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THE STATES AND SUBVERSION

IN THE CONFLICT between democracy and Communist dictatorship, the United States has adopted far-reaching measures to curtail Communism and all movements associated with it. While not outlawing the Communist Party directly, the action taken—developing particularly from the understandable tension and fear aroused by the Korean War—has modified our accepted democratic liberties.

The complex of federal and state measures, intended to expose, curtail or penalize Communist influences, add up to an unprecedented array of restraints violative of the principles of civil liberties. The American Civil Liberties Union has opposed most of these measures because of its belief that existing laws are adequate to cope with any real dangers, and that the new legislation, which strikes at opinions, utterances, and associations, is contrary to the spirit of our constitutional liberties. But, realizing that the threat of Communist subversion, espionage, or sabotage is not an illusory one, the Union has not opposed the barring of Communists from “sensitive” positions. It has further called for a non-partisan study of the problem of maintaining individual freedom and national security, which might recommend new legislation aimed at checking *acts* challenging our security.

This pamphlet, emphasizing state security measures, must first cite the related federal controls.

Federal Measures

The federal government has adopted and at least in part enforced, so far without restraint by, and in some cases the assent of, the Supreme Court, these laws or orders:

1. The Smith Act of 1940, making it a crime to conspire to advocate in speech or writing the overthrow of the government by violence, regardless of genuine overt acts or a proved “clear and present danger.” While leaders of the Communist Party have been convicted under the Act, the Party has not been legally outlawed, nor has mere membership in it been made a criminal offense.

2. The Internal Security Act of 1950, under which a board appointed by the President decides, after hearings, what organizations must register as “Com-

unist-action” groups or “Communist fronts.” The registered organizations’ literature must all be publicly identified; passports are withheld from their members; all members of and contributors to “Communist-action” groups must be reported; tax exemption is refused. The law has just begun to be enforced by way of administrative proceedings, and court tests challenging its constitutionality will further delay its implementation. (A previous registration law of 1940, popularly known as the Voorhis Act, applying to Communists and Bundists, was not effective.)

3. The McCarran-Walter Immigration Act of 1952, as well as the previously mentioned Internal Security Act of 1950, setting up bars to the entry of foreigners who ever were members of totalitarian organizations (Communist or Fascist), and making deportation for political opinions or association an administrative matter. There has been some easing of the ban on entry for former totalitarians who have repented.

4. The federal loyalty order, under which all federal employees and applicants must be dismissed, if there is a reasonable doubt as to their loyalty. Hearings on loyalty charges are given, but procedural protections are inadequate. Eleven federal agencies have statutory powers to dismiss persons as security risks, and applicants for jobs in such agencies, judged a security risk, are not entitled to any hearing. A revised program is expected to be announced shortly by the Eisenhower Administration.

The Munitions Board of the Defense Department had set up a screening procedure for all persons working on private defense contracts who had access to classified information or materials; if denied clearance, persons were entitled to hearings, with about the same kind of procedural protection granted in loyalty cases. A new program is being developed by the Eisenhower Administration.

5. The lists of organizations published by the Attorney General under the federal loyalty program, covering Communist, Nazi and Fascist agencies, membership in which is presumed to be one factor in determining an employee’s or prospective employee’s loyalty. The lists now include approximately 200 agencies, including many organizations now defunct, and have been popularly used to condemn any present or former organizational association as evidence

of subversion—far beyond their purpose. It is the basis of a federal law barring residency in federally-aided low-income housing projects to persons belonging to the proscribed groups. It has been incorporated into state laws, and used by local police officials, private businesses and self-constituted guardians of patriotism, to condemn persons who at any time belonged to any of the organizations. The Supreme Court has held illegal the listing of any organizations without hearing. But despite this, and whatever other revisions the courts may later require, the damage has already been great.

6. A provision of the Taft-Hartley Act, under which no trade union can take advantage of the federal agency (National Labor Relations Board) for promoting fair collective bargaining unless its officers swear that they are not members of the Communist Party.

