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Declaratory Judgment -- Challenging Restrictive and Regulatory Statutes -- Requirement of a Specific Threat of Enforcement to Justiciability

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It is to be noted then that excessiveness standing alone will rarely afford relief. The courts feel justified in interfering in the internal affairs of corporations only when there is bad faith or lack of authority for the remuneration. It is submitted that the principle case accords with this view.

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Declaratory Judgment—Challenging Restrictive and Regulatory Statutes—Requirement of a Specific Threat of Enforcement to Justiciability

Certain individual civil service employees and the United Public Workers of America sought an injunction against members of the Civil Service Commission to restrain them from enforcing against petitioners the provisions of the second sentence of §9(a) of the Hatch Act[1] and a declaratory judgment that this sentence was unconstitutional. The sentence reads, "No officer or employee in the executive branch of the Federal Government . . . shall take any active part in political management or in political campaigns." Only one of the employees had actually violated the provisions of the Act challenged. The others filed affidavits in support of their complaint in which they expressed a desire to engage in specified political activities which they understood were forbidden by the challenged sentence. *Held,* that the latter had not made out a justiciable case or controversy on which to grant the relief prayed for.[2] Only six justices out of seven[3] sitting on the case made a direct pronouncement on this particular point, four[4] holding no justiciable case or controversy, two[5] holding that there was.[6] The majority found no actual interference with petitioners' rights, and only a hypothetical threat

[1] 53 STAT. 1148 (1939), as amended, 18 U. S. C. A. §61h(a) (Supp. 1946).

[2] United Public Workers v. Mitchell, —— U. S. ——, 67 Sup. Ct. 556, 91 L. Ed. (Adv. Ops.) 509 (1947).

An adjudication on the merits, declaring the challenged sentence constitutional, was had in this case, all the justices finding a justiciable case presented by the employee who had actually violated the challenged sentence. On the merits the decision was four to three, Justices Rutledge and Douglas dissenting because of the particular status of the violating employee, that of an industrial worker, and Justice Black on the grounds that the challenged provision was unconstitutional on its face.

[3] Mr. Justice Murphy and Mr. Justice Jackson took no part in the consideration or decision of the case. Mr. Justice Frankfurter concurred with the majority on the merits, but thought that the case should be dismissed as to all the petitioners for want of jurisdiction on another procedural basis.

[4] Justices Reed, Rutledge, Vinson, and Burton.

[5] Justices Black and Douglas.

[6] Although injunctive as well as declaratory relief was prayed for, consideration of justiciability seems to have been confined to the prerequisites for declaratory relief as presenting the minimum requirements. Therefore this note is also confined to that area. For an exhaustive analysis of the point under consideration see Borchard, *Challenging "Penal" Statutes by Declaratory Action,* 52 YALE L. J. 445 (1943); and Note, 50 YALE L. J. 1278 (1941).

of such interference, which they thought not sufficient. Mr. Justice Douglas, in dissent, said, "The threat against them is real not fanciful, immediate not remote. The case is therefore an actual not a hypothetical one."[7] But Mr. Justice Black found justiciability by reason of the mere existence of the Act and the petitioners' compliance with it at a sacrifice by them of asserted civil rights.

Thus it is seen that all but one of the justices deciding this point demanded at least an actual threat of interference as a condition precedent to justiciability; they differed only in that the majority found at best a hypothetical threat, while the one dissent thought it real. Only one seems to have considered seriously the possibility that the mere existence of the Act could constitute a present deprivation of petitioners' rights, by reason of their manifest compliance with its prohibitions.[8] This is striking in view of the fact that this argument was directly urged in the petitioners' brief,[9] and was made in the district court's finding of justiciability cited by Justice Douglas in dissent.[10]

The threat which the five justices were searching for was a threat of enforcement of the sanctions which give the prohibition its teeth, in this case mandatory dismissal from employment by the Commission. This approach to the problem seems to put undue emphasis on an element of any penal statute which is merely incidental to its main purpose of prohibiting or regulating a certain area of activity. It assumes the unrealistic attitude that a person whose activities are within the purview of the statute can only be affected thereby when its sanctions are enforced against him. Professor Borchard has succinctly stated the pre-enforcement effect of such a statute:

> "As a rule, the mere enactment of a statute or ordinance imposing restraints on an individual and implying enforcement by prosecuting officials threatens and hampers the plaintiff's freedom, peace of mind or pecuniary interests, and creates that justiciability

[7] United Public Workers v. Mitchell, cited *supra* note 2, at 579, 91 L. Ed. at 533.

