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POLITICAL CANDIDATES' LOYALTY OATHS

When Washington mustered his revolutionary army,¹ when South Carolinians called for secession,² and when Senator Joseph P. McCarthy kindled fears of Communist infiltration,³ many people affirmed their loyalty to the nation by swearing oaths. Perhaps the oath givers hoped to subdue the anxieties of those anxious times by reducing the ambiguities in the behavior and beliefs of others.⁴

Candidates for political office have not escaped suspicion; eight states still require political candidates to swear oaths of loyalty before their names can appear on the ballot.⁵ But constitutional doctrine and changing times have diminished the loyalty oath's scope and significance.⁶ This

¹ Concerned about cooperation between American soldiers and the British, Washington successfully demanded that Congress require every soldier to take an oath. H. HYMAN, *TO TRY MEN'S SOULS* 82 (1959).

² In the swirl of events surrounding the Nullification controversy, the South Carolina legislature passed a loyalty oath for officers of the state militia. Unionists strongly objected to the oath because it seemed to place allegiance to the state above allegiance to the federal government. It was eventually struck down in the South Carolina Court of Appeals. *Id.* at 122-33.

³ See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 215-25 (1970). See generally R. BROWN, *LOYALTY AND SECURITY* (1958); Comment, *The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1160 (1972); Comment, *The Pervasive Effects of McCarthyism on Recent Loyalty Oath Cases*, 16 ST. LOUIS U.L.J. 437, 447-52 (1972).

⁴ Exemplifying the fears which have motivated some subversive control provisions is the introduction to a Louisiana enactment:

There exists a world communist movement, directed by the Union of Soviet Socialist Republics and the other communist bloc nations, which has as its declared objective, world control. Such world control is to be brought about by aggression, force and violence, and is to be accomplished in large by . . . infiltration, subversion, propaganda, terrorism, and treachery. . . . Communist control of a country is characterized by an absolute denial of the right of self-government and by the abolition of those personal liberties which are cherished and held sacred in the state of Louisiana. . . .

. . . .
The world communist movement constitutes a clear and present danger to the citizens of the State of Louisiana.

. . . .
The public good, and the general welfare of the citizens of this state require the immediate enactment of this measure.

LA. REV. STAT. ANN. § 14:358 (Supp. 1974).

⁵ FLA. STAT. ANN. § 876.05 (1965); ILL. ANN. STAT. ch. 46, § 7-10.1 (Smith-Hurd 1965); *as amended*, (Supp. 1973-74); LA. REV. STAT. ANN. 14:372 (Supp. 1974); MD. ANN. CODE art. 85A, § 15 (1957); N.H. REV. STAT. ANN. § 588:15 (1955); PA. STAT. ANN. tit. 65, § 224 (1959), *as amended*, (Supp. 1973-74); TEX. ELECTION CODE art. 6.02 (1967); WASH. REV. CODE § 29.18.030 (1965). Arizona bars the Communist Party specifically and subversive organizations in general from the ballot. ARIZ. REV. STAT. ANN. § 16-206 (1956), *as amended*, (Supp. 1973).

⁶ See Israel, *Elfbrandt v. Russell: The Demise of the Oath?*, 1966 SUP. CT. REV. 193; Sager, *The Impact of Supreme Court Loyalty Oath Decisions*, 22 AM. U.L. REV. 39 (1972); Note, 58 CORNELL L. REV. 383 (1973); Note, 22 DEPAUL L. REV. 898 (1973); Note, 16 DEPAUL L. REV. 209 (1966); 19 N.Y.L.F. 185 (1973); 21 SW. L.J. 684 (1967); 14 WAYNE L. REV. 635 (1968).

article examines the wane of political candidates' loyalty oaths and uses the Maryland experience⁷ as a basis for evaluating what remains.

