

# THE YALE LAW JOURNAL

VOLUME 58

JULY, 1949

NUMBER 8

## PROGRAM FOR A DEMOCRATIC COUNTER ATTACK TO COMMUNIST PENETRATION OF GOVERNMENT SERVICE

WILLIAM J. DONOVAN\*  
MARY GARDINER JONES†

A serious challenge facing American statesmen and citizens today is to adopt means to defend free institutions and yet retain their freedom.

The challenge is not new. It presents the same issue which in different form but similar content confronted our country on the eve of the Civil War. Abraham Lincoln, in words prophetic of the present, declared:<sup>1</sup>

“And this issue embraces more than the fate of these United States. It presents to the whole family of man the question of whether a constitutional republic, or democracy—a government of the people by the same people—can or cannot maintain its territorial integrity against its own domestic foes. It presents the question whether discontented individuals, too few in numbers to control administration according to organic law in any case, can always, upon the pretenses made in this case, or on any other pretenses, or arbitrarily without any pretense, break up their government, and thus practically put an end to free government upon the earth. It forces us to ask, Is there in all republics this inherent and fatal weakness? Must a government of necessity be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?”

This fundamental question is raised anew today because of the foreign policy of the Soviet Union in its avowed purpose to establish the Soviet system throughout the world. Aware of that policy, the United States is concerned with Moscow “direction and guidance” of Communist activities within the United States.

Certain measures have been adopted by our Government in order

---

\* Member of the New York Bar. War-time Director of Office of Strategic Services.

† Member of the New York Bar.

This article concludes a series of articles discussing the government loyalty program. Previous articles dealing with this subject were Emerson & Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1 (1948), and a comment on that article by J. Edgar Hoover, 58 YALE L.J. 401 (1949).

1. Special Session Message of Abraham Lincoln, July 4, 1861, cited in 7 MESSAGES AND PAPERS OF THE PRESIDENTS 3221, 3224 (1897).

to deal with these activities. One of these measures which has evoked severe criticism is the President's so-called Loyalty Program.<sup>2</sup> This program represents a hastily improvised barrier against Communist attempts to penetrate Government agencies. In the magazines, the press and on the radio, we find those who label it a reckless and hysterical campaign of suppression and violence.<sup>3</sup> It is charged that public sentiment is analogous to past hysterias which produced the Alien and Sedition Acts enacted in the Jefferson administration, appeared during the period of the Populist Party in the 1890's, and created the Red scare after World War I. The analogy is not quite accurate either in circumstances or in consequences. Of course, there are instances in our history when there was the cry "Wolf", "Wolf"—such as those recited here. But even in the fable—one day the Wolf did come.

Before this Loyalty Program can be measured and the validity of the charges analyzed, it is essential first to have a clear understanding of the concept of freedom in the name of which the program is both defended and attacked; and second, to appraise the threats of Communist action to national security.

While much has been said—pro and con—of the preservation of freedom involved in the Loyalty Program, little has been said of the basic concept of freedom. Like all great words for which men are willing to die, the word "freedom" conveys a number of meanings. These meanings though widely different have something in common. Jacques Maritain, the French theologian, finds two principal lines of significance in this variety of meanings.<sup>4</sup>

The one concerns freedom as an absence of necessity—freedom of choice—an act of free will determined by no outer or inner necessity.

The other concerns freedom as an absence of constraint. It is in this that we as average men are interested because it means personal independence. This kind of freedom, dearly bought, is constantly threatened. When freedom from constraint is lost, the rights and privileges of common man go with it. Man is safe only when free to develop his potentialities subject to corresponding responsibility and obligation.

The inseparability of responsibility and freedom—of duty and right—has been recognized through the ages. The central problem of all political philosophy and practice, as brought out by Carl Becker,<sup>5</sup>

---

2. Exec. Order No. 9835, 12 FED. REG. 1935 (1947).

3. See Emerson and Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1, 134 (1948); Judge Thurman Arnold at the American Forum of the Air, July 4, 1949, discussing the subject: "Is There Too Much Spy Hysteria?"; ANDREWS, WASHINGTON WITCH HUNT (1948); Paul Porter, N.Y. Times, Feb. 16, 1949, p. 20, col. 3.

4. MARITAIN, SCHOLASTICISM AND POLITICS 136-43 (1940).

5. BECKER, FREEDOM AND RESPONSIBILITY IN THE AMERICAN WAY OF LIFE 3 (1949).

“. . . is not whether freedom and responsibility shall be united, but how they can be united and reconciled to the best advantage. . . . The essential question always difficult and sometimes impossible to answer is: What action by what person or persons under what specific circumstances does injure others or so far and so persistently injure others that it needs to be restricted or forbidden?”

To John Stuart Mill the answer was clear. In his work, *On Liberty*, regarded by many as the complete and best expression of the faith of a liberal in the progress of mankind through freedom of thought, Mill wrote:<sup>6</sup>

“[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”

The resulting impotence of a government which is denied the right to impose qualifications on such fundamental rights as free speech has been emphasized by many authors. A recent example is the statement of the English professor, A. D. Lindsay, who writes:<sup>7</sup>

“But the doctrine that a democratic government must use as little compulsion as is compatible with its remaining a government at all is a perilous one because of its indecisiveness. . . . The weak and irresolute government which this theory induces may destroy a state as surely, if not as immediately, as thoroughgoing anarchy. Indecisive woolliness is the curse of much modern democratic thought.”

This concept of freedom has formed the basis for the great constitutional documents on which the modern democratic states have been founded. A declaration of rights as well as of duties of the citizen was expressly set forth by the French National Assembly in its constitution of 1793.<sup>8</sup> The principle that “liberty consists in the power to do whatever does not injure others,” enunciated in the French Declaration, has found expression in many of our State Constitutions.<sup>9</sup> Though our Federal Constitution contains no Bill of Responsibilities, it is implicit in our Bill of Rights that every freedom which is conferred carries with it corresponding obligations.

---

6. MILL, *On Liberty*, in UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 72-3 (Everyman's Library, 1929).

7. 1 LINDSAY, *THE MODERN DEMOCRATIC STATE* 262-3 (1943).

8. Draft Constitution, 1793, National Convention, Session June 23, 1795.

9. See, e.g., CONN. CONST. Art. I, § 5; N.Y. CONST. Art. I, § 8; DEL. CONST. Art. I, § 5.

This dual aspect of our Bill of Rights has been recognized on many occasions by our Supreme Court. In sustaining the constitutionality of a state criminal syndicalism statute against charges that it violated the right of free speech, the Court pointed out: <sup>10</sup>

"That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question."

Few would dispute this concept of freedom. Few would urge that the prevention of harm to others and the safety of the community can never outweigh the individual's absolute right to act and to speak in all circumstances and under all conditions.<sup>11</sup> Nor would they deny to their Government the right to take steps to protect its citizens against those individuals who refuse to assume the duty of self-restraint inherent in the rights accorded to them by their Government.

In the light of this concept of freedom, the activities of the Communist Party should be evaluated with a view to determining the propriety of and necessity for self-protective measures on the part of the Government.

In his book, *The Red Decade*, Eugene Lyons expresses the situation in these words:

"[T]here is a point at which self-confidence becomes foolish and even suicidal. Such indulgence in a period of crisis when democracy is admittedly on the defensive is worse than frivolous. . . .

"We cannot and must not deny to any American the right to believe anything he wishes—and that includes socialism and communism and anarchism in all their endless variations. But by no stretch of common sense can this principle be distorted to provide shelter for the agents of any totalitarian nation and to facilitate the success of Hitler's or Stalin's assignments in America. It is not tolerance but stupidity to risk our democracy out of fear of sullyng it. We must make a clear and indubitable distinction between an

---

10. *Whitney v. California*, 274 U.S. 357, 371 (1927); see also *United Public Workers of America (CIO) v. Mitchell*, 330 U.S. 75 (1947).

11. Even in *Terminiello v. Chicago*, 69 S. Ct. 894 (1949), the majority opinion recognized that free speech was not an absolute right. The different views expressed by the various dissenting opinions in that case centered primarily around the question of the type of situation which can properly give rise to curtailment of that right. The majority opinion would not seem even to have reached that question through concentration on the nature of the judge's charge.

American's personal beliefs, however unorthodox or cockeyed, and automatic submission to dictation from outside. It is, in the final checkup, the difference between an honest opinion and an order from headquarters." <sup>12</sup>

#### COMMUNISM: MENACE TO NATIONAL SECURITY

There are honest liberals who consider the Communist Party of the United States as just another "political party" in the American tradition of political parties. Those who would uphold "the rights" of Communist Party members and its sympathizers justify these "rights" from the writings of Jefferson. Particular stress is laid upon the following quotation from his first inaugural:<sup>13</sup>

"If there be any among us who wish to dissolve this Union, or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it."

The market place of ideas, in which Jefferson believed truth would triumph over error, was conceived of as embracing the honest and open exchange of opinion by free people. He did not speak of a clandestine effort where reason was not free from restraints imposed by compulsory adherence to a "party line" which sacrifices integrity to a political end.

