public employees. *Apthecker v. Secretary of State*, 378 U.S. 500 (1964). The Supreme Court has been explicit in showing what kind of activity is *not* enough for criminal prosecution. What must the activity constitute to be constitutionally proscribed? For successful prosecution under the Smith Act, some overt act which links advocacy to action must be proven. Those who are urged to overthrow the government by force or violence must be urged to action and not merely to accept the desirability or propriety of the abstract doctrine. See *Yates v. United States*, 354 U.S. 298 (1957). The action which is urged need not be imminent; rather, advocacy of action for future overthrow is sufficient. *Dennis v. United States*, 341 U.S. 494 (1951). In essence, the whole problem of "activity" involves the clear and present danger test.

59. In *Scales v. United States*, 367 U.S. 203 (1961), the membership clause of the Smith Act was found not to suffer constitutional infirmity because the Court construed the statute to require proof of "active" membership plus the "specific intent" to carry out the illegal aims of the organization. *Id.* at 229-30.

Note that the *Keyishian* Court did not have the benefit of judicial gloss by the New York courts concerning the scope of the Feinberg complex. The Court, however, citing *Baggett v. Bullitt*, 377 U.S. 360, 375-79 (1964) and *Dombrowski v. Pfister*, 380 U.S. 497, 489-90 (1964), asserted that *Keyishian* was not a case where abstention, pending state court interpretation, would help. *Keyishian*, 385 U.S. 589, 601 n.9 (1967).

60. With respect to a state university faculty member, Justice Brennan explains that "the stifling effect on the academic mind from curtailing freedom of association in such manner is manifest. . . ." *Keyishian*, 385 U.S. 589, 607 (1967).

bership, knowledge, and specific intent beyond a reasonable doubt), the constitutional standards the Supreme Court has laid down for prosecution in these federal criminal cases are fairly clear.

The second variation in loyalty legislation concerns criminal prosecution arising from knowing membership in a subversive organization subsequent to taking a state loyalty oath.<sup>61</sup> The main issue in *Elfbrandt* was whether the standard enunciated in *Scales* and the other federal cases applies to state legislative attempts at proscription. *Elfbrandt* would seem to imply that the Supreme Court imposes the same standards in state criminal prosecutions for subversive activity as apply in the Smith Act prosecutions under the membership clause:

Laws such as this 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 in the unlawful aims of the organization.<sup>62</sup>

The Supreme Court said that such a law rests upon the doctrine of "guilt by association" if specific intent is not required.<sup>63</sup> The constitutional infirmities in *Elfbrandt* were overbreadness plus an unconstitutional impingement upon freedom of association. The dissent in *Elfbrandt* felt that the majority should have limited its holding to striking down the criminal section of the statute and remanded the case to the state court for determination of independence of the criminal prosecution section and the government employment section of the statute.<sup>64</sup> As so often happens, the dissent foresaw the result in a subsequent case—*Keyishian*.

The latest chapter of Supreme Court loyalty cases focuses upon state laws prohibiting state employment of a person who is a member of a "subversive" organization, where no criminal penalty is involved, for failure either to accept a loyalty statute as a term of employment or to violate those terms of employment once a position with the state has been obtained. The penalty is the

61. The statute involved in *Elfbrandt v. Russell*, 384 U.S. 11 (1966) provided that a state employee swear that he "support the constitution of the United States and the constitution and laws of the State of Arizona" and "bear true faith and allegiance to the same and defend them against all enemies whatever. . ." and "faithfully and impartially discharge the duties of . . . office." Ariz. Stat. § 38-231 (1965 Supp.). In 1961 the legislature put a "gloss" on the statute by providing that any State employee who took the oath would be "subject to all the penalties for perjury" if he "knowing and wilfully" (1) "does commit or aid in the commission of any act to overthrow by force or violence the government of this state or any of its subdivisions" or (2) "advocates" the overthrow of the government by such means or (3) while in the state's employ "becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations having for one of its purposes the overthrow by force or violence of the government" and where the employee has knowledge of the unlawful purpose of said unlawful organization. Ariz. Rev. Stat. § 38-231(E) (1965 Supp.). To implement the above statute, Arizona required each state employee to renew his oath of allegiance as interpreted in light of the 1961 amendment. A teacher, declaring that in good faith she could not take the oath, petitioned for declaratory relief.

62. *Elfbrandt v. Russell*, 384 U.S. at 19. See also *Apthecker v. Secretary of State*, 378 U.S. 500, 511 (1964).

