Letter to Senate Members from the Committee on Academic Freedom, April 12, 1951

[Letter, April 12, 1951]

Berkeley, California
April 12, 1951
Dear Senate Member:

The Committee on Academic Freedom believes that you will want to study the complete text of the Court decision, a copy of which is enclosed herewith. The Committee on Academic Freedom wishes to take this opportunity to express the profound gratitude of the faculty to those colleagues who, with firm faith in their legal protection under the Constitution of the State of California, have pressed the issue with steady courage to its unequivocal determination.

By this decision of the Third District Court of Appeals, the great tradition of the University of California as an institution of learning free from sectarian and political influence is reaffirmed in the law. The responsibility for preserving this freedom, for keeping the University free from inner and from outer subversion, is memorably defined as the shared burden of both Regents and faculty. The broad powers of the Regents and the security of the faculty under reasonable rules of tenure are likewise reaffirmed.

On this solid and just ground it is surely possible for faculty and Regents to join without further delay in a common effort toward continuation of the achievements which have brought greatness to the University of California.

Sincerely yours
The Committee on Academic Freedom
Academic Senate, Northern Section
University of California

[Court decision]

In the District Court of Appeal for the State of California
In and for the Third Appellate District.

3 Civ. No. 7946
Filed Apr. 6, 1951

Edward C. Tolman, Arthur H. Brayfield, Hubert S. Coffey, Leonard A. Doyle, Ludwig Edelstein, Edwin S. Fussell, Margaret T. Hodgen, Ernst H. Kantorowicz, Harold W. Lewis, Hans Lewy, Jacob Loewenberg, Charles S. Muscatine, John M. O'Gorman, Stefan Peters Brewster Rogerson, Edward Hetzel Schafer, Pauline Sperry, and Gian Carlo Wick

Petitioners

vs.

Robert M. Underhill, as Secretary and Treasurer of The Regents of the University of California; The Regents of the University of California, a public corporation established by Article IX, Section 9, of the Constitution of the State of California, Earl Warren, Goodwin J. Knight, Sam L. Collins, Roy E. Simpson, Arthur J. McFadden, William G. Merchant, Robert Gordon Sproul, Edward Augustus Dickson, John Francis Neylan, Sidney M. Ehrman, Fred Moyer Jordan, Edwin W. Pauley, Brodie E. Ahlport, Edward H. Heller, Norman F. Sprague, Maurice E. Harrison, Victor R. Hansen, Farnham P. Griffiths, Earl J. Fenston, Chester W. Nimitz, Jesse Steinhart, C. J. Haggerty and John E. Canaday, each and all as members of said corporation, The Regents of the University of California, and each as a Regent of the University of California

Respondents.

This is an original proceeding for a writ of mandate to compel the Board of Regents of the University of California and Robert M. Underhill, as Secretary and Treasurer thereof, to issue to petitioners herein letters of appointment to positions as members of the faculty of the University for the academic year of July 1, 1950 to June 30, 1951.

The petition alleges that petitioners are members of the faculty of the University of California of Academic Senate rank; that respondents are each members of a public corporation known as the Regents of the

University of California; that the Regents, in accordance with authority granted to them by the State Constitution, have established an Academic Senate vested with certain powers relating to appointment, tenure and dismissal of faculty members; that the Regents on April 21, 1950, adopted a resolution (more particularly set forth hereinafter) carrying out certain recommendations of the California Alumni Association relative to the signing of a so-called "Loyalty Oath" by the faculty of the University; that each of the petitioners (all of whom are non-signers thereof), pursuant to the resolution, petitioned the President of the University for a review of his case by the Committee on Privilege and Tenure of the Academic Senate; that each petitioner appeared before the said committee which, after full investigation, recommended the appointment of each petitioner to his regular post on the faculty of the University; that on July 21, 1950, upon the recommendation of the President of the University, the Regents by resolution appointed each of the petitioners to his respective post; that notwithstanding their appointments, respondent Underhill refused to transmit letters of appointment to petitioners; that subsequently on August 25, 1950, the Regents refused to recognize the appointment of petitioners; that if respondent Underhill is not ordered by this court to transmit the letters of appointment, irreparable injury to both petitioners and the people of the State of California will result; that petitioners have no plain, speedy or adequate remedy at law.

