By Oath and Association: The California Folly

BY DAVID P. GARDNER

Thirty-six members of the University of California faculty were dismissed by the university's regents in August, 1950, for refusing to sign a loyalty oath. To an interested nearby observer, the dismissal of the thirty-six professors, none of whom stood accused of professional incompetence or disloyalty, was a "classic example of political stupidity," which he defined "as a talent for not doing what you set out to do, and for doing what you wanted to avoid doing." The oath, he said, "is supposed to keep Communists off the University Faculty. There is no clear evidence that it has done so. It is *not* supposed to expel loyal and patriotic Americans from the Faculty. There is evidence that it has done just that."[1]

The California oath was but one of a myriad of statutes and regulations contrived by governmental bodies and their agents in the late forties and early fifties to ensure the loyalty of public employees. Most of these measures were as futile as they were dangerously vague. Even in our time of suspicion and doubt

[1]R. E. Fitch, professor at the Pacific School of Religion in Berkeley, as quoted in the *Berkeley Daily Gazette*, September 15, 1950.

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these mostly negative and self-defeating devices are one after another being judged by the courts to be abridgments of constitutionally protected liberties.

In the recent Keyishian case, for example, the United States Supreme Court held that "even though the governmental purpose be legitimate and substantial [in this instance to bar subversives from teaching in New York State's public schools], that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[2] The court in this instance struck down portions of New York's Feinberg Law which in the Adler case in 1952 had been upheld by the same court. In so doing, it declared constitutionally defective those parts of the legislation which proscribed public employment for individuals who held merely a knowing membership in a group advocating the forceful overthrow of the government.

Mere knowing membership in an allegedly subversive organization, unaccompanied by a demonstrated specific intent to further the unlawful ends of the group, is no longer, according to the court, adequate basis for excluding such individuals from teaching posts. "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned," said Justice Brennan in the majority opinion in the Keyishian case. "That freedom," he continued, "is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." Constitutional doctrine no longer accepts the premise, Brennan continued, that public employment "may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."[3]

The Keyishian decision is only one of several recent Supreme Court judgments which bring into doubt the constitutionality of

[2] *Keyishian* v. *Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), p. 602. The quotation in the text is itself a quotation from *Shelton* v. *Tucker*, 364 U.S. 479 (1960), p. 488, which the court cited in its opinion.

[3] *Ibid.*, pp. 603, 605.

loyalty tests in the twenty-five states which employ them.[4] The court may be expected soon, as Jerold B. Israel of the University of Michigan Law School recently predicted in an article in the *Supreme Court Review*, to issue a ruling broad enough to invalidate all loyalty oaths on the reasoning that while oaths are useless for the purposes they seek, they abridge constitutionally secured rights of free speech and association.[5]

The loyalty oath controversy which raged in California during the years 1949–52, poignantly demonstrates the danger of yielding to the impact of momentary hysteria and of risking permanent values for the sake of expedience. To remember that enormously disruptive dispute, in our day of new fears and growing anxieties, may help us to weigh the consequences of that form of coercion known as an oath and of policies making "guilt by association" an irrefutable test. And in remembering we may, by avoiding past error, put to some intelligent use the protracted, hostile, and bitter controversy which for three years convulsed what was then the nation's largest university.

On March 25, 1949, the board of regents of the University of California amended an oath of allegiance already required of the faculty and staff by adding a disclaimer affidavit. This disclaimer asserted non-membership and non-belief in any organization that advocated the overthrow of the national government, the complete oath reading as follows:

> I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of my office according to the best of my ability [amendment follows]; that I am not a member of, nor do I support any party or organization that believes in, advocates, or teaches the overthrow of the United States Government, by force or by any illegal or unconstitutional methods. [The disclaimer portion

[4]In addition to the Keyishian case, see *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); and *Whitehill* v. *Elkins*, 386 U.S. 906 (1967).

