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REPORT OF THE
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON JUDICIARY

PERTAINING TO
LOYALTY OATHS

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LETTER OF TRANSMITTAL

CALIFORNIA LEGISLATURE
ASSEMBLY INTERIM COMMITTEE ON JUDICIARY
SACRAMENTO, April 9, 1959

HON. RALPH M. BROWN, *Speaker of the Assembly*
and Members of the Assembly
Assembly Chamber, Sacramento

GENTLEMEN: Enclosed is the Report on Loyalty Oaths of the Subcommittee on Constitutional Rights of the Assembly Interim Committee on Judiciary.

The loyalty oath issue is a controversial one. It is treated in this report in a comprehensive and balanced manner, and deserves the thoughtful attention of the Legislature.

Respectfully submitted,

BRUCE F. ALLEN, Chairman

SUBCOMMITTEE LETTER OF TRANSMITTAL

April 2, 1959

HON. BRUCE F. ALLEN, *Chairman*
Assembly Interim Committee on Judiciary
California Legislature
State Capitol, Sacramento

DEAR MR. ALLEN: Pursuant to your directive and in conformance with the provisions of House Resolution No. 224 of the 1957 General Session, the Subcommittee on Constitutional Rights herewith submits its report on loyalty oaths

Three members of the subcommittee, Messrs. O'Connell, Burton, and Masterson, believe that the loyalty oath should be repealed and the traditional oath of allegiance restored for public employees. Their reasons are stated in Part One of the report.

The remaining three members of the subcommittee, Messrs. Busterud, Crawford, and Thelin, believe that the loyalty oath should be retained, revising its application, where necessary, to meet constitutional requirements. Their reasons are stated in Part Two of the report.

Respectfully submitted,

JOHN A. O'CONNELL, Subcommittee Chairman

S. C. MASTERSON
HOWARD J. THELIN
PHILIP BURTON

JOHN A. BUSTERUD
GEORGE G. CRAWFORD

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PREFACE

Few subjects are more emotion laden than that of loyalty oaths. "If a person is loyal, why should he be reluctant to sign an oath?" asks one. "Why should my loyalty be questioned?" asks another. Such rhetorical questions are statements of conclusion and belief rather than attempts at rational persuasion. Moreover, in a field where the people need guidance, such questions tend rather to harangue than to inform.

The loyalty oath issue is a legislative matter and, as such, deserves careful deliberation. The purpose of this report is to treat a passionate matter dispassionately.

PART ONE
EXCERPTS FROM TESTIMONY

Excerpts from testimony given at a public hearing of the Subcommittee on
Constitutional Rights of the Assembly Interim Committee on Judiciary,
held at Los Angeles on December 13, 1957.

Coleman Blease, *Friends Committee on Legislation*: * “Quakers have since the early 1600’s, refused to sign oaths of nondisloyalty on the basis of conscience, on the basis of their understanding of the Bible, because they believe that test oaths were a means of political and religious suppression. * * *

Professor Harold Horowitz, University of Southern California Law School: “By definition, the person who is violating the standard for employment whom you want to fire by having him take an oath, he is the person who is not going to think twice about perjuring himself when he signs the oath and says that he doesn’t advocate the violent overthrow of the government. He is the very person the oath was designed to ferret out and he is the very person who will certainly never disclose himself by signing such a sheet of paper.”

Martin J. Schnitzer, Attorney at Law, Beverly Hills: “The type of people who come into my office and say they do not want to take the oath are the people who have ethical reasons, whether we agree with them or not, that make them think it is a cowardly thing to take the oath. These are the people who stand upon principle and are completely impractical about it, but they are the people who do some of our most creative work. If the loyalty oath is only weeding them out, then we are not doing ourselves any service by having the loyalty oath. We are actually hurting ourselves because the Communists don’t care about it anyway.”

Reverend Forrest C. Weir, Ph.D., *Executive Director, Church Federation of Los Angeles*: “Thus, one of our strong reasons for opposing the present [loyalty oath requirement] is that it violates the principle that the church and the state are separate but co-operating bodies. The church desires to remain as a co-operating body. The present [loyalty oath] makes the state not a co-operating body, but the coercive force over the church. Whether the courts declared it constitutional or unconstitutional, it breaks our established pattern by which a free church in a free society may foster the disposition in its members to give to the state the kind of loyalty you cannot command by force. To serve in this way the church must never be subservient to any force or institution. Its supreme allegiance is to God.”

Rev. Ray W. Ragsdale, *District Superintendent, Los Angeles District of the Methodist Church* (quoting from a letter): “The * * *

* Italicizing the name of the organization indicates that the witness is speaking on behalf of that organization

Grace Methodist Church, Inglewood, [has resolved] not to apply for state tax exemption for the coming year. We wish it clearly understood that this decision in no way represents any unwillingness on our part to affirm our loyalty to the United States of America. * * * Our decision is motivated by the following position: The offer of tax exemption when it is made by the State out of respect for the charitable purposes and nature of the church, is one which is freely accepted with gratitude, but when the offer is made on conditions that tend to break down the traditional separation of church and state, then the church must respectfully maintain its independence and be glad, under the circumstances, to pay the lawful taxes which the State requires. * * *

John Anson Ford, County Supervisor, Los Angeles: “* * * Certain very conscientious and, in my personal view, very loyal, employees took [the loyalty oath] very seriously and we lost some good employees because their conscience wouldn’t permit them to go along. * * *

Reverend Emerson G. Hangen, Minister, First Congregational Church, Long Beach: “Those who believe in loyalty oaths have confused loyalty with orthodoxy. It’s an utterly alien philosophy in America that is based upon a fundamental distrust of people. Its premise is that the general citizenry cannot be trusted to be loyal to their government unless they are officially signed up.”

Dr. John Caughey, Historian, University of California at Los Angeles: “* * * Somewhere in the hierarchy of state employees there is a line below which it is not * * * appropriate to set up an oath requirement. The majority of offices, it seems to me, do not justify it.”

Professor Harold Hyman, Department of History, University of California at Los Angeles: “From my own work in this field, I think historical evidence indicates that test oaths, loyalty oaths, especially those of a retrospective, past-testing nature, are ineffective and damaging to political democracy.”

Reverend Eldon Durham, *Chairman of the Social Education Action Committee of the Los Angeles Presbytery*: “Our voluntary pledge of allegiance to the Flag, the symbol of our beloved Nation, sits much better on our shoulders than an enforced oath signed under the brandished club of taxation.”

E. A. King, *Vice President, California C. I. O. Council*: “In the climate of concern over Communist subversion a charge of disloyalty * * * frequently carries a far greater stigma than conviction for some criminal offenses. * * *

“Our philosophy is premised on the belief that national security will be better assured through political freedom than through suppression.”

Henry Clark, *Federation of Teachers, A. F. of L.*: “* * * The loyalty oath tends to coerce teachers from exercising their political rights, from attending political meetings, and from participating in political campaigns. * * *

“* * * The loyalty oath is an infringement upon the academic freedom of the classroom teacher.”

Robert Vogel, *Chairman, Board of Directors, American Civil Liberties Union*: "The sometime defense of [loyalty] oaths as perjury traps to catch the disloyal is now obviously threadbare. Since the enactment of the current oath over seven years ago, not a single person has been indicted for falsely swearing the Levering oath."

Dorothy Marshall, *Vice Chairman, Citizens Committee to Preserve American Freedom*: "I think * * * it was significant this morning that Supervisor Ford, when questioned, was * * * unable to remember what kind of an oath he had taken. Now this is a responsible public official. If the so-called loyalty oath doesn't even register enough on him so he knows what he signs, then obviously it cannot be very effective."

Reverend Stephen Fritchman, *Pastor, First Unitarian Church, Los Angeles, and representative of the Council of Liberal Ministers of Southern California and Arizona*: "Too many of our forefathers had fled religious persecution—Catholics, Jews, Quakers, Puritans, Congregationalists—to want to bring it to these shores. The expurgatory oath in which a man uncharged with a crime is compelled to deny he committed it is very old in the church-state struggle and for 166 years we Americans have fought any return of the ancient evil."

