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Federal Loyalty-Security Removals, 1946-1956

Robert J. Morgan*

Few persons witnessing events of the past decade would have much difficulty in agreeing with Justice Douglas that the "problems of security are real. So are the problems of freedom. The paramount issue of the age is to reconcile the two."[1] Nor is it any less obvious that during this time government employees have been attractive and largely helpless targets of statutory and administrative regulations intended to scour the public service of actual or potential subversive taint. The loyalty and security programs have posed problems of accommodating our traditions of constitutional liberty to executive power exerted in the name of national security. This situation has called for a measure of judicial scrutiny of executive personnel management largely unknown in more quiet times. With the morale and effectiveness of much of the federal bureaucracy at stake, few issues adjudicated by the courts have resulted in a more cautious balance between judicial restraint and activism.

Quite naturally cases testing the validity of the two programs have been pushed into the courts to metamorphize a bitterly partisan issue into the jargon of legal disputation. However, finding the balance of public and private interest has not been easy. There is certainly some evidence of a disposition by even the most temperate of our citizens to be more than ordinarily suspicious of the political radical. But far more important in the development of legal doctrine has been the necessity for courts to develop *de novo,* and with becoming caution, principles which are both logical and acceptable in the long run in dealing with the question of removing public employees in the interests of national security. Especially have the

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1 Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 174 (1951).

courts been influenced by the long standing view that public employment is not a right and that it is not the business of the courts to intervene in questions of fitness of executive employees to perform their assigned tasks.

I. JUDICIAL REVIEW OF CIVIL SERVICE REMOVALS

It is doubtful whether any idea has contributed more to the precarious position of civil servants in the security crisis than the germ of truth in Holmes' hyperbole, "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[2] With little or no variation this theme has served the apologists for the Truman and Eisenhower programs. Unfortunately, however, much more is involved in the security program than the right to talk politics. Neither a wholesale condemnation of security procedures nor an uncompromising support of summary dismissals deserves thoughtful support.

It is well settled that no officer or employee of the federal government has a vested property right in his office nor in his compensation except for services actually rendered.[3] He does not enjoy a vested right of employment which Congress may not take from him.[4] In fact, courts have viewed federal employment to be a "privilege revocable by the sovereignty at will. . . ."[5] Moreover, Congressional regulation of federal employment conditions to promote efficiency, integrity and discipline has long been judicially

[2] McAuliffe v. New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).

[3] Taylor and Marshall v. Beckham, 178 U.S. 548 (1899).

[4] Crenshaw v. United States, 134 U.S. 99 (1889), citing Butler v. Pennsylvania, 51 U.S. (6 How.) 402 (1850) and Blake v. United States, 103 U.S. 227 (1880).

[5] Id. at 108. This "privilege doctrine", generally accepted by state and federal courts alike, has served as the rationale for imposing upon public employees conditions of employment which appear to many observers to deny civil servants freedom of speech and action in political matters. It has recently again been criticized as being both illogical and unjust. See Nelson, Public Employees and the Right to Engage in Political Activities, 9 Vand. L. Rev. 27 (1955). The wisdom of this doctrine is also denied by Dotson, The Emerging Doctrine of Privilege in Public Employment, 15 Pub. Admin. Rev. 82 (1955). An explanation of the difference in British and American treatment of political activities of civil servants may be found in Epstein, Political Sterilization of Civil Servants: The United States and Great Britain, 10 Pub. Admin. Rev. 281 (1950).

recognized as being within the scope of legislative power.[6] Thus, Congress has positively required dismissal of civil servants under some conditions;[7] it has also specified procedures to prevent arbitrary removals of classified civil servants.[8] It has acted under pressure of emergency to modify the minimum protection to the federal employee.[9] Congress has also required investigation of the "loyalty and security"[10] of certain federal employees and officers.

In view of the privilege theory of public employment (which appears implicitly to place the government worker in a position vis-a-vis the government analogous to the worker in private employment) the only protection against removal without explanation is found in the procedural provisions of the Lloyd-LaFollette Act and the Veterans' Preference Act. The former forbids dismissals from the classified service[11] except to promote efficiency of the service. It specifies the employee shall be removed only for reasons given in writing after being furnished with a copy of the charges and after having a reasonable time to make a written answer with supporting affidavits. Specifically, however, the act stipulates that

[6] *Ex parte* Curtis, 106 U.S. 371 (1882). Four years later the court said. "We have no doubt that when Congress, by law, vests the appointment of inferior officers in the Heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. . . . The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto." United States v. Perkins, 116 U.S. 483, 485 (1886). In fact, the authority of Congress to limit removal extends to all but "purely" executive officers appointed by the President. Humphrey's Executor v. United States, 295 U.S. 602 (1935). The Holmesian hyperbole appears to have reached a legislative zenith in the old section 9A of the Hatch Act, sustained in United Public Workers v. Mitchell, 330 U.S. 75 (1947).

[7] For example see 69 Stat. 6 (1955), 5 U.S.C. § 118j—1 (Supp. 1956) as amended by 69 Stat. 624 (1955), 5 U.S.C. § 118p (Supp. 1956).

[8] 37 Stat. 555 (1912), 5 U.S.C. § 652 (1952); 58 Stat. 390 (1944), 5 U.S.C. § 863 (1946) as amended by 61 Stat. 723 (1947), 5 U.S.C. § 863 (1952).

[9] 54 Stat. 713 (1940), 5 U.S.C. § 653 (1952); 64 Stat. 477 (1949), 5 U.S.C. §§ 22,23 (1952).

[10] 62 Stat. 1152 (1948), 22 U.S.C. § 272(b) (1952); 62 Stat. 441 (1948), 22 U.S.C. § 290(a) (1952); 61 Stat. 103 (1947), 22 U.S.C. § 1434 (1952); 65 Stat. 381 (1951); 22 U.S.C. § 1661 (1952); 60 Stat. 766 (1946), 42 U.S.C. § 1810(b) (5), (B) (i) (ii) (1952).

[11] The term classified service has been defined by statute as consisting of persons who have been given "competitive status in the classified service, with or without competitive examination, by legislative enactment, or under the civil service rules promulgated by the President . . ." 42 Stat. 470 (1922), 5 U.S.C. 658 (1952); Cf. 69 Stat. 709, 5 U.S.C. § 631 (Supp. 1955), for the definition of the term competitive service now used.

"no witness nor any trial or hearing shall be required except in the discretion of the officer making the removal."[12] This act may not be circumvented by exempting a position from the classified service to facilitate summary dismissal of a classified civil servant, but it does not apply to probationary employees.[13] The Veterans' Preference Act differs in two details from the Lloyd-LaFollette Act. The former requires that a preference eligible with permanent or indefinite status have thirty days in which to reply to charges (in most instances) and that the charges proposing removal must state "any and all reasons, specifically and in detail, for any such proposed action."[14]

The federal employee who considers his removal from the service unjust has had little to hope for from judicial intervention, even since passage of Lloyd-LaFollette. Nor is the reason for this condition difficult to find. More than fifty years ago the Supreme Court said if it were inappropriate for courts to supervise civil service examinations, it would be equally improper for them to determine the fitness of employees in the actual performance of their duties. Such matters are administrative in nature.[15] A typical statement of extreme judicial restraint, often cited approvingly in recent years, is: ". . . [T]he courts have uniformly held that the administrative determination by the employing agency of what

[12] 37 Stat. 555 (1912), 5 U.S.C. § 652(a) (1952). This section further provides that "Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay shall be made a part of the records of the proper department or agency . . . and copies of the same shall be furnished, upon request, to the person affected . . ." Present civil service rules, however, specify that the charges must be set forth "specifically and in detail" although the statute imposes no such requirement. 5 C.F.R. § 9.102 (Supp. 1952).

[13] On the first point see Roth v. Brownell, 215 F.2d 500 (D.C. Cir. 1954), *cert. denied* 348 U.S. 863 (1954); in regard to probationary employees see Nadelhaft v. United States, 131 F. Supp. 930 (1955): "[T]he only thing necessary to do to remove a probationary employee is to tell him why you are removing him." Id. at 933; for commentaries on the Roth case see 5 Catholic U.L. Rev. 108 (1955) and 43 Geo. L. J. 104 (1955); Cf. Lamb v. United States, 90 F. Supp. 369 (1950). Even a preference eligible under the Veterans' Preference Act does not have "permanent or indefinite" status at the end of his probationary period, if he is subject to further investigations under the rules of the Civil Service Commission. Kirkpatrick v. Gray and Priestly v. Donaldson, 198 F.2d 533 (D.C. Cir. 1952), *cert. denied* 346 U.S. 937 (1954). Cf. 61 Stat. 723 (1947), 5 U.S.C. § 863 (1952).

[14] 58 Stat. 390 (1949), 5 U.S.C. § 863 (1952); the preference eligible also has a right to appeal to the civil service commission from an adverse decision by an administrative officer; Cf. 5 C.F.R. § 22.10-.11 (Cum. Supp. 1955).

[15] United States *ex. rel.* Taylor v. Taft, 203 U.S. 461 (1906); Keim v. United States, 177 U.S. 290 (1900).

constitutes causes for discharge will not be judicially reviewed."[16] The action of an appointing officer in removing an employee upon written charges and after giving an opportunity to reply "is beyond review in the courts . . . the courts are powerless to review the merits of a valid charge."[17] Even when administrative officers admit the erroneous removal of an employee, as long as the "things required by law and regulations were done, and the discretion of the authorized officers was exercised as required by law . . . the action of executive officers is not subject to revision in the courts."[18] A more temperate and accurate statement of the rule, at the present, at least, seems to be that where "there has been a substantial departure from applicable procedures, a misconstruction of governing legislation, or like error going to the heart of administrative de-

[16] Carter v. Forrestal, 175 F.2d 364,365 (D.C. Cir. 1949), *cert. denied,* 338 U.S. 832 (1949).