63. *Elfbrandt v. Russell*, 384 U.S. at 17.

64. *Id.* at 23.

economic, social, or academic disfavor which may attach to the faculty member upon the denial of his admission to or his removal from the university community.

In *Keyishian*, four members of the faculty and one civil service employee of the State University of New York at Buffalo refused to sign the "Feinberg Certificate" because they felt that it impinged upon the freedoms guaranteed them by the first and fifth amendments as applied to the states by the fourteenth amendment. A three judge district court held against the appellants.<sup>65</sup> The Supreme Court reversed,<sup>66</sup> holding the requirement of removal from employment for "treasonable or seditious" utterances or acts under section 3021 of the State Education Law was "dangerously uncertain" and, as such, too broad to withstand constitutional attack.<sup>67</sup> The same is true of section 105 of the Civil Service Act since it refers to the definition of "treasonable and seditious" in the Penal Law.<sup>68</sup>

Although the Court stated the word "treasonable" as defined in the Penal Law presented no particular problem, the equation of "seditious" with the words "criminal anarchy" in the Penal Law makes the possible scope of the word "seditious" virtually limitless.<sup>69</sup> The Court said that according to the definition,

65. *Keyishian v. Board of Regents*, 255 F. Supp. 981 (W.D.N.Y. 1965), *rev'd*, 385 U.S. 589 (1967).

66. *Keyishian*, 385 U.S. 589 (1967).

67. *Id.* at 598.

68. See N.Y. Civ. Serv. Law § 105-a (amended by N.Y. Sess. Laws 1958, ch. 503, § 2).

69. *Keyishian*, 385 U.S. 589, 599 (1967). The New York Penal Law provides:

Section 160. Criminal anarchy defined

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

Section 161. Advocacy of criminal anarchy

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine,

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

The *Keyishian* Court said if the last sentence in Section 160 brings into play Section 161 of the Penal Law, the possible scope of "seditious" acts or utterances has no discernible limit. *Id.* at 599.

See also N.Y. Revised Penal Law § 240.15 (eff. Sept. 1, 1967) providing:

A person is guilty of criminal anarchy when (a) he advocates the overthrow

## COMMENTS

the teacher cannot know the extent, if any, to which a "seditious" utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between "seditious" and nonseditious utterances and acts.<sup>70</sup>

Furthermore, punishment for mere "advising" the unlawful doctrine, without guidelines specifying whether such advising or advocacy may be in the abstract, whether such advising is of the mere existence of the doctrine, whether the person advising or advocating does himself "advocate" the doctrine, is unconstitutional.<sup>71</sup> Indeed, the Supreme Court visualizes such vague language in a statute as "a highly efficient *in terrorem* mechanism"<sup>72</sup> unduly restricting teachers by jeopardizing their livelihood if they were to engage in these vaguely defined utterances or acts. The entire majority decision is replete with quotations from other cases condemning a control of the academic community which suffocates first amendment rights. The whole regulatory maze in New York was found to be "wholly lacking in terms susceptible of objective measurement"<sup>73</sup> and extraordinarily ambiguous.<sup>74</sup>

Yet perhaps the most important part of the majority opinion deals with subsection (2) of the Feinberg Law in which Communist Party membership, as such, is made *prima facie* evidence of disqualification.<sup>75</sup> Although the Court admits<sup>76</sup> that the constitutionality of that part of the Feinberg Law was challenged and sustained in *Adler v. Board of Educ.*,<sup>77</sup> Justice Brennan, writing for the majority,<sup>78</sup> points out that "constitutional doctrine which has emerged since that decision has rejected its major premise."<sup>79</sup> The premise which the majority says has since been rejected is that "public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."<sup>80</sup> The *Adler* Court said that if the terms of state employment were not unreasonable, such conditions did not infringe upon first amendment freedoms. Teachers were "at

---

of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow.

The constitutionality of the revised statute is as questionable as the Penal Law before the Court in *Keyishian*.

70. *Keyishian*, 385 U.S. 589, 599 (1967).

71. *Id.* at 600.

72. *Id.* at 601.

73. *Id.* at 604, quoting from *Cramp v. Board of Pub. Instr.*, 368 U.S. 278, 286 (1961).

74. *Ibid.*

75. N.Y. Educ. Law § 3022(2).

76. *Keyishian*, 385 U.S. 589, 593 (1967).

