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THE WASHINGTON SUBVERSIVE ACTIVITIES ACT: ITS RESTRICTION ON ACCESS TO THE ELECTION PROCESS[1]

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Since the time of the Alien and Sedition Laws of 1798, the national and state governments have sporadically enacted legislation intended to inhibit and punish activity subversive to existing government. Since Jefferson's time, such legislation has had both impassioned advocates and embittered opponents. It is the product of eras of political tension.[2] Inherent in these laws is the danger that zealousness in the preservation of the integrity of government may violate political rights guaranteed by our constitutions. An examination of their constitutionality need imply no judgment regarding the political wisdom of their enactment nor the manner of their enforcement, and none is here intended.

The Washington Subversive Activities Act[3] states in section 16: "No person shall become a candidate for election under the laws of the

[1] The title was suggested by an organizational division in EMERSON AND HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (1952).

[2] At the time the Act here considered was passed, the laws of Washington contained statutes and constitutional provisions concerning treason and misprision of treason, rebellion and insurrection, sedition, criminal anarchy, the use of red flags, sabotage, the use of masks and disguises, teachers' oaths, and exclusion of certain persons from state employment on the basis of subversive activity. In 1931 the legislature passed a criminal syndicalism law, repealed in 1937. GELLHORN, THE STATES AND SUBVERSION (1952).

Under these laws, and particularly the criminal syndicalism law, many prosecutions have ensued. Perhaps the most active period of appellate litigation on such prosecutions was during 1921-22, when some twelve cases were before the Washington Supreme Court. For an interesting account of these cases, and their relation to Washington history, see: COUNTRYMAN, UN-AMERICAN ACTIVITIES IN THE STATE OF WASHINGTON (1952); HAWLEY AND POTTS, COUNSEL FOR THE DAMNED (1953).

[3] L. 1951, c. 254. The law is a governor's bill, promised in Message of Arthur B. Langlie, Governor of Washington, to the Thirty-Second Legislature, January 10, 1951, (House Journal, p. 30) and introduced as Senate Bill No. 379, in the Thirty-Second Regular Session (1951), by Senator Harold G. Kimball. Held not subject to referendum: State v. Meyer, 38 Wn.2d 330, 229 P.2d 506 (1951).

The Governor's Message gives an indication of the purpose of the law: "To further strengthen our civil defense program, we must also be mindful of that small group of traitors within our citizenry who would destroy our freedom from within. In this connection, I strongly urge that the legislature give thought to enactment of appropriate provisions for the curbing of subversive activity, and to protect our free institutions from perversion into weapons of aggression against us in the hands of our enemies.

"By Concurrent Resolution No. 10, the Thirtieth Legislature created the Joint Legislative Fact Finding Committee on Un-American Activities. Through the labors of the committee much was learned of the degree to which disloyal groups had infiltrated into organizations of our senior citizens, into various economic and educational groups. As a result of these disclosures, some remedial action was taken but in the light of the grave emergency which we now face, additional action must be taken immediately. Therefore, a bill is being prepared calculated to give support at the state level to the efforts of our various federal agencies charged with the responsibility of combating these forces of tyranny and enslavement."

state of Washington to any public office whatsoever in this state, unless he or she shall file an affidavit that he or she is not a subversive person as defined in this chapter. No declaration of candidacy shall be received for filing by any election official of any county or subdivision in the state of Washington or by the secretary of state of the state of Washington unless accompanied by the affidavit aforesaid, and there shall not be entered upon any ballot or voting machine at any election the name of any person who has failed or refused to make the affidavit as set forth herein." Section 1 defines "subversive person" as ". . . any 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, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization." The terms "subversive organization" and "foreign subversive organization" are defined in the same section as any organization which engages in, or has as a purpose, any of the activity proscribed in the quoted portion; and, any organization controlled by a foreign government which engages in, or has as a purpose, any of the activity proscribed.

The constitutionality of this requirement was challenged in *Huntamer v. Coe*,[4] a declaratory judgment action against the secretary of state in his capacity as chief election officer of the state, seeking to have sections 16 and 1 adjudged unconstitutional. Plaintiffs intended to become candidates for governor, United State Congress, and the state legislature. The secretary of state indicated that, in connection with the filing of declarations of candidacy for those offices, the execution of the following would be required:

"Declaration and Affidavit of Candidacy" (For Partisan Offices)

"State of Washington }
} ss. DECLARATION
"County of .....}

"I, ..., declare upon honor that I reside at .. . ., of County of ...., State of Washington, and am a qualified voter therein, and a member of the .... Party; that I hereby declare myself a candidate for nomination to the office of .. .. to be made at the primary election to be held on the . .. day of September, 19 ....., and hereby request that my name be printed upon the official primary ballots, as provided by law, as a candidate of

[4] 40 Wn.2d 767, 246 P.2d 489 (1952).

the ..... Party and I accompany herewith the sum of ..... Dollars, the fee required by law of me for becoming such a candidate.

