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Editors' Forum

CALIFORNIA'S APPLICATION FORMS FOR ADMISSION TO PRACTICE LAW AND THE FIRST AMENDMENT

In the recent cases of *Elfbrandt v. Russell*[1] and *Keyishian v. Board of Regents*[2] the United States Supreme Court once again has altered the course of first amendment constitutional doctrine. As a consequence the State Bar of California may be in the embarrassing position of imposing unconstitutional requirements on applicants for admission to the practice of law in California.

California Business and Professions Code section 6064.1 provides: "No person who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means shall be certified to the Supreme Court for admission and a license to practice law." Question twenty-seven on the *Student's Application and Questionnaire*, distributed by the Committee of Bar Examiners of the State Bar of California to applicants for admission to law practice, states that filing the application is a certification by the applicant that he does not engage in the proscribed advocacy. Since the application is filed under penalty of perjury, the filing of the application becomes in effect an oath that one has not engaged in the advocacy prohibited by section 6064.1.

The reasoning of the Court in *Elfbrandt* and *Keyishian* indicates that a state violates the first amendment by requiring this statement of non-advocacy from applicants for admission to the bar, since the advocacy proscribed extends beyond advocacy which may be criminally punished. According to *Yates v. United States*[3] advocacy of violent overthrow must be aimed at inciting someone to immediate action before it can be punished under criminal law; similarly, in *Scales v. United States*[4] the Court held that membership in organizations with illegal aims may not be criminally punished unless the member has a specific intent to achieve the illegal aims of the organization. *Elfbrandt* and *Keyishian* indicate,

[1] 384 U.S. 11 (1966).
[2] 87 Sup. Ct. 675 (1967).
[3] 354 U.S. 298, 312-18 (1957).
[4] 367 U.S. 203 (1961).

contrary to the rule of prior cases, that a state may not impose civil sanctions on non-criminal advocacy and non-criminal association even in areas where the state's interest in imposing the sanction is substantial. In *Elfbrandt* the Court held that Arizona could not require as a condition of employment in its public schools that the employee swear under penalty of perjury that he did not have certain non-criminal associational connections or engage in non-criminal speech. In *Keyishian* the Court held that New York could not condition employment in its university on the employee refraining from advocacy not criminal under *Yates* or association not criminal under *Scales*.

In both *Elfbrandt* and *Keyishian* the laws in question were overly broad—they cast their net too widely, burdening those engaging in non-criminal speech and association as well as those engaging in criminal speech and association. California Business and Professions Code section 6064.1 has the same defect; it reaches persons who engage in non-criminal advocacy. The state's admittedly great interest in protecting the minds of the children within its school system was not sufficient to justify the infringement of the first amendment rights of teachers resulting from the overbreadth of the statutes involved in *Elfbrandt* and *Keyishian*. The state's interest in ensuring that members of the legal profession are committed to orderly change, which the Court in *Konigsberg v. State Bar of California*[5] construed to be the aim of section 6064.1, would appear to be less substantial than the state's interest in protecting the children in its school system; certainly it is no stronger. The lawyer deals primarily with adults, persons who can formulate and judge political beliefs as capably as he. The teacher or professor deals primarily with children and youths, persons whose ability to judge and formulate political beliefs may not be so well developed as an adult's. Also, the lawyer offers advice which his client is free to accept or reject; the teacher operates in a classroom where he may impose his beliefs on impressionable minds under the guise of instruction. The lawyer engaging in non-criminal advocacy of violent overthrow of government thus represents a lesser danger to the state than the teacher-advocate. Because the danger is less, the state interest is less. The interest of the state in the political beliefs of members of the bar, therefore, should be insufficient to justify the infringement of first amendment rights of bar applicants which results from the overbreadth of section 6064.1. Since question twenty-seven of the admission form uses the overly broad section 6064.1 to create an oath-like declaration of non-advocacy, it is an unconstitutional infringement of the first amendment.