[5]Jerold B. Israel, "*Elfbrandt* v. *Russell:* The Demise of the Oath?," in *Supreme Court Review, 1966*, edited by Philip B. Kurland (Chicago: University of Chicago Press, 1966), pp. 193–94.

was amended on June 24, 1949 to read: "that I am not a member of the Communist Party or under any oath, or a party to any agreement, or under any commitment that is in conflict with my obligation under this oath."]

The new oath, demanded of all university personnel as a condition of initial employment or of continued service, precipitated the controversy which resulted in the dismissal of the thirty-six members of the university's faculty. The dispute focused on nearly all the great issues that arose to afflict America's universities and colleges during those particular times—oaths of loyalty required of teachers on pain of dismissal, penalties levied upon teachers for refusing to cooperate with legislative committees investigating subversion, implications for academic freedom and constitutional liberties assumed by rules disqualifying Communists and other alleged subversives from university employment, and so forth. The University of California's troubled concern with loyalty and security reflected that of the nation as a whole.

A "curtain" had fallen across the face of Eastern Europe and from behind it the Communist strategy for world dominion was allegedly being planned. Communist takeovers in Hungary, Romania, and Czechoslovakia, civil war in Greece, radical unrest in Western Europe, civil war in China, and the gradual dissolution of the British Empire were regarded as threats to the defense and security of the United States. The Communist party, U.S.A., was adjudged by many to be a fifth column within the body politic; and as a people overcome by fear is no more discerning than a people in anger, the nation sought on the domestic front what seemingly eluded it internationally.

Legislation to strengthen and supplement state laws dealing with subversion was introduced in California in early 1949 by Senator Jack B. Tenney, a Republican of Los Angeles and the long-time chairman of the California Un-American Activities Committee. Known popularly as the Tenney Bills, the legislative program of thirteen bills articulated the political temper of the times by proposing to remove from positions of power

and influence persons who were considered to be "a dangerous menace to our freedom and security."[6]

Writers on the oath controversy have reported that threats of budgetary penalties and the Tenney Bills, particularly Senate Constitutional Amendment 13, prompted the regents to adopt the new oath.[7] (S.C.A. 13 proposed to take from the regents and give to the legislature the power to ensure the loyalty of university employees.) The evidence suggests, however, that the "threat" posed to the university by the bills, and by S.C.A. 13 in particular, was remembered only when the administration late in the controversy was hard pressed to answer why the new oath had been needed.

What precipitated the decision of President Robert Gordon Sproul and the board of regents to adopt the new oath the afternoon of March 25, 1949, was a disagreement between Provost Clarence Dykstra of the university's Los Angeles campus (UCLA) and the president and regents. The dispute arose over the appearance at UCLA of a known Communist (Herbert Phillips, who had just been dismissed from the University of Washington faculty for membership in the Communist party), and over an invitation to appear to lecture at UCLA extended to Harold J. Laski, controversial member of the British Labour party, a member of its executive committee, and a professor at the University of London. Both the appearance of Phillips and the invitation to Laski were widely reported in the press, especially in southern California.

The regents, who were well aware of these reports and of their political implications, uniformly criticized Dykstra for permitting Phillips and Laski use of university facilities in contravention, they believed, of university regulations. (University pol-

[6]Edward L. Barrett, Jr., *The Tenney Committee: Legislative Investigation of Subversive Activities in California* (Cornell Studies in Civil Liberty [Ithaca, New York: Cornell University Press, 1951]), p. 303.

[7]See, for example, Alan Barth, *The Loyalty of Free Men* (New York: Viking Press, 1951), pp. 213–14; John Caughey, "A University in Jeopardy," *Harper's Magazine*, CCI (November, 1950), p. 70; Carey McWilliams, *Witch Hunt: The Revival of Heresy* (Boston: Little, Brown and Company, 1950), p. 102; and George R. Stewart, *The Year of the Oath: The Fight for Academic Freedom at the University of California* (Garden City, New York: Doubleday and Company, Inc., 1950), p. 28.

icy not only barred Communists, *ipso facto*, from employment in the university but denied the use of university facilities to those who would use them for political or sectarian advocacy.) For the regents, the use of university facilities by Communists or other alleged subversives was related to the question of the employment of Communists on the faculty. As a consequence of the Phillips and Laski invitations, the board appointed a special regents' committee to review and clarify university rules concerning these two issues.