To this petition respondents filed their general and special demurrer and answer. This court on September 1, 1950, ordered that respondents take no action to enforce any resolution with respect to the non-appointment of petitioners or termination of their posts and that the ten day period granted petitioners by respondents should not expire until ten days following any further order of this court specifying that such period shall commence to run.

Before discussing the facts of the dispute which culminated in the filing of this petition it is important to note by way of background, that the Regents of the University in 1920 by resolution provided "that appointment as associate or full professor carries with it the security of tenure in the full academic sense". At no time prior to the present controversy was that resolution superseded or modified. It further appears that since 1920 the Regents and the faculty of the University have considered professors of the designated rank as not subject to arbitrary dismissal and entitled to all the incidents of tenure as it is commonly understood in American

universities.

The record further discloses that for approximately a year and a half prior to April 21, 1950, the Regents, the faculty and the Alumni Association had considered the question of ways and means to implement the stated policy of the Regents of barring members of the Communist Party from employment at the University by means of a "Loyalty Oath". These discussions culminated in a meeting held on April 21, 1950, at which the Regents passed a resolution providing that after July 1, 1950, the beginning date of the new academic year, conditions precedent to employment or renewal of employment

at the University would be (1) execution of the constitutional oath required of public officials of the State of California, and (2) acceptance of appointment by a letter which contained the following provision:

> "Having taken the constitutional oath of office required of public officials of the State of California, I hereby formally acknowledge my acceptance of the position and salary named, and also state that I am not a member of the Communist Party or any other organization which advocates the overthrow of the government by force or violence, and that I have no commitments in conflict with my responsibilities with respect to impartial scholarship and free pursuit of truth. I understand that the foregoing statement is a condition of my employment and a consideration of payment of my salary."

The resolution further provided that,

> "In the event that a member of the faculty fails to comply with any foregoing requirement applicable to him he shall have the right to petition the President of the University for a review of his case by the Committee on Privilege and Tenure of the Academic Senate, including an investigation of and full hearing on the reasons for his failure so to do. Final action shall not be taken by the Board of Regents until the Committee on Privilege and Tenure, after such investigation and hearing, shall have had an opportunity to submit to the Board, through the President of the University, its findings and recommendations. It is recognized that final determination in each case is the prerogative of the Regents."

Some thirty-nine professors at the University who refused to sign the affirmation set forth in the Regents' resolution accepted what they apparently believed to be the alternative to the signing of the oath as set forth in the resolution and petitioned the President of the University for a hearing before the Committee on Privilege and Tenure of the Academic Senate. The hearing resulted in favorable findings and recommendations by that committee as to each of the professors. On July 21, 1950, the Regents met and by a vote of 10 to 9 accepted those recommendations and appointed the non-signing professors to the faculty for the coming academic year. Following the passage of the resolution one of the Regents gave notice that he would change his vote from "No" to "Aye" and move to reconsider at the next meeting. At the next meeting of the Regents, on August 25, 1950, a motion to reconsider the matter of the appointments was passed by a vote of twelve to ten (one absent member stated by telegram that he would vote "no" if he were present) and the resolution adopting the recommendations of the Committee on Privilege and Tenure and appointing the professors to the faculty was defeated by a like vote of twelve to ten. Following this a

motion was unanimously carried granting the non-signing professors ten days in which to comply by signing the statement prescribed in the resolution of April 21.

Petitioners herein were among those professors who refused to sign the so-called "loyalty" statement. All of the petitioners are scholars of recognized ability and achievement in their respective fields. Additionally it should be noted that it is conceded that none of the petitioners has been charged with being a member of the Communist Party or in any way subversive or disloyal.

Article IX of the Constitution which declares the policy of this state as to education provides at the outset in Section 1 thereof that education is "essential to the preservation of the rights and liberties of the people. .." Section 9 of that article establishes the University of California as a "public trust, to be administered by the existing corporation known as `The Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds". Thereafter follow detailed provisions relating to the membership of the Board of Regents and their powers and duties. The Section concludes with this provision: "The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs..."