The fact is that we are dealing not with a loyal opposition but with the party of Leninism, a philosophy described by the Russian commentator, Ivanov,<sup>14</sup> as:

". . . the inspiring and guiding ideological force of the Bolshevik party and the whole Soviet people . . . [and as] the inspiring and guiding ideological weapon of Communist and Workers' parties, of tens and hundreds of millions of laboring people throughout the world, in their struggle for liberation from a capitalist slavery and the horrors of imperialist wars."

Unless we have some understanding of the basic philosophy of the Party and its members, and some appreciation of the manner of selection and disciplining of these members, we cannot comprehend the danger.

The basic concept of the Communist Party, its structural organization and its announced objectives are all foreign to the ordinary American political party.

Stalin, developing Lenin's teachings on the dictatorship of the proletariat, declares that the Party is the instrument through which the

12. LYONS, *THE RED DECADE* 400-1 (1941).

13. BOWERS, *THE INAUGURAL ADDRESSES OF THE PRESIDENTS* 50, 52 (1929).

14. IVANOV, *Leninism: The Victorious Banner of the International Proletariat*, *VOPROSY EKONOMIKI*, January 1949, pp. 24-44, summarized in 1 *CURRENT DIGEST OF THE SOVIET PRESS* 18-3 (May 31, 1949).

proletariat will overthrow and suppress the bourgeoisie and establish a strong government capable of settling its "scores dictatorially with the class enemies."<sup>15</sup>

The Party is the "advanced conscious detachment of the working class," as a model of discipline and organization capable of directing the struggle of the working class in a planned and organized fashion. To carry out its task the Party must be "strong in its integration and iron conscious discipline." According to Stalin, it is "a unity of will incompatible with the existence of factions in it." Accordingly it can tolerate no freedom for the existence of such factions and must constantly purge itself of all opportunist elements which are the source of such factionism.

In 1929 such a purge was ordered to be carried out in the American Communist Party by the Executive Committee of the Communist International meeting in Moscow. Stalin, speaking at the meeting, declared that:<sup>16</sup>

"The importance of the decision [to purge the ranks of the American Communist Party] consists in the very fact that it will make it easier for the American Communist Party to put an end to unprincipled factionalism, create unity in the Party and finally enter on the broad path of mass political work. No, comrades, the American Communist Party will not perish. It will live and flourish to the dismay of the enemies of the working class. Only one small factional group will perish if it continues to be stubborn, if it does not submit to the will of the Comintern, if it continues to adhere to its errors. But the fate of one small faction must in no case be identified with the fate of the American Communist Party. Because one small factional group is liable to perish politically, it does not follow, that the American Communist Party must perish. And, if it is inevitable that this small factional group perish, then let it perish, as long as the Communist Party will grow and develop."

The Party, accepting the decision heralded by Stalin, declared that:<sup>17</sup>

"Strong with bolshevik self-criticism, boldly exposing, criticising, and correcting the past and present errors, the American Party will follow the path of bolshevization enlightened by Stalin's speeches, and will be worthy of Stalin's definition of our Party as 'one of the few Communist Parties in the world upon which history

---

15. Yudin, *The Development by Stalin of the Teaching of the Dictatorship of the Proletariat*, Pravda, April 27, 1949, pp. 2-3, summarized in 1 CURRENT DIGEST OF THE SOVIET PRESS 17-45 (May 24, 1949).

16. See Stalin's speech delivered in the Presidium of the E.C.C.I. on the American question, May 14, 1929, printed in STALIN'S SPEECHES ON THE AMERICAN COMMUNIST PARTY 39 (1929) (CPUSA Pamphlet) (cited hereafter as STALIN'S SPEECHES).

17. STALIN'S SPEECHES, 10.

has laid tasks of a decisive character from the point of view of the world revolutionary movement.' "

The current purges in Southeast Europe evidence the continued necessity for such constant purification of its membership felt by the Party.

In Hungary, for example, the London *Times*<sup>18</sup> reports that 7,000 control commissions comprised of 30,000 party members have scrutinized the total membership of over one million people and have excluded from membership about 17%. The *Times* Budapest correspondent says that "The Communist Party is intended to be the historical instrument with which the past is excised and the future moulded, its character sharp, steely, composed and unalloyed." Throughout Southeastern Europe, it appears that the procedure is for members to appear before the Control Commission to disclose their moral and political autobiography, expressing on their own, errors no one else could know about. The aim of the Communists has been to refine their membership to what a Rumanian writer describes as a "gold reserve" of the revolutionary forces.

The party as thus conceived operates within a rigid hierarchical structure organized from the Politburo to the lowest echelon of local and factory cells tied into the Party and rules by Party directives.

The activities of the Party are dominated by the principle of centralism.<sup>19</sup> This is not inconsistent with the practice of decentralizing party operations through groups and cells and committees. Thus, it attains security and at the same time insures that the Party's presence and the influence of the Center is felt in many places at the same time. In this way one group communicates with another group only through the all-powerful Center which tolerates no opinions in conflict with those it currently defines.

What the party and its discipline produces is best described by A. Rossi.<sup>20</sup> He stresses that in the Communist hierarchy of values "the Party stands above class and still further above the nation." He points out that Party spirit may well coincide with national spirit, *i.e.*, with patriotism; where, however, party spirit clashes with patriotism, the latter must give way; but there are some situations in which party spirit includes patriotism within it *for the time being*; and at such times patriotism becomes one of the elements in Communist strategy.

The Party, according to Rossi, asserts control over every aspect of the lives of the militant members. It recognizes no dividing line between the political and the personal. The Party is a movement to which

---

18. May 31, 1949, p. 5, col. 5.

19. ROSSI, *PHYSIOLOGIE DU PARTI COMMUNISTE FRANCOIS* 297 (1948).

20. *Ibid.* See especially c. XXV.

the militant belongs, a community in which he lives, and a way of life in which he participates. Devotion to the Party is the *sine qua non* of the Communist, and the man who is devoted to the Party is devoted to the Party's leaders, to whom he owes a debt that can be paid only with faith and obedience. The spirit of initiative and responsibility is, therefore, also identified with "unshakeable faith in the Party and its leaders."

The Party, thus, emphasizes homogeneity and cohesion; exacts in certain respects automatic obedience. But it does not wish to destroy the militants' will to act or the mind that guides that will.

The leadership, and under its tutelage the militants themselves, must therefore strike a nice balance: automatic obedience where automatic obedience is called for, *plus* the intelligence and awareness required by the Party's purposes. Or, if you like, automatic obedience that subordinates the higher faculties of the man and yet, within certain narrow limits, develops them—though only to subordinate them the more completely. The perfectly trained militant can be counted on for this kind of automatic obedience; and the task of the Party's psychologists and teachers is to produce him.

Summarizing these basic elements in the Communist Party structure and philosophy, Rossi declares: <sup>21</sup>

"Like Sorel's evangelical socialism, the Communism of the Communist party is a *societas perfecta*, with its own values, its own hierarchy, its own structure, and its own mores—a society within-a-society which regards itself as destined to destroy the society it is within. Your true Communist thinks of himself as already a citizen of another polity, as subordinated to its laws even as he awaits the time when he can impose them upon others. The Party is the model-in-miniature of the new society, and it is all the easier to recognize as such because that new society already lives and has its being over a sixth of the earth's surface."

How does such a force operate in a given country selected for penetration? The answer is the Fifth Column. While not new as a tactical weapon, the Nazis by 1939 had developed and perfected this dangerous device to an extent and intensity hitherto unknown. But this has been developed even further by the Soviet Union.

The Russian Fifth Column is different from that of the Nazis. The Nazis had small groups of adherents in the democratic countries, and their espionage apparatus was more limited. Nazism had no real base in the United States. The Communist Fifth Column, on the other hand, seeks to identify itself with every social grievance. Russian espionage and subversive operations are made up of trained and skilled spy technicians and intelligence officers, propaganda specialists, experts in spreading rumor.

---

21. *Id.* at 302.



Instruction is planned so that the agent will find it as easy for a minority to operate a labor union, or a pacifist league, or any other such movement, as it is for a minority group to control a large corporation when most of the stockholders take no active interest in the management.

In all countries, the Communists stress the tactical importance of the channels of public information. They give strict attention to the development of their own press abroad, both popular dailies and weeklies and, on the more esoteric level, technical tactics provide for the infiltration by Communists and sympathizers into radio, movies, book publishing, and even music and other arts. Stress is placed upon the seizure of newsprint and other printing forms. Special care is taken to develop the Communist control of labor in key industries—industries rated as of special importance either for warmaking or for disrupting a nation's economy.

In his article already quoted, Ivanov says that there are militant Communist parties in almost all countries—working underground in conditions of the fiercest terror. In their struggle with the fascist occupiers, workers and Communists learned and mastered the art of waging partisan struggle in all its forms, including armed partisan warfare.<sup>22</sup> When the Fifth Column through trade union control and infiltration of government agencies captures the instrumentalities of transportation and communication we can appreciate the effect of that kind of warfare.