Father Charles S. Casassa, *President, Loyola University*: "I do not think that loyalty oaths for faculty members in state institutions are either necessary or effective. I don't think they are necessary because * * * the board of education of trustees * * * can accomplish the same aim by effective screening processes. * * *

"Secondly, I don't think they are effective off the record in the past. I don't believe that anyone committed to the overthrow of this government is hindered from seeking employment by the taking of a loyalty oath."

A. L. Wirin, *Attorney at Law, Counsel for the Southern California American Civil Liberties Union*: "* * * The Constitution of the United States and its guarantees apply to all and * * * there is an obligation on our Legislature to avoid legislation which violates constitutional rights, not merely [to] pass legislation [recklessly] in the hope or assumption that the United States Supreme Court will attend to it."

Edwin A. Sanders, *Executive Secretary, Pacific Southwest Regional Office of the American Friends' Service Committee* (quoting from an earlier statement): "Believing in the importance of the individual, we deplore the tendency toward restriction of individual freedom represented by the property tax law declaration. We protest this requirement because it is part of the attempt to test loyalty by words instead of by deeds."

John Richardson, *Chairman, Los Angeles Chapter of the Federation of American Scientists*: "I think that the loyalty oath is rather ineffectual in accomplishing what * * * I assume the objectives were."

Dr. Joseph Kaplan, *Professor of Physics at the University of California at Los Angeles, and Chairman of the United States National*

Committee for the International Geophysical Year: "I must say that technically it is extremely difficult to have to sign loyalty oaths and * * * for every speech, literally, to have to re-sign the oath because as a matter of bookkeeping it becomes extremely irksome. * * * It makes it a little difficult to accept some of these teaching engagements. * * * If you make 20 speeches a year to teachers' groups * * * [you] sign something 20 times."

Paul Johnson, *Clerk of the Orange Grove Meeting of Friends*: "We were led to seek for the true meaning of loyalty. Could it be commanded by legislation? Can it be created by words or fetish of the annual oath-taking? Least of all, can it be bought? We determined that it could not. Loyalty is a function of love. It must be freely felt."

I. INTRODUCTION

A loyalty oath is a means to an end. We build highways to foster safe and rapid transportation and schools to educate our youth; the mobility of our citizenry, physical and social, is an end in itself. Loyalty oaths are meant to serve an end of a different sort, a more basic one and at the same time, of its very nature, a negative one—that of national security, the safety of the people. The happiness which we derive from roads and colleges is felt directly. The safety which we secure from our armies and diplomats does not create happiness, but only permits it; it is a necessary precondition of the enjoyment of life's bounties, but is not a sufficient cause of them.

The great triumph of western civilization has been to free men to seek happiness, as individuals or in groups. This triumph was made possible only by securing the citizen safe in his home and his travels. Fear of physical danger had to be removed before living could become gracious. Within the United States, and throughout the western hemisphere, such fear has been eliminated to an unprecedented degree. We have conquered banditry, and illness and ignorance are greatly reduced. Moreover, we have accomplished this while increasing human freedom.

But we have not removed the danger of external aggression. The specter of atomic holocaust or Soviet domination disturbs our tranquillity. We are dedicated to the removal of these fearsome threats. One of our weapons in this struggle has been the loyalty oath. And just as we continually reappraise the effectiveness of our tanks and missiles in terms of their cost, so we must ask of loyalty oaths, are they effective? and, what is the price we pay for them?

II. THE CONSTITUTIONAL AND STATUTORY BASIS OF THE LOYALTY OATH

There is one primary loyalty oath in California today, the Levering Oath.¹ This oath was adopted as a constitutional amendment in 1952 by a referendum vote of 2,951,955 to 1,290,851. It is significant to note that even while McCarthyism was at its highest pitch, over one and one-quarter million Californians voted against the adoption of this new oath.

Statutory provisions for the use of this oath are varied and overlapping. The individuals and groups covered are as follows:

1. All taxpayers who claim any exemption (except householders' exemption).²
2. All public employees.³
3. Groups using public school facilities for civic or recreational activities.⁴
4. Members of county central committees of political parties.⁵

In addition, the Dilworth Act (1953) requires that each new school-teacher take an oath that he is not knowingly a member of the Communist Party, and further requires that any employee of a school district who has been a member of the Communist Party since October 3, 1945, file a verified affidavit that he is no longer such a member, and that membership was terminated in good faith.⁶

¹ Art. XX, Sec 3 of the California Constitution provides as follows

"I, -----, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic, that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California, that I take this obligation freely without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties upon which I am to enter

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows: (If no affiliation, write in the words "No Exceptions") and that during such time as I hold the office of ----- I will not advocate nor become a member of any

(Name of office)

party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means"

² Revenue and Taxation Code, Sections 32 and 23705 This provision is superfluous, in that Art XX, Sec 19 of the California Constitution provides that " * * * No person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means * * * shall * * * (b) receive any exemption from any tax imposed by this State or any * * * political subdivision * * * of this State." This section is self-executing, and demands no implementing legislation. (See Opinion No. 3979 of the Office of Legislative Counsel, appended, on this point)

In any event, the taxpayers' oath was declared unconstitutional by the United States Supreme Court as a violation of the First and Fourteenth Amendment guarantees of due process of law, in that the burden of proof to show non-advocacy of violent overthrow of government was improperly put on those seeking exemption. *First Unitarian Church of Los Angeles v. County of Los Angeles*, 2 L. Ed. 2d 1484 (1958); *Speiser v. Randall*, 2 L. Ed. 2d 1460 (1958).

³ Government Code, Sections 1360, 3102, and 3103. Elective officials are required to take two oaths for each term—one when candidacy is filed and one when office is assumed. Oaths have also been required of quasi-public servants, such as boiler and elevator inspectors.

⁴ Education Code, Section 19441, the Civic Center Act

⁵ Elections Code, Section 2842 5

⁶ Education Code, Sections 12601 and 12602.

III. THE PRICE OF LOYALTY OATHS

A. REASON AND THE LOYALTY OATH

1. *First Amendment Guarantees: Freedom of Speech and Assembly*

A legislature could not require a loyalty oath of all citizens, with a fine, imprisonment or civil disability being imposed for refusal to swear, because the legislature would be unreasonably restricting the constitutional right to speak and associate freely. It has been argued, however, that when a legislature grants a *privilege*, it may attach any conditions it wishes to that privilege. This is an overstatement: If the condition requires the relinquishment of a constitutional right, it will be subject to severe judicial scrutiny.⁷ And, in fact, the United States Supreme Court held that California could not demand a loyalty oath as a condition of a tax exemption.⁸ However, the courts have held that public employment is a privilege which may be conditioned by the requirement of an oath.

But to answer the question of the power of the legislature to act is not necessarily to answer the question of the *wisdom* of its actions. To the individual who is faced with the choice of circumscribing his political activities or forsaking government employment, there is little comfort in the knowledge that, technically, his constitutional rights have not been infringed. If he argues that the burden of proof has been reversed, requiring him to prove his innocence, he gains little satisfaction from learning that his guilt or innocence, in a technical sense, are not at issue. If he loses his job, he is not mollified by being told that this loss is not, in the eyes of the law, a punishment.

When the courts find a law to be unconstitutional, the duty of the legislature is clear—a legislature should not pass an act which is null and void, nor enact laws infringing the Bill of Rights. Having overstepped these limits, a legislature has a duty to erase its own error. Thus, the California Legislature should repeal the taxpayers' oath which was stricken in the *Speiser* and *First Unitarian Church* cases, *supra*. Furthermore, the Legislature should examine other similar provisions and repeal those which would lead to further humiliation.⁹

But even when the courts uphold a law, legislative responsibility is not necessarily discharged. A legislature should not attempt to play shuffleboard with civil liberties, to try to come as close to the line as possible without overshooting. The purpose of a legislature is not to exercise the maximum of power at its disposal: habitual self-restraint is the handmaiden of the rule of law.

⁷ See Robert L. Hale, *Freedom Through Law* (1952), pp. 295-304, for a discussion of "Withholding a Special Privilege as a Penalty."