AFFIDAVIT

Further, I do solemnly swear that I have read the provisions of Section 1, Chapter 254, Laws of 1951, of the State of Washington, defining a subversive person as quoted below; that I understand and I am familiar with the contents thereof; and that I am not a subversive person as therein defined.

..... [printed name]

SIGN HERE .....

Subscribed and sworn to before me this ..... day of ....., 19 .....

.....

[official]

....."

The Washington Supreme Court, *en banc* and without dissent, reversed the decision of the trial court and adjudged the provision constitutional. The opinion of the court prompts this Comment.

The court, through Judge Finley, considered two questions: (1) whether plaintiffs' case justified an adjudication under the declaratory judgment act; (2) whether the chapter was unconstitutional in that (a) it allegedly imposed an additional qualification for public office in violation of the constitution, and (b) imposed a punishment on particular candidates for past activity not previously considered illegal. The first question was decided affirmatively.

In considering the second question, the court first examines the history of oaths, quoting at length from the majority opinion in *Imbrie v. Marsh.*[5] The court then states: "In view of the foregoing historical aspects . . . our concern is whether or not the oath . . . constitutes either (1) a restraint upon religious freedom, or (2) is *ex post facto,* or in the nature of a bill of attainder . . ." The opinion continues: "We can quickly and positively state that the statute in question imposes no restraint upon religious freedom. Almost as quickly, and just as positively, we can state that the statute is not *ex post facto,* nor a bill of attainder. . . ." The latter statement the court makes on the basis of their holding ". . . we think the statute . . . can and should be inter-

[5] 3 N.J. 578, 71 A.2d 352 (1950), an action by nominees for governor and members of the state legislature seeking, *inter alia,* a declaratory judgment that a state statute requiring of all state officials an oath of office in addition to the provision of the state constitution—"Every State officer, before entering upon the duties of his office, shall take and subscribe an oath or affirmation to support the Constitution of this State and of the United States and to perform the duties of his office faithfully, impartially and justly to the best of his ability."—was unconstitutional. The oath in question included: a statement that the affiant was not a member of, or affiliated with, any organization advocating force, or violence, "or other unconstitutional means" to overthrow the governments; and a statement that affiant did not believe in, advocate or advise such activity. *Held:* the oath was unconstitutional, in view of the exclusive nature of the oath prescribed in the constitution. See Note, 18 A.L.R.2d 241 (1951).

preted in a present and prospective sense in so far as the requirement of an oath is concerned. . . ."[6]

In determining whether the requirement of the oath ". . . imposes upon candidates . . . qualifications in addition to those prescribed in either the state or the United States constitutions," the court apparently resolves the alleged conflict with the Washington Constitution by finding chapter 254 ". . . consistent with the spirit and intent [of the Constitution, and] . . . in harmony with our way of life and our ideas of the theory and practice of government in our country, as we see and understand these things."

The alleged conflict with the United States Constitution is apparently dismissed with the opinion that "The statute . . . implements and is in furtherance of Article VI, paragraph three . . ." thereof, which provides: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Here the court proceeds in a manner which can be described only as perplexing. Earlier in its opinion, during the examination of the history of oaths the court noted "Some considerable distinction . . . between (a) an oath of office and (b) an oath of allegiance," and indicated the oath in question was one of allegiance. Later, the court added ". . . it is extremely difficult, if not downright impossible, for us to understand or see any reason why any citizen aspiring to public office should object to the kind of oath or affidavit of *allegiance* we think is required by . . . the statute." (Italics supplied) Yet, the court refers to the oath as an implementation of Article VI of the United States Constitution, which

[6] In Gerende v. Board of Supervisors, 341 U.S. 56 (1951), the United States Supreme Court considered the similar provision of the Maryland Subversive Activities Act, after which the Washington law was patterned. The Court said ". . . a candidate need only 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."

