ees or prospective employees to subscribe to a loyalty oath disclaiming belief in or advocacy of, or membership in an organization that stands for or advocates, unlawful or disloyal action. The Federal Government's security investigation program has been tested numerous times and First Amendment issues raised, but the Supreme Court has never squarely confronted the substantive constitutional issues, and it has not dealt with the loyalty oath features of the federal program.[716] The Court has, however, had a long running encounter with state loyalty oath programs.[717]

First encountered[718] was a loyalty oath for candidates for public office rather than one for public employees. Accepting the state court construction that the law required each candidate to "make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by *force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt," the Court unanimously sustained the provision in a one-paragraph *per curiam* opinion.[719] Less than two months later, the Court upheld a requirement that employees take an oath that they had not within a prescribed period advised, advocated, or taught the overthrow of government by unlawful means, nor been a member of an organization with similar objectives; every employee was also required to swear that he was not and had not been

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[716] The federal program is primarily grounded in two Executive Orders by President Truman and President Eisenhower, E.O. 9835, 12 Fed. Reg. 1935 (1947), and E.O. 10450, 18 Fed. Reg. 2489 (1953), and a significant amendatory Order issued by President Nixon, E.O. 11605, 36 Fed. Reg. 12831 (1971). Statutory bases include 5 U.S.C. §§ 7311, 7531–32. Cases involving the program were decided either on lack of authority for the action being reviewed, *e.g.*, Cole v. Young, 351 U.S. 536 (1956); and Peters v. Hobby, 349 U.S. 331 (1955), or on procedural due process grounds, Greene v. McElroy, 360 U.S. 474 (1959); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). *But cf.* United States v. Robel, 389 U.S. 258 (1967); Schneider v. Smith, 390 U.S. 17 (1968). A series of three-judge district court decisions, however, invalidated federal loyalty oaths and inquiries. Soltar v. Postmaster General, 277 F. Supp. 579 (N.D. Calif. 1967); Haskett v. Washington, 294 F. Supp. 912 (D.D.C. 1968); Stewart v. Washington, 301 F. Supp. 610 (D.D.C. 1969); National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969) (no-strike oath).

[717] So-called negative oaths or test oaths are dealt with in this section; for the positive oaths, *see* "Imposition of Consequences for Holding Certain Beliefs," *supra*.

[718] Test oaths had first reached the Court in the period following the Civil War, at which time they were voided as *ex post facto* laws and bills of attainder. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867).

[719] Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) (emphasis original). In Indiana Communist Party v. Whitcomb, 414 U.S. 411 (1974), a requirement that parties and candidates seeking ballot space subscribe to a similar oath was voided because the oath's language did not comport with the advocacy standards of Brandenburg v. Ohio, 395 U.S. 444 (1969). Four Justices concurred more narrowly. 414 U.S. at 452 n.3. *See also* Whitcomb v. Communist Party of Indiana, 410 U.S. 976 (1973).