[17] Levine v. Farley, 107 F.2d 186 (D.C. Cir. 1939), *cert. denied,* 308 U.S. 622 (1940).

[18] Eberlein v. United States, 257 U.S. 82, 84 (1921). Granting also the erroneous removal of a classified civil servant, the doctrine of *laches* may bar him from judicial review. "When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contentions be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service." United States *ex. rel.* Arant v. Lane, 249 U.S. 307, 372 (1919). This rule was applied in Nicholas v. United States, 257 U.S. 71 (1921) and Norris v. United States, 257 U.S. 77 (1921). In a case where a attorney in the Department of Justice was removed before the end of his probationary period without an unsatisfactory rating, the court found the removal erroneous, but added the view that "we have said many times in similar cases, the courts should be slow in issuing mandamus which may result in interfering with the internal management of executive departments." Borak v. Biddle, 141 F.2d 278 (D.C. Cir. 1944), *cert. denied,* 323 U.S. 738 (1944); Hammond v. Hull, 131 F.2d 23 (D.C. Cir. 1942). Farley v. United States, 92 F.2d 533 (D.C. Cir. 1937). The Court of Claims has even been quoted approvingly in saying that "allegations that the plaintiff was innocent of the charges preferred against him . . . and that the investigation which resulted in his removal was biased, prejudiced, and unfair, are immaterial." Levy v. Woods, 171 F.2d 145, 146 (D.C. Cir. 1948). See, however, Knotts v. United States, 121 F.Supp. 630 (1954). Speaking in an early case the Court said: "In all these departments, the power is given to the Secretary to appoint all necessary clerks. . . . And although no power to remove is expressly given, yet there can be no doubt, that these clerks hold their offices at the will and discretion of the head of the department . . . the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment." *Ex. parte* Hennen, 38 U.S. (13 Peters) 230, 259-60 (1839).

termination, a measure of judicial relief may on occasion be obtained."[19]

In fact, in several cases in the past four years there has been a noticeable tendency for the federal courts to read some restrictions into the governing statutes in behalf of classified civil servants. These decisions are of real importance in the loyalty and security cases. In the first place, the doctrine that a discharge motivated by malice and for reasons other than the good of the service is unlawful was applied in *Knotts v. United States* where the aggrieved classified employee was able to demonstrate to the court a plot to drive her out of her position in the National Labor Relations Board.[20] It is obvious the court did not relish determining such a case on its merits and it added a word of caution for the future, saying that "personnel disputes are hard to resolve. In undertaking to do so, we start with the presumption that the official acted in good faith."[21] Whether this doctrine could successfully be applied to loyalty and security cases is difficult to say, since judgment on the merits would almost inevitably lead to a demand that sources of information be revealed to test the worth of allegations against an employee.

Of more significance, however, is the doctrine that charges against the employee must be specific. Cases involving both the Lloyd-LaFollette Act and the Veterans' Preference Act have been similarly treated, although there is some difference in the wording of the two acts.[22] A supervisory employee in the Philadelphia

[19] Powell v. Brannan, 196 F.2d 871 (D.C. Cir. 1952). An officer or employee wrongfully removed by one having no authority so to act is entitled to compensation provided by law during his suspension. United States v. Wickersham, 201 U.S. 390 (1905). For commentary on the problem of judicial review of civil service discharges see Richardson, Problems in the Removal of Federal Civil Servants, 54 Mich. L. Rev. 219 (1955); Gardner, The Great Charter and the Case of Angilly v. United States, 67 Harv. L. Rev. 1 (1953); Westwood, The Right of An Employee of the United States Against Arbitrary Discharge, 7 Geo. Wash. L. Rev. 212 (1938). See also Notes, 49 Nw. U.L. Rev. 816 (1955) 23 Geo. Wash. L. Rev. 69 (1954), 60 Harv. L. Rev. 779 (1947), 47 Colum. L. Rev. 1161 (1947).

[20] 130 Ct. Cl. 574, 121 F. Supp. 630 (1954); the doctrine was first announced in Gadsen v. United States, 120 Ct. Cl. 820. 78 F. Supp. 126 (1848), *cert. denied,* 342 U.S. 856 (1952) (dismissal of the employee was in this case upheld as valid since a finding of malice was lacking).

[21] 130 Ct. Cl. 574, 121 F. Supp. 630,631 (1954) (Knotts received back pay), but her reinstatement was not involved).

[22] That is, the Lloyd-LaFollette Act provides only that the employee be given the "reasons" for his removal or suspension, whereas the Veterans' Preference Act provides that he shall be given "any and all reasons, specifically and in detail" for removal or suspension. 62 Stat 354 (1948), 5 U.S.C. 652 (a)(1952); 61 Stat 723 (1947), 5 U.S.C. 863 (1952).

Navy Yard was removed from the classified service on charges that he had kissed two women at a shop party, had made "improper advances" toward two others who resented his action, and had had abnormal sexual relations over a period of years with teen-age girls in National Park, N.J. He was given three days to reply to the charges and he did so to the best of his ability at that time. After his discharge he brought suit in a New Jersey court against the persons who had accused him of immoral conduct and he was awarded $5,000 in punitive damages. He then sought invalidation of his removal and prayed for reinstatement because the charges against him were not sufficiently specific. The court of appeals held that under the Lloyd-LaFollette Act charges preferred for removal "must be specific enough to provide for a fair opportunity for refutation by the innocent who have no knowledge of the conduct charged, as well as the guilty who do possess such knowledge. To meet that requirement in the present case . . . the first charge must include the names of the women involved . . ."[23] A similar result followed in the case of a veteran's preference eligible employee in the Department of the Army[24] and in the case of an employee in the Internal Revenue Service.[25] In the latter case the court observed, however, that the purpose of the statutory requirement giving the employee reasons for his removal "is not to provide a record to facilitate judicial review of such 'reasons' on their merits, since review is narrowly limited by the absence of statutory provision therefor. On the contrary, it is required as a procedural safeguard against just the sort of errors which, if committed at the administrative level, are beyond the reach of our review."[26]

In *Money v. Anderson* and the more recent *Williams v. Cravens*[27] two important distinctions regarding the exactness of charges have been made. In the former case the court said no "reason appears and none is offered for withholding more specific charges here. Considerations of national security, said to require protection for confidential informants under Executive Order 9835 . . . in Bailey v. Richardson are not present."[28] In *Williams* the court re-

[23] Money v. Anderson, 208 F.2d 34,37-8 (D.C. Cir. 1953) (the court here did not consider whether suit was barred by laches, although the issue was raised and ignored in the district court).

[24] Manning v. Stevens, 208 F.2d 827 (D.C. Cir. 1953) (construing the Veterans' Preference Act).

[25] Mulligan v. Andrews, 211 F.2d 28 (D.C. Cir. 1954) (construing the Lloyd-LaFollette Act).

[26] Id. at 31.

[27] 210 F.2d 874 (D.C. Cir. 1954).

[28] Money v. Anderson, 208 F.2d 34,38 (D.C. Cir. 1953).

fused to find the removal of a loan examiner in the Reconstruction Finance Corporation invalid for the lack of specific charges when he had been dismissed for unreliable judgment and poor recommendations on loan applications. The situation in such a case must be distinguished, the court said, from that in cases "where the 'charge' involved was one of dereliction, possibly criminal in character."[29]

On one other point, however, courts in construing the statutes have given the civil servant little comfort. The Lloyd-LaFollette Act, of course, specifically disavows any requirement of a hearing and makes the granting of one an act of grace by the removing officer. Nor does the Veterans' Preference Act grant any more. It has been held that this statute "... indicates no intention to require a hearing of the adversary type, with compulsory confrontation by witnesses. . . . The selection and retention of employees in the executive branch of the Government is peculiarly within the powers of the executive, under congressional direction or limitation."[30]

In short, guide lines of judicial intervention in civil service removals have been such as to limit review largely, but not exclusively, to insure compliance with statutory and administrative procedural requirements. With employees enjoying no statutory right to a hearing, much less to an adversary proceeding, the courts have nevertheless recently shown a disposition to require charges for removal to be specific enough to allow an adequate defense by the employee enjoying the benefits of the Lloyd-LaFollette and Veterans' Preference Acts.

II. THE LOYALTY-SECURITY CASES

The evolution of case law on loyalty and security dismissals reflects certain remarkably consistent patterns strongly influenced by the case law of ordinary civil service dismissals. On the whole, too, constitutional issues which many commentators consider to

[29] Williams v. Cravens, 210 F.2d 874,876 (D.C. Cir. 1954). The court here specifically distinguished this case from Money v. Anderson and Manning v Stevens, supra, as well as from Deak v. Pace, 185 F.2d 997 (1950). Nevertheless, if several charges are preferred as the basis for removal, they need not all be specific unless all are necessary to effect the removal. Thus, only if removal is based on cumulative charges, is it necessary that they all be specific. Deviny v. Campbell, 194 F.2d 876 (D.C. Cir. 1952).

[30] Deviny v. Campbell, supra at 880. But 5 C.F.R. § 22.9 (Supp. 1955) now provides that a preference eligible shall have a right to a hearing at his request. At such hearing he may produce and cross-examine witnesses, testimony shall be under oath and a summary of the proceedings satisfactory to the parties shall be made part of the record available to the employee.

be involved have, for the most part, been avoided by the courts either through denial of their existence or by a narrow interpretation of guiding statutes or administrative orders. It also seems that the loyalty purge had largely run its course before potentially effective formulae for restraining some abuses could enjoy the support of a majority in the two courts which have decided virtually all of the important cases.