[8] The majority opinion may be construed as having considered the point, rejecting it because of uncertainty as to the exact activities being prohibited. But in view of the obvious restraints imposed by the verbiage of the sentence, supplemented by direct commission prohibitions against specified activities cited by Justice Black in dissent, United Public Workers v. Mitchell, *supra* note 7, at 573, 91 L. Ed. at 527, its consideration can only be deemed cursory. The case cited by the majority in this connection, Alabama State Federation of Labor v. McAdory, 325 U. S. 450 (1944), is distinguishable. There the key prohibitory word in a challenged state statute was "functioning," and the Court quite obviously thought it too vague and uncertain in view of its lack of construction by the state court or application by enforcing officers to make possible more than speculation as to the exact activities being prohibited by its existence.

[9] "Even when not inflicted in specific cases, the statutory prohibition and penalty have the present effect of deterring lawful conduct, and thus inflict the injury of deprivation of constitutional rights." Reply Brief for Appellants, p. 5, United Public Workers v. Mitchell, *supra* note 8.

[10] United Public Workers v. Mitchell, 67 Sup. Ct. 556, 577, 91 L. Ed. at 531, 532.

of the issue which sustains a proceeding for an injunction, and, *a fortiori,* for a declaratory judgment."[11]

Can explanation be found for the Supreme Court's refusal to consider this pre-enforcement effect of the statute as creating justiciability? The inquiry becomes more pertinent in view of the fact that the Court has in the past found justiciability on just such a basis.[12] In these cases, the sole prayer for relief was injunction, and in granting such relief in the *Terrace, Pierce,* and *Euclid* cases it has been urged that the Supreme Court permitted an abuse of the injunctive process in that in its zeal to relieve from the pre-enforcement burden it did not require any showing of irreparable injury or inadequacy or legal remedy.[13] Now, confronted with the same type situation and armed with a new procedure, the statutory declaratory action, which does not require irreparable injury or inadequacy of legal remedy as a prerequisite of equitable jurisdiction, the court fails to find justiciability.

Two explanations may be suggested. The early misgivings with which the Court regarded the declaratory judgment procedure[14] may not have been entirely dissipated by its final acceptance of the procedure in state[15] and federal[16] courts, so that they still influence to a great extent its test of justiciability. In no use of the procedure have these misgiv-

[11] BORCHARD, DECLARATORY JUDGMENTS 966 (2d ed. 1941).

[12] Columbia System v. United States, 316 U. S. 407, 418 (1942) (in granting an injunction against the enforcement of an FCC order requiring the refusal of license to any broadcasting station which entered into certain prohibited contracts with networks, petitioner not yet having been refused such license, the Court said, "Most rules of conduct having the force of law are not self-executing, but require judicial or administrative action to impose their sanctions with respect to particular individuals . . . a valid exercise of the rule-making power is addressed to and sets a standard for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. . . . It is alleged without contradiction that numerous affiliated stations have conformed to the regulations to avoid loss of their licenses with consequent injury to appellant. Such regulations have the force of law before their sanctions are invoked as well as after. When, as here, . . . the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack. . . ."); City of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926) (injunction restraining enforcement of zoning ordinance before petitioner had even applied for building permit); Pierce v. Society of Sisters, 268 U. S. 510 (1924) (injunction restraining enforcement of state statute two years before its effective date; present deprivation of property rights); Terrace v. Thompson, 263 U. S. 197 (1923) (Washington statute forbade land ownership by certain aliens; injunction issued restraining enforcement thereof against petitioner who alleged merely that he wished to sell land to such an alien, on grounds unconstitutional).

[13] See BORCHARD, *op. cit. supra* note 11, at 434, 435; *but cf.* Note, 3 GEO. WASH. L. REV. 248 (1934).

[14] Piedmont and Northern Ry. Co. v. United States, 280 U. S. 469 (1930); Liberty Warehouse Co. v. Burley Tobacco Growers, 276 U. S. 71 (1928); Liberty Warehouse Co. v. Grannis, 273 U. S. 70 (1927).

[15] Alabama v. Arizona, 291 U. S. 286 (1934); Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace, 288 U. S. 249 (1933).