In addition to the requirement of non-advocacy of violent overthrow

[5] 366 U.S. 36, 52 (1961).

imposed by section 6064.1, California law requires in Business and Professions Code section 6060(c) that applicants for admission to practice law be of "good moral character." Presumably to determine whether an applicant meets one or the other of these requirements for admission, the Committee of Bar Examiners of the State Bar of California asks the following question (question twenty) on its application for admission form:

> Are you now or have you ever been (a) a member of or affiliated with the Communist Party, or (b) a member of or affiliated with any political party or other organization which according to your knowledge at the time of your membership or affiliation advocated the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means, or (c) an advocate of the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means?

The applicant who does not answer question twenty is likely to have his application for admission denied. The application form warns that failure to answer questions on the application may result in such denial. In *Konigsberg* the California State Bar successfully applied this rule to an applicant who refused to answer questions concerning his non-criminal associations. While *Elfbrandt* and *Keyishian* cast doubt on the continued validity of *Konigsberg*, that case at present stands as a dire warning to the applicant of the consequences of refusing to answer question twenty. Also, even if admission is not denied for the refusal to answer, an applicant who refuses to answer the question, or who answers that he does have such associational connections or that he engages in such speech, is likely to find himself enmeshed in lengthy hearings held by the Committee of State Bar Examiners to determine his good moral character or his compliance with section 6064.1. Finally, one who answers question twenty untruthfully is subject to prosecution for perjury.

The relevance of question twenty to whether or not an applicant engages in criminal advocacy or is of good moral character is undeniable. If a person is or has been a member of the Communist Party, or of any organization which advocates the overthrow of the government by force or violence, he is more likely to have engaged in criminal advocacy or association than one who has not been a member of such organizations. Inquiring into such associational ties, therefore, aids the investigation by the Committee of State Bar Examiners into the applicant's moral character and his compliance with section 6064.1.

Relevancy, however, is not constitutionality. Even though question twenty is highly relevant to the Bar Examiners' inquiry, the Court's holdings in *Elfbrandt* and *Keyishian* indicate that California violates the first amendment when it requires the question to be answered.

Like the oath in *Elfbrandt* and the certificate of compliance in *Keyishian*, question twenty is overly broad. It inquires into association and advocacy which is non-criminal as well as into the type of association and advocacy which under *Scales* and *Yates* may be criminally punished. Question twenty also has an effect similar to the *Elfbrandt* oath and the *Keyishian* certificate. If the applicant refuses to answer the question, the state may impose, and *Konigsberg* indicates that it will impose, the penalty of denial of admission to the practice of law, just as the state denied employment to the teacher in *Elfbrandt* for her failure to take the oath and to the professor in *Keyishian* for his refusal to sign the certificate. *Elfbrandt* and *Keyishian* suggest that the state may not condition public employment on refraining from advocacy and association which is not criminal; they hold the state may not require as a condition of public school employment that the prospective employee make statements under penalty of perjury disclosing his non-criminal as well as his criminal advocacy and associations. The State of California requires such disclosure of bar applicants when it calls for an answer to question twenty as a condition to admission to the practice of law.

Nor is the chilling effect on a person's first amendment rights any less under question twenty than under the oath in *Elfbrandt* and the certificate in *Keyishian* merely because disclosure of the associational ties by the bar applicant need not automatically result in denial of his application. Disclosure of such ties will trap an applicant in a morass of administrative proceedings similar to those found to be an unconstitutional burden on first amendment rights in *Keyishian*. And disclosure of the advocacy inquired into by question twenty will result in automatic denial of admission under section 6064.1, just as it would have resulted in denial of teaching employment under the statutes in *Elfbrandt* and *Keyishian*. Calling the condition imposed by the state an "oath" in *Elfbrandt*, a "certificate" in *Keyishian*, and a "question" on the application for admission forms should not obscure the essential similarity of these requirements, nor lighten the burden each places on the first amendment rights of the persons they affect. Since the state's interest in maintaining the integrity of its school system would appear to be greater than any interest the state may have in ensuring that the members of the legal profession have some vague commitment to orderly change, question twenty should fall as an unconstitutional infringement of first amendment rights with greater ease than either the oath in *Elfbrandt* or the certificate in *Keyishian*.