With regard to the American Communist Party, Ivanov states that "the existence of huge proletarian masses, the difficult position of the workers, etc., create objectively favorable conditions for developing the work and increasing the influence of the Communist Party among the working people." Despite the powerful opposition of the capitalist monopoly Ivanov writes that:<sup>23</sup>

"The uninterrupted baiting of the Communist Party, organized by the forces of reaction, the official 'crusade' conducted against it, the judicial persecution of its leaders, etc.—all this is evidence that the capitalists, in spite of their huge wealth and dictatorial power, are not at all certain of the stability of their positions."

For the last 6 months, in the United States District Court in New York City, eleven Communist leaders have been on trial for conspiracy to teach and advocate the overthrow of the Government by force and violence.

So far the answer of the indicted leaders has been that their Party is an American party, fighting for economic improvement and civil liberties; that while it is "much interested" in the policies of Com-

---

22. Ivanov, *supra* note 14, at 18-7.

23. *Id.* at 18-9.

munism abroad it is not bound by them here. These defendants assert that this country evidences strong tendencies towards fascism and dictatorship and contend that the American reactionaries will employ violence to resist the assumption of power by the proletariat—only then, they say, would the Communist Party resort to force and violence.

Certain of the defendants conceded that the Party regarded Stalin's "History of the Communist Party in the Soviet Union" as a guide to action in this country.

The defendant Gilbert Green, one of the eleven defendants of the Communist Party American Politburo, under cross-examination <sup>24</sup>

1. Admitted that he had pledged himself to follow the teachings of Stalin and to remain forever faithful to Stalin's leadership for the triumph of world revolution.

2. Admitted that contrary to his direct testimony, he had been for years advocating the overthrow of this Government by force and violence.

3. Admitted that he had used more false names and told more lies under oath than he cared to remember.

4. Admitted that he took part in a pledge to Stalin by delegates from 65 countries at the 1935 Comintern or Communist Internationale meeting at Moscow. Among other American leaders who took part in the pledge he named William Z. Foster, the Party's present leader, and Earl Browder, then its leader.

5. Admitted that he had written an article in the January, 1934, issue of the *Communist*, the Party's theoretical organ, in which he had urged the indoctrination of American youth "in the armed forces, labor camps and factories" on how to use firearms "for the class war" in "turning imperialist war into class war" and in "the overthrow of American capitalism for a Soviet America."

At the recent perjury trial of Alger Hiss, Whittaker Chambers, an avowed former Communist Party member, testified on cross-examination that he had taken a false and perjurious oath of office in connection with securing a government position with the National Research Project. In response to defense counsel's question as to Chambers' attitude towards taking such an oath, Chambers replied: "I mean to indicate that I was a Communist, and that my conscience didn't bother me." <sup>25</sup>

The reading and analysis of Communist literature; the speeches of

24. N. Y. Times, July 6, 1949, p. 8, col. 3.

25. N.Y. Times, June 3, 1949, p. 1, col. 8. See also Lenin's statement with reference to cooperation that "anything we receive for nothing is all right. This must be one of the tactics of Bolshevism. The question is one of utilization not compromise." Quoted by KYOYUSHA, AN ANALYSIS OF THE COMMUNIST PARTY OF JAPAN 65 (unpublished translation; undated).

communistic leaders; the observation of party movements clearly demonstrate that:<sup>26</sup>

1. The Communist Party is not a political party in the usual American sense. Rather, it is, by its own constitution, a closely knit, disciplined organization which tolerates no internal differences on points of fundamental political doctrine as laid down by the Party. Rossi<sup>27</sup> shows that it takes on the cloak of legality—when it seems expedient to do so. It accepts the rules of the democratic process only while it is too weak to do otherwise.

2. It is founded upon and adheres to the political philosophies of Marx, Engels, Lenin and Stalin, and in its present current literature insists there can be no watering down of these philosophies.

3. In adherence to these philosophies, it stands for the complete overthrow of the capitalistic system and the substitution in its place of a socialistic form of government. This government would be controlled entirely by, and in the interest of, a rather nebulously defined group, called the working class, under the leadership of the Communist Party. No party of opposition would be permitted. In this latter respect, and undoubtedly in other respects, it differs fundamentally from the Socialist Party of the United States and the Labor Party of England.

4. American Communists defend and follow the Russian and world Communist program in almost every detail. Whether this identity of thought and policy results from following orders from abroad, or from a blind and automatic imitation, or as the natural consequence of a common philosophy does not alter the fact that the Party consistently does support Russian and world Communist programs rather than those supported by the overwhelming majority of people in this country.

5. The Communist Party of the United States admits of no possible compromise with any other political philosophy, save as a temporary tactical process. In this it adheres to the fundamental Marxian concept that it has the one true political faith and that all others must and inevitably will succumb. It demands freedom for itself only to carry on its struggle for power.

6. In those countries such as Southeastern Europe it controls the trade unions, the municipality, the police force and other administra-

---

26. The basic propositions expressed in this summary are derived essentially from the Findings on the Communist Party drafted on the basis of extensive hearings by the Committee of the Faculty on Tenure and Academic Freedom at the University of Washington, Jan. 7, 1949 (mimeographed). See also, President Raymond B. Allen's statements in debate on the subject, "Should Communists Be Allowed To Teach In Our Schools?" reprinted in Talks, July, 1949, p. 10. See also Cohen & Fuchs, *Communism's Challenge and the Constitution*, 34 CORNELL L.Q. 182, 183-5 (1948); and Report of House Committee on Un-American Activities, summarized in N.Y. Times, Jan. 28, 1949, p. 1, col. 2.

27. ROSSI, *op. cit. supra* note 19, at 297.

tive apparatus. The Communist policeman will not defend the public order his party tells him to destroy. The Communist judge will render only those decisions which will further the interest of the Communist cause.

These practical and well-substantiated incidents of subversion bring into sharp focus the dangers presented by the presence within a state of militant and convinced Communist Party members. The statement of the Communist Party at the time of the negotiation of the Atlantic Pact illustrates the direct challenge which the Party presents to the security of a nation.<sup>28</sup> It is a formal announcement that neither the local Communist Party nor its leaders can be counted on in the time of danger. This should illustrate that these leaders had already enlisted under the banner of Stalinism and they were pledged in their allegiance and their loyalty to treason. It makes the question of subversion a real one. Governments are pressed by their people to meet it by action.

The so-called Loyalty Program of the United States represents one response to that demand. While many sectors of our national life are potential targets for such subversion, requiring a variety of counter attack techniques, the Loyalty Program is illustrative of one such technique designed by the Government to protect the integrity of its personnel against the threatened subversive efforts of the Soviet Union and its weapon of revolution, the Communist Party.

Recognizing that the Loyalty Program deals with but one facet of this problem, let us examine it to determine:

1. Whether it violates the constitutional rights of the government employees who are affected by its provisions; and
2. If it does not, is it effective in uncovering disloyalty?

#### THE CURRENT LOYALTY PROGRAM: CRITICAL APPRAISAL

Over two million persons are employed by the Federal Government. They represent a cross-section of opinion, talent and ancestry in America. On March 21, 1947 all of them became subject to the present loyalty program which President Truman established by Executive Order.

---

28. Thorez, the French Communist leader, expressed the view shared by the others: "We deny that our Government has the right to sign the Atlantic Pact. . . . We shall carry on the battle of France against the imperialistic war." And he asked the question, "Could the workers and peoples of France have any other attitude towards the Soviet Army (if it arrived on French soil) than has been that of the peoples of Poland, Rumania and Yugoslavia?" *N. Y. Times*, March 3, 1949, p. 5, col. 1; p. 1, col. 4. Sharkey, general secretary of the Australian Communist Party, was recently convicted for uttering seditious words on account of a similar declaration. *Christian Science Monitor*, July 2, 1949, p. 9, col. 4.

When the Loyalty Review Board was set up, President Truman stated:<sup>29</sup>

“[D]isloyal and subversive elements must be removed from the employ of the Government. We must not, however, permit employees of the Federal Government to be labeled as disloyal or potentially disloyal to their Government when no valid basis exists for arriving at such a conclusion. . . . Rumor, gossip, or suspicion will not be sufficient to lead to the dismissal of an employee for disloyalty.”

Nevertheless, criticism has been aimed at this program. Charges have been directed at its methods, its alleged unfairness.

Its necessity has been challenged. It has been condemned as a means of preserving the *status quo* against new concepts. Its scope, both as regards the acts which it proscribes and the employees which it reaches, has been regarded as too broad.

#### *Evaluation of Basic Premises Underlying Loyalty Program*

Basic to much of this criticism lies a serious doubt as to whether the Government can constitutionally initiate a program of this type. It is this fundamental premise, therefore, that must be examined before the actual operation of the program is considered. The problem has two aspects: does the Government have a right to examine into the loyalty qualifications of its employees; and does it owe any corresponding duty to protect these employees against unjustified rejections or dismissals from government service.

