September 1, 1967

HONORABLE CARL L. MARBURGER
Commissioner, Department of Education
225 West State Street
Trenton, New Jersey

FORMAL OPINION 1967—NO. 3

Dear Commissioner:

You have requested our opinion as to the constitutionality of the oath of office to which teaching and supervisory employees in the public schools must subscribe pursuant to N.J.S.A. 18:13-9.1 and as set forth in N.J.S.A. 41:1-3.

It is our opinion for the reasons expressed herein that the second paragraph of the statutory oath is unconstitutional, but that the first paragraph of the statute is constitutional and enforceable. You are therefore advised that each and every teaching and supervisory employee in the public schools must conform to the provisions of N.J.S.A. 18:13-9.1 by taking the first paragraph of the oath which appears in N.J.S.A. 41:1-3.

I.

N.J.S.A. 41:1-3 provides as follows:

> "In addition to any official oath that may be specially prescribed, every person who shall be elected, appointed or employed to, or in, any public office, position or employment, legislative, executive or judicial, of, or in, any county, municipality or special district other than a municipality therein, or of, or in, any department, board, commission, agency or instrumentality thereof shall, before he enters upon the execution of his said office, position, employment or duty take and subscribe the oath of allegiance and office as follows:
>
> 'I, ... do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully discharge the duties of .... according to the best of my ability.
>
> 'I do further solemnly swear (or affirm) that I do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this State; and that I am not a member of or affiliated with any organization, association, party, group or combination of persons, which so approves, advocates or advises the use of such means. So help me God.'"

In addition to the persons expressly enumerated in the above statute, the perscribed oath is also required to be taken by every person who applies for a license or a renewal thereof to teach or to supervise in any of the public schools of this state. N.J.S.A. 18:13-9.1[1]

The first paragraph of the oath requires demonstration of support for the State and Federal Constitutions and exacts a promise from the affiant that the duties of the respective office will be faithfully discharged by him in accordance with the best

of his abilities. This paragraph of the oath is similar in both form and substance to the oath required by the Federal Constitution of the President of the United States, and also to the oaths required by the State Constitution for the Governor and Members of the Legislature.[2]

In the case of *Imbrie v. Marsh,* 3 N.J. 578 (1950) the State Supreme Court ruled that the oath prescribed in N.J.S.A. 41:1-3 could not constitutionally be applied to the Governor, members of the Legislature, nor to candidates for these offices since the New Jersey Constitution directly and exclusively prescribed the requisite oath to be administered to these officials. N.J. Const. 1947, *Art.* IV, § 8, *par.* 1; *Art.* VII, § 1, *par.* 1. However, as the State Constitution did not provide specific oaths of office for other public officials, the Legislature was deemed competent to provide such oaths of office for other state officials or employees, as it might require, limited only by pertinent provisions of the New Jersey and the United States Constitutions as might be applicable.

The first paragraph of the statutory oath requires the taker to support the Constitutions of the United States and New Jersey and to discharge the duties of his office faithfully and to the best of his ability. Recently, in *Knight v. Board of Regents of University of New York,* 269 F. Supp. 339 (D.C.S.D.N.Y. 1967) a statute requiring that the subscriber affirm that he will support the constitutions of the United States and the State of New York and that he will be a dedicated teacher was upheld against constitutional challenge. The ruling was rationalized in the following manner:

> "The statutory language of support of the constitutional governments can be substantially equated to that allegiance which, by the common law, every citizen was understood to owe his sovereign . . .
>
> "As for the statutory requirement of professionaldedication . . . [I]n our view, a state can reasonably ask teachers in public or tax exempted institutions to subscribe to professional competence and dedication. . . .
>
> "[W]e interpret the statute to impose no restrictions upon political or philosophical expressions by teachers in the State of New York. A state does not interfere with its teachers by requiring them to support the governmental systems which shelter and nourish the institutions in which they teach, nor does it restrict its teachers by encouraging them to uphold the highest standards of their chosen profession. Indeed, it is plain that a state has a clear interest in assuring . . . careful and discriminating selection of teachers by its publicly supported educational institutions." *Ibid.* 35 U.S. Law Week, p. 2744, *Cf. Imbrie v. Marsh, supra.*

Earlier, the United States Supreme Court saw no constitutional defect in the simple oath to support the Federal Constitution, stating:

> "For the President, a specific oath was set forth in the Constitution itself. Art. II, § I. And Congress has detailed an oath for other federal officers. Obviously the Framers of the Constitution thought that the exaction of an affirmation of minimal loyalty to the Government was worth the price of whatever depriviation of individual freedom of conscience was involved." *Communications Ass'n v. Douds,* 339 U.S. 382, 415, 70 S. Ct. 674, 692 (1950).

