

From the Bag

Flaws in Paradise

THE LOYALTY OATH AT THE UNIVERSITY OF CALIFORNIA

Brainerd Currie

with introduction & notes by David P. Currie

IN THE AUTUMN of 1949 Brainerd Currie, who would later make a name for himself as an innovator in the Conflict of Laws, became one of the six members of the faculty of the spanking new Law School of the University of California at Los Angeles. It seemed at the time, as he later put it in an unsent letter to his Columbia mentor Elliott Cheatham, a dream come true: the romance of the Pacific Coast, “the prospect of an excellent salary, the economic soundness of a state university in California, the physical advantages of the new law school,” the freedom from existing editorial responsibility.

It proved a nightmare. “Once or twice I have hinted to you,” he wrote in his Cheatham letter, “that there might be flaws in the paradise of Southern California”; and now, half a year after his arrival, he decried his move to UCLA as “the mistake of my teaching career.” The Dean was an autocratic bigot, surrounded

by “spineless toad[ies],” who would brook no dissent and who ran the Law School without faculty input. “There has not been a single faculty meeting,” he wrote; “there has not been a single committee appointed.” But the most corrosive issue was that surrounding the loyalty oath that the Board of Regents had recently prescribed for all members of the University faculty.

It was the time of the great postwar witch-hunt. Senator Joseph McCarthy would soon make his notorious accusation about Communists in the State Department. The House Un-American Activities Committee was seeking Communists under every bed. The resulting first-amendment questions would dominate the work of the Warren Court to an extent matched only by desegregation, and Harry Kalven would write a splendid book about them.¹

Paradise did not escape the contagion. In

Brainerd Currie was a Professor of Law at the UCLA Law School when he wrote this memorandum. David Currie is the Edward H. Levi Distinguished Service Professor of Law at the University of Chicago.

¹ Harry Kalven, *A Worthy Tradition: Freedom of Speech in America* (Harper & Row, 1988).

March 1949 the Regents of the University of California required all persons connected with the University to take the following oath:

I do solemnly swear (or affirm) ... that I do not believe in, and 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 by force or by any illegal or unconstitutional methods.²

In June the Regents expressly required a disclaimer of membership in the Communist Party;³ the following February they explicitly made this disclaimer “a condition precedent to employment or renewal of employment in the University.”⁴

Far from the scene, Professor Currie had signed the oath “readily enough” as a condition of employment. He arrived on campus in the middle of a firestorm of discontent. Vocal members of the faculty assailed the oath as an infringement of academic freedom. The faculty Senate, of which Currie was an active member, debated little else. Dale Coffman, the Dean of the Law School, brought pressure on his colleagues to sign a statement in support of the Regents’ policy. Currie refused. The mem-

orandum in which he explained that refusal is the fullest statement of his position on the oath controversy.

The memorandum deals with the constitutional issues only obliquely. It treats the oath question essentially as a matter of policy. But Currie was a lawyer, and his policy arguments recall to today’s reader the constitutional arguments that were soon to be made to and by the Supreme Court.

Currie’s position paper reveals no unexpected insights into the problem. We have seen his arguments before – in opinions, briefs, and secondary sources composed after he wrote the memorandum. Yet it discloses more than one man’s carefully considered, if somewhat labored view of an issue he plainly viewed as more complex and difficult than did many of those around him. In placing the oath controversy in the context of a particular time and place it may help to put meat on the bones of what for many current observers is a rather abstract and distant dispute.

It happened in paradise in 1949, and it could happen here. Those who do not learn from the past are condemned to repeat its mistakes.



² The history of the dispute is related in detail in David Gardner, *The California Oath Controversy* (California, 1967). The text of the resolution is quoted in *id.* at 26.

³ See *id.* at 45, 47.

⁴ *Id.* at 114-16 and App D.

April 14, 1950

MEMORANDUM

TO: Dean Coffman
FROM: Brainerd Currie

This is, for the record, a statement of my position on the loyalty oath. On two previous occasions I have made more or less complete statements in writing, which you have seen. Nevertheless, I feel it necessary to make a further and perhaps more comprehensive statement now, in view of developments. Throughout the controversy I have felt unable to identify myself either with the militant faculty opposition to the Regents' policy or with those who support that policy. I have expressed my views informally on many occasions, and I have voted in accordance with those views on the various measures which have been presented to the Academic Senate for action. Now, however, the controversy has reached the stage of individual public statements by members of the faculty; the pressure is to stand and be counted. In these circumstances my silence – my inability to support either of the extreme positions – may be misinterpreted. I have made no public statements, and will make none. I do intend to make copies of this statement available to certain of my friends and associates, who have an interest, as I have, in the avoidance of any such misinterpretation.

