

11/1/65

Memorandum 65-76

Subject: 1966 Annual Report (Unconstitutional and Impliedly Repealed Statutes)

The Commission has previously approved the 1966 Annual Report except for the portion relating to statutes repealed by implication or held unconstitutional. We will up date the report to include staff changes and the like. In addition, we would like to have the 1966 Report list the new Chairman and Vice Chairman rather than the old officers. Since the 1966 Report is to be dated December 1965 in order that it may be included in Volume 7, we suggest that the Handbook of Practices and Procedures be amended as follows:

The officers of the Commission are the Chairman and the Vice Chairman. The term of office of the Chairman and Vice Chairman is two years, commencing on December 31 of each odd-numbered in-January of-each-even-numbered year. [Remainder of provision unchanged.]

Attached as Exhibit I (yellow and green pages) is a draft of the portion of the 1966 Annual Report dealing with unconstitutional and impliedly repealed statutes. In connection with this attachment, the following policy questions are presented for Commission determination:

1. The decisions reported in the 1966 Annual Report affect not only statutes but also provisions of the California Constitution, i.e., Griffin v. California (the "no comment" case); Silver v. Brown and Jordan v. Silver (the reapportionment decisions). In fact, the cases mention only constitutional provisions although several related statutes follow the precise wording of the particular constitutional provision in issue. See Exhibit II (pink) for pertinent extracts from the statutes and constitutional provisions involved. The policy question presented is whether our enabling legislation, which directs the Commission to "recommend the express repeal of all statutes . . .," should be construed to embrace constitutional provisions as well.

We believe that the enabling legislation should be construed so that its spirit--if not its specific language--is effectuated by reporting fully on the cases and identifying those statutes and constitutional provisions that have been held unconstitutional by the California and United States Supreme Courts. It may be of interest to know that the California Supreme Court is now hearing arguments in six cases involving 1964 Ballot Proposition 14 (unfair housing), which clearly will involve the same type of problem if Proposition 14 is held unconstitutional.

2. The cases reported in the 1966 Annual Report neither cite nor discuss any of the statutes that are mentioned in the report. Nevertheless, these statutes appear to have been "held" unconstitutional just as effectively as if they had been mentioned specifically. For example, Penal Code Sections 1093 and 1127 both use language identical to the language that appears in Article I, Section 13, of the Constitution. Note that we have not mentioned Sections 412 and 413 of the Evidence Code.

We suggest that you read the cases cited in the attached proposed portion of the 1966 Annual Report prior to the meeting. In this connection, you will recall that the Commission has previously determined that the report will not include a statement of the grounds on which statutes are held unconstitutional. See Minutes, October 1962.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

EXHIBIT I

REPORT ON STATUTES REPEALED BY IMPLICATION

OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

The Commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States.

Pursuant to this directive, the Commission has made a study of the decisions of the Supreme Court of the United States and of the Supreme Court of California handed down since the Commission's last annual report was prepared.<sup>1</sup> It has the following to report:

(1) No decision of the Supreme Court of the United States holding a statute of this state repealed by implication has been found.

(2) Two decisions of the Supreme Court of the United States holding statutes of this state unconstitutional have been found.

In Griffin v. California,<sup>2</sup> the Supreme Court held provisions of California law unconstitutional to the extent that such provisions authorize "comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Provisions that may be affected by this decision include Article I, Section 13, of the California Constitution, Article VI, Section 19, of the California Constitution, and Penal Code Sections 1093, 1127, and 1323,<sup>3</sup> insofar as they purport to authorize such comment or instructions.

In Jordan v. Silver,<sup>4</sup> the Supreme Court affirmed a United States District Court decision holding unconstitutional "the present plan of Senate apportionment by districts in California . . . ."<sup>5</sup> A special session of the California

Legislature, meeting in October 1965, passed legislation designed to provide a constitutional plan of Senate apportionment. The October 1965 reapportionment legislation did not, however, provide for the repeal of Section 6 of Article IV of the California Constitution to the extent that this section was held unconstitutional in Jordan v. Silver.

(3) No decision of the Supreme Court of California holding a statute of this state repealed by implication has been found.

(4) One decision of the Supreme Court of California holding statutes of this state unconstitutional has been found.

<sup>6</sup>  
In Silver v. Brown, the Supreme Court held unconstitutional the present apportionment of the Senate and Assembly of California. A special session of the California Legislature, meeting in October 1965, passed legislation designed to provide a constitutional plan of apportionment of the California Senate and Assembly. The October 1965 reapportionment legislation did not, however, provide for the repeal of Sections 5 and 6 of Article IV of the California Constitution to the extent that those sections were held unconstitutional in Silver v. Brown.

FOOTNOTES

1. This study has been carried through 63 Adv. Cal. 334 (1965) and 381 U.S. 763 (1965).
2. 381 U.S. 415 (1965). See Malloy v. Hogan, 378 U.S. 1 (1964); People v. Bostick, 62 Adv. Cal. 869 (1965) (The "comment of the prosecutor and the trial court's instruction herein [both relating to criminal defendant's failure to testify] each constituted error.")
3. Section 1323 of the Penal Code is repealed by Chapter 299 of the Statutes of 1965, operative January 1, 1967.
4. 381 U.S. 415 (1965).
5. 241 F. Supp. 576, 585 (1964).
6. 63 Adv. Cal. 278 (1965).

#### RECOMMENDATIONS

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to continue its study of the topics listed on pages 0000-0000 of this report.

Pursuant to the mandate imposed by Section 10331 of the Government Code, the Commission recommends the repeal of Sections 1093 and 1127 of the Penal Code and Article I, Section 13, Article IV, Sections 5 and 6, and Article VI, Section 19, of the California Constitution, to the extent that those provisions have been held unconstitutional.

EXHIBIT II

California Constitution, Article I, Section 13:

. . . in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.

California Constitution, Article VI, Section 19:

The court . . . may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. . . .

Penal Code Section 1093:

The judge . . . may comment on the failure of the defendant to explain or deny by his testimony any evidence or facts in the case . . . .

Penal Code Section 1127:

. . . the court . . . may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case and in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court. . . .

Penal Code Section 1323:

. . . The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel.

California Constitution, Article IV, Sections 5 and 6:

[Note: These sections are too long for feasible reproduction. See Silver v. Brown, 63 Adv. Cal. 278 at 287 (1965), in which the court said:

The question remains to what extent other provisions of the California Constitution governing apportionment can be reconciled with equal protection requirements. In addition to the clearly invalid part of section 6 providing that no county shall have more than one senate district or be included in a district with more than two other counties, sections 5 and 6 contain additional provisions that cannot all be given effect in the case of either the Assembly or the Senate. ]

Elections Code Section 30100:

[This section is too long for feasible reproduction; it merely defines state Senatorial districts.]

Elections Code Section 30200:

Any precinct, or portion of any precinct, not situate within an assembly district, as such districts are described in this chapter, constitutes a part of the adjacent assembly district which is in the same county and has, as shown by the last federal census, a less population than any other such adjacent district.

Elections Code Section 30201:

[This section is too long for feasible reproduction; it merely defines state Assembly districts.]