In *Imbrie v. Marsh, supra,* our Supreme Court noted:

> "Not only does the [common law] duty of allegiance continue [even in the absence of an oath] but it would seem, moreover, to be difficult, if not impossible, to state the distinction between the scope of our traditional oath of allegiance before 1949 [the date at which the statute in its present form was enacted] and the scope of an oath to support the Constitution." *Id.*, 3 N.J. at 592-593.

It it clear, therefore, that the portion of the state statutory oath which provides that the affiant will support the Constitutions of the United States and New Jersey and will discharge the duties of his office faithfully and to the best of his ability, as set forth in the first paragraph of N.J.S.A. 41:1-3, is constitutional.

II.

The second paragraph of the oath prescribed in N.J.S.A. 41:1-3 requires two additional avowals which are substantially different in content. Firstly, the affiant must swear that he does "not believe in, advocate, or advise the use of force or violence or other unlawful or unconstitutional means to overthrow the government." Secondly he must swear that he is neither a member of, nor affiliated with subversive organizations.

The United States Supreme Court has consistently required utmost precision in the construction of statutes which attempt to regulate constitutionally guaranteed freedom. While recognizing that governmental interests in this area are both legitimate and substantial, the Court has cautioned that "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488, 81 S. Ct. 240, 252, 5 L. Ed.2d 231 (1960). See also *Cantwell v. Connecticut,* 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). The Court has also emphasized that there is a critical relationship between individual freedom and the state's interest in self-preservation, noting that:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that. . . change, if desired, may be obtained by peaceful means." *De Jonge v. Oregon,* 299 U.S. 353, 365, 57 S. Ct. 255, 260.

The United States Supreme Court in a series of decisions has concerned itself with state statutory oaths proscribing such activities as the belief in, advocacy, advice or teaching of certain political doctrines or membership in or affiliation with certain types or organizations. The most recent inquiry by the United States Supreme Court into the validity of state loyalty oaths was in *Keyishian v. Board of Regents,* 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). In that case the Court invalidated an intricate New York statutory and administrative scheme which required newly appointed teachers to answer the following question:

> "Have you ever advised or taught or were you ever a member of any society or group of people which taught or advocated the doctrine that the Government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence, or any unlawful means?"

The Court, in invalidating the New York procedure, emphasized that academic freedom was a special concern of the First Amendment and that the classroom, which is both the source of peaceful social change as well as the market place of ideas, cannot be shadowed by a "pall of orthodoxy." It concluded that the particular requirements of the statutory oath proscribing advice and teaching were not sufficiently precise and trenched upon the freedoms constitutionally protected by the First Amendment. See also *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); *Baggit v. Bullit*, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 275 (1961).

That portion of the second paragraph of the oath dealing with membership or affiliation with subversive organizations also offends the Federal Constitution. In *Elfbrandt v. Russell*, 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966), an Arizona oath was invalidated essentially on the ground that it denied freedom of association as guaranteed by the First Amendment because it failed to confine its scope to persons who joined organizatons with the "specific intent" to further their illegal aims. Rather, the Arizona Legislature was found to have put a "gloss" on the oath by subjecting to prosecution for perjury and to discharge from public office anyone who took the oath and who knowingly became a member of any organization having for one of its purposes the overthrow of the government of Arizona. The Court stated:

> ". . . Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as these which are not restricted in scope to those who join with the 'specific intent' to further illegal action impose, in effect, a conclusive presumption that the members share the unlawful aims of the organization." *Ibid.*, 384 U.S. at 17, 86 S. Ct. 1241 (1966).