⁸ See the discussion of the *Speiser* and *First Unitarian Church* cases, *supra*, p. 13, footnote 2. In the *Speiser* case (2 L.Ed. 2d 1460), the court stated (p. 1468) that:

"* * * The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or a 'bounty,' its denial may not infringe speech * * *"

⁹ The Civic Center Act, *supra*, p. 13, is a clear example of such a provision: The same oath which was held to be unconstitutional in the *Speiser* case is made a condition of the privilege of using public facilities.

It should be added that the courts, by their very nature, cannot function as a *general* protector of civil liberties. Each decision of a court is limited to the facts of the case before it, each remedy provided by a court is directed to the parties at the bar. A court is incapable of undertaking a comprehensive lawmaking role. And so it should be. It is the legislative branch of government which is entrusted with this broader task. The actions of a court are specific and retroactive; those of a legislature are general and prospective. Our Constitutions, State and Federal, prescribe the minimal measurements of the mantle of civil liberty; it is the legislature which cuts the cloth; the courts are limited to a search for basic flaws in legislative workmanship. The courts may not question the wisdom of legislative action, but only the power of the legislature to act in a given situation. For the greater protection of civil liberties as well as for the maintenance of our traditional separation of powers, the legislature must not abdicate to the courts its duty to "secure the Blessings of Liberty to ourselves and our Posterity."¹⁰

Whether or not loyalty oaths have been effective in fostering national security (to be discussed later), it must be recognized, then, that a price has been paid in terms of freedom of speech and assembly. Some government employees and prospective government employees have refrained from expressing political views or from joining various organizations, because they have feared that their jobs would be jeopardized. Schoolteachers in the classroom have, to some degree, been stifled in discussion of controversial matters, because they feared that the line between discussion and "advocacy" (which latter they had to swear they had not done) was not clear. In short, the loyalty oath has acted as a political oath. The loss of freedom which these people have experienced must be included in totalling the costs of the loyalty oath program. The price paid by those who have forsaken government employment rather than give up any part of their freedom must also be considered. They have lost a job opportunity which they otherwise had.

Nor has the cost in this category been limited to the individuals directly affected. The Nation as a whole has suffered proportionally to the degree of restriction of discussion and association. When it is stated that constitutional guarantees do not restrict the government in the conditions it may attach to public employment, it does not follow that the *reasons* for these guarantees have conveniently disappeared. It only means that other purposes—here, national security—have counter-vailed. We need the ideas of our public servants, and their active participation in the political process, just as much as those of any other group. We need the critical insights of our teachers perhaps even more. In an attempt to gain security, we have sacrificed a portion of the contribution which our state employees could make. This sacrifice is part of the price we pay for loyalty oaths.¹¹

¹⁰ Preamble to the United States Constitution

¹¹ Another price which we have paid indirectly for loyalty oaths is that we have offended influential groups among our faithful and democratic allies abroad—those who have resented even the suspicion that our freedoms were being restricted

2. Group Oaths

To receive a tax exemption, religious and charitable organizations must have an oath signed by one of their officers. Similarly, an officer must sign an oath for any group desiring to use public school facilities for meetings or recreation.¹²

The officers who sign such an oath on behalf of a group are undertaking either an impossible responsibility or none at all. If they are responsible for the loyalty of each member of the group, they are in a very difficult position: they cannot control the actions or thoughts of the members—or even know what these actions or thoughts are. If they are not responsible for the individual members, then the signing of the oath is a meaningless gesture.¹³

For the State to demand the execution of meaningless or impossible oaths is to breed hypocrisy and cynicism. This is a very high price to pay for this particular type of loyalty oath.

3. Confusing the Word With the Thing

That the use of loyalty oaths could lead to the illogic of demanding group oaths indicates that there is a more basic logical error underlying all loyalty oath legislation—that of hypostatization, the substitution of the word for the thing. This confusion rarely occurs with physical objects. We do not accept the words “food” and “drink” in satisfaction of our hunger and thirst. But in the realm of ideas and beliefs, which do not lend themselves to direct sensory perception, there is such a danger. Let us develop this problem a little further.

In the proper context certain words have a constitutive force. The “I do” of a marriage ceremony and the “I promise” of a contract are examples. These words create a clearly defined and enforceable obligation. Other words are declaratory; they express an existing state of affairs, but they do not create that state of affairs. “I love you” and “I am loyal to you” are examples. If we strongly need the love and desire the loyalty, we tend to permit our doubts as to their existence to be overcome by erroneously considering the words as constitutive. In a close personal relationship, such as marriage, the parties can test the declaration by observing each other’s actions continuously over a long period of time. This device is not feasible for larger groups. Taking the declaratory words as constitutive then becomes conclusive. The word becomes the thing itself, and the result is not loyalty, but only the word “loyalty.”

This situation is frightening. By taking the words “I am loyal” as constitutive, we are undermining the very thing we set out to ensure—

¹² These laws are enumerated, *supra*, at page 13. The tax exemption oath was held to be unconstitutional in the *First Unitarian Church* case, *op. cit.* A test case on the oath for the use of public school buildings and grounds has not yet come before the courts.

¹³ Reverend Emerson G. Hangen, Minister of the First Congregational Church in Long Beach, California, described this dilemma very aptly at the public hearing held in Los Angeles on December 13, 1957. He stated (p. 39):

“* * * [When the treasurer signs that oath, for whom does he sign? Does he sign for the minister? Absolutely not, because I have already declared my opposition to it and I would not sign it under any circumstances. Does he sign it for the board of trustees? Does he sign for the church membership? One man cannot possibly make such a declaration on behalf of 2,000 or more people.]

“Suppose, God forbid, that some disloyal people might be discovered in our congregation at some time. What would happen then? Who would be liable? The signer of the oath, the trustees or the other 2,000 people in our church?”

the safety of the people. Instead of having loyalty and resulting security, we have only a word and a false sense of security. If the price of loyalty oaths is danger and self-contradiction, it is indeed high.

4. Veterans' Tax Exemptions

One group of Americans has given unimpeachable proof of its loyalty: our servicemen risked their lives for their Country. We need not rely on declarations of loyalty from these men and women for proof of their patriotism. Their actions speak for themselves, and loudly. To take the word for the thing when the thing itself has been amply demonstrated is a double error, one of logic and one of misjudging weight of evidence.

There is another reason why veterans' exemptions should not be conditioned on the taking of a loyalty oath. The exemption was granted to veterans as a gesture of thanks for sacrifice made. It is a gift in consideration of past services. To exact a promise of future loyalty and an oath of past loyalty under such circumstances is simply in poor taste. The spirit of the gift is marred by the insult which accompanies it. It would be better to make no gift at all, to say a modest "thank you," than to add to the gift a requirement which impugns the very qualities it is intended to reward. Our fighting men deserve our unreserved thanks.

It is not surprising that the Supreme Court struck down the veterans' oath in the *Speiser* case, *supra*. In this case, the court stated (2 L. Ed. 1460, at p. 1474):

"But while a union official or public employee may be deprived of his position and thereby removed from the place of special danger, the State is powerless to erase the service which the veteran has rendered his Country. * * *"

B. RELIGION AND THE LOYALTY OATH

1. Separation of Church and State

The State is under no obligation to grant tax exemptions to religious or charitable organizations or to veterans. If it does so, it is because the State has decided that it wants to encourage these groups or reward these warriors. But once the State has decided to grant such an exemption, the picture is changed—it cannot then burden the gift with onerous conditions.

No one familiar with our form of government and with the history of religious persecution which brought our forebears to this Country advocates state control over religion. Special taxes on religion, censorship or sermons, or punishment of sects are all inimical to our laws and morals. We tend to take such toleration for granted, but it was not easily won. If the State—by way of tax exemption—freely gives money to all religions without requiring adherence to one or another dogma, then churches may accept the gift in the spirit in which it is given. But if the gift is withheld from those churches which do not sign an oath of nondisloyalty, then the effect is to license or to tax all churches. They must either conform to a state dictated creed or pay,

indirectly, a tax. Either result is a slash from Caesar's sword, a thrust at the bulwark of church-state separation.¹⁴

2. Invasion of the Privacy of Religious Beliefs

If one price which has been paid for loyalty oaths is the erosion of the principle of the separation of church and state, another is the anguish suffered by a small group of deeply religious people whose beliefs prevent them from swearing loyalty to any but their God. Assuming that the State has the power to exact loyalty oaths from these people, and assuming that such oaths are otherwise effective (to be discussed later), the conscientious legislator must recognize that this price is being exacted.