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

78. Justices Warren, Douglas, Black, and Fortas concurring in the majority; Justices Clark, Harlan, White, and Stewart dissenting.

79. *Keyishian*, 385 U.S. 589, 605 (1967).

80. *Ibid.*

liberty to retain their beliefs and associations and go elsewhere."<sup>81</sup> The *Keyishian* Court, however, enumerates the decisions since 1952 which have expressly rejected the premise that freedoms of speech and association may be denied by placing a condition upon a benefit or a privilege.<sup>82</sup> Proceeding then to the specific sections of the Feinberg Law, the Supreme Court set out further constitutional doctrine concerning the barring of employment to persons in listed subversive organizations which has developed since *Adler*; specifically: "Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants."<sup>83</sup> Quoting from both the Smith Act cases and *Elfbrandt*, the Supreme Court extended the requirement of "specific intent" in teacher-loyalty legislation to those statutes for which the penalty cannot be criminal punishment.<sup>84</sup>

In light of this new enlarged standard, the prima facie disqualification rule of the Feinberg Law swept "overbroadly into association which may not be proscribed."<sup>85</sup> The infirmity of the prima facie disqualification as it stood in the Feinberg Law was that such disqualification could not be overcome by showing either that the teacher was not an active member or that he had no specific intent to further the unlawful aims of the organization.<sup>86</sup> After *Keyishian*, a state, proscribing membership in a subversive organization, must show such membership to be active, knowing, and with the specific intent to carry out the illegal aims of the organization. Thus the Feinberg Law suffered from impermissible overbreadth, as it penalized those persons who were actively engaged in the legitimate activities of subversive organizations, as well as those who were occupied with the illegitimate activities.

The case, in its application, extends to both the State Education Law and the Civil Service Law insofar as sanctions are applied to mere knowing membership.<sup>87</sup> It is interesting to note that although a great part of the majority opinion relates to academic freedom and its relation to first amendment freedoms, the rationale of the opinion may also apply to any person in the service of the state regardless of his association with an institution of higher learning. The main thrust of the opinion, however, as well as the specific holding of the case, applies to faculty members of a state institution of higher learning.<sup>88</sup>

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

82. As expressly rejecting the premise, the Court listed the cases of *Weiman v. Updegraff*, 344 U.S. 183 (1952); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Speiser v. Randall*, 357 U.S. 513 (1958); *Cramp v. Board of Pub. Instr.*, 368 U.S. 278 (1961); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Shelton v. Tucker*, 364 U.S. 479 (1960).

83. *Keyishian*, 385 U.S. 589, 606 (1967). Cases having rejected this principle are said to be *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Apthecker v. Secretary of State*, 378 U.S. 500 (1964). The dissent, of course, is able to distinguish the above cases with relative ease. See *Keyishian*, 385 U.S. 589, 620-29 (1967).

84. This is the result which the *Elfbrandt* dissent presaged. *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966).

85. *Keyishian*, 385 U.S. 589, 608 (1967).

86. *Ibid.*

87. *Id.* at 609.

88. Since the entire majority opinion focuses upon the effect that the Feinberg complex

ACTIVITY IN FURTHERANCE OF SUBVERSIVE GOALS: THE REQUIREMENTS

In order to validly prohibit employment in a state university system, the state must prove a teacher's "specific intent" to carry on illegal activity. Yet proof of "specific intent" alone will not suffice to prohibit employment. The intent of the teacher must be accompanied by some overt activity which may be constitutionally proscribed. The question must be asked, "What activity constitutes the 'clear and present danger' which loyalty legislation seeks to overcome?"

In the years immediately following World War II there may have been a justifiable fear of subversives infiltrating our state educational system. Such concern gave rise to enactment of the Feinberg Law.<sup>89</sup> In the 1950's, sparked by the McCarthy investigations,<sup>90</sup> many states enacted legislation evidencing an awareness that the control of subversives in the academic community was vital to American society.<sup>91</sup> The most pressing concern of the legislators was control of Communist activity—and so a tug of war with fourteenth amendment protections continued. Yet it was suggested by some, even during the McCarthy era, that the fear of Communist takeover, although it permeated the American public, was grossly overrated and reflective of a national anxiety neurosis.<sup>92</sup> Few contemporary legislative, administrative or judicial findings support the apprehension of a Communist overthrow.<sup>93</sup> However, the need to *instruct* the youth of America concerning subversive philosophies and ideals has been vigorously advanced by a President of the United States in this decade.<sup>94</sup>