As the chief executive officer of the university, the president thought that it was his responsibility, not the regents', to deal with Dykstra and the UCLA invitations. Hence, at the regents' meeting of March 25, 1949, he supported an "innocuous" amendment (the disclaimer) to the oath of allegiance to strengthen his hand in dealing with the UCLA incidents. For Sproul, the oath would accomplish several ends. It would implement explicitly the regents' policy on the non-employment of Communists, it would narrow the problems then under study by the special regents' committee to the single question of the use of facilities, thus returning administrative initiative to the president, it would respond to those on the faculty who supported the position of the American Association of University Professors, which asserted that mere membership in the Communist party was not in itself sufficient reason to bar a man from faculty appointment, and finally, it would answer those in the university who were uncertain of the university's policy toward the employment of Communists.

Because university regulations on the use of facilities were not definitive in proscribing Communists and other alleged subversives, the administration had found itself in trouble at UCLA over the Phillips and Laski matters. The oath of allegiance was not definitive either, as it no more specifically proscribed subversives than did the regulations on the use of facilities. Accordingly, Sproul wished to "strengthen" the oath of allegiance in order publicly to clarify university employment policies toward subversives. In like manner, the special regents'

committee wished to "strengthen" regulations governing the use of facilities so as to deny them to anyone who would use them as a "platform" for propaganda. The Tenney Bills, therefore, were a catalyst precipitating an expeditious solution to the unrest and uncertainty generated within the university over the Phillips and Laski invitations. Further, they suggested the means for solving administratively university problems which by then had gained widespread public notice.

The purging of Communists from the university's faculty or preventing their appointment was never seriously considered by the regents as an objective of the new oath. Rather, the oath was a tactical measure designed to confirm public confidence in the university and to relieve internal tensions brought on by the UCLA difficulties.

Owing to almost incredible and inexcusable administrative ineptness, the new oath requirement was not fully disclosed publicly until early June, some ten weeks following its adoption by the regents, and only a few days before the final scheduled meeting of the academic senate for the year 1948–49. The delay caused some of the faculty to suspect administrative intent to minimize faculty opposition, when in fact the crucial lapse of time was due to a startling breakdown in communications within the university's administrative hierarchy.[8]

"We don't like the idea of oaths—nobody does," George Pettitt, assistant to the president for public information, was reported as saying when announcing the new oath, "but in the face of the cold-war hysteria we are now experiencing, something had to be done."[9] For Pettitt, Sproul, and the regents, the oath was not a genuine attempt to preserve a faculty free from Communists. Rather, it was a gesture designed to allay public fears, real or imagined, that the university was especially vulnerable to infiltration by subversives. The new oath merely made "more explicit the oath of allegiance to the state and nation," Pettitt went on to say, the implication being that it

[8]For a full account, see David P. Gardner, *The California Oath Controversy* (Berkeley, California: University of California Press, 1967), pp. 29–30.

[9]*New York Times*, June 13, 1949, p. 1.

changed in no substantive way the loyalty oath already required of and willingly subscribed to by the faculty. If the difference between an oath of allegiance and a disclaimer was recognized by the board of regents and administration, it was not, apparently, regarded as critical.

The apparent harmlessness of the new oath, however, was no less fatal to principle than a more severe oath would have been. Two days following Pettitt's remarks, Ernst H. Kantorowicz, one of the university's foremost scholars and one of the world's renowned medievalists, observed: "A harmless oath formula which conceals the true issue, is always the most dangerous one because it baits even the old and experienced fish. It is the harmless oath that hooks; it hooks *before* it has undergone those changes that will render it, bit by bit, less harmless." For Kantorowicz, the new oath tyrannized as it brought the "scholar sworn to truth into a conflict of conscience. To create alternatives—'black or white'—is a common privilege of modern and bygone dictatorships," Kantorowicz went on. "It is a typical expedient of demagogues to bring the most loyal citizens, and only the loyal ones, into a conflict of conscience by branding non-conformists as un-Athenian, un-English, un-German, and what is worse—by placing them before an alternative of two evils, different in kind but equal in danger," that is, either sign the oath or lose your job. "Those who belong, *de facto* or at heart, to the ostracized parties," Kantorowicz concluded, "will find it easy to sign the oath and make their mental reservation. Those who do *not* sign will be, now as ever, also those that suffer—suffer, not for their creed or affiliations, but because they defend a superior constitutional principle far beyond and above trivial party lines."[10] Fourteen months later, Kantorowicz was among those thirty-six members of the university's faculty who in defense of a principle they regarded more highly than personal fortune chose not to sign the oath, and were relieved of their professorships.

