

11/8/65

First Supplement to Memorandum 65-76

Subject: 1966 Annual Report (Unconstitutional and Impliedly Repealed Statutes)

We sent Memorandum 65-76 to George Murphy, Legislative Counsel, with the request that he check the proposed portion of the 1966 Annual Report and suggest any needed revisions on the portion concerning the reapportionment decisions.

We received his response and have revised the proposed portion of the 1966 Annual Report in accord with his suggestions. The revised portion is attached. This replaces the material attached to the basic memorandum. Because Herman Selvin is familiar with the reapportionment situation, we have asked him to check on the accuracy of the revised portion of the proposed 1966 Annual Report.

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REPORT ON STATUTES REPEALED BY IMPLICATION  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The Commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States.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(1) No decision of the Supreme Court of the United States holding a statute of this state repealed by implication has been found.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.

<sup>2</sup>  
In Griffin v. California, 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.

<sup>4</sup>  
In Jordan v. Silver, 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> The order as affirmed required the

State Legislature to reapportion the Senate by July 1, 1965, and further provided that if the Legislature had not presented an adequate plan of reapportionment by that time the court would hold further proceedings and devise its own plans to bring the Senate in compliance with the Constitution of the United States. The Legislature failed to adopt any such plan. However, before the United States District Court could hold further proceedings in the matter, the California Supreme Court accepted jurisdiction in Silver v. Brown and Adams v. Brown, discussed infra, and in those cases determined that the apportionment of both houses of the Legislature violated the U. S. Constitution and gave the Legislature until December 9, 1965 to apportion itself. In view of the California Supreme Court's action in the matter, the United States District Court postponed further proceedings in the matter until January 8, 1966.

(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.

In Silver v. Brown and Adams v. Brown (consolidated cases),<sup>6</sup> the Supreme Court held unconstitutional the present apportionment of the Senate and Assembly of California. As a consequence of this decision, the Governor called the Legislature into special session on September 20, 1965. This 1965 Second Extraordinary Session adjourned on November 4, 1965,<sup>7</sup> and enacted legislation that redistricted both the Senate and the Assembly. The legislation passed at the 1965 Second Extraordinary Session 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).  
241 F. Supp. 576, 585 (1964).
5. 63 Adv. Cal. 278, 46 Cal. Rptr. 308, 405 P.2d 132 (1965).
7. Cal. Stats. (2d Ex. Sess.) 1965, Chs. 3, \*\*.

#### 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.