1. I am not, and I have never been, a member of the Communist party.

2. I have signed and filed with the President the loyalty oath prescribed by the Board of Regents.

3. At the time I accepted appointment to this faculty, in June, 1949, I was fully informed of the requirement that the loyalty oath be executed as a condition of employment. My acceptance of the appointment was an acceptance of that condition. Therefore I complied

promptly with the requirement, filing the executed oath even before my arrival on the campus. This fact has an important bearing on my position throughout the controversy. Whatever my feelings might have been if I had been a member of the faculty at the time this policy was established, I have not felt free, as one whose status in the faculty is derived from voluntary acceptance of the condition, to defy the authority of the Board of Regents to impose it. That alone would have been sufficient reason for my dissociating myself, as I have done, from the militant opposition.

4. Moreover, I did not see in the oath requirement any serious threat to academic freedom. I regretted the requirement, because the action of the Board of Regents seemed to indicate either that there was at the University of California a real problem of Communist infiltration, or that an attempt was being made to discourage free inquiry into unpopular but by no means disloyal ideas. Either of those possible causes for the action would have been ground for deep regret. I had confidence, however, in the future of the University of California as a truly free institution of learning – confidence that it would survive, essentially unchanged, whatever threat of Communist domination or unwarranted suppression was implied in the adoption of the Regents' policy. And certainly I had no personal objection to signing a non-Communist oath. My personal freedom was in no way infringed. At that time, so far as I know, the faculty itself had accepted the requirement; thus my feeling that there was no real threat to the University was confirmed. I believe it is the fact that faculty opposition to the requirement did not crystallize until the time of the first meeting of the Academic Senate in the fall.

5. Since my arrival on the campus, I have come to see that the action of the Board of Regents presents issues which were not apparent to me at the time I made my decision. That decision was a personal one. But from

the point of view of those who were identified with the University, and to whom the University's welfare had long been a matter of prime concern, there were implications of principle affecting the institution more than the individual. This, I think, goes a long way toward explaining the attitude of the loyal member of the faculty who has no objection to proclaiming to all the world that he is not a Communist, but who objects to the establishment of a policy or procedure which is inconsistent, as he sees it, with fundamental principles for which a university should stand. This is an attitude which commands my understanding and respect, although not my unqualified agreement with its application to the present situation.

6. In fact, I have at no time been able to see that the policy of the Board of Regents, in so far as it prohibits the employment by the University of members of the Communist party, involves any substantial and unwarranted interference with academic freedom, or any threat to the continued functioning of the University as a free institution. I do consider that even this aspect of the policy is in part regrettable. In the following paragraphs I should like to state once again in detail the reasons underlying my attitude:

(a) In my opinion, the Communist Party (1) is dedicated, despite its denials, to the overthrow of the governments of the United States and California by other than constitutional means; (2) acknowledges allegiance to a foreign power which is a potential enemy; and (3) represents a totalitarian system of dogma, suppression of free inquiry, and denial of elementary human liberties. Whether or not these charges are susceptible of legal proof, there is abundant evidence to justify the conduct of ordinary affairs on the basis that they are true.⁵

(b) No person who seeks the overthrow of the state or national government by unconstitutional means, or who owes his primary allegiance to a foreign power rather than to his own country, or who adheres to the totalitarian suppression of the individual which Communism represents, is fit to be a member of a university faculty, particularly the faculty of a state university.

(c) But the fact that an individual is a member of the Communist Party does not establish ipso facto that the individual is disqualified by virtue of his possession of the characteristics which I attribute to the Communist Party. From the points which I have stated as (a) and (b) the conclusion is usually drawn quickly that a member of the Communist party is not fit to be a member of a university faculty, and, indeed, that conclusion is easy to draw. It is said that the evidence of the Communist Party's objectives is clear and convincing, and I agree; it is said that, in view of the notorious efficiency of party discipline, deviation by an individual is highly unlikely or impossible, and I agree that it is highly unlikely. But these arguments prove only that it is extremely probable that a member of the Communist Party is guilty of the offenses which are charged against the organization itself. And whenever it is proposed to attribute the sins of an organization to an individual member of the organization, merely on the ground of his membership, the principle of guilt by association is involved. This is true whether the offenses of the organization have been established by proof or not, and it is true no matter how great the probability may be that the individual is an undeviating adherent of the organization's policies. It was highly likely that members of the German Nazi party were undeviating adherents to the policies of that organization,