*Right of Government to Enact Measures for the Protection of National Security.* The right of government to adopt measures to protect itself from conduct which imports a threat to national security is well established.<sup>30</sup> It has been argued, however, that the exercise of this right should be conditioned on a finding that a clear and present danger is presented sufficient to warrant the enactment of regulatory legislation.<sup>31</sup> Although the clear and present danger rule was originally conceived by Justice Holmes in *Schenck v. United States* as a test of the constitutionality of the 1917 Espionage Act itself,<sup>32</sup> the concept shifted

29. N. Y. Times, Nov. 15, 1947, p. 2, col. 2.

30. See cases cited in notes 32 and 36 *infra*. The great majority of federal statutes looking towards the protection of national security are applicable in times of peace as well as war; see, e.g., 40 STAT. 217 (1917), 50 U.S.C. §§ 31-2 (1946) (espionage); 54 STAT. 670 (1940), 18 U.S.C. §§ 9-10 (1946) (subversive activities); 35 STAT. 1083 (1909), 18 U.S.C. § 4 (1946) (incitement to rebellion); 35 STAT. 1089 (1909), 18 U.S.C. § 6 (1946) (seditious conspiracy); 40 STAT. 226 (1917), 18 U.S.C. § 98 (1946) (illegal possession or control of government papers or property); 54 STAT. 1220 (1918), 50 U.S.C. §§ 101-6 (1946) (sabotage); 40 STAT. 219 (1917), 50 U.S.C. § 33 (1946) (control of propaganda and rumor limited to period of war).

31. See discussion of the cases by Emerson & Helfeld, *supra* note 3, at 86.

32. *Schenck v. United States*, 249 U.S. 47 (1919).

in later cases to an evidentiary test of the applicability of the statute to the particular acts in issue.<sup>33</sup> Its subsequent development in cases dealing with a variety of civil rights indicates its utilization by the courts for both purposes.<sup>34</sup> Nevertheless, in general the rule has not been applied in either form to legislation involving national security since the decision in the *Schenck* case in 1919.<sup>35</sup>

The constitutional test generally applied to legislation involving measures designed to protect national security has rather been the reasonableness of the regulation in the light of the danger sought to be guarded against.<sup>36</sup> When this approach to national security legislation is coupled with the traditionally sympathetic approach of the courts to legislation restricting the civil rights of Government employees,<sup>37</sup> it seems clear that any program undertaken by the Government with regard to restrictions on the employment of federal civil servants will not be required to meet a constitutional standard of clear and present danger in any form.<sup>38</sup> It is therefore sufficient if there exists a reasonable relationship between the security and efficiency of government service and the restriction imposed on the employment of disloyal persons as defined in the Loyalty Order.

Application of the so-called test of reasonableness in determining the

33. See, *e.g.*, dissenting opinions of Justice Holmes in *Abrams v. United States*, 250 U.S. 616 (1919) (indictment under 1917 espionage act) and *United States v. Schaeffer*, 251 U.S. 466 (1920) (same). In both these cases a majority of the court held that proof of the "bad tendency" of defendant's words was sufficient for conviction.

34. In several cases involving conviction under state criminal syndicalism statutes, the clear and present danger rule was utilized by Holmes and Brandeis as an evidentiary test of defendant's acts. *Whitney v. California*, 274 U.S. 357 (1927) (concurring opinion) and *Gitlow v. New York*, 268 U.S. 652 (1925) (dissenting opinion). On the other hand, the rule has been applied in both majority and dissenting opinions as a test of constitutionality: *Thomas v. Collins*, 323 U.S. 516 (1945) (Texas registration statute governing labor organizers invalidated); *Bridges v. California*, 314 U.S. 252 (1942) (state judicial contempt statute invalidated); *Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941) (dissenting opinion) (state use of injunction power to regulate picketing accompanied by violence sustained); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (state statute regulating solicitation of money for religious causes invalidated).

35. See cases cited in notes 33 and 34 *supra* and 36 *infra*.

36. See, *e.g.*, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (West Coast curfew order affecting persons of Japanese ancestry); *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1927); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Fisk v. Kansas*, 274 U.S. 380 (1927) (state criminal syndicalism statutes); *Butler v. United States*, 138 F.2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943) (1917 espionage statute); *Dunne v. United States*, 138 F.2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943) (Alien Registration Act of 1940); *United States v. Pelley*, 132 F.2d 170 (7th Cir. 1942), *cert. denied*, 318 U.S. 764 (1943) (1917 Espionage Act).

37. See, *e.g.*, *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1943); Notes, 60 HARV. L. REV. 779 (1947) and 47 COL. L. REV. 1161 (1947).

38. See note 36 *supra*. This conclusion would seem to be borne out by lower court decisions sustaining the constitutionality of the program, notes 43 and 44 *infra*.

constitutionality of a loyalty program such as that embraced in the President's Executive Order is supported by sound principles of practice as well as by constitutional authority. Justice Sanford pointed out in the *Gitlow*<sup>39</sup> decision:

"for yet more imperative reasons, a state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story . . . does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. . . . In short this freedom does not deprive a state of the primary and essential right of self-preservation; which, so long as human governments endure, they cannot be denied."

*Right of Government Employees to Due Process.* There is no constitutional guarantee *per se* of governmental employment of citizens. Nor does it violate a citizen's rights to require that he will do his utmost to make our kind of government work and will join in no effort to make it fail. Indeed it is traditional in American politics to assume that government employees will be in sympathy with the basic American philosophy of government within which all parties function. Moreover, as respects Cabinet officers and top policy-making or administrative officials, the principle has long been adhered to that such officials should change with the changing tides of election to insure that their views will generally accord with those of the party elected to power. The philosophy underlying both these principles was early laid down by George Washington when he declared:<sup>40</sup>

"I shall not, whilst I have the honor to administer the government, bring a man into any office of consequence knowingly, whose political tenets are adverse to the tenets which the general government are pursuing; for this, in my opinion, would be a sort of political suicide."

This principle has been reflected in numerous early decisions sustaining the right of the Government, in the absence of a statute to the contrary, to discharge its employees without assigning any reason therefor.<sup>41</sup> With the introduction of the merit system, however, Congress has now limited executive freedom of action in this regard and has

39. *Gitlow v. New York*, 268 U. S. 652, 667-8 (1925).

40. WILSON, GEORGE WASHINGTON 307 (1896).

41. *Shurtleff v. United States*, 189 U.S. 311 (1903); *Reagen v. United States*, 182 U.S. 419 (1901); *Morgan v. TVA*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Meyers v. United States*, 272 U.S. 52 (1926); *Borak v. Biddle*, 141 F.2d 278 (D. C. Cir. 1944).

stipulated that the great bulk of government employees may not be dismissed except for cause. The courts have implied from this a right on the part of the employee to a hearing prior to dismissal.<sup>42</sup> The first case to reach the courts involving a dismissal on loyalty grounds<sup>43</sup> proceeded on a premise of complete absence of right in an aggrieved employee to procedural due process in the hearing granted prior to dismissal. The cases relied on by the court in support of this conclusion would not seem in fact to sustain the proposition. Nevertheless, the court's position has been followed in two lower court decisions sustaining the constitutionality of the program, although in one case the court noted as "unusual" the fact that neither the evidence nor its source had been disclosed to the defendant.<sup>44</sup> In so far as the *general* hiring and firing policies of the Government are concerned, the soundness of judicial policy in refusing to insist on full procedural due process plus a right to judicial review cannot be doubted.

But dismissal proceedings on grounds of disloyalty constitute a somewhat different issue, more nearly comparable to the special instances of curtailment imposed upon private employers. The practical consequences to an individual either of an unjust dismissal by the Government on a charge of disloyalty or of an unjustified interference with his legitimate union activities by a private employer would seem to be the same—a man's reputation as well as his ability to earn a livelihood may be seriously jeopardized.<sup>45</sup>

Moreover, in the case of the Loyalty Program as a whole, public

---

42. Although generally where Congress has specified the causes which can give rise to a dismissal it has also provided for notice and hearing, the Supreme Court has ruled that such a hearing must be granted whether provided for or not wherever a dismissal is in fact predicated on the enumerated causes. *Shurtleff v. United States*, 189 U.S. 311 (1903).

43. *Friedman v. Schwellenbach*, 159 F. 2d 22 (D. C. Cir. 1946), *cert. denied*, 330 U.S. 838 (1947). The court justified its decision by analogizing the dismissal by the agency to that category of administrative activities authorized by statute which the Courts have traditionally regarded as in the nature of instructions by the Government to its agents creating duties thus to the Government alone rather than rights in the individuals affected. The cases relied on in support of this principle included *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940) (suit by private contractor charging erroneous wage determination by Secretary of Labor); and *Butte, Anaconda and Pac. Ry. Co. v. United States*, 290 U.S. 127 (1933) (ICC payment of deficit incurred by private carrier not recoverable by United States on ground it was paid in error).

44. In a suit for reinstatement brought by Dorothy Bailey, Federal Judge Holtzoff ruled that he could not set aside Federal Loyalty Board findings. *N. Y. Times*, July 29, 1949, p. 9, col. 2. One month earlier Judge Holtzoff upheld the constitutionality of the program and dismissed an action for a declaratory judgment brought by twenty-six employees of the Post Office Department asserting that the Loyalty Program was unconstitutional as a denial of plaintiffs' right of free speech. *Washington v. Clark*, 18 U. S. L. WEEK 2036 (D.D.C. June 28, 1949).