A. The Removal Power and the Bill of Rights

The first three cases to reach the Supreme Court directly involving loyalty dismissals seemed clearly to vindicate the government's program. The loyalty removals during World War II were upheld in *Friedman v. Schwellenbach.*[31] Friedman was a temporary appointee subject to character investigation and denial of appointment if there were reasonable doubt of his loyalty.[32] Although he did not enjoy the benefits of the Lloyd-LaFollette Act, he was given two hearings at which he admitted he had opposed entry of the United States into the war against Germany until the latter's hostilities with the Soviet Union broke out. Brushing aside Friedman's contention that his dismissal on the order of the Civil Service Commission was a violation of statute, civil service regulations and constitutional rights protecting political opinions, the court held the administrative finding to be conclusive and beyond judicial review as long as it was not arbitrary and was within the scope of official discretion. The court took the view that the government had the power to prescribe qualifications and to deny employment to persons who failed to meet them. It was reasonable for the government to determine that its employees were loyal and to refuse to appoint those whose loyalty was in doubt. The court denied that it could be concerned with whether Friedman was in fact loyal or disloyal; it was enough that the Commission had a reasonable doubt of his loyalty. The court's language, however, was sweeping enough to sustain not only denials of appointment, but also to encompass removals when loyalty was the issue.

Bailey v. Richardson[33] also involved the discharge of a temporary appointee subject to loyalty clearance under Executive Order 9835,[34] although Miss Bailey once had been in the classified service before being "riffed" out. She asserted her loyalty despite mem-

[31] 159 F.2d 22 (D.C. Cir. 1946), *cert. denied,* 330 U.S. 838 (1947).

[32] Executive Order 9067, 7 Fed. Reg. 1407 (1942) and War Service Regulations of March 16, 1942, 7 Fed. Reg. 7723 (1942).

[33] 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court with Mr. Justice Clark not participating,* 341 U.S. 918 (1951).

[34] 3 C.F.R. 129 (Supp. 1947).

bership in several organizations proscribed by the Attorney General. She enjoyed the support of several witnesses at the hearings conducted by various loyalty boards. Unlike *Friedman,* this case challenged the government's use of the faceless informer and its barring Miss Bailey from service for three years. The court invalidated the three-year bar, holding it to be punishment applied to the individual and indistinguishable from the permanent proscription dealt with similarly in the earlier *Lovett* case.[35] The court noted, on the other hand, that a general regulation effecting the same result might not be invalid. In dealing with the faceless informer, the court permitted itself the license of discussion ". . . upon the *assumption* that a Government employee in the *classified service* is being dismissed . . ." upon loyalty grounds.[36] (emphasis added.) Here the court was on well-worn ground. Traditionally, it said, the employee has had no right to a quasi-judicial trial or hearing before being dismissed from the service and even if the due process clause of the Fifth Amendment were to apply, it is doubtful it would require specific charges, confrontation and cross-examination on evidence openly submitted. The constitutional test for retention of executive employees is the confidence of their superiors and confidence is not controllable by judicial process. The cold war justifies a public interest in shrouding in secrecy the means by which the President detects disloyalty and he should not be put in the dilemma either of continuing a loyalty suspect in the service or of revealing sources and methods by which disloyalty is detected. The Constitution does not forbid "a policy of caution in respect to *members of the Communist Party* in the Government Service under current circumstances."[37] (emphasis added.) Risks and estimates of danger are for the President to make and no court has the power to force him to retain a suspect employee, even if his removal action injures her. She has no redress because she has no right to a government job. Even Judge Edgerton, in voicing a vigorous dissent against a concept of loyalty which permits dismissals for what he called a state of mind, would voice no opinion on validity of the loyalty order as applied to sensitive positions.

In short, the court denied Miss Bailey's claim that dismissal

[35] Lovett v. United States, 328 U.S. 303,316 (1946); "This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type."

[36] 182 F.2d at 55 (the majority stated that it understood Miss Bailey to be contesting only the three year bar and that she was merely an applicant for appointment. Miss Bailey was not in the classified service and she was no more than an applicant for the appointment—like Friedman).

[37] Id. at 65.

from government service on loyalty grounds is punishment requiring a jury trial; denied that the due process clause of the Fifth Amendment requires specific charges, confrontation and cross-examination of witnesses and a hearing upon evidence openly submitted; and denied that the First Amendment bars discrimination against government employees because of their political views.[38]

In *Washington v. McGrath* the Truman loyalty order was again attacked—this time on the ground that it had been applied discriminatorily against several Jewish and Negro postal employees because of their associations with proscribed organizations. Considering the issue settled by earlier decisions, the court dismissed this claim on the ground that there was no showing of discrimination in fact.[39]

Inability to get a majority in loyalty cases coming before the Supreme Court during 1951 (because Mr. Justice Clark absented himself from these cases) made it difficult to know the high court's attitude towards the issues. With the shift of one justice, however (and there are indications it may have been Mr. Justice Burton), the decision in *Joint Anti-Fascist Refugee Committee v. McGrath*

[38] In the light of recent developments one of the important aspects of this case is Miss Bailey's argument that she had not enjoyed the procedural safeguards of the President's loyalty order. In attacking the use of faceless informers against her, she contended that the government had failed to observe Executive Order 9835, Part II (2) (b) which provided: "The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit." The court, however, said that the order "leaves specificity a wholly discretionary matter." Id. at 52. The court held that the Lloyd-LaFollette Act afforded her no protection because she was not in the classified service, although she had competitive status. At the time of this decision it appeared that the court considered the Lloyd-LaFollette Act inapplicable to loyalty cases. Id. at 52-54. In summary it said: "It is our clear opinion that the President, *absent congressional restriction,* may remove from Government service any person of whose loyalty he is not completely convinced. He may do so *without assigning any reason* and without giving the employee any explanatory notice. If, as a matter of policy, he chooses to give the employee a general description of the information which concerns him and to hear what the employee has to say, he does not thereby strip himself of any portion of his constitutional power to choose and remove." Id. at 65 (emphasis added). Executive Order 10450 makes no mention of the specificity of charges and presumably reliance has been placed wholly on the provisions of Public Law 733, 64 Stat. 476 (1950), 5 U.S.C. §22-1 (1952). As a result of the recent decision in Cole v. Young, 351 U.S. 536 (1955) it appears that appropriate statutes will govern the specificity of the charges.

[39] 182 F.2d 375 (D.C.Cir. 1950) *aff'd by an equally divided court with Mr. Justice Clark not participating,* 341 U.S. 923 (1951).

made clear the diversity of opinion among the members. Four (Black, Douglas, Frankfurter and Jackson) preferred to face constitutional issues involving the Attorney General's list of proscribed organizations, but the swing man, Mr. Justice Burton, yielded to the tug of obligation which was ". . . not to reach these issues unless the allegations before us squarely present them . . ."[40] It was not necessary to go beyond terms of the President's Loyalty Order to determine that the Attorney General, in branding these organizations without notice or hearing or the opportunity to rebut allegations against them, had permitted the ". . . doctrine of administrative construction . . . to run riot."[41] The fiction that the President had not authorized his Attorney General to defame the organizations without a hearing (the court's understanding of the term "appropriate investigation") was really the aspect of the decision most important to federal employees. For it was this same attenuated doctrine, that powers conferred by the President's Loyalty Order were to be narrowly construed, which enabled the court to avoid the constitutional issue again in the later *Peters v. Hobby*.[42]

It was evident, as Justice Jackson said, that the real concern of the court was the federal employee who could not attack the Attorney General's designation of an organization in loyalty proceedings. Ordinary removals not violating fixed tenure, he argued, are not subject to judicial review, but "these are not discretionary discharges but discharges pursuant to an order having the effect of law . . ."[43] Justices Black and Douglas specifically condemned the loyalty procedures and joined Justice Frankfurter in calling for a broadening of due process, not as ". . . a technical conception with a fixed content unrelated to time, place and circumstances [but one implying] respect for the elementary rights of men, how-

[40] 341 U.S. 123,136 (1951).

[41] Id. at 138.

[42] 349 U.S. 331 (1954).

[43] 341 U. S. at 185. In contrast is the view that "civil service regulations made by the civil service comissioners and the President, and promulgated by the latter, do not have the effect and force of law, nor can the courts enforce them as such, or entertain jurisdiction to review the action of an appointing officer in removing an employee. The President may nevertheless enforce them by removing any person who refuses to abide by them. United States v. Lapp, 244 Fed. 377,382 (6th Cir. 1917). More recently, however, the view was expressed that the rules of the Civil Service Commission "undoubtedly have the force and effect of law because of the broad powers conferred upon the President by Revised Statutes, Section 1753, 5 U.S.C.A. § 631, to make such rules, and by him delegated to the Civil Service Commission." Nadelhaft v. United States, 131 F. Supp. 930, 932 (1955).

ever suspect or unworthy."[44] While many an epigram from the majority side has inspired condemnation of the government's security program, a court majority in support of a successful constitutional attack upon it is still lacking.

