Appendix to the Journal of the Assembly

LEGISLATURE OF THE STATE OF CALIFORNIA
1968 REGULAR SESSION

REPORTS

January 8, 1968–September 13, 1968

HON. JESSE M. UNRUH
Speaker

HON. CARLOS BEE
Speaker pro Tempore

HON. GEORGE ZENOVICH
Majority Floor Leader

HON. ROBERT MONAGAN
Minority Floor Leader

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Chief Clerk of the Assembly

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JOINT LEGISLATIVE RETIREMENT COMMITTEE REPORT

Volume 1 1968 Number 4

SUPPLEMENTAL REPORT OF THE JOINT LEGISLATIVE RETIREMENT COMMITTEE

To the 1968 General Session
of the California Legislature

AB 1672, Chapter 1417, 1963

MEMBERS OF THE COMMITTEE

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Roberta Chock, *Committee Secretary*

COMMITTEE LETTER OF TRANSMITTAL

JOINT LEGISLATIVE RETIREMENT COMMITTEE
CALIFORNIA LEGISLATURE
March 1, 1968

HONORABLE JESSE M. UNRUH
Speaker of the Assembly

HONORABLE HUGH M. BURNS
President pro Tem of the Senate

Gentlemen:

We are submitting herewith to you and to the Honorable Members of the California Legislature a supplemental report of the Joint Legislative Retirement Committee for 1968.

Our purpose in presenting this report at this time is in response to the requests of members of both houses regarding published articles covering the STRS which appeared in the *CTA Action*, a teachers' trade publication, and in the San Leandro *Morning News*.

Thorough investigation by the committee of each charge made by the CTA has been documented from official records, and this detailed information is available in committee files upon request.

However, for your convenience we have reduced the material to a review of the salient issues raised, with a summary of our findings following each charge. This digest constitutes the body of our report, attached hereto.

Respectfully submitted,

E. RICHARD BARNES, *Chairman*
CLAIR BURGENER, *Vice Chairman*
HARVEY JOHNSON
JOHN SCHMITZ
L. E. TOWNSEND
ANTHONY BEILENSON

PREFACE

On Friday, September 22, 1967, at a board meeting of the State Teachers' Retirement System, Mr. William Barton, who is legislative representative of the California Teachers' Association, read a prepared statement which was released to the press on September 24, 1967. Five days later the first of a series of five articles was published in *CTA Action* (a teachers' trade paper), followed in November by three articles in the San Leandro *Morning News*.

As far as can be determined, only two other publications picked up the story. The Sacramento *Union* gave it cursory mention with no followup, and the *California News Reporter*, a limited-distribution publication, investigated the controversy and charges, and published its own series of articles in November 1967.

Because of the inordinate amount of reaction on the part of teachers responding to inflammatory insinuations and sensational charges made by the CTA, the Joint Legislative Retirement Committee staff was assigned to collect all available published material, research the background surrounding the STRS and other departments of state government, and prepare a commentary on the allegations and accusations. This has been done, and the results are available in committee files for any who want to consider this matter in detail.

The staff discovered that in too many instances the CTA and the *Morning News* reporter accepted misleading information as fact, and proceeded to elaborate on it, resulting in some frightening premises without factual bases. It is difficult to predict at this point what the long-range effect of this activity on the part of CTA may be. One of the immediate results could be a thwarting of legislation introduced to correct some of the more critical deficiencies within the Retirement System.

Certainly the reputation of certain state departments will be unfairly diminished in the eyes of many California teachers. The CTA itself must undoubtedly come in for a large share of blame and loss of faith because of the hysteria created over alleged abuse of the Teachers' Retirement System, plots to divert the teachers' contributions from legitimate use, and conspiracy to destroy individuals.

In the summary which follows, the charges which deal with the seven main issues are considered separately, with quoted excerpts from *CTA Action* and San Leandro *Morning News*. The complete and detailed commentary may be requested from committee files.

STATE TEACHERS' RETIREMENT SYSTEM SUMMARY

AB 2147

The *Morning News* asserted:

"Still another skirmish won by the political powers was the move to put a political appointee at the head of STRS—booting civil service Director Leo Reynolds down to Assistant Director"

CTA Action continued·

"Barton charged a move to oust STRS Executive Officer Leo J. Reynolds is part of a broader issue on how STRS funds are to be invested. If successful, he warned, Reynolds' ouster would be only a prelude to the replacement of present Board members with new faces acceptable to those who want control of the system.

"Reyonlds' ouster is provided for in AB 2147 by Assemblyman Barnes, who is chairman of the Joint Legislative Retirement Committee."

On November 17 the *CTA Action* reported

"At the last meeting the (CTA Retirement) Committee voted to ask State Council approval of legislation to repeal provisions of AB 2147. This measure eliminates the present civil service post of the STRS and creates another chief to be appointed by the STRS Board and to serve at its pleasure."

Finally, the *Morning News* predicts.

"With a study now going on to interview and screen men for the newly created political plum—all teachers' eyes are firmly fixed on just who will get the Governor's nod. If it should go to anyone backing the stock investment plan—or to anyone not willing to continue the conservative investment policies STRS has laid down—fireworks will flare."

These statements ignore certain relevant factors which bear measurably upon the true nature and effect of AB 2147. It is quite clear that the intent is to encourage legislation to repeal this bill. But with considerable effort having been expended to screen the applications of 189 candidates for the position of chief executive officer of STRS, the board is prepared to select the most highly qualified individual at their February board meeting. A serious consideration, then, is the effect of such a repeal measure on the new chief executive officer, who will have, in good faith, accepted the board's appointment.

Next, in spite of intimations to the contrary, Mr. Reynolds' only change at STRS was of title (from "executive officer" to "assistant to chief executive officer") and in job specifications whereby he may now concentrate on work in the area in which he is best qualified, and being relieved of the responsibilities of management. He lost nothing in salary, pension rights or other fringe benefits.

Third, the intimation that the new chief executive officer might be able to plunge STRS funds into stock investments is entirely faulty, since at this point even the STRS Board could not make such a decision. Considering the constitutional prohibition against Teachers' Fund investment in equities, a statewide vote of the people is needed to remove this restriction, before the board could even consider policy in that direction. The province of the system chief will be to advise, and then to execute board policy decisions.

A further factor to consider is that with the appointment of chief executive officer being made by the board, teachers now have a larger voice in this selection through their three representatives on the board.

Mr Barton, in his address to the board on September 22, 1967, stated.

"The question remains unanswered as to Mr Reynolds' ability to adequately administer the System. We doubt that it is possible for any human being to evaluate this, and would doubt that even Mr. Reynolds could answer for himself the question of his efficiency as an administrator. For years the operation and administration of the System have been starved for manpower, money and machines to the extent that no person could, in all probability, keep the accounting records on a current basis and cause the System to operate smoothly and efficiently."

The Peat, Marwick, Mitchell and Co. management survey report of May 1967 provides some insight into this matter from an objective point of view. Their findings on page VII-3 and -4 state in part:

"The present Executive Officer is extremely competent in the technical matters of the System as they relate to the execution of the existing and prior laws. Section heads have to rely on top management to provide day to day technical guidance because when policy decisions were made they were not formally documented. As a result of this situation, together with the Executive Officer's technical background, delegation of responsibilities to division managers and section heads has not been achieved. . . .

"We advocate that the Executive Officer should not be involved in the routine flow of work and that this work be delegated to the appropriate sections. . . ."

It is well recognized in the field of business management that daily workflow should continue below the executive level, so that those energies may be directed to top-level supervision. If this has been the key to former loss of efficiency, it would be reasonable, then, to endeavor to correct that misdirection of effort.

Indicative of the consequences of hasty action based on unverified statistics was the decision of the board to move toward a change in interest rate accruing to teachers' accounts from the present 4 percent to 4.5 percent. Mr. Reynolds recommended the increase based on a purported actuarial rate on investments of 4.705 percent, while noting that the Public Employees' Retirement System had achieved only 4¼ percent increase in the past year.

However, it soon developed that these figures were misleading and could not be used for such a purpose. Since the STRS actuary had retired in February 1967, the PERS actuary was enlisted to develop true calculations of interest rate earned, and the following proportions were revealed for the two systems:

Fiscal year	*PERS*	*STRS*
1963	4.08%	4.06%
1964	4.16	4.11
1965	4.25	4.19
1966	4.36	4.23
1967	4.51	4.39

"The formula used to calculate yield is income divided by average investments, including accrued interest, minus one-half of the income:

$$\frac{I}{\frac{A+B}{2} - \frac{1}{2}I}$$

I = income for the year.
A = opening book value plus accrued interest.
B = closing book value plus accrued interest.

"The only adjustment that is made for profits or losses is by the lower or higher closing book value resulting from profit or loss transactions."

Mr. Anderson, acting chief executive officer, then brought this to the attention of the board at its January 19, 1968, meeting, and the board rescinded their previous action approving a rate increase, and deferred any such adjustments until a complete actuarial survey could be completed and the results analyzed.

STARVATION OF STRS BY STATE DEPARTMENTS

CTA Action states:

"[Mr. Barton] said the system has been subjected to deliberate financial 'starvation' of its administration through the withholding of funds for personnel and equipment by the Department of Finance 'to make Mr. Reynolds look inefficient.'

"Barton cited records going back to 1961 to show that, whereas 148.3 new positions had been requested by Reynolds, only 67.3 had been authorized. Today the system has an authorized staff of 146, but only 126 positions have been filled. Funding for the 20 unfilled positions is being demanded by Miss Hanrahan."

The following table, submitted by the Legislative Analyst on February 13, 1968, shows the number of authorized positions in the Teachers' Retirement System, and the money expenditures from the General Fund.

Fiscal year	*Number of authorized positions*	*Total expenditures*
1964–65 (actual)	98.8	$804,417
1965–66 (actual)	113.1	921,771
1966–67 (actual)	134 6	945,758
1967–68 (estimated)	151 6	1,214,856
1968–69 (estimated)	166 7	1,608,193

Mr. Alan Post explained further:

"For the current fiscal year 151.6 authorized positions were provided including 15 (11 permanent and 4 temporary help) positions which were provided by the Legislature as an improvement in the level of service. In addition five positions have been added administratively during the current fiscal year, 1967–68, which also constitute an improvement in the level of service

"For the budget year 1968–69 a total of 166 7 positions are proposed in the budget including 15 1 new positions, approximately 10 of which will provide an improved level of service

"As shown in the table above the actual expenditure for the support of the system during the 1966–67 fiscal year was $945,758 from the General Fund."

Referring to the legislative session of 1967, Mr. Barton spoke of Assembly Bill 2150 by Assemblyman Barnes It was the successor to Assembly Bill 93 of the 1966 session which had passed the Assembly but was not adopted by the Senate. Assembly Bill 2150 changed the distribution of administration cost of the Retirement System to a basis of 50 percent from the state, 25 percent from employing districts, and 25 percent from teacher reserve funds. He deplored the "betrayal" of CTA, which, according to Mr. Barton, supported this legislation in return for a promise that funds would immediately be released for the purchase of EDP equipment for STRS.

Mr. Barton continued, as quoted by *CTA Action*

"Your records are handled by outmoded, obsolete automatic accounting equipment abandoned by most large private industries many years ago. Skilled operators can make about 150 entries per minute. The SERS accounting has been operating for several years with high-speed Honeywell computers, said to be capable of several thousand entries per second.

"The CTA agreed to legislation several years ago which would provide the money for improved equipment and better service. Fulfillment of these promises has been denied amidst a ridiculous, buckpassing set of excuses."

Mr. Alan Post, in his letter dated February 13, 1968, explained:

"For the current fiscal year, 1967–68, it is now estimated that an amount of $1,214,856 will be expended by the system. It is important to note that this again is all from the General Fund. Thus, for the current fiscal year the General Fund is supporting a considerable increase in proposed improved level of service for the members of the system.

"Chapter 1476, Statutes of 1967 (AB 2150), provides that effective July 1, 1968, the administrative support of the State Teachers' Retirement System will be funded 50 percent by the General Fund, 25 percent by teacher members and 25 percent by school districts. Currently administrative support comes from the General Fund.

"Although the sharing of administrative expenses resulting from Chapter 1476 is not effective until the 1968–69 fiscal year, the Legislature and administration have provided funds from the General Fund during the current fiscal year for an improved level of service in order that work can begin on the conversion to automatic data processing. With the positions authorized in the current budget and the positions proposed in the 1968–69 fiscal year budget, the system will have a full complement of 26 data processing positions. Conversion to monthly rather than annual reporting of contributions and service by the counties will commence on July 1970."

ELECTRONIC DATA PROCESSING FOR STRS

CTA Action asserts that *"Funds to provide equipment and personnel to handle the new computerized methods were allocated to STRS—then iced over in freeze orders by two State administrations."*

At the strong recommendation of the Legislative Analyst, Auditor General and Department of Finance, the first request made by STRS for data processing equipment allocation was granted in the 1966 Budget Act as Item 317. Quite possibly such a request might have been granted earlier had it been made. It must also be recognized that the "freeze" was imposed universally on all state departments, with no special discrimination practiced on the Teachers' System.

Item 317 was conditional, as explained by Roy M. Bell, Assistant Director of Finance, on November 23, 1966. He said that the "appropriation made by this Item was . . . predicated on assurances to the Legislature that allocation of funds would be approved only after thorough analysis had demonstrated that the proposed new EDP installations were in the best interest of the state." Total allocation of these funds was deferred until such final plan could be approved.

Such stipulation was entirely reasonable, since it was determined by the Departments of Finance and General Services, the Legislative Analyst and the Auditor General, and by the firm of Peat, Marwick, Mitchell and Co. in their management survey, that preliminary updating of crucial records by STRS must take place before any installation of data processing equipment could be effected. But this in no way indicates that the state departments involved consider EDP not to be an essential goal for the Teachers' System.

CONSPIRACY

CTA Action headline reads "WHO WANTS TO CONTROL YOUR RETIREMENT SYSTEM" and a cartoon is shown of a safe being burglarized and titled "Let There Be Light."

The article begins:

"Who wants control of the billion dollars of teachers' money now on deposit in the State Teachers' Retirement System?

"Recent events which bear resemblance to an international spy novel make it imperative for teachers to face this question, and to demand clear answers.

"It's your money. Somebody is behind the moves to make sure that your representatives have no controls over investment and operation of these funds. Why?"

These lead paragraphs by *CTA Action* are calculated to put state government "on the spot," to force a defense of legislative actions, and to lay groundwork for a repeal of AB 2147 and AB 2150 with a return to the management practices that have brought STRS to the condition it is in today.

As has been repeatedly pointed out, the teachers' funds are no more in danger than they have ever been Investment policy is decided by the nine-member board, under such restrictions as are outlined in the state law governing the State Teachers' Retirement System.

Further, all financial practices within the system are subject to continued and careful scrutiny by the board, by the Auditor General's office and the Legislative Analyst's office, and three state departments: General Services, Finance, and Management Services.

In its second article, the San Leandro *Morning News* stated

"California Teachers Association, the powerful organization that represents teachers from all over California, has claimed the billion dollars

in teachers' money is the actual prize of the political warfare being waged over the STRS.

"Under present policy, this money only goes into the most conservative investments—bonds, with a possibility of putting some of it to work on blue-chip mortgages after competent study.

"Yet several factions in Sacramento would like to see the billion dollars turned loose in the stock market—a move Miss Hanrahan and the CTA has battled.

"'We are not against stock investment—if we had a fully qualified man on the STRS staff as a stock consultant,' a CTA official declared

"'Since such a man would cost around $80,000 annually—and we can't even get the money for updated equipment yet—we certainly do not feel we should start playing the stock market with the retirement money of our teachers,' he added"

The "prize" referred to does not exist as such, since investment of each dollar of teacher contributions is controlled by statute. These investments, in bonds only according to present policy decision of the board, are handled by the very competent and reputable investment officers at the Public Employees' Retirement System.

The Teachers' Retirement System can in no way invest in common stocks unless the State Constitution is amended by a statewide favorable vote of the people. At CTA request, STRS was specifically not included in provisions of Proposition No 1, permissive legislation which passed in 1966 allowing for rigidly controlled investment in stocks by all other public retirement systems.

Jack Germain of the *California News Reporter* found the matter of sufficient import to spend several weeks investigating all sides of the controversy. That paper's coverage was imminently fair and unbiased, and editorial comment at the conclusion of the series of four articles on the subject stated clearly their disapproval of the practice of indictment by innuendo.

The *California News Reporter* maintained ". . . we cannot avoid the following conclusions. There is not now, nor do we suspect there ever was, a 'conspiracy' or plot to downgrade the influence of STRS teacher-members over the system's policy-making board;

"The $1,235,000,000 in member contributions now on deposit in the fund are in no kind of danger, either from criminal conspiracy, political intrusion or administrative manipulation."

ATTACKS ON THE PEAT, MARWICK, MITCHELL AND CO. SURVEY

Marilyn Baker, *Morning News* reporter, asserted.

"Now a special study of the STRS has come under fire.

"This study, done by the Certified Public Account firm of Peat, Marwick, and Mitchell touched off the bumping of civil service director, Leo Reynolds down to 'special assistant' and the opening of the top slot in STRS to Governor's appointee"

First, the PMM report made no recommendations to fire or "bump" anyone, and AB 2147 specifically provides that the appointment of chief executive officer shall be by the board, not the Governor.

CTA Action made the startling disclosure that PMM Company *"received the study-job on the strength of the recommendation of William Merrifield, state Auditor General, and was the only firm he recommended."*

Selection of the company to conduct the management survey as directed by the Legislature was made by the Joint Legislative Retirement Committee, after careful consideration being given to proposals from 10 of the top firms of the nation. The Joint Committee on Legislative Organization concurred, as required by law, after a review of the proposals and contract.

CTA Action continued:

"Before Merrifield took up his present post in government, he was a partner of P M and M, in charge of their Chicago office for a number of years."

Investigation reveals that Mr. Merrifield was never a partner of PMM, although he worked as their Chicago office manager for less than two years. Twelve years ago he resigned to accept the post of Auditor General of California, receiving top rating in competitive examination

The San Leandro *Morning News* cast aspersions on the purity of PMM motives in making their recommendations for STRS. by referring to their activities in the executive-placement area, implying strongly that their report was geared to placing one of their own men in the position of chief executive officer In actual practice, of course, the salary offered by the STRS of $22,300 is significantly lower than the $25,000 yearly commanded by PMM executive placements

This company was not asked to recommend prospective candidates for this position, and they did not offer to do so The STRS Board itself advertised for such persons, and interviewed the more likely of the nearly 200 who responded. From these a selection was made on February 16, 1968, of Mr Michael N. Thome of Minnesota, the executive officer of their State Employees' Retirement System.

Soon after these charges were made, the *CTA Action* reported that their retirement committee had *"agreed that a representative will attend all future STRS Board meetings, and that conferences will be sought*

with the Legislature's Joint Committee on Retirement and a spokesman from the management consultant firm of Peat, Marwick, Mitchell and Co.

". . . Went over the consultant firm's report on STRS on an item-by-item basis and took a position on many major recommendations."

As of March 1, 1968, no conferences have been sought by CTA with the Joint Retirement Committee, and our information is that they have not met with Peat, Marwick and Mitchell, either The CTA hired an actuary, Mr J. P Dandy, FSA, to make an analysis of the PMM survey report, and a copy of this analysis was sent to the joint committee chairman on December 12, 1967. Mr. Dandy supported and approved the recommendations of PMM on the greatest number of points upon which he commented It was, all in all, an accurate and fair appraisal. However, to date the CTA has not seen fit to undo editorially any of the mischief created by their earlier charges, even when the errors have been pointed out personally to their legislative spokesman.

UNJUSTIFIED COMPARISONS OF STRS WITH PERS

CTA Action asserts.

"The STRS and the State Employees' Retirement System (SERS) are sufficiently comparable in size of membership and in numbers of retired teachers to be compared in their administration. In the current budget, 143 more positions were authorized for SERS than for the STRS—289.1 to 146 6. In 1965–66, the most recent year for which final figures are available, SERS administration cost $2.4 million as compared to less than $1 million for STRS. Similar ratios have persisted for many years."

Such a comparison of systems is absurd and not realistic. Over the past five years the records will show that the STRS received a 90 percent increase in staff with a 41 percent increase in workload, while PERS received a 17 percent staff increase with a 30 percent workload increase.

STRS administers a one-formula operation for approximately 343,000 total members, of which about 40 percent are not active in that they do not contribute regularly to the system or are on the retired list. There was an administrative cost in 1966–67 of $945,758. That cost, presently borne totally by the State General Fund, by virtue of 1967 legislation will be apportioned 50 percent from the state, 25 percent from school districts, and 25 percent from investment earnings, beginning July 1, 1968.

The Public Employees' Retirement System furnishes service to STRS (investments), State of California, University of California, cities, counties, school districts, and other entities for a grand total of 2,596 governmental agencies. A number of different formulas must be serviced, including safety member (police and fire) formulas, Social Security, hospital and medical insurance programs. Also, investment of some

$1⅛ million must be made each working day. PERS operating costs in the 1965–66 fiscal year were $2,839,552, reimbursed $2,055,146 from interest earnings, with the remainder spread between the contracting agencies

APPOINTMENTS, ELECTIONS AND VOTING ON THE STRS BOARD

Coming at a time when the STRS was immersed in reorganizational efforts, the annual election of officers of the board provided CTA with additional leverage in their attempts to upset the orderly accomplishment of needed improvements.

By insinuating a sinister meaning to each phone call and personal conversation that could be injected into the situation, CTA cast a cloud of suspicion on a very normal and routine action by a respectable body of citizens

Quite simply, the law provides that the board shall elect one of its number to act as chairman, and another as vice chairman, each year. There is no requirement, and indeed no governmental precedent, which dictates that any individual shall or shall not be repeatedly reelected. The law further provides that upon expiration of a term of service for any board member, or in case of death or resignation, such vacancies shall be filled by appointment by the Governor

Any overt or direct attempts to circumvent the provisions of the law should immediately become suspect, but none of the actions taken in this instance, either in appointments or in elections, were in any way irregular. Therefore, CTA would appear to be out of order in raising such issues serving only to divert attention and create suspicion where none is deserved

The *Morning News* reporter referred to another internal problem which the board faced and solved with less flurry than the newspaper would have us believe. Although the reporter incorrectly stated the problem, it actually involved the voting privileges of proxies of the ex-officio officers on the STRS Board

It was determined after the Attorney General had issued an opinion that only one deputy of a constitutional officer might vote at any one time. Of course this does not affect the voting of the officers themselves, should they decide to attend in person, and in no way concerns the voting of the deputy from the Department of Finance, since that director is appointed and not elected.

CONCLUSIONS

It goes without saying that the teachers have a substantial vested interest of some $1.2 billion in the State Teachers' Retirement System. And they and other taxpayers have the added liability of almost $3.1 billion to guarantee that vested interest. Thus it can be reasonably argued that the taxpayers, too, through their elected representatives, have the right to insist on the best possible management of the system.

As spokesman for a large number of teachers in California, CTA should also share in the concern for the teachers whose money is deposited They should be quick to recognize deficiencies in a system which is two years behind in fiscal reporting, where methods of record-keeping, calculation of accounts, verification of service and office management have not kept pace either with the times or with continually increasing membership responsibilities.

It has become apparent from a research of legislative activity in the past decade that the STRS has been a subject for continued interest and concern. Frequently it is found that hasty action is worse than no action at all, but it is the consensus of opinion of a great many knowledgeable people that it is time to take the first definitive steps toward assisting the board in creating a climate conducive to accomplishing needed improvements in their system.

The management system envisioned by the board will result in accurate annual reporting, up-to-date management of members' accounts, and installation of electronic data processing. With such efficient business practices, and with CTA coverage of policy decisions made in monthly STRS Board meetings, it will not be difficult for teachers to be as well informed as they wish to be.

The plea should now be for a renewal of faith and confidence on the part of teachers, the CTA, and state government A united effort can accomplish in months what it would take years to do with these great forces divided and suspicious of one another.

A very thoughtful appraisal of the possible consequences of these activities was made in the *California News Reporter* following its investigation of the controversy. Published in their November 24, 1967, issue, it states in part.

"If, in final analysis, the CTA's decision to touch off the current dispute by over-statement and sensationalism brings an ultimate net gain to STRS and the State, then the means—no matter how distasteful—will have served an appropriate end.

"But if the harvest of the CTA's deliberately hostile seed is continuing, destructive dispute, petty political vendettas, further suspicions and loss of confidence in an essentially sound and vital public institution, then the teachers and the taxpayers will have been gravely disserviced.

. . . .

"We submit that the CTA has a traditional right and a moral responsibility to represent the interests of its members in the Retirement System, to advocate general policies and administrative direction before the Legislature and the STRS Board, and to press for optimum services and benefits to its teacher members. But the CTA has neither statutory authority nor public mandate to intervene—by invitation or influence—into the legislative and executive decision-making responsibilities of state government."

"I support the report generally, but I have reservations to those portions of the report which tend to imply to some of the interested parties a less than sincere interest in the welfare of the retirement system.

I feel the purpose of this report is to clarify an unfortunate series of events in 1967 and not to chastise anyone. It is not to imply that any party mentioned was motivated by a lack of concern for the welfare of the system and its teacher members.

I would, however, add that this does not mean that recent accusations and actions were not unwise and divisive.

SENATOR CLAIR BURGENER

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CALIFORNIA LEGISLATURE

Volume 4 Number 22

A Final Report of the

ASSEMBLY COMMITTEE ON REVENUE AND TAXATION

A Study of

AIRCRAFT ASSESSMENT IN CALIFORNIA

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CALIFORNIA LEGISLATURE

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Majority Floor Leader

HON ROBERT T MONAGAN
Minority Floor Leader

JANUARY 1968

LETTER OF TRANSMITTAL

January 1, 1968

HON JESSE M. UNRUH
Speaker of the Assembly, and
MEMBERS OF THE ASSEMBLY
State Capitol
Sacramento, California

Dear Speaker Unruh:

Transmitted herewith is a report on the Study of Aircraft Assessment in California which recommends legislation for a uniform method of aircraft assessment in the state to take the place of Senate Bill 337 which expires on July 1, 1968 This study was undertaken pursuant to House Resolution 217.

The committee wishes to thank you and your staff for the support you have given us in our work

Sincerely,

JOHN G VENEMAN, *Chairman*
March K Fong, *V. Chairman*
William T. Bagley
Kenneth Cory
Wadie P. Deddeh
Bill Greene
Frank Lanterman
(with reservations)
Robert Monagan
Robert Moretti
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I. INTRODUCTION

In a letter dated March 15, 1967, Herbert F Freeman, Executive Secretary of the State Board of Equalization, informed the Chairman of the Assembly Committee on Revenue and Taxation, John G. Veneman, that the board could not, on the basis of present law, decide upon a method on which to instruct the county assessors to apportion the value of commercial aircraft for property tax purposes Stated Freeman:

> "The board considers the allocation of air carrier flight equipment a problem to which the laws of the state provide no answers. In this situation, the board's rulemaking power may and has been invoked to provide a temporary guide to county assessors. We believe, however, that the substantial legal and policy questions involved call for a permanent solution by the Legislature "

The board indicated that its interim rule was, however inadequate as a permanent solution to the problem States the board in Section 202, subsection (c), paragraph (2) of the California Administrative Code·

> "The rule is adopted as an interim rule, however, because the board has requested the Legislature to review the taxation of mobile flight equipment of airlines in the light of decisions of the United States Supreme Court in *Braniff Airways, Inc. v. Nebraska State Board* (1954) 347 U S 590 and *Central Railroad Company of Pennsylvania v Pennsylvania* (1962) 370 U S 607 . . , which would permit the Legislature to provide for a method of allocation that would insure a more adequate and equitable assessment of aircraft."

The information communicated to the committee indicated that (1) the home port method of allocating value was unacceptable to it, (2) it felt that there was in existence a better method of allocation than that promulgated in the board's interim rule, and (3) any of the alternative formulas would have to be based on statute rather than case law. In the absence of such a statute the board concluded that any solution would have to be a legislative solution

Accordingly, the Revenue and Taxation Committee pursuant to HR 219 (Veneman), commenced the present interim study of the subject. During the 1967 session there was enacted into law Senate Bill 337 (McAteer) which was the same in substance as the board interim rule The bill, sponsored by the airlines, was devised originally as a permanent solution However, the Senate Revenue and Taxation Committee amended it to be effective only through June of 1968, giving time for a legislative investigation The Assembly Committee on Revenue and Taxation agreed with the bill in this form and the airline industry during the formal and informal hearings on the bill promised their full cooperation

The objective of the study was to determine what method of allocating value is most appropriate in terms of the amount of revenue raised for local government, the economic implications, equity to the

taxpayers, and the limitations that Congress, the courts, and the United States Constitution have placed on the taxation of interstate and foreign commerce

Specifically, it was concluded during the hearings and informal discussions on Senate Bill 337 that there was a real lack of empirical data on the effect of the alternative allocation methods

II. THE BACKGROUND

The problem came to the Legislature as the result of a series of events commencing in 1965 In that year the Aircraft Assessment Advisory Committee was formed as a body attached to the Assessment Standards Committee of the County Assessors Association The committee was formed to decide upon the proper method for allocating the value of the mobile flight equipment of commercial air carriers flying in interstate and foreign commerce At the time there was considerable confusion as to what the law was The California statutes had nothing to say specifically about the valuing of air carriers for property tax purposes. Sections 1101–1104 of the Revenue and Taxation Code (referring to "rolling stock") are the only provisions dealing specifically with the taxation of interstate commerce The sections were enacted in 1935 at a time when the airline industry was hardly worthy of consideration for tax purposes Without specific statutory direction, the assessors were left substantially to their own invention, subject to the limitations placed on them by the courts

We shall go into the court cases in more detail below In autumn of 1966 the Aircraft Advisory Committee recommended to the Assessment Standards Committee the adoption of a proposed Assessor's Handbook Section 577 [1] The allocation formula contained therein was most often referred to as the modified home-port formula What the formula essentially requires is that the state or county of domicile tax to the full extent, minus the amount that could be levied by another jurisdiction on an apportioned basis [2] The section was approved by the Assessment Standards Committee of the Assessors Association and subsequently by the Assessment Standards Division of the State Board of Equalization [3] Stated the handbook

> Aircraft operating out of California in interstate and/or foreign commerce, owned by air carriers having a home-port or domiciled in California, shall be assessed at their full value less that portion of their value which is allocable to other jurisdictions where they acquired a situs for apportioned taxation [4]

Under the proposed handbook section, intrastate flights of nondomiciled airlines would be apportioned as they had been previously

> In computing the time which is attributable to each non-domiciliary county, the ground time plus ½ of the inbound and outbound flight time should be used.[5]

For interstate flights of nondomiciliary airlines

> The ground time plus ½ of the inbound and outbound time is computed and included for flights in California, and the ground time plus the flight time from or to the state line is similarly computed and included for interstate flights [6]

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[1] Testimony of Hugh Strachan, tax counsel, State Board of Equalization, before the Committee, September 6, 1967

[2] AH 577, *Assessors' Handbook Aircraft Assessment Procedures* (Sept 15, 1966)

[3] The board is charged with providing this advisory information under Sections 401 5 and 5364 of the Revenue and Taxation Code

[4] AH 577, p 18

[5] Ibid, p 19

[6] Ibid.