45. Several specific instances indicate the increasing trend to bar Communist members and sympathizers from obtaining work. *E.g.*, the recent Consolidated Edison union



support and confidence are essential to its effective and successful enforcement. The present lack of confidence and confusion stems from a feeling either conscious or unconscious that the traditional concepts of American fair play are being disregarded. Court review would go a long way towards refuting this attitude.

Either the judiciary or the Congress should recognize the right of an individual employee to come into court and obtain a review both of the substantive finding of disloyalty and of the type of hearing granted, if not as a matter of legal right <sup>46</sup> then as a matter of sound public policy.

---

contract requiring a Loyalty Oath from all union members, N.Y. Times, March 8, 1949, p. 20, col. 7; the movement among educators to close the teaching doors to Communists, see editorial summary of President Allen's action in University of Washington, N. Y. Herald Tribune, Jan. 30, 1949, II, p. 3, col. 4 and of New York State's proposal to legislate their removal from the state educational system, N.Y. Times, Feb. 25, 1949, p. 1, col. 2; and the ousting of Reverend Dr. Melish and his son from a Brooklyn parish, see, e.g., Bishop De Wolfe's statement on removal of Dr. Melish, N.Y. Times, March 3, 1949, p. 11, col. 1. This development was foreshadowed by the Congress in 1940 when it provided in the Selective Service and Training Act that it was the express policy of the Congress that employers should be prohibited from hiring Communist Party members to fill vacancies left by their employees' service in the armed forces. 54 STAT. 890 (1940), 50 U.S.C. § 308(i) (1946). So far as is known this policy was never raised in question in the courts and it is inferable that it remained a dead letter.

Most recent of the legal sanctions imposed on individuals by reason of their disloyalty is the California Superior Court decision holding that it is an implied condition in every employment contract that the employee is not a Communist, a violation of which constitutes valid ground for non-performance by the employer. This extraordinary judicial reasoning, while undoubtedly deserving of reversal on appeal, is a gross example of the present climate of thought with regard to those charged or found to be disloyal by reason of Communist affiliations. *Cole v. Loews, Inc.*, 17 U.S.L. WEEK 2403 (Calif. Super. Ct., Feb. 11, 1949). The California court's decision would seem to provide an efficient means of enforcing the Congressional policy announced in 1940 if an employer desired to take advantage of it. However, a similar action for reinstatement brought by Cole against MGM in the California District Court has apparently resulted in a decision favorable to plaintiff Cole and his reinstatement by the court. In the absence of a copy of the decision, it is impossible to determine the basis for the court's decision although it is reasonable to conclude that the court did not accept the reasoning in the State court's opinion referred to above; for a brief report of the district court's decision, see N.Y. Times, Dec. 31, 1948, p. 10, col. 2. A potent extra-legal sanction is the recent Papal excommunication order. See N.Y. Times, July 27, 1949, p. 10, col. 2.

46. It should be pointed out that the courts have been willing to make an exception to their policies against a judicial review *de novo* of the acts of administrative officials when the serious nature of the consequences would seem to justify this action. See, for example, *Schneiderman v. United States*, 320 U.S. 118 (1943) and *Bridges v. Wixon*, 326 U.S. 135 (1945). And where the basis for the administrative action depended on jurisdictional facts, the court has asserted its right to reexamine the administrative finding as to the existence of these facts. See, for example, *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (trial *de novo* on the issue of citizenship in a deportation proceeding); see *Borak v. Biddle*, 141 F. 2d 278 (D. C. Cir. 1944) (dismissed employee seeks review of action on ground no notice and hearing granted; court reversed agency finding that plaintiff was still within probationary period and therefore not entitled to notice and hearing). It should be noted, however, that in both these situations an initial right

*Workings of Loyalty Boards*<sup>47</sup>

In practice here is approximately the way the Loyalty Program works. All employees who were in federal service prior to October, 1947, execute Form 84 which sets forth sufficient biographical data to identify the individual properly. Applicants for federal service are required to fill out a different, though similar, form. These forms are processed through the employing agency and the Civil Service Commission respectively and forwarded to the FBI; the files of the FBI are searched with respect to the individual concerned, and if there is, in the opinion of the FBI, sufficient information in their files to warrant the undertaking of a full field investigation, then this is done.<sup>48</sup> The employing agency or the Civil Service Commission is notified that such an investigation is being instituted by the FBI. When the reports of a full field investigation are completed, they are submitted either to the Civil Service Commission or through the Commission to the agency concerned.

Agencies operating under the President's Loyalty Program are required to have a Loyalty Board which is empowered to act upon the reports of FBI investigations. In the case of applicants, the hearing body is the Regional Loyalty Board of the Civil Service Commission. As a practical matter, it is understood that these reports are reviewed by three members of the Board, and if, in the opinion of the Board, there is sufficient derogatory information to cause charges to be preferred against the individual then this is done. Or an interrogatory requesting further information on a particular subject may be dispatched to the employee. If, on the other hand, the Board feels that the individual may be cleared without the benefit of further information, then the Board meets in executive session and a recommendation

---

to judicial review existed and the court seized upon these factors to justify an extension of its normal review procedure.

In another related field, members of Congress have already indicated their awareness of the necessity of protecting the rights of individuals whose reputation may be adversely drawn in question by governmental action. A concurrent resolution is now before Congress which would guarantee any individual under investigation or charges by a Congressional committee the right *inter alia* to testify in his own behalf, to summon up to four witnesses and to cross-examine opposing witnesses. N.Y. Times, July 21, 1949, p. 1, col. 7.

47. Unless otherwise indicated, material in this section is based upon Statement, Regulations and Directives of the Loyalty Review Board as revised through Dec. 17, 1948 (mimeographed); and upon conversations which the senior author had with agency representatives, members of agency loyalty boards and lawyers who have represented employees at loyalty hearings.

48. As J. Edgar Hoover has pointed out, the role of the FBI in the implementation of the Loyalty Program is confined to two main functions: to check fingerprints and names of federal employees and applicants against its files; and to obtain and report facts ascertained during its investigation. Hoover, *A Comment on the Article "Loyalty Among Government Employees,"* 58 YALE L.J. 401 (1949).

is submitted to the agency official who has the authority to make final determinations in such matters.

It would appear that most agencies operating under the Loyalty Program have limited assistance in their operations. In some agencies this assistance is in the form of clerical help only. In others, a legal officer or counsellor is designated to advise the agency Loyalty Board. An administrative staff is required, as reports must be made to the Civil Service Commission and the administrative and clerical functions of the Board must be handled. In some instances someone must explain the nature of the charges or discuss the charges with the accused prior to a hearing.

It is understood that in certain departments before the Loyalty Board acts on a specific case, the members of the Board discuss the relevant facts with appropriate technical employees of the particular department. These individuals can often give valuable assistance regarding implications of organizational memberships, etc. It would appear that if a Loyalty Program is to continue, this practice should be encouraged and all agency Boards should be urged to consult with the technical staffs in the agency who have knowledge of Communist trends and are informed on political philosophies and subversive techniques.

If a hearing is required, it is conducted in accordance with the provisions of the President's Loyalty Program and the accused is permitted the benefit of counsel, defense witnesses, etc. Under present procedures, the investigating agencies other than the employing agencies are called upon to develop the case at the hearing. This places a burden upon the FBI which it was never designed to carry. The Director of that organization says that the FBI reports the facts; it does not evaluate the information developed in its investigations. Experience indicates that persons so charged, for the most part, have merely attempted to refute the allegations made concerning them with favorable testimony or affidavits submitted by persons acquainted with them. These "defense witnesses" often merely attest to the good character and loyalty of the individual, if these characteristics are known to them. All agency Loyalty Board actions are, of course, subject to review by the Loyalty Review Board of the Civil Service Commission.

In making its check of these two-million odd cases,<sup>49</sup> the Federal Bureau of Investigation found 7,667 cases in which a full field investigation appeared advisable. Of these, about 1700 cases were discontinued, either because the people involved had left the Government or because further study showed that the investigation was unnecessary. It may be worth noting that 494 of these cases proved to be simple cases of mistaken identity.

---

49. Washington (D.C.) Sunday Star, March 27, 1949, p. A6, col. 5; N.Y. Times, Jan. 5, 1949, p. 4, col. 8; Jan. 16, 1949, IV, p. 6, col. 5; and April 5, 1949, p. 17, col. 1.

Thus far, the agencies of the Federal Government have completed action on 3,091 cases in which a full investigation had been carried out by the Federal Bureau of Investigation. Of these, 2,916 employees were cleared of all suspicion of disloyalty, and 174 resigned under fire or were rated ineligible for Government employment. 124 of the latter appealed from the adverse verdict; 27 cases have been heard by Review Board Panels. In 16 cases the employees were cleared and in the remaining 11 cases the original verdict of ineligibility was upheld. There are now pending in the hands of the various Government agencies 107 cases.

*Evaluation of Specific Criticisms Levelled Against Loyalty Program*

It might appear that a detailed discussion of the criticisms directed at the Program is academic in view of the fact that such controversies as have arisen over its implementation have become substantially moot with the virtual completion of the Program. In fact, however, if the Program is to be continued in any form, it is essential that the underlying objections—both substantive and procedural—be carefully analyzed so that any further development of the Program can proceed on the wisest possible basis.