⁵ A handwritten note in the margin of the author's file copy says "Prior to Dennis et al in NY Dist Ct," where the court confirmed Currie's conclusions.

and participants in the crimes which it perpetrated. But the international tribunal which conducted the Nuremburg trials rejected the principle of guilt by association, and demanded proof of individual guilt in each case. As a lawyer, I detest the idea of guilt by association.⁶ The imposition of punishment without a fair hearing and a finding of individual guilt based on competent evidence is plainly a denial of the most elementary due process.

(d) The fact that the Regents' policy involves an issue concerning the principle of guilt by association accounts in large part, I feel sure, for the opposition of the faculty. The issue is real enough to make the faculty's position understandable to me. I do not, however, oppose the Regents' action on this ground as strongly as some of the faculty do. It is one thing to reject the principle of guilt by association as the basis of punishment in a legal system; it is another thing to recognize that reasonable men, in the practical administration of the affairs with which they are charged, can and must proceed on the basis of probable inferences, without waiting for proof which satisfies the requirements of due process of law. Certainly, for example, the United States is justified in refusing to employ a member of the Communist Party in a position of military or diplomatic trust, simply because of the probability that he is disloyal. Similarly, although the danger may be less dramatic, I have no doubt whatever as to the justification of the Regents' policy in so far as the refusal to hire a member of the Communist Party is concerned. I would adopt the same policy myself if I were in the position of the Board of Regents.

(e) In so far as the policy calls for the dis-

missal of incumbent members of the faculty merely on the basis of membership in the Communist Party the considerations are, in my opinion, somewhat different. Dismissal from employment on grounds of disloyalty and unfitness is in a very real sense punishment, as refusal to employ is not. If I had been in the position of the Board of Regents I would have provided, instead, for a hearing to determine the loyalty and fitness of a member of the faculty on an individual basis, even though he were a member of the Communist Party, before calling for his discharge. Surely, if our assumptions about the Communists are correct it would not be difficult to bring proof of disloyalty and unfitness to such a hearing. My feelings on this matter constitute one reason why I cannot endorse the policy of the Regents. I can and do, however, concede that the Regents have authority to apply the requirement in this way. Although it amounts to much the same thing, dismissal from employment is not, after all, the same thing as punishment in the legal sense. I recognize that the Board of Regents shares with the faculty responsibility for the integrity of the University, and that it has a responsibility to the public. The same practical considerations which justify the Board in acting on a presumption in refusing to employ a Communist may justify the Board in discharging a man simply because he is a Communist.⁷ In my judgment, however, the policy as applied to incumbent members of the faculty is a regrettable adoption of the principle of guilt by association. I say this despite the fact that the faculty has now supported the Board of Regents in this respect, declaring unequivocally that a member of the Communist Party as such is unacceptable as a member of the faculty. While this

6 "I am a member of the Presbyterian Church," Currie had written four months earlier, "but I should not like to be held personally accountable for all the items in the creed of that organization."

7 The Regents had declared membership in the Communist Party "incompatible with membership in the faculty of a State university" in 1940. See Gardner, *The California Oath Controversy*, App A (cited in note 2).

is farther than I should like to go as a matter of personal principle, I have supported this action of the faculty on the ground that it amounts to a recognition of the fact that the Regents have justification for acting on a presumption in this matter, and on the ground that it provides a basis for the settlement of a controversy which threatens irreparable harm to the University.

(f) I have not been impressed with the argument, made by some members of the faculty, that the policy of excluding Communists may set a precedent which will pave the way for the exclusion of members of other organizations which may be suspected, on more or less tenuous grounds, of being similarly objectionable. The argument is of a type which is frequently met with in judicial opinions, and I have always been impatient with it. Questions ought to be decided on their own merits, and a sound decision on the problem in hand ought not to be rejected because of the fear that some unwarranted extension of the principle supposed to be involved might influence the decision of a problem which may never arise. I shall be content to oppose extension of the policy when, or if, its extension is attempted.⁸ As a matter of fact, I understand that the Regents have given assurances that there will be no such extension, and I think those assurances ought to be accepted.