Two United States Supreme Court cases decided before *Elfbrandt*, however, hold that a state may constitutionally deny an applicant admission to the practice of law if he refuses to answer questions like

question twenty. In *Konigsberg* and *In Re Anastaplo*,[6] both five to four decisions, the Court held that a state may deny an applicant admission to the practice of law because of his non-cooperation if he refuses on first amendment grounds to answer questions concerning non-criminal association and advocacy.

The rationale of *Konigsberg* and *Anastaplo*, however, has been severely undercut by more recent cases, among which are *Elfbrandt* and *Keyishian*. *Konigsberg* and *Anastaplo* relied on a line of cases, such as *Adler v. Board of Education*[7] and *Beilan v. Board of Education*,[8] which held that the state could deny public employment, such as teaching, to persons who engage in non-criminal advocacy or association, or who refuse to disclose such advocacy or association. These cases have now been overruled sub silentio by *Elfbrandt* and *Keyishian*, for the latter hold precisely the opposite: The state may neither require a person to sacrifice non-criminal advocacy and association nor to disclose his non-criminal advocacy or association in order to obtain public employment as a teacher. Since the state interest in disclosure by bar applicants is less than in areas like public education, the constitutional approval given in *Konigsberg* and *Anastaplo* to compelling applicants to answer inquiries like question twenty has probably been withdrawn.

The State Bar of California could, of course, rest on the existing *Konigsberg* and *Anastaplo* decisions and simply not recognize the compelling implications of *Elfbrandt* and *Keyishian* concerning the validity of questions twenty and twenty-seven of its application for admission form. Such a course might be permissible for ordinary state agencies, but not for a state agency composed entirely of persons versed in the law who are expected to be intimately acquainted with its changing configurations. The State Bar should not let itself be caught, as recent case law indicates it will be, in a violation of the Constitution of the United States. Question twenty and question twenty-seven should be dropped as conditions to admission to the practice of law in the state of California.

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Note and Comment Editor

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[6] 366 U.S. 82 (1961).
[7] 342 U.S. 485 (1952).
[8] 357 U.S. 399 (1958).

GOVERNOR REAGAN AND EXECUTIVE CLEMENCY

On April 12, 1967, Aaron Mitchell died in the San Quentin gas chamber. California thus recorded its first execution of a condemned man in more than four years. The highest courts of California and the United States had rejected Mitchell's eleventh hour petitions. As public concern about the upcoming execution rose, Governor Reagan announced he could find no grounds for clemency, indicating by his statements an unflinching reluctance to act in the absence of legal grounds which would justify court interference. The position taken by the new governor toward the exercise of his clemency power compels an examination of the institution of executive clemency and an analysis of the proper standards for its exercise.

The pardoning and commutation power is not inherent in the executive branch of government; rather it exists as part of the sovereignty of a state. In theory, this sovereign power could be placed in any branch of government. However, from the early kings of England, through the American colonial charters to the federal and state constitutions, the power traditionally has been given to the executive. Article VII, section 1 of the California Constitution vests the power to pardon and commute sentences solely in the governor.

The principal reason offered to justify the pardoning power in modern times is that men cannot administer a perfect system of justice. Mistakes will be made concerning proper punishment for particular crimes and criminals. Since penal legislation cannot deal specifically with myriad factual situations or predict infallibly the forces that may lead to the commission of a crime, the conscience of the community must be permitted to intervene in cases in which it might be inferred that the letter of the law was not intended to operate. The pardoning power offers flexibility to a comprehensive penal system committed to the fair administration of its laws. Thus, in determining the appropriate punishment for an individual, the clemency authority traditionally has considered humanitarian factors arising from individual circumstances which cannot be taken into account adequately by the criminal law. Alexander Hamilton expressed this purpose of the clemency power:

> Humanity and good policy conspire to dictate, that the benign prerogative of pardoning, should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.[1]

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[1] THE FEDERALIST No. 74, at 407 (E. Scott ed. 1902) (Hamilton).