[10]Excerpts from the text of remarks made by Kantorowicz on June 14, 1949, to the northern section of the university's academic senate. Text on file in the office of the Academic Senate, University of California, Berkeley.

The manner in which the regents of the University of California dismissed from university service men and women against whom no charge of professional unfitness or personal disloyalty had been made confirms this study in futility.

California's oath controversy consisted of three dominant issues: the disclaimer affidavit of the regents' oath adopted on March 25, 1949, and later amended on June 24, 1949; the regents' policy which prohibited the appointment of members of the Communist party; and the question of where authority in the university lay in the selection and retention of faculty members.

Throughout the summer and autumn of 1949, many on both sides hoped for a reconciliation between the regents and the faculty over the new oath requirement. During the long months of those two seasons, however, the principal point of dispute slowly shifted from the oath to the regents' policy of denying faculty appointment to Communists merely because of their party membership. The regents held that membership in the Communist party constituted presumptive evidence of unfitness. The faculty representatives, on the other hand, believed that professional unfitness could not be inferred from mere association or determined by imparting to an individual the characteristics known generally to identify any category or organization—including Communists. Only if a Communist were found to be bound to the party discipline, these representatives argued, could his membership in the organization be made relevant to the question of fitness. Then he could be judged to be neither free as a scholar nor objective as a teacher. Thus, the faculty representatives reasoned, a Communist encumbered by a primary allegiance to the party should be refused appointment on the ground that he was not free as a scholar to seek or to impart the truth, but not barred on the ground that he was a Communist. To argue for the latter course, they contended, would be to hold for political tests to positions of academic responsibility—tests unqualifiedly rejected by those faculty members negotiating with the regents.

By late fall the oath had become a secondary consideration employed by the contending parties to gain concessions. By winter the stability of common resolve, the harmony of purpose, and the respectful goodwill which had characterized relations within the university had withered.

On February 24, 1950, the controversy entered a new and potentially disastrous phase. That day by a 12 to 6 majority (Governor Earl Warren and President Sproul among the minority) the board of regents voted to dismiss non-signers of the oath by April 30, 1950, and to do so without reference to intramural procedures governing faculty privileges and tenure. Known in faculty circles as the "sign-or-get-out" ultimatum, the resolution for the first time in the controversy committed the regents to dismiss non-signers of the new oath irrespective of tenure rights and in the absence of charges against them of either professional incompetency or personal disloyalty. The action was designed by the regents to engender a more active participation in the controversy by a larger segment of the faculty. (A majority of the regents believed the opinions expressed by the faculty committees which had been privately negotiating with the special regents' committee over the oath and the non-Communist policy it implemented were unrepresentative of the university's faculty.)

To propose to violate tenure rights in the university, these regents believed, would arouse the quiescent moderates among the faculty who had been involved in the controversy only peripherally. Once aroused, however, the moderates could be expected to wrest control of the academic senate from the "more extreme dissidents" who had represented that body in discussions with the regents. Once that purpose was realized, the next step would be to seek the senate's unequivocal approval of the university's policy on communism. Then the regents could negotiate with a more "moderate and representative" faculty committee to find a mutually acceptable alternative to the oath, thereby concluding the controversy. The tactics almost worked.