To what, then, must the "clear and present danger" doctrine relate? Although it is evident that the danger need not be as grave as the forcible over-

had upon chilling academic freedoms, perhaps a state loyalty statute applying to non-teachers need not be so restrictive. "Our Nation is deeply committed to safeguarding academic freedom. . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. 589, 603 (1967). See also the Court's special concern with academic freedom in *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Cramp v. Board of Pub. Instr.*, 368 U.S. 278 (1961); *Shelton v. Tucker*, 364 U.S. 487 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

89. See Declaration of Policy, N.Y. Educ. Laws § 3022.

90. For an instance of typical McCarthyism see *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary*, 83d Cong., 1st Sess. (1953).

91. It is arguable that knowing membership involves an intellectual commitment to the doctrines espoused by the subversive organization. A legitimate presumption may arise that the Party member will carry his commitment into the classroom to incite such action as will further the illegal aims of the organization.

92. See Stouffe, *Communism, Conformity, and Civil Liberties* (1955). A comparative study between the relation of the *danger* of subversive ideas and the *danger* of obscene literature might prove most interesting. Both are commonly thought to undermine our American society not by action but by erosion.

93. See, e.g., Reply for Appellants, p. 6, *Keyishian*. See generally Sommerville, *The Communist Trials and the American Tradition* (1956); O'Brian, *op. cit. supra* note 91; Stouffe, *op. cit. supra* note 92; Am. Bar Ass'n Special Comm. on Educ. in the Contrast Between Liberty Under Law and Communism, *Instruction on Communism and its Contrast With Liberty Under Law 2-7* (1962).

94. See Am. Bar Ass'n Special Committee, *supra* note 93, at 4, quoting President John F. Kennedy, "It is most urgent that the American educational system tackle in earnest the task of teaching American youth to confront the reality of totalitarianism in its toughest, most militant form—which is Communism—with the facts and values of our American heritage."



turn of the government,<sup>95</sup> to restrict first amendment freedoms of speech and association the regulation must relate to one of the objectives of the control of subversive activities. It cannot be that the clear and present danger relates to incompetent or insubordinate teachers; there is presently adequate protection through non-loyalty legislation.<sup>96</sup> If the clear and present danger arises from the teacher's own subversive activities or from the effect of his activities upon his students, the legislation proposed in the appendix allows state action only when the teacher's overt acts are conspicuously in furtherance of illegal goals.<sup>97</sup> It is submitted that the clear and present danger exists when the activity of a teacher falls within one of the subdivisions of the proposed statute.

FURTHER PROCEDURAL STATUTORY PROVISIONS:  
A NECESSITY OR AN INFIRMITY?

Assuming the appended legislation is both constitutional on its face and as applied, the important issue arises whether, to be effective, the substantive law must be procedurally reinforced by regulations similar to those which existed under the old Feinberg "complex," specifically, State Education Law section 3022(2). Should a new loyalty "oath" or "disclaimer" of subversive activity buttress the proposed substantive law? For those who would suggest that some procedure is either desirable or necessary, several constitutional, historical, and conceptual objections should be noted.

If the proposed legislation is without constitutional infirmity, the same limitations propounded by *Keyishian* with regard to substantive legislation would also apply to any procedure by which a state legislature, a state university, or a Board of Regents, would endeavor to make the proposed proscription more effective. Even in the light of cases recognizing the power of a state to require an employee to reveal past or present membership or association with organizations which advocate the violent overthrow of the government,<sup>98</sup> case law clearly

95. See, e.g., *Woods v. Georgia*, 370 U.S. 375 (1962) (contempt); *Garner v. Louisiana*, 368 U.S. 157 (1961) (public order).

96. For an extensive treatment of New York dismissal procedures, see Comment, *New York Administrative Procedure For the Dismissal of Teaching Personnel*, 16 Buffalo L. Rev. 815 (1967).

97. It should be noted, however, that there may be some doubt as to the "danger" of individual illegal activity as opposed to activity which is linked to an organization with illegal aims. It is generally assumed that the existence of a conspiracy constitutes the danger. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951). The magnitude of the danger discounted by its probability is one way of determining a "clear and present danger" in federal criminal prosecutions. *Id.* at 510. Perhaps that danger is not as great where activity is neither directed nor effectuated on a world-wide scale.