The New Jersey oath similarly imputes guilt by mere association, thereby unconstitutionally restricting the affiant's guaranteed right to freedom of association. See also *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964); *Scales v. U.S.*, 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed 2d 782 (1961). These decisions combine to indicate that only active membership with the specific intent of promoting the unlawful ends of the organizations involved may be made the basis of governmental sanctions. In *Keyishian v. Board of Regents, supra*, the Court again affirmed this test:

> "[L]egislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations." *Id.*, 385 U.S. at 608, 87 S. Ct. 686.

The membership and affiliation language of the New Jersey oath is plainly infected with the same constitutional infirmity which the Supreme Court found to be present in the *Elfbrandt, Scales, Aptheker* and *Keyishian* cases, *supra.*

It is not often that the Attorney General is constrained to rule that a state statute, expressive of public policy, is contrary to either the Federal or State Constitution and, therefore, invalid. *Wilentz v. Hendrickson,* 133 N.J. Eq. 447 (Chan. 1943), *aff'd* 135 N.J. Eq. 244 (E. & A. 1944). The Attorney General is constitutional officer and by his oath of office is bound to support both the Constitution of this State and of the United States. *N.J. Const.* 1947, *Art.* V, § 4, *paras.* 1, 3; *Art.* VII, § 1, *para.* 1. In that capacity he must also respect and abide by the decisions of the United States Supreme Court which equally represent the supreme law of the land where federal law controls. *Cf. Jackman V. Bodine,* 43 N.J. 453 (1964); *Sills v. Hawthorne Bd. of Ed.,* 84 N.J. Super. 63 (Chan. Div. 1963), *aff'd per curiam* 42 N.J. 351 (1964). As suggested, the Attorney General is bound to uphold and apply the United States Constitution as the supreme law of the land. See *Cooper v. Aaron,* 358 U.S. 1, 16-20, 78 S. Ct. 1401, 3 L. Ed. 2d 3 (1958). See also, Opinion of the Attorney General F.O. 1964, No. 1.

It is clear that the second paragraph of the oath as provided in N.J.S.A. 41:1-3 could not survive constitutional challenge and therefore must be considered invalid.

III.

Under existing United States Supreme Court decisions, we conclude that the first paragraph of the oath set forth in N.J.S.A. 41:1-3, and required to be subscribed under N.J.S.A. 18:13-9.1 is constitutional, the second paragraph, however, is invalid. Accordingly, the remaining issue is whether the first paragraph of the oath is severable from the second paragraph thereby permitting it to retain its vitality as a legal requisite in accordance with N.J.S.A. 18:13-9.1

We are of the opinion, for the reasons following, that the first paragraph of the statutory oath, N.J.S.A. 41:1-3 is severable from the second paragraph and that it is capable of separate application and enforcement.

N.J.S.A. 1:1-10 provides:

> "If any title, subtitle, chapter, article or section of the Revised Statutes . . . shall be declared to be unconstitutional . . . in whole or in part . . . such title, subtitle, chapter, [etc.] . . . shall to the extent that it is not unconstitutional . . . be enforced and effectuated. . . ."

This statute has recently been interpreted to mean that if one part of a statute is deemed unconstitutional, the remainder may nonetheless stand independently so long as it does not conflict with the overall legislative purpose. *Cf. N.J. Chapter, American Institute of Planners v. N.J. State Bd. of Professional Planners,* 48 N.J. 581 (1967). The courts, in their consideration of the issue of severability, seek to ascertain conceptually what the Legislature would have done if the invalid section had not been included in the initial bill. *Carter v. Carter Coal Co.,* 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936); *Ahto v. Weaver,* 39 N.J. 418 (1963); *State v. Lanza,* 27 N.J. 516 (1958).

> "In statutes not containing a separability clause, the independence of the

valid portion of the statute will be a principal indicia of the legislative intent that the statute be separately enforced." 2 Sutherland, *Statutory Construction* § 2404 (3rd. ed. 1943).