In times gone by, governments paid heavily for forcing recusants to swear loyalty to the king or to an established church. France lost the cream of her craftsmen when the Huguenots fled; England suffered civil war in attempting to enforce conformity. We are faced with no such loss for demanding oaths of our religious minority: they do not flee nor threaten war. We do miss their contributions to jobs for which they are not eligible, but to the extent that they are adamant in their refusal to conform there is no diminution of free speech or assembly. It is the minority itself which pays the cost in lost tax exemptions, lost jobs, and expenses of litigation. That the price is not borne by the whole body politic does not mean that the legislator should dismiss it. To the contrary, he should consider it even more seriously. Martyrs should not lightly be created. These men will not abandon their profound religious faith; do we wish to penalize them for it?¹⁵

C. SUMMARY

While the dollar and cents outlay is the most obvious cost paid for loyalty oaths, others are more important.

The cost in terms of moral fiber and personal integrity has been oppressive. Organized religion and rugged individualism—two of the major currents in the stream of American history—have been forced to choose between civil disability and, to them, damning conformity. The disability attendant on noncompliance with the oath has taken the form of lost tax exemptions or lost job possibilities. The damnation has resulted whenever individuals have violated their own consciences by subscribing to oaths inconsistent with their religious or philosophical beliefs. Many of these conscientious people have resolved the dilemma in favor of their peace of mind and at the expense of their pocketbooks. They have not signed.

In addition to the costs borne by these groups and individuals, the people as a whole have paid heavily for the loyalty oath program. The independence of our churches has been lessened and we have lost skilled persons who might otherwise have taken public employment

¹⁴ The loyalty oath for religious and charitable organizations was held to be unconstitutional in the *First Unitarian Church* case, *op. cit.*, on the ground that it unduly restricted freedom of speech. The church-state issue, then, was not reached by the court.

¹⁵ One witness who otherwise favored loyalty oaths conceded that loyal persons might possibly have religious objections to swearing an oath. See the testimony of B. E. Gwartney, American Legion Chairman on Americanism for the County of Los Angeles, given at the public hearing held in Los Angeles on December 13, 1957.

Most costly of all, we have eroded freedom of speech and assembly. An informed and critical populace is the cornerstone of a democracy. We have sacrificed the stimulation which freer expression and participation on the part of teachers and civil servants might give. This strikes at the very foundation of our form of government.

These, then, have been some of the costs of loyalty oaths. Let us now see what we have received in return, in terms of the increased safety of the Nation.

IV. THE EFFICACY OF LOYALTY OATHS

A. IN THE PAST

1. *Situations of Mass Disloyalty*

If the loyalty of more than a small fraction of the people is in question then there is no such thing as a timely oath: it is either not needed at all or it is too late. For a loyal people no oath is necessary; for a disloyal one, none will help. Of necessity, then, loyalty oaths must be directed at very small groups who threaten subversion or sabotage, but not popular revolution. In the face of mass disaffection, historical examples of the futility of oaths abound.

Loyalty oaths were legion in England during the religious antagonism of the sixteenth and seventeenth centuries. They did not prevent two civil wars (1640-1660, 1688-1689) nor save the head of Charles I.¹⁶ Asseverations of loyalty during the War of American Independence and during the Civil War were equally ineffective.¹⁷

But these examples are not the most pertinent to our present situation, one in which there is no question as to the loyalty of the great mass of the people. The experiences of World Wars I and II fit more into this latter category.

2. *Situations of Isolated Disloyalty*

The use of loyalty oaths during the world wars has been succinctly stated by Professor Hyman, as follows:¹⁸

"With American entrance into World War I, the Federal Government largely abandoned loyalty oaths. * * * For the first time in any major American war, federal officials were confident of the fidelity of the American people and that an effective security system existed. The result was general agreement among these officials that loyalty oaths were unnecessary for the successful prosecution of the war. * * *

¹⁶ Professor Harold M. Hyman, a historian at the University of California at Los Angeles, states that he approaches his research "with no prejudice either for or against loyalty oaths in the abstract." In the prepared statement which he submitted at the public hearing held in Los Angeles on December 13, 1957, *op. cit.*, he asserts as follows (page 5):

"[T]he loyalty oaths of the seventeenth century were failures. They did not create loyalty nor did they provide security."

¹⁷ Professor Hyman, *op. cit.*, further notes (page 14):

"The history of loyalty oaths in the American Revolution indicates that allegiance closely paralleled the reality of military power. The combat was not between theoretical concepts of loyalty as measured by formal oaths, but between contending armies. * * * Loyalty to one side or the other existed or did not exist regardless of the oaths sworn."

And, again (pages 20, 23):

"Yet history judges that all the oaths sworn, deceptions practiced, and perjuries committed failed to affect the course of the war. Union loyalty oaths were more effective than their Confederate counterparts only because Union armies defeated Confederate armies. * * *

"The tragic era of reconstruction, which left more scars in southern memories than did defeat in the Civil War, resulted in large part from the postwar exploitation of loyalty oaths."

¹⁸ *Ibid.*, pp. 25-28.

"Local and state governments, however, used loyalty oaths with great energy and increasing application. * * * These oaths were directed against pro-Germans, but even before the Armistice, local pressures and prejudices twisted the security purposes of state loyalty oaths into subjective, partisan weapons. * * *

"Local loyalty testing encouraged the violence, the tragic vigilantism, the lynchings and beatings which marred the home front history of the United States in World War I. * * *

"American history during World War II indicates that the past can teach. Every earlier American war had given rise to uncontrolled mob action in local communities, ostensibly in support of loyalty. In 1941, however, the national government obtained, with the approval of state authorities, a monopoly of internal security functions. As in World War I, federal security agencies did not employ loyalty oaths. Unlike World War I, the unprecedented federal security monopoly resulted in a new efficiency and temperance in the performance of security responsibilities. World War II is America's first wartime experience in which no Americans were lynched, beaten or terrorized for alleged disloyalty. * * *

"American history indicates that loyalty oaths do not preserve government or suppress disloyalty. From Benedict Arnold to the Rosenbergs, America's major traitors have been fully sworn to American loyalty by the oaths they had signed."

In none of the examples cited by Professor Hyman, then, is there evidence that loyalty oaths have been effective in securing national safety. Many of them, to the contrary, have exacerbated internal dissension at a time when unity was needed. These lessons of history should give pause to those who would institute loyalty oath programs. But once such a program is started it is only fair to let it speak for itself rather than to condemn it merely by reference to the failure of all its predecessors.

How effective have California loyalty oaths been in fostering national security?

B. TODAY

1. *Widespread and Wordy Oaths*

Oaths can be edifying. To be so they must be short and must be limited to positions of unusual trust. When a governor or a judge, for example, swears to uphold the Constitution, he is emphasizing the fact that his importance in maintaining the Constitution is greater than that of the ordinary citizen. The honor of his position carries with it greater responsibility. The oath is a recognition of this difference. It is an assurance to the people of his acceptance of a higher duty and at the same time an inspiration to the officeholder to fulfill his promise.

If everyone takes such an oath, it fails to distinguish the statesman—he is no longer honored, his duty is no longer set apart. The oath becomes commonplace, taken for granted, and forgotten. It comes to be measured in terms of the economic advantage which it confers as a condition of a tax exemption or salary payment. It is not a badge of merit but a ticket of admission. It is, in a word, debased.

The depreciation of the value of an oath is increased when group oaths are required. The spirit of dedication is an individual thing; the very concept of loyalty is an individual one. Love and hate are highly personal emotions. To have an officer take an oath on behalf of a group inspires neither the group nor the officer.

The inspirational effect of an oath is further lessened by making it lengthy. The noble purpose becomes mired in petty detail. Striving for awe, it instills boredom; the long-remembered moment of inspiration becomes a soon-forgotten quarter-hour of pedantry.