7. A section of the Hatch Act, denying federal employment to any member of the Communist Party and other groups advocating the overthrow of our government. (There was also a war-time ban on members of the German-American Bund.)

8. Decisions of the Supreme Court upholding, directly or by implication, the Smith Act of 1940; the federal loyalty program; the Taft-Hartley Act non-Communist oath; and most, though not all, state and local loyalty oath laws or other loyalty tests, affecting all public employees or teachers specifically. It appears a very remote hope that the Supreme Court will, in any substantial way, interfere with the federal and state laws adopted to deal with subversion, loyalty or security, except where clearly inconsistent with present concepts of constitutional rights.

Congress has adopted every measure seriously urged, except formal outlawing of the Communist Party, and the courts have put the seal of judicial approval on Congressional power to take such action in all those cases which have come before it.

State Measures

The fears and tension arising out of the cold war have stimulated the states to act, too, and an epidemic of laws has spread over the country in the wake of federal action. Though it is generally accepted that national security is primarily the concern of the federal government, the states have satisfied an excited public demand for action by passing an unprecedented array of "protective" laws. Many are identical. They follow a popular fashion, regardless of whether, in the states, the evils are proved and the danger is "clear and present."

Fear and concern over the threat of Communist infiltration gave proponents of strict legislation unopposed leadership; the laws passed almost unanimously. Are you for Americanism or Communism? That was the simple black and white choice presented to the legislators. Little debate was heard over the infringement of civil liberties that the laws represented.

The state laws, aimed at subversion, are not without precedent. Similar instances of repressive law-making in recent history occurred before, from 1917 to 1921, under pressure of the first World War, the Russian revolution and the almost forgotten fears of the I.W.W. (Industrial Workers of the World); and again, but milder, in the early 1930's when some 20 states succumbed to a drive by the Daughters of the American Revolution for special teachers' loyalty oaths.

As these and the newer state laws stood as of early 1952, the record shows:*

- 34 states with anti-anarchy or criminal syndicalism laws passed from 1917 to 1923, aimed at the I.W.W. and the early Communist movement; rarely invoked since the late 1920's.
- 31 states with laws against sedition, defined generally in terms of advocacy of the overthrow of the government by violence; passed also from 1917 to 1923; now rarely used.
- 24 states with stricter sedition laws, passed mostly since 1945, and aimed at Communists.
- 33 states with laws against sabotage of public or private property; rarely used.
- 32 states with laws requiring special teachers' loyalty oaths; about 20 were passed in the 1930's, the rest since 1947; they are being enforced.
- 28 states with laws barring the public employment of subversive persons, defined in various ways, but fundamentally aimed at Communists; some ban subversives even from running for elective office; enforcement varies.

* *The clearest picture of these state laws is presented by the two maps on pages 9 and 11. Examination shows how widespread are the recent "protective" laws. Only one state, Utah, seems to have resisted the contagion of all "protective" legislation. Delaware has resisted since 1935. The information on state laws, as of early 1952, is taken from three sources, The Library of Congress, a survey by the Council of State Governments, and the laws of the 1951 state legislative sessions. Because of conflicting interpretations of just what some laws cover, exceptions may be taken to some designations. Some of the dates are of the year when statutes were revised and published, not of the year when passed.*

- 26 states with laws barring from the ballot any subversive political organization, defined to reach Communists; some make such organizations criminal; effectiveness of the laws, in practice, varies.
- 11 states with laws denying use of schools as meeting places to subversive organizations; enforcement is effective.
- 5 states with laws requiring subversive organizations and their members to register; apparently an ineffective law as no one has registered.
- 2 states, Pennsylvania and Massachusetts, in 1952 adopted laws making membership in an organization advocating overthrow of the government a crime, thus, in effect, outlawing the Communist Party; not yet enforced.

Two states have taken more drastic action. Michigan, in 1950, imposed life imprisonment as a penalty for writing or speaking subversive words, and Tennessee, in 1951, adopted a law calling for the death penalty in cases of unlawful advocacy.

What Is The Effect?