I. CONSTITUTIONAL DEFECTS OF THE OATHS

The main constitutional problem with candidates' loyalty oaths has been their vagueness.⁸ For example, an officeseeker who is required to forswear "subversive" status—that of a person who would overthrow the government "by revolution, force, or violence"⁹—might understandably be confounded by a request to compare his conduct or beliefs with those vague terms. The Constitution demands more precise standards of behavior so that citizens can intelligently comply with the law¹⁰ without inordinate fear of unintentional transgression.¹¹ The candidate might also be forced to deny any association with a "subversive organization;"¹²

⁷ See Asper, *The Long and Unhappy History of Loyalty Testing in Maryland*, 13 AM. J. LEGAL HIST. 97 (1969).

⁸ See generally Sager, *supra* note 6; Comment, *The Loyalty Oath as a Condition of Public Employment*, 19 BAYLOR L. REV. 479 (1967); Comment, *The National Security Interest and Civil Liberties, supra* note 3; Comment, *Loyalty Oaths*, 77 YALE L.J. 739 (1968).

⁹ See MD. ANN. CODE art. 85A, § 15 (1957), which defines a "subversive person" as [A]ny person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow destroy or alter . . . the constitutional form of the government of the United States, or of the State of Maryland, . . . by revolution, force, or violence; or who is a member of a subversive organization. . . .

A "subversive organization" is defined as

[A]ny organization which engages in or advocates, abets, advises, or teaches . . . activities intended to overthrow, destroy or alter . . . the constitutional form of the government . . . by revolution, force, or violence.

MD. ANN. CODE art. 85A, § 1 (1957). See also N.H. REV. STAT. ANN. § 588:15 (1955). In *Lisker v. Kelley*, the court referred to the definition of a subversive person as one who

commits, attempts to commit, or knowingly aids in the commission of any act intended to overthrow, destroy, alter, or to assist in the overthrow, destruction or alteration of the constitutional form of government . . . by force or violence. . . .

315 F. Supp. 777, 779 (M.D. Pa. 1970), *aff'd*, 401 U.S. 928 (1971).

¹⁰ *Baggett v. Bullitt*, 377 U.S. 360 (1964).

¹¹ Justice White noted the contours of the problem:

We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. . . . Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment . . . only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.

Id. at 372.

¹² See ILL. ANN. STAT. ch. 46, § 7-10.1 (Smith-Hurd 1965), *as amended*, (Supp. 1973-74); LA. REV. STAT. ANN. § 14:372 (Supp. 1974); FLA. STAT. ANN. § 876.05 (1965) (declared unconstitutional in *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961) and *Connell v. Higginbotham*, 403 U.S. 207 (1971)). See also *Communist*

indeed, his political party might have to make similar assertions.¹³ The same problems of vagueness apply. For example, with regard to the possibility of proscribed involvement with the Communist Party, Mr. Justice White has written:

Persons required to swear they understand this [loyalty] oath may quite reasonably conclude that any person who aids the Communist Party or teaches or advises known members of the Party is a subversive person because such teaching or advice may now or at some future date aid the activities of the Party.¹⁴

This understanding of an oath, created in unconstitutionally vague language,¹⁵ might induce its taker to forgo important constitutional rights.¹⁶

First among these constitutional rights is the privacy of one's beliefs. A Texas loyalty oath, which required an affirmation of the aspirant's belief in and approval of "our present representative form of government"¹⁷ was held unconstitutional¹⁸ because the phrase, "present representative form of government," could be read to exclude permissible beliefs in communism, fascism, or the like.¹⁹ The court said that "[n]o state may condition the right to seek elective office on the willingness of candidates to fore swear their political beliefs and thoughts."²⁰

A second right is the somewhat more restricted freedom to express those beliefs. For example, the Indiana requirement that a political party swear "not [to] advocate the overthrow of local, state or national government by force or violence . . ." before it could have candidates placed on the ballot²¹ was held to violate constitutional freedoms of expression.²² The Indiana oath improperly included "advocacy of abstract doctrine"—a protected right—along with "advocacy of action" to overthrow the government by force or violence—not a right at all.²³

A third right infringed by loyalty oaths is one's freedom of association.²⁴ Florida is one state in which mere association with a group is not permitted to preclude one's candidacy. That state's oath²⁵ was held per-

Party of Indiana v. Whitcomb, 42 U.S.L.W. 4129 (U.S. Jan. 9, 1974) (dealing with prerequisites to the placement of a political party's candidates on the ballot) and Wieman v. Updegraff, 344 U.S. 183 (1952) (dealing with oaths for state employees).