In order to implement these tests, it is necessary to examine the legislative history of N.J.S.A. 41:1-3. An official oath of office was first provided in 1799 (*Paterson*, p. 377):

> "I, ..., do solemnly promise and swear, that I will faithfully, impartially and justly perform all the duties of the office of ..... according to the best of my abilities and understanding. So help me God."

This statute was carried to R.S. 41:1-3 in 1937, and was amended by P.L. 1949, c. 22 to read much as it does now. A revision in 1962 made the statute more concise but did not change its import.

The history of the oath of office demonstrates that the first paragraph of the oath as it presently appears in N.J.S.A. 41:1-3 has existed in the same or substantially similar form since 1799. It was not until 1949 that the Legislature saw fit to add the second paragraph of the oath. Clearly, had the Legislature then been aware that the second paragraph was invalid, it would not reasonably have been willing to repeal the first paragraph of the oath which has been utilized in our State for close to two centuries. Throughout the history of New Jersey, we, as a people, have required our public servants before embarking upon their trusteeship to declare allegiance to our organic system of law, namely the State and Federal Constitutions, and to elicit a promise that the duties of office will be discharged faithfully and well. There is absolutely no evidence in either history or logic which would indicate that the Legislature would be willing to sacrifice this form of oath which is already an integral part of our State and Federal Constitutions merely because the newly developed language which was added in 1949 would subsequently be held invalid.

For the foregoing reasons, it is our opinion that the first paragraph of the statutory oath, as prescribed in N.J.S.A. 41:1-3 is constitutional; the second paragraph thereof is unconstitutional and severable from the remaining portions of the statute. Consequently every person who is required to take an oath pursuant to N.J.S.A. 18:13-9.1 must subscribe to the first paragraph of the oath which appears in N.J.S.A. 41:1-3 as follows:

> "I, ..., do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully discharge the duties of ..... according to the best of my ability."

Since the second paragraph of the oath is unconstitutional, no one can be compelled to subscribe to that portion thereof.

Very truly yours,

ARTHUR J. SILLS
Attorney General

1. The same oath must also be taken by every professor, instructor, teacher or other person employed in any teaching capacity in any State college. N.J.S.A. 18:13-9.2.

2. *Art.* II, §1, *par.* 8 of the United States Constitution provides as follows:

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Art. IV, §8, *par.* 1 of the New Jersey Constitution provides as follows:

Members of the Legislature shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully discharge the duties of Senator (or member of the General Assembly) according to the best of my ability." Members-elect of the Senate or General Assembly are empowered to administer said oath or affirmation to each other.

Art. IV, §8, *para.* 2 of the New Jersey Constitution provides as follows:

Every officer of the Legislature shall, before he enters upon his duties, take and subscribe the following oath or affirmation: "I do solemnly promise and swear (or affirm) that I will faithfully, impartially and justly perform all the duties of the office of . . . . . , to the best of my ability and understanding; that I will carefully preserve all records, papers, writings, or property entrusted to me for safe-keeping by virtue of my office, and make such disposition of the same as may be required by law."

Art. VII, §1, *para.* 1 of the New Jersey Constitution provides as follows:

Every State officer, before entering upon the duties of his office, shall take and subscribe an oath or affirmation to support the Constitution of this State and of the United States and to perform the duties of his office faithfully, impartially and justly to the best of his ability.

February 19, 1969

HONORABLE CHARLES R. HOWELL
Commissioner of Banking and Insurance
State House Annex
Trenton, New Jersey 08625

FORMAL OPINION 1969—NO. 1

Dear Commissioner Howell:

You have requested our opinion as to whether an insurance company, as a subrogee, is a "party in interest" within the meaning of *N.J.S.A.* 39:6-100, in order that it may file for payment from the Motor Vehicle Liability Security Fund. For the reasons to follow, it is our conclusion that a subrogee in the position of the claimants hereinafter referred to should be permitted to file with the Fund.

You have advised us that the Chesapeake Insurance Company, a Maryland corporation authorized to do business in New Jersey, (hereinafter referred to as "Chesapeake") was declared insolvent by a Maryland court. Due to its insolvency, various claims arising out of automobile accidents allegedly caused by its insureds remain unpaid. In each instance, the injured party was compensated pursuant to his