In the expectation that the oath requirement would be eliminated once the faculty had unqualifiedly endorsed the univer-

sity's policy on communism, the "moderate" leadership in the academic senate asserted itself and secured faculty endorsement of the policy by a vote of 1,025 to 268. But one week later, on March 30, 1950, on a 10 to 10 vote, the regents refused to rescind either the oath or the April 30 deadline for signing. Branded the Great Double Cross by the faculty, the regents' refusal to modify their earlier position in exchange for senate approval of the policy fixed the university on a course to ruin. Only a last minute "compromise" proposal by the alumni association, adopted by the regents on April 21, 1950, averted the wholesale dismissal of non-signing faculty members.

The compromise reaffirmed the university's policy on communism and incorporated the language of the Communist disclaimer into the employment contract. A new provision, however, promised to any non-signer of the disclaimer the right to a hearing by the faculty's committee on privilege and tenure before board action would be taken. The majority of the regents regarded the hearing procedure proviso of the alumni plan as sufficient to accommodate conscientious objectors, Quakers, and others whose religious loyalties conflicted with the oath. The non-signers, on the other hand, saw the hearings as a means to avoid signing for whatever reason seemed legitimate to them—except, of course, for membership in the Communist party. It was the non-signers' expectation that a favorable finding by the committee on privilege and tenure would secure the petitioner in his post. The regents, of course, would be expected to review the findings, but not to reverse them. The dispute over the meaning of the procedural provisions of the compromise was merely the more visible evidence of disagreement over the authority of the faculty and the regents in the selection and retention of faculty members.

By August, 1950, each side had given but one choice to the other. On the one side, the non-signers, rather than sign and violate their concepts of academic freedom, tenure, and faculty self-government, refused to sign. On the other, a majority of the board of regents was determined not to accept the authority of the academic senate whose committee on privilege and tenure

had recommended in almost all instances to confirm the non-signers in their posts. Hence, the board voted to dismiss, thus severing from the university's service thirty-six members of the faculty, no one of whom, when the oath was adopted, the regents had ever intended to dismiss. To complete the opening reference to the California controversy as an example of "political stupidity," no Communist or other alleged subversive had been uncovered in the entire process.

The non-signers took legal action. Following two long and frustrating years of litigation, the California Supreme Court on October 17, 1952, in a decision which struck down the regents' oath, ordered the non-signers reinstated in the university upon their "taking the oath now required of all public employees by the Levering Act"—the state loyalty oath enacted by the California legislature in early fall of 1950, and regarded by the titular head of the non-signers as "even worse than the regents' declaration [oath]."[11] (On December 21, 1967, the California Supreme Court in the case of *Vogel* v. *County of Los Angeles* held the disclaimer portion of the Levering Act to be unconstitutional.) The 1952 decision dashed the hopes of the non-signers that the court would pass judgment on tenure rights, academic freedom, faculty self-government, and political tests for appointment to positions of academic responsibility. Instead, the court said only that the state of California, under its emergency powers, had preempted the field of loyalty, and no further requirement, therefore, could be demanded by the regents.[12]

Thus ended one of the most momentous events in American academic history and one which cost the University of California several men of considerable distinction. The university lost stature as well from protest resignations submitted by other eminent members of its faculties. And it lost potential strength

[11]Letter, Edward Tolman to Benjamin Fine, November 5, 1951, in files of the Group for Academic Freedom, University Archives, University of California, Berkeley.

[12]The case is *Tolman* v. *Underhill*, 249 P.2d 280.

from the refusal of men to come to California under conditions considered by them to be hostile to scholarship.

Because of the dismissals, resignations, and refusals, gloomy predictions were made at the time concerning the university's future. Contrary to these foreboding forecasts, the University of California survived and subsequently more than regained its academic reputation, with the Berkeley campus being named in 1966 by the American Council on Education as the "best balanced distinguished university in the country."[13] The controversy had been mostly a futile interlude in the life of an otherwise highly productive intellectual community. But perhaps it was not a wholly infertile interlude if we have learned as a result how unavailing it is to seek to know another man's mind by oath and his intentions by association.

[13]Allan M. Cartter, *An Assessment of Quality in Graduate Education* (Washington, D.C.: American Council on Education, 1966), p. 107.