Previous to AH 577 air carriers regardless of domicile were allocated value on the basis of the "ground and air time" in state for interstate flights, and "ground and ½ the time to the next port" for intrastate flights[7] Therefore, AH 577 was a departure from the current practice. Under this, the county of domicile would have the special privilege of taxing the full value of the aircraft, unless it has acquired a situs for apportioned taxes elsewhere. As the result of the complaints of the airlines, the board scheduled a public hearing on the handbook for December 13, 1966. The procedure outlined in the handbook had not been previously presented to the elected board[8] The airline industry opposed the handbook on the basis that·

1. It discriminated against California based airlines;
2. It was not consistent with the legal precedent; and
3. It might subject the airline to double taxation[9]

The board decided to take the matter under consideration and ordered the board's legal staff to confer with the Attorney General's Office and the Los Angeles County Counsel. It should be noted that the Los Angeles assessor was involved in this from the inception since he was the chairman of the Assessors Advisory Committee, and the primary proponent of the home-port method

On January 5, 1967 the board heard the testimony of its own legal staff and a representative of the Attorney General's office[10] On February 9, the board adopted an interim instruction for use during the 1967 assessment season This was essentially the method used in previous assessors handbooks and recently accepted by the California Supreme Court in *Zantop Air Transport v. County of San Bernardino* (1966) 246 A C A. 484.[11]

The assessor of the Los Angeles County, Philip E Watson, refused to follow the instructions He preferred to go ahead with the home-port method, because he alleged:

1. The board's instructions permitted property to avoid taxation;
2. Under the Constitution of the state, the assessor has the duty to exercise the full measure of the taxing or assessing power, and the interim instructions did not provide for this,
3 The board instruction was permissive rather than mandatory;
4. The instruction was interpreted by Mr Watson to apply to non-domiciliary aircraft only, since there was no specific reference to California-domiciled aircraft;
5. The procedure outlined in the proposed AH 577 was in accord with recent court decisions

As a result:

> In order to assure uniformity, the board, therefore, incorporated the substance of its instruction in an interim rule which it adopted on an emergency basis on March 9, 1967.[12]

Senate Bill 337 placed the same provision into the statutes

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[7] Assembly Interim Committee on Revenue and Taxation, *Taxation of Property in California* (Dec 1964, p 102–103)
[8] Hugh J Strachan in answering a question put to him by Chairman Veneman, Sept 6, 1967
[9] See "Memorandum to the State Board of Equalization in opposition to proposed draft of AH 577 . ," submitted by Dunn and Crutcher, Dec 13, 1966.
[10] Deputy Attorney General Edward P Hollingshead
[11] The instruction was in the form of a letter of Feb 14, 1967 addressed to the county assessors from Jack F. Eisenlauer, Chief of the Assessment Standards Division.
[12] Testimony of Hugh Strachan, Sept. 6, 1967. The rule became Section 202 of the *California Administrative Code.*

III. THE CASE LAW AND CONSTITUTIONAL LIMITATIONS

The earlier discussions in the Assessors Advisory Committee and the State Board of Equalization revolved around what the law was, and what was the best way to implement the law. Now that the question is before the Legislature, the alternatives available have been substantially increased Still the arena of decision making is limited by the United States and California Constitutions, and federal statutes

FEDERAL STATUTES

Congress in the field of aircraft value allocation has not exercised its broad authority under the commerce clause (Article I, Section 8(3) of the U S. Constitution). Their greatest concern was shown comparatively early in the history of the airline industry Public Law 416 (78th Congress) charged the Civil Aeronautics Board to develop the

> means for eliminating and avoiding . multiple taxation of persons engaged in air commerce and their employees, by states, territories, and possessions, and subdivisions thereof, and other taxation by states territories, and possessions . which has the effect of unduly burdening or unduly impeding the development of air commerce

Pursuant to the law, the CAB conducted the most thorough study of the subject that has occurred up to the present time [13] The CAB recommended a three factor allocation formula originating and terminating tonnage (40%), originating revenues (40%) and aircraft arrivals and departures (20%) It should be noted that the air transport association suggested that the allocation factors be plane-miles and/or revenue ton-miles.[14]

No allocation method has been enacted by Congress, and in recent years, not even the CAB has been involved in this field.[15]

THE UNITED STATES CONSTITUTION

The allocation of interstate taxing powers has been a dilemma since the formation of the Republic In early days one had to deal with wagons, barges, and later railroads Airplanes further compounded the question It was as the result of the first airlines case (*Northwest Airlines v Minnesota* (1944) 322 U S 292) that the CAB study was conducted The Supreme Court invited congressional intervention. Stated Mr Justice Frankfurter in the leading opinion in the *Northwest Airlines* case (in relating the taxing rules applied to land commerce to air commerce)

> To what extent it should be carried over to the totally new problems presented by the very different modes of transportation and com-

[13] Civil Aeronautics Board, *Multiple Taxation of Air Commerce* (1945) 79th Congress, 1st Session, H Doc 141, 158 pg

[14] Memorandum for the Civil Aeronautics Board submitted by ATA Dec. 14, 1944 and Jan 16, 1945

[15] Letter dated August 31, 1967 from W Fletcher Lutz, Deputy Director of the CAB, to Chairman Veneman

munication that the airplane and the radio have already introduced, let alone the still more subtle and complicated technological facilities that are on the horizon, raises question that we ought not to anticipate, certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship.[16]

The rulings of the U.S. Supreme Court seem to establish two requirements One, is quite clear This is the question of situs, which determination is ruled by the due process clause (Article XIV of the U.S. Constitution):

> The Supreme Court justifies state property taxation on the theory that the expenses incurred by a state (or a political subdivision thereof) in protecting or providing benefits to property should be apportioned according to the value of the property protected However . it is not necessary that the amount of tax be proportioned exactly to the protection, benefits, or opportunities actually conferred on the taxes property.[17]

The court stated in *Braniff Airways, Inc, v. Nebraska State Board of Equalization* (1954) 347 U S 590, that the tax situs is a due process question, and so far as the due process is concerned, the only question is whether the tax relates to opportunities, benefits or protection conferred by the state [18]

After answering the question of situs for apportioned taxation, however, the further question that arises is the constitutionality of the method of apportionment used So far, the courts have said only that the tax must "relate to the opportunities, benefits, or protection conferred by the state " The *Braniff* case is the most recent airline case decided by the U S Supreme Court In that case the apportionment formula was not an issue This would be the *second* requirement—i e that the apportionment formula be reasonable Stated the court in the *Braniff* case

> We have frequently reiterated that the Commerce clause does not immunize interstate instrumentalities from all state taxation, but that such commerce may be required to pay a nondiscriminatory share of the tax burden [19]

Yet the apportionment formulas applied by the several states in which a given air carrier makes landings should not go so far as "to constitute an unreasonable burden on interstate commerce "[20] The test of reasonableness for the apportionment would seem to be (a) do the apportioned taxes bear some relationship to the opportunities, benefits, or protection conferred by the state, and (b) does the method used subject the carrier to double taxation

In the *Northwest* case an airline domiciled in Minnesota was required to pay taxes on the full value of the airline However, in that case there

[16] 322 U S 292, at 300
[17] 35 *So California Law Review* 316 (1962), at 333
[18] 347 U S 590, at 600
[19] 347 U S 590, at 598
[20] 68 *Harvard Law Review* 127 at 129

was no showing that any state other than the home state had jurisdiction to tax[21] In the *Braniff* case, the court ruled that Braniff Airways had established sufficient contact with Nebraska to be subject to apportioned property taxes But the airline had not challenged the reasonableness of the apportionment method and the court did not speak to the reasonableness of the method The other cases establishing the validity of apportioned taxation provides us with no rule by which to judge the reasonableness of an aircraft allocation formula.[22]

The corollary to the *Ott* case, *Standard Oil Company v Peck* (1952) 342 U S 382, placed a limitation on the traditional right of the domicile to tax The "domiciliary state was denied power to tax the total value of barges and tugs used in interstate commerce, but rather was required to apportion "[23] Yet, the state of domicile still has some advantage:

> From the evidence standpoint, the state of domicile does have an advantage over its taxpayers, as can be seen from the latest of the series of U S Supreme Court cases *Central Railroad Company of Pennsylvania v Pennsylvania* (1962) 370 U S 607 The railroad was taxed on the unapportioned value of its rolling stock even though it was a party with other roads to an interchange agreement calling for per diem rental of railroad cars Since the railroad was unable to show that the cars, which were subject to the interchange and used by other roads outside the state, had established a taxable situs outside the state of domicile, the court held the unapportioned tax was proper[24]

The California cases are ambiguous The California Supreme Court in a 4-to-3 decision applied the home-port doctrine to aircraft flying in exclusively foreign commerce and domiciled in a foreign country, *Scandinavian Airlines Systems, Inc v County of Los Angeles* (1961) 56 Cal 2d 11, cert denied 368 U S 899 However, the decision was not based upon the fact of being domiciled in a foreign country, but on the fact of being engaged in interstate commerce. The fact of being an instrumentality of foreign commerce is the controlling factor[25]

A California appellate court recently upheld the homeport doctrine in *Star Kist Foods, Inc v Byron* (1966) 241 Cal App. 2d 313 Yet earlier, the County of Los Angeles was denied the right to tax a domiciliary corporation on the unapportioned value of flight equipment in use in the Korean Airlift, *Flying Tiger Line v County of Los Angeles* (1958) 51 Cal 2d 314

> The Supreme Court . concluded that apportionment is necessary where aircraft are engaged in interstate and foreign commerce Justice Traynor and two other justices dissented on the ground that no taxable situs had been established elsewhere[26]

The cases above had primarily dealt with questions of situs, *i.e.*, whether the aircraft have acquired situs for apportioned taxation, full

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[21] Ibid , at 128
[22] *Pullman's Palace Car Co v Pennsylvania* (1891) 141 U S 18; *Ott v. Mississippi Valley Barge Line Co* (1949) 336 U S 169
[23] Hugh Strachan, September 6, 1967
[24] Testimony of Hugh Strachan, Sept 6, 1967
[25] 56 Cal 2d 11, at 32
[26] Testimony of Hugh Strachan, September 6, 1967

taxation, or whether they have not acquired situs at all. One recent case does speak to the reasonableness of the apportioned formula, *Zantop Air Transport v County of San Bernardino* (1966) 246 ACA 484 In that case the plaintiff airline specifically calls into question the propriety of the allocation formula in use (which was that used in the State Board of Equalization's interim rule and Senate Bill 337) The airline contended that the inclusion of "flight time" in the formula was improper. The court dismissed the contention that the decision in the *Flying Tiger* case by implication prohibits inclusion of flight time [27] It went on to maintain on principle that it was appropriate to include flight time. In terms of benefits conferred by the county "mathematical exactitude . . . is neither attainable nor constitutionally required." [28] Further, the airline did not contend that the apportionment was discriminatory, would result in double taxation, or was excessive in relation to commerce carried on within the state The court stated that "there is no showing that the inclusion of flight time will cause an undue burden on interstate commerce " It further denied the company's objection on due process grounds

The court does not consider as applying to the present case Justice Traynor's objection in the *Flying Tiger* case that in a time formula "bridge time" over other states or the ocean should not be considered In other words, Traynor felt that the airlines ought to be taxed on the basis of the relation of ground activity in the county to all ground activity. He mentions the Nebraska formula However, the court does answer the plaintiff's objection that the time over other counties other than San Bernardino should not count in the California figures·

> Since values represented by such flight time have no other taxable situs in the state, they were properly treated as having situs in the defendant.

The same logic might be applied in bridge time over other states or international waters, either by including the time in California factor or eliminating it from the denominator

We must conclude that in regard to aircraft, the Supreme Court has not ruled on the reasonableness of an allocation factor (see *Braniff v Nebraska*) although they have required that there be sufficient contact for the establishment of situs The California cases indicate that an apportionment formula will most likely be approved if (1) it does not discriminate between domestic carriers, (2) the carriers are not exposed to multiple taxation, (3) the tax bears some reasonable relation to the amount of activity that is carried on The state, in conclusion, can act within some very broad limits under the United States Constitution, once there is sufficient activity for the establishment of situs

THE CALIFORNIA CONSTITUTION

The California Constitution gives the Legislature considerable latitude in establishing the extent and method to which aircraft shall be subject to property tax Under the Constitution, "All property in the state except as otherwise . provided, not exempt under the laws of

[27] *Zantop*, supra
[28] Ibid

the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, . . ."[29] However, in the case of personal property:

> The Legislature by ⅔ of all the members elected to each of the two houses voting in favor may classify any and all kinds of personal property for purposes of assessment and taxation in a manner and at a rate or rates in proportion to value different from any other property in the state subject to taxation . .[30]

Since an airplane is an item of personal property, the Legislature has considerably more latitude than in the case of real property.

The plaintiff in the *Zantop* case contended that San Bernardino could not tax their aircraft because as migratory property they were not "situated in the county," as is required by Article XIII, Section 10. Section 10 states:

> All property . . . shall be assessed in the county, city, city and county, town or township, or district in which it is situated . . .

The court concluded, however, that the word "situated" as used in Section 10 Article XIII is synonymous with "situs," situs meaning having such contacts as to confer jurisdiction to tax. Stated the court:

> We conclude that a portion of the value of plaintiff's flight equipment was situated in and subject to taxation by (the) county.

We must conclude that the California Constitution gives the Legislature very broad authority to tax mobile flight equipment.

[29] Article XIII, Section 1.
[30] Article XIII, Section 14.

IV. ALTERNATIVE ALLOCATION FORMULAS

At the time of the *Northwest Airlines* case in 1944, the airline industry was in its infancy, and the CAB multiple taxation study was the first official examination of some of the ways that the value of mobile flight equipment could be allocated for purposes of taxation One of the important questions at that time was whether or not there should be a federal mandate for the use of a uniform formula by the states, and to what extent there should be involvement in the administration of the formula by federal agencies[31] History has already answered this question since Congress has not passed a uniform act, and the formula is different in every state.

The factors used for interstate allocation of the value may be divided into two major categories

(1) Those that allocate value only to states in which landings and takeoffs are made (terminal factors) and, (2) those that allocate both to such states and to states which are overflown (mileage factors or time factors)[32] When only the former type of allocation factor is used by all states in which an airline operates is the full value of the carrier's fleet available for taxation When allocation formulas contain one or more of the second type of allocation factors, however, some part of the fleet's value will not be available for taxation, since some part of the value will be allocated to overflown states and these states are generally assumed to lack property taxing jurisdiction.

The *terminal* factors are arrivals and departures, the ratio of ground time in state to total ground time, tons of passengers and freight loaded and unloaded, and originating revenue *Mileage* or *time* factors included route miles or miles flown, ground time plus flight time in jurisdiction, revenue ton-miles and flight time.

Table I lists each state and summarizes its apportionment formula Table II lists each factor, and which states use which factors in their formula Two states use solely terminal factors, three states use only mileage or time factors, and the rest use a combination

The early recommendations favored the use of terminal factors The CAB in 1945 recommended using three terminal factors, with the following weightings:[33]

Originating and terminating tonnage (40%)
Originating revenues (40%)
Arrivals and departures (20%)

The National Association of Tax Administrators adopted the formula that became known as the Nebraska or NATA formula

Originating and terminating tonnage (33⅓%)
Originating revenue (33⅓%)
Arrivals and departures (33⅓%)

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[31] See Ronald B Welch, "The Taxation of Air Carriers," *Law and Contemporary Problems XI* (winter-spring, 1946, p 584–597)

[32] Testimony of Ronald B Welch, Assistant Executive Secretary of the State Board of Equalization, before the committee, September 6, 1967.

[33] CAB, *Multiple Taxation of Air Commerce*

Later this method was embraced by the Council of State Governments However, only two states, Nebraska and Wisconsin, have adopted the formula.

The latest pronouncement by tax aministrators was that of the Western States Association of Tax Administrators (WSATA) in 1960. They recommended three factors with the following weighting:

Plane hours (75%)
Originating and terminating tonnage (5%)
Revenue ton miles (20%)

This is moving much more toward the use of the mileage or time factors, rather than the terminating factors recommended earlier The State of Oregon now uses the WSATA formula

The following are definitions for the various factors:

1 *Revenue miles flown*—the miles for each interairport flight actually completed in revenue service, whether or not performed in accordance with a scheduled pattern

2 *Revenue ton-miles*—one revenue ton transported one mile (Computed by multiplying the revenue miles flown on each interairport flight by the revenue tons carried on that flight—each passenger is assigned the value of 200 pounds)

3 *Originating revenue*—revenues to an air carrier from the transportation of revenue passengers and revenue property first received by such carrier either as originating or connecting traffic

4 *Tons on and off*—the weight in tons of revenue passengers and revenue cargo first received either as originating or connecting traffic or finally discharged by such carrier at such airport

5 *Plane hours*—the amount of time the plane is in the state or taxing jurisdiction in flight and on the ground

6 *Route miles*—the number of miles of scheduled routes the air carrier has within the state.

The CAB noted five criteria for evaluating the allocation factors in 1945 We think the five criteria are still appropriate They are listed below:

1 The factor or factors chosen must realistically reflect the degree to which the tax base, whether it be all real and personal property, aircraft, net income, capital stock, or gross receipts, is employed in the state

2 The selection of factors should be confined to those that can be clearly and uniformly interpreted and are not subject to any significant degree of estimation by the taxpayer

3 The cost of compliance to the taxpayer and of administration to the government should be weighted in the selection of appropriate factors

4 Factors of allocation should be excluded which contain exempt categories or nonallocable elements The entire tax base should be apportioned to jurisdictions with tax claims, and if an otherwise desirable factor contains unallocated portions these should be excluded from the denominator in order to assure a 100 percent distribution

5 Factors which encourage avoidance operations should be rejected [34]

[34] CAB, *Multiple Taxation of Air Commerce*, pp 51–52

The basic difference between the mileage or time, and terminating factors is in criterion (4), as previously noted. Mileage or time factors do not subject the total value of the aircraft to taxation. In the denominator of the factor the mileage or time over the "bridge states," which cannot tax, is usually included. Thus the terminal states cannot tax for the portion based on that time or mileage. One hundred percent of the value will not be subject to taxation. The terminal factors considered only events which occur in the terminal states, thus the planes can be taxed for the full amount.[35]

There has been little evidence presented to the committee that would indicate that the terminal factors as a type would be more difficult to compute and audit than the mileage or time factors. However one factor, originating revenue (which is a terminal factor), would be especially difficult to use on both counts. Airlines have many different kinds of arrangements for selling tickets. Often the tickets are sold in a jurisdiction which doesn't even have an airport—this would be the case for downtown ticket offices. Often the airline sells a ticket which will carry the passengers on other airlines during a good part of their journey. This factor meets neither criterion (2) or (3). We will have occasion to consider these five criteria below.

THE PRACTICE IN OTHER STATES

Tables I and II are the results of a survey conducted by the State Board of Equalization. In those states that do levy a property tax on mobile flight equipment, the mileage factors are by far the most widely used. As we noted, three states use mileage factors solely. Most use a combination of both, while only two use terminal factors solely. Of those, all except for one give greater weight to the mileage or time factors—often they use one mileage and one time factor. From Table II it can be seen that 12 states use some kind of mileage factor and nine more use time. These are by far the largest categories. Only originating and terminating tons come close, with eight. This is the most frequently used terminal factor.

The most striking discovery of the survey was that mobile flight equipment is not widely taxed. Six states do not tax personal property at all—Delaware, Hawaii, Maryland, New York, Ohio, and Pennsylvania. Ten others do not tax mobile flight equipment, Iowa, Maine, Michigan, Mississippi, New Hampshire, North Carolina, South Carolina, Tennessee, Vermont, and Virginia. Six states collect license fees in lieu of property taxes on aircraft: Connecticut, Florida, Idaho, Massachusetts, New Mexico, and Rhode Island. Typically, the license fees are quite low—such as 2½ cents per pound net load (Idaho, New Mexico), $100 per plane (Massachusetts and Florida), up to $250 per plane (Rhode Island). In six of the taxing states the tax is locally levied, and apparently not carefully administered. It should be noted that our survey of property taxation of air carriers gives us a fragmentary picture of the total taxes paid by air carriers in those states.

[35] This does not mean the planes will be taxed on the full amount. Some states, such as New York, do not tax personal property.

For instance, the Director of Taxation of American Airlines told the committee

> we have other types of taxation in New York We have not only state-level taxes, but very high city taxes We have occupancy taxes, we have gross receipts taxes overall, the tax impact is quite large [36]

However, the survey would indicate that the states and localities having a high density of air traffic are less inclined to apply property taxes, and generally do not levy burdensome substitute taxes The 12 states which have the greatest density of commercial air traffic are Illinois, Texas, Michigan, California, Ohio, Florida, New York, New Jersey, Pennsylvania, Virginia, Massachusetts, and Georgia [37] Of the 12, 5 (Michigan, Ohio, New York, Pennsylvania, Virginia) do not assess mobile flight equipment at all Two (Florida and Massachusetts) levy minimal in-lieu taxes In Chicago the apportionment is based on time in the county for interstate flights, including ground and air time Dallas County, Texas, negotiates with airlines Atlanta, Georgia, reports that it considers ground time and other factors, which are unspecified It would appear that, since California taxes all the time in the state, including all ground and air time, that it is the leader, or near the top, in taxing the air carriers It is interesting to note that only one of the major air carrier states uses a terminal factor.

[36] Charles F Echart, Director of Taxation, American Airlines before the Committee, September 6, 1967

[37] Federal Aviation Agency, FAA Statistical Handbook of Aviation (1966) pp 187–207

V. THE FRANCHISE TAX BOARD'S ALLOCATION METHOD

To determine taxable income in California for interstate corporations, the Franchise Tax Board uses a three factor apportionment formula consisting of the factors of property, payroll and sales For the purpose of this inquiry it is interesting to note how the Franchise Tax Board determines the value of airline property which is included in the property factor The value of all flight equipment is included in the denominator of the property factor For the purposes of the numerator, flight equipment is assigned to California on the basis of revenue passenger miles flown in California to total revenue passenger miles flown. A revenue passenger mile is defined as one revenue passenger transported one mile [35] The ratio is computed for each individual aircraft coming into California or to a class of aircraft The purpose of the committee in examining this apportionment formula was to answer these questions

1 Would this method be suitable for the allocation of property for property tax purposes?

2 Would there be any value in using the same method for property tax allocation as for income allocation?

Our answer to the first question is in the negative First, the revenue passenger mile concept ignores the very important factor of activity on the ground The activities on the ground and in the air are inseparable in their contribution to the value of the aircraft Second, the revenue passenger mile is inferior to the present time-in-state formula, which considers ground time and exposes more of the value of the plane to taxation Third, since California is a terminal state planes will be spending a substantial amount of time on the ground, and the revenue-passenger mile factor would miss this completely The committee compared the Franchise Tax records of the major air carriers with the assessors' records Unfortunately, the Franchise Tax records were for 1965 and the assessors' records for 1967 But we think the discrepancy between the values of aircraft allocated to California by the two formulas is substantial enough to support the conclusion that the present assessment formula exposes to taxation a significantly greater portion of the value of the aircraft than the Franchise Tax formula The committee found the following ratios between the Franchise Tax figures for mobile flight equipment and the assessors' figures. 66, 47, 50, 95, 10, 45, and 46 percent, and three airline totals at 23 percent (This is the ratio of the total Franchise Tax figures for mobile flight equipment determined by the assessors) [36] The empirical evidence is totally consistent with our earlier observations about California's position as a terminal state

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[35] Letter from Martin Huff, Executive Officer of the Franchise Tax Board to Hon. Nicholas C Petris, January 24, 1967

[36] State law prevents us from releasing the actual values

We answer the second question in the affirmative Bruce Walker, Assistant Executive Officer of the Franchise Tax Board, stated the following

> I think probably you should use the same formula if you can do so without violating the basic concepts if they are different in the different law you are administering . In this case, I see no essential difference If you allocate, say, 20 percent of the value of flight equipment to California for property tax purposes, it seems to me that it would follow that 20 percent should be allocated for income tax purposes [40]

We can see no reason, if it is proper to use a property factor in income tax allocation why it should allocate less value to California than the property tax formula Furthermore, a change to a property allocation factor that places more emphasis on ground activity will increase the income subject to California taxes As the data above shows, a change to the present time-in-state method would occasion a substantial increase in the property factor. and subsequent increase in state taxes collected. (The change from the revenue passenger method to the time method will also increase the wage factor, since the wages of flight personnel are also allocated on a revenue passenger mile basis)

The Franchise Tax Board can by administrative action switch to the time-in-state method However, it would require legislation to use an allocation formula that included airline activity as measured by arrivals and departures Section 25101 of the Revenue and Taxation Code reads:

> Any such factors or other method of allocation shall take into account as income derived from or attributable to sources without the state, income derived from or attributable to transportation by sea or air without the state, whether or not such transportation is located in or subject to the jurisdiction of any other state, the United States or any foreign country [41]

[40] Testimony before the committee, September 6, 1967

[41] This section was added in 1957 after the Franchise Tax Board had endeavored to allocate on a part day or landings and takeoffs basis

VI. PRESENT PROCEDURES OF ASSESSMENT IN CALIFORNIA

Of the 28 counties (out of 58) which are served by commercial air carriers in California on a regular basis, all use essentially the same procedure for assessing aircraft, i e, the interim rule of the Board of Equalization adopted on March 9, 1967

(a) *Interstate flights*
Ground time in the county plus flight time to the state line

(b) *Intrastate flights*
Ground time in the county plus one-half the inbound and outbound flight time.

These formulas consider the terminal factor of ground time and the additional factor of flight time in relation to 24 hours The market value of the plane is then multiplied by this factor Market value is determined by referring to the "Schedule of Flight Equipment Market Value Computator" which is provided to the county assessors by the Board of Equalization Finally, the assessment ratio (generally between 22 and 25 percent) is applied to the result to arrive at the assessed valuation of the aircraft

No distinction is made in this procedure as to whether the aircraft is domiciled in California or not The only distinction made is between interstate and intrastate flights

VII. CONCLUSIONS AND RECOMMENDATIONS

Primary issues in deciding on an apportionment formula for the assessment of mobile flight equipment are equity in the tax treatment of the airline industry and the encouragement of the economic growth of the industry in California The present method does not fully measure the activity of aircraft in the deriving value subject to local property taxation.

Equity in taxation requires that property taxes should bear some relationship to the benefits and protections afforded the property by the taxing jurisdiction We have indicated earlier that the courts have not required that the taxes be precisely related to the benefits, or that the benefits be direct There is no scientific test It is generally admitted that the property tax (based on the market value) may bear little relation to the cost of providing services to that property However, our objective in this report is not to argue the merits of the property tax. Our recommendations will stay within the framework of the present property tax structure It is indeed true that the aircraft flying in interstate or foreign commerce receive fewer benefits from state and local government than surface transportation There is validity in the contention of the air carriers that such mobile flight equipment should be taxed somewhat less than other types of property.

Under the present formula, the only measure of benefits is derived from time in state which is primarily ground time Benefits also accrue to the airlines because of markets provided by an area, the facilities provided and the willingness of the local populace to put up with noise, low flight patterns, interference with TV reception, etc , associated with takeoffs and landings Under the present formula, these considerations are not properly weighed

The heavy emphasis on ground time also works against the state in attracting a larger share of the airline repair and service industry As the aircraft is mobile and easily moved, all other things being equal, the fact that excess ground time in California will weigh heavily in the tax bill may be the marginal factor which determines the location of such facilities

California has a number of positive factors—climate, location, skilled labor, etc , which make the state a prime candidate for more aircraft repair activity. To make it even more attractive, we should remove some of the tax deterrents which exist in the present airline assessment allocation formula.

RECOMMENDATIONS

A. Proposed Formula

It is our recommendation that both the concepts of time and termination be reflected in the allocation formula The time-in-state factor reflects as well as any of the factors studied the activities of aircraft in the state, and the opportunities of the aircraft to receive the benefits and protections of the state It has the advantage of being a statistic that is already collected However, it tends to discourage the development of the airline industry in California.

Among the factors that would tend to divide the value among states and/or other jurisdictions in which landings take place, we have looked at arrivals and departures, originating and terminating tonnage, and originating revenue Arrivals and departures have the advantage of being both an easily determined statistic and a definite physical act not closely related to indicators of income such as originating and terminating tonnage or originating revenue

We, therefore, recommend that the factors of arrival-and-departure and time-in-state be given the following weight in determining the allocation percentage:

time-in-state · 75 percent
arrivals-and-departures 25 percent

The addition of the arrival-and-departure factor to the present formula will add little to the cost of reporting and auditing.

By reducing the present time-in-state factor from 100 to 75 percent we will encourage the airline industry to repair their aircraft in California because they will no longer be fully taxed on time spent by the aircraft in the state. This, in turn, should encourage the growth of maintenance facilities in the state.

In changing the present assessment formula from the single factor of time-in-state to the two factors of time-in-state and arrivals-and-departure, we reach a compromise between the time factor and the terminal factor In doing so we give the airlines an incentive to relocate their servicing facilities in California because they will not be saddled with paying for all the time the planes remain in the state for repairs and servicing.

On the other side of the picture, California stands to benefit by this new formula in several ways By having the airlines locate their maintenance facilities in California, state and local government will gain additional revenue from property taxes on the land where such facilities would be located, from income taxes as a result of the increased employment and from property taxes on the increased assessments of additional aircraft which would come to California to be serviced or repaired.

To give guidance to the Board of Equalization and the county assessors, the formula we are recommending would be determined in the following manner·

Step one total time-in-state (time in air plus time on ground) divided by total time times 75 percent

Step two. arrivals-and-departures in California divided by total arrivals and departures times 25 percent

Step three step one plus step two divided by 100 (this equals the allocation to be applied to market value which will be multiplied times the county assessment rate to reach the assessed valuation of the aircraft).

We recommend that the procedure outlined above be used for all present interstate and intrastate flights using subsonic aircraft However, on future flights using supersonic aircraft we recommend that this proposed formula be reevaluated to take into consideration new prob-

lems, such as noise abatement, and unforeseeable problems which counties would have to cope with

Before arriving at our formula of 75 percent time-in-state and 25 percent arrivals-and-departures, we reexamined our old formula of 100 percent time in state, and considered the Nebraska formula advocated by the State Board of Equalization of one-third arrivals and departures, one-third tons on and off, and one-third originating revenue.

In analyzing these formulas we felt that the present one is inadequate because among other deficiencies it fails to adequately reflect airline activity. The Nebraska formula presented a problem of determining situs, i e , where income originated, place of sale of the ticket, place of purchase, place of pickup, or place of departure of the plane Conceivably, these could be in three or four different counties or states.

After much discussion and examination we arrived at our proposed formula of 75 percent of time-in-state and 25 percent arrivals and departures This formula is the moderate formula between the one factor present formula and the three factor Nebraska formula It is a compromise between the time factor and the terminal factor In addition, it has the advantages of more closely reflecting airline activity and being a readily available statistic.

We have surveyed 10 major air carriers serving California whose flight equipment accounted for over 80 percent of the total percentage of flight equipment allocated to California We compared the present formula with our proposed formula and discovered that the probable impact on the airline industry as a whole will be insignificant However, there will be small shifts among air carriers benefiting the ones with large service and repair facilities in California

In addition, we believe that the new formula better reflects airline activity among the various counties Our preliminary conclusion is that Los Angeles County would receive slightly more of the total airline assessments in the state—at the expense of San Mateo Unfortunately, we cannot report this as a hard-and-fast conclusion as we have experienced great difficulties with the Los Angeles County Assessor's office in verifying comparable figures from Los Angeles and San Mateo (See VIII—addendum)

As an alternative, the airlines could be given the option of the above formula or any other formula which was weighted by 25 percent by a terminal factor.

Airlines have a profound impact on the economy of the state In 1966 they paid California citizens some $244 million a year in salaries and wages, had sales of $327 million in California, have thousands of stockholders, employ thousands of workers in designing, producing, piloting, servicing and repairing airplanes In addition, the airline industry in California pays approximately $11 million in property taxes a year, plus millions more in corporate income and payroll taxes

This is a large and growing industry in this state and we feel it should remain a healthy one Our proposed formula of 75 percent time-in-state and 25 percent arrivals-and-departures should encourage the airline industry to continue its dynamic growth and development in the years ahead, thereby resulting in increased revenues for the State of California and increased employment for the people of California.

B. Use of the Home Port Doctrine

We reject the use of the home port doctrine in the case of air carriers, as originally suggested and advocated by the Los Angeles County Assessor The home port doctrine, i e , giving the state or county of domicile the special privilege of taxing the full value of the aircraft unless it acquired a situs for apportioned taxes elsewhere, would discriminate against California-based aircraft It would discourage air carriers from basing operations in California for the future Another problem is the fact that the concept of domicile is ambiguous Each county assessor would be in the position of making this determination In addition, the criteria would not be uniform There would most certainly be disagreement between counties and the air carriers The conflicts would then have to be settled by the courts

C. Franchise Tax Allocation

We feel that the same allocation factor should be used for both property taxation and the property factor of the income tax allocation formula Adoption of the suggested method for the franchise tax property factor would require amendment of Section 25101 of the Revenue and Taxation Code However, even the property tax factor presently used is superior to that used in the franchise tax allocation and could be adopted through administrative action We recommend that the Franchise Tax Board take this action

D. Air Taxis

We recommend that air taxis, defined by the Federal Aeronautics Administration as aircraft having a gross takeoff weight in excess of 12,500 pounds, be assessed at 25 percent of full market value and taxed at general rates Presently, under Section 539 of the Revenue and Taxation Code, they are assessed at full market value and taxed at the rate of 1½ percent of this full market value This section was meant to include only private aircraft and not air taxis using their aircraft either as a scheduled short-range airline or a nonscheduled charter service or rental service We believe that since there are over some 350 air taxis operating in California and since they use their aircraft as air carriers do, viz , as a business and not for private use, that they should be taxed on the same basis as air carriers, viz , 25 percent of market value applied to the local tax rate This would increase revenue to local governments and make more uniform the assessment practices on these companies whose aircraft are now assessed as if they were private aircraft It does not seem reasonable that these companies who use their airplanes as their business the same as air carriers only on a smaller scale should be assessed as if they used their airplanes for private purposes Therefore, we recommend that air taxis be assessed as air carriers and not as private aircraft and that Section 5303(b)(2) of the Revenue and Taxation Code be amended accordingly.