*Substantive Problems.* There are two major objections directed against the substantive provisions of the Loyalty Order: first, that they are not sufficiently flexible to cover all cases where an agency seeks to dismiss an employee for reasons of security; and second, that they are too ambiguous and indefinite to apprise the individual employee of the prohibited conduct or to furnish the administrators of the program with anything more than a blank check to "probe the records and past associations of individual employees with little guide other than their own notions of what is disloyal or subversive." Intermingled with this latter criticism is the feeling that existing legislation, exclusive of the President's Executive Order, is sufficient to deal with treasonable activities.

On a substantive level it would appear that the provisions of the Loyalty Order are sufficiently broad to embrace the major dangers or threats presented to national security by the employment of disloyal individuals in federal service: to wit, the transmission of confidential information to foreign powers; the formulation or implementation of Congressional or executive policies either in an attempt to further the aims of a foreign power and undermine the expressed interests of the United States, or in furtherance of an attempt to overthrow the Government by force or violence; and finally, wilful attempts to impede or destroy the morale of Government workers to the same ends.

With regard to the argument based on the lack of necessity for the Loyalty Program, it should be noted that while the transmission of confidential information is already punishable under existing legis-

lation,<sup>50</sup> the latter two threats outlined above do not seem to be punishable expressly under any existing statute except perhaps that relating to treason—a crime which has never been prosecuted except in time of war. Even were existing statutes adequate to punish these types of activities, it is not clear that similarly adequate detection techniques are presently provided for. While counter espionage can be utilized for the detection of employees who transmit confidential material to unauthorized persons, it cannot be said that such techniques will be successful with regard to those employees who engage in more subtle overt acts such as the impairment of morale or the performance of their assigned tasks in the interests of a foreign power. Other types of investigatory techniques such as are provided for in the Loyalty Order are necessary for the detection of these activities.

There remain for consideration the contentions advanced by some that the standard is too broad and indefinite to provide the loyal civil servant with sufficient protection against unjustified charges and dismissal.

Implicit in this criticism is the assumption that the standard of disloyalty laid down in the Executive Order fails to require proof of knowledge and intent on the part of the employee; that this failure thus enables the triers of fact to employ their own judgment as to what constitutes, for example, conduct "in furtherance of the aims and interests of a foreign power," and that the inevitable result of this is a deterioration of the program into a prosecution of the deviational thinker.

The extreme position that the program is designed to penalize the non-conformist is not borne out by the facts.<sup>51</sup> Available evidence indicates that, at least at the level of the Loyalty Review Board proceeding, either knowledge<sup>52</sup> of the employee of the subversive nature of an organization with which he has been associated or his intent<sup>53</sup> to fur-

---

50. Note 30 *supra*.

51. The Loyalty Review Board has repeatedly stated that the program is not intended to extend to the advocacy of any change in the form of government or the economic system of the United States however far reaching, unless such advocacy is coupled with the advocacy of illegal or violent measures to accomplish the change. Statement of the Loyalty Review Board, Dec. 23, 1947 (mimeographed). This position has been reiterated affirmatively by statements of the Board. *Ibid*.

52. Chairman Richardson has stated explicitly in his directions to regional loyalty boards that "the probative value of evidence of past or present membership in affiliation or sympathetic association with, any one or more of the organizations now or hereafter designated by the Attorney General can be fairly evaluated only after determining, so far as possible, the character of the organization, the period, nature and duration of the association, whether the employee or applicant was aware of the subversive character of the organization at the time of the association and the nature of his activities in connection with such organization." Statement of Seth Richardson, Chairman of the Loyalty Review Board, Dec. 23, 1947.

53. Insistence by the Loyalty Review Board on some evidence of personal intent looking towards disloyalty is evident in at least one of its decisions which has been made public.

ther the interests of a foreign power must be proved. It would be a simple matter to incorporate these requirements expressly into the text of any future Loyalty Order utilizing the same or similar standards. Objection to this criterion on the ground of difficulty involved in proving knowledge and intent cannot seriously be entertained. The objection, if valid, would require the deletion from the books of a substantial number of statutes, both criminal and civil, which depend almost entirely on a judicial inquiry into the motives and intent of the parties. As one court recently phrased it, "such inquiry is laden with uncertainties and fake paths." But the court did not for that reason refuse to decide the issue or invalidate the statutes which created the problem.<sup>54</sup> Nor does an examination of the cases indicate that judges have been unsuccessful in weighing the intent and motives of a party when confronted with the necessity of so doing.<sup>55</sup>

With regard to the provision relating to affiliation with subversive organizations, it would appear advisable to elaborate further the meaning of "sympathetic association" as designed to include such degree of conscious approval or support of the subversive aims of the organization falling short of membership or affiliation as to justify the imputation of the character of the organization to the individual involved—approval or support which is to be shown not by friendship or blood relationship with its members or by irregular attendance at meetings, but rather by *activities*, such as the contribution of money or solicitation of members, which may indicate support of its *policies*.

With these changes there is no doubt that the program can withstand any attack directed against it on grounds of its failure to apprise the individual or the guilt determining bodies of the type of conduct sought to be proscribed.

*Procedural Problems.* Most acute of all the criticism of the Loyalty Program has been that directed at its failure to accord certain procedural safeguards to the Government employees and to organizations declared to be subversive by the Attorney General.<sup>56</sup> This criticism, made almost unanimously, does not proceed solely on a premise of un-

See report of the Board's decision in the case of William Remington, N.Y. Times, Feb. 11, 1949, p. 1, col. 7, when the Board reversed a finding of disloyalty although Remington admitted having transmitted information to Miss Bentley. This would seem to be further borne out by the Board's statement that evidence based on membership or affiliation with subversive organizations can be fairly evaluated only after determining, *inter alia*, whether the employee in question *was aware* of the subversive nature of the organization. See note 52 *supra*.

54. *Martel Mills v. NLRB*, 114 F.2d 24 (9th Cir. 1940).

55. See cases cited note 36 *supra*.

56. Letter of Dean Griswold and Professors Scott, Katz and Chafee of the Harvard Law School to the N.Y. Times, April 13, 1947, IV, p. 8, col. 5; Note, 47 *Col. L. Rev.* 1161, 1175-7 (1947); Emerson & Helfeld, *supra* note 3, at 95-120; Cushman, *The President's Loyalty Purge*, 36 *SURVEY GRAPHIC* 283 (1947).

constitutionality but appears to be motivated primarily by considerations of fair play. In essence the major defects which have given rise to criticism are, first, that an employee is not sufficiently apprised of the charges against him prior to hearing; and second, that during the hearing his opportunity to defend himself is curtailed because of the policy of the hearing bodies against requiring disclosure to the employee of the source of information on which some of the charges are based.

The truth of the first alleged defect is difficult to substantiate. On the one hand, the press has frequently reported complaints of employees that information contained in charges served on them prior to hearing has been inadequate.<sup>57</sup> On the other hand, the authors have received a sample copy of what is said to be a typical charge served on an employee which would indicate that in fact the employee receives substantial notice of the evidence underlying the charge which he will be expected to meet at the hearing.<sup>58</sup>

---

57. A recent example of this arose in the case of Samuel L. Wahrhaftig, AMG official, ordered to return from Germany in connection with charges made against him on account of disloyalty. N.Y. Herald Tribune, Jan. 11, 1949, p. 1, col. 4; see also the case of Dorothy Bailey reported in the Washington (D.C.) Sunday Star, March 27, 1949, p. A4.

58. In the Directives issued by the Loyalty Review Board to the regional hearing bodies, it is provided that the employee shall be notified of "the charges against him in factual detail, setting forth with particularity the facts and circumstances relating to the charges so far as security considerations will permit." A sample copy of charges served on an employee pursuant to this Directive is reproduced below:

1. There was established by Executive Order 9835, dated March 21, 1947, a Federal Employees Loyalty Program, the purposes of which are to protect the United States against the presence of disloyal persons in the Federal Service, and to protect loyal employees of the Government from unfounded accusations of disloyalty.
2. As a result of recent investigation conducted pursuant to the aforementioned Executive Order 9835, there has been received information which indicates that reasonable grounds may exist for the belief that you are disloyal to the Government of the United States and therefore unsuitable for Federal employment.
3. It is charged that you have manifested disloyalty to the United States in that:
  - A. You have been a member of certain organizations of known subversive character.
    1. You have been a member of the Communist Party, U.S.A.
    2. You have been a member of (name or names of any other Communist organization or fronts).
  - B. You have been closely associated with persons known or reputed to be Communists, under such circumstances as to justify an inference that you are sympathetic to communistic viewpoints and objectives.
    1. You have been closely associated with (name of individual) over a period of years, socially as well as in connection with the duties of your employment.
    2. You have met and associated with various other Communists, including (name of individual), in connection with your membership in the Com-

The second alleged defect in present procedures relates primarily to the practice of the FBI with regard to non-disclosure of its sources of information and the willingness of the Loyalty Review Board to admit evidence of this nature. The Loyalty Review Board has indicated its awareness of the importance and meritorious nature of this criticism, but has concluded that the considerations in favor of protecting the investigatory tasks of the FBI against undue restriction outweigh the disadvantages flowing to the individual employees.<sup>59</sup>

While the Board's conclusion on the importance of protecting the investigatory work of the FBI appears justified, it does not follow that

munist Party, U.S.A., and (name or names of other Communist organizations or fronts).