98. Cases prior to *Keyishian*, however, outlined the constitutional limits of the state's power to inquire into the allegedly subversive association of its employees: *Cramp v. Florida*, 368 U.S. 278 (1961). (A disclaimer may not be so vague as to inhibit free association of an innocent kind.); *Shelton v. Tucker*, 364 U.S. 479 (1960) (Broad inquiries into activities of a non-subversive character may not be made.); *Nostrand v. Little*, 362 U.S. 474 (1960) (The state must afford an employee procedural due-process, i.e., specification of charges and an opportunity to be heard when an employee is discharged.); *Weiman v. Updegraff*, 344 U.S. 183 (1952) (A state may not require a disclaimer of innocent as well as knowing membership in a subversive organization.).

distinguishes the power of the state to deny employment solely because of this membership or association.<sup>99</sup> The state inquiry must clearly relate to some valid standard of disqualification—mere knowing membership is not such a standard.<sup>100</sup> The question follows, then, may a state require a teacher to answer questions relating to his “active” membership? His “knowing” membership? His “specific intent” to carry out the illegal aims of the organization? Even assuming that these questions are relevant to some valid standard of disqualification or employment, must not the protection of the fifth amendment “self-incrimination” clause come into play?<sup>101</sup>

Obviously, if the state may require an answer to the above inquiries, the teacher is confronted with two equally unpleasant alternatives: he may refuse to answer the questions and thereby be subject to disqualification; or he may answer the inquiries and subject himself to possible criminal sanctions.<sup>102</sup> It is a choice between the “rocks and the whirlpool.”<sup>103</sup> Two cases decided by the Supreme Court only a week before *Keyishian* illuminate this disastrous dichotomy.

In *Garrity v. New Jersey*,<sup>104</sup> a majority of the Court reversed a conviction of several New Jersey police officers who were confronted by officials of the state concerning the alleged fixing of traffic tickets. Although they were advised of their right to remain silent, the police officers were told that if they exercised this “right” they were subject to removal from office. Having answered certain questions, some of their answers were subsequently used against them in a conspiracy prosecution. Speaking for the Court, Justice Douglas said the choice imposed upon the officers between self-incrimination and job forfeiture constituted such coercion as to amount to a coerced confession prohibited by the fifth amendment and applied to the states through the fourteenth amendment.<sup>105</sup> The same day the *Garrity* opinion was announced, Justice Douglas, speaking again for a majority of the Court in *Spevak v. Klein*,<sup>106</sup> condemned the action of

99. See, e.g., *Nelson v. County of Los Angeles*, 362 U.S. 1, 8 (1960); *Beilan v. Board of Educ.*, 357 U.S. 399, 405 (1958); *Lerner v. Casey*, 357 U.S. 468, 474, 477 (1958); *Israel, Eljbrandt v. Russell: The Demise of the Oath*, 1966 Sup. Ct. Rev. 193.

100. *Israel, supra* note 99, at 208; *Lerner v. Casey*, 357 U.S. 468, 474, 477 (1958).

101. There is, of course, a theory of multiple justifications which the Supreme Court has recognized. These cases involve a balancing of the justifications for government inquiry with the refusal to comply with the same. See, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959).

102. A teacher may fall within the purview of either the New York Criminal Anarchy Statute (quoted *supra* note 69) or within the “membership clause” of the Smith Act. But the cases of *Beilan v. Board of Educ.* 357 U.S. 399 (1958), *Lerner v. Casey*, 357 U.S. 468 (1958), and *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960) upheld state refusal of employment where the Court characterized the appellants’ privilege against self-incrimination as a general lack of uncooperativeness.

103. *Stevens v. Marks*, 383 U.S. 234 (1966), quoting from *Froal Trucking Co. v. Railroad Comm’n*, 271 U.S. 583 (1926).

104. 385 U.S. 493 (1967). Majority opinion written by Justice Douglas, joined by Justices Warren, Black, Brennan, and Fortas.

105. “We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.” *Id.* at 500.

106. 385 U.S. 511 (1967). Justices Douglas, Warren, Black, and Brennan for the majority. Justice Fortas concurred separately.