[16] Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 (1937).

ings been more apparent than where declarations on constitutional issues were sought. The reasons for this wariness with respect to constitutional issues have not been expressly announced by the Court, but others have attempted explanation,[17] and some have praised the Court's attitude to the extent of advocating exception of these cases from the purview of the Federal Act.[18] The general tenor of these discussions is that an all-out use of the declaratory procedure in constitutional cases will cloak the Supreme Court with practical veto power over state and federal legislation, at a sacrifice of the traditional function of the judiciary. But, admitting to some extent the validity of this argument, although it has been met on its own ground with much force by the greatest authority on this procedure,[19] it is submitted that in the particular field under consideration, some retreat from the traditional judicial function is warranted. If it be admitted that such statutes as the one under consideration may operate from their inceptions as unconstitutional deprivations of rights, should there not be a remedy, and that as speedily as possible? The declaratory judgment procedure seems to be hand-made for the purpose; Congress evidently contemplated its pre-enforcement use in enacting the Federal Act.[20] If *it* cannot be availed of by an aggrieved party in such cases, it appears that here is a wrong without a remedy except when the aggrieved party has submitted himself by violation to further injury. This should not be a condition precedent to obtaining relief.[21]

The Court's requirement of a threat of enforcement may be explained, aside from the general policy grounds set out above, on a procedural basis. The immunity of both the individual states[22] and the United States[23] to actions testing the constitutionality of their legislative enactments results in the necessity of bringing such actions against the proper enforcing officer as distinguished from the sovereign. This focuses attention at the outset on enforcement by the officer rather than

[17] See THURMAN ARNOLD, SYMBOLS OF GOVERNMENT 186 (1935).

[18] Notes, 51 HARV. L. REV. 1267 (1938); 45 HARV. L. REV. 1089 (1932).

[19] Borchard, *Declaratory Judgments in Federal Courts,* 41 YALE L. J. 1195 (1932); BORCHARD, *op. cit. supra* notes 11, 13, at 766-770.

[20] See SEN. REP. No. 1005, 73d Cong., 2d Sess. 2, 3 (1934).

[21] See Mr. Justice Butler, in Terrace v. Thompson, 263 U. S. 197, 216, "They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights."

[22] The doctrine of state immunity to such actions, its inception and effect are discussed in Borchard, *Government Liability in Tort,* 34 YALE L. J. 1 (1925). The fiction that a suit to enjoin the enforcement of an unconstitutional state statute is actually a personalized action against the attorney-general, divested of official capacity, had its inception in *Ex parte* Young, 209 U. S. 123 (1907).

[23] The Federal Declaratory Judgment Act did not enlarge the area of the susceptibility of the United States to suit beyond that set out by the Tucker Act and other statutory provisions. Of course if a declaratory judgment action to determine the constitutionality of an Act of Congress can be brought within the area delimited by those special statutory provisions the United States may be made a party defendant.

the sovereign's enactment as the wrong complained of, so that requirement of threat of enforcement naturally follows. This procedural requirement should not be allowed to be-cloud the obvious adverse interest which the sovereign has in such actions. The doctrine of state immunity to such actions as derived from the Eleventh Amendment has been criticized as conflicting with the purpose of the Fourteenth Amendment to afford protection against state enactments.[24] The Judiciary Act of 1937[25] provides for intervention by the United States in cases, including declaratory judgment actions, where the constitutionality of an act of Congress is involved. This seems to be a tacit Congressional recognition that in such proceedings the United States has a definite adversary interest, although the action cannot be brought against the United States in the first instance. The effect of the sovereign immunity doctrine on the type of cases under consideration is made apparent by the fact that pre-enforcement declaratory judgment actions challenging municipal ordinances, where the municipality itself can be made the party defendant, have probably had the most success in this field, insofar as having the Court recognize justiciability of the issue is concerned.[26] However, these cases might be explained also by the fact that state courts generally have been less prone to require a showing of threatened enforcement. So that even where a state statute is challenged and the enforcing officer is made the party defendant, state courts have usually found pre-enforcement justiciability.[27] If this procedural requirement

[24] Note, 50 HARV. L. REV. 956 (1937).

[25] 50 STAT. 751 (1937), 28 U. S. C. A. §401 (Supp. 1946).