With this flood of state laws, it might be expected that some resistance would be encountered and some prosecutions would result. But inquiries addressed by the ACLU to the Attorneys-General of all the states brought replies from 32 that not a single prosecution has taken place under any of these laws. One known prosecution of a Communist under a state law took place in Pennsylvania where Communist leader Steve Nelson was convicted under a sedition statute. Two other prosecutions, in Louisiana and California, have been brought under registration laws. Few known Communists have lost their jobs. Indeed, it has been the Quakers and others conscientiously opposed to test-oath-taking who have lost their jobs as teachers or public employees. Intimidation of dissent, fear of false accusations as Communists or fellow-travelers, pressures to conform with majority views—these, rather than prosecutions, mark the effects of the laws.

The laws in five states requiring registration with public authorities of all members of subversive organizations have not been enforced. No effort has been made to enforce them; they are unenforceable because nobody will admit membership, or because officials are unwilling to proceed against the few known members. In Texas, which requires registration even of Communist students at the state uni-

versity, the known leader of the student Communist group was not disturbed, and one Communist candidate for elective office who publicly challenged the Attorney General to make him register, was ignored.

The laws barring subversive organizations from the ballot are generally ineffective because the Communist Party has been able, up to now, to overcome them in states where it complies with election laws, by filing affidavits that it does not advocate what the law forbids, or by getting favorable court decisions. Only one state high court (Arkansas in 1940) had, up to 1951, upheld the laws. California courts voided one in 1942 and the Washington courts in 1940 overruled the Secretary of State who, without a law, barred the Party. It is too early to appraise the effect on these laws of the U.S. Supreme Court's decision, in the Smith Act case, that at least the Communist Party leaders conspire to advocate the overthrow of government by violence.

Some of the Attorneys-General expressed the view that the subject matter of the state laws is for the federal government to handle—a view evidently widely shared by others. No enthusiasm for enforcement of these laws was expressed by the officials replying. Some said that though they had the laws to deal with subversives, they had no problem, since none were reported.

The few test cases taken into the courts have on the whole sustained the state anti-subversive laws in principle. The U.S. Supreme Court has not struck down loyalty oaths for public employees where the individual had knowledge of the aims and philosophy of the proscribed organizations, state sedition laws, discharges of public employees for holding subversive views and membership in alleged subversive organizations. One state court, New Jersey, voided a loyalty oath for candidates for elective office; Maryland's high court upheld it. The California Supreme Court voided a special oath required of college professors by the state university Board of Regents. With the exception of the Oklahoma public employee loyalty oath, voided by the U.S. Supreme Court because the law did not require "knowledge" of the proscribed organization's purpose, all other oaths stand.

The "Un-American" Committees

A lot of the furor over subversion, indeed its most dramatic and sometimes distorted exposures, stems from investigations by legislative committees set up for the purpose of proving what they already believe

exists. The function of legislative inquiry into the conduct of public business, or the need for legislation, is a vital part of the machinery of democracy. But, when it is directed at opinions and associations, not acts, it reaches into areas where constitutional guarantees of free speech would presumably bar the legislature from acting. Even in dealing with acts, as legislative inquiries sometimes do, they trespass upon the functions of established investigative agencies, such as the FBI or the prosecuting arm of the government.

The ACLU, which vigorously opposes Communist totalitarianism, has also opposed all such legislative investigating committees, but wholly without success, in the face of the powerful alarms which have prompted them. Beginning with the New York State Committee investigating subversion just after World War I and the Russian revolution, and on through the several Congressional committees to the later state bodies, the Union has expressed its opposition on grounds both of constitutional principle and public policy. But legislative inquiries are unreviewable by courts and unresponsive to minority protest. Taking the cue from the special House Committee on un-American Activities, which later became a permanent standing committee, legislatures in seven states have set up similar bodies—fortunately, all temporary. No particular evil in any one of the states seems to have prompted them; they arose from the enthusiasm for combatting subversion on the part of some legislator, or from the pressure by some newspaper or a “patriotic” agency or charges against some particular institution—such as the Illinois probe into the University of Chicago.