If we would continue the impressive tradition of having officeholders take oaths of allegiance, we must make the oath short, we must make it individual, and we must limit it to those who wear a mantle of special trust.

2. Negative and Expurgatory Oaths

To the extent that negative oaths are lengthy, they have already been treated. But negative oaths have another aspect which bears even more directly on efficacy. When an oath requires the affiant to promise *not* to hold certain beliefs or associations, it becomes a test oath rather than a simple oath of allegiance. The test oath may include the oath of allegiance, but it adds something quite different: it makes the oath "a criterion of the fitness of the person to fill a public or political office."¹⁹

The standard oath of allegiance is not meant to exclude anyone from office, it is a formality—a formality whose meaningfulness depends on the solemnity with which it is taken. The test oath, on the other hand, is intended to affect standards of employment. In short, it is a political oath. The current test oath is meant to exclude from office or tax exemption those who would overthrow the government by "violence or other unlawful means." Its effectiveness in this regard is not measured by the loyalty which it inspires, but by the number and nature of those it keeps out of office.²⁰

When the negative oath looks backward it is an expurgatory oath. The affiant swears that he has not held certain beliefs nor maintained certain associations in the past. If he is able so to swear, he has passed this particular test of employment. If he is not so able, then he must admit past beliefs or associations and swear not to retain them. This may purge him, and, if so, he has again passed the test. If he refuses to take the expurgatory oath, he is denied employment (or tax exemption). Having defined our terms, we must now ask, how effective have negative oaths, including expurgatory oaths, been?

¹⁹ *Black's Law Dictionary* (4th ed., 1959), p. 1643.

If negative oaths are no different from positive ones (or test oaths from oaths of allegiance), then they add nothing to the traditional oath and are merely redundant. If there is a difference then it must be definable. Definitions are necessarily arbitrary and a given definition is defensible if it is noncircular, consistent, and consonant with accepted usage. The definitions used here are operational—they attempt to distinguish different oaths according to the different results which they achieve. And it is, after all, the effectiveness of oaths which is here under consideration.

Once a definition has met the requirements of being customary and not self-contradictory, it is pointless to quibble over fine distinctions. Human experience does not fit well in air-tight categories. If the different kinds of oaths have had different effects, then it is to these effects that we should direct ourselves.

²⁰ It might be mentioned that the democratic process is weakened to the extent that selection for elective office is made conditional on an oath. The function of the voting public is to choose officials on the basis of record and platform. Impeachment, prosecution, or defeat at the next election are safeguards far superior to a merely self-serving oath.

First of all, such oaths have not been edifying. They are too lengthy and widespread in application to foster loyalty. But, equally important, their very negativeness is deadening. The distinction between promising to be good and promising not to be bad has an important effect. The latter type promise is seldom inspiring. A similar difference exists between forward-looking and backward-looking oaths. The hopeful future may exalt the spirit; the dead past is not so calculated. And this is particularly so when the reference to the past is negative. We have already argued that, if oaths are going to augment loyalty, they should be personal, short, and limited to higher offices. To these requirements we should now add that the oaths ought to be positive and forward-looking.

If negative oaths have not added to our legacy of loyalty, we must ask if they have been effective in keeping the disloyal out of government. This is indeed a crucial question. Even if loyalty oaths have not fostered loyalty, their price can perhaps be justified if they have contributed to national safety by preventing subversion.

Unfortunately, they have not served this purpose. None of the millions of California oath-takers has ever been prosecuted for perjury, as far as is known. Furthermore, no one dedicated to the violent overthrow of the government would have qualms about signing an oath. Still, some people have refused to sign oaths, and have lost jobs or job opportunities. Who have these people been? Anarchists? Communists? Fascists? No, they have been the deeply religious and ruggedly individualistic persons earlier discussed.²¹

This does not mean to imply that the original purpose of the loyalty oaths was to harry these people. But such has been the effect—and the sole effect. We have lost their contribution to the public service; they have lost the chance to work for the government. But we have not lessened danger; we have rather increased it by inculcating a false sense of security.²² As political litmus paper the loyalty oath has failed: it has turned red, not on contact with Communists, but on contact with nonconformists.

Even if loyalty oaths were effective in detecting subversives there would be questions left to be answered. Would national security be increased to any significant degree if revolutionaries were kept from menial or ministerial tasks? Would the safety of the Nation be enhanced if dangerous groups were denied tax exemptions or the use of public facilities? Not significantly. Any danger they present would not be appreciably decreased by these gestures.

²¹ As pointed out by Father Charles S. Casassa, President of Loyola University of Los Angeles: "[No one] committed to the overthrow of this government is hindered from seeking employment by the taking of a loyalty oath." See the transcript of the public hearing held in Los Angeles on December 13, 1957, *supra*. As far as public employment is concerned, the price paid for loyalty oaths and the effect achieved by them have been one and the same.

²² The loyalty oaths which are signed are so numerous that they have not been effectively screened. The oath is taken at face value and becomes the sole—and, as we have seen, futile—means of ensuring security. If we guard our safety pins and our sapphires each with equal vigor we will lose fewer safety pins but more sapphires.

Not only do excessive numbers of people take oaths, but single individuals or groups take an excessive number of oaths. As an illustration of this latter problem, see the excerpt of testimony, *supra*, given by Dr. Joseph Kaplan, Professor of Physics at the University of California at Los Angeles, and Chairman of the United States National Committee for the International Geophysical Year.

If the relation between oaths and security is remote the conclusion emerges that the sole effect of the loyalty oath program, whether or not inadvertent, has been to punish rather than to purify. The laws are not couched in language of punishment, but this has been their result. Moreover, the primary punishment is not to be refused a job or a tax exemption, but is the stigma which such refusal brings with it. And because the suffering is not technically punishment there are no legal protections against it, such as the presumption of innocence, the right to be informed of the crime of which one is accused, the rules of evidence, and the proscriptions against bills of attainder and ex post facto laws.

“ ‘Go to’, said the Quaker to poor old Trey, ‘I will not kill thee, but I will give thee a bad name.’ So he turned him out into the streets with a cry of ‘mad dog’ and somebody else did kill Trey.”²³

²³ This illustration was provided by Reverend Hangen at the public hearing held in Los Angeles on December 13, 1957, *op cit* (p. 42)

V. CONCLUSIONS AND RECOMMENDATIONS

We have paid a heavy price for loyalty oaths. Among the costs have been the following:

- (1) Administrative expense;
- (2) Lessening of separation of church and state;
- (3) Forcing the pious and the principled to choose between conscience and civil disability;
- (4) Erosion of freedom of speech and assembly and of free exchange of ideas; and,
- (5) Debasing man's rational faculty through confusing the word "loyalty" with the thing itself and through embracing the illogic of the group oath.

The return on this precious investment has unfortunately been negative. Some of the effects of the loyalty oath program have been as follows:

- (1) Inculcation of a false sense of security;
- (2) Failure to inspire greater loyalty;
- (3) Dilution of the impressiveness of the traditional oath of allegiance; and,
- (4) Punishment of nonconformists.

And all of this has occurred without increasing national security, the primary purpose for which the legislation was enacted. We have bought a white elephant and placed it in a china closet; the loyalty oath program has been both useless and destructive. We cannot afford to keep it.

It is our recommendation that loyalty oaths not be required of groups or individuals claiming tax exemptions, nor of groups using public facilities for civic or recreational purposes, nor of members of county central committees.

We further recommend that the loyalty oath for public employees be repealed and the traditional oath to uphold the Constitution of the United States and the Constitution of the State of California be restored.