It is evident therefrom that the Constitution has conferred upon the Regents broad powers with respect to the government of the University, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds. (Hamilton v Regents of the University of California, 219 Cal. 663; Wall v. Board of Regents, 38 Cal. App. 2d 698.) It follows that this court may not inquire lightly into the affairs of the Regents, and should exercise jurisdiction only where the Regents have acted without power in contravention of law.

The validity of the action taken by the Regents on August 25, 1950 is first challenged by petitioners on the ground that the affirmative statement demanded as a condition to their continued employment is a violation of Section 3 of Article XX of the Constitution which prescribes the form of oath for all officers, executive and judicial, and concludes with the prohibition that "no other oath, declaration or test, shall be required as a qualification for any office or public trust".

Respondents' answer to this argument is that the constitutional provision is not here applicable because members of the faculty of the University do not hold office or positions of public trust. In support of their position respondents place great reliance on Leymel v. Johnson, 105 Cal. App. 694. There it was held that Section 19 of Article IV of the Constitution, which provides that "No Senator or member of Assembly

shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this State; provided, that this provision shall not apply to any office filled by election by the people," did not preclude a member of the legislature from also holding a position as a teacher in the public schools of the city of Fresno. The court's holding was that the position of instructor in a public school was not an "office, trust, or employment under this State", as those terms are used in Section 19 of Article IV of the Constitution.

That the decision is limited to the particular provision of the Constitution there in question is indicated by the fact that the court gave serious consideration to the purposes of the people in adopting that section of the Constitution, citing Chenoweth v. Chambers, 33 Cal. App. 104, where this court held that the intent and purpose of said section was that "those who execute the laws should not be the same individuals as those who make the laws".

There is nothing either in the Leymel case or any other case cited by respondents which is conclusive of the status of petitioners with respect to the constitutional oath of office as set forth in Section 3 of Article XX. Furthermore it is necessary in this case, as it was in the Leymel case, in dealing with another provision of the Constitution, to consider the purposes and intent of the people of California in adopting said Section 3 of Article XX. While the courts of this state have had no occasion in the past to discuss specifically the purposes behind this section, the history of the English and American peoples in their struggle for political and religious freedom offers ample testimony to the aims which motivated the adoption of the provision.

A similar provision is found in Clause 3 of Article 6 of the Federal Constitution where it is stated that all legislative, executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support the Constitution; but no religious test shall ever be required as a qualification

to any office or public trust under the United States. Speaking of this provision, Mr. Chief Justice Hughes, in his dissenting opinion in United States v. Macintosh, 283 U.S. 605, 631, 75 Law Ed. 1302, 1313, which views were later upheld in Girouard v. United States, 328 U.S. 61, 90 L. Ed. 1084, said:

> "I think that the requirement of the Oath of office should be read in the light of our regard from the beginning for freedom of conscience. .. To conclude that the general oath of office is to be interpreted as disregarding the religious scruples of these citizens and as disqualifying them for office because they could not take the oath with such an interpretation would, I believe, be generally regarded as contrary not only to the specific intent of the Congress but as repugnant to the fundamental principle of representative government."

Again, in the case of United States v. Schwimmer, 279 U.S. 644, 73 L. Ed. 889, Mr. Justice Holmes, whose dissenting views were likewise upheld

in the Girouard case, said at page 654, ".. . if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought - not free thought for those who agree with us but freedom for the thought that we hate.".

In the Girouard case, which was the last in this line of cases involving aliens who had been barred from naturalization because their then religious beliefs would not permit them to bear arms to defend the country, Mr. Justice Douglas, speaking for the court in approving the views expressed by Hughes and Holmes and holding that such aliens were not barred from citizenship, succinctly stated at page 69: "The test oath is abhorrent to our tradition."

This basic principle was also discussed by Mr. Justice Jackson in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 87 L. Ed. 1628, the last of the "flag salute" cases where, in speaking for the court he said at page 642:

> "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

At this late date it is hardly open to question but that the people of California in adopting Section 3 of Article XX also meant to include in our state Constitution that fundamental concept of what Mr. Chief Justice Hughes referred to as "freedom of conscience" and Mr. Justice Holmes called the "principle of free thought". Paraphrasing their words we conclude that the people of California intended, at least, that no one could be subjected, as a condition to holding office, to any test of political or religious belief other than his pledge to support the Constitutions of this state and of the United States; that that pledge is the highest loyalty that can be demonstrated by any citizen, and that the exacting of any other test of loyalty would be antithetical to our fundamental concept of freedom. Any other conclusion would be to approve that which from the beginning of our government has been denounced as the most effective means by which one special brand of political or economic philosophy can entrench and perpetuate itself to the eventual exclusion of all others; the imposition of any more inclusive test would be the forerunner of tyranny and oppression.

