

The Burger Court Opinion Writing Database

Cole v. Richardson

405 U.S. 676 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



To: Mr. Justice Douglas
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall ✓
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: The . . .

Circulated: FEB 25 1972

Recirculated: _____

No. 70-14 -- Cole v. Richardson

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

In this appeal we review the decision of the three-judge district court holding a Massachusetts loyalty oath unconstitutional.

The appellee, Richardson, was hired as a research sociologist by the Boston State Hospital. The appellant is Superintendent of the hospital. Mrs. Richardson began work on September 30, 1968. On November 15, 1968, Mrs. Richardson was asked to subscribe to the oath required of all public employees in Massachusetts. The oath is as follows:

I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method.^{1/}

1/

The full text of the two relevant statutes is as follows:

Ch. 264, § 14. Oath or affirmation; form, filing: exemptions

Every person entering the employ of the commonwealth or any political subdivision thereof, before entering upon the discharge of his
 (footnote continued)

6
MURKIN
OCT 1972
SAC-72

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 70-14

Recirculated: APR 7 1972

Jonathan O. Cole, Superintendent, Boston State Hospital, et al., Appellants,
v.
Lucretia Peteros Richardson.

On Appeal from the
United States District
Court for the District
of Massachusetts.

[April —, 1972]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

In this appeal we review the decision of the three-judge District Court holding a Massachusetts loyalty oath unconstitutional.

The appellee, Richardson, was hired as a research sociologist by the Boston State Hospital. The appellant is superintendent of the hospital. Soon after she entered on duty Mrs. Richardson was asked to subscribe to the oath required of all public employees in Massachusetts. The oath is as follows:

"I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method." ¹

¹ The full text of the two relevant statutes is as follows:

"Ch. 264, § 14. *Oath or affirmation; form, filing; exceptions*

"Every person entering the employ of the commonwealth or any political subdivision thereof, before entering upon the discharge of his

November 23, 1971

Dear Chief:

Re: No. 70-14
Cole v. Richardson

I see you did not assign the
above case.

You probably have a good reason,
but I just wondered if it was because
the vote was incomplete or whether it
was perhaps an oversight.

W. O. D.

The Chief Justice

70-14

October Term 71
Douglas Paper

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-14

Jonathan O. Cole, Superintendent, Boston State Hospital, et al, Appellants, v. Lucretia Peteros Richardson. } On Appeal from the United States District Court for the District of Massachusetts.

[January —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

The part of the oath that says "I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method" is plainly unconstitutional by our decisions. See *Board of Education v. Barnette*, 319 U. S. 624, 634.

Advocacy of basic fundamental changes in Government, which might popularly be described as "overthrow," is within the protection of the First Amendment even when it is restrictively construed. In *Brandenburg v. Ohio*, 395 U. S. 444, a case involving criminal syndicalism, the Court ruled that a State may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. The same idea was put in somewhat different words in *Noto v. United States*, 367 U. S. 290, 297-298, that "abstract teaching" of overthrow is protected activity as contrasted to "preparing a group for violent action and steeling it to such action." And see *Yates v. United States*, 354 U. S. 298, 318.

The present oath makes such advocacy a possible offense under a restrictive reading of the First Amendment.

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close

4th DRAFT

1. The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Earnquist

SUPREME COURT OF THE UNITED STATES

No. 70-14

From: Douglas, J.

Reuled:

Jonathan O. Cole, Superintendent, Boston State Hospital, et al, Appellants
v.
Lucretia Peteros Richardson.

On Appeal from the ~~United States~~ 2/28/72
United States District
Court for the District
of Massachusetts.

[March —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

The part of the oath that says "I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method" is plainly unconstitutional by our decisions. See *Board of Education v. Barnette*, 319 U. S. 624, 634.

Advocacy of basic fundamental changes in Government, which might popularly be described as "overthrow," is within the protection of the First Amendment even when it is restrictively construed. In *Brandenburg v. Ohio*, 395 U. S. 444, a case involving criminal syndicalism, this Court ruled that a State may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. The same idea was put in somewhat different words in *Noto v. United States*, 367 U. S. 290, 297-298, that "abstract teaching" of overthrow is protected activity as contrasted to "preparing a group for violent action and steeling it to such action." And see *Yates v. United States*, 354 U. S. 298, 318.

The present oath makes such advocacy a possible offense under a restrictive reading of the First Amendment.

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M 23

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice White

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Circulated

No. 70-14

Recirculated. 1/10/72

Jonathan O. Cole, Superintendent, Boston State Hospital, et al., Appellants
v.
Lucretia Peteros Richardson.

On Appeal from the
United States District
Court for the District
of Massachusetts.

[March —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

The part of the oath that says "I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method" is plainly unconstitutional by our decisions. See *Board of Education v. Barnette*, 319 U. S. 624, 634.