It is remarkable that the passion for investigation did not seize more legislatures. But the damage done by some of the more persistent and well-financed committees has been great, conspicuously by the California Committee from 1941 to 1949 under the chairmanship of Senator Jack Tenney, who was referred to in early House Committee on un-American Activities reports as both a probable former Communist and at least a fellow-traveler. He atoned by excessive labeling of individuals and agencies as Communist, in many cases without hearings, and by extreme legislative proposals. So outlandish were his activities that he was removed from his committee and his bills killed. But his extensive listings generally have been taken over by the House un-American Activities Committee and are used both by public officials and private veteran and patriotic agencies to name people “found to be Communist or sympathizers by official government agencies.”

The damage done by other temporary legislative committees has been much less, but all have contributed to the tension and fear over alleged Communist infiltration into unions, civic agencies, schools and colleges, and the entertainment industry.

Four of the seven state committees have held spectacular public hearings at which witnesses, many of them former Communists, charged persons with former associations with Communism. Persons named were given no chance to reply to these denunciations, a fundamental error in the procedures of the inquiries which makes proper evaluation of the testimony impossible. Volumes of reports and transcripts have been issued which find their way chiefly into the hands of officials and interested agencies combatting the Communist menace. There they are constantly used to attack the person named in efforts to remove them from their jobs or at least to injure their reputations.

The ACLU queried its representatives in the states which have had these committees, and all reported their adverse effect on civil liberties by limiting the areas of public debate through confusion of liberals with Communism. Since such terms as “subversion,” “loyalty,” and “Un-American” cannot be precisely defined, and are subject to the definition of the committees and whatever interpretation the tension of the moment prompts, these legislative committees are dangerous to our liberties. While we agree that anti-democratic movements should be fully guarded against, the job should be done not by committees with their sensational approach, which can often present a distorted picture, but by qualified investigative agencies, such as the FBI.

The states which have had these committees are:*

1. *California*: 1941 to 1950 (a discussion of this group appears in column 1 of this page).
2. *Washington*: 1947 to 1949; Joint Legislative Fact-Finding Committee on Un-American Activities. The Committee died for lack of funds, which were refused by the Legislature. None of its bills were adopted. Its chief targets were the University of Washington and Communist infiltration in other political movements. Extensive hearings were held and a brief report made.

* *The record of these committees should discourage any move to repeat the experience in other states. None succeeded in getting recommended legislation adopted. In California and Washington, the chief champions of the investigations were defeated for re-election; and in Illinois, the chairman was discredited by his excesses. This experience is contrary to that of anti-Communist crusaders in Congress.*

3. *Illinois*: 1947 to 1949; Seditious Activities Investigating Commission. This probe was inspired by the American Legion; a voluminous report was made showing, in effect, that no seditious activities were found. The hearings were aimed chiefly at the University of Chicago and Roosevelt College. The bills recommended were vetoed by the governor.
4. *Ohio*: 1951; Ohio Un-American Activities Commission. This inquiry followed the usual style of hearing with former Communists listing names. Its special targets are state university employees. A sweeping report recommending restrictive legislation was issued.
5. *Massachusetts*: 1950; Joint Committee to Curb Communism. No hearings were held; a report was issued in 1951 constituting a survey and "exposure."
6. *New Hampshire*: 1949; Interim Commission on Subversive Activities. A report was published in 1950. It said that it had obtained "very meager" information from law enforcement officials, recommended no legislation, and concluded that exposure of Communism is a job more appropriate for federal agencies. It reprinted the Attorney General's list of subversive organizations. No hearings were held.
7. *New Jersey*: 1947; a committee was set up by legislative resolution, appointed by the governor, to study subversion in the schools but has functioned only in closed meetings.

Arizona and Florida appointed committees which did not function.

Public Opinion

Because of fear of Communist infiltration, so marked since the outbreak of the Korean War, a repressive attitude towards Communism and every movement touched by it, was to be expected. Dominant public opinion, as shown repeatedly by opinion polls, and independently reported by ACLU correspondents all over the country, is for the complete outlawry of the Communist Party.