7. But even though I concede that the Regents have justification for excluding Communists as such from the faculty, I cannot defend the means which they have chosen for the accomplishment of this objective. The alternative should be stated first: now that it is established that membership in the Communist Party is ipso facto ground for disqualification, any member of the faculty is subject to dismissal on proof of the fact of membership

alone. Yet the Regents are not satisfied with even so simple and summary a procedure as this. Instead, they require of every member of the faculty an oath or equivalent affirmation that he is not a member of the Communist Party. The objections to such a requirement, as I see them, are as follows:

(a) It is an ineffective method of ferreting out the Communists, if there are any, on the faculty. If my beliefs about the nature of the party and its members are well founded, no Communist would hesitate to take the oath.

(b) It will have negative effects which will be very serious indeed. There will be members of the faculty who will refuse on grounds of principle to sign the oath or equivalent affirmation. They will be perfectly loyal and competent members of the faculty, and not Communists at all. Their noncompliance with the requirement will result in their being discharged solely because they have taken a stand on a matter of principle. The result of any such discharge will, in my opinion, be disastrous for the University.

(c) It is offensive because it indiscriminately implies that all members of the faculty alike are under suspicion of disloyalty and unfitness; it suggests that they are all suspect of adhering to a philosophy which is abhorrent to the overwhelming majority of them, if not to all.

(d) It violates another basic principle of Anglo-American justice; the principle against self-incrimination. In referring to this principle I am no more expressing solicitude for the possible Communist on the faculty who might be induced by this requirement to disclose his affiliation than the Constitution of the United States expresses solicitude for the guilty criminal when it establishes the principle against self-incrimination. The point, I think, is that a

⁸ As Currie wrote in an earlier memorandum on the same subject, "when the Regents require an oath that a teacher is not a Presbyterian the time will have arrived to fight that battle; now is not the time."

society or an institution which respects the dignity of its individual members must protect itself by orderly methods of investigation, and cannot rely on inquisitorial methods. If there are Communists on the faculty they may and probably do constitute a threat to the University. So do murderers and thieves constitute a threat to society; but we do not protect ourselves by asking every resident to swear that he is not a criminal, and jailing those who refuse to swear, or affirm. Any such procedure is futile, offensive, degrading, violative of due process, and corrupts the administration of law. At the risk of being tiresome, I repeat that this point always brings to my mind the priggish British schoolmaster of cheap fiction. If little Willie's wallet is missing, he does not investigate to determine whether it has been stolen, and, if so, by whom; instead he requires each member of the class, on pain of a sound thrashing, to state on his honor that he is not the thief. As likely as not the wallet turns out to have been in Willie's other pocket all the time.

(e) Since it requires dismissal without any hearing at all, it violates the basic requisite of fairness for any procedure which leads to the imposition of sanctions; since it provides for dismissal without a hearing by fellow teachers, it violates an established tradition of the academic world. If this is not an invasion of academic freedom it is undeniably an impairment of an essential safeguard of that freedom.

I can think of no justification whatever for the Regents' adoption of this device for implementing its policy of excluding Communists. My only reason for not opposing it actively is that I accepted the requirement when I joined the faculty.

8. I am aware of the argument that the whole issue over the requirement of the oath is illusory. I put forward this argument myself at a recent meeting of the Academic Senate. Following the Regents' February 24 reaffirmation of their policy, the chairman of the board, Mr.

Dixon, made a statement which I interpreted as meaning that a simple statement of non-Communist affiliation, even one coupled with a refusal on grounds of principle to sign the oath or affirmation, would be taken as satisfying the requirement. While I am not certain that such an interpretation would meet the objections which are urged against the oath, it seemed to me that the statement offered a promising basis of settlement and that it deserved consideration. I was disappointed and puzzled when the Academic Senate refused to consider it. As nearly as I have been able to determine, that unwillingness stemmed from a feeling either that the statement could not be interpreted as I interpreted it, or that Mr. Dixon's informal statement could not be taken as superseding or as authoritatively construing the prior formal pronouncement of the Board. While I still regret that the Senate chose to ignore what might have proved to be the basis of an acceptable settlement, I must confess that subsequent events have tended to bear out its view of the matter. If such a simple statement is all the Board requires, there has been ample opportunity for that to be made clear to the faculty. And, after the last meeting of the Board, Mr. Dixon issued a further statement along similar lines, this time indicating rather clearly that the simple statement he has in mind is the "equivalent affirmation" provided for those who have conscientious scruples against swearing – an alternative which has, of course, been available all along, and which meets none of the objections urged against the oath.