Respectfully submitted,

JOHN A. O'CONNELL, Chairman
PHILLIP BURTON
S. C. MASTERSON

PART TWO

I. INTRODUCTION

The views expressed in Part One of this report are based on one-sided evidence. Notice of hearing to groups favoring the loyalty oath was scanty, and only one member of any such group appeared; that member, Mr. B. E. Gwartney, American Legion Chairman on Americanism for the County of Los Angeles, had little time for preparation, as he did not know of the hearing until the morning it was to take place. Mr. Gwartney agreed that the existence of the loyalty oath had a sobering effect on persons who might be considering joining questionable organizations.¹

Moreover, one of the most impressive witnesses who attended the hearing, Dr. Joseph Kaplan, Professor of Physics at the University of California at Los Angeles and Chairman of the United States Committee for the International Geophysical Year, did not find the loyalty oath to be a serious problem. Dr. Kaplan noted that he was not aware of any scientists who had refused, because of opposition to the loyalty oath, to take positions "at either of the two universities with which I am best acquainted * * *, the University of California at Los Angeles and the University of California at Berkeley."² Dr. Kaplan went on to state:

"The history of the last few years at Berkeley * * * and at La Jolla * * * has indicated that if the loyalty oath situation has had any adverse effect, the adverse effect has been measured only by an increased number of Nobel Prizes and memberships in the National Academy."

It would seem that the specter of loyalty oath-imposed stultification, as raised in Part One, is, at best, exaggerated.

Similarly, while Part One of this report argues that there have been no perjury convictions based on the Levering Oath, it should be noted that Mr. Hugh Bryson, President of the National Union of Marine Cooks and Stewards, was recently convicted of perjury in the United States District Court for falsely swearing to the non-Communist oath of the Taft-Hartley Act.³

Perhaps even more important, many of the groups and individuals which the authors of Part One claim to be protecting do not wish to be so protected. The vast majority of veterans⁴ and church members do not oppose the loyalty oath. To the contrary, they believe it serves a useful purpose.

¹ See the transcript of the public hearing held in Los Angeles on December 13, 1957.

² *Loc. cit.*

³ Appeal denied (November, 1956) and petition for rehearing denied (April, 1957) by the Court of Appeals (Ninth Circuit) (238 F. 2nd 657, 243 F. 2nd 837) Petition for writ of certiorari denied (October, 1957) by the United States Supreme Court (2 L. Ed. 2nd 34).

⁴ Part One of this report maintains that the loyalty of veterans should not be questioned under any circumstances, whether they were volunteers or draftees, and no matter what their actions may have been, now and then. While we are confident of the loyalty of the overwhelming majority of ex-servicemen, this does not preclude the possible presence of some disloyal elements among them.

II. THE AGE OF THE NATION-STATE

But aside from these specific objections to Part One of this report, we take issue with the basic philosophy which underlies it. There is no inherent conflict between loyalty to one's Country and loyalty to one's family, friends or church. In truth, it is loyalty to the Nation which cements all the other loyalties—and protects them. Without this higher loyalty, the others would all be lost in internecine strife.

If we were not brought together in love of country, we would find church struggling against church, family against family, and region against region. If there is any lesson to be learned from the historical incidents cited in Part One, it is that a government which could not command the respect of its citizens could not prevent them from warring one against the other. Had the Englishmen of the seventeenth century been primarily loyal to England, had the American Revolutionaries found in England of the eighteenth century a worthy object of loyalty, had the South of the nineteenth century placed its first loyalty in the *United States*, there would have been no civil wars, no Revolutionary War. The object of the loyalty oath is to help insure a degree of fealty to Country which will prevent such tragedies from re-occurring. The loyalty oath is not only a shield against a foreign enemy, it is the preventive cure of internal chaos.

Man's basic political loyalties change very slowly. Past eras have seen identification with the Greek city-state, with the Roman Empire, and with the feudal lord. Today we find that the viable unit of political life is the nation-state. Each of these units in its time has been the matrix of human intercourse, social, economic and political. As such, each has had a duty to preserve its own existence; the death of the Nation is the death of *all* its valued institutions—family, church and business. The loyalty oath deserves credit for its role in preserving the state and in preserving these institutions. Let us not, confusing liberty with unbridled license, permit it to be hastily undone.

III. CONCLUSION AND RECOMMENDATIONS

The recommendations of Part One of this report are based on a faulty understanding of the import of the *Unitarian* and *Speiser* cases.⁵ These cases did not hold any part of the California Constitution to be unconstitutional. Nor did they find the imposition of a loyalty oath requirement to be unconstitutional as such. Rather, they declared that the oath, *as applied in these cases*, was invalid because it had the effect of placing the burden of proof as to loyalty on the taxpayer.

Section 19 of Article XX of the California Constitution still requires implementation by the California Legislature, as follows:

“ * * No person or organization which advocates the overthrow of the Government of the United States by force or violence or other unlawful means shall: * * (b) receive any exemption from any tax imposed by the State or any political subdivision of this State.

“The Legislature shall enact such laws as may be necessary to enforce the provisions of this section.”

On the basis of this constitutional directive, it is our recommendation that Sections 32 and 23705 of the Revenue and Taxation Code not be repealed, but instead be amended to conform to the requirements laid down by the United States Supreme Court in the *Unitarian* and *Speiser* cases. This could be done in one of the following two ways:

(1) By substituting a positive oath for the present negative language, and then by making the violation of the sections a crime; or,

(2) By retaining the present oath, but with the additional provision that the burden of proof of disloyalty be clearly placed on the State or its subdivisions.

It is our further recommendation that the loyalty oath for public employees be retained.

Respectfully submitted,

GEORGE G. CRAWFORD
HOWARD J. THELIN

I concur in Sections I and III of Part Two of this report, but not in Section II of Part Two.

Respectfully submitted,

JOHN A. BUSTERUD

⁵ *First Unitarian Church of Los Angeles v. County of Los Angeles*, 2 L Ed 2nd 1484 (1958); *Speiser v. Randall*, 2 L Ed 2nd 1469 (1958).

APPENDICES

OFFICE OF LEGISLATIVE COUNSEL
SACRAMENTO, CALIFORNIA
October 20, 1958

HONORABLE JOHN A. O'CONNELL
1095 Market Street
San Francisco 3, California

PROPERTY TAXATION—LOYALTY OATHS—#3979

Dear Mr. O'Connell:

You have directed our attention to Section 19 of Article XX of the California Constitution, and with respect to that section have asked the three questions considered and answered below.

QUESTION NO. 1

Is Section 19 of Article XX of the State Constitution self-executing?

OPINION NO. 1

The section is self-executing.

ANALYSIS NO. 1

Section 19 of Article XX provides in part:

“Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

(b) “Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State.

“The Legislature shall enact such laws as may be necessary to enforce the provisions of this section.”

This provision has been viewed by the California Supreme Court as in effect self-executing. In *First Unitarian Church of Los Angeles v. County of Los Angeles* (1957), 48 Cal. 2d 419 (reversed by the United States Supreme Court on ground that implementing legislation in R. & T. C., Sec. 32, violated due process [2 L. Ed. 2d 1484, rehearing denied 10-13-58]), the court pointed out that Section 19's provisions “are plain and unambiguous and require no interpretation in the matter of their prohibitions. * * * Its prohibitions are declared by its own terms and are mandatory and prohibitory” (page 428). The court also pointed out that it was the duty of the assessor to see that exemptions are not allowed in violation of the constitutional provision irrespective of implementing legislation (page 430 et seq.).

In *Speiser v. Randall* (1958), 2 L. Ed. 2d 1460, 1470, rehearing denied 10-13-58, the United States Supreme Court appears also to have taken the view that Section 19 is self-executing.

QUESTION NO. 2

If Section 19 of Article XX is self-executing, may constitutional procedures be adopted to implement it by (a) the Legislature only or (b) the taxing authorities through administrative regulations?

OPINION NO. 2

In our opinion either the Legislature or the taxing authorities may enact constitutional procedures to implement the provisions of Section 19 of Article XX.

ANALYSIS NO. 2

That the Legislature has authority to implement the provisions of Section 19 of Article XX is apparent from the last paragraph of that section, which provides:

“The Legislature shall enact such laws as may be necessary to enforce the provisions of this section.”

The Legislature would probably be considered to have such authority even in the absence of such a provision (see *Chesney v. Byram* (1940), 15 Cal. 2d 460, 463).

In the event of failure on the part of the Legislature to enact legislation on the subject, any concerned taxing agency would probably be considered as having authority to enact reasonable rules and regulations to enable it to perform its duty in regard to Section 19 of Article XX (see *California Drive-In Restaurant Association v. Clark* (1943), 22 Cal. 2d 287, 302-303). As previously noted, that duty is to see that exemptions are not allowed in violation of the section.