It is a well established principle of constitutional interpretation that the meaning of any particular provision is to be ascertained by considering the Constitution as a whole and that the duty of the court in interpreting the Constitution is to harmonize all its provisions. (In re Oliverez, 21 Cal. 415; Edler v. Hollopeter, 214 Cal. 427.) A

strikingly analogous application of this principle of construction is found in West Virginia State Board of Education v. Barnette, supra, where Mr. Justice Jackson said at page 639:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard." (Emphasis ours.)

In the problem of interpretation with which we are presently confronted, we find in the specific mandate of Section 9 of Article IX of our Constitution, providing that the University shall be entirely independent of all political or sectarian influence, a standard by which to decide the question of whether or not the petitioners herein are to be included within the term "office or public trust" as used in Section 3 of Article XX. It goes without saying that in the practical conduct of the affairs of the University the burden of so preserving it free from sectarian and political influence must be borne by the faculty as well as by the Regents. Hence, if the faculty of the University can be subjected to any more narrow test of loyalty than the constitutional oath, the constitutional mandate in Section 9 of Article IX would be effectively frustrated, and our great institution now dedicated to learning and the search for truth reduced to an organ for the propagation of the ephemeral political, religious, social and economic philosophies, whatever they may be, of the majority of the Board of Regents of that moment.

It must be concluded that the members of the faculty of the University, in carrying out this most important task, fall within the class of persons to whom the framers of the Constitution intended to extend the protection of Section 3 of Article XX.

While this court is mindful of the fact that the action of the Regents was at the outset undoubtedly motivated by a desire to protect the University from the influences of subversive elements dedicated to the overthrow of our constitutional government and the abolition of our civil liberties, we are also keenly aware that equal to the danger of subversion from without by means of force and violence is the danger of subversion from within by the gradual whittling away and the resulting disintegration of the very pillars of our freedom.

It necessarily follows that the requirement that petitioners sign the form of contract prescribed in the Regents' resolution of April 21, 1950, was and is invalid, being in violation both of Section 3 of Article XX and Section 9 of Article IX of the Constitution of the State of California, and that petitioners cannot be denied reappointment to their posts solely because of their failure to comply with the invalid condition therein set forth.

Subject to such reasonable rules of tenure as the Regents may adopt, the appointment and dismissal of professional personnel of the University is a matter largely within the discretion of the Regents. (Wall v. Board of Regents, supra.) Nevertheless, in the event of proof of an abuse of discretion the "propriety of the remedy. .. is clear". (Landsborough v. Kelly, 1 Cal. 2d 739.) Thus in the present case the imposition of the oath in question being violative of the applicable constitutional provisions, the abuse of discretion is clear, and hence this court may compel the reinstatement of petitioners to their respective positions. (See also Inglin v. Hoppin, 156 Cal. 483.)

In view of the foregoing it is unnecessary to consider the further contentions of petitioners that the resolution of July 21, 1950 constituted an irrevocable appointment of the petitioners, and that the action of the Regents constituted an arbitrary dismissal in violation of petitioners' tenure rights.

Therefore, since the letters of appointment issued to petitioners following the Regents' resolution of April 21, 1950 were subject to the condition that the petitioners sign letters of acceptance of appointment containing the affirmative statement, the requirement of which we have held to be invalid, it is the order of this court that the writ issue directing respondents by their secretary, respondent Underhill, to issue to each of the petitioners a letter of appointment to his regular post on the faculty of the University, which appointment shall not be subject to the aforementioned invalid condition. Provided that, if any of petitioners has not yet executed the constitutional oath of office as provided in the said resolution of April 21, 1950, the respondents may require that such petitioner, as a condition precedent to his appointment, execute said constitutional oath.

Let the writ issue.
Peek, J.

We concur:
Adams, P. J.
Van Dyke, J.