BRIGGS INITIATIVE

By Tom Steel

National Lawyers Guild

State Senator John Briggs' anti-gay school worker initiative will appear on November's statewide ballot. On May 31st, Secretary of State March Fong Eu certified the measure stating that it had gathered well over the required number of valid signatures. On the following day, Public Response Associates announced the result of a comprehensive poll of 980 voters, concluding that a slight margin of Californians favor passage of the initiative at present. Over the coming months the initiative is likely to be the subject of heated debate throughout the state. As progressive lawyers and legal workers, it is important that we inderstand the proposed law fully and are able to explain its repressive features.

WHAT IS THE BRIGGS INITIATIVE?

The initiative provides that school districts shall refuse to hire, and shall dismiss, any employee who engages in "public homosexual activity" or "public homosexual conduct" likely to come to the attention of school-children or other employees, if the governing board determines that the employee is thereby "unfit" for service. The phrases used in the initiative are somewhat deceptive and it is necessary to look beyond the wording to understand the actual reach of the proposed law.

"Public homosexual activity" is defined as oral copulation and sodomy between members of the same sex which is not practiced in private and which is not "discreet." The initiative does not explain what is meant by the requirement that such acts be "discreet." Is sexual activity indiscreet if persons of the same sex are observed entering a residence at night and leaving in the morning? The requirement of "discretion" presumably paves the way for the punishment of private sexual activity which is insufficiently clandestine because some person somewhere learns of it.

The initiative does not stop at an attack on sexual "activity," whether public or private. The heart of the initiative is its prohibition of "public homosexual conduct," which in fact does not refer to conduct at all but instead to what is ordinarily denominated "pure speech." The "conduct" prohibited is thus defined by the initiative as: "...the advocating, soliciting, imposing, encouraging or promoting of private or public homosexual activity directed at, or likely to come to the attention of school-children and/or other employees."

The potential applications of this section are virtually limitless. A participant in a demonstration in support of civil rights for gay people could be said to "advocate" or "encourage" private homosexual activity by seeking to remove legal obstacles facing gay people. This advocacy might well be "likely to come to the attention of...other employees.." through direct observation or media coverage. Similarly, the removal of legal impediments to private homosexual conduct is among the stated goals of numerous gay teachers organizations, as well as progressive organizations in general. It is entirely possible that membership in an organization actively supporting this issue could in itself be considered "encouraging, or promoting," sufficient to lead to dismissal. Thus, membership in the Anti-Sexism Committee of the Lawyers Guild would qualify as basis for loss of employment by any school employee.

NOT LIMITED TO GAYS

Moreover, the initiative is not confined to gay people or to what is ordinarily considered "public" advocacy. Thus, any heterosexual who defended gay rights in a situation "likely to come to the attention of.. other employees.." could be refused a job or fired. This would presumably include a private discussion in a home where another teacher was present.

It might also include the assignment of Walt Whitman or Sappho by an English teacher, attendance at a gay bar by a school administrator, or any response short of condemnation to students' questions concerning homosexuality. All of these could conceivably "promote," "encourage," or "advocate" private homosexual activity for some hypothetical person. The initiative contains no requirement of specific intent and it is not necessary that the offender desire to promote or encourage homosexual activity.

The initiative is clearly an invitation to a witch-hunt. The extent to which this invitation is accepted will depend largely on the county involved. In many counties, particularly in rural areas, there is very little support for gays. In such areas, conservatives may well bring charges based on any of the examples described above. Opportunistic politicians will

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push the charges as a means of promoting their own careers. School boards, responsive to this type of pressure, will trip over each other in an effort to demonstrate that they don't tolerate gays.

FITNESS HEARINGS A FARCE

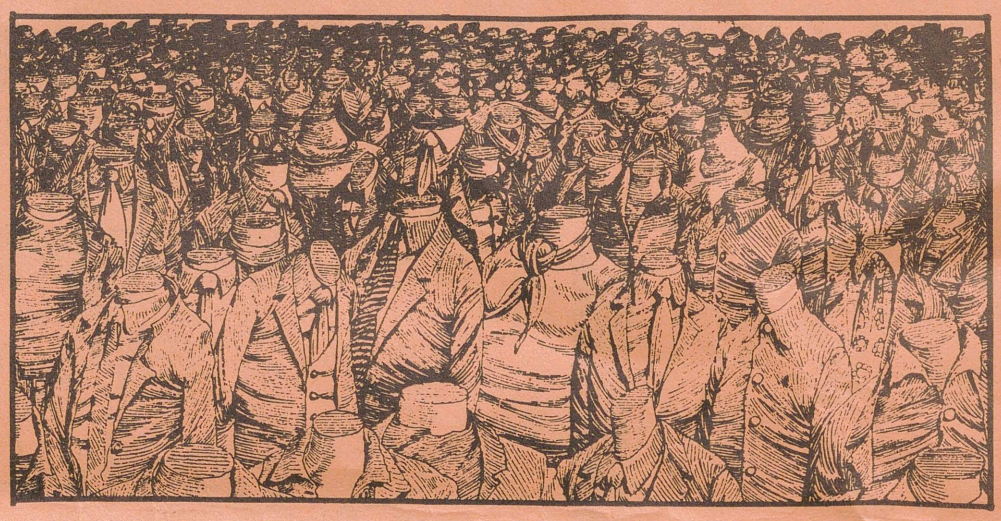
Anyone may file written charges under the proposed law to set its procedures in motion. The governing board of the school district then holds a "probable cause" hearing. If probable cause to believe the charge of homosexual activity or conduct exists, then the employee may be immediately suspended. A full hearing on the charges is held within thirty days after a finding of probable cause.