- C. You have manifested sympathy with Communist doctrine and a desire to influence others toward its acceptance by your conduct, including service as a Communist Party canvasser, assigned to the (name and location of election district and election year or years).
4. You have ten calendar days from the date of your receipt of this notice to exercise your right:
  - a. To reply to the foregoing charges in writing under oath or affirmation, which oath or affirmation must be executed before a person duly authorized to administer oaths, and to support your answers by affidavits if you wish; and/or
  - b. Request an administrative hearing on the charges before the (name of Government Agency Loyalty Board). At such hearing you may appear personally before the Loyalty Board, be represented by a counsel or other person of your own choosing, produce witnesses and present evidence in your behalf. If you desire but for any reason are unable to obtain a representative, you may request the Loyalty Board or any responsible (name of Government Agency) official(s) to assist you in securing such representative.
5. No decision has been made as to whether or not the above stated charges are true as presented, and no such decision will be made until after consideration of your reply, if a reply is submitted, and consideration of the evidence developed at a hearing, if a hearing is held.
6. The proposed removal action will not become effective in less than 30 calendar days from the date of your receipt of this notice. During this period of advance notice you will be carried in an active duty status. (In some cases where necessary the employee is placed immediately on inactive duty status pending hearing and until decision).
7. This action is taken under authority of Section 9A of the Hatch Act (18 U.S.C. 61i), The Supplemental Independent Offices Appropriation Act, 1949 (Public Law 862, 80th Congress), Executive Order 9835, approved March 21, 1947, and the regulations and directives duly promulgated by and under the authority of the U.S. Civil Service Commission Loyalty Board, in accordance with the provisions of Executive Order 9835 as set forth in Title 5, Chapter II, Code of Federal Regulations, 13 FR 253, and (Technical Bulletin of Government Agency).
8. Upon request, you may at any stage in the adjudication of your case, examine a copy of (Technical Bulletin of Government Agency), Executive Order 9835, and such directives and regulations of the U.S. Civil Service Commission Loyalty Review Board as may have been made available to the (name of Government Agency).
59. Statement of Seth Richardson, Chairman of Loyalty Review Board, Dec. 23,



a Government employee must therefore be denied opportunity to be informed of the source of the evidence upon which the charges against him are based.

Certainly in practice much more could be disclosed to the employees than is currently disclosed. There seems no reason why the anonymous informant who is not in the regular employ of the FBI and whose testimony is relied on by the Board should not be revealed to the employee. It seems reasonable also that the Board should have the right to subpoena these informants. If non-confidential informants do not want to stand up and be counted, then their information should be used only as possible leads and not be made the basis of a record which cannot be refuted. And where it is impossible to reveal to the employee the *source* of the evidence against him, as in the case of confidential informants, the employee should at least be fully apprised of the *contents* of the testimony.

Many of those identified with the loyalty test express the opinion that information obtained from an anonymous informant has been given little weight by those responsible for decisions.<sup>60</sup> At best it was used only as a lead or in confirmation of information already obtained from independent sources. This practice should be expressly required so that it is uniformly followed by all hearing boards.

It sometimes happens that the employee may admit the truth of statements made by the anonymous informers. All of this is to the good. But the basic requirement should be insisted upon—namely that in every hearing proceeding detailed “findings of fact” should be drawn up to insure a proper basis for appeal.

The presence in the departmental files of the undigested and ambiguous yet very critical summaries of personnel under investigation can do a great deal of harm. In the case of the initial hiring of employees, very often the existence of such reports may frighten the personnel officer into rejecting the applicant out of hand—or may prevent him from further pursuing his search. In any case this is not the fault of the investigating agency. The responsibility lies with the appointing agency. But to the applicant it makes no difference where the blame lies. He is the one who gets hurt.

There would appear to be no practical remedy<sup>61</sup> for this defect ex-

---

1947. In its Directives issued for the guidance of Local Agency Boards, the Loyalty Review Board has provided that “the fact that the applicant or employee may have been handicapped in his defense by the non-disclosure to him of confidential information or by the lack of opportunity to cross examine persons constituting such sources of information shall be taken into consideration by the initial hearing body.” Loyalty Review Board, Directive III.

60. Statements made to the senior author. See also note 59 *supra*.

61. One alternative, of course, would be to require that the FBI make its files and the names of its informants available to the public. This would appear to constitute an extreme solution which would unduly hamper the work of the FBI without sufficient

cept to have men of character as well as judgment in charge of personnel who could exercise discretion and fairness in the handling of these files.

Finally, two further amendments to existing procedures appear desirable. First, more discretion should be given to agency officials charged with evaluating the investigative reports to determine whether complaints should be further processed. Under the existing system, many cases of no substance reach the Loyalty Board which must then take on the first responsible job of eliminating unwarranted complaints. Doing this at an earlier stage would alleviate the burden of work placed on the Loyalty Boards and relieve the employee from the harrassment of a protracted Loyalty hearing. Similarly, at the hearing stage the agency board should assume a greater responsibility in asking the questions and in directing the course of the hearing. It should not rely on the investigatory officials to carry this burden. The inferences and significance of the employee's activities should be brought out by those whose special competence lies in the field of analysis rather than detection.

If this Loyalty Program needs doing—it should be done well. Complaint is made by certain of these agencies that the standards set up by the Civil Service Commission which must be followed in adjudication in cases under Executive Order 9835 make operation complex, because appropriations for investigative staffs in sensitive agencies have been reduced as a result of increased appropriations to the FBI and the Civil Service Commission under the Loyalty Program. It is obvious that this program cannot be made effective by the agencies concerned unless they have the funds to follow the leads of the FBI and the means to evaluate their findings. Just as sufficient funds should be appropriated for investigative purposes so the legislature should by appropriations make possible a proper job of evaluation. That is the vital end product of investigation.

#### RECOMMENDATIONS

In so far as all Government employees now in office have been examined, the Loyalty Program is completed. The present problem is essentially one of dealing with new applicants.

In appraising the effect of this program neither those who oppose it nor those who support it have given sufficient weight either to the

---

compensating advantage. For a discussion of the legal issues involved in the problem of disclosure in a judicial proceeding, see Note, *Government Privilege Against Disclosure of Official Documents*, 58 YALE L. J. 993 (1949).

An alternate remedy is suggested by a recent Congressional Resolution, proposing that any person who believes that testimony or other evidence before a Congressional committee tends adversely to affect his reputation shall have the right to include a sworn statement to that effect in the record. N.Y. Times, July 21, 1949, p. 1, col. 7.

effect the Loyalty Order had (1) in heading off more drastic measures or (2) in weeding out in advance actual or potential disloyal employees.

But in hiring new employees the basic question remains: "Is there a common sense course of action that will enable us to save our Government from being too strong for the liberties of its own people or too weak to maintain its own existence?" What is the best method of procuring for Government service loyal, competent, responsible, free and fresh-minded civil servants? Assuming that, under the present program with the qualifications and corrections already noted, there is no violation of constitutional guarantees, the question still remains: "Is this an effective method of ascertaining disloyalty?"

In evaluating this problem, the present distinction between loyalty and security tests in agencies subject to the Presidential Order of March 21, 1947 and in so-called sensitive agencies is of little assistance. Under the President's Executive Order, loyalty clearance refers to the requirements placed upon all Government employees. Security clearance refers to the special requirements of certain "sensitive security areas" and applies to persons who work with classified or restricted information. This artificial distinction between loyalty and security results in confusion. The two should be considered together.

Experience teaches us that a future war will not be fought in terms of the last war. New forms of aggression are accompanied by new weapons both open and secret, as part of a total war. We are learning each day that we do not need to be engaged in a shooting war to suffer losses in terms of prestige, or influence, or policy, or even of loyalty. Exploitation of national weakness by a skillful and ruthless enemy can result in dissension and disorder. Physical weapons are not the sole means of breaking the will of a man to resist. The same result will follow from the undermining of his mental and spiritual defenses. All these things are aspects of a total war.

We can prepare against this only by an assessment of a man's total personality. This is a problem for personnel management, which is as necessary an art in public office as in private business.<sup>62</sup> It is essential that procurement and security work together. The assessment must be made not only to ascertain a man's elements of weakness but to aid him in strengthening his powers of resistance, i.e., making him aware of the methods and devices of those who would seek to divert him.

To determine whether or not an individual is likely to commit disloyal acts, either willingly and deliberately or under pressure from enemy agents, it is not sufficient to ask him "Are you or have you been

---

62. An excellent survey of the entire field of government personnel can be found in WHITE, *INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION* (1943); see also, MERRIAM, *PUBLIC PERSONNEL PROBLEMS* (1938); and Levitan, *The Responsibility of Administrative Officials in a Democratic Society*, 61 *POL. SCI. Q.* 562 (1946).

a member of the Communist Party?" Nor can it be determined by his willingness or unwillingness to take a loyalty oath.