QUESTION NO. 3

Would the requirement of due process be met by a loyalty oath which, once signed, would establish a conclusive presumption of compliance with Section 19 of Article XX?

OPINION NO. 3

In view of the holding in *Speiser v. Randall*, above, it is our opinion that such an oath would not be held to satisfy the requirements of due process under the Federal Constitution.

ANALYSIS NO. 3

Section 19 of Article XX of the California Constitution prohibits any “person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities” from receiving any tax exemption imposed by the State of California or any of its political subdivisions or public agencies.

Section 32 of the Revenue and Taxation Code, enacted by the Legislature in implementation of Section 19 of Article XX, requires a

claimant, as a prerequisite to qualification for any property tax exemption, other than the householder's exemption, to declare that he does not engage in the activities described in the constitutional provision.

Section 32 was recently held unconstitutional by the United States Supreme Court in its application to the veterans' and church exemptions from property taxation (*Speiser v. Randall* and *First Unitarian Church of Los Angeles v. County of Los Angeles*, above).

In the *Speiser* case the taxpayer, Speiser, refused to subscribe a loyalty oath, which had been prescribed pursuant to Section 32, in support of his claim for the veterans' exemption, and struck it from the form which he executed and filed with the assessor. The assessor denied the exemption solely for the refusal to execute the oath. The Supreme Court of California sustained the assessor's action against the taxpayer's claim that requiring the oath as a condition of obtaining the tax exemption was in violation of the Federal Constitution, and reversed the judgment of the trial court which had ruled in favor of Speiser (48 Cal. 2d 903). Speiser appealed to the United States Supreme Court upon the ground that the statutory and constitutional provisions mentioned denied him freedom of speech without the procedural safeguards required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. With this the United States Supreme Court (hereinafter referred to as "court") agreed insofar as the argument applied to Section 32 and, accordingly, reversed the decision of the California Supreme Court.

The court pointed out that under the California procedure the appellant had the affirmative burden of proof, in court as well as before the assessor, to show that he was qualified for the tax exemption in question; that is, that he was not a person who advocated the overthrow of the government of the United States, or of the State, by force or violence or other unlawful means, or who advocated the support of a foreign government against the United States in the event of hostilities.

The court further pointed out that when the State undertakes to restrain unlawful advocacy, it must provide precedures which are adequate to safeguard against infringement of constitutionally protected rights, and that only considerations of the greatest urgency can justify restrictions on speech. It stated that the separation of legitimate from illegitimate speech calls for more sensitive tools than California had supplied, and that it is plain that where the burden of proof lies may be decisive of the outcome.

The court held that when the constitutional right to speech is sought to be deterred by a state's general taxing program, due process demands that the speech be unencumbered until the state comes forward with sufficient proof justifying its inhibition, and that the state bear the burden of proof in that regard.

In addition, the court stated that, though the validity of Section 19 of Article XX of the California Constitution be conceded for the purposes of argument, "its enforcement through procedures which place the burdens of proof and persuasion on the taxpayer is a violation of due process" (2 L. Ed. 2d, at p. 1474).

In rendering its decision, the court distinguished cases previously decided relating to loyalty oaths required for public employees. It

pointed out that each of those cases concerned a limited class of persons in, or aspiring to, public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political speeches but to deny positions to persons supposed to be dangerous whose positions might be misused to the detriment of the public. The court stated that the tax exemption loyalty declaration legislation could have no such justification, in that it purported to deal directly with speech and the expression of political ideas.

Moreover, the court pointed out that the oaths required in the public employee cases performed a different function from the declaration in issue in the *Speiser* case. In the earlier cases it appeared that the loyalty oath, once signed, became conclusive of the facts attested so far as the right to office was concerned. If the person took the oath he retained his position. The court pointed out that the oath was not part of a device to shift to the office holder the burden of proving his right to retain his position. The signer could be prosecuted for perjury, but only in accordance with the strict procedural safeguards surrounding such criminal prosecutions, whereas in the *Speiser* case, the declaration might be accepted or rejected on the basis of incompetent information or no information at all.

Based on these distinctions, the court held that the principles of the employee loyalty oath cases had no application to the matter under consideration.

In view of the general reasoning employed by the court in the *Speiser* case in reaching its conclusion, we do not think that the court would hold otherwise as to a loyalty oath which, once signed, establishes a conclusive presumption of compliance with Section 19 of Article XX. Although the court held that the present California law does not involve a declaration which is conclusive, the court's reasoning would appear to cover such a situation, for such an oath would also impose an affirmative burden on the taxpayer in the matter of establishing his loyalty. While it might, in a sense, be easier to bear than that provided by Section 32, nevertheless, as in the case of the latter, it would still be a burden and, as such, consistently with the general reasoning in the *Speiser* case, constitute a penalty on, or infringement of, an exemption claimant's exercise of the right of free speech.

For example, the court said "appellants could not be required to execute the declaration as a condition for obtaining a tax exemption or as a condition for the assessor proceeding further in determining whether they were entitled to such an exemption" (emphasis added). (2 L.Ed. 2d, at p. 1474) Furthermore, as pointed out in the dissent (at p. 1481), if the statute could have been sustained by construing the declaration to be conclusive, it was the court's duty to so construe it, yet it did not do so. Considering the entire situation, therefore, we conclude that the Supreme Court of the United States would not sustain a procedure which requires the claimant for tax exemption to establish his nonadvocacy of subversive doctrines by filing a loyalty oath, even if the oath is given conclusive effect. We recognize that this is a point

not passed upon in the *Speiser* case, but we think the reasoning in that case clearly foreshadows such a result.

Very truly yours,

RALPH N. KLEPS
Legislative Counsel

By RYAN M. POLSTRA
Deputy Legislative Counsel

PROPOSED LEGISLATION

CALIFORNIA LEGISLATURE, 1959 REGULAR (GENERAL) SESSION

Assembly Constitutional Amendment No. 8

Introduced by Messrs. O'Connell, Burton, Elliott, George E. Brown,
Crown, Hawkins, McMillan, Petris, Rees, and Waldie

January 13, 1959

REFERRED TO COMMITTEE ON CONSTITUTIONAL AMENDMENTS

Assembly Constitutional Amendment No. 8—A resolution to propose to the people of the State of California an amendment to the Constitution of the State by amending Section 3 of Article XX, relating to oaths of office.

1 *Resolved by the Assembly, the Senate concurring,* That the
2 Legislature of the State of California at its 1959 Regular
3 Session commencing on the fifth day of January, 1959, two-
4 thirds of all the members elected to each of the two houses of
5 the Legislature voting therefor, hereby proposes to the people
6 of the State of California that the Constitution of the State
7 be amended by amending Section 3 of Article XX, to read
8 as follows:

9 SEC. 3. Members of the Legislature, and all public officers
10 ~~and employees~~, executive, legislative, and judicial, except
11 such inferior officers ~~and employees~~ as may be by law ex-
12 empted, shall, before they enter upon the duties of their
13 respective offices, take and subscribe the following oath or
14 affirmation:

15 "I, -----, do solemnly swear (or affirm, *as the case may*
16 *be.*) that I will support ~~and defend~~ the Constitution of the
17 United States and the Constitution of the State of California
18 ~~against all enemies, foreign and domestic~~; and that I will
19 ~~bear true faith and allegiance to the Constitution of the~~
20 ~~United States and the Constitution of the State of California;~~

LEGISLATIVE COUNSEL'S DIGEST

A. C. A. 8 as introduced, O'Connell (C. A.). Oaths of office.

Amends Sec. 3, Art. XX, Cal. Const.

Revises oath of office required of Members of the Legislature, executive, and judicial officers before entering upon the duties of their respective offices.

Requires all executive and judicial officers except inferior officers exempted by law, rather than all public officers and employees, including those employed by the State, the University of California, every county, city, city and county, district, and authority, except inferior officers and employees exempted by law, to subscribe to the prescribed oath.