The dissenting justices resorted to the evasive fiction that the Attorney General's list had no more effect than a press release! It was intended to assist in determining an employee's loyalty in proceedings under which he has ". . . never had the right of confrontation, cross-examination and quasi-judicial hearing . . ."[45] Any administrative hearing granted despite the Lloyd-LaFollette and Veterans' Preference laws is an act of grace which "does not create a constitutional right . . . or requirement."[46]

Making a similar fetish of procedural rectitude the court in *Peters v. Hobby* again avoided the constitutional issues "in reconciling fundamental constitutional guarantees with the procedures used to determine the loyalty of government personnel . . ."[47] The Truman Loyalty Order was meticulously combed only to find that the long established practice of post-auditing cases, including those favorable to the employee under charges, was not authorized and could not be presumed to enjoy the President's approval. All constitutional issues involving the stain of loyalty dismissals, "guilt" by association and use of the faceless informer left unresolved by the court in *Bailey v. Richardson*[48] were consciously side-stepped under the rule that the court gets to constitutional issues not first, but last. Dr. Peters had twice been cleared by agency loyalty boards, first under provisions of Executive Order 9835 and later under the more unfavorable standard of Executive Order 10241.[49] Nevertheless, the Loyalty Review Board of the Civil Service Commission ordered a post-audit of his case four years after the original charges had been twice met successfully. As a result, the board informed him that he would be discharged on loyalty grounds and that he was barred from the federal service for three years, despite *Bailey v. Richardson*. The Court held that the literal terms of the President's order, however, authorized appeal of findings of a depart-

[44] Id. at 162-3,168.

[45] Id. at 207.

[46] Id at 211-12.

[47] 349 U.S. 331,338 (1955).

[48] 182 F.2d 46 (D.C. Cir. 1950).

[49] 3 C.F.R. 431 (Supp. 1951). It was held in Jason v. Summerfield, 214 F.2d 273 (D.C.Cir. 1954),*cert. denied*, 348 U.S. 840 (1954), that cases of persons cleared under the standard of Executive Order 9835 (grounds exist to believe an employee disloyal) could be reopened under the new standard of reasonable doubt of the loyalty of the person involved.

mental or agency board to the Loyalty Review Board merely "for an advisory recommendation."[50] Such a procedure, the Chief Justice said, was in keeping with the principle that a verdict of guilty is appealable, while one of innocent is not. This feature of the procedure was one of the few assuring an employee that his fate would not be decided by political appointees who might buckle under to public opinion.

Dr. Peters' three-year bar was held invalid on the technical nicety that since he was not in the classified service, the existing Rule V, 5.101 (a) did not apply to him.[51]

The dissenting justices thought post-audit practices had been made so well known to the President by annual reports of the Civil Service Commission that it scarcely could be said he had not

[50] 349 U.S. 331, 339 (1954); Executive Order 9835, Part II § 3. The order further provided that the Loyalty Review Board should have authority "to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned." Part III § 1.a. The order also provided: "The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty." Part III § 1. b. 12 Fed. Reg. 1935 (1942). The court acknowledged that, as of the time of decision, twenty agency findings favorable to employees had been reversed by the LRB. It is of further interest to note the statement of Mr. Seth Richardson who was chairman of the Loyalty Review Board when he wrote *in 1951* that the Board "generally supervises the operation of the subordinate boards in two ways: it promulgates detailed regulations for the administration of loyalty checks by them; its staff of examiners looks at the files of all the cases handled by subordinate boards to make certain that those regulations have been complied with. In ordinary cases the Review Board does not review the judgments of lower boards on the merits although, as a safeguard, it does reserve the power to re-examine and re-try any loyalty proceeding *de novo* and without regard to the decision below." Richardson, The Federal Employee Loyalty Program, 51 Colum. L. Rev. 546, 551 (1951). At another point in this same article Mr. Richardson said: "The board must be able to consummate its determinations *by bringing them to the attention of the President.* Since the *final responsibility* for employee suitability lies with him, *it is he who determines the disposition of the board report.* In the official life of an employee, however, the department head acts as the President's representative. Thus, the board report should go to the head of the department concerned. But it need not go as an order preempting his constitutional authority to discharge employees. Rather, it should communicate the board's conclusions as information supplied by another representative of the President, the head of the department finally determining whether the particular employee shall be dismissed or retained." (Emphasis added) Id. at 517.

[51] Peters v. Hobby, 349 U.S. 331, 348 (1955).

sanctioned them. Moreover, if procedural niceties were in order, it was proper to note that the decision of the Loyalty Review Board was only advisory and it was the letter from the Surgeon General which had separated Peters from service.[52] Justice Reed considered judicial review of "such intra-executive operations . . . not completely free from doubt."[53] Justices Douglas and Black agreed with the decision, but were far from satisfied with the rest of the majority's failure to meet constitutional issues. Justice Douglas saw the post-audit as a practice sanctioned by the President through usage. The real issue was still that of the faceless informer through whose information a person could be deprived of one "of man's most precious liberties . . . his right to work."[54] Sources of information used to destroy a man's reputation "must be put to the test of due process of law." [55] Justice Black agreed the case should have been decided on the constitutional issues which Peters had raised and he added the suggestive observation that here, as in the *Youngstown* case, he had grave doubt whether the President's order was authorized by any act of Congress. He not only considered the President's order to be legislation, but he also doubted the power of Congress to delegate authority to do what the President had attempted in the executive order. He did not wish the issue of the President's power to be considered as having been decided *sub silentio*.

This decision, together with the one in *Joint Anti-Fascist*, simply ignored the principle emphatically established by Andrew Jackson that the President is master of his own official household. Certainly if he is master of his subordinates it must be presumed by the courts that he knows what they are doing and approves of their long standing practices in respect to an issue of the importance of the loyalty program. Moreover, these two cases also mark a unique application of the doctrine that the courts will not intervene in civil service removal cases except to insure compliance with applicable statutes. It seems evident that the majority in *Peters* lacked a workable constitutional formula for curbing excesses of the security program so that they were reduced to expressing their disapproval by whipping a dead horse. [56]

[52] Cf. Kutcher v. Gray, 199 F.2d 783 (D.C. Cir. 1952).

[53] Peters v. Hobby, 349 U.S. 331, 354 (1955).

[54] Id. at 352.

[55] Ibid.

[56] The provisions of the Eisenhower security order in effect at the time of the decision explicitly recognized the existence of the practice and provided

The net result of these decisions has been that all constitutional attacks on the Truman loyalty order have been frustrated. The upshot of *Friedman* was that courts could not interfere with executive judgment of the fitness (loyalty) of a government employee. In *Bailey*, constitutional issues were canvassed with the result that the Bill of Rights came off second best to the privilege doctrine in support of a broad latitude of executive removal power. The decision in *Joint Anti-Fascist* amounted to a light rap on the Attorney General's knuckles but it gave employees no ground for either challenging the black listing of organizations or proving the innocence of their associations with proscribed groups. The ruling in *Peters* was no more than a mild expression of judicial disapproval.

B. THE DOCTRINE OF SPECIFIC CHARGES

Since 1950, the Court of Appeals for the District of Columbia has decided three cases in which protective statutes have been interpreted to afford the classified civil servant *some* protection in security cases. *Deak v. Pace*[57] raised the question whether the Secretary of the Army had complied with a statutory requirement that persons in the classified service removed on security grounds should be "fully informed of the reasons. . . ."[58] The charges against the employees were that they had attended meetings open only to members of the Comunist Party and of other organizations known to be affiliated with that party. They were also charged with having a sympathetic and active association with these organizations, but they were not told of specific times or places at which they had

for its elimination by abolishing the various loyalty review boards and substituting therefore agency units for handling security cases. "Agency determinations *favorable to* the *officer* or *employee* concerned *pending before the Loyalty Review Board* on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order." (Emphasis added) Executive Order 10450, §11, 3 C.F.R. (Supp. 1953).

[57] 185 F.2d 997 (D.C.Cir. 1950).

[58] 56 Stat. 1053 (1942), 8 U.S.C. 806(1952) (later repealed by 64 Stat. 477 (1950), 5 U.S.C. § 22-1 -22-3 (1952). This act, a modification of the Lloyd-LaFollette Act, authorized the summary dismissal when "warranted by the demands of national security" of any employee in the War or Navy Departments or the Coast Guard. Employees were given thirty days to make a reply and to be "fully informed of the reasons for such removal."

demonstrated this relationship. The court held that these employees were entitled, under this statute, to demand more specific charges, although the majority refused to lay down any rule of general application, saying the circumstances of one case might be wholly different from others. The court found the organizations were openly known and sponsored so that national security could scarcely be jeopardized if the Secretary were to make the charges specific. More recently, however, this same court had occasion to say that "*Deak v. Pace* expressly did not decide 'the course that should be followed if security interests were thought to conflict with an employee's right to precise information' . . . " [59]

In the first of his two brushes with the loyalty-security system, a legless veteran employed by the Veterans Administration, James Kutcher, scored a victory of limited significance to most employees. Once again a technicality momentarily saved an employee. Kutcher had been charged with membership in the Socialist Workers Party, an organization on the Attorney General's list, and was consequently removed because of doubt of his loyalty. Kutcher, however, called his dismissal illegal because the Loyalty Review Board had made *mandatory* under section 9A of the Hatch Act the removal of employees who were members of organizations on the Attorney General's list.[60] Kutcher claimed, and the court agreed, that the President's order 9835 required a personal finding by the head of each agency before an employee could be dismissed. The Loyalty Review Board was authorized only to make rules and regulations "not inconsistent with provisions of the Order and advise departments and agencies on problems relating to employee loyalty . . ."[61] Agency decisions appealed to the Board were merely "for an advisory recommendation." [62] Mere membership, then, in an organization on the Attorney General's list was not, by itself, evi-

[59] Money v. Anderson, 208 F.2d 34, 38 n.11 (D.C.Cir. 1953) (There was no discussion of constitutional issues in Deak v. Pace, 185 F.2d 997 (D.C. Cir. 1950).)