In the instant case, the Washington Court stated "We are in agreement with these views . . ." thus implying the Washington oath need refer only to present activity *knowingly* engaged in. Weiman v. Updegraff, 344 U.S. 183 (1952), decided five months later, held that the "due process" clause of the Fourteenth Amendment forbids a state to exact an oath from its employees negativing membership in any subversive organization regardless of the employee's knowledge of the nature of the organization. In 1953, the Washington legislature amended the definition of "subversive person" accordingly. See Sholley, *Criminal Law,* 28 WASH. L. REV. 175 (1953).

The court's construction so as to render the act constitutional if possible is based on the routine canon. See Casco Co. v. P.U.D. No. 1, 37 Wn.2d 777, 226 P.2d 235 (1951).

means, necessarily, the oath is one of *office.* The court evidently realized this, as it stated ". . . the oath required . . . is of no important respects different from the oath required by Article VI. . . . The time for taking [it] is merely advanced . . . to the time a candidate files and declares his candidacy, and the oath is required of *all* candidates—those ultimately successful, as well as those ultimately unsuccessful."

The court's analysis, in effect, makes the oath part of an oath of *office,* administered *before* election, to all candidates. It is respectfully submitted that this is an analytic confusion.[7] An oath of office is one administered as a prerequisite to full investiture with the office and is in effect a formal acceptance of the office.[8] As will be indicated subsequently, this distinction should be considered as essential in determining the constitutionality of the oath in question.

The opinion deals with only one further constitutional point: ". . . plaintiffs can have no possible logical convincing objection to [the oath provision], unless it is the devious, deceiving, and transparently dishonest claim that they have a right, as candidates, to be disloyal during the time elapsing between the date declarations of candidacy must be filed and the date of assuming office as a successful and elected candidate. . . . Any claim of [such right] . . . we are convinced, must be characterized as *de minimis,* and is hardly worthy of consideration in a constitutional sense." An examination of the rest of the opinion and the briefs of appellant, respondent, and *amicus curiae* does not yield any indication to what "right" the court here refers. Certainly no part of either constitution speaks of any "right to be disloyal." The court's final "constitutional" point, then, seems rather a statement of opinion than the examination of any legal issue.

In considering the second of the two questions dealt with in its opinion—whether the chapter was unconstitutional—it is respectfully suggested that the court's analysis of the chapter's imposition of an additional qualification for public office is incomplete, and that the court erred in believing that it had ". . . meticulously observed, guarded, and protected . . . [the plaintiffs'] stoutly-maintained constitutional rights. . . ."

Because rights relating to the election process are central to liberty under republican government, and because the Washington Subversive Activities Act is still a vital law, a detailed examination of the consti-

[7] The confusion evidently was caused by a misreading of Justice Oliphant's extensive discussion of Article VI, in his dissent in Imbrie v. Marsh, note 5 *supra.*

[8] Murphy v. Freeholders of Hudson, 91 N.J.L. 40, 102 Atl. 896 (1918).

tutionality of its restriction on access to the election process is justified.[9] This examination will consider the restriction first as an oath of office and second as an additional qualification for office.

National Office: If it were an oath of national office, it would conflict with provisions of the United States Constitution.[10] Article VI, paragraph 3, quoted above, requires of all legislators, state and national, and all executive and judicial officers, state and national, an oath to support the Constitution of the United States. This paragraph was implemented by the first statute enacted by Congress,[11] setting out the exact form to be used in administering the required oath: "I, A.B., do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States."[12] The form required of national officers has been altered subsequently by Congress, at various times.[13] Also, Article II, Section 1, indicates the oath required of the President: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." It follows from Article VI, paragraph 2, that no state possesses the requisite sovereignty to alter the form of either the oath prescribed by Congress in pursuance of Article VI, paragraph 3, or the oath for the President set out in the Constitution.[14]

State Office: Were it an oath of state office, it would conflict with provisions of both constitutions. Article VI, paragraph 3, of the United States Constitution, quoted above, extends to all state officers, and the form of the oath of office required of them, also quoted above, has

[9] As to the Act's vitality, see note 6 *supra*. Laws excluding certain persons from elective office or from candidacy for elective offices were in existence in eleven states and territories, as of January 1, 1951. GELLHORN, *op. cit.* note 2 *supra*.

It is of interest to note that Washington's first statute requiring filing of declarations of candidacy was L. 1907, c. 209 (Primary Election Law). The 1915 legislature passed c. 52, which required, among other things, that candidates swear in their declarations that they were eligible to the office to which they aspired. The act was vetoed by a popular referendum in 1916, and the old form of declaration, contained in L. 1907, c. 209, restored, in which the candidate was not required to certify to his eligibility, under oath or otherwise, nor is he now required to do so. See State v. Reeves, 196 Wash. 1, 81 P.2d 860 (1938).