VIII. ADDENDUM

A recent development in our study of aircraft assessment in California merits a short discussion

In August 1967, we wrote to the assessors of all the counties involved in aircraft assessment asking for information on total assessed value of airlines broken down into assessed value of mobile flight equipment and spare parts.

When we finally received responses from the 28 counties which are served by air carriers we discovered that Los Angeles County which has the fourth most active airport in the country showed a lower assessment on flight equipment of three air carriers, Delta, Pan American, and TWA, than did San Mateo County which only has the 11th most active airport in the country In other words, Los Angeles County, which has more flights of these three airlines, showed a lower assessment than San Mateo County which has fewer flights of these three airlines.

We were puzzled by this and since the State Board of Equalization was already auditing the assessments of Los Angeles County we asked them to look into this and we informed the Los Angeles County Assessor of our action We then asked him to make his records and files on these three airlines available to the Board of Equalization as is provided in Section 15612 of the Government Code

When an auditor from the Board of Equalization appeared in December 1967 to examine the assessment records of these three airlines in the Los Angeles County Assessor's office, they were refused permission to do their audit as was requested by the Board of Equalization, the Assembly Committee on Revenue and Taxation, and as is authorized by Section 15612 of the Government Code

The Los Angeles County Assessor explained his position in a letter to the Board of Equalization on December 29, 1967 "I have a constitutional responsibility to the property owners in my county to keep confidential any information supplied by them which is not required to be public information, unless I am fully reassured as to the legitimacy of the purpose for which such inspection is being undertaken."

The Los Angeles County Assessor continued to refuse to allow the Board of Equalization to examine the aircraft assessment records of these three specified airlines in spite of the apparent inconsistency between higher aircraft assessments in San Mateo County and higher activity in Los Angeles County, in spite of the fact that the airlines in question as well as the San Mateo County Assessor were more than happy to open their files and records, and in spite of the fact that Section 15612 of the Government Code says "The board (Board of Equalization) may inspect, either as a board, individually, or by its duly appointed representative, the work of any local officers whose duties relates to the assessment of property for taxation and the collection of taxes It may require such officers to produce any records in their custody, including, but not limited to, records relating to the assessment of specific properties and give testimony with reference to such matters of assessment and tax collecting as it deems useful to it in its investigations."

The Los Angeles County Assessor then wrote the Chairman of the Assembly Committee on Revenue and Taxation attempting to explain

the apparent inconsistency between the higher assessments in San Mateo County and the higher aircraft activity in Los Angeles County for these three airlines "The principal reason for the difference is that the airplanes spend more time on the ground in San Mateo County than they do in Los Angeles County despite the fact that the total number of flights in and out are greater here San Mateo is the terminal and turn around point for each of the three airlines in question on a majority of their flights, while Los Angeles is a through point."

The audit is still necessary since we do not know whether Los Angeles County is a through point and San Mateo a turn-around point for a majority of the flights of each of these airlines until the Board of Equalization has an opportunity to look at the records in the Los Angeles County Assessor's office. In addition, we are not certain that this is the sole reason for the almost three-quarters of a million dollars higher assessment of these three airlines in San Mateo while Los Angeles has more activity for these three airlines We believe that there is still a sufficient question as to warrant the Board of Equalization to look at the records for these airlines in the Los Angeles County Assessor's office.

If the turn-around theory proves to be correct, we believe it adds weight to the committee recommendation to add arrivals and departures to the assessment formula This will then reflect airline activity in airline assessment It would also appear that Los Angeles County will particularly benefit from the new formula

Since Mr Watson has continued to refuse the Board of Equalization access to his records, the board has now asked the Attorney General's Office to file suit to require the Los Angeles County Assessor to allow the board to audit the records of these three airlines under authority granted to the board by Section 15612 of the Government Code The Chairman of the Board of Equalization said "By his refusal to disclose his office files, Assessor Watson is unwittingly subjecting himself to the suspicion, right or wrong, that his staff has erred in its airline assessments With the advice of the Attorney General, the state may have to carry this case to court "

As of January 21, 1968, a petition of mandate by the Attorney General to the Supreme Court was pending *(State Board of Equalization v. Philip E Watson,* Los Angeles No 29529) It is the position of the Assembly Committee on Revenue and Taxation that the Board of Equalization has the authority under the Government Code to inspect, audit, and require the assessor of any county to produce any records in his office for any official, legislative purposes. We believe that the integrity of this effective check and balance on assessment practices in this state is now at stake.

CHAIRMAN'S NOTE · After the adoption of this report and during its printing, the Supreme Court assumed original jurisdiction in the Watson-Board of Equalization dispute and ruled that the State Board of Equalization has full access to the Assessor's records.

The first report of the Board of Equalization after examination of the information in the assessor's records indicates that some of the value of commercial aircraft is escaping taxation in Los Angeles County as a direct result of policies adopted by the assessor.

The Supreme Court decision and the Board of Equalization report are reproduced in the Appendix.)

TABLES

I Survey of Air Carrier Assessments in the United States

II Factors Used by States in Allocation of Air Carrier Assessments

III Assessed Value of Air Carriers in California by County

IV Assessed Value of Domestic Air Carriers in California

V. Assessed Value of Foreign Air Carriers in California

TABLE I

SURVEY OF AIR CARRIER ASSESSMENTS IN THE UNITED STATES (1967)

State	Central	Local	Statute	Admin rule	Apportionment formula	Uniform	Comments
Alabama	X			X	Arrivals and departures Passenger miles Scheduled ground time	Yes	
Alaska		X		X	Unknown	No	
Arizona	X		X		50% ground time/total 50% miles in state/total	Yes	
Arkansas	X			X	Miles in state/total Plane hours/total	Yes	
California		X		X	Flight time/24 hours Ground time/24 hours	Yes	Within state use ½ inbound and outbound flight time
Colorado	X			X	75% plane hours/total 20% rev ton miles/total 5% tons on-off/total	Yes	Enterprise ratio used to get unit value
Connecticut	In lieu tax						
Delaware	Personal property is exempt						
Florida	In lieu tax ($100 per plane)						
Georgia		X		X	Atlanta ground time and other unknown factors	No	
Hawaii	Personal property is exempt						
Idaho	In lieu tax (2½¢ lb)						
Illinois		X		X	Unknown	No	

Iowa	Not assessed						
Indiana		X		X	Ground time/total ground time	Yes	
Kansas		X		X	Ground time/total time	Yes	
Kentucky	X[1]			X	50% prop in Ky 25% route miles 25% passenger miles	Yes	
Louisiana	X		X		50% ground time/total 50% plane hours/total	Yes	Includes miles flown over state if carrier lands anywhere in state
Maine	No commercial airlines have situs						
Maryland	Personal property is exempt						
Massachusetts	In lieu tax (up to $100 per plane)						
Michigan	Not assessed						
Minnesota	X		X		Plane hours/system Rev ton miles/system Tons on-off/system	Yes	Nonschedules not apportioned
Mississippi	Not assessed						
Missouri	X			X	Route miles in state/system	Yes	Within state use arrivals and departures
Montana	X			X	Plane hours/system Rev ton miles/system Tons on-off/system[2]	Yes	Apportion counties on arrivals and departures
Nebraska	X		X		Arrivals and departures Originating revenue Tons on-off	Yes	
Nevada	X[3]		X		Plane hours/system Rev ton miles/system	Yes	Apportion counties on rev ton miles
New Hampshire	Not assessed						

TABLE I—Continued

SURVEY OF AIR CARRIER ASSESSMENTS IN THE UNITED STATES (1967)

State	Central	Local	Statute	Admin. rule	Apportionment formula	Uniform	Comments
New Jersey	X	----------	X	----------	Unknown as of 1/1/68	Yes	
New Mexico	In lieu tax (2¢ lb)						
New York	Personal property is exempt						
North Carolina	Not assessed						
North Dakota	X	----------	X	----------	Reg schedule arrivals	Yes	Nonschedules not locally assessed
Ohio	Personal property is exempt						
Oklahoma	X	----------	----------	X	Miles in state/total	Yes	No nonschedules
Oregon	X	----------	----------	X	75% plane hours/total 20% rev ton miles/total 5% tons on-off/total	Yes	Supplementals are taxed same but not other nonschedules
Pennsylvania	Personal property is exempt						
Rhode Island	In lieu tax (up to $250 per plane)						
South Carolina	Not assessed						
South Dakota	X	----------	----------	X	Flight time/system Rev ton miles/system Tons on-off/system	Yes	Schedules only

[1] Nonscheduled aircraft would be assessed at home port However, none are home ported in state.
[2] Unitary basis not used for nonscheduled aircraft.
[3] Locally assessed and no apportionment for nonschedules.

TABLE II

FACTORS USED BY STATES IN ALLOCATION OF AIR CARRIER ASSESSMENTS

Revenue On Route Miles (11)	Revenue Ton Miles (7)	Flight Time (10)	Ground Time (6)	Tons On and Off (8)
Alabama Arizona Arkansas Kentucky Louisiana Missouri Oklahoma* Utah Washington West Virginia* Wyoming*	Colorado Minnesota Montana Nevada Oregon South Dakota Utah	Arkansas California Colorado Minnesota Montana Nevada Oregon South Dakota Utah Washington	Alabama Arizona California Indiana* Kansas Louisiana	Colorado Minnesota Montana Nebraska Oregon South Dakota Utah Wisconsin
Arrivals and Departures (4) Alabama Nebraska North Dakota* Wisconsin	**Originating Revenue (2)** Nebraska Wisconsin	**Situs-in-state (1)** Kentucky	**Non-Uniform (2)** Georgia Texas	**Unknown (3)** Alaska Illinois New Jersey
Aircract Not Assessed (10) Iowa Maine Michigan Mississippi New Hampshire North Carolina South Carolina Tennessee Vermont Virginia	**Personal Property Exempt (6)** Delaware Hawaii Maryland New York Ohio Pennsylvania		**License Fees (6)** Connecticut Florida Idaho Massachusetts New Mexico Rhode Island	

* States which use one factor only

TABLE III

ASSESSED VALUE OF AIR CARRIERS IN CALIFORNIA BY COUNTY *

(As of December 31, 1967)

County	*Total*	*Flight equipment*	*Spare parts*
Alameda	$5,242,020	$4,363,750	$392,010
Butte	14,220	14,030	0
Del Norte	6,270	4,395	0
El Dorado	7,830	7,060	0
Fresno	159,364	109,380	0
Humboldt	24,120	20,510	0
Imperial	38,595	38,175	0
Kern	56,880	52,370	4,510
Los Angeles	71,107,120	42,375,060	8,990,860
Merced	11,190	3,350	0
Monterey	237,330	232,035	0
Orange	290,420	252,280	0
Riverside	167,370	104,340	0
Sacramento	1,127,024	1,082,443	15,531
San Bernardino	571,560	383,850	0
San Diego	9,172,037	6,035,690	1,325,740
San Joaquin	92,460	76,255	3,910
San Luis Obispo	3,170	2,780	0
San Mateo	54,024,505	31,689,005	8,765,310
Santa Barbara	328,370	304,320	0
Santa Clara	1,219,980	1,199,660	0
Shasta	40,285	26,510	3,225
Solano	3,790,450	3,742,360	46,430
Sonoma	4,630	3,690	0
Stanislaus	55,410	34,270	0
Tulare	11,170	9,000	0
Ventura	3,551	2,718	0
Yuba	4,595	4,320	0
	$147,811,926	$92,173,706	$19,547,556

* Excludes air taxis, military aircraft, and private aircraft.

TABLE IV

ASSESSED VALUE OF DOMESTIC AIR CARRIERS IN CALIFORNIA *

(As of December 31, 1967)

Carrier	Assessed Value
Aerospace Lines, Inc	$78,680
Air California	594,250
Airlift International, Inc	1,258,535
Alaska Airlines	15,500
American Airlines	19,681,615
Bonanza Air Lines [1]	653,895
Braniff Airways	225,910
Continental Air Lines	10,810,850
Delta Air Lines	2,302,115
Flying Tiger Line, Inc	7,047,060
Hawthorne Nevada Airlines	4,620
Los Angeles Airways	829,650
Mercer Enterprises	440
National Airlines	1,670,750
Northwest Airlines	167,090
Pacific Air Lines [1]	3,764,321
Pacific Southwest Airlines (PSA)	11,144,893
Pan American World Airways	8,911,560
San Francisco and Oakland Helicopter Airlines	458,805
Saturn Airways, Inc	188,240
Seaboard World Airlines	524,455
Slick Airways, Inc	48,920
Superbas, Inc	39,060
Trans International Airlines (TIA)	1,407,030
Trans World Airlines (TWA)	15,462,975
United Air Lines	39,028,605
Universal Airlines	110,095
West Coast Airlines [1]	311,835
Western Air Lines International	17,719,387
World Airways, Inc	2,588,105
	$147,049,246

* Includes possessory interest, personal property, mobile flight equipment, rotables and spare parts

[1] Merger into Air West pending before Civil Aeronautics Board

TABLE V

ASSESSED VALUE OF FOREIGN AIR CARRIERS IN CALIFORNIA *

(As of December 31, 1967)

Carrier	Assessed value
Aeronaves de Mexico, S.A.	$20,700
Avianca (Colombia)	230
Air Canada	480
Air France	56,270
Air India	1,750
Air New Zealand	3,100
Alitalia (Italy)	3,340
British European Airways	500
British Overseas Airways (BOAC)	1,490
Canadian Pacific Airlines	9,070
El Al Airlines (Israel)	210
Iberia Airlines de Spain	360
Irish International Airlines	540
Japan Airlines, Ltd (JAL)	199,915
K L M Royal Dutch Airlines	4,900
Linea Aerea Nacional de Chile	240
Lufthansa Airlines (Germany)	133,845
Malaysian Singapore Airways	610
Cia Mexicana de Aviacion, S A (CMA)	8,080
Middle East Airlines (Lebanon)	150
Peruvian Airlines	790
Philippine Airlines	30,930
Qantas Empire Airways, Ltd (Australia)	183,510
Sabena World Airlines (Belgium)	2,250
Scandinavian Airlines System (SAS)	55,980
Swissair Transport Company, Ltd	1,010
Trans-Australia Airlines	750
Union de Transports Aeriens (UTA-France)	2,200
United Arab Airlines (Egypt)	300
Varig (Brazil)	39,180
	$762,680

* Mobile flight equipment excluded

APPENDIX I

Statements made before the Assembly Committee on Revenue and Taxation hearings on Air Carrier Assessment Procedures on September 6, 1967 in Sacramento, California

A. Board of Equalization
   Ronald B Welch, Assistant Executive Secretary

B County Assessor Philip E Watson, Los Angeles County

C. County Assessor Jack H Estes, San Mateo County.

D. County Assessor Donald J Hutchinson, Alameda County

E Franchise Tax Board
   Bruce W Walker, Assistant Executive Officer

F. Air Transport Association
   David N. West. Taxation Coordinator

A. BOARD OF EQUALIZATION

RONALD B WELCH, Assistant Executive Secretary

The chairman of the committee asked five questions of the Board of Equalization, and I have been designated as the respondent to three of them. These three are

1 How does the allocation of the value of commercial aircraft compare with the allocation of the value of other mobile equipment traveling in interstate and foreign commerce?

2 How do other states allocate commercial aircraft values?

3. How does the present California allocation formula work, and how is it justified?

ALLOCATION FOR OTHER CARRIERS

First, how is the value of other mobile equipment traveling in interstate and foreign commerce allocated? There are three other types of mobile carrier equipment: (1) railroad cars, (2) highway vehicles; and (3) watercraft.

Railroad Cars

Railroad cars include (a) cars owned by railroads and (b) what are known as "private cars" One can distinguish the two kinds both by the owners' names and by the initials inscribed on the cars; a private car carries the owner's name and a series of letters that identify the owner, followed by an "X."

Cars owned by railroads are assessed as part and parcel of the total operating property of the respective railroads on which they are used No distinction is made between the cars owned by the using railroad and cars that are owned by other railroads. The cars of the New York Central Railroad which are part of the Southern Pacific's trains, for example, are assessed as part of the Southern Pacific Railroad's operating property; the only California assessments of the New York Central are local assessments of off-line properties in traffic solicitation offices Most of the operational property of a railroad is fixed property, and it is usually assumed that the railroad-owned rolling stock is distributed among the states and localities in which the using railroad operates in the same proportion as the rest of the road's operating property. Although the interchange of railroad-owned cars parallels the interchange of planes on a few cross-country flights, railroad tax practices tell us very little about airline taxation.

The taxation of "private" railroad cars is more relevant to the problem of airline taxation. These cars are assessed in almost all states to the owning companies rather than to the railroads. A substantial number of states tax the owners of these cars on their gross earnings Since the car owners are paid by the railroads a certain amount per mile of travel (the amount depending upon the type of car), the gross earnings are divided among the states in approximate proportion to miles traveled. Almost every state that imposes an ad valorem property tax on private cars also allocates the value of a company's fleet, or of groups within the fleet such as all tank cars in the fleet, in the propor-

tion that miles traveled within the state bear to the total miles traveled within and without the state

California is unique, to the best of my knowledge, in allocating the value of private cars in proportion to time spent within the state. We are able to do this by reason of reports filed by the railroads on which each private car that enters or leaves the state is identified and the time of entry or departure is stated These border-crossing reports are supplemented by reports of any cars manufactured in the state and semiannual counts of cars on private sidings in the state on June 30 and December 31. As a terminal state with many car loadings and unloadings, California accounts for a considerably larger percentage of car time than of car mileage Hence, we derive much larger revenues from our private car tax than we would were we to use the mileage proration used by most other states.

The main lessons that I derive from the history of allocation of railroad property are that each state tends to find virtue in an allocation method that maximizes its share in the unit value that is being allocated, that the conflicting interests of terminal and so-called bridge states are irreconcilable, and that an interstate surface carrier operating over fixed routes is therefore typically taxed on more than 100 percent of the unit value ascribed to its property

Motor Vehicles

The allocation of highway carriers' equipment is less easily described All commercial railroads are closely regulated common carriers of freight or of freight and passengers, but highway carriers provide a great variety of services—common, contract, and private carrier service, urban and intercity service, passenger and freight service, fixed-route, charter, and irregular-route service. Since property tax practices can, and do, vary with all these different types of service, it is nearly impossible to summarize allocation practices.

Many states, including our own, do not tax motor vehicles under the general property tax or anything very closely resembling the general property tax Instead, they license the vehicles and charge a licensing fee based on gross or net weight or occasionally on value. In California we have what amounts to a vehicle license fee based on a combination of unladen (net) weight and value All states give some recognition to the licenses issued by other states, usually by means of reciprocity statutes or agreements A trucking firm operating in more than one state with full reciprocity may endeavor to license the several vehicles in its fleet in rough or close proportion to the number of miles traveled in the states in which it operates A formalization of this proportional-registration plan is one of the more recent developments in the field of motor vehicle taxation

Where conventional property taxation of motor vehicles is still in vogue, most highway carriers' vehicles are taxed in full at the fleet headquarters, which are usually the places where the carriers' principal offices are located Allocation of fleet values among the states in which operations are conducted is limited to a few states and to a few of the highway carriers operating in these states—such as the common carrier bus lines or common carriers of either freight or passengers. Vehicle miles is almost invariably the sole allocation factor.

Experience with motor vehicle taxation teaches us that allocation is very difficult if not entirely impractical for carriers unless they are closely regulated and travel regular routes or at least have fixed termini

Watercraft

We come last to the water carriers Like highway carriers, these may engage in common, contract, or private carrier service They may also engage in inland, coastal, intercoastal, or foreign service With the exception of the barge lines on the Mississippi River and its tributaries, water carriers are largely immune from property taxation This curious fact arises from interstate and international competition for carrier headquarters, from the fact that most watercraft are on the high seas much of the time, and from the longstanding practice of subsidizing oceangoing shipping in furtherance of national defense

When vessels are taxed, they are usually taxed on their full values at their home ports Allocation of vessel values among taxing jurisdictions is practiced only on inland waterways and to only a limited extent there Although we are indebted to the inland water carriers for two of the leading cases on taxable situs of carrier equipment,[1] there are few property tax lessons to be learned from the water carriers. The main one, I believe, is that taxation at home ports tends to degenerate into no taxation at all because of interstate competition for vessel headquarters.

HOW OTHER STATES ALLOCATE AIRCRAFT VALUES

I turn next to the aircraft allocation practices of other states Like the private railroad car owners, the motor carriers, and the water carriers (and unlike the railroads), airlines are almost always taxed on their property other than flight equipment—the so-called "fixed-situs" property—at its location under the same laws and administrative regulations as apply to the property of nontransportation companies. Only flight equipment is ordinarily valued as a unit with an allocation of the unit value between states and between local governments.

In anticipation of this committee's study, we in the State Board of Equalization formulated and distributed to the tax departments of other states a questionnaire on aircraft value allocation practices. With the help of Mr Buck of your staff, we have recently analyzed the responses. As is so often the case, we found that the questions did not elicit full and unambiguous responses. We are in the process of renewing the inquiry in some of the states whose responses were not clear to us. We will keep your staff abreast of additional information collected

A surprisingly large number of responses indicate that aircraft engaged in interstate commerce are not taxed at all. This is the case not only in the four states[2] that tax no personal property of any kind, but also, apparently, in at least 10 more states.[3] Six other states,[4] taking

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[1] *Ott v Mississippi Valley Barge Line Co*, 336 U S 169, in which the right of a state to tax a fractional part of a nonresident barge line's fleet was affirmed, and *Standard Oil Co v Peck*, 342 U S 382, in which the right of a state to tax the whole fleet of a resident interstate water carrier was denied

[2] Delaware, Hawaii, New York, and Pennsylvania

[3] Iowa, Maine, Maryland, Michigan, Mississippi, New Hampshire, North Carolina, South Carolina, Tennessee, and Vermont

[4] Connecticut, Idaho, Massachusetts, New Mexico, Ohio, and Rhode Island

a leaf out of the highway carrier book, collect license fees in lieu of property taxes on aircraft. This leaves 30 states in which there is probably some assessment of commercial aircraft for ad valorem property taxes. In well over half of these,[5] the flight equipment of the common carriers is assessed by the state tax department. Our questionnaire revealed very little information on the allocation practices of the assessors in the 10 states other than California where local assessors handle this type of property.

For analytical purposes, the factors used for interstate allocation of the value of aircraft may be divided into two major categories: (1) those that allocate value only to states in which landings and takeoffs are made and (2) those that allocate both to such states and to states which are overflown.[6] When only the former type of allocation factor is used by all states in which an airline operates, the full value of the carrier's fleet is available for taxation.[7] When allocation formulas contain one or more of the second type of allocation factors, however, some part of the fleet's value will not be available for taxation, since some part of the value will be allocated to overflown states and these states are generally assumed to lack property-taxing jurisdiction.[8]

The currently used allocation factors of which we have been informed include these two types and some hybrids. Those that allocate the full value of a fleet to states with clearly established property-taxing jurisdiction are: (1) plane arrivals and departures, (2) ground time of planes (i.e., the ratio of ground time in the state to total ground time[9]), (3) passenger and freight tonnage loaded and discharged; and (4) originating revenue.[10] Those that allocate value both to states with clearly established property-taxing jurisdiction and to states that are overflown are: (1) plane miles, (2) ground plus flight time of planes, (3) flight time of planes, and (4) ton miles of passengers and freight.[11] There is a third type of allocation factor which I have called a "hybrid." Only two factors of this type are in use, to the best of my knowledge: (1) route miles and (2) plane miles, inclusive of overflight miles. Route miles, I assume, include routes on which planes

[5] Alabama, Arizona, Arkansas, Colorado, Kentucky, Louisiana, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

[6] When the assessment is performed by local officials, the jurisdiction of the local assessor is like that of a state with central assessment. California may be unique in having local assessment and yet having an allocation process that extends the reach of the local assessor to the state's boundaries. This is the first year, however, in which every California county reaches or purports to reach to the state line.

[7] The full value may not actually be taxed, however, if one or more of the states (e.g., New York) chooses not to tax this kind of property.

[8] Whether or not a state with which an airline has no ground contact but whose airspace is "invaded" by the carrier can assert a property tax has never been tested. Nor do we know whether a state which an airline often overflies but in which it makes some landings can tax a fraction of the whole fleet equal to the fraction that flight mileage or time *in and over* the state bears to all mileage or all time. A Western States Association of Tax Administrators' committee has expressed the opinion that the latter practice is constitutional (see *Report of the Committee on Allocation of Public Utilities*, WSATA, 1960, p. 20), but I know of only one state in which this has been tried and none in which it has been litigated.

[9] In this connection, see the dissenting opinion of Justice Roger Traynor in *Flying Tiger Line, Inc. v. County of Los Angeles*, 51 Cal. 2d 314 at pp. 330–331.

[10] "Originating revenue" means revenue at the place where a passenger or shipment of goods enters the carrier's line.

[11] There are many minor variations of these eight basic factors which need not be described here. For example, plane landings and takeoffs are usually "equated" by giving greater weight to landings and takeoffs of large planes than to those of small ones. Kentucky uses a factor that is apparently not used elsewhere in states with central assessment and which is not mentioned in the text: value of immobile property (a type one factor).

overfly the state as well as those on which planes fly to and from ports of call in the state—provided the airline has any ports of call in the state Thus, only an airline that completely overflies one or more of the states along its route—as American completely overflies Nevada—would have value allocated to a state that apparently lacks taxing jurisdiction. Plane miles including overflight mileage is the allocation factor in at least one state (Oklahoma), however, a carrier which completely overflies the state is not taxed, nor is the overflight mileage of a type of plane counted if no planes *of that type* are landed in the state by a carrier that serves a port in the state

All but 7 of the 20 states for which we have identified flight equipment allocation factors[12] use one or more allocation factors of each of the first two types Indiana, Nebraska, and Wisconsin use only type one factors—factors that allocate all value to states with clearly established taxing jurisdiction California, Washington, West Virginia, and Wyoming use only type two factors—factors that allocate some value to overflown states

THE CALIFORNIA ALLOCATION METHOD

This brings me to my third assignment How does the California flight equipment allocation rule operate, and what are its merits?

The California rule provides for segregation of an air carrier's fleet by type of plane and the allocation of the value of each group in the fleet in the proportion that total plane time in California bears to total plane time both within and without the state Suppose that a carrier on the lien date has a fleet of five Fairchild F-27's and three Boeing 727's A value would be placed on the F-27's as a group If in a representative period around the lien date, this company's F-27's were in the state, either in flight or on the ground, 25 percent of the time, 25 percent of the value of all the company's F-27's would be taxed in California Each of the California airports which were served by the F-27's would receive a fraction of the value of all the company's F-27's The numerator of the fraction would be ground time of the F-27's at the port plus half the inbound flight time of each plane from the last California port of call, or all of the time from the state line if coming in from out of state, plus half the outbound flight time of each plane to the next California port of call, or all of the time to the state line if going out of the state The denominator of the fraction would be the total time during the test period times the number of F-27's in the fleet The value of the company's Boeing 727's would be similarly allocated

This allocation plan has several merits It appears to accord with the principles of property taxation by implementing taxation of the property in proportion not only to value but also to time within the

[12] These 20 states are 17 states with central assessment of air carriers (all those listed in footnote 5 except Louisiana and North Dakota) plus Indiana, California, and Nevada In the latter three states, airline equipment is locally assessed under rules prescribed by the state tax department The California rule was incorporated in Ch 319, 1967 session, shortly after its issuance in order to insure its constitutionality

state.[13] When it was adopted as a Board of Equalization rule and as a statute, it was the method most consistent with prior practice in California. Although the formula does not extend the "reach" of the California property tax as far as the United States Supreme Court's decisions permit, it allocates less value to overflown states—states without established taxing power—than any other of the type two allocation factors.

But the California allocation method also has some demerits. It discourages the location of plane overhaul facilities in California, although, so far as I know, the discouragement has been too slight to have had any effect on carriers' decisions. A more important demerit is the fact that it is a type two allocation factor and therefore allocates some flight equipment value to states which, so far as may be discerned from the court decisions, lack taxing jurisdiction. Finally, it is not an allocation formula that is popular in other states. To the best of my knowledge, it has not been advocated by any of the authorities which have taken a stand on airline value allocation—the Civil Aeronautics Board,[14] the National Tax Association's Committee on Multiple Taxation of Airlines,[15] the National Association of Tax Administrators,[16] the Western States Association of Tax Administrators,[17] the Council of State Governments.[18] For this reason, if for no other, it seems unlikely to be adopted by other states. Unless all states in which a carrier operates apply the some allocation formula and the formula allocates value only to states with taxing power, the allocation fails in its primary purpose—to expose to taxation 100 percent of the value of the property—no more and no less.

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[13] The present method of allocating the value of private railroad cars, which is identical with the present method of allocating flight equipment, was instituted on the ground that property taxes should be proportional to both value and time. For this reason, it was customary until quite recently for California county assessors to assess airline flight equipment only in proportion to time spent within their respective counties, so that time spent in flight over California counties in which landings were not made was tax-free time.

[14] *Multiple Taxation of Air Commerce*, House Document No. 141, 79th Congress, 1st Session (1945), which recommended an allocation formula with 40-percent weight for originating and terminating tonnage, 40 percent for originating revenues, and 20 percent for plane arrivals and departures.

[15] *Proceedings of the (1946) Annual Conference on Taxation*, National Tax Association, pp. 281–284.

[16] *Revenue Administration, 1946*, National Association of Tax Administrators, pp. 56–58.

[17] *Report of the Committee on Allocation of Public Utilities*, 1960, pp. 6–21.

[18] *Suggested State Legislation—Program for 1960*, Council of State Governments, 1959, pp. 61–64.

B. COUNTY ASSESSOR

PHILIP E. WATSON, Los Angeles County Assessor

Mr. Chairman and Honorable Members of the committee:

My name is John D Cahill I am Deputy County Counsel of the County of Los Angeles and I am here to represent Mr Philip E. Watson, the Assessor of Los Angeles County Mr. Watson intended to be here to share with you his views with respect to the important and difficult task before you—that of developing a fair and reasonable method of assessing air carriers in the State of California—but due to the exigencies of pressing business, he was unable to leave Los Angeles and has asked me to substitute for him He sincerely regrets his inability to be with you this morning

At the outset of my remarks, I want you to know that the material I plan to present today is that which Mr Watson has specifically requested be given to the committee The Assessor of Los Angeles County has strong and firm views with respect to the problem we are considering here, and those views have been formed as a result of extensive experience in the field of assessment of aircraft

As a point of reference, it might be well to review for you some of the history that led up to this interim study on the assessment of aircraft in California For the past several years, assessments in Los Angeles County were made on the basis of the allocation formula enunciated in the *Flying Tiger* case (*Flying Tiger Line, Inc.* v. *County of L A*, 51 C 2d 314) decided in 1958—that is, solely on the basis of the time the aircraft were physically present within the county There was no difference of treatment given to airlines domiciled in the county as contrasted to nondomiciliary aircraft, or to the consideration of foreign versus interstate commerce However, in 1965–1966 it became apparent by analyzing the more recent judicial pronouncements on allocation or apportionment theories that the method of allocation utilized in the *Flying Tiger* case permitted property to avoid taxation; or, to put it another way, the method did not exercise or utilize the full measure of the taxing power as authorized by Sec 1 of Art XIII of the State Constitution. As a result thereof owners of commercial air carriers were not contributing their fair share to the burdens of local government, as were other property owners

As a result of this situation, the staff of the State Board of Equalization and the County Assessors of California, acting through the Aircraft Advisory Committee of the County Assessors' Association, proceeded with a study during the years 1965–66 to determine the true status of the law relative to the allocation of aircraft for taxation purposes. After a thorough and comprehensive investigation into the matter, both the staff of the County Assessors' Association of this state and the State Board of Equalization proposed a method of procedure for the assessment or allocation of aircraft for taxation purposes This procedure represented the current status of the law relative to the allocation of aircraft for assessment and taxation purposes The recommended procedure was in relevant part as follows:

Allocation. When it has been determined that an aircraft has acquired more than one taxable situs, the method of allocating the taxable value thereof to the various taxing jurisdictions should be calculated on a time basis. Such an approach has proven to be fair and equitable to both the taxpayer and the California taxing jurisdictions. Moreover, it eliminates the possibility of multiple taxation.