[60] Memorandum No. 32, Dec. 17, 1948, (later amended 5 C.F.R. p. 199, App. A. (1949), revoked 18 Fed. Reg. 5099 (1953)).

[61] Kutcher v. Gray, 199 F.2d 783,788 (D.C.Cir. 1952). Cf. Friedman v. Schwellenbach, 159 F.2d 22 (D.C.Cir. 1946) *cert. denied* 330 U.S. 838 (1947), where the court ignored the fact that the removal was not made by the agency head.

[62] Kutcher v. Gray, supra at 787. Certainly the doctrine seized upon in Peters v. Hobby is evident here. This knife can cut both ways. In Jason v. Summerfield, 214 F.2d 273, 279 (D.C.Cir. 1954) *cert. denied* 348 U.S. 840, Judge Edgerton dissented on the grounds that the President's executive order did not, by its own terms, direct the reopening of loyalty cases under the new standard of Executive Order 10241.

dence of disloyalty, [63] but the list might be used in loyalty proceedings which the court termed administrative, and not of a nature requiring the constitutional safeguards of a judicial trial. At the same time the court held that membership in a proscribed organization might justify an official *doubt* of an employee's loyalty. In concluding that Kutcher had not enjoyed the procedural safeguards of the President's order, the court also observed that procedures for removing disloyal employees must, in the case of preference eligibles,[64] conform to the provisions of the Veterans' Preference Act. Nevertheless, this act was construed to mean that loyalty removals from individual positions were intended to promote efficiency of the service in general.

Kutcher's more recent bout with the security system resulted in a decision which may be highly important although its practical effect is not yet entirely clear.[65] At any rate, this decision extends to some loyalty-security cases the doctrine of specific charges developed in such recent civil service cases as *Money v. Anderson* [66] and *Mulligan v. Andrews.* [67]

Kutcher again faced the charge that there was official doubt of his loyalty under Executive Orders 9835 and 10241. He was formally charged with being an admitted member of the Socialist Workers Party, of being employed by that party, of contributing funds to its newspaper and with demonstrating "evidence of a record of . . . association and activity with persons, associations, movements and groups" on the Attorney General's list. After a hearing and review of the record the Loyalty Review Board recommended his dismissal. In support of its action the Loyalty Review Board provided a *summary* statement of its conclusions, but when Kutcher contested his removal in the district court the government produced another sixteen-page document which was the Loyalty Board's *detailed* record of its *reasons* for recommending Kutcher's dismissal. This record revealed that the Board had reviewed reasons why the Attorney General had listed the party and had also re-

[63] See President Truman's statement of November 14, 1947, 5 C.F.R. § 200.1 (Supp. 1949) (revoked 18 Fed. Reg. 5699 (1953)), and Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 205-207 (1951), Mr. Justice Reed dissenting.

[64] Veterans' Preference Act of 1944, 58 Stat. 387 as amended 5 U.S.C. § 851 (1952)

[65] Kutcher v. Higley, 235 F.2d 505 (D.C.Cir. 1956).

[66] 208 F.2d 34 (D.C.Cir. 1953)

[67] 211 F.2d 28 (D.C.Cir. 1954)

viewed the record in *Dunne v. United States.* [68] According to this hitherto secret record, the Board also accepted the decision in *Dunne* that the party advocated the violent overthrow of the United States government. The Board was of the opinion that Kutcher could not be discharged solely because of his membership in the party, but it asked whether ". . . one, who knowingly participates actively in the furtherance of such an organization over a period of years, stand (s) without reasonable doubt as to his loyalty . . .?" [69] The Board record also disclosed that according to its reports Kutcher had once made a speech in support of the Communist Party and had once stated he would not report a member of that party to the Federal Bureau of Investigation. In reviewing Kutcher's case, the Board considered itself on safe ground in following the doctrine laid down by the Court of Appeals in the first Kutcher case: membership in a proscribed organization is not of itself ground for dismissal, but such an association may create a *doubt* of loyalty. Since doubt of loyalty is a ground for official lack of confidence in the employee (*Bailey v. Richardson*), dismissal is valid. Thus, the essential factual situation in the second Kutcher case was not different from the first.

The Court of Appeals, however, considered it unnecessary to elaborate the point that the reasons for discharge formally given to Kutcher in writing differed substantially from reasons revealed in the lengthy report of the Loyalty Review Board—unknown to Kutcher until they were introduced in trial court. Under the Veterans' Preference Act this error was fatal to the government's position. "*Since only findings on the charges, specificially identified,* can constitute *reasons* for removal, a reading of the *charges must demonstrate* the *reasons for dismissal,* assuming all the charges are sustained." [70] (emphasis added.) In comparing the formal charges against Kutcher with the Board's secret record it was evident to the court that his employment by the party was not an important reason for his dismissal; membership in a proscribed organization could not of itself constitute a valid reason for removal and no finding was made in respect to his financial support of the party's newspaper. The fourth charge was, in the court's view, a shotgun blast "wholly vague" and a mere summary of the preceeding three.

[68] 138 F.2d 137 (8th Cir. 1943), *cert. denied* 320 U.S. 790.

[69] Kutcher v. Higley, 235 F.2d 505, 508 (D.C.Cir. 1956).

[70] Id. at 509. Cf. Deviny v. Campbell, 194 F.2d 876 (D.C. Cir. 1952) Did the court mean *all* charges, or a *single charge sufficient in itself to warrant discharge,* must be sustained?

There are numerous interesting facets to this decision. Most important, the government must now face a preference eligible employee with specific and detailed charges which reveal the case against him. Such a rule does not insure the demise of the faceless informer, but it may be of great value to the accused employee and his lawyer who are attempting to fight the shadows which often obscure security cases. [71] Moreover, it may be of some significance, or it may be a mere oversight, that the court did not hedge its ruling with the usual exception that the reasons assigned by the government for a security discharge must not reveal the government's sources of information. In *Deak v. Pace* this same court held that reasons for discharge were required by the applicable statute to be given employees, since none of the security considerations said to be present in *Bailey v. Richardson* were present. And, again, in *Money v. Anderson* this same court held that specific charges must be presented since confidential informants here did not require the anonymity necessary for national security. [72] Certainly the court has not said to what extent the government must show its cards; and just as certainly the court has not said that the hearing must be an adversary proceeding.

The court's use, and non-use, of precedents in this case is intriguing. No mention is made of its decision five years earlier in *Bailey v. Richardson* which gave unqualified support to the loyalty purges. *Mulligan v. Andrews*, an "ordinary" civil service case, is the majority's principal precedent, although the first Kutcher case is also mentioned. It is true Miss Bailey was not in the classified service and she had no veterans' preference eligibility, but these facts only underscore the court's looseness in undergirding the government's security system by dictum in 1950. How much of the *Bailey* case would the court prefer to forget? Since Kutcher came under the protection of the Veterans' Preference Act, it is appropriate to question whether the court's doctrine in this case applies also to the Lloyd-LaFollette Act. The doctrine of specific charges has been applied in "ordinary" civil service cases involving both acts recently and it is logical to conclude that it will be applied to security cases falling under the Lloyd-LaFollette Act in the future.

The practice of "guilt by association" seems to have been

[71] This advance may be of real value. See Elson, People, Government and Security; An Analysis of Three Books and a Program, 51 Nw. U. L. Rev. 79, 83-92 (1956).

[72] See note 28 supra.

viewed in a new light in this case. The rule of the first *Kutcher* case was a "this is the house that Jack built" verbalization. Membership in an organization on the Attorney General's list is not of itself a reason for discharge, but such membership may create official doubt of an employee's loyalty. Since official confidence of superior in subordinate is the ultimate test of continued employment as regards security, doubt caused by membership is a sufficient ground for dismissal! In the second *Kutcher* case, however, the court reiterates the first premise of the syllogism while omitting the remainder. Membership alone in listed organizations does not constitute a valid reason for discharge—and the court is emphatic on this point. [73]

[73] In the light of old section 9A of the Hatch Act, 53 Stat. 1148 (1939), 5 U.S.C. §§ 118i-n (1952) (later amended by 69 Stat. 624, 5 U.S.C. §§ 118p-r (Supp. 1956), as well as the Urgent Deficiency Appropriation Act of 1955, 69 Stat. 6, 5 U.S.C. § 118j-1 (Supp. 1956), forbidding the employment of persons who advocate, or are members of organizations which advocate, the violent overthrow of the government of the United States, the court's meaning on this point is not clear. In Dennis v. United States, 341 U.S. 494 (1951), the Supreme Court took judicial notice of the Communist Party as an organization advocating the violent overthrow of the government of the United States. In Dunne v. United States, 138 F.2d 137 (8th Cir. 1943), *cert. denied,* 320 U.S. 790, *rehearing denied,* 320 U.S. 814, the conviction of eighteen leaders of the Socialist Workers Party for violation of the Alien Registration Act of 1940, 54 Stat. 671, 8 USC § 155 (1946) (later amended by 18 U.S.C. §§ 2385-87 (Supp. 1952)), was upheld. In the Dunne case, however, the court carefully pointed out its belief that these leaders of the party must have had knowledge of its unlawful aims. Section 9A of the Hatch Act was sustained as constitutional in Joint Anti-Fascist Refugee Committee v. Clark, 177 F.2d 79, 84 (D.C.Cir. 1949), but this decision was reversed without discussion of the validity of section 9A in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). Section 9A was not at issue in United Public Workers v. Mitchell, 330 U.S. 75 (1947), but the court used language broad enough to permit a reasonable inference that the entire act was constitutional. Id. at 102-03. Assuming, then, the validity of the present section, (69 Stat. 624, 5 U.S.C. §§ 118 p-r (Supp. 1956)), as successors to section 9A, is *admitted* membership in the Socialist Workers Party evidence of violation of a statute which not only forbids continued employment of a person who advocates the violent overthrow of the government of the United States, but also attaches punitive sanctions to this felony? Should the answer be in the affirmative, it would appear that Kutcher could not be continued in employment without violating the statute. Yet the Loyalty Review Board apparently took the view that membership in the Socialist Workers Party could not of itself be a sufficient warrant for Kutcher's discharge, but could only be evidence of doubtful loyalty. It is possible, of course, that the inarticulate assumption in the opinion of the Court of Appeals is that *scienter* is necessary on the part of the employee in view of the decisions in Gerende v. Board of Supervisors, 341 U.S. 56 (1951), Garner v. Board of Public Works, 341 U.S. 716 (1951), and Wieman v. Updegraff, 344 U.S. 183 (1952). The statute does not appear to say when the membership in any such organization must have been

Lastly, it is obvious, despite the rule that the courts will not consider civil service cases on their merits, that the Court of Appeals did so in this case. It thoroughly reviewed the reasons why the Loyalty Review Board recommended Kutcher's dismissal and found them wanting when compared with official reasons actually given to him as formal charges. It takes considerable judicial sleight of hand to recast this action into a purely procedural question.