In this context, state laws are only one expression of a public demand for definite action against what is correctly conceived to be an alien force aimed at American institutions. That security or loyalty is not really achieved by such measures seems to be a consideration far removed from the emotional responses to the danger of subversion. Protests have been made

over the threats such laws present to our basic liberties by such groups as the CIO and other anti-Communist trade unions, social action agencies of the churches of leading denominations, civic agencies such as the anti-Communist Americans for Democratic Action, the American Veterans Committee, and representatives of some ninety national organizations, interested in furthering the United Nations, called together by the American Association for the United Nations to consider U.S. policy. In the past year, particularly, as attacks on the schools mounted, educational and other professional associations have warned against the inroads being made on civil liberties by repressive legislation. There has also been persistent editorial protest voiced by such powerful newspapers as the "New York Times," the "Louisville Courier Journal," the "St. Louis Post-Dispatch," the "Washington Post," the "New York Post," the "Cleveland Press," the "Christian Science Monitor," and among the magazines of large national circulation, "LOOK."

The ACLU Stand

The ACLU, which shares the national concern for security against Communist subversion, has opposed these state laws, as it has similar federal legislation. It has done so solely on the ground of its specialized function—maintaining the principles of the Bill of Rights. *It has no sympathy with Communist totalitarianism which is totally incompatible with political freedom. It recognizes that Communist dictatorship seeks to extinguish democratic liberty wherever it exists.* As far back as 1940, the ACLU, by resolution, formally excluded Communists and other totalitarians and their sympathizers from its governing councils and staff, a resolution faithfully followed ever since.

But to safeguard the principles of civil liberties, which belongs to all Americans, the ACLU holds that Communists, like others, should be prosecuted only for what they do, not for what they believe or advocate, or for what they might do. An exception, which permits a ban based on the standard of "sensitive areas," has been made in the case of certain federal jobs and officers—as distinct from members—of labor unions.

We would not bar Communists from the ballot. Rather let us encourage them to vote and be counted so that we may know their strength or weakness and deal with it in the open political forum.

We oppose means of trying to ferret out Communists from schools, colleges, or the public service by

loyalty oaths. We oppose such oaths on the principle that acts only, not opinions and associations, should be ground for dismissal. Moreover, we regard such a procedure as futile, because Communists, to further their ends, will readily perjure themselves and take the oath.

We would not bar from teaching posts any Communists or other totalitarian, solely on grounds of his belief or association. This policy is best described by the following, from the ACLU's 1952 statement on "Academic Freedom and Academic Responsibility":

It is [a teacher's] duty . . . not to advocate any opinions or convictions derived from a source other than his own free and unbiased pursuit of truth and understanding. Commitments of any kind which interfere with such pursuit are incompatible with the objectives of academic freedom. . . . The ACLU does not oppose the ouster or rejection of any teacher found lacking in professional integrity. . . . On the other hand, the ACLU steadfastly opposes any ban or regulation which would prohibit the educational employment of any person solely because of his personal views or associations (political, religious, or otherwise). Even though a teacher may be linked with religious dogmatists or political authoritarians, the ACLU believes that he must nevertheless be appraised as an individual.

We oppose the idea of registering Communists with a public authority. They would change their names to some innocent looking movement and go further underground rather than have their members thus exposed.

We oppose legislative committees, federal or state, whose purpose is to investigate opinions and associations, not acts.

We believe that all acts against our government—espionage, sabotage, treason, conspiracies to commit unlawful acts, should be vigorously and promptly prosecuted.

We believe that a non-partisan federal commission should be named by the President to soberly study the problem of maintaining both security and freedom, and to recommend appropriate legislation.

These principles are in the best tradition of American civil liberties. They are the common sense way to deal with a political movement, however dangerous—in the open where it can be combatted by the far stronger forces of our democracy. Dangers to the liberties of all inhere in denying them to some. The strength of our democracy lies in our freedom, even for those we fear and hate, not in restraints.

What's To Be Done?

Repeal of repressive laws, born of fears of Communism and subversion, is difficult to achieve. But experience with the old sedition and criminal syndicalism laws, among others, shows that they can be modified and whittled down by obtaining higher court decisions in their specific applications.