[10] In the instant case, the court held the chapter applicable to the plaintiff who sought candidacy for the United States Congress. Although no other national office was before the court, their interpretation of section 16 would seem to make the law applicable to any national officer elected by state machinery. For a similar interpretation of "state" office, see State v. Howell, 92 Wash. 381, 159 Pac. 118 (1916).

[11] 1 Stat. 23 (1789).

[12] *Ibid.*

[13] See dissent, Imbrie v. Marsh, note 4 *supra*, 71 A.2d at 364 *et seq.*

[14] "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

remained unchanged.[15] Article VI, paragraph 2, then, requires that the provisions of any state oath of office which relate to support of the Constitution of the United States be in the prescribed form.[16] Article 6, Section 28, of the Washington Constitution requires: "Every judge of the supreme court, and every judge of a superior court shall, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Washington, and will faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state." The oath in question would conflict with this Section.[17] As to all other state officers, no state oaths of office being prescribed by the state constitution, the legislature may not alter by statute the constitutional qualifications for those offices by making what is *de facto* an additional qualification—the taking of an oath of office.[18]

But the oath here in question is not properly termed an oath of office. It is an additional qualification for candidacy to office. This was recognized by the New Jersey court in *Imbrie v. Marsh,* even by the dissent.[19] The similar provision of the Maryland Subversive Activities Act was denominated an additional qualification for office by both the majority and the minority opinions in *Shub v. Simpson.*[20] Logic would suggest that since those who do not swear the oath in question cannot become candidates, it is therefore an additional qualification for candidacy.[21] The problem then becomes whether the legislature has the power to prescribe this additional qualification for candidacy.

[15] 4 U.S.C. 101.

[16] Note 14 *supra.* Article VI, paragraph 3, was not considered by the court in Gerende v. Board of Supervisors, note 6 *supra.*

[17] See Imbrie v Marsh, note 5 *supra.*

[18] *Ibid.,* 71 A.2d at 356. If the Washington Constitution required an oath of office of all officers, similar in form to that required of judges, the same reasoning as to the oath for judges would apply. Since even formal variation of constitutionality required oaths is invalid, no examination is made in this Comment concerning the possible substantive variation between the contents of the oath required by the Act and the contents of customary oaths of support to state constitutions.

[19] Justice Oliphant, dissenting, stated that the oath ". . . does in effect require the candidate to make open profession of his allegiance. . . ." 71 A.2d at 376.

[20] 196 Md. 177, 76 A.2d 332; motion to expedite appeal denied, 340 U.S. 861; appeal dismissed, 340 U.S. 881 (1950). Plaintiffs brought proceeding for writ of mandamus directing the secretary of state to accept certificates of their nominations as candidates for offices of governor, Representative, and Senator, without the filing of affidavits required by the Maryland Act. *Held:* the qualification for candidacy is inapplicable to those seeking national office, applicable to those seeking state office (in view of a previous amendment to the state constitution).

[21] See Justice Carter's dissent in Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 267 (1952).

National Office: It has been suggested that because the Fourteenth and Fifteenth Amendments, while they prohibit certain discrimination regarding suffrage, do not prohibit such discrimination regarding public office and it may therefore be implied that states have the power to add qualifications for national offices.[22] Authoritative analysis rebuts this: Hamilton said "The qualifications of persons who may choose, or be chosen . . . are defined and fixed in the Constitution and are unalterable by the legislature."[23] Story points out that under the Tenth Amendment, "No powers could be reserved in the States except those which existed in the States prior to the adoption of the Constitution." A Senator or a Representative, he states ". . . is an officer of the Union, deriving his powers and qualifications from the Constitution and neither created by, dependent upon, nor controllable by the States."[24] Previously, the Washington Court has accepted this analysis,[25] and it did not explicitly overrule the position in the *Huntamer* opinion. In *Shub v. Simpson,*[26] *both* the majority and the dissent agreed that the provisions of the Maryland law were inapplicable to candidates for national office. The majority opinion cites a full list of authorities to support its holdings,[27] but perhaps the dissent states the conclusion more forcefully: "The State of Maryland has no more authority to prescribe qualifications for a member of Congress than for the Prime Minister of Canada or Russia."[28]

It follows that the prescription in question here conflicts with Article I, Sections 2 and 3; and Article II, Section 1, which state the qualifications for Congressmen and the President and Vice President, and is superseded by those provisions through the operation of the second paragraph of Article VI of the United States Constitution.[29]

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[22] 1949 WIS. L. REV. 303.