Advocacy of basic fundamental changes in Government, which might popularly be described as "overthrow," is within the protection of the First Amendment even when it is restrictively construed. In *Brandenburg v. Ohio*, 395 U. S. 444, a case involving criminal syndicalism, this Court ruled that a State may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. The same idea was put in somewhat different words in *Noto v. United States*, 367 U. S. 290, 297-298, that "abstract teaching" of overthrow is protected activity as contrasted to "preparing a group for violent action and steeling it to such action." And see *Yates v. United States*, 354 U. S. 298, 318.

The present oath makes such advocacy a possible offense under a restrictive reading of the First Amendment.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 29, 1972

RE: No. 70-14 - Cole v. Richardson

Dear Thurgood:

Please join me in your dissent in
the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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M

To: The Chief Justice
Mr. Justice Douglass
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-14

Stewart, J.
Circulated: APR 5 1972

Recirculated: _____

Jonathan O. Cole, Superintendent, Boston State Hospital, et al., Appellants,
v.
Lucretia Peteros Richardson.

On Appeal from the
United States District
Court for the District
of Massachusetts.

[April —, 1972]

MR. JUSTICE STEWART and MR. JUSTICE WHITE,
concurring.

All agree that the first part of this oath, under which a person swears "to uphold and defend" the federal and state Constitutions, is wholly valid under the First and Fourteenth Amendments. But if "uphold" and "defend" are not words that suffer from vagueness and overbreadth, then surely neither does the word "oppose" in the second part of the oath.

When the case was here before, Mr. Justice Harlan expressed the view that "[t]his oath does not impinge on conscience or belief, except to the extent that oath taking as such may offend particular individuals." *Cole v. Richardson*, 397 U. S. 238, 241 (concurring opinion). We agree. And as to such individuals, the Massachusetts law clearly permits an affirmation rather than an oath. Mass. Gen. Laws, c. 264, § 14.

On this basis we join the opinion and judgment of the Court.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-14

Jonathan O. Cole, Superintendent, Boston State Hospital, et al., Appellants,
v.
Lucretia Peteros Richardson. } On Appeal from the
United States District Court for the District of Massachusetts.

[March —, 1972]

MR. JUSTICE MARSHALL, dissenting.

Appellee was discharged from her job with the Boston State Hospital solely because she refused to swear or affirm the following oath:¹

"I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and . . . I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by an illegal or unconstitutional method." Mass. Gen. Laws, c. 264, § 15.

She brought this action in the United States District Court for Massachusetts seeking declaratory and injunctive relief against enforcement of the oath as a condition of her employment.² The District Court found

¹ Appellee was not requested to take the oath before she began her employment. The reasons for the failure of the hospital officials to require the oath as a prerequisite to employment are not readily apparent from the record. In any event, the oath was required of all state employees at all relevant times.

² Appellee also sought damages for back wages allegedly owed. It is apparent that all back wages have now been paid. Thus, this claim is no longer in controversy. The District Court rejected appellee's belated attempt to make a claim for loss of wages due to termination, and this decision was well within its discretion under Rule 15 of the Federal Rules of Civil Procedure.

pp. 1, 6
2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-14

Jonathan O. Cole, Superintendent, Boston State Hospital, et al., Appellants,
v.
Lucretia Peteros Richardson. } On Appeal from the
United States District Court for the District of Massachusetts.

[March —, 1972]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Appellee was discharged from her job with the Boston State Hospital solely because she refused to swear or affirm the following oath:¹

"I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and . . . I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method." Mass. Gen. Laws, c. 264, § 15.

She brought this action in the United States District Court for Massachusetts seeking declaratory and injunctive relief against enforcement of the oath as a condition of her employment.² The District Court found

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SUPREME COURT OF THE UNITED STATES

No. 70-14

Jonathan O. Cole, Superintendent, Boston State Hospital, et al., Appellants
v.
Lucretia Peteros Richardson. } On Appeal from the
United States District Court for the District of Massachusetts.

[April 18, 1972]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Appellee was discharged from her job with the Boston State Hospital solely because she refused to swear or affirm the following oath:¹

"I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and . . . I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method." Mass. Gen. Laws, c. 264, § 15.

She brought this action in the United States District Court for Massachusetts seeking declaratory and injunctive relief against enforcement of the oath as a condition of her employment.² The District Court found

¹ Appellee was not requested to take the oath before she began her employment. The reasons for the failure of the hospital officials to require the oath as a prerequisite to employment are not readily apparent from the record. In any event, the oath was required of all state employees at all relevant times.

² Appellee also sought damages for back wages allegedly owed. It is apparent that all back wages have now been paid. Thus, this claim is no longer in controversy. The District Court rejected appellee's belated attempt to make a claim for loss of wages due to

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 29, 1972

Re: No. 70-14 - Cole v. Richardson

Dear Chief:

Please join me.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

April 4, 1972

Re: No. 70-14 - Cole v. Richardson

Dear Chief:

With all the writing that has now come in,
I am still with you. What do you think, however,
of omitting the middle paragraph on page 10 of your
circulation of February 25?

Sincerely,

H. A. B.

The Chief Justice