Friends of civil liberties can assist by:

1. Reporting to the ACLU every case or issue as it arises, and sending in newspaper clippings of such incidents.
2. Protesting to officials any application of repressive measures.
3. Helping prevent the enactment of new measures by arousing civic agencies, newspapers, and other forces to the dangers of repression, using the facts in this pamphlet to make the case.
4. Informing the public, by letters to newspapers and personal contacts with editors, of the danger of repressive laws whenever proposals come before state legislatures.
5. Sending for additional copies of this pamphlet and distributing them with your own letters to public officials, editors, and others likely to influence action.
6. Advising the ACLU of any changes in laws of your state not covered in this pamphlet, or of any errors which you may note.

For further study of this problem, the following books and articles should be read:

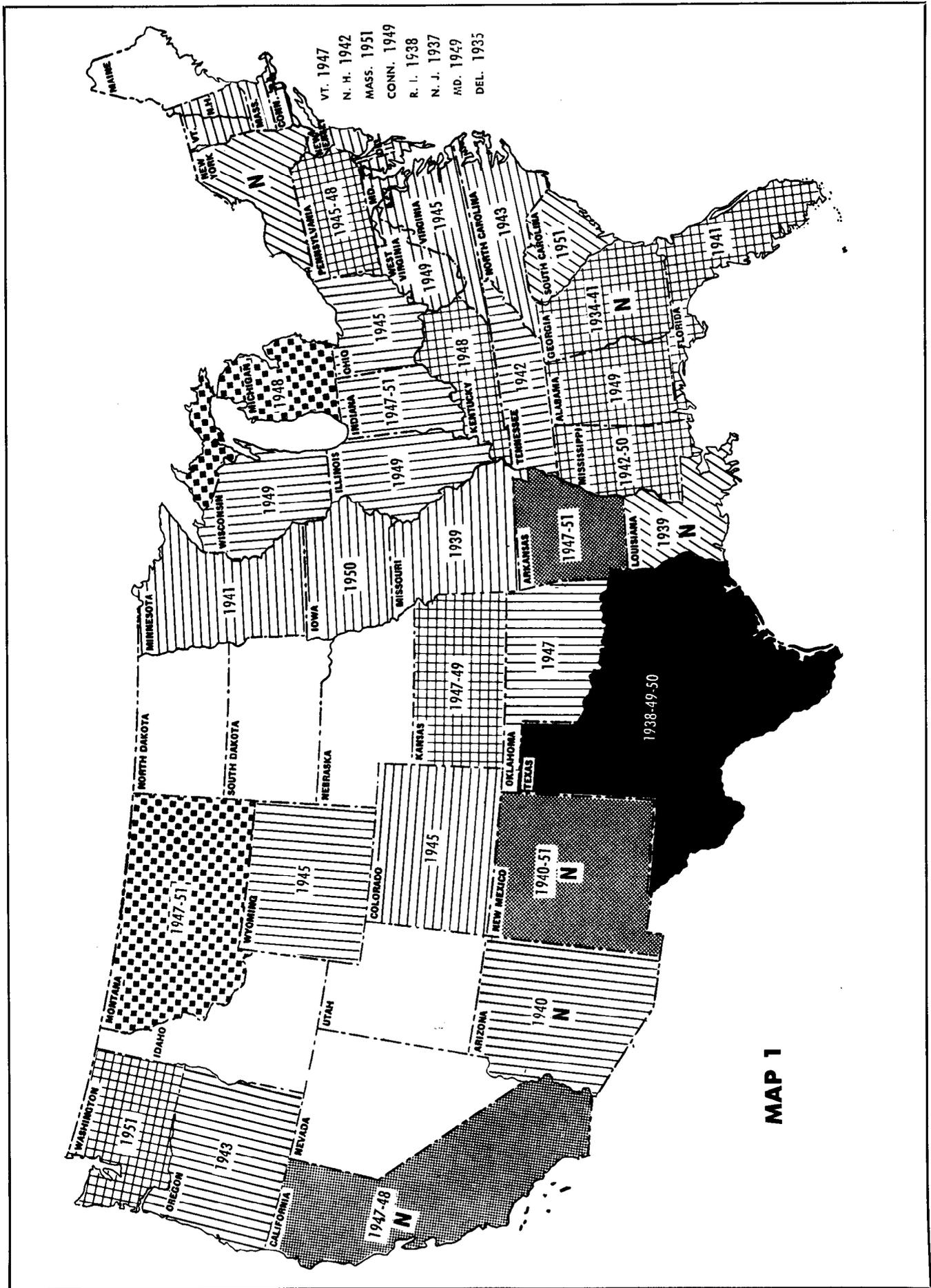
1. *The State and Subversion* by Walter Gellhorn; Cornell University Press.
2. *The Tenney Committee: Legislative Investigation of Subversive Activities in California*, by Edward L. Barrett, Jr.; Cornell University Press.
3. *Un-American Activities in the State of Washington: The Work of the Conwell Committee*; by Vern Countryman; Cornell University Press.
4. *Loyalty and Legislative Action: A Survey of Activity by the New York State Legislature*; by Lawrence Chamberlain; Cornell University Press.
5. *State Control of Subversion: A Problem in Federalism*; Harvard Law Review, December, 1952.
6. *A Report on the Pennsylvania Loyalty Act* by Clark Byse, University of Pennsylvania Law Review, January, 1953.