Given the broad reasons for the existence of the prerogative of pardon, it is not surprising that generally the executive has possessed wide discretion in the decision to exercise his power. This is certainly true in California. The constitutional grant specifies no standards to restrict the governor's discretion. The section contains only three general limitations: the governor may not grant pardons in cases of treason and impeachment; the legislature may pass laws relative to the manner of applying for pardons; and if the convict has been twice convicted of a felony, the governor may not grant a pardon or commutation without the written recommendation of a majority of the justices of the supreme court. The absence of restrictive standards to govern the exercise of the power may be criticized as tending to encourage abuse. But the power sets its own limits. Since it is designed to be used only in exceptional cases where mercy or justice so dictates, the actions of the executive are subject to perhaps the most effective control—public knowledge of the use of the power and the resulting force of public opinion.

Despite the absence of fixed standards, however, each clemency authority undoubtedly develops its own guides for exercising the power. To be consistent with the purposes of the clemency system, these standards must be flexible and capable of expansion or extension in response to community opinion and the merits of the particular case.

Governor Reagan has departed from this elastic rule by leaving the impression that he will not grant clemency in the absence of grounds which would permit a court to intervene in support of the condemned man. This position would seem to be based upon an extreme unwillingness to overrule the decision of the judge and jury. In refusing to stay the execution of Aaron Mitchell, the governor stated that the clemency hearing had shown no new evidence in the case,[2] and that should he grant mercy under such circumstances he would be putting himself above all judicial bodies.[3] Mr. Edwin Meese III, the governor's clemency secretary, stated that the governor did not believe he should substitute his judgment for that of the jury or overrule the courts in their disposition of the legal issues.[4]

This position, however, is inconsistent with the purpose of executive clemency. The power is designed to operate independently of the determinations of courts and juries and with reference to different standards

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[2] San Francisco Chronicle, April 12, 1967, at 1, col. 2.

[3] Oakland Tribune, April 12, 1967, at 7, col. 2; San Francisco Chronicle, April 12, 1967, at 1, col. 2.

[4] Remarks of Mr. Edwin Meese III on *Capitol and the Clergy*, April 23, 1967, KCRA TV, Sacramento, California.

of decision. Although the governor may choose as a matter of policy to grant some deference to the determination of the judicial system, he is not required to do so. The clemency power is intended to operate *after* the convicted individual has exhausted his legal remedies. The governor is the condemned man's last recourse. Were adequate legal grounds present in his case, the judicial system could be expected to have acted on them unless a remedy were unavailable for the particular ground. The governor, of course, should consider whether the prisoner has any legal ground to challenge his conviction or sentence; but this should not be the governor's only, or even his primary, consideration. In fact, by so limiting the exercise of the clemency power, the governor does precisely what he says he does not wish to do: The clemency hearing becomes in effect a super court to review judicial findings.

Placing the clemency power in the executive branch reflects a considered judgment by the people of California that the power is extrajudicial. Although certain procedures surrounding the exercise of the power—notably hearings and decisions made on the basis of the factual data presented—of necessity resemble judicial proceedings, the arbiter is the governor and his standards for decision need not be limited to legal criteria. Contrary to the implications of Governor Reagan's statements, executive clemency is clearly a matter of grace, not of law; its exercise is not dependent upon the existence of substantive judicial grounds that justify setting aside a conviction or granting a new trial. Consider Cardozo's eloquent statement:

> Such an application [for pardon] is not a proceeding in court, nor one before an officer having "attributes similar" to a court's. . . . It is a petition for mere grace and mercy. . . . It grows out of the action of the courts, but it seeks to reverse their action by an appeal to motives and arguments which are not those of jurisprudence. . . . At such a time anything is pertinent that may move the mind to doubt or the heart to charity. It is not necessary that reason be convinced; it is enough that compassion is stirred.[5]

California courts have taken the position that the exercise of executive clemency is not subject to legal principles which restrict judicial redress. In cases in which no legal grounds were open for consideration under the facts presented by the petitioner to the court, the supreme court has stated that "Only the governor of this state is empowered to consider and, if he be so advised, to give effect to, such arguments."[6] And in denying

[5] Andrews v. Gardiner, 224 N.Y. 440, 447, 121 N.E. 341, 343 (1918).