These are subjective matters that cannot be reached by inquisitional methods. A man may be subject to certain tensions which he is able to resist, yet yield to pressures which he might not expect would ever be applied. A man may work specifically to overthrow the American System because he is a confirmed Marxist, or he may be a conformist to our system of government yet reveal secret information because he cannot resist bribes, or because he is temperamentally unreliable and incapable of keeping a secret.

A person may be indiscreet, careless, a dupe, or emotionally and ideologically confused. An individual may be an habitual drunkard and therefore a poor security risk. He may be politically opposed to Communism, and yet, because he has a close relative in the Soviet Union or in a Soviet controlled country, be under pressure and therefore potentially insecure.

These examples of security dangers indicate that to determine the kind and degree of actual or potential disloyalty, if any, in an individual it is necessary to discover what dispositions or motives he has which might induce him to commit a disloyal act, as well as to discover what abiding dispositions or motives he has which would prevent him from doing such a thing.<sup>63</sup>

The essential problem resolves itself into one of finding a method to be applied in conjunction with regular security investigations which would disclose the basic personality structure, motivations and general security fitness of a government employee before hiring him.

A basis for such enquiry is the experience of the Assessment School of OSS during World War II. These experiences in reaching the component parts of a man's personality are recited in a book called *Assessment of Men*, written and published by a distinguished group of scholars, scientists and professional men under the direction of Dr. Harry Murray, Harvard Medical School. This group was charged with developing a system of procedures which would reveal the personalities of OSS recruits to the extent of providing ground for sufficiently reliable predictions of their usefulness to the organization.<sup>64</sup> The OSS

---

63. Typical of the complexities involved in the problem is the case of Julian Wadleigh, former State Department employee and admitted thief of government documents, who wrote that his original decision to deliver documents to the Soviet government through the medium of the Communist Party was motivated primarily by his concept of "world" loyalty, his desire to fight fascism even if it meant spying on his own country. See series of articles in N.Y. Evening Post, July, 1949. See also WEST, *THE MEANING OF TREASON* (1947); Samuels, *American Traitors: A Study in Motives*, N.Y. Times Magazine, May 22, 1949, p. 17.

64. The extensive "assessment" program initiated during the war by the Office of Strategic Services was designed to screen overseas personnel in terms of their potential aptitude, including physical, mental and emotional, for the tasks to which they would be assigned.

Assessment School represents the first attempt to apply this type of personnel procedure in measuring the qualification of those in government service.

In the present situation the President might appoint a Commission to review the Loyalty Program and to examine into the feasibility of employing similar techniques in the screening of Government employees. The personnel of such a Commission should be selected with a view to their special competence to examine into the social, cultural and emotional bases underlying an individual's allegiance to his country and the pressures and tensions which affect that allegiance.<sup>65</sup>

The Commission could be asked to consider, among others, the following questions:

A. Are there existing<sup>66</sup> or projected<sup>67</sup> techniques, which, in con-

---

Although many of the tests devised by the Assessment Staff would not be feasible or appropriate for the problem at hand, nevertheless the experiment is of significance as the first serious attempt to utilize the services of psychiatrists and psychologists in predicting behavior and capabilities in government service. For a description of this experiment see ASSESSMENT STAFF, *THE ASSESSMENT OF MEN* (1948).

65. In a related field, the suggestion has been made for the establishment of a National Personnel Assessment Board for the selection and supervision of competent experts in the description of democratic and anti-democratic personalities with the eventual purpose of devising tests or investigations for individuals seeking public office in order to select leaders from among the "non-destructive genuinely democratic characters." LASSWELL, *POWER AND PERSONALITY* 187 (1948). The conclusions and recommendations of Professor Lasswell would seem to lend support to the belief in the practical feasibility of devising tests for the determination of such variable and intangible elements in the human personality as are involved in the loyalty problem.

Suggestive of the possibilities and potentialities of studies which might be made in the loyalty field is the work of the Foreign Morale Analysis Division of the Office of War Information, which made a study of Japanese wartime morale in an effort to determine its weaknesses and susceptibility to deterioration. For a description of this work and the technique employed, see Leighton & Opler, *Psychiatry and Applied Anthropology in Psychological Warfare Against Japan*, read before the Association for the Advancement of Psychoanalysis at the New York Academy of Medicine, May 22, 1946 (mimeographed).

66. At present the Civil Service examines applicants primarily in terms of their capabilities for the particular post applied for. A general intelligence test, mechanical intelligence test, and a so-called unit test (designed to isolate mental traits) are administered and in addition a personal interview and investigation of references is carried out. Although other tests have been designed for the testing of social intelligence and personality, these are not utilized by the Commission. WHITE, *op. cit. supra* note 62, at 356-61.

67. For example, one of the tests currently employed to determine whether an employee may be disloyal is whether he has followed the Communist Party line through one or more shifts. Obviously, this is a useful although essentially crude technique in the absence of precise information, first, with regard to the infinite variety of party lines adopted from time to time by the Communist Party and other "subversive groups"; and second, with regard to a proper analysis technique of the beliefs of the individual employee.

Professor Harold D. Lasswell has made some interesting experiments in the field of content analysis which seek to formulate on a scientific basis techniques for analyzing

junction with the Civil Service intelligence tests now employed, could be used in the testing of an individual's total personality—its creative imagination, its balance, its motivation?

B. Would it be feasible and advisable to apply these tests to every employee coming into Government service and also on each occasion when the employee is considered for promotion? <sup>68</sup>

C. Is it possible to obtain a sufficient number of trained and skilled professional men and women qualified as assessors in such a program?

D. Should such an assessment of applicants be made by an overall Assessment Board or should assessment be decentralized so that each agency would have its own board? <sup>69</sup>

E. Should these boards be given the power of selection or should

propaganda. His tests were utilized by the Government in its prosecution of William Dudley Pelley in order to show the consistency of Pelley's writings with the Axis line. *United States v. Pelley*, 132 F.2d 170 (7th Cir. 1942), *cert. denied*, 318 U.S. 764 (1943). For summary of this type of work, see SMITH, LASSWELL & CASEY, *PROPAGANDA, COMMUNICATION AND PUBLIC OPINION 74 et seq.* (1946).

The relevancy of this technique for analyzing reports and memoranda submitted by applicants as evidence of their capabilities or prepared by government employees in the course of their work is obvious. Yet clearly unless a Commission such as the one recommended in the text is established, endowed with sufficient funds and trained personnel, the utility and utilization of such techniques would be beyond the powers and skill of existing investigatory and adjudicatory bodies responsible for the Loyalty Program under the existing framework.

68. A basis for such reassessment is found in the civil service practice of making out efficiency ratings periodically on all its employees.

Existing rating techniques for promotion and other purposes have gone through several developments and modifications.

After considerable experimentation, the Civil Service discontinued in 1935 the use of the Graphic Rating Scale test which involved the scoring of the employee on fifteen specific traits or qualities. Today it employs a simplified Service Rating Form which requires the Supervisor to rate the employee in terms of his quality of performance (dependability and skill), his productiveness (amount of work done, promptness, etc.) and the qualifications displayed (knowledge of duties, ability to learn from experience, initiative and cooperativeness). In 1948, the Probst Rating Form was introduced experimentally in a few agencies. This form contains a detailed list of qualifications on which the employee is to be rated including such characteristics as indifference, crankiness, teamwork, self-confidence, etc. For discussion of these rating techniques, see WHITE, *op. cit. supra* note 62, at 417 *et seq.* The forms mentioned above are reproduced respectively at pp. 412, 415 and 417. For analysis of rating techniques used by the Army Air Forces during the war, see Guilford, *The Discovery of Aptitude and Achievement Variables*, 106 *SCIENCE* 279-82 (1947).

69. Since 1938, departmental personnel officers have been established in the majority of the federal agencies. The Civil Service Commission extends to them every facility for advice and cooperation. Thus, the feasibility of establishing agency assessment boards would not constitute any innovation. The success of this practice has been attested to on every hand. WHITE, *op. cit. supra* note 62, at 331; and see recommendations for strengthening of this system by the recent Hoover Commission, *N.Y. Times*, Feb. 11, 1949, p. 1, col. 4.

their analysis and report be merely advisory to the agency head who is vested with the final power of appointment?

If such an assessment program were found to be feasible, it would constitute a major advance in the development of a security program capable of coping effectively and constructively with the type of threats posed by the aggressive tactics of the Soviet Union and members and sympathizers of the Communist Party.

While the procurement of loyal and intelligent civil servants constitutes a major consideration in countering Communist infiltration tactics in government service it must be recognized that no single formula can provide a complete answer to the prevention of subversive infiltration. We must face up to the fact that counter espionage must be used as a measure of protection.

Where actual violations of security occur on the part of Government employees, the accused would be accorded a full hearing with right of counsel and all other constitutional safeguards as discussed above with reference to current Loyalty hearing proceedings.

Any program designed to strengthen the calibre of our civil service and capable of meeting the threats posed by Communist infiltration in Government service must recognize the dual problem of procurement and security. It must embrace techniques adaptable to the special necessities of each. The techniques indicated above are not necessarily exclusive. Nevertheless, they are suggestive of a type of scientific, non-political approach to the problem, which should relieve the Government and the employee of many of the difficulties which have arisen under the present Loyalty Program.