C. The Cole Case

On the final day of the 1955 term the Supreme Court announced its decision in *Cole v. Young*.[74] Initial public reaction appears to have been that the Court has greatly limited the government's loyalty-security program for civilian employees. Those who favor such a course have applauded the results.[75] Careful analysis, however,

acquired so that some question of its efficacy might be raised. Does the law apply to past membership, present membership, or both? Provision for administrative removal of an employee member of such an organization appears to be superfluous in the light of the fact that it is now a felony for any such person to continue in the employment of the United States. From the first Kutcher case it appears that the old Loyalty Review Board considered membership in the Socialist Workers Party to be a violation of section 9A. Since, in Kutcher v. Gray, 199 F.2d 783 (D.C.Cir. 1952), the Court of Appeals invalidated Kutcher's removal on the ground that it was the personal responsibility of the agency head to make the ultimate finding respecting an employee's loyalty, its holding that mere membership in a proscribed organization is not sufficient grounds for removal left the precise application of section 9A to loyalty removals clouded with doubt. The court did not explicitly or implicitly say that membership in organizations advocating violent overthrow is mandatory cause for removal, while membership in other organizations on the Attorney General's list is not. If the old section 9A and the present statutes mean anything, it appears to be that there is one ground for removal made mandatory by statute, unless the executive order (Executive Order 9835, 12 Fed. Reg. 1935 (1947) or Executive Order 10450, 3 C.F.R. (Supp. 1953)) is legally superior to the conflicting provisions of statute. Germane to the problem, but no answer to the precise question, is the Supreme Court's observation that "[O]ne's associates, past and present, as well as one's conduct, *may properly be considered* in determining fitness and loyalty." (emphasis added) Adlier v. Board of Education, 342 U.S. 485, 493 (1952), and see Garner v. Board of Public Works, 341 U.S. 716 (1951).

[74] 351 U.S. 536 (1956).

[75] See the editorial, N. Y. Times, June 13, 1956, p. 36, col. 1. News reports indicated that initially, at least, the Department of Justice viewed the decision as imposing no serious obstacle to the government's program. Later however, Attorney General Brownell and Chairman of the Civil Service Commission Phillip Young favored legislative modification of the statute construed in this case. Their positions on this matter were not identical, however, since Chairman Young apparently testified that the Court's decision would cripple the government's program in some respects. N. Y. Times, June 15, 1956, p. 14, col. 1 and July 7, 1956, p. 1, col. 8.

suggests the utmost caution in concluding that the court has placed any extensive barrier on executive authority to remove employees on security grounds in either sensitive or non-sensitive positions. Executive Order 10450 [76] still stands as the basic instrument for effectuating the federal civilian employee loyalty-security program.

Cole, a veterans' preference eligible food inspector in the Department of Health, Education and Welfare, was investigated under the provisions of Executive Order 10450 and charged with close association with Communists and with attending meetings of organizations on the Attorney General's list. Initially Cole refused to explain the charges against him because he considered them to be violations of his right of freedom of association. The Secretary ordered his dismissal, but two weeks later Cole asked for a reopening of his case, stating that he would prove his associations were innocent ones. The Secretary denied this request and a second similar one. On appeal the Civil Service Commission held his removal valid on the ground that section 14 of the Veterans' Preference Act had been modified by Public Law 733. [77]

Public Law 733 was enacted by Congress at the outset of the Korean War with the apparent intent of making it easier for many agencies of the executive branch to dismiss employees as "security risks" instead of depending entirely on the provisions of Execu-

[76] 5 U.S.C. § 631 (Supp. 1955)

[77] 64 Stat. 476 (1950), 5 U.S.C. § 22-1 - 22-3 (1952). The relevant provisions are:

"That notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), as amended (5 U.S.C. 652), or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense . . . Army . . . Navy . . . Air Force . . . Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee . . . (of his agency or department): *Provided,* That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may . . . terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security . . . and such determination by the agency head concerned shall be conclusive and final." Section 1 also pro-

tive Order 9835. [78] Debate in the House revealed that Congress desired to extend and make permanent the authority some agencies had prior to 1950 to make summary security dismissals. [79] Under Public Law 733 an agency head may, at his "absolute discretion," suspend and dismiss an employee in the interest of national security. The reasons for such action may be given the employee "to the extent that such agency head determines that the interests of national security permit." The act specifies certain procedures for an employee who has a "permanent or indefinite" appointment and has completed his probationary period. He is authorized to have the reasons for the charges (if *security considerations permit*), an opportunity to reply within thirty days, a hearing at his own request, a review of his case by the agency head or some person designated by the head and a written statement of the decision of the agency head. It is important to note that the written charges "shall be stated as specifically as security considerations permit." Thus the employee is authorized to know the case against him *only* to the extent that his agency head believes security concerns allow. Hearing and review in such cases are a matter of statutory right, unlike the Lloyd-LaFollette and Veterans' Preference Acts.

The statute specifically names some eleven agencies authorized to employ the summary dismissal procedures. It also provides that the President may "from time to time" extend its provisions to such other agencies as he may deem necessary in the

vided that such an employee shall have a written statement of the charges within thirty days after suspension; a review by the agency head or some agency designated by the agency head before an adverse decision shall be final; and a "written statement of the decision of the agency head. . . ." This section also provides that "the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in other other department or agency of the Government" after the prospective employing agency has consulted with the Civil Service Commission. Section 3 provides that "this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress."

64 Stat. 476 (1950), 5 U.S.C. §§ 22-1-22-3 (1952). Section 14 of the Veterans' Preference Act of 1944 provides for the removal of preference eligibles only for causes that will promote the efficiency of the service and grants among other procedural guarantees the right of appeal to the Civil Service Commission whose decision is binding on the removing officer. 58 Stat. 390 (1944), as amended 5 U.S.C. § 865 (1952).

[78] See debate in the House, 96 Cong. Rec. 10015-36 (1950).

[79] Authority existed under 56 Stat. 1053 (1942) and various riders to appropriation bills such as 63 Stat. 456 (1950).

interests of national security. A provision authorizes re-employment of any person removed under the act's provisions, after "consultation" between the head of the agency proposing to re-employ the individual and the Civil Service Commission. During House debate this provision was included to satisfy members who favored giving removed employees a right of final appeal to the Civil Service Commission. It is expressly stipulated that this act modifies the Lloyd-LaFollette Act and the provisions of "any other law." Moreover, determination by an agency head to remove an employee "shall be conclusive and final."

In its opinion the Court limited itself to a narrow issue. "The question for decision here is not whether an employee *can* be dismissed on [loyalty and security] grounds but only the extent to which the summary *procedures* authorized by the 1950 Act are available in such a case." [80]

The Court noted that the government had established a loyalty program during World War II and that Executive Order 9835 had been in effect for nearly three years before the passage of Public Law 733. "Thus there was no want of substantive authority to dismiss employees on loyalty grounds . . . " [81] If the limited effect of the Court's decision is to be understood one should note the repeated emphasis the opinion places on the issue. If Congress had intended the summary *procedures* of this act to be employed to insure the *loyalty* of *all* employees regardless of the relationship of their positions to the national security, "rather than simply a desirable personnel policy to be *implemented under the normal civil service procedures*,"[82] (emphasis added) it would not have limited the application of the statute to selected agencies. Elsewhere the Court underscored the limitations of its decision by saying that it might be difficult to justify " . . . *summary* suspensions and unreviewable dismissals *on loyalty grounds*" for employees in *non-sensitive* positions. "In the absence of an immediate threat of harm to the 'national security,' the *normal dismissal procedures* seem fully adequate and the justification for *summary* powers disappears." [83] (emphasis added.) Presumably, "normal" dismissal procedures are those authorized by the Lloyd-LaFollette and Veterans' Preference Acts.

In holding that Cole's removal violated the Veterans' Preference

[80] Cole v. Young, 351 U.S. 536, 544 (1956).

[81] Ibid.

[82] Id. at 545.

[83] Id. at 546.