KEY TO MAP 1

-  States with laws punishing subversive movements, defined variously, but aimed at advocacy of overthrow of the government by force and violence, attributed to Communists.
-  States with laws barring subversive parties from the ballot, defined as Communist, or those advocating violence, or under foreign control.
-  States with laws requiring public registration of all members of subversive organizations.
-  States with laws covering 1 and 2 above.
-  States with laws covering 1 and 3 above.
-  States with laws covering 2 and 3 above.
-  States with all three kinds of laws.

A single date indicates the year in which the first law was passed of the type indicated by the map key. Similarly, two dates refer to two kinds of legislation operative, and three dates to the three kinds of legislation operative.

NOTES: States marked by an 'N' denote the following: Four states deny the ballot to subversive organizations by opinion of their Attorneys-General: Arizona, New Mexico, Georgia, and Kentucky. The California ballot bar applies to primaries only. New York has an old registration law, passed in the 1920's, for secret societies, aimed at the KKK, and invoked ineffectively against Communists. The Louisiana law also antedated the present drive. Massachusetts and Pennsylvania, in effect, in 1952 outlawed the Communist Party.



MAP 1

KEY TO MAP 2



States with special loyalty oath laws for teachers in public schools. (A few have laws for private school and college teachers also.)



States with special loyalty oath laws for all public employees, including in most states teachers also. 'L' in a state means that county and city employees are also covered; 'C' means that candidates for elective office are also covered.



States with special loyalty oaths for civil defense workers, whether volunteer or paid.



States with laws covering 1 and 2 above.



States with laws covering 1 and 3 above.



States with laws covering 2 and 3 above.



States with all three kinds of laws.

A single date indicates the year in which the first law was passed of the type indicated by the map key. Similarly, two dates refer to two kinds of legislation operative, and three dates to the three kinds of legislation operative.

NOTES: States marked by an 'N' denote the following: Virginia's teacher oath is covered by contracts, not law. Arizona's employee oath covers only welfare departments. South Dakota requires all teachers, public or private, who get teaching certificates to take an oath. North Carolina requires no oath for civil defense workers, but sets loyalty standards with dismissal as the penalty. Ohio has a unique requirement of a loyalty oath only from unemployment relief recipients. Utah requires special oaths only from state police.

The map does not show all the states with old special teacher loyalty oath laws passed in the early 1930's under the pressure of the Daughters of the American Revolution. They are included (with dates) when they are reinforced by oaths for all public employees.

A few states require students in state colleges also to take a loyalty oath as a condition of pursuing their education. Most states considerably exempt their alien employees, mostly teachers, from taking oaths, but a few require them to "support American institutions" while on their jobs.

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