New York State disbarring a lawyer because of his refusal to produce judicial records and honor a subpoena duces tecum. The attorney's sole defense was that either producing the records or giving testimony would tend to incriminate him.<sup>107</sup> In overruling the recent case of *Cohen v. Hurley*,<sup>108</sup> and relying heavily upon fifth amendment protections set forth in *Malloy v. Hogan*,<sup>109</sup> the Court stated, "the threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege."<sup>110</sup> Surely this "powerful instrument of compulsion" is as evident in the questioning of a teacher as it is in the questioning of a police officer or a lawyer. All are professionals. All are faced with the same insidious "choice." All must have the protection of the fifth amendment. An affirmative answer to state inquiries in all three examples could provide "a link in the chain needed in prosecution."<sup>111</sup> It is suggested that any person employed by a state, including one in the educational system, should never be placed in the position of having to choose between his job and his constitutional rights.

#### CONCLUSION

It is probable that neither oaths of affirmation of allegiance to government nor disclaimers of subversive activities serve a useful purpose in a state university system when used as a condition of employment. Indeed, an oath or disclaimer may be totally ineffective in serving the state's purpose.<sup>112</sup> For the most part, those persons who challenge the oaths and disclaimers are conscientious objectors to an impingement upon what they feel, and the Supreme Court now recognizes, are constitutionally protected rights. The hard core subversive, the person trained and educated in methods of deceit, would have no qualms of falsifying an oath or disclaimer. His objectives are attained through indoctrination in the classroom and not through non-compliance with a condition of employment. Now, however, through what is hoped to be constitutionally effective legislation, the subversive teacher can be prevented from carrying out his callous indoctrination of students. Yet under the same statute, no teacher who wishes to give an honest expression of a political viewpoint will be faced with the uncertainties with which he was confronted under the Feinberg Law. It is hoped that proposed legislation does not offer a potential threat to freedom of speech, association, or belief. It is an attempt to outline a middle ground—a constitutional ground—in the battle of the war of philosophies until the time when further Supreme Court decisions evolve.<sup>113</sup>

107. *Id.* at 512-13.

108. 366 U.S. 117 (1961).

109. 378 U.S. 1 (1965).

110. *Spevak v. Klein*, 385 U.S. 511, 516 (1967).

111. *Blau v. United States*, 340 U.S. 159, 161 (1950).

112. See Israel, *supra* note 99, at 247.

113. The proposed legislation in the appendix is similar in parts to the Adams-Schmidt Bill, proposed New York legislation subsequent to *Keyishian*, which was a result of the program of the New York Attorney General. See S.I. 4098, A.I. 5353, Print 5639, 6862, N.Y. Legis., 190th Sess., N.Y. Legis. Record and Index (Albany, The Legis. Index Co., 1967), pp. S 366, A 511.

## COMMENTS

### APPENDIX

#### PROPOSED LEGISLATION TO REPLACE THE FEINBERG LAW COMPLEX: THE SUBSTANTIVE LAW

##### *I. Disqualification of State Employees*

No person shall be appointed to any office or position in the service of the state or of any political or civil division thereof, nor shall any person employed in such appointed office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal, president, dean, teacher, or other employee in any public school or academy or any college or university or any other institution of higher education owned and operated by the state or any subdivision thereof who:

(a) is an active participating member of an organization, group, society, or assembly which has for one of its purposes the overthrow or destruction, by force or violence, of the government of the United States, or the government of any state, territory, district, or possession thereof or the government of any political subdivision therein and who has knowledge of the illegal purposes; and who has the specific intent to carry out the illegal aims of the organization, group, society, or assembly; or

(b) with the specific intent to cause the overthrow or destruction, by force or violence, of the government of the United States or the government of any State, territory, district, or possession thereof, or the government of any political subdivision therein, and with the further intent to incite others to such action as may bring about the forcible overthrow of such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any writing or printed matter which teaches, advises or advocates the active and illegal overthrow of the government; or

(c) with the specific intent to cause the overthrow or destruction, by force or violence, of the government of the United States or the government of any state, territory, district, or possession thereof, or the government of any political subdivision therein, and with the further intent to incite others to such action as may bring about the forcible overthrow of such government, teaches, advises or advocates the active and illegal overthrow of the government.

##### *II. Provisions for Review*

Any person who is dismissed from or declared ineligible for employment pursuant to this section shall within three months from such dismissal or rejection be entitled to an order to show cause, signed by a Justice of the New York State Supreme Court, why a hearing on such charges of ineligibility should not be had. Until the final judgment on such hearing, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and, if the final determination shall be in his favor, he shall be restored to his position with pay for the period of

such suspension, less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with the opportunity for cross-examination. The burden of sustaining the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

LEGISLATIVE COMMENT

Section I:

(a) The purpose of this section is to eliminate from the state educational system all persons whose membership in an organization which aims to overthrow the government by force or violence is such that the member knows of these illegal aims and intends to carry them out. Yet, even proof of the above cannot merit disqualification unless some action by the teacher is shown to be in furtherance of these aims. Without this requirement a state may be punishing a teacher's former activity or only his beliefs or thoughts.