Act the Court based its reasoning on the legislative history of the act and the intent of Congress. In fact, it was very careful to avoid the constitutional issue of Presidential *versus* Congressional power to regulate employment of executive personnel. The majority said the issue turns on the meaning of "national security" as used in the act. Lacking legislative definition in express terms, the Court construed the phrase to mean ". . . only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare." [84] Thus, before using the summary dismissal procedures authorized by this act, it is necessary to determine that the employee occupies a position bearing a direct relationship to the national security so interpreted. The Court noted debates and reports of committees in both houses where it found intent to limit removal procedures under this statute to "sensitive" positions in the government. [85] The Court found further warrant for its interpretation in authorization for the President to extend the act to other agencies "from time to time". In view of previous legislation which this act amended or replaced, the Court thought it evident that Congress was concerned with only "sensitive" agencies. Congress had merely enumerated some of

[85] The statement of Rep. Edward H. Rees (R., Kan.) the ranking member of the Committe on Post Office and Civil Service, is typical: "One of the most important provisions of the legislation allows employees separated as security risks from agencies covered by this bill to be employed in non-sensitive Government agencies upon the approval of the Civil Service Commission." 96 Cong. Rec. 9618 (1950). Similar statements were made by other members of the House. Id. at 10020-24.

Cf. Hearings Before the Committee on Post Office and Civil Service of the House on H.R. 7439, 81st Cong., 2nd Sess., at 42-43, 60-61, 65, 67-74 (1950), where the assumption that the distinction between sensitive and non-sensitive agencies would be maintained is manifest. There was no debate to clarify the congressional intent in regard to the President's authority to extend the act to all agencies. The Senate did not debate the bill, although Sen. Saltonstall offered an extemporaneous explanation in behalf of the Committee on the Armed Services which had heard the bill. He said that it permitted summary dismissal on *loyalty* grounds with a right of appeal to the Loyalty Review Board of the Civil Service Commission. As Justice Clark pointed out in his dissent, however, some members of Congress were aware that the language of the act could be interpreted to extend the power of dismissal to every agency and position. Cole v. Young, 351 U.S. 536, 567 (1956).

[84] Id. at 544.

the agencies especially concerned with national security and had given the President power to add other agencies when circumstances dictated. Moreover, Congress would not, in the Court's view of the legislative history, have authorized the re-employment of dismissed personnel, if it had intended to embrace all positions with the act. Were the Court to accept the government's view of the act, it said, Public Law 733 would have superceded other personnel removal legislation in all but form.

In construing Executive Order 10450 the Court found the order did not require the agency head to make any determination that Cole's position was a sensitive one. The burden of proof must in such a case fall on the government, not the employee. The Court found that section 3 (b) of the order did distinguish between sensitive and non-sensitive positions, but only for determining the nature and scope of the investigation to be carried out in relation to such positions. This section did not, however, limit use of the summary removal procedures of Public Law 733 to sensitive positions. [86] It was the government's position that this statute authorized *summary* removals in security cases regardless of the nature of the position. This contention the Court did not accept, but in-

[86] Public Law 733 has not been applied so as to mean that every person in every executive agency occupies a sensitive position; this determination is for the discretion of the agency head. Mr. Philip Young was asked what would happen under Executive Order 10450 to an employee who has worked for an agency for a few years only to have his agency head notified that he is a chronic drunk or a sex deviate.

"Mr. Young: Well, it would depend entirely on what position the man holds.

Mr. Green: You mean that if he holds a sensitive position it would apply and if he holds a non-sensitive position it would not apply.

Mr. Young: It depends upon the relationship of the position to the national security.

Mr. Green: In terms of whether it is sensitive or non-sensitive?

Mr. Young: You might have a position which would have a direct relation to the national security which would not be classed as sensitive.

Mr. Green: In other words, there are circumstances in which individuals occupying a nonsensitive position, as that term is defined in the Executive order, may be dismissed as security risks under Executive Order 10450 because they are chronic drunks or sex perverts or something of that kind?

Mr. Young: I certainly do not subscribe to your definition as to why he was being fired. I was saying that it is certainly conceivable to me that you can have a position which would fall for adjudication under Executive Order 10450, section 8 (a), which was classified by the head of the agency

terpreted the act to authorize proceedings only in respect to sensitive positions.

In a brief dissent Justice Clark, joined by Justices Reed and Minton, opposed the majority because he thought the Court's opinion "raises a serious question of presidential power under Article II of the Constitution which it leaves entirely undecided." [87] Implicitly, he thought, the majority raised a question as to the President's constitutional power to authorize dismissal of executive employees on security grounds. The majority, he said, excused its avoidance of this issue on the ground that no contention had been made that the Executive Order might be sustained under the President's constitutional executive powers. Justice Clark considered it the business of the court to avoid constitutional questions whenever possible, but not to create them. He also thought the Court's construction of the act, limiting its procedures to sensitive positions, flew in the face of the express terms of the statute which provides for the removal of "any civilian officer or employee," not any civilian officer or employee in a sensitive position. He felt, moreover, that Congress had discussed and approved the President's interpre-

as nonsensitive and yet which could have a direct relationship to the national security.

Mr. Green: I see. Well, let us assume that an individual was dismissed because he was drunk or a sex pervert, not under Executive Order 10450 but rather under the authority or ordinary civil-service laws and regulations. Would this individual case turn up as a statistic in the Civil Service Commission's tabulation of individuals dismissed under the security order? . . . Mr. Young: I would go farther than that . . . As I testified before Senator Johnston's committee last year, I said probably the bulk of such terminations were made under civil-service regulations and procedures rather than Executive order 10450 ... (f) or this period of May 27, 1953, through last September, which is the most current figure I have unfortunately at the moment, 28,153 Federal civilian employees were fired for cause ... included ... are 3,002 persons who appear in the statistics ... (under) standards set forth in section 8 (a) of Executive Order 10450. . . ."

According to the testimony of Philip Young in the period from May 27, 1953, to March 11, 1955, 54 cases were processed pursuant to section I of Public Law 733. Of these cases 9 were resolved in favor of the employee and 29 against; 16 cases were closed without action and 11 were then pending. Hearings Before the Subcommittee on Reorganization of the Committee on Government Operations of the Senate on S.J. Res. 21, 84th Cong., 1st Sess., 530 (1955). For further illuminating testimony by Mr. Young, see his exchange with Sen. Humphrey, Id. at 537.

[87] Cole v. Young, 351 U.S. 536, 565 (1956).

tation of the act when he reported his actions to the houses as required by the terms of section 3 of Public Law 733. [88]

Once again, as in *Peters v. Hobby,* the Court has rendered a decision in a loyalty case giving government employees a victory that is more apparent than real. The Court has only very gently applied the brake to the loyalty-security program. It has said that there is ample *substantive* authority for effecting the removal of employees from *sensitive and non-sensitive positions* on loyalty and security grounds; Public Law 733 has in no way affected it. All this legislation does, according to the Court, is provide the executive with a *procedure* which may, at the discretion of an agency head, effect dismissal from sensitive positions in a highly summary manner. If the agency head decides national security requires it, he may dismiss an employee without giving reasons and he may face him with charges so vague as to reveal little of the government's case against him. The nub of this matter is that Public Law 733 was concerned with *procedures* to be used to protect the national security. Of course, it is important that the Court defined this term to mean that this act applies only to sensitive positions—those bearing a direct relation to the protection of this country from internal subversion and foreign aggression. The end result is that loyalty and security dismissals made from non-sensitive positions must be effected under the provisions of the Lloyd-LaFollette or Veterans' Preference Acts, if an employee is in the classified service. The Court certainly did not invalidate all of Executive Order 10450; it is basic authority for determining that removal for many enumerated causes relating to "security" shall be carried out by executive officers.

One wonders what inference can reasonably be drawn from holding that Cole was denied some beneficial right when he was erroneously removed under the provisions of Public Law 733 instead of the Veterans' Preference Act. Of course, it is fairly obvious that it is now necessary for executive agencies to designate sensitive positions explicitly in order to determine the applicable removal statute. Since, in the Court's view, Cole had been denied the protection of the Veterans' Preference Act, it is proper to ask what this protection amounts to. Obviously, a preference eligible has a statutory right to specific and detailed charges and final review of his case by the Civil Service Commission, but this guarantee may be a mere formalism if he is being removed under the provisions of section 8 of Executive Order 10450 which lumps together willy-nilly,

[88] See 99 Cong. Rec. 4511-43, 5818-5990 (1953).

pinks, prostitutes, perverts and paranoids as security risks. It has been the burden of this paper to demonstrate that unless the holding in *Kutcher v. Higley* is construed much in favor of the employee, civil servants in non-sensitive positions will be subjected to removal procedures even more summary than the ones applied to sensitive positions under Public Law 733. It begins to look as though the Veterans' Preference Act, long the *bete noire* of most public personnel experts, affords the only hope of protection for employees in non-sensitive positions.