9. The issues in this matter have been very much clarified by the most recent exchange between the faculty and the Board of Regents. At any earlier stage there may have been room for doubt as to the grounds on which the faculty opposed the action of the Regents. Now, however, the Academic Senate, by mail ballot, has overwhelmingly voted that members of

the Communist Party are unacceptable as members of the faculty. It is clear, therefore, that the opposition is to the method of implementing the policy. The Senate proposed, as an alternative to the oath or affirmation, a provision making all contracts subject to the policy which disqualifies members of the Communist Party as such. The result would be that any member of the faculty suspected of disloyalty or unfitness would be subject to discharge upon the finding by the Committee on Privileges and Tenures of the simple fact of that membership. Surely this proposal offered a reasonable basis of settlement. It coincides in all substantive respects with the policy of the Regents. It differs only in that it proposes, as an alternative to the oath or affirmation, an orderly procedure for implementation consistent with basic considerations of fairness and with academic tradition. After the Senate had taken this action, there was very general expectation that the matter would be settled on that basis. I know of no member of the faculty who did not hope for such a settlement. The conservative *Los Angeles Times* welcomed the action and assumed that the controversy was as good as settled. Members of the Board of Regents who had been particularly active in support of the anti-Communist policy made public statements which contributed materially to the assurance that a settlement was now not only possible but imminent. I simply cannot understand why, in the face of all this, the Board of Regents adhered to its original pronouncement. It is difficult to escape the conclusion that someone, regardless of the consequences to the University, is more concerned with literal victory and vindication than with an agreement on essentials in the interests of all concerned.

10. What all this amounts to is that I have never supported the action of the Board of Regents, and have still less reason to do so now. Because I submitted to that action when I joined the faculty, and because I concede the

justification for some aspects of the action, I have confined my participation in the controversy to supporting, chiefly by my votes in the Academic Senate, the moderate efforts of the faculty to achieve a settlement by negotiation with the Regents. These reservations, however, do not remotely mean that I can endorse the action of the Board. I have declined to join in statements such as the one which you recently issued for the following reasons:

(a) While I agree with the Regents' policy in part, and while as to another part I concede its justification while disagreeing with it in principle, as to a very important part I consider it unsound, indefensible, and seriously detrimental from the standpoint of the interests of the University.

(b) In failing to accept the faculty's settlement proposal, which would have assured the attainment of the substantive objects of the Regents' policy while meeting the most serious objections which have been urged against it, the Regents have, in my opinion, at least temporarily taken a position for which no reasonable grounds are apparent.

(c) As I have always been, I am still primarily interested in the attainment of an acceptable solution of this unhappy controversy. The effort to reach a settlement is still in progress. It is my opinion that the issuance of such statements jeopardizes a settlement, particularly when they endorse what appears to me to be an attitude of obstinacy on one side.

(d) As a member of the Academic Senate, I do not feel free in a matter such as this to make extra-parliamentary statements dissenting from the actions taken by that body, even though those actions may not have been at all times in accord with my personal convictions.

(e) Such statements seem to me, by implication at least, to impugn the motives of those members of the faculty who have taken a firm stand in opposition to the action of the Regents. On many occasions I have found it necessary to disagree with the positions taken

by some of these men. But I do not think they are Communists; I do not think they are the dupes of Communist agitators; I do not think they are actuated by fear of the displeasure of their colleagues who are in positions of academic authority. I respect them as sincere and intelligent men who have placed principle and the welfare of the University above their immediate personal interests in this controversy.

Brainerd Currie.⁹ 

⁹ In August 1952 the Regents dismissed thirty-one dissenters, including several prominent academics, for refusal to take the oath. The California Supreme Court held the requirement invalid on the narrow ground that state legislation occupied the field. *Tolman v Underhill*, 39 Cal 2d 708, 249 P2d 280 (1952). The victory was hollow: The nonsigners were ordered reinstated on condition that they take a more obnoxious oath the legislature had prescribed, which the voters in their infinite wisdom promptly wrote into the state constitution. See 39 Cal 2d at 713, 249 P2d at 283; Gardner, *The California Oath Controversy* at 201, 250 (cited in note 2); Cal Const, Art 20, § 3. The California Supreme Court struck this latter provision down on first-amendment grounds in 1967. *Vogel v Los Angeles County*, 68 Cal 2d 18, 434 P2d 961, 64 Cal Rptr 409.