[26] Lisenba v. Griffin, 242 Ala. 661, 8 So. 2d 175 (1942) (regulating operation of barber shops; in this case the City Barber Board made party defendant rather than the municipality); Dowdy v. City of Covington, 237 Ky. 274, 35 S. W. 2d 304 (1931) (regulation of moving van business); Barron v. Minneapolis, 212 Minn. 566, 4 N. W. 2d 622 (1942) (regulating owning and operation of coin-vending machines used for sale of edibles); Quaker Oats Co. v. City of New York, 295 N. Y. 527, 68 N. E. 2d 593 (1946) (regulating sale of horse meat for animal feed); 432 Fifth Ave. Corp. v. City of New York, 184 Misc. 1001, 55 N. Y. S. 2d 203 (1945) (zoning ordinance; but court stressed fact that here petitioner could be considered as stating a grievance on behalf of a large group and that more was involved than merely the unique problem of a particular landowner); Drake v. City of Portland, 172 Ore. 558, 143 P. 2d 213 (1943) (civil service commission order reclassifying employees); Vermont Salvage Corp. v. Village of St. Johnsbury, 113 Vt. 341, 34 A. 2d 188 (1943) (regulating junk dealers). *But cf.* Witschner v. City of Atchison, 154 Kan. 212, 117 P. 2d 570 (1941) (declaratory judgment that certain type pin-ball machines was not within purview of anti-gambling statute refused; distinction should be made between *mala in se* criminal statutes and those merely *mala prohibitum*).

[27] American Federation of Labor v. Reilly, 113 Colo. 90, 155 P. 2d 145 (1944) (regulating labor unions); Doyle v. Clark, 220 Ind. 271, 41 N. E. 2d 949 (1942) (regulating sale of alcoholic beverages in certain stores under certain conditions); Davis v. State, 183 Md. 385, 37 A. 2d 880 (1944) (regulating advertising by physicians and surgeons; granted despite procedural error of joining state as party defendant); Chronicle & Gazette Publishing Co. v. Att'y Gen'l, —— N. H. ——, 48 A. 2d 478 (1946) (regulating political advertisement rates); statute violated, but apparently no threat of enforcement); Arnold v. Board of

is indeed a factor in the test of pre-enforcement justiciability the United States Supreme Court seems peculiarly influenced by it.

With increasing state and federal legislation regulating business activities and civil rights,[28] it is safe to assume that persons such as petitioners in the instant case will continue to resort to the declaratory judgment procedure as a possible mode of obtaining surcease from the restraints of such legislation before actually violating its provisions. The fact that their chances of even getting such complaints considered on their merits will probably vary with the place of the enacting legislature and of the court in the governmental hierarchy is an anomaly. The anomaly is the more serious because the higher the prestige, and probably the effect, of such legislation, the less opportunity there will be for obtaining pre-enforcement relief.

A repudiation of the doctrine of Ex parte *Young*[29] to lift state immunity from such actions, and legislation making the United States suable in such actions might help to de-emphasize the threat of enforcement as a factor and lead to its repudiation by the highest Court for reasons already suggested. However, if this procedural aspect be not the crux of the problem, but merely a handy device to buttress the Supreme Court's desire not to handle such cases before actual violation as a matter of policy,[30] then the anomoly will probably remain until the court reconsiders this policy in the light of the quandary in which it places the affected individuals, and therein finds it wanting. Perhaps the dissent in the instant case, particularly that of Mr. Justice Black, presages such a reconsideration.

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Evidence—Employer's Vicarious Liability for Negligent Operation of Automotive Vehicle—Presumptions from Ownership

In *Carter v. Thurston Motor Lines*,[1] the North Carolina Supreme Court held in a four to three decision that the plaintiff failed to make

Barber Examiners, 45 N. M. 57, 109 P. 2d 779 (1941) (regulating prices in barber shops). *Contra:* De Cano v. State, 7 Wash. 2d 613, 110 P. 2d 627 (1941).

For earlier cases to the same effect as these and those in note 26, *supra*, see BORCHARD, *op. cit. supra*, at 969-971, and cases there collected.

[28] Probably most striking recent examples are those federal and state measures designed to curb subversive activities, particularly among federal and state employees. The president's executive order "prescribing procedure for the administration of an employee's loyalty program in the executive branch of the government," Exec. Order No. 9835, 12 FED. REG. 1935 (1947), has already been questioned by eminent jurists as respects its procedural sufficiency. Chafee, Griswold, Katz, and Scott, *The Loyalty Order*, N. Y. Times, April 13, 1947, §4, p. 8E, col. 4.

A recent example of state legislation on the same subject is North Carolina's amendment to N. C. GEN. STAT. §14-12 (1943) by (1947) session of N. C. General Assembly, S. B. No. 1028; H. B. No. 980.

[29] See notes 22 and 24 *supra*. [30] See notes 17 and 18 *supra*.

[1] 227 N. C. 193, 41 S. E. 2d 586 (1947).