I. AIR CARRIERS DOMICILED IN CALIFORNIA

a *Interstate and foreign operations*

Aircraft operating out of California in interstate and/or foreign commerce, owned by air carriers having a home port or domiciled in California, shall be assessed at their full value less that portion of their value which is allocable to other jurisdictions where they acquired a situs for apportioned taxation.

b *Intrastate operations*

Aircraft operating exclusively within California, owned by air carriers having a home port or domiciled in California, shall be assessed by the home port or domiciliary county at their full value less that portion of their value which is allocable to those counties where a taxable situs has been acquired In computing the time which is attributable to each nondomiciliary county, the ground time plus one-half of the inbound and outbound flight time should be used In counties having extensive air traffic, an air time factor may be used in lieu of computing the time between counties provided said factor takes into consideration the preceding principles

II AIR CARRIERS DOMICILED OUTSIDE CALIFORNIA

Aircraft owned by air carriers having a home port or domiciled in a state other than California, operating in and out of the state in interstate and/or foreign commerce are taxable for the time they spend in California, and shall be assessed by the various California counties in which they have acquired a situs for apportioned taxation In computing the time allocable to each county, the ground time plus one-half of the inbound and outbound time is computed and included for flights in California, and the ground time plus the flight time from or to the state line is similarly computed and included for interstate flights In counties having extensive air traffic, an air time factor may be used in lieu of computing the time between counties and the state line provided said factor takes into consideration the preceding principles.

This proposed procedure was reviewed and approved by both counsel for the various assessors of the State of California and the State Board of Equalization It was then approved by the Standards Committee and the County Assessors' Association and by the Assessment Standards Division of the State Board of Equalization It was then incorporated into the Assessors Handbook under the title "AH 577" and was on the verge of being released when members of the State Board of Equalization, at the insistence of the airline industry, decided to hold a public hearing on the proposed procedure. This hearing was con-

ducted last December here in Sacramento, and subsequent thereto the board decided not to approve the recommended procedure as outlined in the proposed manual In February of this year the board, while recognizing the impact of the most recent cases, adopted an interim instruction and later an interim rule based on procedures that had been followed in previous years with minor modifications The rule as adopted by the board specifically recognized that the recent judicial decisions and especially *Central Railway Co of Pa vs Pennsylvania* (1962) 370 U S 607, 82 S Ct 1297 would permit a "method of allocation that would insure a more adequate and equitable assessment of aircraft "

At this juncture, I would like to direct the remainder of my remarks to the questions propounded in your letter to Mr Watson of August 15, 1967. Your first inquiry was as follows.

> "1 Earlier this year you decided to apportion the value of mobile flight equipment of commercial air carriers in a manner which was contrary to an instructional letter from the State Board of Equalization What method had you decided upon and why did you prefer this to the method advocated by the board staff?"

As the Assessor of Los Angeles County, Mr Watson intended to use the procedure outlined in the manual prepared by the staff of the State Board of Equalization and the County Assessors' Association He preferred this method to that advocated by the board's interim instruction for the following reasons

1 Because the board instruction permitted property to avoid taxation

2 The state board instruction was merely *permissive,* rather than mandatory.

3 Under the Constitution of the State, the assessor has the duty to exercise the full measure of the taxing or assessing power The interim instruction did not provide for this

4 As Mr Watson interpreted the state board instruction, it applied only to nondomiciliary aircraft, since no specific reference to the treatment of aircraft domiciled in California was contained in the instruction

5 The procedure outlined in the proposed manual (AH 577) was more in accord with the recent judicial decisions on the subject.

In amplifying the method he intended to use, Mr Watson asked me first of all to briefly discuss the method of handling foreign commerce time As a general principle, Mr Watson is in full accord with the statements contained in the proposed manual under the headings of "Situs" and "Allocation" (AH 577—17 and 18) Under the heading of "Situs" the manual in relevant part states

> "The general rule is that the home port or domiciliary jurisdiction of an instrument of commerce, such as an aircraft, may tax the vehicle at its full value unless it is shown that it has acquired a situs for apportioned taxation elsewhere. . . ."

Under the heading of "Allocation" the proposed manual further states that·

"1 Air Carriers Domiciled in California

a *Interstate and foreign operations*

Aircraft operating out of California in interstate and/or foreign commerce, owned by air carriers having a home port or domiciled in California, shall be assessed at their full value less that portion of their value which is allocable to other jurisdictions where they acquired a situs for apportioned taxation"

Under a strict application of the home port doctrine, aircraft domiciled in California and engaged in foreign commerce would *not* acquire a situs for apportioned taxation while situated in a foreign airfield If this is true, and no situs is acquired under such circumstances, then the home port or domiciliary jurisdiction could tax the full value of the plane including the time it spent in the foreign country This result is not prohibited by the above-quoted provision of the proposed manual and would seem to find strong support in the California Supreme Court's *S A S* decision [*Scandinavian Airlines System, Inc v County of L A* (1961) 56 C 2d 11]

On the other hand, Mr Watson planned to eliminate that portion of foreign commerce time allocable to a Los Angeles domiciled plane while located in a foreign country on the theory that it has acquired a situs therein for apportioned taxation Naturally, this method of assessment would modify to a certain degree the strict interpretation of the home port doctrine It does, however, find substantial support in the recent cases which have considered the problem of allocation.

Central Railroad Company v Pennsylvania
(1962) 370 U S 607, 8 L Ed 2d 720
Memorandum Opinion of Honorable Eugene Sax
overruling county's demurrer in *Flying Tiger Line, Inc. v. County of Los Angeles*
(1965), Superior Court No 629330
Star-Kist Foods, Inc v County of Los Angeles
(1966), 241 C A 2d 313

In the *Central Railroad Company* case, *supra*, the U.S. Supreme Court held that the domiciliary state of instrumentalities of communications (railroad cars) had the power to tax them at their full value less that value that was attributable to other jurisdictions in which they had, by regular and recurring contacts, acquired the power to tax In other words, said vehicles of commerce could be assessed at full value in the domiciliary state until it was shown that they had acquired a situs for apportioned taxation elsewhere Admittedly, this case involved only interstate commerce However, the principle of law enunciated in this case was applied to foreign commerce in the *Flying Tiger* case, which was heard by the Los Angeles Superior Court in 1965 In that case, the County Assessor, in computing the value allocable to Los Angeles domiciled aircraft for tax purposes included a certain portion of foreign commerce time, to wit, the time the aircraft

was located on the ground in the foreign country plus 15 minutes for each flight in and out of the foreign country The complaint filed in this case sought a refund of those taxes which were attributable to the inclusion of said time in computing the value of plaintiff's planes as allocable to Los Angeles County The county demurred to the complaint on the ground that the home port theory, as expressed in the *S A S.* case, permitted the assessor to consider and include *all* foreign commerce time in his apportionment formula and, further that since something less than the full taxing power had been exercised by the county, plaintiff had no reason for complaint In overruling the county's demurrer, Judge Sax concluded that the principle of the *Central Railroad Company* case, which dealt with interstate commerce, was equally applicable to foreign commerce At page 7 of his memorandum opinion he stated

> " . . It is true that *Central Railroad Company, supra,* did not deal with foreign commerce However, I do not see any reason for failing to apply to foreign commerce the same rule applicable to interstate commerce, viz., that where an organism of foreign commerce has acquired a taxable situs outside of its domicile, in addition to that acquired in the domicile the domiciliary taxing jurisdiction may not levy a tax based upon the value attributable to the foreign tax situs, for to do so would constitute multiple taxation and therefore an unconstitutional burden on foreign commerce.
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> * * * * * * *
>
> "In arriving at this result it is not necessary that it be shown that the property was *actually taxed* by the foreign country; it is sufficient if it be shown that the property has acquired sufficient situs in the foreign country so that it *could* be taxed by such country *Central Railroad Company of Pennsylvania, supra* "

In 1966 our California court of appeal also applied the principle of the *Central Railroad Company* case to foreign commerce (*Star-Kist Foods, Inc v County of Los Angeles, supra*) As you may recall, the fishing vessels taxed in that case were home ported in Los Angeles County and were engaged for a substantial portion of the year in fishing operations on the high seas, mainly off the coasts of Mexico, Ecuador, and Peru The vessels were assessed at their full value and the appellate court sustained the tax on both the strict home port and *Central Railroad* theories In commenting on the *Central Railroad Company* case, the opinion states at page 319

> ". . . While the Supreme Court of the United States was dealing here with the right to tax the rolling stock of a railroad engaged in interstate commerce, *the principles enumerated with respect to the right of the domiciliary to tax for the full value of the equipment unless the taxpayer establishes that the property has attained an actual situs elsewhere*, and that the taxing power of the domiciliary, in the absence of another tax situs, is not confined to such portion of the value of the property being taxed as is equal to the fraction of the tax year which the property spent within the state's borders, *are applicable and controlling in the case at bench."* (Emphasis added)

There can be no question that under the facts of that case the vessels involved were engaged in foreign commerce [see *Mitchell v. Indep. Ice & Cold Storage Co* (1961); 294 Fed 2d 186; and *Local 36 of International Fishermen & Allied Workers of America v U.S*, (9th Cir 1949) 177 Fed 2d 320, cert, den. 339 U S. 947].

Therefore, it would appear that the method of assessment proposed to be utilized by Mr Watson finds strong support in the recent cases, and in my professional judgment it will be the principle ultimately adopted by the courts

The reasons why Mr Watson preferred the method of assessment outlined in the proposed manual rather than that advocated by the board are as follows

1 It eliminated the possibility of property avoiding taxation.
2 It authorized the exercise of the full measure of the power to tax, which is an assessor's duty under the Constitution.
3. The method was more in conformity with the latest judicial expressions on the subject.

In your second question, you inquired of Mr Watson:

"What weaknesses do you see in the apportionment method mandated by the Board of Equalization rule? What are its advantages?"

As previously mentioned, the weaknesses of the board rule are that:

1 It permits property to avoid taxation
2 It is not in conformance with the constitutional requirement that all property be assessed and taxed in proportion to its value, and further, that the full measure of tax be employed.
3 It does not take into consideration all the activities of an airline.
4 It is not in accord with the latest judicial thinking on the subject matter.

Inasmuch as the rule abrogates the power to tax aircraft domiciled in California, Mr. Watson feels there are no concrete tangible advantages in utilization of the board rule

Your third question is:

"Prior to this year, did Los Angeles County use the method outlined in the board rule? How did it differ? What other methods have been used in Los Angeles County?"

Generally speaking, since 1959 Los Angeles County has used the method outlined in the board rule, except for the year 1962, when as a result of the *Scandinavian Airline* decision, the county assessor included a portion of foreign time in the allocation of air carriers domiciled in Los Angeles County. The utilization of this method of procedure was a result of the 3-1-3 decision in the *Flying Tiger* case (*Flying Tiger Line, Inc v County of Los Angeles*, 51 C 2d 314), which was decided in 1958 That case dictated the "physical presence" factor as the sole test Other cases, however, have cast serious doubt upon the formula enunciated in the *Flying Tiger* decision. In 1962 the United States Supreme Court decided the *Central Railroad Company v. Pennsylvania* case, and adopted in essence the theory of the dissenting opin-

ion in the *Flying Tiger* case, which was written by our present Chief Justice Roger Traynor In 1964 our trial court in Los Angeles County decided the *Star-Kist Foods* case, upholding an unapportioned tax on Los Angeles domiciled vessels engaged in foreign commerce In 1965 our superior court ruled on the second *Flying Tiger* case and held that the principle enunciated in the *Central Railroad Company* case was fully applicable to instrumentalities engaged in foreign commerce. In 1966 the *Star-Kist Foods* case was affirmed by the appellate court. It likewise applied the *Central Railroad Company* principle to vehicles of foreign commerce As a result of these recent cases, the manual was rewritten to conform to the apportionment principles enunciated therein.

You further inquired How did our method differ from the board rule? Rather than compute one-half of the inbound and outbound flight time for flights between counties within the state and the flight time from or to the state line for flights in or out of the state, we used an air time factor that was uniform for the entire fleet This factor, however, took into consideration the principles mentioned above

The fourth question propounded in your letter is

> "What do you think are the strengths and weaknesses of other allocation formulas that have been suggested? What method would be best, in your opinion?"

Some of the formulas that have been suggested include the Braniff or NATA (National Association of Tax Administrators) formula, which considers an average ratio of arrivals and departures of aircraft, revenue tons handled and originating revenue, or any one of those factors considered individually Other factors that have been suggested are ground-to-ground ratio, revenue mileage, revenue tons, scheduled mileage, actual mileage and various time factors, etc The problem with many of these methods or any combination thereof is that they are extremely complex or unfeasible to administer from a practical and realistic standpoint. Many of these factors do not measure what is really happening in the airline industry, or to put it another way, they do not measure *all* the activities of an airline. Take, for example, the arrivals and departures factor Let us suppose an airline flies from Los Angeles to Sacramento, with a 10-minute stop in Fresno to discharge and take on passengers, and then returns from Sacramento to Los Angeles with a similar 10-minute stop in Fresno If you counted the number of arrivals and departures, you would find two for Los Angeles, two for Sacramento, and four for Fresno. Under the arrivals and departures, 50 percent of the value of the plane would be allocated to Fresno and only 25 percent to Los Angeles and Sacramento—yet the total time the aircraft spent in Fresno amounted to only 20 minutes.

With respect to the NATA formula or the Braniff formula, that measures only line haul factors, not situs factors, and as Justice Douglas said in his concurring opinion in Braniff, the formula poses "substantial questions" as to its validity.

In Mr. Watson's considered opinion, a time factor would be the most practical to administer—one that would consider (1) the line haul factor (flight time), and (2) the situs factor (ground time). In his opinion, the only factor that measures the total activities of an airline

is total time He feels that such a factor would be practical to administer because:

1 It is a relatively easy method to compute,
2. It treats all air carriers alike,
3. It lends itself to audit and verification

Therefore, Mr Watson feels that the best method of assessing aircraft would be that outlined in Assessors Handbook 577

In question No 5, you inquire as to whether or not the county assessor's office would have any estimate of how much more or how much less the value of mobile flight equipment would be in Los Angeles County under the alternative methods of allocating value Naturally, this is somewhat of an impossible question to answer, since we do not have the facts and figures or any information upon which to compute this value for the various types of formulas that have been suggested If this committee were to adopt the rule as proposed in the manual, there would be no increase in the value of flight equipment of nondomiciled air carriers, but such aircraft would be subject to tax in the state of their domicile With respect to mobile flight equipment of domiciled air carriers, there would be an increase in value of flight equipment as contrasted to the interim rule.

If your honorable committee were to adopt some time factor based upon ground time, all aircraft, whether domiciled in California or not, would be treated alike, and any alleged discrimination occurring against domiciled air carriers under the proposed procedure outlined in the manual would be eliminated This, however, is problematical, since there is no basis for any alleged discrimination under the procedure outlined in the proposed manual This is so because the nondomiciled aircraft are subject to taxation in the state of their domicile, and we cannot administer the tax laws of other jurisdictions They have the power to tax—whether they exercise that power is not our concern. Besides it is extremely difficult to compare various tax systems since some states utilize a franchise tax, others, an income tax, others consider landing fees and charges The various types of taxes paid by airlines in other states are just not measurable for comparison purposes.

However, if a ground time formula were adopted, the taxable value of mobile flight equipment of both domiciled and nondomiciled air carriers would probably increase

In summary, gentlemen, may I emphasize that Los Angeles County has had more experience in assessing airlines than any other taxing jurisdiction in this nation As long as 20 years ago it was reported that 95 percent of all property taxes paid on airplanes in this country were paid in Los Angeles County And it is not uncommon today for airline representatives to tell us that they pay more taxes in Los Angeles than in all other taxing jurisdictions combined

Gentlemen, we have pioneered this field of assessment, and we have pioneered the system and we believe we have made it a workable system The trend in the law is clear from the trial courts to the appellate courts, all the way to the Supreme Court—yes, even the highest court in the land, the United States Supreme Court We only ask that you implement what we feel is the best method of allocating aircraft valuation for assessment and taxation purposes, that which we feel is the law—namely, the procedure outlined in the proposed manual.

C. COUNTY ASSESSOR

JACK H ESTES, San Mateo County Assessor

Mr Chairman, my remarks will be directed to the questions in your letter of August 15, 1967, as it relates to San Mateo County

The first question asked was the apportionment formulas that have been used in the past and the formula that was being used immediately prior to 1967

In the assessment years prior to 1967–68 San Mateo County apportioned aircraft time using ground time plus a 10- or 15-minute time factor for each flight This was predicated on time in the county concept. It was the opinion of our office and the county counsel that the legality of assessments of time outside the county border had not been established at that time Subsequently, the decision in the *Zantop Air Transport v County of San Bernardino* formed a basis for apportionment based on time on the ground plus one-half of the inbound and outbound flight for intrastate flights intrastate flights were timed to the state line This is the procedure outlined by the State Board of Equalization in its property tax rule No 202 and reiterated in SB 337, the McAteer Bill This is the apportionment used by San Mateo County for the 1967–68 assessment year

The second question was asking our opinion of the formula prescribed in the Board of Equalization regulation and in SB 337, in terms of equity, economic impact on the airlines, and revenue effect on the county.

In our opinion, the formula just described seems equitable The fact that it was used for the current year assessment without objection on the part of the airline indicates that there is no damaging economic impact involved The revenue to the county in this area is nearly double the procedure of the preceding year

The third question is the method that you feel should be used, and the support of your position in terms of equity, the economic impact on airlines, and the revenue effect on the county

We require a scheduled airline to report all trips according to the last schedule prior to the lien date covering a period of at least one week The ratio of time reported to the total time available is applied to the total value to arrive at the San Mateo County value. Supplemental airlines are required to report all flights during three separate months of the year prior to the lien date The three months are to represent a typical average activity a year The time thus obtained is projected to indicate the allocation of the assessment year following the lien date Although we have had no particular problem obtaining time information from the airlines, we believe that some sort of rule directing the airlines to report a uniform period would be helpful to the assessors in general.

In terms of the economic impact of the rule, I think that SB 337 would certainly be more equitable insofar as California home-ported airlines are concerned

For any difficulty you see in the administration of the present formula We see no difficulty at all We haven't had any difficulty in computing the time We don't use an air time factor but instead, use a computed time to the state line in case of interstate flights Of course, in intrastate flights, we use half-way to the next stop schedules. So we don't see any difficulty in the administration of this formula

D. COUNTY ASSESSOR

DONALD J HUTCHINSON, Alameda County Assessor

I, Don J. Hutchinson, Assessor for Alameda County, offer my regrets at not being able to attend this hearing because of previous commitments Mr Thomas Pyle, Supervising Auditor-Appraiser, and Mr George Wales, Marine and Aircraft Appraiser, have been authorized to convey my thoughts on this subject to you

In answer to your letter dated August 15, 1967, here follows comments on your specific points of inquiry

1 The apportionment formulas that have been used in your county in the past, and the formula that was being used immediately prior to 1967

In the years prior to 1966 we used a similar method but instead of "bridge time" we used a standard air time factor for all flights of all airlines (Ground time plus 10 minutes air time in and out of Alameda County regardless of inbound starting point or outbound destination of these flights)

For 1966, we used the same method the State Board of Equalization specified for 1967 For both of these years, aircraft assessments were based on the so-called "bridge time " (Interstate ground time plus in and out air time to and from the state line Intrastate ground time plus one-half air time to and from another county in the state)

2 Your opinion of the formula prescribed in the Board of Equalization regulation and in SB 337 in terms of equity economic impact on the airlines, and revenue on the county

(a) Equity In our opinion the formula prescribed in SB 337 is probably the most equitable for the State of California and the airlines By airlines we mean interstate, intrastate and nondomiciled and domiciled air carriers

(b) Economic impact on the airlines Under SB 337 there is no distinction between the above mentioned types of air carriers The change that was proposed in 1966 would have given the non-California based airlines a distinct tax advantage over the California based airlines For example, the three charter air carriers that are based at Oakland International Airport have stated that it would cost them 15 cents per mile more than their competitors whose home ports are not in California

(c) Revenue effect on the county You, no doubt, have heard of the effort that has been put forth and how hard the city has worked to build up the Oakland International Airport If these three airlines should move, it would have a very adverse effect on the tax base in both the City of Oakland and Alameda County.

On pages 1 and 2 of attached appendix are listed the net effect on future assessment of these three airlines with that of the 1967–68 assessment Page 3 illustrates what the economic effect would be to our county

3 The method that you feel should be used, and the support for your position in terms of equity, the economic impact on airlines, and the revenue effect on the county.

Although there are different ways to measure the situs acquired by an airline in a particular jurisdiction, we feel the standard of time, as set down in SB 337 is best suited to this type of property.

Use of revenue factors, while appropriate, perhaps in the franchise tax field will yield arbitrary and capricious results when used to measure the amount of property employed within a jurisdiction The major distortion resulting from use of revenue factors is the basic assumption of the factor that the aircraft are continually being used for revenue producing purposes. Such is not the case. The average daily utilization of aircraft in revenue producing operations is approximately eight hours Therefore, revenue factors can at best measure only one-third of aircraft activity. Identical criticism must be made of mileage factors, including those mileage factors weighted with revenue factors.

Greater disproportion can result from use of arrivals and departures as a basis of allocation again because of limited activity measured by it and further because the intermediate port can recieve an apportionment larger than the terminal

The relation of situs property and/or ground payrolls to the operation of aircraft is remote if existing at all At a large terminal, an airline may employ a large number of employees in operations not directly connected with aircraft operations or, at an intermediate port, may employ none and rely on agents to handle the necessary business The lack of a direct relationship to the aircraft operation would make these measures extremely poor.

The above-mentioned factors each appear to be subject to one or more of the following criticisms:

(1) Determinations external to the taxing jurisdictions are required.
(2) Limited portions of the aircraft operations form the complete base
(3) No apparent correlation exists between the factor and the aircraft.
(4) The dissimilar aircraft operations result in distortions as between jurisdictions.

The remaining factor, time, is the one element which adequately measures both terminal factors and line-haul factors. Time, therefore should be the basis of all allocation used to determine the amount of property habitually employed within a jurisdiction.

4. Any difficulty you see in the administration of the present formula.

We find no difficulty in the adminstration of SB 337. The information needed to develop the apportionment factor, for Alameda County, is secured through two different means

(1) Each year we request from the airlines their flight schedules and the amount of time their equipment has spent in Alameda County

(2) The above information is checked against the airport records of schedules and actual landings

We feel SB 337 has long been needed as it gives all the air carriers, especially the California-based supplemental air carriers, a method of taxation they can rely upon as being fair and equitable in relation to their non-California based competitors.

E. FRANCHISE TAX BOARD

BRUCE W WALKER, Assistant Executive Officer

I am Bruce Walker, Assistant Executive Officer of the Franchise Tax Board In your letter of August 15, 1967, you posed several questions regarding aircraft assessment in California The first one is the reason a property factor is used in the income allocation formula. Well, a theoretical justification for using property at all is that property is generally considered to be productive of income and therefore it is properly used in the formula. We use two other factors, generally, payroll and sales A justification for payroll is that people are important in earning income; people and property are important in your selling effort

Now I think a basic question here is whether the property factor we use, which is the revenue passenger mile, is more suitable. I am hard put to justify this I think our justification is historical rather than rational This formula was developed in the 1930's with a rather limited viewpoint on earning prevalent The notion was that airlines are in the transportation business and only while you are actually moving passengers are you earning money I believe this is a rather obsolete viewpoint as to the function of an aircraft; the ground time is important as well as other factors

The board attempted to change its approach to the property and other factors in the formula as to aircraft about 1956 At that time, we proposed that we use arrivals and departures, landings and takeoffs, but the response to that was the change in the law in 1957 where the Legislature amended Section 25101, I believe, of the Revenue and Taxation Code, and provided that we must take into account and in effect, allocate out of the state any revenues which were attributable to activities outside of the state, even though no other state or country would have jurisdiction to tax such income When this occurred in 1957, the matter was actually dropped as far as any further consideration of the formula applied to aircraft was concerned, and it has not been considered in any particular depths since

Now, question two is whether or not you feel that the revenue passenger mile concept would be suitable for the allocation of property values for purposes of assessment I think I have to say no to that, because it is too limited a view of what services an air transportation company does perform Certainly the time on the ground of an airplane is very important It has to load It has to have a place to land and simply looking at the miles it travels, is not a fair method

Now the third question is whether or not you feel there is a sound reason to use the same method for arriving at the property factor for purposes of income allocation as that used for arriving at the proper allocation of value for property tax purposes I think probably you should use the same formula if you can do so without violating the basic concepts if they are different in the different laws you are administrating And in this case, I don't see any essential difference If you allocate 20 percent, say of the value of flight equipment to Cali-

fornia for property tax purposes, it seems to me that it would follow that 20 percent should be allocated for franchise or income tax purposes So, if this is a sound approach, I think the Franchise Tax Board could well examine its practices in relation to determining the California portion of the property factor, and perhaps the guideline set down by SB 337 might be a suitable approach if that should become the permanent rule for property tax

F. AIR TRANSPORT ASSOCIATION

DAVID N WEST, Taxation Coordinator

My name is David N West and I am Property Tax Manager for United Air Lines, Inc I appear today in my capacity as Taxation Coordinator of the Air Transport Association for the member airlines serving California, and I also speak for the three supplemental carriers and the largest intrastate carrier

Chairman Veneman wrote to Mr Thigpen and me on August 15 asking that we discuss with you problems associated with the allocation of flight equipment values for ad valorem purposes.

This is a big assignment and one that we welcome Let me commence by saying that the airlines present rather unique problems in allocation The major part of their property, approximately 65 to 75 percent, is made up of airplanes which are migratory in nature. Most companies operate more than one type of airplane, and the planes may be new with most of the original cost still on the books or they may be old and fully depreciated. Thus, jet aircraft costing over $5,000,000 each may be found in the same fleet with twin engine Convairs which are largely depreciated. There are certain companies that are local service or "feeder" line in character in that they feed traffic to trunk line carriers Other companies combine local service operations with long distance or trunk operations Thus, flights originating in a state may terminate in that state, or they may fly nonstop half or all the way across the United States, or even to a foreign country One company's planes may sit for repair or overhaul in one state a considerable amount of time yet do practically all their flying elsewhere All combinations that could occur do actually occur in practice An equitable allocation must take into consideration these many characteristics of aircraft fleets and operations

Allocation should reflect the quantity of property in each state, since the purpose for which allocation is being made in this instance, is for ad valorem purposes Allocation factors should be those that are readily available rather than requiring some new or additional statistic. The desirability of certain statistics must be weighed against the cost of determining such desirable statistic to the extent that it does not cause an undue burden on the airline company in furnishing such information. So long as a company employs an accredited accounting system, the readily available statistic from such accounting should suffice. An example of this would be where it may be desirable to use replacement cost, however, the only statistic a company may have is historical or original cost In such case, the formula should be so designed to consider that which is available

Allocation factors "in themselves" should not be allocations Any factor which has been derived from another factor is objectionable in that it accumulates error and may become entirely unrealistic Therefore, all allocations should be derived directly from basic data

There are many fundamental mobile allocation factors which have been considered in the past Certain of these factors fall into a group which basically determine quantity of property. They are:

Quantity factors

a. Cost, original or reproduction, of all property.
b. Plane hours.
c. Plane miles.
d Route miles.

Certain other factors fall into a group of use elements which determine the productivity to which a property is put and are appropriate to measure revenue or income These are

Use factors

a. Revenue.
b. Net income.
c Originating and terminating tons
d. Ton miles or passenger miles.
e Plane hours.

There are other allocation factors that could be explored, but they should generally fall into one of the above groupings.

Considering quantity factors further we find cost, or cost less depreciation, has a different character in the allocation of air transportation companies than with other categories of assessed property This is because the major portion of the property is comprised of airplanes and is transistory, and consequently, the cost of such property in a given state must itself be an allocation of the total cost For this reason, cost figures should not be used directly as a mobile allocation factor.

Plane miles is an available statistic but because of the wide variances in the capacity of aircraft, it appears less useful as an allocation factor. Furthermore, plane miles omits the very important element of ground time

Route miles is even less desirable in that it measures neither the quantity nor size of planes nor density of traffic which fly over such routes

Originating revenue is the total sales for transporting passengers or commodities and is, of course, an available and unambiguous statistic on a system basis. But on a state or on a city or county basis, it is subject to varying interpretations, and unless defined precisely, may have different meanings to different persons It may be defined as ticket sales within a state, a county or a city regardless of where the transportation sold may originate or terminate, and regardless of whether the trip is completed on the carrier which sold the ticket It may be defined as sales relative to departures on line which includes sales made anywhere for passage originating in the state. Revenue within the state is quite often considered as a proration of total revenues on a passenger or ton miles basis Or the proration may be applied to interstate revenues with intrastate revenues being assigned directly There are defects or complications in all of these various interpretations The statistics on a state, county or city basis may be difficult or impossible to obtain. Interline revenue presents a problem in some cases The situs of the sale in the case of freight, mail, and express may be a problem A proration of revenues on a revenue ton mile basis tends to parallel the direct use of a revenue ton mile factor, and sales relative to departures on line are a partial duplication of originating and terminating tonnage.

Net income, if it were available, would measure the economic advantage of one state as compared to another. For air transportation companies, net income by states is unavailable without major allocations of revenue and expense

Originating and terminating tonnage is the sum of all tons originated and terminated It is arrived at by converting passengers to tons using the standard weights for passengers as prescribed by the CAB It is essentially a measure of terminal activity and therefore reflects variances in economic productiveness of different states Revenue ton miles is the product of tons and miles transported of all revenue traffic Passengers are converted to tons as in the case of originating and terminating tonnage and multiplied by the distance traveled

Plane hours is considered the most useful factor, and is perhaps the only factor that produces both the elements of quantity and use which can be used in allocating the mobile property System plane hours (assuming no acquisitions or dispositions of aircraft during the year) is the number of planes times 24 (hours) times 365 (days) Plane hours in a given state will iclude hours aloft and all hours on the ground

Use of plane hours requires weighting to reflect the variation in their relative capacity and value Or as is the case in California plane hours or equivalent aircraft units are developed directly from the published schedule of the company This procedure has the additional advantage of easily establishing the relative quantities of different aircraft types at the same time providing a ready source for audit verification

To determine equavalent aircraft units, the total plane hours accumulated by the airplanes present in each county during a 24-hour period is determined from the airline timetable or schedule This accumulation includes all ground and air hours The schedule used is the one in effect on the lien date The total accumulated hours is divided by 24 total hours in a day The result is the equivalent number of complete airplanes present in the county

The equivalent aircraft factor is the allocation basis historically used by the California counties It is the basis contained in the state board's ruling and in SB 337

The airlines are of the opinion that the plane hour factor is best for allocating mobile value to the counties It directly relates the quantity and use of aircraft present in the county and applies equally to all companies whether intrastate, interstate or foreign in scope.

Your chairman has requested opinion and comment on several facets of assessment practice as related to airline companies

First, the airlines oppose application of a "home-port" method of assessment in California because it discriminates against the domiciled airlines It assigns value attributed to "flyover" plane hours to the home-port state Those arlines domiciled in California set forth their position fully in a memorandum filed with the State Board of Equalization at its hearing on December 13 1966

Second, application of a two or three factor formula may be desirable or undesirable depending upon the factors selected and the weight assigned It is our judgment a formula comprised of use factors only may have economic justification only if used to allocate an "in-lieu" type tax but certainly not in a property tax. It is undesirable and may

be discriminatory if employed in a revenue structure like that used by California Your state makes use of all revenue sources and those sources should be balanced and equitably administered Whereas, in a state not employing all revenue sources, an "in-lieu" tax allocated by a formula using one or more use factors may be proper

It might be observed at this point that a review of allocation factors used by assessing agencies in the past leads one to believe that a factor which falls into the group of quantity elements was used at times when it was intended that a factor falling into the group of use factors be considered, or vice versa

Third, under the present equivalent aircraft unit method, aircraft owned by the airline companies are taxed from the moment they enter the State of California until the moment they leave, except in the case of the foreign companies which have been ruled exempt by the California courts

Finally, we are aware of a number of different allocation formulae employed by the different states Many of them are very similar to that used by the California assessors On the other hand, some are quite different It would seem to us that if consideration is to be given to a multifactor formula it should be pointed out that the use of additional factors complicates application of the formula in direct proportion to the number of factors used It should also be pointed out that to our knowledge the most recent authoritative study of a multifactor formula was conducted and reported by the Committee on Allocation of the Western States Association of Tax Administrators in 1960

We would urge that any study of factors employed by other states be made with great care to be sure that the property tax is established in its proper place as a revenue source in the particular state being studied Otherwise a change in formula may create a bias detrimental to the taxpayer, the state or both If each state adopts factors designed to maximize its share, there is real danger that more than 100 percent of the mobile property will be assessed

The airlines have been asked to submit data which will enable this committee to study the impact of the various allocation factors That data is now being compiled and will be furnished as soon as possible.