[6] People v. Tuthill, 32 Cal. 2d 819, 827, 198 P.2d 505, 509 (1948); *accord*, *In re* Lindley, 29 Cal. 2d 709, 728, 177 P.2d 918, 930 (1947); *In re* De La Roi, 28 Cal. 2d 264, 276, 169 P.2d 363, 370-71 (1946).

judicial relief to Aaron Mitchell on the ground that no new legal points had been presented, Federal District Judge Zirpoli said that although he had no power to act, the executive branch could act "not as judges or lawyers, but on humanitarian considerations beyond the judicial."[7] Restrictions on the availability of certain writs, the general limitation of appellate review to questions of law, and perhaps most important, deeply ingrained judicial reluctance to redetermine issues once decided often prevent the courts from redressing harsh results.

The governor has further confused matters by his action in the case of Daniel Roberts. His position in that case—that Roberts might be innocent—indicated that the governor was willing to annul judicial action if it could be demonstrated that the individual had been convicted erroneously. If his doubt as to Roberts's guilt arose from uncertainty concerning the credibility of a witness or the desire to review the evidence, as seemed to be the case,[8] then in the absence of admitted perjury or new evidence, reevaluation of guilt would constitute a significant interference with the province of the jury. The governor then would merely be conducting another trial and continuing to ignore relevant non-judicial standards for the exercise of the clemency power. Moreover, the remedy for an innocent man is pardon, not commutation of sentence; the distinction between pardon and commutation is ignored if the issue at the clemency hearing is restricted to the question of innocence.

The governor's misconception of the clemency power is further illustrated by his refusal to attend clemency hearings because he is not an attorney.[9] This indicates that he intends to restrict the clemency hearing to presentation of legal grounds. While the heavy burdens of office might prevent attendance at every clemency hearing, adoption of a general policy of nonattendance is indefensible. The exercise of executive clemency is extra-judicial and is not limited to legal criteria for which an attorney's skills are required. Moreover, to ask that the governor attend the hearing is not to impose an intolerable burden. A recent study concluded that in every state where the governor has the clemency power, except Kansas, he personally presides at the hearing in the absence of "unusual circumstances."[10] As the person ultimately responsible for the informed exercise of the clemency power, the governor should attend the

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[7] San Francisco Chronicle, April 12, 1967, at 11, col. 2.

[8] Los Angeles Times, April 18, 1967, at 1, col. 6; San Francisco Chronicle, April 18, 1967, at 8, col. 5; Oakland Tribune, April 17, 1967, at 1, col. 3.

[9] Los Angeles Times, April 12, 1967, at 29, col. 1; Los Angeles Times, April 11, 1967, at 3, col. 6.

[10] *Symposium, Evolving Post-Conviction Procedures—Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 156 (1964).

hearing to provide the condemned man the personal attention which the sanctity of human life demands. The personal plea of those closest to a condemned man cannot be replaced by the clemency secretary's written report. In addition, reliance on second-hand reports carries the danger that the clemency secretary rather than the governor might in effect control the exercise of the power.

Governor Reagan has erred by failing to consider certain accepted standards in his disposition of clemency cases. Grounds which would justify judicial action and doubts concerning guilt are only two of many factors which legitimately may be considered, and neither should be primary. The principal consideration should be whether the interests of society would be served adequately by imposing a lesser penalty on the individual. This standard is broad and flexible, but it truly reflects the meaning of executive clemency. The governor should consider mitigating circumstances surrounding the particular crime and the criminal's history. For example, the individual might have killed someone while under a form of duress which does not qualify as a defense to first degree murder. Due regard for the individual's personal background would ensure that care is taken to evaluate concepts of responsibility as applied to the particular individual and to those with similar backgrounds. Social disadvantage might have underlain his criminal conduct,[11] thus diminishing his personal responsibility. Further, his history might indicate a strong potential for rehabilitation and contribution to society.