In order to preserve some semblance of constitutionality, the initiative states that homosexual activity or advocacy will result in dismissal only where they "render the person unfit for service." California Supreme Court cases require that the reason for firing a teacher relate to job fitness.

However, none of the four "fitness" considerations contained in the initiative suggest that how well the employee does the job is a relevant factor. None touch on the quality of the employee's job performance; instead, these factors focus on the homosexual activity or advocacy and its time, place and manner. The stated premise of the initiative is that the government has a "compelling interest in refusing to employ and in terminating the employment" of gay schoolteachers and supporters of gay people. Given this basic premise, any gay school worker or supporter is presumably unfit due to the subject of homosexuality alone, and the "fitness" requirement boils down to a re-hash of the original charge.

LEGAL CHALLENGE

The broad sweep of the initiative is raised in a lawsuit filed by Gay Rights Advocates as an original proceeding in the California Supreme Court on the day the initiative was certified by the Secretary of State. The petition for writ of mandate argues that the initiative is patently unconstitutional and asks that the Court order it removed from the ballot prior to voting. Pre-election review is urged, because the prohibition of "advocating..encouraging, or promoting" homosexual activity is so broad that it may well include opposition to the Briggs initiative itself. Thus, school employees, the group most affected, may oppose the



initiative only at the risk of dismissal should it pass.

While the petition submitted is excellent and the initiative may well be unconstitutional, pre-election intervention by the Supreme Court is unlikely. Gay Rights Advocates is joined by the ACLU as Amicus Curiae. The suit is filed on behalf of individual gay teachers, several gay teacher organizations and the California Federation of Teachers.

ROOTS OF THE INITIATIVE

For many progressive lawyers, the prohibitions of "advocacy," "encouragement" and "promotion" recall the provisions of the Smith Act and the notorious anti-communist trials of the fifties. The parallel goes beyond the language employed. The anti-communist witch-hunt of the fifties was inextricably bound up with a similar but less known vendetta against gay people.

Senator McCarthy himself made frequent reference to homosexuals throughout his career, alleging their presence in the State Department, CIA, Commerce Department, etc., and calling for their immediate dismissal. (See New York Times, 3/1/50; 3/12/50; 3/15/50; 2/7/63.) He was joined in this witch-hunt by the Republican Floor Leader, Senator Wherry, and the Republican National Chairman, Guy Gabrielson. In 1950, Gabrielson wrote, "(p)erhaps as dangerous as the actual Communists are the sexual perverts who have infiltrated our Government in recent years." (See New York Times, 4/19/50.) The campaign was so widespread that by October, 1954, the Civil Service Commission reported the firing of 5,183 gay people within the preceding thirteen months. (See New York Times, 10/12/54.)

Briggs follows in the footsteps of these opportunistic politicians with his initiative. Like his predecessors, he combines an emotionally charged attack on gay people with a generalized attack on all progressives and on democratic rights themselves. The initiative embodies this unholy alliance in that it requires dismissal of any person, regardless of sexual orientation, who stands in solidarity with gay people in defense of their democratic rights.

In this respect, the initiative goes far beyond recent repeal efforts in Miami, St. Paul, Wichita and Eugene. These campaigns repealed ordinances protecting gays from discrimination. The Briggs Initiative requires discrimination and extends that discrimination to any person opposing it. In this respect, the initiative is a patent attempt to resurrect the wholesale blacklisting and punishment of "advocacy" associated with laws such as the Smith Act in the fifties, thus making important inroads on the rights guaranteed by the First Amendment and on the mass movements which utilize those rights. If successful in passing this extraordinarily repressive measure, it is unlikely that the Briggs forces will stop with the subject of homosexuality.

WHAT WE CAN DO

The Briggs Initiative is more complex and more sweeping than appears on the surface in phrases like "public homosexual activity" and "public homosexual conduct." Lawyers and legal workers can play a significant role in explaining the scope of the proposed law and its concrete applications wherever possible. Towards this end, the Anti-Sexism Committee of this Chapter has taken up the Briggs Initiative as a primary area of work in the coming months leading to the November election. People interested in working with the Committee can call the Regional Office (285-5066).

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