APPENDIX II

Decision of the California Supreme Court
State Board of Equalization v. Watson

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

STATE BOARD OF EQUALIZATION, *Petitioner*,
v. } L A. 29539
PHILIP E WATSON, as Assessor, etc, *Respondent.*

This is an original petition for writ of mandate filed by the State Board of Equalization (hereinafter called the board) to compel respondent assessor to comply with his statutory duty of making available for the board's inspection certain records in his custody pertaining to the assessment of three airlines operating in Los Angeles County. (Gov Code § 15612) We have concluded that respondent's objections to discharging his duty are without merit, and hence that a peremptory writ should issue

For more than a year both the board and the Legislature have been seeking a solution to the difficult problem of developing a uniform formula for allocating and assessing the value of certificated aircraft operating in intrastate or interstate commerce, in general, such aircraft are subject to property taxation on an apportioned basis by the counties in which they are physically present. The matter was first regulated by the board under its rule-making power (Cal Admin Code, tit 18, § 202), that regulation, however, was temporary, covering only the 1967 assessment year Thereafter the Legislature enacted section 987 of the Revenue and Taxation Code (Stats 1967, ch 319) to govern this same matter for the 1968 assessment year, but the statute also was temporary, and will expire by its own terms on July 1, 1968 The Assembly Committee on Revenue and Taxation (hereinafter called the committee) is currently undertaking a study of the entire problem with a view to drafting new legislation prior to the July 1 expiration date

In the course of this study the committee discovered an apparent discrepancy in local assessment practices, i e, that Pan American, Delta, and Trans World Airlines showed a lower assessment of flight equipment in Los Angeles County than in San Mateo County (location of the San Francisco International Airport), yet operated a greater number of flights in and out of the former than the latter As the State Board of Equalization was then conducting an audit of assessments in Los Angeles County, the committee chairman requested the board spe-

cifically to audit the personal property assessments of the three named airlines [1]

In due course the board provided respondent assessor with a detailed list of the records it wished to examine, explaining its concern over the apparent discrepancy and adding that "to further aid in evaluating the various possible allocation formulae which may be recommended for uniform application by counties of this state, it is our purpose to examine in depth the original records which show the valuation, allocation and assessment of flight equipment and related personal property of the subject air carriers in San Mateo and Los Angeles Counties." [2]

The petition alleges that respondent has refused to make these records, or any part of them, available to the board, and that respondent will continue to so refuse unless and until required to comply by court order.

The case is a proper one for the exercise of our original jurisdiction (Cal Rules of Court, rule 56(a)) To begin with, time is of the essence If the Legislature is to enact a statute to replace Revenue and Taxation Code section 987 before it expires, it must do so during the current session; and if the board's investigation is to be of any value whatever to the legislative committee, the requested records must be made available as soon as possible, without the delays attendant upon first submitting the case to the lower courts Any new legislation, moreover, will govern not only Los Angeles County but all counties of the state in which certificated air carriers operate; in such counties the valuation of airline flight equipment runs into the millions of dollars, and hence affects the assessment rolls, the tax rates, and the ultimate burden on the taxpaying public. Finally, it is apparent that the question of the board's right of access to county assessors' records transcends the particular dispute before us, and generally bears on the board's discharge of its statewide supervisory duties in the field of property taxation It follows, as in County of Sacramento v Hickman (1967) 66 A C. 875, 879, that "the issues presented are of great public importance and must be resolved promptly "

A prima facie case is stated for issuance of the writ of mandate. Government Code section 15606 and following declare the powers and duties of the board and its authority over county assessors. Thus the board is empowered to "Prescribe rules and regulations to govern . . . assessors when assessing" (§ 15606, subd (c)) and to "instruct, advise, and direct assessors as to their duties under the laws" (§ 15608). Controlling here is section 15612, which provides that "The board may

[1] We are told that the committee has a long-standing practice of asking for technical assistance from the board in securing and evaluating information for use in its legislative studies and proposals

[2] As set forth in the petition, the board requested respondent "to make all of the Los Angeles County records for the 1967–68 assessment year pertaining to the valuation, allocation and assessment of mobile flight equipment operated by Delta Air Lines, Inc , Pan American Airways and Trans World Airlines available to the board for examination, and particularly

"(1) The property statements, with all attachments and schedules, as reported by the taxpayers, any listings of aircraft showing cost, as well as items and costs of other property used in connection with the air lines' flight activity, including but not limited to machinery, equipment, rotable and other parts, and fuel,

"(2) All working papers of respondent's office showing computations with respect to valuing, allocating and assessing the flight equipment, and

"(3) Any other records and documents of respondent's office pertaining to the valuation, allocation and assessment of the above-described personal property of the designated taxpayers "

inspect, either as a board, individually, or by its duly appointed representative, the work of any local officers whose duties relate to the assessment of property for taxation and the collection of taxes. *It may require such officers to produce any records in their custody,* including, but not limited to, records relating to the assessment of specific properties and give testimony with reference to such matters of assessment and tax collecting as it deems useful to it in its investigations." (Italics added.)

Respondent is such a "local officer" whose duties relate to assessment of property. Section 15612 empowers the board to "require" him to produce "any" records in his custody, expressly including records "relating to the assessment of specific properties" such as that owned by the three named airlines. The statute, furthermore, gives respondent no discretion to withhold such records from inspection by the board. In such circumstances, mandate is the proper remedy to compel respondent to comply with the ministerial duty imposed on him by law. (Code Civ. Proc., § 1085; County of Sacramento v. Hickman (1967) supra, 66 A.C. 875, and cases cited.)

In opposition to the petition, respondent first contends that the records in question are confidential and are closed to the public, citing Revenue and Taxation Code sections 451 and 408.[3] There is no doubt that members of the general public have no right of access to such records, but section 408, which so provides, contains an explicit exception governing the present case. Subdivision (c) of that section, added by the 1966 property tax reform legislation (Stats. 1966, First Ex. Sess., ch. 147), commands that "The assessor *shall* disclose information, furnish abstracts or permit access to *all* records in his office" to certain named governmental agencies, including the State Board of Equalization. (Italics added.)[4] By such amendments the Legislature manifested a clear intent to deny to local assessors their former power of withholding records from governmental agencies having an interest in inspecting them. That right of inspection is an essential part of the tax reform program, and must be scrupulously respected.

Respondent's remaining points are equally devoid of merit. He contends that the committee chairman's request to the board was "of no legal effect" because it was not the result of formal action by a majority of committee members. But there is no sufficient showing to overcome the presumption that the chairman acted in compliance with his committee's rules or direction; moreover, the board is entitled to demand this information for its own use regardless of any additional need therefor by a legislative committee.[5] Respondent's somewhat obscure

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[3] Section 451 provides that "All information requested by the assessor or furnished in the property statement shall be held secret by the assessor. The statement is not a public document and is not open to inspection, except as provided in Section 408 [discussed *infra* in text]."

[4] The present form of Government Code Section 15612, quoted above, is likewise a product of the 1966 legislation. Prior to that reform the section provided that the board could only require assessors to produce "any public records in their custody"; the 1966 Legislature deleted the "public" qualification and added the broad language, "including, but not limited to, records relating to the assessment of specific properties ...." (See generally, Carr, *Need for Disclosure in Property Tax Proceedings* (1965) 40 State Bar J. 794.)

[5] In this regard the petition alleges—and respondent does not challenge the allegation—that the records in issue "are further relevant to, and will be used together with other information which the board has accumulated in determining what if any further rules, regulations or instructions should be issued [by the board] for aircraft allocation and assessment pursuant to sections 15606 and 15608 of the Government Code."

complaint as to the timing of the board's original request is irrelevant, in view of his present and continuing refusal to comply. Also irrelevant is his charge that the board "refused to disclose" the purpose for which the records were sought, respondent must now be well aware of that purpose, and in any event no such condition on the board's power is imposed by section 15612 Finally, respondent argues that the board seeks "more data than is needed" in that the "rotable and other parts" mentioned in the request are assertedly not "mobile flight equipment" But section 15612 authorizes no such censorship of the board's request either by the local assessor or by the courts, as noted above, it empowers the board to require assessors "to produce any records in their custody," not merely those which a local assessor deems the board "needs" for some limited purpose Respondent's duty under this statute is clear, and it is time that he performed it

Let a peremptory writ of mandate issue as prayed This order is final forthwith

MOSK, J.

We concur:
TRAYNOR, C. J.
MCCOMB, J.
PETERS, J.
TOBRINER, J.
BURKE, J
SULLIVAN, J.

APPENDIX III

Report of the State Board of Equalization Relating to Assessment Practices of Los Angeles and San Mateo Counties With Regard to Commercial Aircraft

STATE OF CALIFORNIA
STATE BOARD OF EQUALIZATION

April 25, 1968

HONORABLE JOHN G VENEMAN, *Chairman*
Assembly Revenue and Taxation Committee
Room 4016, State Capitol
Sacramento, California

Dear Assemblyman Veneman

In furtherance of the Assembly Revenue and Taxation Committee's efforts to develop a uniform formula for allocating and assessing the value of certificated aircraft operating in interstate and foreign commerce, you have requested this Board to audit the assessments of aircraft and related equipment operated by Delta Airlines, Pan American Airlines, and Trans World Airlines The purpose of the audit was to resolve a question concerning the assessment of flight equipment of these airlines at a lower value in Los Angeles County than in San Mateo County when they operated a greater number of flights in and out of the former county than the latter As you know, our response has been delayed by the necessity to establish by litigation the Board's authority to examine the assessment records in the office of the Los Angeles County Assessor.

To obtain the answer to your question, we examined the 1967 assessment files for the airlines in the two counties, and we also conducted audits of the books and records of two of the airlines Our findings are based solely on an examination of records and have not been discussed with either taxpayer or county assessor personnel It should be emphasized that the purpose of this report is to illustrate the administration of the assessment of commercial aircraft in the two counties, not to replace the county assessor in making the assessments of the property in question By our own rules, an assessor cannot conclude an audit without giving the taxpayer an opportunity to examine and comment upon the audit report Therefore, this report will be confined to comments on the methods employed in the reporting and processing of aircraft data for assessment purposes as related to the question presented to us After we have had an opportunity to verify certain factual information, a later report will be furnished to you dealing with specific details of other complexities encountered in our study

Before proceeding further, it may be well to comment briefly on the necessity for making audits When we examined the assessment files, we were confronted with a mixture of information which made it impossible to compare one county's assessment of the flight equipment of an airline company with another county's assessment of the flight equipment of the same airline Methods used for reporting and processing costs and time were different for each county and for each airline No one of the three airlines reported in the same way to both counties, and no two of the companies reported in the same way to either one of the counties In order to make valid comparisons, it was necessary to obtain from the companies comparable costs and time bases

Because of the distant location of its home office, we did not audit the records of Delta Airlines A written request was sent to the company on March 20, 1968, asking for necessary data so that comparisons might be made between the assessments of their flight equipment by the two counties A response was received on April 24, but too late for inclusion in this report Therefore, we are not able to comment on the assessments of this airline except to say that the value allocated to Los Angeles County would have been $173,845 greater had Los Angeles County made the same revision of the company-reported depreciation schedule for aircraft that San Mateo County made Any further conclusions regarding this company which may be derived from the additional information received this week will be made a part of our later report

Aircraft Value Estimate

Both San Mateo and Los Counties computed the average value of an aircraft for the entire fleet reported by the airline company and their assessments were based on these computations As explained herein, this method does not provide sufficient accuracy in the allocation of values of planes having costs of the magnitude and variety of those here involved

Of the 13 aircraft types found in the Trans World Airlines fleet, 6 types were used in San Mateo County and 6 types (some the same and some different from San Mateo) were used in Los Angeles County. Because of the differing mix of aircraft types, the values actually allocated to each county were greater or less (depending on the distribution of flight and ground time to the more valuable or to the less valuable aircraft types) than they would have been had an allocation by each aircraft type been computed

To illustrate this point by a highly simplified example, suppose that an airline's fleet consists of 10 Boeing 727's, with an average value of $4,000,000 each, and 8 Boeing 707's with an average value of $5,500,000 each If 5 percent of the 727's total time and 3 percent of the 707's total time are allocated to a county, the two methods of valuation produce the following results

	Segregating plane types	Unsegregated
Average plane value		
727's	$4,000,000	$4,666,667
707's	5,500,000	
Equivalent full-time aircraft		
727's	5	
707's	24	74
Allocated value		
727's	2,000,000	3,450,000
707's	1,320,000	
Total	$3,320,000	

Flight Time

Los Angeles County and San Mateo County used different methods for computing flight time San Mateo estimated the air time within the state for each individual incoming and outgoing flight An average was not used We believe that this is the most accurate method and we, therefore, used it for purposes of this study

Los Angeles County computed flight time by allowing 15 minutes in for each arrival and 15 minutes out for each departure Our calculations indicate that substantially more than 15 minutes of flight time is actually incurred for most flights except those to the west If an airline's flights are predominately westerly, this method will overstate the actual average flight time to the state's boundary; if the line's flights are predominately north or east, the method will understate the actual average flight time to the state's boundary or half way to the next California port of call

For example, in the case of Trans World Airlines, we used a one-week representative time period (March 5–11, 1967, inclusive) and we processed time and costs not for the fleet as a whole, as was done by the counties, but by subdividing the fleet into aircraft-type groupings We also used estimated flight time calculated in the manner prescribed by Section 987 of the Revenue and Taxation Code (Chapter 319, Statutes of 1967) On the basis of the records available to us, we then found that the value allocated to Los Angeles County should have been greater than that allocated to San Mateo County The use of the previously described methods by the counties concerned appears to have resulted in an overstatement of $1,031,644 of the value allocated to San Mateo County and an understatement of $5,031,351 of the value allocated to Los Angeles County.

A comparison of the pertinent factors for Trans World Airlines is shown in the exhibit attached Additional supporting detail is available and will be furnished if desired

Turn-Around and Maintenance Time

Our analysis of the data related to the Pan American operations indicates that the value of aircraft allocable to San Mateo County is greater than the value of air craft allocable to Los Angeles County. The reasons for this conclusion are:

1 San Mateo County is a turn-around point for many of Pan American's flights Here the aircraft are serviced and thus spend more

time on the ground than in Los Angeles County where little servicing or clean-up work is performed

2 Pan American maintains a repair shop in San Mateo County, and its aircraft are given various types of servicing taking 10–40 hours per aircraft Thus large amounts of ground time are accumulated. No such facility exists in Los Angeles County at the present time.

Pan American Airlines

In addition to Pan American Airlines' extensive repair work in San Mateo County, involving substantial periods of ground time, it also conducts there a pilot training program, maintains a military passenger and cargo service and a civilian charter service These operations are in addition to normal incoming and outgoing scheduled flights

Our subsequent audit report on the three airlines will include more details on the complex operations of this airline in San Mateo County, with our comments on the resulting allocation and assessment problems.

Summary

We assume that legislation prescribing a uniform allocation formula for certificated aircraft will be adopted at the current session of the Legislature. To the extent that our study indicates the need for corrective action not covered by such legislation, we will be prepared to implement the statutory provisions In that event we shall review with you any plans for such action

Our subsequent audit report should be completed and submitted to you within the next several weeks

Sincerely,

H F. FREEMAN
Executive Secretary

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ASSEMBLY INTERIM COMMITTEE REPORTS

Volume 22 | 1967–68 | Number 13

REPORT OF THE ASSEMBLY INTERIM COMMITTEE ON CRIMINAL PROCEDURE

on

- **Drug Use**
- **Drug Rehabilitation Centers**
- **The Chronic Drunkenness Offender**
- **Misconduct on Commercial Property**
- **The Use of Deadly Force to Effect an Arrest**
- **Police Techniques in Mass Demonstrations**
- **Implied Consent**
- **Judicial Authorization for Electronic Eavesdropping**
- **Reimbursement for the Legal Services Provided by the Public Defender**

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LETTER OF TRANSMITTAL

To the Speaker and Members of the Assembly:

Your Interim Committee on Criminal Procedure in accordance with your instructions, herewith respectfully submits a report on Drug Use, Drug Rehabilitation Centers, The Chronic Drunkenness Offender, Misconduct on Commercial Property, The Use of Deadly Force to Effect an Arrest, Police Techniques in Mass Demonstrations Implied Consent, Judicial Authorization for Electronic Eavesdropping, Reimbursement for the Legal Services Provided by the Public Defender, studies conducted by the Committee in accordance with House Resolution No 545 of the 1967 Regular Session

Respectfully submitted,

/s/ W CRAIG BIDDLE, *Chairman*
JOHN J MILLER, *Vice Chairman*

ROBERT W. CROWN
WALTER J KARABIAN
WILLIAM M KETCHUM
JOHN T KNOX
CARLOS J MOORHEAD
FRANK MURPHY, JR.
ALAN SIEROTY
FLOYD L. WAKEFIELD

PREFACE

The Assembly Committee on Criminal Procedure conducted a number of studies during 1967 Included among the subjects studied were drug abuse, drug rehabilitation, alcoholic rehabilitation, misuse of private commercial property by minors, the use of deadly force in affecting an arrest, police techniques and procedures in handling mass demonstrations, the "Implied Consent" law, judicial authorization for the use of eavesdropping apparatus by law enforcement agencies, and the reimbursement by indigent defendants for the services provided by the public defender The results of these studies are reported in the following pages

The limited time available precluded the Committee from carrying out an intensive investigation of these subject matters Many of them are quite complex and warrant a far greater effort than was possible to give them Nevertheless, the Committee feels a certain satisfaction in its work and looks hopefully to the passage of the legislation which it has recommended

The members of the Committee wish to express gratitude to those who participated in the hearings and who provided valuable assistance in the gathering of material for our studies Special appreciation is also given to the Committee staff for the diligent work and effort that went into the hearings and the preparation of these reports.

SECTION 1

DRUG USE

INTRODUCTION

On November 2 and 3, 1967, the Committee met in San Francisco to study the nature and extent of drug use in our society. Its investigation focused on two points first, the increased use of marijuana and restricted dangerous drugs (such as LSD and methedrine) and, second, the effectiveness of our existing laws in controlling that use.

In recent years a dramatic change has occurred in the patterns of drug use in this country. It is a change primarily affecting the young and has left much of the older generation somewhat bewildered, frustrated and angry. They have watched with concern while young people from all classes of society, including many who have previously avoided contact with drugs, have begun accepting them with enthusiasm and often a cultish fervor. Such use has become widespread and from the tenements to the suburbs, much of our youth is turning its back on the attitudes of five, ten, and twenty years ago. They have begun creating their own standards; and, often, these standards are ones of easy tolerance, if not committed use

While this change has roots in several well established and long existing centers of drug use (for years tranquilizers and stimulents have been habitually, if discreetly, used throughout society, and marijuana has long enjoyed a permanent place in the cultural milieu of certain distinct groups) it was actually the introduction of the psychedelic or hallucinogenic drugs which triggered this sudden widening acceptance of drugs among the youth. The cults which quickly grew up around the use of hallucinogenic drugs influenced many other individuals and the hallucinogens soon became identified with a general psychedelic movement which has had a significant impact on the young This growing emphasis on the use of hallucinogens released the social barriers inveighing against the use of marijuana and other non-narcotic drugs and the total effect has been to make drug use not only acceptable, but desirable among a large and growing segment of the population.

One immediate and disconcerting result of this has been the increasing number of individuals who are not criminally oriented and who would not normally appear in a criminal court who are, in fact, becoming convicted felons Many people, most of them young, are simply refusing to recognize and abide by the Legislature's decision that marijuana and other substances are socially repugnant and deserving of stern penal sanctions While this refusal to abide by existing law cannot be justified or accepted, it is equally difficult to accept without question the serious consequences a criminal conviction will have on the lives of these individuals

For this reason the Committee devoted a great deal of time to a careful study of the existing structure of laws regulating the illegal use of drugs. It then arrived at the following conclusions.

MARIJUANA

After many hours of testimony and careful consideration, the Committee concluded that the existing laws regulating the possession of marijuana need reform

In 1960, the law provided that a person convicted of possessing marijuana could, in the discretion of the court, be sentenced either to the county jail or to state prison If he were sentenced to the county jail the offense became a misdemeanor, and if he were sentenced to state prison it became a felony In that year there was an unprecedented number of 3,000 arrests for possession of marijuana

As a result, the following year, 1961 saw a stiffening of the law The misdemeanor alternative was abolished and the state prison sentence was increased Nevertheless, by 1966, there were 14,000 arrests for possession of marijuana

Obviously, the 1961 legislation has not been completely successful in controlling the use of marijuana It has, however, successfully restricted the courts' ability to exercise discretion in handling marijuana offenders, a discretion it still retains when dealing with other offenses of a similar magnitude California has long recognized that offenses bearing the same label (i e, burglary, forgery, assault with a deadly weapon) often differ in the degree of culpability involved Therefore, in cases not involving premeditated violence, it has usually granted the courts the right to treat a particular offense as either a misdemeanor or a felony In removing this discretion from marijuana cases, the Legislature had hoped to deter people from using the substance. And no doubt in many cases it had that effect. But it also had the effect of saying to the courts that regardless how innocuous the case, regardless how deserving the defendant, if he possesses even one marijuana cigarette, he must be stamped a felon

While the Committee heard sufficient evidence to indicate a continued need for criminal controls, it heard little to indicate the need for such inflexible controls Many law enforcement officers, district attorneys and judges join the Committee in this belief and have argued long and well that the alternative misdemeanor sentence should be restored

Therefore, the Committee recommends that Section 11530 of the Health and Safety Code be amended to provide that upon a first conviction for possession of marijuana the defendant shall be sentenced to the county jail for up to one year, or to the state prison for not more than 10 years.

Mr. Karabian and Mr. Wakefield dissent

RESTRICTED DANGEROUS DRUGS

At the same time that the Committee concerned itself with the problem of marijuana, it looked into the spreading use of what are known as the "restricted dangerous drugs" These include such substances as LSD, DMT, and methedrine Almost without exception, the testimony dealing with these drugs called attention to their destructive propensities.

Methedrine, for example, was repeatedly characterized as being more dangerous than any drug except perhaps, heroin Some even characterized it as being more dangerous than heroin, in that it is at least as addictive, and has a greater debilitating effect on the mind and body.

While the use of LSD and the other hallucinogens did not seem to disturb the witnesses as much as did methedrine, it caused far more concern than did the use of marijuana There is apparently a growing body of evidence indicating that the hallucinogens may have a destructive effect on the genetic and mental structure of its users, and indiscriminate use, especially by immature subjects, may result in long-term mental deterioration, possibly to the point of psychosis.

While the Committee recognizes that individuals using these substances are voluntarily submitting themselves to their destructive tendencies, it also feels that society has a legitimate interest in curtailing the spread of such abuse among the general population. It also feels that it has a legitimate interest in preventing individuals presently using such drugs from continuing that activity.

Because of the inordinate hazard presented to society by the use of "restricted dangerous drugs" the Committee believes that stronger controls are warranted Certainly substances more dangerous than marijuana should be controlled by penalties at least as strong. While it recognizes that stiffer penalties are never successful as an absolute deterrent, it nevertheless feels that they are needed to further restrict and discourage the spread of these types of drugs

Therefore, the Committee feels that the penalties for possession of marijuana and possession of restricted dangerous drugs should be made uniform and recommends that the penalty for a violation of Section 11910 of the Health and Safety Code be amended to conform to that already recommended by the Committee for a violation of possession of marijuana

Mr. Karabian and Mr. Sieroty dissent

REGISTRATION REQUIREMENTS

Section 11850 of the Health and Safety Code requires that any person who has been convicted of violating any of a number of listed narcotic provisions must thereafter register with the local police whenever he moves into a new city or county At the present time all of the listed violations activating the registration requirement are felonies.

Following the reasoning behind the Committee's recommendation that possession of marijuana and restricted dangerous drugs be made a misdemeanor-felony, it would seem appropriate to amend this section to provide that whenever a person is convicted of possession of marijuana or restricted dangerous drugs and the court makes the offense a misdemeanor by sentence, the person shall not be subject to the provisions of Section 11850.

Therefore, the Committee recommends that Section 11850 be amended to provide that it shall be applicable only to felony convictions.

Mr. Murphy dissents.

Mr. Ketchum and Mr. Miller dissent as to the Report on Drug Use.

SECTION 2

DRUG REHABILITATION CENTERS

INTRODUCTION

On November 29 and 30, 1967 the Committee met in Sacramento to investigate the feasibility of establishing a statewide program for the care and rehabilitation of the non-narcotic drug abuser Earlier hearings in San Francisco, on November 2 and 3 had indicated a serious need for such a program Testimony at that time had established the existence of a growing population of young drug users who are increasingly experiencing adverse effects from a group of drugs legally characterized as "restricted dangerous drugs" Included among these drugs are such substances as LSD, DMT and methedrine

With the exception of a few small experimental programs, the State of California lacks any facilities specifically designed to cope with these individuals or capable of dealing with their problems The only existing state facility, the California Rehabilitation Center at Corona, is limited by law to caring for individuals addicted to the use of narcotics This means, for all practical purposes, that it is limited to treating heroin addicts

Given the lack of existing programs and what appeared to be an obvious and increasing need, the Committee approached the matter with a great deal of concern.

THE NEED FOR A TREATMENT AND REHABILITATION PROGRAM

With the increasing incidence of new kinds of drug abuse there is an increasing need for new types of treatment programs Until recently drug abuse has been characterized by a certain uniformity in the kinds of individuals involved This has allowed society to make easy generalizations about the problem

The narcotic addict and the middle class pill dropper were accepted as constituting different problems subject to separate and distinct methods of treatment For the former (usually a heroin addict), treatment concepts have usually centered around the existence of a rigidly structured rehabilitation facility and long-term, intensive parole supervision Treatment of the narcotic addict is, in fact, quasi-penal in nature The addict is typically viewed as being a criminally oriented individual, and society is as much concerned with protecting from against him as it is with curing him. The pill dropper, on the other hand, has been typically viewed as a middle class social problem. Society has readily accepted him as being nothing more than an alcoholic who has taken to tranquilizers and stimulants rather than whiskey and wine Like the alcoholic, he has been viewed with a certain degree of compassion and a willingness to accept his problem as being medical rather than criminal in nature While largely left to his own and private resources, the state has nevertheless made available to him the same type of general treatment programs it has provided for the alcoholic These range from institutional facilities within the Department of Mental Hygiene to local community health programs. But by and large such programs have been incidental to broader programs designed to treat more generalized mental health problems.

The new kinds of drug abuse, however, do not fit easily into either of the above patterns Neither the hippie gone psychotic from too much acid, nor the "crystal fiend" addicted to the use of methedrine, fit the stereotypes of either the criminally oriented heroin addict or the unstable middle class pill dropper Nor are programs designed to treat such stereotypes capable of dealing with the problems presented by the new drug cultures

First, the quasi-penal treatment program provided for the heroin addict is unsuited for youngsters who are not criminally oriented While the growing number of young people using "restricted dangerous drugs" are committing crimes insofar as their use of drugs is concerned, they have not manifested as a group, a general tendency towards criminal lives What crimes they do commit are usually committed against themselves They have, however, manifested a severe alienation from society and a refusal to accept its middle class standards. But this refusal to accept social precepts is quite distinct and quite different from a conscious preying upon society. For this reason, among others, every witness at the hearing, urged the Committee to avoid extending the existing program for rehabilitating narcotic addicts to "restricted dangerous drug" users Furthermore, these same witnesses even advised the Committee against initiating a separate but similar program for "restricted dangerous drug" users While most of the witnesses approved of the work being done at the narcotic rehabilitation center at Corona, they felt that a comparable program for youngsters using LSD and methedrine was both inadvisable and unnecessary. It was their feeling that whatever programs are devised should be locally oriented and under the auspices of a public or mental health agency rather than a correctional agency

Second, the existing public or mental health facilities are incapable of adequately dealing with the growing numbers of alienated youngsters using "restricted dangerous drugs". There are a number of reasons for this Probably the most significant, and at the same time the least acceptable reason, is that these youngsters do not fit the normal pattern of the unstable or mentally ill individual Because they often adopt a psuedo-philosophical approach to their use of drugs, they present a stiffer resistence to normal treatment methods This leads them not only to avoid treatment, but makes it more difficult for the doctors to reach them when they do seek it One immediate and unfortunate result of this is that both the medical profession and the dangerous drug users tend to avoid one another (Significantly, this problem is also typical of the alcoholic Again, both the doctors and the patients tend to shun one another)

Another reason for the inadequacy of existing facilities is a simple problem of numbers There are far more youngsters needing help than there are available personnel capable of working with them If these youngsters followed normal patterns and sought help in normal ways, the existing programs could probably absorb them without a great deal of trouble But they are not exhibiting normal patterns and are not seeking help in normal ways And compounding this problem is the fact that within the new drug cultures there are a variety of distinct drug patterns, each exhibiting different problems and demanding different treatment techniques The youngster suffering a psychotic

reaction from too much LSD and the young methedrine addict are not comparable individuals. Evidence presented to the Committee indicated that they are often different psychological types, have different philosophical approaches to their use of drugs, circulate in totally distinct peer groups, and that often the drugs themseves create different physical and psychological patterns of dependency.

To adequately meet these problems, public and mental health authorities would have to divert resources from normal programs and engage in highly experimental and costly programs of a new kind Unfortunately, they have neither the budgets nor the personnel to do this, except on a very limited scale.

For these reasons, among others, the Committee was urged to consider the feasibility of establishing a new and separate program for the care and rehabilitation of the "restricted dangerous drug" user

THE NEED FOR PILOT PROJECTS

While the Committee was satisfied that there is a sufficient need for a new treatment and rehabilitation program, it was seriously disturbed by the apparent lack of substantive knowledge indicating how the State could most effectively develop and administer such a program.

The few small programs that already exist (some private and some public) are experimental in nature and are both too new and too limited in scope to offer any authoritative guide as to the most effective methods of treatment

Since research and experience is limited, most of the testimony received by the Committee was speculative in nature and much of it conflicting Some witnesses indicated a need for extensive community oriented programs depending heavily on out-patient counseling, job orientation and immediate emergency care, while others stressed the need for removal to an isolated medical setting, free of the tensions and strains of the individual's normal environment A few witnesses emphasized the need for a program stripped of any identification with the existing establishment They pointed to the basic alienation between members of the drug cultures and society and argued that the most effective treatment would come not from representatives of that society, but from individuals who understand and to a certain extent identify with the philosophies of the various drug cultures Other witnesses urged programs dominated by and fitting within existing institutional structures And some witnesses urged the need for a completely voluntary program, while others urged the need for at least limited involuntary treatment.

All of the witnesses agreed that we are not dealing with one homogenous drug culture encompassing individuals amenable to a single uniform program It was stressed again and again that we are dealing with a variety of cultures, involving a variety of drugs, and that there is a need for flexible program approaches capable of reaching distinctly differing elements of the drug using population.

But there was little agreement as to who should administer the programs, how they should function, who should finance them, where they should be located, or what degree of success could be expected from any given approach.

For this reason the Committee finds it impossible to recommend any overall program at this time It is the Committee's feeling that while sufficient need has been demonstrated, the adequate knowledge and experience necessary to the formation of an effective statewide program is lacking. Therefore, the Committee feels that it must, at this time, limit its recommendation to two experimental pilot projects; one to explore the effectiveness of institutional oriented programs; and the other to explore the effectiveness of community oriented programs

The Committee finds it necessary to recommend two pilot projects for two reasons. First, it was unable to determine, from the evidence presented to it, whether an institutional or community type program would be most effective Second, it tends to believe that a successful program will necessarily involve both approaches as part of an overall interlocking program of treatment.

For this reason, while the Committee believes that the two projects should function under separate authority in order to foster a certain independence in approach and experimentation, it also believes that the two projects should attempt to complement one another, lending ideas and personnel, and, to the extent that it is appropriate, referring patients from one to the other program Obviously, this will necessitate the two programs being located in the same general area and serving the same general population For reasons that will be further explained below, the Committee feels that the institutional pilot project should be located at the Mendocino State Hospital at Talmage, California and that the community pilot project should be located somewhere in the San Francisco Bay Area.

INSTITUTIONAL PROJECT

The Committee feels that in establishing an institutional pilot project in one of its existing facilities, the State need go no further than the existing experimental program at the Mendocino State Hospital.

The Committee was very much impressed with the work being done at that institution under the direction of Dr E W Klatte, the Superintendent and Medical Director, and Wayne M Wilson, the Director of the Alcoholism and Drug Abuse Services They have maintained an experimental program at that institution since August of 1966, and while they have been working with a small and select group of patients, their success has been very encouraging The Committee realizes that because of the self-imposed limitations on their program, the success that they have attained cannot be too broadly interpreted Both Dr Klatte and Mr. Wilson were quick to point out to the Committee that their techniques could not be expected to be successful with all drug abusers, and probably would have only a limited success with most. They have admittedly been working with a select and highly motivated group, not necessarily typical of all drug abusers.