¹³ See Communist Party of Indiana v. Whitcomb, 42 U.S.L.W. 4129 (U.S. Jan. 9, 1974).

¹⁴ Baggett v. Bullitt, 377 U.S. 360, 367-68 (1964).

¹⁵ See Morris, *Baggett v. Bullitt: Scienter & "Guiltless Knowing Behavior,"* 1 LAW IN TRANS. Q. 185 (1964).

¹⁶ See T. EMERSON, *supra* note 3, at 240.

¹⁷ TEX. ELECTION CODE art. 6.02 (1952).

¹⁸ Socialist Workers Party v. Hill, 483 F.2d 554 (5th Cir. 1973).

¹⁹ 483 F.2d at 557.

²⁰ *Id.*

²¹ IND. ANN. STAT. § 3-1-11-12 (1971).

²² Communist Party of Indiana v. Whitcomb, 42 U.S.L.W. 4129 (U.S. Jan. 9, 1974).

²³ 42 U.S.L.W. at 4131.

²⁴ U.S. CONST. amend. I.

²⁵ FLA. STAT. ANN. § 876.05 (1965).

missible only to screen out officeseekers with a specific intent to further the unlawful aims of an organization bent upon violent overthrow of the government; a person's beliefs in overthrow could not alone be used as a basis for disqualification.²⁶

In order to protect these constitutional rights²⁷ and remedy unconstitutional vagueness,²⁸ candidates' loyalty oaths must avoid much of the language that has characterized them for so long.

II. THE ELEMENTS OF CONSTITUTIONALLY VALID OATHS

The strictures outlined above²⁹ have not, however, eliminated the candidates' loyalty oath entirely. For example, the following oath would probably withstand a constitutional challenge:

I . . . do solemnly swear (or affirm) to uphold the laws and Constitution of . . . (name of state) . . . and the United States. I further swear (or affirm) that I am not engaged in any attempt to overthrow or destroy the constitutional form of government by force or violence.³⁰

This oath consists of two parts: the first is an affirmative promise to uphold the law, and the second is a denial of improper activity. Both types of statements seem to be well supported in the decisions reviewing loyalty oaths.

The affirmative promise to uphold the law resembles the President's oath of office, which is contained in the Constitution.³¹ Therefore, the constitutionality of the affirmation can hardly be in doubt. Loyalty oaths that include this promise have consistently been upheld in that respect.³² The safest promise seems to be one that is "addressed to the future, promising constitutional support in broad terms."³³

The denial of improper activity presents more complex problems. For example, an officeseeker can be required to swear that he is not a "subversive"³⁴ if the statute defines that term to mean a person who:

commits, attempts to commit, or *knowingly* aids in the *commission* of any act intended to overthrow, destroy, alter, or to assist in the overthrow, destruction or alteration of the constitutional form of government. . . *by force or violence* . . .³⁵

²⁶ See *Connell v. Higginbotham*, 305 F. Supp. 445 (M.D. Fla. 1969), *aff'd in part* 403 U.S. 207 (1971).

²⁷ See notes 15-26 and accompanying text *supra*.

²⁸ See notes 8-11 and accompanying text *supra*.

²⁹ See part I *supra*.

³⁰ See Comment, *State Loyalty Oaths: A Constitutional Resurrection*, 24 FLA. L. REV. 555, 563 (1972).

³¹ U.S. CONST. art. II, § 1, cl. 8.

³² *Socialist Workers Party v. Hill*, 483 F.2d 554 (5th Cir. 1973).

³³ *Cole v. Richardson*, 405 U.S. 676, 681 (1972). The opposite of an "affirmative" oath is the "test" oath, which demands a denial of any past subversive activity. See 18 A.L.R.2d 268, 274 (1951).