Active membership must be proven to consist of overt acts which link a teacher to the illegal activity of the organization. Such activity is separate and distinct from any knowledge the teacher may have of the organization's illegal aims. Relevant to determining whether the teacher's activities are sufficient for discharge under this statute are (1) his official capacity in the organization, (2) the frequency with which he attends the meetings of the organization, (3) his donations to the organization, (4) his subscriptions for the organization, and (5) his open advocacy of the illegal aims of the organization.

Proof of active, knowing membership in such organization which has for one of its aims the overthrow, by force or violence, of one of the governments listed herein, plus proof of the employee's specific intent to bring about these illegal aims, shall constitute *prima facie* evidence of disqualification.

(b) The purpose of this section is to prohibit employment by the state to those persons who may not be members of an organization which espouses the forcible overthrow of the governments listed herein but whose written activities are intended to bring about the same result. This section and section (c) recognize the fact that a person need not be a member of an organization to carry on such activity as is specifically calculated to effect the forcible overthrow of the government.

It is the legislative judgment that the activity described in sections (b) and (c) of this law may be so pervasive that, if not proscribed, such activity shall constitute a clear and present danger to the peaceful and orderly existence of the governments described herein.

(c) The purpose of this section is to prohibit employment by the state to those persons who may not be members of an organization which espouses the forcible overthrow of the governments listed herein but who verbally advocate the same result.

Section II:

The fact of disqualification under this statute shall entitle a teacher to an order to show cause as a matter of right.

DAVID R. PFALZGRAF

RECENT TRENDS IN STATE PLANNING LEGISLATION:  
A SELECTIVE SURVEY

Air pollution, population shifts, floods, research duplication, sewerage, inadequate recreational facilities, transportation patterns, economic stability, . . . on and on runs the growing list of critical problems, both big and small, facing every level of modern government. Each individual problem falls to some person, some group, or some agency, whose duty it is to provide a satisfactory policy for future control. Unfortunately there exists a tremendous degree of overlap among these various problems, and the individual solution-seekers are often frustrated by conflicting policies, needless duplication, and ever-present fiscal limitations. The community's answer has been what may be loosely termed "planning," a word of many meanings,<sup>1</sup> but which may be broadly described in this context as an attempt to recognize and overcome such problems in a manner designed to promote the optimum physical, economic and social growth of the community. Planning in the United States generally began in the cities and slowly spread to the village, town, and county levels;<sup>2</sup> more recently, aided by the substantial thrust of various federal aid programs, planning on a regional basis is becoming an organized reality.<sup>3</sup> Current trends indicate that we are in the process of making the next obvious, logical, and perhaps necessary step, which is the creation of effective planning organizations at the state level.

AN HISTORICAL INTRODUCTION

The history of formalized state planning dates back more than three decades.<sup>4</sup> Some forty-six states enacted state planning legislation in the post-depression era of the mid-1930's, mainly due to the encouragement of the National Resources Planning Board.<sup>5</sup> The immediate objective of many of these

---

1. See generally, Seeley, *What is Planning? Definition and Strategy*, 28 J. of the American Institute of Planners [hereinafter cited J. Am. Inst. of Planners] 91 (1962).

2. The history of municipal planning over a span of some four centuries is developed in Reps, *Making of Urban America: A History of City Planning in the United States* (1965). For an analysis of the present organizational posture of local planning, see Law and Land: Anglo-American Planning Practice (Haar ed. 1964); International City Manager's Ass'n, *Local Planning Administration* (3rd ed. 1959).

3. See generally, Wise, *Current Developments in Regional Planning in the United States*, in American Society of Planning Officials, *Planning 1965*, at 47 (1965). For a special issue devoted to regional planning, see 30 J. Am. Inst. of Planners (Friedmann ed. May 1964).

4. See generally, Black, *State Planning as an Established Procedure*, 2 J. Am. Inst. of Planners 85 (1936).

5. Committee on State Planning, *State Planning: Its Function and Organization*, 25 J. Am. Inst. of Planners 207, 210 (1959).