However, the Committee feels that they and their personnel have acquired the knowledge and experience necessary to conduct a successful pilot project. Therefore, the Committee would recommend that their program be designated a pilot project, that they receive the

full cooperation of the Department of Mental Hygiene and other appropriate state agencies, and that they report to the Legislature, on a semi-annual basis, the results of their program.

COMMUNITY PROJECT

The Committee believes that the community oriented pilot project should be located in the San Francisco Bay Area for two reasons First, the Mendocino State Hospital is located immediately north of the area and serves it as a mental hospital The location of the community oriented project in the Bay Area would facilitate cooperation between the two projects and allow them to serve the same general population Second, the Bay Area presently contains a high concentration of drug abusers and a large number of the existing treatment and rehabilitation programs. While these programs are by no means adequate to the problem, they do contain many of the most knowledgable and experienced personnel in the State The availability of these people for counseling or participation in the program should prove invaluable.

The Committee also feels that the State should seek to take advantage of Federal funds that are available for projects of this nature

Therefore, the Committee recommends that an appropriate resolution be adopted designating the Health and Welfare Agency as the appropriate agency to carry out, with Federal funding if available, a community oriented pilot project for the care and rehabilitation of "restricted dangerous drug" users Furthermore, the resolution should require that the project be located in the San Francisco Bay Area, that it should receive the cooperation of other state agencies, that it should cooperate to the extent possible with the project being conducted at the Mendocino State Hospital, and that it should report to the Legislature, on a semi-annual basis, the results of their program.

CONCLUSION AND RECOMMENDATION

1. The lack of existing rehabilitation facilities and the increased use of restricted dangerous drugs indicate a definite need for a statewide rehabilitation program.
2. Evidence presented at the hearing indicates a need for a broad program encompassing a variety of approaches designed to reach differing elements of the drug using population
3. Because the problem is a relatively new one, the witnesses who testified before the Committee were unable to provide it with sufficient information to allow it to determine what specific type of overall program should be devised
4. Therefore the Committee recommends the creation of two pilot projects. the first to operate in a community setting, and the second to operate in an institutional setting Both projects should be located in the same general area and seek to cooperate with each other in determining the most appropriate ways of dealing with the problem.

SECTION 3

THE CHRONIC DRUNKENNESS OFFENDER

INTRODUCTION

Pursuant to House Resolution No 525, introduced by Assemblyman Alan Sieroty, the Assembly Committee on Rules assigned the Assembly Interim Committee on Criminal Procedure the responsibility for studying the problem of the chronic drunkenness offender As a part of its research, the Criminal Procedure Committee held legislative hearings and heard testimony given by witnesses well versed in the legal and medical aspects of the problem Having completed its investigation the Committee hereby submits to the Assembly its report including an analysis of the problem and recommendations for legislative action.

THE REVOLVING DOOR

The abuse of alcohol leads to a wide variety of social ills. This report will consider only one It will focus on a particular type of alcohol abuser, the chronic drunkenness offender, and critically examine the method society presently employs to try to control his abuse

The chronic drunkenness offender is often the man we best know as the "skid-row bum" or the "down-and-outer". Usually he is uneducated and unskilled Most often he has no home, no family, and no steady job. The number of arrests for public drunkenness on his record is apt to reach into the hundreds He may have spent more time during his adult life in the county jail than out More probably than not this person is physically dependent upon alcohol, but he need not necessarily be But his most salient characteristic is that he frequently gets drunk and displays his drunkenness publicly

We treat the drunk on the street as a criminal. Typically, he is arrested and put in the "drunk tank" to spend the night. The next morning he goes before the judge, pleads guilty, and is sentenced to a brief term in the county jail or perhaps in a county "drunk farm". After his release, he returns to his old haunts and most probably is soon picked up again only to begin the entire process anew.

This "revolving door" syndrome monopolizes a huge portion of the resources of our system of criminal justice. It is estimated that about one-half of all non-traffic arrests are for drunkenness offenses. This enormous arrest rate places a similarly enormous burden on the criminal courts In order to be able to expedite the drunkenness caseload the courts have virtually been forced to ignore basic constitutional rights Approximately one-third of all inmates in county correctional facilities are there on drunkenness convictions. It is obvious, therefore, that processing the chronic drunk through the criminal system significantly burdens the police, the courts, and the jails.

The use of the criminal process as the means for the control of alcohol abuse has apparently failed. It has failed to deter chronic drunkenness. It has failed to rehabilitate chronic drunks. If our present system has succeeded at all, it is only because it has been able to remove public drunks from the streets where they lay prey to bad weather, moving automobiles, criminal attacks, and disapproving glances.

Like the present system, a non-criminal procedure for handling chronic drunks could succeed in removing them from the streets. And

like the present system, a non-criminal procedure would probably fail to deter drunkenness. But unlike the present criminal system a non-punitive public health approach to the problem could result in the rehabilitation of chronic drunkenness offenders Such a system would be more humane It would tend to remove the criminal stigma from the plain drunk and elevate his self-esteem It would free resources in the criminal system to deal with more threatening matters. It would represent a more rational social response to a problem which is basically psychological and medical in nature rather than criminal

The Committee recommends that the problem of the chronic drunkenness offender should be treated primarily as a public health matter rather than as a criminal matter.

TREATMENT AND REHABILITATION PROCEDURES

(A) The Inebriate Reception Center

There appears to be a consensus among the experts in the field that the "drunk tank" should be replaced by some form of non-penal medical facility as the place where those picked up for public drunkenness should be immediately taken This point of view has been expressed by the witnessess testifying before the Committee, the President's Crime Commission, and most authorities writing in the field.

The Committee recommends that each county be required to establish inebriate reception centers equipped and staffed to provide detoxification services, emergency medical care, and diagnosis The inebriate reception centers are to be planned and administered by the county health officer or his representative. Each county must submit its master plan to the State Department of Public Health for approval The State Department of Public Health shall publish a set of uniform general standards which each county must satisfy in order to have its master plan ratified.

(B) Processing Public Drunks Through Inebriate Reception Centers

Many procedural problems arise in the operation of inebriate reception centers First, it is necessary to decide who will pick up the public drunks Many argue that white-coated public health officers are better suited for the task than the police These persons suggest this would remove the criminal stigma from the process and aid more rapid diagnosis and treatment of emergency medical problems The Committee concludes, however, that the police should continue to have the responsibility for picking up those persons intoxicated in public. Through many years of experience, the police have learned how best to handle the inebriate, and we should take advantage of this expertise. Very many drunkenness arrests result from the response by police to a call. In these situations it would be inefficient to require the responding police officer to call in another agency to take the inebriate into custody. Some form of violent conduct may often accompany drunkenness. A police officer would be able to subdue violence more easily than a medic.

The second problem is whether the police officer should place the public drunk under criminal arrest or in civil protective custody. The Committee has concluded that the publicly intoxicated person is to be

placed in civil protective custody The system should presume, until proved otherwise, that the drunk is a sick person, not a criminal, and that therefore he should be subjected to non-criminal procedures There is ample precedent, both in the common law and California statutory law, supporting the notion of civil protective custody for those unable to care for themselves

Third, it is necessary to define the legal standard upon which one's placement in protective custody is to be based Rather than create a new standard the Committee concludes that the present criminal standard set out in Penal Code 647(f) should be the basis for the police pick-up Thus, whenever a police officer has probable cause to believe that a person ". . is found in any public place under the influence of intoxicating liquor . in such a condition that he is unable to exercise care for his own safety or the safety of others . " the grounds for placement in protective custody are established. Using 647(f) as the standard has the advantage of utilizing a proven standard, one which police officers already know how to apply Thus, the violation of a criminal standard of conduct would have operative civil consequences This notion of a civil effect of criminal conduct is also well-precedented in the law

A fourth and crucial issue is whether it is to be mandatory that a police officer place a public drunk in protective custody and take him to an inebriate reception center rather than arrest and jail him One might argue that the decision should be purely discretionary on the officer's part But this might lead to discriminatory enforcement and would certainly inhibit the intent and purpose of reform One might also argue that this should be a mandatory procedure only when there is space available in a county center. But the Committee recommends that the State require each county to insure that enough space is available to handle local needs Therefore, the Committee opts for a mandatory system subject to the two conditions mentioned immediately below.

Fifth, it must be decided whether drunks who may act violently in, or attempt escape from the inebriate reception center should be excepted from the normal procedure and sent to jail It may be argued that such an exception is subject to an abuse of discretion which could swallow up the rule But the Committee has concluded that that risk is worth taking in the interest of preserving in the inebriate reception centers an atmosphere of peace and quiet, relatively free from the trappings of a security maintaining system which we associate with jails Therefore, if the peace officer taking custody reasonably believes the drunk will present an abnormal security problem he may take him to jail.

A sixth issue concerns the situation where an officer arrests an inebriate on probable cause to believe that he has committed a violation of a Penal Code section other than or in addition to 647(f) Some have argued that all drunken arrestees should be taken to the inebriate reception center. Others would limit this to the situation where the non-647(f) offense is a misdemeanor Still others would leave it to the discretion of the arresting officer The Committee has concluded that reform should be limited to those cases where 647(f) only has been violated. The Committee does recognize that it may be advisable to expand the scope of the program at a later date.

Seventh and finally, it must be decided how long a person may be involuntarily detained in an inebriate reception center Any restriction on an individual's liberty is justifiable only to the extent social needs make it imperative Therefore, the Committee concludes that the public health officer shall release any inebriate when he believes that detoxification, emergency medical, and diagnostic services are no longer necessary In no case shall an inebriate be confined against his will in a reception center any longer than 72 hours

The Committee recommends that whenever a police officer has probable cause to believe a person has violated Penal Code section 647(f) he must place the person in protective custody and take him to an inebriate reception center where he may be detained for a period not to exceed 72 hours

(C) The Treatment and Rehabilitation Program

Most experts have expressed the view that society can help control alcohol abuse among chronic drunkenness offenders by developing well-conceived and well-executed treatment and rehabilitation programs

The Committee recommends that each county be required to establish a treatment and rehabilitation plan designed for chronic drunkenness offenders Such a plan should be a comprehensive scheme consisting of a variety of types of services and programs It should include hospitals sanitariums, out-patient clinics, halfway houses, and family and vocational counseling centers These programs are to be planned and administered by the county health officer or his representative Each county must submit its master plan to the State Department of Public Health for approval The State Department of Public Health shall publish a set of uniform general standards which each must satisfy in order to have its plan ratified

(D) Processing Chronic Drunks Through Treatment and Rehabilitation Programs

Probably the most difficult and most controversial issue in this area is whether chronic drunkenness offenders should be required to participate in a treatment and rehabilitation program involuntarily. This involves both a legal and a medical question On the legal point it has been argued that subjecting an unwilling person to a treatment program may be an unconsitutional restraint on his liberty. The Committee concludes, however, that any constitutional problems can be overcome by drafting statutory standards sufficiently narrow as to cover only those cases where the purpose, means, and effect of the restraint is rationally related to the legislative objectives of removal and rehabilitation On the medical point some persons suggest that persons with chronic drinking problems can be rehabilitated only if they voluntarily engage in a treatment program While the Committee feels that it is true that treatment is only effective in patients with positive attitudes, it concludes in accord with substantial evidence presented to it that even mandatory therapy can develop the proper

frame of mind which is a necessary precondition to successful rehabilitation. Thus, the Committee concludes a system of involuntary treatment for chronic drunkenness offenders is appropriate

Second, it is necessary to decide who shall make the determination whether a given person should undergo involuntary treatment The Committee concludes that this is properly the function of a judge of the superior court, after hearing evidence and making factual findings in the context of a normal civil proceeding

A third question is who should bring the issue before the court The members of the Committee conclude that the county health officer or his representative is the appropriate person to petition the superior court. He may file a petition with respect to any person brought into an inebriate reception center whom he feels is subject to compulsory treatment. The district attorney of course, would be the appropriate person to represent the county health officer during the commitment proceeding

Fourth, a precise and workable legal standard must be established upon which to base the commitment Labels such as "chronic alcoholic" or "chronic inebriate" are not sufficient What is required is a two-step test The petitioner must prove first that the person, as a result of a chronic drinking problem, is gravely disabled or is a danger to himself or to others and, second, that a reasonable likelihood exists that the person will benefit from his exposure to an available treatment and rehabilitation program The petitioner should be allowed to introduce into evidence the results of his medical examination, social work reports, the patient's record for drunkenness, and any other relevant evidence.

Fifth, it is necessary to decide what the effect of a successful petition shall be The Committee concludes that the person meeting the two-step test set out above is to be committed to the care of the county health officer for a period not to exceed six months The health officer may expose the person committed to his care to any program or combination of programs in his state-approved comprehensive rehabilitation scheme He may in his discretion shift his patient from one program to any other whenever a change in treatment procedures is deemed appropriate But in no case may a patient be confined in a closed institution for a period longer than 60 days In his discretion, the health officer may release anyone committed to his care at any time before the expiration of the six-month period

The Committee recommends that upon the filing of a petition by the county health officer and upon a proper showing, the court will order a patient in an inebriate reception center to be placed in the continuing care of the county health officer for a period not to exceed six months for the purpose of undergoing treatment and rehabilitation

(E) Miscellaneous Matters

First, the problem of criminal prosecutions must be resolved. The Committee has concluded that the district attorney should be left free to file a criminal complaint for violation of 647(f) if he deems it appropriate. Any person against whom a complaint is filed may be arrested and prosecuted upon his release from the inebriate reception

center. However, in any case where a commitment petition is filed by the county health officer, the court, either upon its own motion or motion of counsel, must suspend the criminal proceedings. If the person is committed to the care of the county health officer, the criminal prosecution for 647(f) shall be dismissed

Second, the question of voluntary commitments must be answered When a problem drinker voluntarily commits himself to the care of the county health officer, the goals of society are promoted without the necessity of invoking established procedures and thus wasting public resources The Committee concludes, then, that an inebriate may volunteer for admission to a treatment and rehabilitation program Such an admission would also operate to suspend any pending criminal prosecution for public drunkenness

Third, the legal rights of confined inebriates must be defined. The Committee concludes that all those rights set out in section 5325 of the recently enacted Lanterman-Petris-Short Act as well as the right to habeas corpus must be guaranteed to any person detained under these provisions.

Fourth, a legislative timetable must be established Were a legislative scheme to be enacted into law, enough time would have to elapse after the date it became effective to allow the State Department of Public Health to establish general standards, to allow the counties to submit their master plans for approval, and to allow the local programs to get started The Committee concludes that the deadline date should be January 1 of the year which is two years after the year of enactment

The Committee recommends that treatment and rehabilitation programs should supersede criminal prosecutions, that a system of commitment should be instituted, that valuable legal rights should be guaranteed to each confined inebriate; and that a legislative timetable be established

THE SUBSTANTIVE CRIMINAL LAW

(A) Chronic Alcoholism as a Defense to the Crime of Public Drunkenness

A recent line of cases has developed the principle of law that a chronic alcoholic can not be punished criminally for the crime of public drunkenness The rationale supporting this conclusion is that chronic alcoholism is a disease, that public drunkenness is a symptom of that disease displayed involuntarily, and that, therefore, an individual is not responsible for such a display

This principle was first announced in the case of *Driver* v. *Hinnant,* 356 F 2d 761 (4th Cir 1966) That case held that it was cruel and unusual punishment violative of the Federal Constitution to criminally convict and incarcerate a chronic alcoholic for the crime of public drunkenness A subsequent case, *Easter* v *District of Columbia,* 361 F.2d 50 (D C. Cir., 1966), affirmed *Driver* on the constitutional issue, and developed additional common law and statutory bases for the decision. Several lower court decisions have followed the *Driver-Easter* rationale

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Last year the United States Supreme Court refused to take a case which would have decided the question, *Budd* v. *California*, cert. denied, 385 U S 909 (1966) The refusal may have been based on a procedural flaw involved in the case At any rate, the Court has noted probable jurisdiction in a case raising the issue this term, *Powell* v *Texas* We should have the decision in the *Powell* case sometime in the spring of 1968

It is argued that California, as a matter of wise legislative policy, should anticipate the probable result in *Powell*, and establish chronic alcoholism as a statutory defense to Penal Code 647(f). The wisdom of this approach is questionable for several reasons If the Supreme Court establishes the constitutional defense, a statutory defense would be superfluous But if the Court does not establish the defense, the adoption of the plan set out above for the treatment of chronic drunkenness offenders would hopefully make the prosecution of chronic alcoholics rare Also, creating the defense raises the knotty problem of alcoholism as a defense to any criminal act precipitated by the defendant's involuntary drunkenness Finally, the label "chronic alcoholic" is a very imprecise legal standard and creates difficult proof problems.

The Committee recommends that the Legislature should not establish chronic alcoholism as a statutory defense to 647(f) at this time

(B) Public Drunkenness as a Criminal Offense

It is also arguable that the first part of Penal Code 647(f), which makes public drunkenness *per se* a criminal offense, should be amended out. Since most public inebriates are also alcoholics, this would eliminate the punishment of "sick" alcoholics without necessitating protracted judicial proceedings and complex factual determinations Further, it is argued that the criminal punishment of the status or condition of being drunk violates that basic principle of the criminal law which requires an overt act as a basic element of a crime. Penal Code 647(f) may also operate in such a way as to discriminate against the homeless, indigent person who has nowhere else but the streets to drink Finally, repeal of this provision would help remove the criminal stigma attached to chronic drunkenness offenders, and thereby aid treatment and rehabilitation by raising patient self-esteem The Committee concludes, however, that some means of control must be maintained over the willful, malicious drinker, and that in light of the procedural reforms recommended above, repeal is unnecessary.

The Committee recommends that Penal Code section 647(f), which makes it a crime for one to display his drunkenness publicly, should not be amended at the present time.

FINANCIAL ASPECTS

The Committee feels as a result of its investigation that any financing problems associated with the proposed reform are neither prohibitive nor particularly alarming While the Committee is not prepared at this time to recommend a specific financing scheme it has arrived at a consensus on several major points

First, the Committee feels that the problem can best be met by a joint local, state, and federal attack The cooperative financing arrangement under the McAteer Act may provide an example of the type of scheme best suited to the task Under that plan, the county pays 25% of the total, and the State is responsible for a 75% share, a large portion of which comes from federal grants Such a plan would be especially appropriate during the initial stages of program development where capital expenditures might be particularly burdensome on the counties

In the area of administrative costs it is essential to note that a new program would result in new savings as well as new costs Certainly new expenditures would result in providing staff, research, and facilities for medical and social work programs. But also, very significant savings would result in the correctional system The expensive booking process for public drunks would be eliminated and jail costs should decrease markedly Very persuasive evidence was presented to the Committee at its hearings which indicates that the *per diem* cost of maintaining a problem drinker in a penal facility is about two and one-half times greater than in a rehabilitation facility, due to the high costs of maintaining tight security Therefore, should there be a net increase in administrative costs, it may be minimal

Finally, it should be noted that many presently existing plant facilities and rehabilitation centers can be utilized in any new venture by merely transferring them from a criminal agency to a health agency.

CONCLUSIONS AND RECOMMENDATIONS

To summarize, the Committee recommends

1 The problem of the chronic drunkenness offender should be treated primarily as a public health matter rather than as a criminal matter.
2 Each county should be required to establish inebriate reception centers equipped and staffed to provide detoxification services, emergency medical care, and diagnosis
3. Whenever a police officer has probable cause to believe a person has violated Penal Code 647(f), he should place the person in protective custody and take him to an inebriate reception center where he may be detained involuntarily for a period not to exceed 72 hours.
4. Each county should be required to establish a comprehensive treatment and rehabilitation scheme for chronic drunkenness offenders featuring a variety of types of services, facilities, and programs

5. Upon the filing of a petition by a county health officer and upon a proper showing, the court should order a patient in an inebriate reception center to be placed in the continuing care of the county health officer for a period not to exceed six months for the purpose of treatment and rehabilitation.
6. Inebriate reception centers and treatment and rehabilitation programs should be planned, instituted, and administered by county health officers, and should be subject to the approval of the State Department of Public Health.
7. No change in the substantive criminal law is appropriate at this time.

SECTION 4

MISCONDUCT ON COMMERCIAL PROPERTY

INTRODUCTION

Throughout California shopping centers have begun to experience the increasing problem of young people congregating on their premises, and converting them into open-air social centers These youngsters often tend to be rowdy and troublesome They have blocked sidewalks with large and noisy crowds, have disrupted traffic with slow moving chains of automobiles, have engaged in loud and obscene language, and have verbally abused the passers-by On occasion they have even assaulted shoppers and destroyed property

Assemblyman Joe A Gonsalves, through the introduction of House Resolution 457, asked the Committee to study this problem in the hope that it could arrive at a legislative formula which would offer some relief to the shopping centers

Pursuant to that Resolution the Committee held a hearing in Los Angeles on October 10, 1967, during which it arrived at the conclusion that, except in one limited instance, what was needed was not new legislation, but effective enforcement of the existing laws

The Committee arrived at this conclusion while fully appreciating the extent of the problem The concern of both the shopping center owners and the surrounding communities is fully understood, and Assemblyman Gonsalves should be commended for bringing this matter to our attention.

Nevertheless, the Committee feels that the problem can be corrected through enforcement of existing laws It should also be mentioned at this point that the Legislature has recently enacted certain legislation which should prove of great help to the local communities in controlling this kind of problem These new laws will be further noted below, and a clarifying amendment will be recommended for one of them

FAILURE TO ENFORCE EXISTING LAW

Excluding those acts which are clearly criminal acts of assault, theft, or malicious mischief, the disruptive activities of these youngsters can be broken down into two broad categories those which are pedestrian, and those which are vehicular in nature. The former generally consists of abusive and obscene language, the blocking of sidewalks and roadways, and horseplay of a kind which is either extremely frightening or dangerous The latter, or vehicular misconduct, consists of the misuse of automobiles and can be further subdivided into that which occurs on the roadways and that which occurs in the parking lots In both of these latter cases the misuse generally consists of reckless driving, the tying up of traffic by carloads of youngsters moving slowly in long continuous chains, and the deliberate parking of the cars in such a way as to block exit points

With, perhaps, a few minor exceptions, these activities are all in violation of existing Penal or Vehicle provisions

Section 415 P C. (disturbing the peace) is an extremely broad section and would by itself cover most of these situations

Section 602j P C (trespassing) expressly covers the situation where someone enters upon property for the purpose of interfering with the

conduct of a business Intent is sometimes difficult to prove under this section, but when a person is informed that he is interfering with the conduct of a business and is asked to either refrain from what he is doing or leave the premises, it should not be too difficult to prove intent if he continues his disruptive acts

Another section the recently enacted 647c P C, makes it a misdemeanor to willfully and maliciously obstruct the free movement of any person on any street, sidewalk, or other public place This is one of the new sections mentioned above

The other is Section 21107 5 of the Vehicle Code Under this section by enacting an appropriate ordinance, a local area can extend the provisions of the Vehicle Code to private roads open to public use Careful use of this section would allow local police to regulate traffic on private shopping center roads Because of the language contained in the statute, there is some question to to which private roads are subject to this provision, but the Committee has recommended, below, an amendment clarifying this point

Thus, the shopping centers can, with the cooperation of the local police and prosecuting agencies, curtail much of their problem simply through the proper utilization of existing law

But, this is where the breakdown occurs

Shopping centers are sometimes reluctant to press for a prosecution for fear of alienating the local population Too often it is the sons and daughters of their own customers who are primarily responsible for the problem

More often the local police are at fault Understandably, they are reluctant to deploy the manpower necessary to control a nuisance situation when their available manpower is already strained to carry out more serious and vital functions

The real breakdown occurs, however, at the level of the district attorney. They are reluctant to prosecute cases of this type First, they are difficult cases to prove and juries are reluctant to convict for such petty offenses It must be remembered that while in the aggregate these youngsters present a serious problem to the shopping centers, each individual case when considered alone, takes on the appearance of being a pretty minor thing Thus, district attorneys hesitate to spend time which they feel could be more profitably spent on something both a little more important and more likely to result in a conviction

Since the district attorney won't prosecute, the police hesitate to arrest And since the police won't arrest, the shopping center people don't bother to call them Thus, the natural reaction of the shopping center people is to believe that the law must be inadequate and they then lobby for a legislative hearing

There are two immediate ways of resolving this problem. One is to develop better cooperation among the shopping centers local police, and the district attorneys' office A few arrests and prosecutions would probably bring a great deal of relief The second method is really nothing more than an extension of the first Recent legislation allows a city prosecutor when authorized by the district attorney, to prosecute misdemeanors occurring within his jurisdiction. Usually a city prosecutor will be a little closer to local community problems and more sympathetic to shopping center problems than the district attorney.

If the local communities involved can prevail upon their district attorney to grant the necessary authorization to their city attorneys, they would probably find that the latter would be much more willing than the former to spend the time necessary to prosecute these cases

RECOMMENDATION

After due consideration, the Committee feels that the only recommendation warranted by the hearing is an amendment to Section 21107 5 of the Vehicle Code.

That section presently allows a city or county, by ordinance, to extend the provisions of the Vehicle Code to private roads generally held open to the public and "which so connects with highways that the public cannot determine that such roads are not highways".

A strict construction of the above language creates a problem While this section is currently being used by some local jurisdictions to control shopping center traffic, there is a serious question whether its provisions are actually applicable Although many private industrial streets give every appearance of being part of the overall public network, most shopping center streets are obviously privately owned.

Should the language of the section be strictly construed it would probably foreclose use of the section to many shopping centers.

Therefore, the Committee recommends that appropriate language be drafted which would extend the provisions of Section 21107 5 of the Vehicle Code to private roads open to the public for the purpose of allowing them access to retail commercial establishments.

SECTION 5

THE USE OF DEADLY FORCE TO EFFECT AN ARREST

INTRODUCTION

Pursuant to House Resolution No 459, offered by Assemblyman John Miller, the Assembly Committee on Rules assigned to the Assembly Interim Committee on Criminal Procedure the responsibility for studying the problem of the use of force by police to effect an arrest. As a part of its research, the Criminal Procedure Committee held legislative hearings and heard testimony given by law enforcement experts, legal experts, and civic leaders Having completed its investigation, the Committee hereby submits to the Assembly its report, including an analysis of the problem and recommendations for legislative action

THE GUIDING PRINCIPLE—NECESSARY AND REASONABLE FORCE

Present law authorizes the police to employ certain amounts of force in certain instances Each instance is governed by a general principle of law which regards as justifiable the use of force only when necessary and the use of only that amount of force which is reasonable For example, a policeman may clearly use reasonable force to defend himself against a law violator who is physically resisting arrest. Police officers also use force to effect mass dispersals of large groups engaging in violations of law, although legal authority for such a practice is hard to find And clearly, a police officer may use reasonable force when it is necessary to effect an arrest This report will focus on the use of particular type of force—deadly force—in a particular situation—effecting the arrest of a fleeing suspect. The general principle of reasonable and necessary force is equally as applicable in this special area as it is in every other area of the law.

The public is apparently no longer willing to take police shootings for granted This may be due in part to the growing feeling that exercises of police power in general are properly subject to public scrutiny and control It may perhaps also be explained in part by the fact that it is now quite obvious that the problem will arise not only in ordinary crime fighting situations but also in urban riot and perhaps political demonstration situations

The value conflict in this area is a most troublesome one On the one hand we abhor capital punishment without any judicial determination of guilt or due process of law, particularly for felonies of a noncapital nature, except perhaps in those cases where it is necessary to take a life to save another Yet on the other hand, we must have some system for apprehending suspects and deterring flight

The public has every right to expect sound laws in this area and to know with certainty what those laws mean In its investigation, the Committee concentrated on the two major issues. (1) is the present state of the law clear? (2) does the present standard best promote the principle of reasonableness?

THE STATE OF THE LAW *

Before the use of force is ever justifiable to effect an arrest, the arrest itself must be lawful The requirements for a lawful arrest are set out in Penal Code Section 836 That section authorizes a peace officer to arrest a person only when he has reasonable cause to believe that the person either has committed a crime in his presence or has committed a felony, or when the person has, in fact, committed a felony

Once the grounds for a lawful arrest are present, three principle penal code sections come into play With respect to an arrest made under the authority of a warrant, Penal Code Section 843 provides that, "the officer may use all necessary means to effect the arrest" of a fleeing suspect This section is applicable to any arrest, whether it be for a felony or a misdemeanor

Penal Code Section 835a provides that a peace officer, having probable cause to believe that a person has committed a crime, "may use reasonable force to effect the arrest" of the person if he flees Like Section 843, this applies to both felony and misdemeanor arrests It is not clear, however, whether it applies to both the warrant and non-warrant situations While its language purports to cover both, certainly its prime impact is in the area of non-warrant arrests, given the operation of Section 843

Another uncertainty in the operation of these two sections arises from the fact that Section 835a was amended in 1957 to conform more closely to the common law by substituting the term "reasonable" force in the place of "not more than necessary" force Section 843, however, was not similarly amended and retains the "all necessary means" test The Legislature's failure to amend Section 843 may evidence an intent to sanction a greater amount of force—perhaps even deadly force—in the case where the arrest is for a misdemeanor and covered by a warrant. On the other hand, this failure may be due to mere legislative oversight.

California's justifiable homicide law, Penal Code Section 196(3), provides that homicide is justifiable when "necessarily committed" in effecting the arrest of one "charged with felony" This section is directly operative, of course, only in felony cases only when deadly force is used, and only when the suspect dies as a result of the use of force The case law is of little help in ascertaining whether "charged with felony" means that an accusatory pleading has been filed against the defendant or merely that an officer has probable cause to believe defendant committed a crime Most courts, police, and academicians appear to assume, however, that a finding of probable cause is sufficient, and one case seems to go so far as to suggest that a mere good faith belief on the part of the officer is all that is required Section 196(3) is also unclear as to when homicide resulting from the use of deadly force is "necessarily committed" The necessity alluded to may refer simply to the need to make the arrest This is in fact, the common assumption. But in examining the language of Section 196 ('Homicide is justifiable when *committed* by public officers when *necessarily com-*

* For a more detailed analysis see the report prepared for the Committee by Donald C Green, Legislative Intern 1966–1967, copies of which may be obtained from the Committee Secretary

mitted in arresting persons charged with felony . . ."), one might argue that the use of the term "necessarily" to modify a second "when committed" phrase means either that the required necessity is something more than the need to make the arrest, or that the second phrase is redundant The commonly accepted interpretation could have been more clearly implemented by language which omitted the phrase, "when necessarily committed".

The justifiability of the use of deadly force to apprehend a fleeing felony suspect is, of course, not governed directly by Section 196(3) if the officer's shot misses or merely wounds the suspect The criminal liability of the police officer for assault, battery, or attempted murder would be determined, therefore, by reference to the general force statutes discussed above Thus all those uncertainties arising out of the interaction of Sections 843 and 835a are brought into play again.

Several other miscellaneous ambiguities exist in this area of the law The use of deadly force to capture juveniles is open to question, since a juvenile who violates a criminal standard has not committed a crime, but has only committed an act of juvenile delinquency. Second, it is not clear whether the term "public officer" in Section 196 means peace officer, or something else Third, Section 196 (2) provides that homicide is justifiable if committed "in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty" This section has never been interpreted If read most broadly, it could mean that police officers may use their firearms whenever they have legal grounds to arrest Finally, the effect of Penal Code Section 197 (4) is uncertain It may or may not apply to police officers. It may or may not justify deadly force whenever a felony has, in fact, been committed

Ambiguity and uncertainty abound in the Penal Code sections. Case law is meager and unenlightening The law has remained substantially unchanged for nearly a century, and it has gone substantially unnoticed until very recently Over the years, most persons who have dealt with the statutes have generally assumed that they restate the common law rule that police may shoot at felony sustpects, but not at misdemeanor suspects In view of recent concern, it would appear that this assumption should now be examined critically.

The Committee recommends, therefore, that since the law governing the use of firearms by police to effect lawful arrests of fleeing suspects is unclear, the Legislature should redraft the justifiable homicide law so as to clearly state presently existing law.