³⁴ See note 9 *supra*.

³⁵ *Lisker v. Kelley*, 315 F. Supp. 777 (M.D. Pa. 1970), *aff'd*, 401 U.S. 928 (1971) (footnotes omitted).

As a requisite ingredient of the oath, however, the term "force or violence" has been given special meaning.³⁶ "Force or violence" must refer to either action to overthrow the government³⁷ or advocacy of action which creates a probable danger of the destruction of the state.³⁸ The other important problem with the denial of improper activity concerns one's organizational ties. A political candidate can probably be required to swear that he neither currently belongs to an organization which has the unlawful purpose of promoting violent overthrow nor specifically intends to help carry out such an organization's unlawful purposes.³⁹ This broad denial may be permissible because the Constitution does not recognize a right to overthrow the government by force, violence, or other illegal means.⁴⁰

Today, then, the eight states with candidates' loyalty oaths⁴¹ can constitutionally employ only a rudimentary oath which affirms support for the law and denies activity designed to overthrow the government by force or violence.⁴²

III. THE PROCESS OF ADJUSTMENT IN MARYLAND

In Maryland, the candidates' loyalty oath has been increasingly circumscribed as the constitutional constraints upon oaths have tightened. The Maryland oath began as part of the Subversive Activities Act of 1949,⁴³ which required political aspirants to affirm that they were not "subversive" people.⁴⁴ That requirement was first interpreted as one of forswearing any involvement "in one way or another in the attempt to overthrow the government *by force or violence*," as well as any conscious membership in an organization engaged in such an endeavor.⁴⁵ When Maryland's Attorney General promised to require an oath no broader than this, the Supreme Court sustained the formulation.⁴⁶

However, the Attorney General later changed the loyalty oath when the Supreme Court ruled that an individual's activity in subversive organizations could be proscribed only if the person were an active member of it, knew of its illegal purposes, and acted with specific intent to further those purposes.⁴⁷ A candidate would now have to swear

I, . . . do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the

³⁶ *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 *passim* (1967).

³⁷ *See, e.g., Yates v. United States*, 354 U.S. 298, 318 (1957).

³⁸ *Dennis v. United States*, 341 U.S. 494, 505 (1951).

³⁹ *Hughes v. Kramer*, 82 Wash. 2d 537, 541 (1973).

⁴⁰ *See* 43 Miss. L.J. 543 (1972).

⁴¹ *See* note 5 and accompanying text *supra*.

⁴² *See* notes 29-40 and accompanying text *supra*.

⁴³ MD. ANN. CODE art. 85A (1969).

⁴⁴ *Id.* § 1.

⁴⁵ *Shub v. Simpson*, 196 Md. 177, 192 (1950).

⁴⁶ *Gerende v. Board of Supervisors of Elections*, 341 U.S. 56, 57 (1951).

⁴⁷ *Elfbrandt v. Russell*, 384 U.S. 11, 17 (1966) (involving loyalty oaths for state employees).

United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.⁴⁸

Nevertheless, litigation involving the oath persisted, and, although no political candidate was a party to it, the judicial decisions that followed further changed the content of the oath. A state employee who refused to take the oath in its new form successfully argued that Maryland's definitions of "subversive person"⁴⁹ and "subversive organization"⁵⁰ were still part of the statutory basis for the oath,⁵¹ therefore, the definitions were held unconstitutionally broad because they forced the oath taker to eschew both peaceful and violent alteration of the government, as well as unknowing and knowing membership in a subversive organization.⁵² The Attorney General responded by relieving state employees of their obligation to take the loyalty oath.⁵³

The oath, however, may not be dead. On the basis of a decision⁵⁴ that parts of the Maryland statute dealing with sedition⁵⁵ remain valid,⁵⁶ the Attorney General said that the act would be constitutional if the definitions of "subversive person"⁵⁷ and "subversive organization"⁵⁸ were limited to:

a person [or organization] who commits, or attempts to commit, any act intended to overthrow or destroy the constitutional form of the government of the State of Maryland, or any subdivision thereof, by force or violence.⁵⁹

If the Attorney General is correct, then a candidates' loyalty oath based upon the proposed definitions might withstand constitutional attack. Only further litigation can clarify exactly what a Maryland officeseeker may be required to swear.