By providing for separate trials on the issues of guilt and penalty in capital cases, the legislature has established the policy that such considerations are the most relevant in determining the appropriate punishment for a particular crime and individual. Under this system, the jury in the penalty phase is intended to be exposed to any mitigating circumstances and to the background of the individual. In view of this legislative policy, the governor should reconsider these factors in the clemency process. The twelve jurors were not attorneys; the governor is no less capable of evaluating these circumstances than they. At the very least, he should not automatically defer to the jury's determination. Perhaps at the time of the penalty hearing the jury decided that the defendant could not be rehabilitated. However, by the time of the clemency hearing it may appear that rehabilitation has occurred or is possible.

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[11] Former Governor Brown indicated that when he reviewed the cases of the sixty-two men on death row during the last month of his term in office he found that in most cases the men were "products of broken homes, men who had never known kindness, who had been kicked around and been in jail at a very early age." San Francisco Chronicle, April 14, 1967, at 9, col. 2.

Moreover, defense attorneys in California have often failed in the penalty phase to take advantage of the opportunity to present all relevant mitigating factors and pertinent history, while the prosecution has capitalized on the opportunity to expose all aggravating circumstances.[12] Thus, the jury may not have been exposed to all the relevant information.

In addition to those already mentioned, a partial list of criteria which have been used in exercising the clemency power would include the following:[13] the mental condition of the individual; the nature of the crime committed; disparity between relative guilt and severity of sentences when more than one person is involved in the commission of a crime; geographical equalization of sentences when certain judicial districts within the same state have consistently imposed harsher penalties than other districts for the same crime; dissents and inferences drawn from court opinions; the necessity of upholding the good faith of the state, such as when the individual has been promised immunity for giving state's evidence; recommendations by the prosecutor or trial judge; the need for calm second judgment after a period of hysteria; precedent from previous administrations; prolonged delay between sentence and execution; technical violations of the law which lead to harsh results; correction of injustices when an individual has been convicted under a law or judicial doctrine which has since been changed or overruled; petitioner's loss of sanity while awaiting execution; the clemency authority's opposition to capital punishment; the principle of *autrefois puni*, that is, the belief that the individual has already been sufficiently punished by his own crime (for instance, where the criminal has lost the sight of both eyes in the commission of the crime); and changed public opinion concerning the appropriate punishment for a particular crime.

The variety of factors which legitimately can be taken into account demonstrates the extent of the governor's discretion in exercising his power to overturn the judgment of courts and juries. Behind this power is the time-honored belief that a means to express the compassion of society should be afforded within a system of criminal justice. If the governor believes that a man should die for his crime, that is his prerogative; but the governor should reach his decision only after a painstaking considera-

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[12] *Symposium*, *supra* note 10, at 167.

[13] 3 U.S. DEP'T OF JUSTICE, SURVEY OF RELEASE PROCEDURES—PARDON 64-85 (1939); Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI.-KENT L. REV. 13, 23-28 (1965); Weihofen, *Pardon—An Extraordinary Remedy*, 12 ROCKY MT. L. REV. 112, 119-20 (1940); Yager, *Executive Clemency*, 33 CAL. ST. B.J. 221, 227-28 (1958); *Symposium*, *supra* note 10, at 159-77; Comment, *Habeas Corpus and the Pardon Power: Judicial Relief for Changes in the Law*, 11 STAN. L. REV. 769, 777 (1959).

tion of all relevant factors. The people should then have no quarrel as long as they choose to retain capital punishment. But if the governor persists in ignoring considerations which reflect the purpose of the clemency power, he effectively destroys the vitality of that institution.

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