A REASONABLE STANDARD

In its study, the Committee focused primarily on two possible legislative standards of reasonableness The first is the common law rule and the rule which is apparently incorporated in present California statutes That rule holds that shooting a suspect in flight is necessary and reasonable if the crime he is suspected of having committed is a felony The second standard examined by the Committee was that advanced in the American Law Institute's Model Penal Code and incorporated into A B 2357 introduced by Assemblyman Miller at the last general session. Like the common law rule the Model Penal Code

rule would authorize the use of deadly force only in felony situations. But it would also add other conditions concerning the surrounding factual circumstances of each incident. Before a police officer could lawfully shoot he would have to reasonably believe that his shots would create no substantial risk of injury to innocent persons He would also have to reasonably believe either that the felony involved includes the use of deadly force, or that there was a substantial risk that a delay in apprehension would cause serious bodily harm

The Model Penal Code standard better inhibits the unnecessary taking of human life Execution at the hands of a police officer is only legitimate under that standard when it is likely that letting the suspect flee may result in an equal or greater evil This involves an evaluation of the surrounding circumstances, the presence of innocent bystanders, the danger inherent in the crime, and the characteristics of the suspect The common law rule, on the other hand, concerns itself only with the crime involved. Furthermore that approach asks only whether the crime is a felony or a misdemeanor, a rather arbitrary distinction, for often the classification has little to do with the amount of physical violence involved in certain conduct

The value of deterring flight may be better promoted by the common law rule, on the other hand. There can be little doubt that the knowledge that he may be shot will often deter a suspect from trying to evade arrest To the extent that the common law rule allows the use of deadly force in a broader range of cases, the motivation to flee is inhibited. For example, in the situation where a police officer orders a suspected felon in a crowd to halt, if the suspect knows the officer cannot shoot, he may be tempted to try to beat the officer in a foot race It must be noted, however, that modern technology may make the subsequent apprehension of the fleeing suspect much easier than it was in the days when the common law rule developed.

A second possible reason for preferring the common law rule is a reluctance to subject police officers who pursue their duties in good faith to an increased risk of criminal prosecution A policeman, like a member of any profession, may make on occasion an error of judgment The consequences of his error, however, are far more severe, merely because his job requires him occasionally to employ force and therefore run the risk inherent in any use of force. The Committee feels it may be unfair to expose police to any greater risks of criminal prosecution

Another means of comparison is the ease with which each standard allows rapid, accurate judgments by police officers under great stress. Under the common law standard an officer, in deciding whether to employ deadly force, must determine only what crime, if any, has been committed and whether it is a felony Under the Model Penal Code standard the same determination must be made, and in addition the officer must make judgments with respect to the presence of bystanders, the deadliness of the felony, and the probable course of the defendant's future conduct. This may be too much to expect of an officer in a split-second.

The Model Penal Code rule also suffers from a lack of clarity not found in the common law rule. It is unclear whether the requirement of an officer's reasonable belief establishes an objective standard of

criminal negligence, as a literal reading of the language would indicate, or a subjective standard of criminal intent like that usually found in the criminal law It is not clear how far the term bodily harm is meant to go Perhaps those felonies involving the use of deadly force should be spelled out Finally, the problem of flight in an automobile perhaps deserves special attention Therefore, the common law rule may be superior from the standpoint of clarity.

Finally, it has been suggested that the adoption of the Model Penal Code standard may have serious psychological consequences Acting under controls perhaps more restrictive than those applicable to layman, the police officer would feel stripped of freedom and power Fearing prosecution, he may be unwilling to use any force at all except in cases of self-defense In situations of combative confrontation between officer and suspect, the competitive advantage may have shifted Police morale may suffer greatly

The Committee is unable to agree that legislative change is proper at this time Majority support could not be marshaled for either formulation of a standard of reasonableness Though the Model Penal Code standard more rationally implements the policy against taking life unnecessarily, the common law rule better deters flight, limits the risk of unfair criminal prosecutions, facilitates split-second judgments, is free of vagueness, and establishes an appropriate psychological advantage for police

FLIGHT AS A SUBSTANTIVE OFFENSE

Under present law, a felony suspect with notice of the fact that he has been ordered by a policeman to halt and submit to an arrest is deterred from trying to run away, if at all, by his knowledge that the officer may try to use deadly force to apprehend him The Committee feels that the addition of a second deterrent may help to save lives Knowing flight from arrest, itself, could be made a separate substantive offense To be an effective deterrent the penalty for the crime of flight would be a sentence consecutive to that imposed for any conviction for the felonious act giving rise to the arrest from which the suspect fled. Thus, were such a law to be enacted, the halted suspect would have to consider both the possibility of being shot and the possibility of spending added years in prison. To the extent that this supplementary measure would make flight less frequent, unnecessary killings could be avoided

The Committee recommends, therefore, that in those cases where an officer is legally authorized to shoot a fleeing suspect, the act of fleeing should be made a separate substantive offense carrying with it a consecutive sentence

PENALTIES

As noted above, the Committee is very concerned about the problem of the increased risk of criminal prosecution of police officers inherent in any further restriction on the permissible use of force In its study the Committee considered two possible ways to create tightened standards without subjecting police officers to unreasonable penalty risks

First, the Legislature could require that police departments throughout the state adopt firearms regulations incorporating more restrictive standards This would mean that errant police officers would be subject to normal police disciplinary procedures and to the sanctions of suspension or dismissal from the force This approach may be objectionable, however, on either the basis of legislative reluctance to interfere in administrative matters or the basis of departmental reluctance to rigorously invoke disciplinary procedures

Second, more restrictive standards of conduct could be incorporated into the justifiable homicide statute and could be accompanied by a new section which would establish that the negligent, as contrasted to wilful, violation of such standards would subject one to more limited sanctions, such as a brief term in county jail or perhaps compulsory dismissal from the force

The Committee, however, does not feel at this time that it can recommend legislation conforming to either of these two plans.

CONCLUSION

In summary, the Assembly Committee on Criminal Procedure recommends:

—the law of justifiable homicide should be recodified so as to clearly state presently existing law, and

—flight from lawful arrest should be made a separate substantive offense

Mr Ketchum and Mr Sieroty dissent

Mr. Crown declined to approve The Use of Deadly Force To Effect An Arrest Report.

SECTION 6

POLICE TECHNIQUES IN MASS DEMONSTRATIONS

INTRODUCTION

Pursuant to House Resolution No. 399, introduced by Assemblyman Alan Sieroty, the Assembly Committee on Rules directed the Assembly Interim Committee on Criminal Procedure to study the subject of police techniques and procedures in mass demonstrations The Committee held several days of legislative hearings and heard testimony about police methods in general and about two recent incidents in particular The Committee hereby submits its report, including an analysis of some of the major problems in this most complex area of police science

THE ADVENT OF THE MASS DEMONSTRATION

The mass demonstration, a mainstay of the labor union movement for many years, has now come of age as a tool for social and political action It is quite obvious that mass demonstrations will continue to be a significant factor in American life for some time As evidenced by recent incidents at the Century Plaza Hotel in Los Angeles and the Oakland Induction Center, mass demonstrations raise particularly complex problems for the police, problems timely, important, and deserving of legislative study The Committee's investigation did not extend to urban ghetto riots, as it was felt this was a subject with special problems warranting separate study.

Mass demonstrations are of two main types First, there are peaceful protests involving no violations of law. In these situations the police have the responsibility to protect the demonstrators from harassment and to help insure their First Amendment rights to free speech and free assembly Second, there are mass demonstrations involving extensive violations of law and civil disobedience This report will examine several selected problem areas affecting both types of demonstrations, and some suggested ways and means for effectively handling these problems

POLICE TRAINING

The response society demands from its police officers in mass demonstration situations takes on superhuman proportions We ask in the same breath that the officer provide firm enforcement of the law, protect each person's legal rights to the fullest extent, and yet react in a rational, restrained, automaton-like manner in a setting which is filled with tension, demands quick action, and is often laden with abusive language This is no mean task But the public has the right to exact this high standard of conduct from its police Public expectations can be satisfied if sound techniques and practices are developed and if police are adequately trained to use them.

Good police training programs are essential to insure that our police are well prepared Good preparation is essential to insure that our policemen react to difficult situations with poise, expertise, and dispatch. Poised, expert, quick reactions are essential to insure the realization of society's justifiable goals.

The Committee feels that police training programs should increase the amount of attention paid to techniques and procedures in mass

demonstrations Greater emphasis should be given this problem by the Police Officer's Standards and Training group, police department academies, and the schools of criminology. The sponsorship of seminars and workshops in the area should be encouraged

PRE-DEMONSTRATION PLANNING AND NEGOTIATION

The Committee learned much about techniques of pre-demonstration planning from Wesley A Pomeroy, Undersheriff of San Mateo County He pointed out how many potential difficulties connected with mass demonstrations can be avoided before they occur if police take the initiative to set up meetings with demonstrators to study the upcoming event, to try to work out ground rules, and to try to develop an atompshere of mutual trust

All factions, pointed out Undersheriff Pomeroy, must be identified and brought together If a faction lacks organization or leadership, the police should help the group develop these qualitites to insure better discipline and cooperation later Flexibility must be built into planning so that tactics can be changed easily as the need arises The police should seek a commitment from the demonstrators that they will engage in no violations But if no commitment is forthcoming, the police should explain what arrests might be made, and what arrest procedures would be followed.

COMMAND COMMUNICATION PROBLEMS

The commanding officer must, of course, give his men a thorough briefing as to what to expect and how to proceed This involves the delicate problem of how much discretion to give the individual officer in the field on matters of strategy and the use of force Particularly difficult command problems arise once the demonstration has begun. The commanding officer has to be able as a practical matter to communicate his orders to every one of his men very rapidly and very clearly. This requires strategic placement of men and communication centers and the sophisticated utilization of electronic devices No individual officer in the field should ever be entirely cut off from his commanding officer.

Police must also be sure to employ communications systems sufficient to relay to each and every demonstrator loudly and precisely every direction given by the police This is necessary to maintain crowd discipline, to give dispersal orders, and to communicate an intent to make arrests and procedures to be followed.

USE OF FORCE

One of the most troublesome problems concerns the use of force by police in mass demonstrations Clearly, an officer may use a reasonable amount of force in self-defense against an unprovoked attack or in order to effect the arrest of a physically resisting suspect Difficult problems arise, however, when arrestees go limp or when protestants fail to obey an order to disperse.

When a person is lawfully placed under arrest and goes limp, it is clear that reasonable force may be used to effect his arrest The prob-

lem is what kind and what amount of force is reasonable under those circumstances. The law is not clear on this point but it is agreed that police should refrain from using so much force as to inflict injury on the person.

The most crucial questions are whether it is ever permissible to use force to disperse a large group of law violators rather than make mass arrests, and if it is permissible, under what circumstances. The choice to disperse rather than arrest has several distinct effects It prevents demonstrators from obtaining an arrest record and possibly a conviction record. It obviates the tremendous administrative burden on the police, courts, and jails which results from mass arrests It may reduce the dramatic quality of the protestants' acts of civil disobedience by foreclosing the confrontation between the forces of dissent and the judicial process It allows the infliction of punishment without a judicial determination of guilt or due process of law It increases the potential for physical harm to innocent persons. The desirability of these various effects is the subject of widespread and volatile discussion The issue is certainly worthy of further consideration

The use of force to effect mass dispersals also raises interesting legal questions. Penal Code sections 409, 416, and 726 establish police authority to make dispersal orders, and provide that failures to comply are, themselves, separate substantive crimes. Authority, on the other hand, for the use of force to disperse is hard to find Indeed, Penal Code section 727 provides that police "must arrest" those ordered to disperse under section 726 Section 726 dispersal orders, however, may be directed only against those "unlawfully riotously assembled", and whether, therefore, an officer "must arrest" (rather than forcibly disperse) a criminal trespasser, for example, is open to question.

Other authority exists, however, which may tend to negate the impact of section 727. Sections 26602, 27823, and 41601 of the Government Code provide that sheriffs, constables, and chiefs of police may "suppress" riots, public disturbances, and the like Also, *obiter dicta* in two cases arising out of the same incident, *People* v. *Yuen*, 32 C.A 2d 151(1939), and *People* v *Spear*, 32 C A 2d 162(1939), has been cited by some as recognizing the authority of police to effect forced dispersals. If the use of force to effect mass dispersals is ever proper, it is also very important to insure that only a minimal amount of force is ever used.

THE PRESS

Complete and accurate press coverage at mass demonstrations serves a vitally important public function Unwarranted harassment of the press, therefore, is not justifiable, and impedes the freedom of the press protected by the First Amendment to the Constitution. It is essential that the police and the press cooperate and work out an arrangement whereby well-identified reporters and photographers who refrain from unreasonably interfering with police operations can be guaranteed exemption from dispersal orders and freedom from harmful force.

CONCLUSION

The Committee does not wish to recommend passage of any legislation relating to police techniques in mass demonstrations at this time It feels that wherever possible, these matters are best left to departmental control. The Committee is convinced that the rate at which police problems become more complicated is matched by the rate at which police science becomes more highly developed The challenge facing our police in this era of unrest is staggering The challenge must be met The Committee is committed to the proposition that it will be met

SECTION 7

IMPLIED CONSENT

INTRODUCTION

On October 9, 1967, the Committee met in Los Angeles to review the "Implied Consent" law after it had been in effect for one year. This measure was extremely controversial at the time of its enactment, and the philosophical opposition that existed at that time manifested itself to a certain extent at the hearing in Los Angeles. Apart from that, however, and considering the law solely from a technical point of view, the general impression of the Committee was that despite some unforeseen complications the law was working fairly well.

During the hearing a number of issues were raised both by the witnesses and various members of the Committee Some of the more significant among them are listed below

1. The administration of the law is costing the Department of Motor Vehicles far more than had been anticipated.
2. The fact that the Department is using hearing officers who are lacking in any legal background or training was seriously questioned.
3. The fact that hearings are located in the licensee's county of residence rather than the county of arrest is causing some law enforcement agencies serious inconvenience and additional costs
4. The propriety of the situation in which an individual who pleads guilty to drunk driving loses his license anyway because he refused to take one of the tests was again questioned.
5. The reliability and virtue of the breath and urine tests was questioned
6. The issue of establishing a presumptive level was raised

While legislation touching on some of these matters is expected during the 1968 General Session of the Legislature, the Committee itself has no recommendations to make.

ADMINISTRATION COSTS

Testimony received by the Committee indicated that to a certain extent the "Implied Consent" law has shifted the cost of processing the drunken driver from the county to the State.

While the number of contested drunk driving cases prosecuted at the county level has declined as a result of the "Implied Consent" law, the cost of administering the suspension program at the State level has outrun the original estimates projected by the Department of Motor Vehicles.

There are several factors apparently contributing to this, but by far the most significant ones seem to be the number of formal hearings which have been requested (far exceeding expectations) and the number of appeals taken from them.

This latter factor, the number of appeals, can be expected to decline in importance as the appellate courts begin to rule on many of the still unresolved issues arising from the new legislation and establish guidelines which can be relied upon both by the Department of Motor Vehicles and defense counsel.

The establishing of clearer guidelines may have the additional effect of slightly reducing the number of requests for a formal hearing received by the Department. A small but significant number of these are obviously initiated by individuals relying on an interpretation of the existing law in conflict with that relied upon by the Department of Motor Vehicles. Once these issues are resolved by the appellate courts. the number of formal hearings will probably decline slightly.

While on the whole, the costs of administering this program far exceed original expectations, it is felt that this cost does not begin to approximate the savings realized at the county level as a result of the reduced number of contested cases prosecuted in the criminal courts

HEARING OFFICERS

Some members of the Committee seriously questioned the advisibility of having Department of Motor Vehicle employees without any legal training sitting as hearing officers. Two alternatives were suggested. One was that the Department be required to hire lawyers and the other was that the entire suspension proceeding be removed from the Department and placed with the courts.

There are four primary objections to the latter proposal First, the suspension proceeding was conceived as administrative in nature and, therefore, should be retained within an administrative rather than a judicial context.

Second, the suspension proceeding is separate and distinct from any criminal proceeding which might be initiated against the individual involved, and special care should be taken to prevent the two separate proceedings from being blurred together in either the public's or the court's mind.

Third, and along similar lines, if the suspension proceeding were removed to a judicial setting, it could easily become a part of the plea bargaining process and lose some of its effectiveness as an evidence gathering device District attorneys faced with the desirability of obtaining a conviction of some sort might be willing to bargain away the suspension provisions in return for a lesser plea Thus, an individual would neither lose his license nor be convicted of drunk driving.

Fourth, and finally, a judicial proceeding would be far more expensive than existing administrative process

The basic argument in support of having the proceedings placed within the court system is that the parties involved will then be afforded the legal safeguards inherent in our legal system. The suspension hearing concerns itself not only with determining questions of fact, but with the legal implications of those facts as well Furthermore, the involved, and sometimes obscure, rules of law which determine the admissibility of certain types of evidence are not whimsical rules. They exist for well-founded reasons and their application in a suspension hearing can only be assured if the hearing is before a legally trained person. This, the argument runs, can best be guaranteed in the court room.

The other suggestion, that the Department hire attorneys as hearing officers, offers the advantage of having legally trained individuals deciding legal issues without involving the exorbitant costs necessitated by transferring the proceeding to a judicial setting. The Department of Motor Vehicles has submitted one projection to the Committee estimat-

ing that such a changeover would cost approximately $120,000. It should be pointed out, however, that this estimate was dependent upon certain other technical changes in the law which would allow the Department savings in other areas.

LOCATION OF THE HEARING

The existing law requires that the suspension hearing be held in the licensee's county of residence. This creates a burden for many law enforcement agencies throughout the State. They often have to send men long distances at a great cost in inconvenience and expense. Working manpower is lost and travel expenses swell already over-burdened budgets On the other hand, individuals who become the subject of a suspension proceeding will often find it almost impossible, or at least extremely inconvenient, to return to the county of arrest in order to take part in the proceeding They may well have jobs which would be jeopardized by their absence, or the great distance involved may well make the trip prohibitive financially.

While the Committee does not recommend a change in the law at this time, it does feel that this is a matter which deserves further consideration It may well be that legislation effecting a compromise between the varying interests of law enforcement and the private individuals involved might be appropriate. Such a compromise could possibly provide that the hearing should be held in the county of arrest unless the licensee upon the filing of an affidavit of good cause requests that the hearing be held in the county of his residence Such an affidavit could state facts indicating that returning to the county of arrest would work a hardship and that there was not then pending in that county a criminal action requiring his personal appearance. It would seem that if the licensee was returning to the county of arrest in order to appear at a criminal hearing arising from his arrest, it would require little to schedule the suspension proceeding for the same period of time.

THE DOUBLE PENALTY SITUATION

One problem that has bothered both the Committee and members of the general public for some time concerns the licensee who, while in a drunken condition, refuses to take one of the three required tests and later, upon sober reflection, realizes that he was intoxicated and voluntarily enters a plea of guilty to drunk driving.

Under the existing law he still loses his license even though the ultimate purpose of the "implied consent" law has been accomplished. He has been found guilty and his plea has, in effect, rendered his earlier refusal meaningless The invocation of the suspension penalty at this point seems unnecessarily harsh and vindictive under the circumstances

From time to time various proposals have been put forward to solve this problem The "Santa Clara Plan" was suggested to the Committee during the hearing Essentially, it would provide that the suspension proceeding would be initiated by the court during a trial on the charge resulting from the arrest. This would mean that only those who refused the test and also pled not guilty would be subjected to the sus-

pension provisions An individual who pled guilty would avoid their effect since he would not be placed in a trial setting

This proposal seems defective for both constitutional and policy reasons The policy reasons against it are first, it would put the suspension proceeding directly in the hands of the district attorney where it would almost certainly become a part of the plea bargaining process, and, second, the district attorney would often find that he was unable to initiate a criminal action (especially in felony cases) because of insufficient evidence and would thus at the same time be blocked from instituting the suspension proceeding Under these circumstances an individual who refused the alcohol test could successfully avoid both the prosecution on the criminal charges and the suspension of his license.

The constitutional objections to the "Santa Clara Plan" are that it is both coercive in effect and violative of the equal protection clause It is coercive because it would have the clear and patent effect of inducing individuals to plead guilty in order to avoid the loss of their license under the suspension provisions It violates the equal protection clause in that the suspension provisions would be invoked only against those individuals who, in fact, contested a criminal action Thus, similar individuals committing similar acts would be accorded different treatment based upon a standard which is totally unrelated to the acts which make them subject to the loss of their license

THE BREATH AND URINE TESTS

During the hearing the reliability and virtue of both the breath and urine tests were seriously questioned Law enforcement personnel seem to have the greatest objection to the urine test, while the objection to the breath test was raised primarily by members of the Committee

However, it is felt that as long as the "implied consent" law remains on the books all three tests should remain Many individuals will object to the taking of blood and they should be allowed an alternative method of measuring their alcohol content For those who might object to the scientific reliability of the breathalizer, the urine test should be provided, and the inconvenience that it might cause law enforcement seems to be a rather weak argument for discontinuing that test Therefore, the Committee recommends that all three alternative tests remain in the law as it presently exists

PRESUMPTIVE LEVEL

The Federal Government recently passed legislation which requires the States to either enact legislation establishing a presumptive level of 10% at which all persons will be presumed to be intoxicated, or submit to the possibility of losing federal highway funds to which it would otherwise be entitled If California does not enact such a presumptive level during the 1968 General Session of the Legislature, there is a possibility it could lose federal highway funds

While practically all available scientific evidence indicates that every person is appreciably affected when the content of alcohol in their blood system reaches a level of 10%, the issue of a presumptive level still remains a highly volatile one The Committee was unable to reach an agreement and, therefore, makes no recommendation at this time.

SECTION 8

JUDICIAL AUTHORIZATION FOR ELECTRONIC EAVESDROPPING

INTRODUCTION

Pursuant to House Resolution No 538, introduced by Assemblyman Newton Russell, the Assembly Committee on Rules directed the Assembly Committee on Criminal Procedure to study the subject of judicially authorized eavesdropping The Committee held a legislative hearing and heard testimony from expert witnesses on the legal and policy issues involved The Committee hereby submits its report, including an analysis of the problem and conclusions with respect to the desirability of any future legislation

RIGHTS OF PRIVACY AND THE WAR AGAINST CRIME

Each new blessing of modern technology seems to carry with it a concomitant curse Such is the case with electronic eavesdropping Private conversations are now subject to clandestine interception by means of highly sophisticated telephone wire taps and sensitive mircophone equipment This report concerns the desirability of enacting legislation which would permit police to make limited court-supervised use of these technological advances to fight crime

The view that this use of electronic surveillance would be a blessing is based, of course, on the value assumption that the apprehension and conviction of those who engage in criminal conduct is good Indeed, this value bulwarks our entire body of criminal law The view that such a law would be a curse is founded on the value assumption that the freedom from the invasion of one's privacy is good Indeed, the right to privacy is a fundamental right enjoying constitutional status

These two basic values are properly seen as being in conflict with one another only if certain empirical determinations of fact are made. To show that a judicial authorization statute would be a blessing, it is necessary to prove with reasonable certainty that a limited use of electronic surveillance can, as a matter of fact, significantly aid law enforcement in apprehending criminals and aid criminal courts in determining guilt On the other hand, to show that a system of eavesdropping warrants would be a curse, it is necessary to prove with reasonable certainty that restricted electronic surveillance would create an unreasonable risk of invading rights of privacy

The Committee has carefully weighed the values and evaluated the factual evidence It is unable, however, to make a recommendation with respect to the passage of an eavesdropping warrant law.

STATE OF THE LAW

On the constitutional level, recent United States Supreme Court cases make it clear that eavesdropping is governed directly by the Fourth Amendment The first half of that Amendment provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." The right of privacy guaranteed by this amendment has been conclusively interpreted to extend to conversations The electronic interception of those conversations has been conclusively interpreted to be a "search" The constitutional problem, therefore, is establishing a test for distinguishing those governmental eavesdrops which are "unreasonable" from those which are not The Court has

employed, individually and in various combinations, three different tests thus far the trespass theory, the one-party consent theory, and the warrant approach. The most recent Supreme Court pronouncements in the area, the *Osborn, Berger,* and *Katz* cases, shed considerable light on the present status of these three tests

At one time the Court felt unreasonable searches were those involving a physical trespass on private property Later this was modified to proscribe only physical trespasses in "constitutionally protected areas" *Katz*, however, now makes it very clear that the Fourth Amendment protects people, not places, and that the trespass rationale is no longer controlling.

For years the Court has permitted any electronic search where the government official has received the prior consent of one of the parties to the expected conversation Although, in effect, this theory allows the privacy of the non-consenting party to be invaded, it is accepted on the rationale that any communication, even if intended to be confidential, can be later disclosed verbally to a third party A recording of the communication is more reliable evidence than a conversant's subsequent testimony about it *Osborn* was a one-party consent case, and the Court could very easily have upheld the admissibility of the eavesdropping evidence on that basis The Court chose, however, to decide the case on the new basis of the presence of judicial authorization.

The judicial warrant approach is suggested by the very wording of the Fourth Amendment itself The second half of that Amendment provides that " no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized" The *Berger* case declared a New York judicial authorization statute unconstitutional on the grounds that it failed to require the particular descriptions called for by the Fourth Amendment The *Katz* case held inadmissible eavesdropping evidence, which had been obtained with minimal interference with any rights of privacy, but which had not been gathered pursuant to a judicial warrant Again, in both of these cases the Court failed to cite lack of consent as a basis for the decision

There is no definite answer to the issue whether the Supreme Court would uphold a conviction based on the admission of evidence obtained pursuant to an eavesdropping warrant issued under a tightly drawn statute Most lawyers seem to feel, however, that *Osborn*, *Berger*, and *Katz*, when read together, imply that the Court would uphold such a conviction

At the federal statutory level, Section 605 of the Federal Communications Act provides that no unauthorized person shall " . intercept . *and* divulge . . "or" . receive . . *and* use . for his own benefit ." any wire or radio communication (emphasis added) The use of the conjunctive, "and," rather than the disjunctive, "or", and the ambiguity inherent in the term, "use", make the meaning of this section unclear What is clear is that certain wiretapping activity is violative of federal law, and that proscribed conduct could not specifically be authorized by state statute This does not apply to microphonic surveillance or any wiretapping which federal law does not outlaw.

AN EAVESDROPPING WARRANT STATUTE *

Although the Committee is unable to recommend the enactment of an eavesdropping warrant law, and although the constitutionality of such a measure is not definite, the Committee feels, nevertheless, that it is essential to discuss several major issues one would encounter in drafting an eavesdropping warrant law.

The major problem would be to spell out exactly what must be particularly described in an application for a warrant and in the warrant itself, and how the warrant is to be executed. This is to guarantee the presence of probable cause and to protect against any more than necessary interferences with right of privacy. *Osborn, Berger,* and *Katz* contain a great deal of discussion in this area, and may give the draftsman considerable help in knowing what standards and procedures to establish.

A second major issue is what crimes should be covered. Because of the risks to privacy inherent in any further governmental electronic eavesdropping, many feel that the scope of any new law should be restricted to only those types of criminal conduct we view as especially heinous Thus, it might be proper to limit its use to only those cases where felonies, or even certain specially enumerated felonies, were involved But the prime purpose and effect of eavesdropping legislation is to aid law enforcement in the fight against organized crime. To the extent that organized crime exists in California, it is generally crime of the victimless variety. With respect to victimless criminal activity such as gambling, prostitution, and narcotics, society generally has ambivalent attitudes. We abhor the criminal boss who purveys sin for profit, but we are more tolerant with respect to his customers. But the wisdom of trying to draft a statute which would distinguish between those who participate in a given crime for business and those who engage in the same crime for pleasure is questionable.

Another possible means of restricting the scope of such a law is to differentiate between various types of conversation Police can overhear presently operative commissions of verbal crimes, such as extortion, bribery, or conspiracy. Or police can merely overhear evidence about past or future crime In light of the Supreme Court's recent rejection of the "mere evidence rule" no distinction could meaningfully be drawn between commissions of crime and evidence of crime. But police can also overhear confessions of crime, and these statements may be worthy of special treatment. One can argue that confessions obtained through the use of electronic devices should be inadmissible either on the ground that they deny one's right to counsel, or that they violate one's privilege against self-incrimination. Thus, confessions could be excluded from coverage.

From a constitutional standpoint, and from a logical policy standpoint, it is clear that any statute passed should apply equally to wiretapping and to microphonic eavesdropping But the federal prohibition on wiretapping creates the problem mentioned above. Thus, a statute could be made applicable either only to microphonic eavesdropping or

* See appendix for text of statute proposed by Paul Savoy

to all forms of electronic surveillance not illegal under federal law This latter tack would allow state courts to interpret these ambiguities in Section 605 of the Federal Communications Act which federal courts have for so long left unsettled

Another crucial problem is whether to extend the judical authorization rationale into the area of one-party consent cases One approach would be to allow law enforcement the option of obtaining either the consent of one party to the expected conversation or an eavesdropping warrant Another approach would be to allow electronic surveillance only in those situations where both consent and a warrant were obtained The third way to alter the present law is to require a warrant in every case and to render consent thereby irrelevant This may indeed be the direction in which the courts are headed

Finally, there is the problem of the admissibility of electronically gathered evidence. On the one hand, a statute could provide that all evidence collected pursuant to a lawfully obtained and executed warrant would be admissible in court On the other hand, one might wish to limit the admissible evidence to those conversations particularly described in a warrant The only reason to prefer the second alternative is the fear that law enforcement personnel might invent grounds upon which to base an application for a warrant in order to engage in a general search.

CONCLUSION

The Assembly Committee on Criminal Procedure is unable at this time to make any recommendation with respect to the enactment of a law authorizing judicial eavesdropping warrants.

APPENDIX

Act Proposed by Paul Savoy, Associate Professor, School of Law, University of California at Davis to add Chapter 3A to, and to amend section 633 of, the Penal Code, relating to electronic eavesdropping by law enforcement officers.

SECTION 1 Chapter 3A (commencing with section 1543) is added to Title XII *of Part II of the Penal Code, to read*

CHAPTER 3A

EAVESDROPPING WARRANTS

Sec.
1543 *Definitions.*
1544 Application for Warrant.
1544a Issuance of Warrant.
1544b Form and Content of Warrant
1544c Period of Effectiveness.
1544d Renewals.
1544e. Execution.
1544f Return
1544g Notice
1544h Records to be Maintained
1544i Custody of Sound Recordings
1545 Admissibility of Evidence
1546 Annual Reports.
1547 Penalties
1548 Remedies

§1543. Definitions

The following definitions are applicable to this chapter

1. "Eavesdropping" means the intentional overhearing or recording of a conversation without the consent of at least one party thereto, by a person not present thereat, by means of a device
2. "Device" means any mechanical or electronic instrument or equipment designed or used for acoustical detection without regard to whether the installation or operation of the instrument or equipment requires a physical trespass upon private premises "Device" does not include any instrument designed or used to intercept a telephonic or telegraphic communication by making a connection, physically, inductively or otherwise, with any telephone or telegraph wire, line, cable or instrument
3. An "eavesdropping warrant" is an order in writing of a judicial officer directed to a public officer, authorizing eavesdropping, as defined by this section

§1544. Application for Warrant

1 An application ex parte for an eavesdropping warrant may be made only by the Attorney General, or an assistant or deputy Attorney General expressly and particularly designated by the Attorney General for such purpose, or by a district attorney or an assistant or deputy district attorney so designated by a district *attorney for such purpose*

2 An application for an eavesdropping warrant must be in writing, subscribed and sworn to by an applicant authorized by this chapter and must contain the following

(a) A statement of facts establishing probable cause to believe that the conversation of a particularly described person in a particularly described place or premises will constitute evidence of a particularly described crime or will materially aid in the apprehension of the perpetrator of a particularly described crime, and

(b) a particular description of the nature of the conversation that is expected to occur, and

(c) the name and position or classification of the public officer who is to execute the warrant; and

(d) a statement of facts establishing that there are no other means reasonably available to obtain comparative evidence or information, and

(e) a statement of the period of time for which the eavesdropping is required to be maintained, including, if practicable, a designation of the hours of the day or night during which the conversation reasonably may be expected to occur, and

(f) if a surreptitious entry upon a private place or premises is required in order to install an eavesdropping device pursuant to a warrant issued under this Chapter, a statement

(1) that there are no other means reasonably available by which the eavesdropping may be accomplished,

(2) describing generally the device to be installed, and

(3) establishing reasonable grounds to believe that such place or premises will be unoccupied at the time of entry, and

(g) if a prior application has been submitted or a warrant previously obtained for eavesdropping with respect to the same person and place or premises for which a warrant is presently sought, a statement disclosing the date of application court, name of applicant, and where applicable the date of execution, results and present status of the investigation, and,

(h) if there are exigent circumstances requiring the postponement of notice pursuant to section 1544g, a description of such circumstances, including reasons for the applicant's belief that secrecy is essential to the efficacy of the pending investigation

§ 1544a. Issuance of Warrant

1 An application for an eavesdropping warrant must be made to a judge of the superior court in the county in which the warrant is to be executed or to a judge of the superior court in the county in which an office of the applicant is located One superior court judge shall be expressly and particularly designated in each county for such purpose by a Presiding Justice of the Court of Appeals for the District in which the superior court is located

2 If an application has been made to a judge of a superior court pursuant to paragraph (1) of this section and has been denied, a further application may be made to a presiding justice of the court of appeals for the district in which such superior court is located, or to an Associate Justice thereof designated by a Presiding Justice for such purpose

3 The judge or justice, before issuing an eavesdropping warrant pursuant to this chapter, may examine under oath or otherwise interrogate any person for the purpose of determining whether grounds exist for issuance of the warrant Any such examination or interrogation must be recorded or summarized on the record by the court If an application for a warrant is denied, the judge or justice shall state his reasons for denial on the record

4 In any case in which an application for an eavesdropping warrant has been made and denied, a subsequent application with respect to the identical crime, premises or place, and conversation must be accompanied by the original application and supporting papers

§ 1544b. Form and Content of Warrant

If the judge or justice is satisfied that grounds exist for the issuance of a warrant pursuant to this chapter, he shall grant the application and issue a warrant The warrant must contain the following

1 The name of the issuing court and the subscription of the issuing judge or justice, and

2 The date of issuance, date of effect termination date, and where practicable the hours of the day or night during which the eavesdropping may be conducted, and

3 A particular description of the person and the place or premises upon which eavesdropping may be conducted, and

4 A particular description of the nature of the conversation to be obtained by eavesdropping, including a statement of the crime to which it relates, and

5 The name and position or classification of the public officer who is to execute the warrant, and

6 A direction that the warrant and any recordings of conversations made pursuant thereto be returned and delivered to the issuing court within the time specified by section 1544f, and

7. An express authorization for a surreptitious entry upon a private place or premises to install a specified eavesdropping device, if such entry is necessary to execute the warrant

§ 1544c. Period of Effectiveness

1. An eavesdropping warrant shall be effective for a period specified by the issuing judge or justice, but in no event shall such period exceed ten days.