IV. THE SIGNIFICANCE OF WHAT REMAINS

Today, a political aspirant in any of eight states⁶⁰ may have to swear, at most, a rather truncated oath.⁶¹ While the penalties for false swearing could be severe,⁶² their significance will depend upon the actual rate of

⁴⁸ 54 OP. MD. ATT'Y GEN. 151, 152 (1969).

⁴⁹ MD. ANN. CODE art. 85A, § 1 (1969).

⁵⁰ *Id.*

⁵¹ *Whitehill v. Elkins*, 389 U.S. 54, 56-57 (1967).

⁵² *Id.* at 61-62.

⁵³ *See* 54 OP. MD. ATT'Y GEN. 151, 154 (1969).

⁵⁴ *Washington Free Community v. State's Attorney*, 310 F. Supp. 436 (D. Md. 1970).

⁵⁵ MD. ANN. CODE art. 85A § 2-9 (1969).

⁵⁶ *Washington Free Community v. State's Attorney*, 310 F. Supp. 436, 445 (D. Md. 1970).

⁵⁷ MD. ANN. CODE art. 85A, § 1 (1969).

⁵⁸ *Id.*

⁵⁹ 56 OP. MD. ATT'Y GEN. 418, 420 (1971).

⁶⁰ *See* note 5 and accompanying text *supra*.

⁶¹ *See* note 30 *supra*.

⁶² *See, e.g.*, 18 U.S.C. § 2385 (1970). The Act provides penalties of up to \$20,000 and twenty years imprisonment for anyone who knowingly or willfully advocates, abets, or advises the overthrow of the federal government by force or violence.

prosecution. Whether loyalty oaths are genuinely useful is subject to some doubt. While national security considerations may linger from the McCarthy era,⁶³ they should be weighed against the effects of forcing people to proclaim their innermost beliefs⁶⁴ and the consequent risk of repressing dissent and diversity.⁶⁵ As Mr. Justice Black has written:⁶⁶

Loyalty oaths, as well as other contemporary "security measures," tend to stifle all forms of unorthodox or unpopular thinking or expression—the kind of thought and expression which has played such a vital and beneficial role in the history of this Nation. The result is a stultifying conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be. . . . I am certain that loyalty to the United States can never be secured by the endless proliferation of "loyalty" oaths; loyalty must arise spontaneously from the hearts of people who love their country and respect their government.⁶⁷

These remarks should suggest the merit of repealing the candidates' loyalty oath statutes which remain⁶⁸ and refraining from enacting new ones. If the states follow this policy, then the present candidates' loyalty oaths can be eliminated, and citizens will have to trust in a free and open electoral system to give them the leaders they want.

—Jeffrey F. Liss

⁶³ See T. EMERSON, *supra* note 3, at 205; H. HYMAN, *supra* note 1, at 413.

⁶⁴ See generally *In re Stolar*, 401 U.S. 23 (1971) and Mr. Justice Brennan's dissenting opinion in *Uphaus v. Wyman*, 360 U.S. 72, 82 (1959).

⁶⁵ See T. EMERSON, *supra* note 3, at 202:

It is difficult to see how the social interest in internal security is served by exclusion of a political party from the political process. On the contrary, the danger to the state or nation would surely be enhanced by denying to any party or group the possibility of redressing their grievances through democratic procedures.

⁶⁶ *Speiser v. Randall*, U.S. 513, 529 (1952) (Black, J., concurring).

⁶⁷ *Id.* at 532 (Black, J., concurring). Justice Black consistently rejected the balancing approach to loyalty oath litigation, preferring to afford full protection to first amendment rights. See Askin, *Loyalty Oaths in Retrospect: Freedom and Reality*, 1968 WIS. L. REV. 498, 504 n. 16.

⁶⁸ See note 5 and accompanying text *supra*.