[23] THE FEDERALIST, No. 60.

The negative phrasing of qualifications for national offices—see Article I, Section 2 and 3 and Article II, Section 1, Constitution of the United States—does not imply a power in the states to add qualifications. People v. McCormick, 261, Ill. 413, N.E. 1053 (1914).

[24] STORY, COMMENTARIES ON THE CONSTITUTION 640 (5th ed.). It is appropriate to note here that the oath required by the Act involves a statement of allegiance to state government—something not necessarily required of national officers.

[25] State v. Howell, 104 Wash. 99, 175 Pac. 569 (1918). Presumably, were the case shown the oath in question is an attempted prescription of an additional qualification for candidacy for national office, it would abide by this decision.

[26] 196 Md. 177, 76 A.2d 332.

[27] *Ibid.,* 76 A.2d at 340, 341.

[28] *Ibid,* 76 A.2d at 345.

[29] Note 14 *supra.*

State Office: The Washington Court, in the *Huntamer* case, said: "The language of [Section 16] . . . is directed to the operation and functioning of the election machinery in the State of Washington." Presumbably, the Court accepted the contention of appellant in his brief that the section was designed to protect the electorate from "fraud." This, in turn, is probably a contention derived from a reading of the dissent in *Imbrie v. Marsh,* where Justice Oliphant stated: "[The New Jersey law in question] aims to prevent a fraud on the electorate . . ."[30] However, regardless of the aim of the Washington oath, if its administration violates the constitutions, it is invalid.

The Washington Constitution sets out the qualifications for state public offices in: Article 2, Sections 7 and 14, legislators; Article 3, Section 25, all state executive offices; Article 4, Sections 15, 17, the judiciary; Article 6, Sections 3 and 5, and Amendment 5, set out the requirements of electors. No state oath of office is prescribed by the Constitution for any state officer, except a judge. (Article 4, Section 28, quoted above)[31] As indicated by *Imbrie v. Marsh,* and the authorities cited therein,[32] it is an elementary principle of constitutional law that the legislature cannot add, directly or indirectly, to the constitutional qualifications of an officer; therefore, the prescription in question here violates the above Sections of the Washington Constitution.

It was further contended in the briefs of respondent and *amicus curiae* that the section under consideration violated Article 1, Section 19, of the Washington Constitution: "All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." No Washington cases were discovered litigating the full meaning of this Section,[33] but it is suggested that the oath required by section 16, as analyzed above, prevents equal access to candidacy by all constitutionally qualified citizens, and thereby prevents equality of elections and prevents the free exercises of the right of suffrage.[34]

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[30] Note 5 *supra,* 71 A.2d at 376. This concept of "fraud" is somewhat novel as compared to the usual view of what constitutes fraud in an election. See "Elections," 18 AM. JUR. cc. XII, XIII.

[31] Perhaps the Washington Constitution should be amended to provide an oath of office for non-judicial officers. However, Amendment 8 and RCW 29.82 provide for recall of all non-judicial elective officers.

[32] Note 20 *supra,* 76 A.2d at 356.

[33] The Section has been incidentally involved in several cases: e.g., State v. Nichols, 50 Wash. 508, 97 Pac. 728 (1908), Carstens v. P.U.D. No. 1, 8 Wn.2d 136, 111 P.2d 583 (1941).

[34] People v. McCormick, note 23 *supra.*

On the basis of the analysis presented in this Comment, it is contended that the Washington Subversive Activities Act imposes an additional qualification for candidacy to public office in violation of the constitutions and section 16 of the Act is therefore invalid.[35]

[35] It should be noted that there is authority that subsections 4 (2) and 4 (3) of the Act are inoperative as to national office candidates and national electors.

The subsections provide: "Any person who shall be convicted or shall plead guilty of violating any of the provisions [of the Act], in addition to all other penalties therein provided, shall from the date of such conviction be barred from . . . (2) Filing or standing for election to any public office in the state of Washington; or (3) Voting in any election held in this state."

Using the interpretation indicated in note 10 *supra*, it is possible to read section 4 as applying to candidacy for national office, and to voting in state-conducted national elections. Such an application would be erroneous. State v. Schmahl, 140 Minn, 219, 167 N.W. 481 (1918), State v. Thorson, 72 N.D. 246, 6 N.W.2d 89 (1942). Also, see *Ex Parte* Yarbrough, 110 U.S. 651 (1883).