2. An eavesdropping warrant may be issued in advance of the date of effect of execution of the warrant, but in no case shall a warrant be issued more than 15 days preceding its effective date.

§ 1544d. Renewals

1 At any time prior to the expiration of an eavesdropping warrant or a renewal thereof, the applicant may apply to the judge or justice who issued the original warrant, or if such judge or justice is unavailable, any judge or justice authorized by section 1544a to issue eavesdropping warrants, for a renewal thereof with respect to the same person and place or premises

2 An application for renewal must set forth the results to date of the eavesdropping conducted pursuant to the warrant sought to be renewed The application must also establish probable cause for the applicant's belief that additional conversations of the person described in the original warrant will occur in the place or premises designated therein and will constitute evidence of the crime described therein.

3 An application for renewal also must incorporate the original warrant together with the application therefor and any supporting papers.

4. If satisfied that grounds exist for renewal of the warrant, the judge or justice must issue an order renewing the eavesdropping warrant and extending the authorization for a period not exceeding ten days from the entry thereof.

§ 1544e. Execution

1. An eavesdropping warrant may be executed pursuant to its terms anywhere in the state.

2. An eavesdropping warrant may be executed only by the public officer designated in the warrant.

§ 1544f. Return

Within ten days after termination of the warrant or the last renewal thereof, the applicant or public officer who executed the warrant must return to the issuing judge or justice the warrant, together with the application therefor and any supporting papers on which it was issued. He must also submit to the court a written inventory of the recordings made of eavesdropped conservations, together with a summary of the contents of the recordings, subscribed and sworn to by the applicant or public officer

§ 1544g. Notice

1 Within thirty days after the termination of the warrant or the last renewal thereof, written notice of the execution of the warrant must be served upon the person named in the warrant whose conversation was the subject of the eavesdropping and upon the owner, lessee, or occupant of the place or premises in which the eavesdropping device was installed

2. If there are exigent circumstances requiring postponement of notice beyond the initial thirty day period, or beyond an extended period authorized by paragraph 3 of this section, an application may be made at any time prior to the expiration of such period to the judge or justice who issued the original warrant or renewal, or if such judge or justice is unavailable, to any judge or justice authorized by section 1544a to issue eavesdropping warrants, for a postponement of notice.

3. Upon a showing that continued secrecy is essential to the efficacy of the investigation, the judge or justice may extend the time within which notice must be served for an additional period not to exceed thirty days.

§ 1544h. Records to Be Maintained

1. A copy of the warrant, any renewals of the warrant, the applications therefor and any supporting papers shall be retained by the judge or justice issuing the warrant Such documents shall not be open to public inspection until after notice of the execution of the warrant has been served pursuant to section 1544g Thereafter, such documents, together with the original documents returned pursuant to section 1544f shall be filed with the clerk of the issuing court and shall be open to public inspection as a judicial record

§ 1544i. Custody of Sound Recordings

1 Upon return of an eavesdropping warrant, the judge or justice shall direct that any sound recordings obtained pursuant to the warrant be held in the custody of the applicant upon condition that they be returned to the court upon order thereof or delivered to any other court upon order thereof

2 To assure the physical integrity and security of sound recordings obtained pursuant to an eavesdropping warrant, the Attorney General shall prescribe uniform statewide procedures governing the custody and safekeeping of such recordings. These procedures shall include the making of written records by the Attorney General and each district attorney that will reflect as fully as possible the location and use of such recordings throughout the period of custody.

§ 1545. Admissibility

All evidence obtained pursuant to an eavesdropping warrant issued in accordance with the provisions of this chapter shall be admissible in any criminal or administrative proceeding or before the grand jury.

§ 1546. Reports

1. All courts issuing eavesdropping warrants shall make annual reports relating to the operation of this chapter to the Judicial Council. The reports shall contain (1) the number of applications made, (2) the number of warrants issued, (3) the effective period of such warrants, (4) the number and duration of all renewals of warrants, (5) the crime in connection with which the eavesdropping was conducted, (6) the name of the applicant, and (7) the results of the execution of each warrant

2. The Attorney General and each district attorney shall make annual reports to the Judicial Council containing (1) a statement of the purposes for which evidence or information obtained pursuant to an eavesdropping warrant was used in each case in which such a warrant was executed; (2) the present status or disposition of all cases in which an eavesdropping warrant was executed, and (3) a general description of the nature of the devices utilized in the execution of such warrants

3 The Judicial Council shall make annual public reports of all information and data collected on the operation of this chapter and shall from time to time submit to the legislature such recommendations as it may have with respect to changes in existing laws governing electronic eavesdropping

§1547. Penalties

Any person who engages in eavesdropping without a warrant, or who obtains information as a result of eavesdropping and before such information becomes a public record discloses such information for a private purpose or for any purpose not authorized by this chapter, shall be punishable by imprisonment in the state prison for a period not exceeding five years, or in the county jail for a period not exceeding one year, or by fine not exceeding five thousand dollars ($5,000) or by both fine and imprisonment

§1548. Remedies

1 Any person whose conversation is overheard or recorded by an eavesdropping device the installation or operation of which is not authorized by a warrant issued pursuant to this chapter may bring an action against the person who installed or operated such device

2 Any person who is injured by disclosure of information obtained by means of an eavesdropping device and before such information becomes a public record, where the disclosure is for a private purpose or for any purpose not authorized by this chapter, may bring an action against the person who made such disclosure

3 In an action pursuant to paragraphs 1 or 2 of this section, the plaintiff may recover the greater of the following amounts

(a) Three thousand dollars ($3,000)

(b) Three times the amount of actual damages, if any, sustained by the plaintiff

4 Any person may in accordance with the provisions of Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Criminal Procedure, bring an action to enjoin and restrain the installation or operation of an eavesdropping device on the ground that

(a) the eavesdropping is being conducted without a warrant issued pursuant to this Chapter or

(b) the eavesdropping is being conducted with a warrant and (1) the warrant or affidavit for the warrant does not comply with the requirements of this chapter, or (2) the method of execution of the warrant did not comply with the requirements of this chapter, or (3) the eavesdropping is being conducted in violation of federal or state constitutional standards

5 It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages

SECTION 2 Section 633 of the Penal Code is amended to read:

§633

Nothing in Section 631 or 632 shall be construed as prohibiting the Attorney General, any district attorney, or any assistant, deputy, or investigator of the Attorney General or any district attorney, or any officer of the California Highway Patrol, or any chief of police, assistant chief of police, or policeman of a city or city and county, or any sheriff, under-sheriff or deputy sheriff regularly employed and paid as such of a county, or any person acting pursuant to the direction of one of the above-named law enforcement officers acting within the scope of his authority, from overhearing or recording any communication which they could lawfully overhear or record prior to the effective date of this chapter

Nothing in Section 631 or 632 shall be construed as prohibiting any public officer authorized by Section 1544e of the Penal Code for overhearing or recording any conversation pursuant to an eavesdropping warrant issued in accordance with the provisions of Chapter 3A of the Penal Code

Nothing in Section 631 or 632 shall be construed as rendering inadmissible any evidence obtained by the above-named persons by means of overhearing or recording any communication which they could lawfully overhear or record prior to the effective date of this chapter

Nothing in Section 631 or 632 shall be construed as rendering inadmissible in any criminal or administrative proceeding, or before the grand jury, any evidence obtained by means of an eavesdropping warrant issued in accordance with the provisions of Chapter 3A of the Penal Code

SECTION 9

REIMBURSEMENT FOR THE LEGAL SERVICES PROVIDED BY THE PUBLIC DEFENDER

INTRODUCTION

The Committee met in Monterey on September 26, 1967 to consider a number of proposals allowing a county to seek reimbursement from indigent defendants for legal services provided by the public defender.

In recent years California has experienced an expansion in the nature and quality of the legal services it provides for indigent criminal defendants This expansion, prompted largely by state legislation and court decision, has resulted in one of the finest and most expensive public defender systems in the country.

Unfortunately, however, even though it may be the finest and most expensive system in the country, it is still not operating as effectively and as efficiently as it could. It still suffers from the restraints of a limited budget Under existing law, the state contributes 10 percent of the cost of maintaining a public defenders' office while the counties contribute the rest. Given the already over-burdened state of county budgets, this means that a public defenders' office is typically overworked and understaffed And this, of course, cuts into the quality of the services provided for indigent criminal defendants

While the average client of a public defender is not in a position to afford expensive private counsel, he is oftentimes capable of contributing something toward the expense of his defense. For example, every public defender has on occasion been forced to represent a person who may have five hundred to a thousand dollars available for counsel, but whose case is so involved that no private attorney will handle it for that amount And a large number, perhaps a majority, of any public defenders' clientele is capable of paying ten or twenty-five dollars for the services they receive Few private attorneys are going to take on a case for that amount, regardless how little work may be involved. Even those clients who are unable to afford a penny when they first come to the public defender may subsequently be in a position to contribute something. If the public defenders were allowed to tap these financial reservoirs, they could augment their budgets significantly without seriously overburdening either their clients or the taxpaying public

This opportunity for improving the services available to indigent defendants becomes apparent when it is considered in conjunction with the fact that the average case is processed through a public defenders' office at a cost of about fifty dollars If an average of only twenty dollars a case were collected by a public defender, he could increase his budget and staff by almost half. Better yet, he could afford to retain and keep the professional and experienced defense attorneys necessary to an effective system of criminal justice.

POSSIBLE APPROACHES

During the 1967 General Session the Committee considered three bills dealing with this subject Senate Bill 936 by Senator Lagomarsino; Assembly Bill 2111 by Assemblyman Harvey Johnson; and Assembly Bill 2546 by Assemblyman Meyers. Each of these bills suggested a different approach and they were referred to a subcommittee for study and recommendation. While the subcommittee was able to arrive at a compromise recommendation acceptable to all three authors, the

regular Committee rejected the recommendation and the three bills died.

All of the approaches which have been suggested to the Committee break down basically into three different kinds, each capable of being served by three different collection methods Each of the approaches is briefly described below with appropriate comments.

THE LOS ANGELES APPROACH

Los Angeles favors a system under which the defendant and his immediate relatives would be liable for the costs incurred in representing the defendant They would like to see legislation introduced which would give the county board of supervisors the power to set fee schedules and the authority to collect those fees They propose implementing the latter suggestion through a county collection agency and civil litigation It was pointed out that Los Angeles is presently pursuing a similar program with respect to medical assistance to the poor and indigent and that the county is recovering between 30 and 35 percent of its billings Most of the payments are made on a time payment basis and many of them are compromised for a lesser amount because of the financial condition of the individuals involved Los Angeles feels that it could be equally successful with criminal defendants and their immediate relatives

The primary objection to this proposal is directed towards the inclusion of the defendant's relatives among those financially responsible. Many feel that even asking a wife to pay for the criminal acts of her husband is inappropriate. To go beyond that and ask other immediate relatives such as father, son and brother to pay for the criminal acts of a person they could not hope to control seems unconscionable.

Other objections were made to the inclusion of all defendants within the scope of the plan Some members of the Committee feel that those defendants who are not found guilty should not be made to bear the cost of their prosecution Presumably they are innocent Since society brought them before the court, society should pay the costs.

It was also pointed out that if reimbursement is sought from all defendants the cost of collection might outweigh the amount collected. Both those acquitted and those sent to prison can be expected to resist collection of any sort; the former because they were unjustly accused and forced to undergo an unwanted expense, and the latter because, being in prison, they have little to lose Of the remaining individuals, those convicted but not sent to prison, they are not typically known as prompt bill payers They tend to be the more irresponsible element of society. as well as the more transient. Bill collectors would have far more difficulty collecting from them than they do from the medically indigent There will always be a greater number of responsible individuals seeking medical aid than being convicted of crimes. This holds true even among the poor.

THE SAN FRANCISCO APPROACH

Mr Edward Mancusco, the Public Defender of San Francisco, suggested an approach that would allow the public defender to either collect a feee in advance or obtain a signed commitment to pay He does not favor extending liability to relatives, but believes that all defendants should be required to pay even if they are acquitted or sent to prison In addition to obtaining a fee or commitment in advance, he would also like to see payments allowed as a condition of probation or parole

The objections to collecting from all defendants that were raised against the Los Angeles Plan are equally applicable here. In addition to those problems, there is the additional one of collecting fees in advance of services rendered Within a general range it is usually possible to make a fairly accurate estimate of the amount of work that will be involved in a typical criminal case But this does not always hold true Often cases will demand either far more or far less work than had been expected In this latter situation, refunding money to the client, especially a dissatisfied client, could cause complications The county could well find itself involved in a number of small, and sometimes malicious, suits each costing as much as the original defense Furthermore, the propriety of the county taking money in advance of a criminal prosecution seems questionable Even though it may involve greater collection problems, it would seem better to collect upon the conclusion of a case rather than at its beginning.

THE PROBATION APPROACH

The third suggested approach is one that would require reimbursement only from those individuals who are both convicted and granted probation It would allow the courts to impose as a condition of probation a requirement that the defendant pay a specified amount for the costs of his defense The amount would be limited to one which the defendant could reasonably be expected to meet and he could be given sufficient time in which to pay it.

The objections to this approach are that it discriminates against one class of defendants, unreasonably limits the amount of money which could be obtained, and might induce certain individuals to reject probation when they might otherwise accept it The advantages of this approach are that it does not burden the innocent with the costs of their defense, involves fewer collection problems by providing a greater inducement, and allows the court to decide what amount should be paid The court can make this decision at the close of the case with help from both the public defenders office and the probation office and it can easily make subsequent adjustments should they prove necessary Civil litigation would never be involved.

COLLECTION METHODS

While all of the above approaches were submitted with a specific collection method in mind, they are all capable of being adapted to any of the following methods

First, payment to a private or public collection agency This system is best suited to the Los Angeles Plan and offers one distinct advantage in that it would provide trained professional bill collectors for what may well prove to be a difficult job

Second, payment directly to the public defenders' office While this approach is possible, it is probably the most inappropriate Most public defenders shy away from it They have neither the staff nor the facilities to handle large sums of money nor are they able to handle the collection problems that would be necessarily involved

Third, payment to the court, either through a court agency or the probation office. This approach is best suited to a system wherein the court has some direct control over the defendant If reimbursement were limited to individuals placed on probation then it would probably be the best system While it might put extra strain and expense on the probation office or the court, it would probably be even more expensive to set up a separate and independent collection agency

CONCLUSION

The Committee was unable to reach an agreement on the approach that should be taken A majority of its members agree that some method of reimbursement should be devised

It might also be noted in closing, that the Committee is of the belief that the Probation Approach needs no legislative enactment in order to be implemented The Attorney General's office, in opinion number 66/83, September 12, 1967 concluded that:

> A trial court may as a condition of probation require a defendant to reimburse the county for costs borne by it in providing him counsel either by public defender or by assigned counsel if in the circumstances imposition of such a condition is reasonable and appropriate

The Committee concurs in that opinion

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Report of the

ASSEMBLY INTERIM COMMITTEE ON

STATE PERSONNEL AND VETERANS AFFAIRS

EMPLOYER-EMPLOYEE RELATIONS IN THE PUBLIC SERVICE

January 1968

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James W. Dent, *Vice Chairman*
Robert H. Burke
Mike Cullen
Gordon W. Duffy
Walter J. Karabian
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Mrs. Cristine B. Trask, *Committee Secretary*

LETTER OF TRANSMITTAL

January 29, 1968

HONORABLE JESSE M. UNRUH
SPEAKER OF THE ASSEMBLY, AND
MEMBERS OF THE ASSEMBLY
State Capitol
Sacramento, California

Gentlemen:

Pursuant to House Resolution No. 72 of the 1967 Regular Session, the Assembly Committee on State Personnel and Veterans Affairs submits its report covering employer-employee relations in the public service.

In reviewing federal reorganization plans for the State Military Department, the committee is satisfied that federal reorganization plans are in the best interest of the State of California and will not have an adverse effect on the preparedness of our state militia (HR 560).

The committee was unable to hold hearings and conduct research into any of the other subjects assigned to it by the Rules Committee.

The committee expresses its appreciation to the many representatives of public agencies and public employee organizations who contributed responsibly to the study on public employer-employee relations.

The cooperation of the State Military Department in reviewing federal reorganization plans is also very much appreciated.

Respectfully submitted,

GEORGE W. MILIAS, *Chairman*

JAMES W. DENT, *Vice Chairman*
ROBERT H. BURKE
MIKE CULLEN
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RECOMMENDATION

The people of California are vitally concerned that public agencies and their employees operate under policies and procedures that will promote efficiency, insure good management and seek to improve the service to the public.

Due to the complexity of the issues involved and a lack of sufficient time, the committee has not been able to adequately analyze and consider all of the proposals submitted by interested parties, and thus will not be able to recommend at this time a long-term solution to current disputes between public agencies and their employees.

Although some certain specific problems have been identified, it appears unwise to recommend stopgap legislation at this time. The committee therefore recommends continued study and review of this vital subject.

The committee further recommends, if it appears that meaningful legislation concerning rights of public employees will not be enacted during the 1968 Regular Session, that a Public Employment Relations Study Commission be established to conduct a comprehensive study of public employer-employee relations in California. A comprehensive study by a qualified and representative group may be desirable to explore the issues and the need, if any, for legislation to insure a smooth-working relationship between public agencies and their employees. A proposed model resolution establishing a study commission is at the conclusion of this report.

EMPLOYER-EMPLOYEE RELATIONS IN THE PUBLIC SERVICE

INTRODUCTION

This committee met on October 23 and 24, 1967, in Los Angeles and on December 11, 1967, in San Francisco to hear suggestions for improving employer-employee relations in the California public service. Management and employee representatives made separate presentations

California has been characterized as currently engaged in a social experiment of applying certain collective-bargaining principles and practices as known in private industry to the public service

The Legislature established basic guidelines governing public agencies and their relationship with employee organizations in 1961 This law provides that employees and employee organizations shall be accorded certain rights in order to "promote the improvement of personnel management and employer-employee relations within the various public agencies generally in the state except public schools."

Public employees in California have the right to form join or not to join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations Public agencies are required to meet and confer with employee representatives on request and to consider employee requests prior to determination of policy or of a course of action

Public agencies and employee organizations are prohibited from interfering with, intimidating, restraining, coercing or discriminating against public employees because of their exercise of the new rights granted to them

Public agencies may adopt reasonable rules and regulations to carry out the purposes of the law

The rights of certain law enforcement employees are limited and firefighters are excluded

Finally, Labor Code Section 923 is made not applicable to government employees Section 923 of the Labor Code provides, among other things, that individual workmen have had full freedom to organize and to engage in collective bargaining

Generally speaking, it is a settled rule in California that in the absence of a statute, public agencies may not be compelled to engage in collective bargaining The courts have stated that public employees do not have the same rights to strike and to bargain collectively as their counterparts in private industry The courts have not ruled on whether a public agency may voluntarily engage in collective bargaining Courts in other states are split on this issue However, California courts would probably follow the view that a public entity may voluntarily negotiate and enter into collective bargaining agreements with its employees concerning employment matters not regulated by law and as to which the entity has been vested discretion to negotiate

The statutory laws of this state do not specifically regulate strikes by public employees against public agencies Government Code Sections 3500–3509 do not specifically refer to strikes by public employees The

courts would probably rule that strikes by public employees are not generally permitted.

However, strikes by public employees in Los Angeles, Sacramento, Alameda, and Humboldt Counties have generated discussion of legislation prohibiting strikes by public employees. Both management and employee groups expressed the opinion that antistrike legislation is generally unenforceable and therefore accomplishes little Antistrike legislation in other states, notably New York and Michigan, broke down in enforcement. Although severe penalties associated with strikes are of little practical value, there are some penalties that can be enforced Taking away the dues deduction from wages seems to be evolving as the ultimate penalty.

A study of the Department of Industrial Relations indicated that, in 1966 alone, 18 strikes involving public employees occurred in California, compared to an average of two per year for the previous decade. The mood of public employee groups does not indicate a lessening of tension but forecasts a disruption of government service to the public.

In general, public employee organizations are disturbed over current practice by public agencies concerning wages, fringe benefits, and working conditions Public agencies are accused of relying upon the doctrine of sovereignty based on the divine right of kings and of a failure to permit employees or their representatives use of the democratic process of give-and-take negotiations on matters of employment conditions Management has been criticized as meeting and conferring with employees in form only and not in a good faith exchange of proposals

STATE EMPLOYEES

State employees described certain unique problems The state civil service has about 112,000 employees geographically spread through all parts of California. The Government Code assigns responsibility for adopting rules governing employer-employee relations to the five-member Personnel Board. Rules were adopted after consultation with employee groups in 1962. As of December 1967, the State Personnel Board had not had a request for revision of those rules from employee organizations.

Theoretically, state employees have three opportunities to make presentations of their requests: to the State Personnel Board, to the office of the Governor, or to the Legislature. The Legislature has retained jurisdiction over salary increase funds and employee benefits such as overtime premium pay rates, vacation benefits, and health and welfare benefits.

There are approximately 50 employee organizations representing state employees. State agencies may adopt their own rules governing employer-employee relations, or they may follow the rules adopted by the State Personnel Board, as most of them do. The State Personnel Board invites employee organizations to submit information concerning the State Personnel Board's annual report to the Governor and the Legislature The employee organizations submit recommendations relating to salaries and employee benefits and furnish information in support of their recommendations.

A State Personnel Board spokesman has advised the committee that it does not consider the availability of funds in making its recommendations to the Governor and the Legislature. The State Personnel Board considers need and equity and does not concern itself with the problem of how to finance any proposed salary increase or other employee benefits. At this stage of the salary-setting procedure which is the only stage in which there is regular procedure for presentation of employee organization views, there is no provision for the consideration of fiscal matters nor any attempt to obtain employee understanding of any fiscal limitations that may exist.

Neither the Governor nor his fiscal experts appear before the State Personnel Board public hearings to present information bearing on the fiscal impact of salary matters.

In fact, state employees claim they do not really know who management is. Is it the State Personnel Board, or the Governor, or the Director of Finance, or is it the Legislature? There is no single management spokesman to hear recommendations by state employee organizations While the State Personnel Board considers employee requests, the Governor's office, the Department of Finance, and the Legislative Analyst's office separately transmit recommendations to the Legislature that typically are developed without consultation with employee organizations.

Furthermore, the committee is not aware of an instance when employee groups were consulted by the executive branch of state government prior to any Governor's Budget recommendations covering salaries and employee benefits The committee is also unaware of any instances

in which a Governor has consulted employee organizations prior to the signing or veto of budget items relating to employee compensation

Currently, there is no machinery within the Governor's office established to negotiate with state employees The committee is unaware of any industrial relations experts in the Governor's office who are skilled in bargaining and hearing requests of employees There was, under a prior administration, an advisory council of employee representatives and state management representatives which the Governor consulted from time to time

A difference of opinion between the State Personnel Board and employee groups is obviously clear concerning state pay rates for building tradesmen The pay rates recommended by the State Personnel Board have been challenged for over 10 years The concept of prevailing rates is invoked by both the State Personnel Board to justify its recommendation and by employee groups who maintain that private construction firms pay much more than the state and that the prevailing rate-of-pay principle is not followed

The recent strike by employees of the California workshops for the blind which resulted in new benefits for the workshop workers may well be a portent of future events, although the workshop workers are not state employees and are not directly funded by the state

Within the last two years labor unions have signed agreements with management of the Sacramento State College Foundation known as the Hornet Foundation and the San Francisco State College Foundation covering all food service workers employed at the two respective colleges These agreements were signed with self-funded associations and do not cover state employees

The University of California and the California State Colleges have unique characteristics concerning employer-employee relations which should be examined separately

LOCAL GOVERNMENT EMPLOYEES

There are 400 cities, 58 counties and many special districts in the state, which compounds the complexity of the problem and which presents the issue of state conformity versus local control

Some local jurisdictions are progressing toward an establishment of a workable relationship with employee organizations For example, in the City of San Diego a Personnel Advisory Council has been in operation for over seven years It is composed of four major department heads and representatives from four employee organizations The council meets monthly to consider referrals from the personnel director and the Civil Service Commission

Most local jurisdictions are now or will soon be considering adoption of local ordinances governing employee organizations Militant public employee organizational activity has compelled public management to begin devising means of avoiding confrontation with an interruption of service as a result of a work stoppage by organized employees A northern California county is very close to signing a collective bargaining agreement with an employee organization, including a provision for binding arbitration

Although this committee focused its attention on problem areas identified by employee representatives, local government appears to be responding to the challenge of employee militancy California public personnel practices by local government have been increasingly flexible and progressive in meeting new conditions and changing attitudes Local public management is characterized by the absence of recruitment problems with the possible exception of law enforcement personnel recruitment which is a special problem nationally Public agencies have also demonstrated remarkable success in retaining their employees Grievance procedures in the public service in the state have been established for many years and are constantly undergoing change and revision

Unfortunately, only the more dramatic crisis gets wide public attention It is clear that both employee groups and public management in some communities are still experimenting with approaches to this problem Consequently, mistakes are made Some public employee organizations have on some occasions engaged in public criticisms of local government officials without first exhausting all administrative remedies to solve a dispute

Public management has also made some serious errors in judgment which were brought to the attention of the committee These examples do not reflect current practices but are cited as an indication of what does occasionally happen while the great experiment continues

On the local government level, the committee notes a court decision which ordered a county board of supervisors to grant salary adjustments it had previously denied (*Schecter v County of Los Angeles Superior Court*, Los Angeles County Department 57)

In another case the State Supreme Court found that the board of supervisors improperly failed to perform their mandatory duty to estab-

lish a prevailing wage (*Walker v. County of Los Angeles,* 55 Cal. 2nd 626.)

In the Williams case the court ordered a county to pay a salary increase retroactively two months, July and August. (*Williams v. County of Los Angeles,* superior court memorandum)

But perhaps the clearest example of a court decision in favor of employee demands involved a large city. The district court of appeal found that the city "ignored their own evidence which established affirmatively that in many of the city jobs salary increases were due This was not merely an abuse of discretion. It was a flagrant breach of duty." (*Saunders v. City of Los Angeles,* 252 ACA 53)

Specific examples of cases where public agencies have favored one employee organization over another have been presented to the committee. In one city a labor union won the allegiance of the members of a nonaffiliated employee association. The city then revoked the previously existing practice of many years of permitting dues checkoffs for members of employee groups.

In another case a county board of supervisors granted exclusive recognition to a nonaffiliated employee group only after a union membership drive seemed to be destined for success. Some nonaffiliated employee associations also alleged interference by public management in the affairs of employee groups.

In one city, a segment of the city employees went on strike and the city retaliated by eliminating dues checkoffs for all employee groups.

In another city, the city manager signed a written agreement with a union and then rescinded it, claiming he had no authority to sign the agreement in the first place.

Some public utilities have signed written memorandums with their employee representatives. In other districts employees resort to litigation to settle their disputes

Other issues considered by the committee concerned the role of fact-finding, mediation, and arbitration as a means of resolving disputes. Management deems arbitration as an unlawful delegation of legislative authority by governing boards. It was the contention of management that having the public surrender its rights to a third party to make a final binding decision affecting a public agency would remove from the public the right to determine how their government shall be run and what its cost would be. Management considers arbitration, binding or not, as worse than a strike.

Voluntary arbitration, that is arbitration pursuant to a voluntary agreement in a collective bargaining contract, with advisory, nonbinding opinions, is generally more receptive to employee groups. Fact-finding and mediation are also favored by employee organizations.

A myriad of other crucial issues with many ramifications were also discussed. Those included establishment of representation units, the exclusion of supervisory personnel from participation in employee representation activities, and formal recognition of employee representatives by management. Committee witnesses were unable to develop a consensus of how exclusive recognition should be granted among competing employee groups, although this continues to be a crucial problem.

The committee was impressed with the sense of urgency conveyed by public employee representatives A forecast of strikes by public employees in California is of great concern to this committee

A significant challenge facing the people of California today is the development of some process to prevent the industrial strife of the '30's from becoming characteristic of our public service today.

ASSEMBLY CONCURRENT RESOLUTION NO. ____

Relative to the Public Employment Relations Study Commission

WHEREAS, The people of the State of California are vitally concerned that public agencies and their employees operate under policies and procedures that will promote efficiency, insure good management and seek to improve the service to the public, and,

WHEREAS, The Legislature has been studying this subject and has spent many hours working toward a recommended procedure for the solution of disputes between public agencies and their employees, and

WHEREAS, Due to the complexity of the issues involved and lack of sufficient time, the Legislature has not been able to adequately analyze and consider all of the proposals submitted by interested parties; and thus, will not be able to recommend at this time long term solutions to current disputes between public employees and their employers, and

WHEREAS, It appears unwise to enact stopgap legislation at this time although certain specific problems have been identified, and

WHEREAS, A comprehensive study by a qualified and representative group is desirable to explore the issues and the need, if any, for further legislation to promote the resolution of disputes between public agencies and their employees, and if appropriate, make recommendations for legislation, consistent with the public interest, now, therefore, be it

Resolved by the Assembly of the State of California, the Senate thereof concurring, as follows

The Legislature hereby establishes a Public Employment Relations Commission.

The commission shall provide the Legislature with facts and recommendations relating to public employer-employee relations in California The commission shall consider all aspects of employee-employer relations for state and local government agencies, recommend policies and procedures for promoting fairness, harmony cooperation, and efficiency in public employment consistent with the public welfare, recommend methods of dealing with issues concerning the representation of public employees, and shall enlist the cooperation of knowledgeable individuals concerning these goals The commission shall consist of 24 citizens, excluding 18 legislative members, and all of the nonlegislative members shall be appointed by the Speaker of the Assembly and the President pro Tem of the Senate The Speaker of the Assembly and the President pro Tem of the Senate shall each appoint an equal number of citizens to the commission

The Speaker of the Assembly and the President pro Tem of the Senate shall be ex-officio members of the commission. The commission shall, in addition, include three other members of the Senate appointed by the Committee on Rules thereof, and three other members of the Assembly, appointed by the Speaker thereof. Not more than two of such other members of the Assembly shall be of the same party Not more than two of such other members of the Senate shall be of the same party. Vacancies in the commission shall be filled by the respective appointing powers. The commission membership shall be broadly representative of the various political, economic and social groupings within the state and shall also include public agency representatives and representatives of public employee organizations

The Chairman of the Assembly State Personnel and Veterans Affairs Committee shall serve as chairman of the commission. The chairman of the commission may appoint an executive committee and such other committees as the commission shall determine. The commission shall assist and advise the Legislature in its deliberations concerning public employer-employee relations in California and shall report its findings and recommendations to the Legislature not later than the 10th day of January 1970, at which time the commission shall cease to exist The members of the commission shall be allowed actual expenses incurred in the discharge of his duties, including travel expenses

The commission shall employ the necessary staff, equipment and supplies to carry on its work All expenses of the commission including the expenses of its members both legislative and nonlegislative shall be paid from the money allocated from the Senate and Assembly Contingent Funds, and be it further

Resolved, That the sum of one hundred thousand dollars ($100,000), or so much thereof as may be necessary, is hereby made available from the Contingent Funds of the Assembly and the Senate, in equal shares for the expenses of the Public Employment Relations Study Commission and its members to assist the Legislature in considering proposals to adopt and revise legislation concerning public employer-employee relations, to be disbursed after certification by the chairman of the commission upon warrants drawn by the State Controller upon the State Treasurer

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