1 that I take this obligation freely, without any mental reserva-
 2 tion or purpose of evasion; and that I will well and faithfully
 3 discharge the duties of the office of -----, according to the
 4 best of my ability, upon which I am about to enter.

5 And I do further swear (or affirm) that I do not advocate,
 6 nor am I a member of any party or organization, political or
 7 otherwise, that now advocates the overthrow of the Govern-
 8 ment of the United States or of the State of California by
 9 force or violence or other unlawful means; that within the
 10 five years immediately preceding the taking of this oath (or
 11 affirmation) I have not been a member of any party or organ-
 12 ization, political or otherwise, that advocated the overthrow
 13 of the Government of the United States or of the State of
 14 California by force or violence or other unlawful means
 15 except as follows:

16 -----
 17 (If no affiliations, write in the words "No Exceptions")
 18 and that during such time as I hold the office of -----
 19 (name of office)

20 I will not advocate nor become a member of any party or
 21 organization, political or otherwise, that advocates the over-
 22 throw of the Government of the United States or of the State
 23 of California by force or violence or other unlawful means."

24 And no other oath, declaration, or test, shall be required as
 25 a qualification for any public office or employment public
 26 trust.

27 "Public officer and employee" includes every officer and
 28 employee of the State, including the University of California;
 29 every county, city, city and county, district, and authority,
 30 including any department, division, bureau, board, commis-
 31 sion, agency, or instrumentality of any of the foregoing.

CALIFORNIA LEGISLATURE, 1959 REGULAR (GENERAL) SESSION

ASSEMBLY BILL**No. 214**

Introduced by Messrs. O'Connell, Burton, George E. Brown, Elliott,
Hawkins, Masterson, McMillan, Petris, and Rees

January 13, 1959

REFERRED TO COMMITTEE ON EDUCATION

An act to repeal Sections 19441 and 19442 of the Education Code, and to repeal Sections 16565 and 16566 of the Education Code as proposed by Senate Bill No. 2, relating to applications for the use of school property.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 19441 and 19442 of the Education Code
- 2 are repealed.
- 3 SEC. 2. Sections 16565 and 16566 of the Education Code
- 4 as proposed by Senate Bill No. 2 are repealed.
- 5 SEC. 3. Section 2 of this act shall become operative only
- 6 if the Education Code as proposed by Senate Bill No. 2 is
- 7 enacted by the Legislature and in such case at the same time
- 8 as Senate Bill No. 2 takes effect.

LEGISLATIVE COUNSEL'S DIGEST

A. B. 214 as introduced, O'Connell (Ed). Use of school property.

Repeals Secs. 19441 and 19442, Ed. C.

Deletes provision requiring applicant for use of school property to state under oath that organization in whose behalf he is making application for such use does not advocate overthrow of Government of United States or of State by force, violence or other unlawful means, and that such organization is not communist-action or communist-front organization required to register with Attorney General of the United States.

CALIFORNIA LEGISLATURE, 1959 REGULAR (GENERAL) SESSION

ASSEMBLY BILL**No. 215**

Introduced by Messrs. O'Connell, Burton, Elliott, Meyers, George E. Brown, Busterud, Crown, Hawkins, Masterson, McMillan, Petris, Rees, and Waldie

January 13, 1959

REFERRED TO COMMITTEE ON REVENUE AND TAXATION

An act to repeal Sections 32 and 23705 of the Revenue and Taxation Code, relating to claims for tax exemption.

The people of the State of California do enact as follows:

- 1 SECTION 1. Sections 32 and 23705 of the Revenue and Tax-
2 ation Code are repealed.

LEGISLATIVE COUNSEL'S DIGEST

A. B. 215 as introduced, O'Connell (Rev. & Tax.). Tax exemptions.

Repeals Secs. 32 and 23705, R. & T. C

Deletes provisions requiring claimants to tax exemption to declare that person or organization making such claim does not advocate overthrow of Government of United States or State by force or violence or other unlawful means or support of foreign government against United States in the event of hostilities

CALIFORNIA LEGISLATURE, 1959 REGULAR (GENERAL) SESSION

ASSEMBLY BILL **No. 1766**

Introduced by Messrs. O'Connell, Burton, George E. Brown, Elliott,
Hawkins, McMillan, Petris, Rees, and Waldie

March 2, 1959

REFERRED TO COMMITTEE ON GOVERNMENTAL EFFICIENCY AND ECONOMY

*An act to amend Sections 1360, 1368, 1369, 3103, and 18150
and to repeal Sections 1192, 3108, and 3109 of the Govern-
ment Code, and to repeal Section 2842.5 of the Elections
Code, relating to oaths of office.*

The people of the State of California do enact as follows:

- 1 SECTION 1. Sections 1192, 3108, and 3109 of the Govern-
2 ment Code are repealed.
- 3 SEC. 2. Section 1360 of said code is amended to read:
- 4 1360. (a) Unless otherwise provided, before any *elective*
5 *officer, or any appointive officer whose term of service is fixed*
6 *by the Constitution*, enters on the duties of his office, he shall
7 take and subscribe the oath or affirmation set forth in Section
8 3 of Article XX of the Constitution of California. *No other*
9 *public officer or employee, as defined by this provision of the*
10 *Constitution, shall be required to take or subscribe the oath.*
11 (b) *Any public officer not within the scope of subdivision*
12 *(a) shall, before he enters on the duties of his office, take and*
13 *subscribe the following oath or affirmation:*
14 "I do solemnly swear (or affirm) that I will support the
15 Constitution of the United States and the Constitution of

LEGISLATIVE COUNSEL'S DIGEST

A B. 1766 as introduced, O'Connell (G. E. & E.). Oaths of office and employment.
Amends, repeals various sections, Gov. C., Elec. C.

Implements the constitutional provision that the Legislature may exempt "inferior officers and employees" from the oath requirement of Art. XX, Sec. 3, Const., by providing that, instead of said oath, public officers and employees other than elective officers and appointive officers whose term of service is fixed by the Constitution, shall instead take the oath required of public officers by Art. XX, Sec. 3, Const., prior to amendment in 1952. Makes inapplicable to officers and employees exempted from constitutional provision, certain penal provisions relating to violation of the terms of the constitutional oath.

Eliminates requirement that members of county central committees take the oath required of public officers by Article XX, Section 3, of the Constitution.

1 *the State of California, and that I will faithfully discharge the*
 2 *duties of -----, according to the best of my ability."*

3 *No other oath, declaration, or test shall be required as a*
 4 *qualification for such office.*

5 SEC. 3. Section 1368 of said code is amended to read:

6 1368. Every person who, while taking and subscribing to
 7 the oath or affirmation required by ~~this chapter~~ *subdivision*
 8 *(a) of Section 1360*, states as true any material matter which
 9 he knows to be false, is guilty of perjury, and is punishable
 10 by imprisonment in the state prison not less than one nor more
 11 than 14 years.

12 SEC. 4. Section 1369 of said code is amended to read:

13 1369. Every person having taken and subscribed to the
 14 oath or affirmation required by ~~this chapter~~ *subdivision (a) of*
 15 *Section 1360*, who while holding office, advocates or becomes
 16 a member of any party or organization, political or otherwise,
 17 that advocates the overthrow of the Government of the United
 18 States by force or violence or other unlawful means, is guilty
 19 of a felony, and is punishable by imprisonment in the state
 20 prison not less than one or more than 14 years.

21 SEC. 5. Section 3103 of the Government Code is amended
 22 to read:

23 3103. The oath or affirmation required by this chapter is
 24 the oath or affirmation set forth in ~~Section 3 of Article XX of~~
 25 ~~the Constitution of California~~ *Section 18150*.

26 SEC. 6. Section 18150 of the Government Code is amended
 27 to read:

28 18150. The oath *or affirmation* required by this chapter is
 29 ~~the oath set forth in Section 3 of Article XX of the Constitu-~~
 30 ~~tion of California.~~ *following:*

31 *"I do solemnly swear (or affirm) that I will support the*
 32 *Constitution of the United States and the Constitution of*
 33 *the State of California, and that I will faithfully discharge the*
 34 *duties of -----, according to the best of my ability."*

35 SEC. 7. Section 2842.5 of the Elections Code is repealed.

o