In these circumstances the holding of *Kutcher v. Higley* stands as most important in relation to loyalty-security dismissals from non-sensitive positions. Should this decision weather any possible future challenge it means that preference eligible employees will at least be faced with specific and, apparently, detailed charges before they are dismissed. One of the anomalies of existing personnel legislation, however, is that under Public Law 733 an accused employee in a sensitive position has *a statutory* right to the ritual of a hearing and agency review of his case (regardless of whether the government makes very specific or wholly vague charges against him), while the employee in a non-sensitive position has *no statutory* right to either of these procedural safeguards. Obviously, an overhaul of the Lloyd-LaFollette and Veterans' Preference Acts is due on this count. Moreover, with the extension of the probationary period to three years before career or career-conditional appointments, there appears to be little or no protection for the beginning federal employee. [89]

It is not amiss to note that the majority again glossed over the constitutional issues. Aside from the fact that all the old matters of due process were not even hinted at, the majority, like bloodhounds without a sense of smell, ignored the separation of powers issue implicitly involved. It is fairly obvious that this act has been construed to limit the Executive's free choice of means in security removals. The Court has demonstrated a preference for statute over executive order. Surely such a choice raises the question whether the President has an unfettered discretion in directing removal of subordinates who seem clearly within the category of purely executive officers. It took no little judicial ledgerdemain for the Court

[89] See Nadelhaft v. United States, 132 Ct.Cl. 316, 131 F. Supp. 930 (1955). The new system for career-conditional and career appointments is provided for in 69 Stat. 700 (1955), 5 U.S.C. § 631 (Supp. 1956), and Executive Order 10577, 5 U.S.C. § 631 note (Supp. 1956) Cf. 5 C.R.F. § 02.4 and 2.301 (Supp. 1954).

to conclude that Executive Order 10450 was not intended to override the statute, but only to implement it.[90]

Speculation about judicial behavior is commonly said to be bootless, but one of the most intriguing aspects of this case is the unanimity of the majority's six members. The constitutional objections repeatedly raised in the past, especially by Justices Black and Douglas, evaporated in this case. Perhaps the majority feels it has said the final, practicable word on the issue.

III. A CRITIQUE

As Justice Frankfurter has said, "It is a familiar experience in the law that new situations do not fit neatly into legal conceptions that arose under different circumstances to satisfy different needs."[91] Certainly the loyalty-security programs have created new situations for which existing legal conceptions were not designed. Administrative abuses have forced some modification of the stiff principle that the courts cannot intervene in the executive management of personnel. The rule that public employment is not a right but a privilege amendable at the will of the government still

[90] See Cole v. Young, 351 U. S. 536, 557n.20 (1956). By way of contrast, although not for clarity, it is well to note the Court of Appeals dismissed the contention that the act required a distinction between sensitive and non-sensitive positions. It called the provision allowing the President to extend the act to all agencies entirely constitutional and refused to "venture into the intricacies of the executive-legislative relationship in respect to executive employees. . . . The policies to be pursued in the matter by Congress and the President are for them to determine, not for us." Cole v. Young, 226 F.2d 337, 340 (1955). Elsewhere the Court of Appeals expressed the view that the President's standard for retention (clearly consistent with the national security), attacked in the lower court by Cole, was reasonable under the statute "quite apart from the consideration that the President may have such power . . . as a part of the direct constitutional grant of 'executive power.' There is a line somewhere beyond which Congress cannot go in enacting prescriptions in respect to executive power over executive employees." Ibid. In dissenting, Judge Edgerton took the view that the provision of Public Law 733 requiring the agency head to give a dismissed employee a written decision of his determination required that the decision state the reasons for the outcome. That is, he construed the term in the generic sense in which it is usually employed in relation to court decisions; a decision contains not only a statement of the judgment, but also the reasons for reaching it. Id. at 343. Judge Edgerton also insisted that the distinction between sensitive and non-sensitive positions was evident.

[91] Dennis v. United States, 341 U.S. 494, 543 (1951).

stands, although some of its vigor was sapped in the *Wieman* case.[92] Both of these doctrines were developed and applied at a time when there was only a figurative handful of public employees and they provided no more than an occasional outcry against the injustices sometimes worked. But with the burgeoning bureaucracy of the welfare state and two generations of total war there are too many opportunities for injustice in the human relations of personnel management to leave every removal decision to the ultimate authority of administrative omniscience. Then, too, as long as big bureaucracy is a hated symbol of big government to the political right, the rage for political purity will go on.

It is quite clear that from the *Friedman* case forward the question as far as the federal courts are concerned has not been whether a loyalty-security program is legal, but rather, whether any restrictions are necessary to curb administrative abuses in the interest of justice. It is a striking coincidence that a similar attitude has recently developed in respect to "ordinary" civil service removals, although in dealing with both kinds of dismissals the courts have moved cautiously. It has been necessary for them to break new ground and *stare decisis* has not served them well. In fact only the privilege doctrine and the rule of judicial non-intervention are rooted in the soil of ancestral wisdom. In both the *Peters* and *Cole* cases the court failed to cite a single precedent relevant to the basic issues. Viewing the record of the last ten years it can be said that the courts have not moved significantly away from the practice of restricting judicial review of civil service removals to the interpretation of applicable administrative regulations and statutes. Nor have they yet adopted the view that administrative hearings granted to accused employees must be adversary in nature.

As long as this country remains in a posture of armed alert, anxiously guarding against the Communist world, the security virus

[92] Wieman v. Updegraff, 344 U.S. 183 (1952). The court said that although employees have no right to work for the state on their own terms such an idea does not permit the "facile generalization that there is no constitutionally protected right to public employment . . ." Id. at 191. Further: "We need not pause to consider whether an abstract right to public employment exists. It is sufficent to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Id. at 192. The crack in the privilege doctrine was further widened during the past term of the court in Slochower v. Board of Higher Education, 350 U.S. 551 (1956): "To state that a person does not have a constitutional right to Government employment is only to say that he must comply with reasonable, lawful and non-discriminatory terms laid down by the proper authorities." Id. at 555.

will produce endemic disease. Security regulations touching the lives of not only government employees, but also millions of Americans in private employment will be the order of the day. In such circumstances Justice Douglas' remarks on the importance of procedural due process are highly pertinent. "It is procedure that spells much of the difference between rule by law and rule by whim or caprice." [93] The voice of Justice Brandeis from a generation ago reminds us that in the "development of our liberty insistence on procedural regularity has been a large factor." [94] We can no longer afford the abusive luxury of mere ritualistic due process. The tale-bearers need be brought into the open—at least those who are not an integral part of the secret counterintelligence apparatus—before any man is forced to wear the government's "badge of infamy."[95]

[93] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 179 (1951).

[94] Burdeau v. McDowell, 256 U.S. 465, 477 (1921).

[95] Wieman v. Updegraff, 344 U.S. 183, 191 (1952). In the recent case of Parker v. Lester, 227 F.2d 708 (9th Cir. 1955), the court held the government's port security regulations a denial of due process because merchant seamen were not confronted with the witnesses against them. The District Court had merely directed the Coast Guard to confront suspected seamen with charges sufficiently specific to permit their possible refutation without revealing the government's sources of information. The Court of Appeals said that the need for shielding the government's witnesses was more an article of dogmatic faith than one of demonstrated truth. "Is this system of secret informers, whisperers and tale-bearers of such vital importance to the public welfare that it must be preserved at the cost of denying to the citizen even a modicum of the protection traditionally associated with due process?" Id. at 719. Significantly, according to a published news report, the Department of Justice decided not to appeal. N.Y.Times, Mar. 26, 1956, p.1, col. 2. Of course, these merchant seamen were not government employees, but they have no more constitutional right to employment than the government worker.

For evidence that employers' "blacklists" have been used, at least against scientists *denied clearance*, see the letter of M. Stanley Livingston, Chairman, Federation of American Scientists (not a proscribed organization!), Hearings Before the Subcommittee on Reorganization of the Committee on Government Operations of the Senate on S.J.Res. 21, 84th Cong., 1st Sess., 424 (1955), and his testimony. Id. at 414. Cf. Brown, Loyalty-Security Measures and Employment Opportunities, 11 Bulletin of the Atomic Scientists, 113 (1955), and Morgenthau, The Impact of the Loyalty-Security Measures on the State Department, 11 Bulletin of the Atomic Scientists, 134 (1955). See also Hattery, The Prestige of Federal Employment, 15 Public Adm. Rev. 181, 182 (1955) on the adverse impact of loyalty-security clearances on federal employment prestige. Cf. Chase, Security and Liberty, 55 (1955). See the testimony of M. Stanley Livingston, Hearings, Supra, 409:

> Confrontation of witnesses we think should be treated as a constitutional right. Even if it is not, the arguments for denying it are not im-

The consequences of being branded a security risk or disloyal are as destructive as they are real. We must recognize that in our complex industrial society a man must be able to seek employment, usually at the hands of others. A social outcast can no longer stake out a claim in the wilderness and survive by the toil of his muscles. In such circumstances no man should be cast into darkness unless those who sit in judgment have more than a mere doubt of his worthiness. "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure."[96] At a time when approximately one person out of every ten gainfully

> pressive. In a very few cases these witnesses are paid informers or under cover agents whose identity must be kept secret. Most witnesses (landladies, et cetera) can be called without exposing essential secrets of the investigation agency. Yet very few have been called in any cases heard to date. This is the situation, despite President Eisenhower's direct statement that the accused must have 'the right to meet your accuser face to face.'

More recently the Special Committee on Communist Tactics, Strategy and Objectives of the American Bar Association got at least one leg cautiously over the fence with the following statement relative to the faceless informer: "There has been a marked movement, (1) against the use of such undisclosed information, and (2) compelling disclosure of source and confrontation. It is the view of this committee that while the necessity for such use of undisclosed information should be carefully guarded against and avoided wherever possible, nevertheless, in the ultimate determination, the national security must prevail.

The individual rights must be respected and preserved to the extent consistent with national security. However, one who by his own conduct has created *a doubt as to his loyalty* to this country should not expect the Nation, or its responsible officials, to gamble national security on his continued status or on a confidence in him which does not exist." (emphasis added) 102 Cong. Rec. A2051 (daily ed. Mar. 5, 1956).

For the case of Sidney Hatkin, see N.Y. Times, May 7, 1956, p. 15, cl. 1, N.Y.Times, May 8, 1956, p.14, cl.4. Cf. Fund for the Republic, Case Studies in Personnel Security (Yarmolinsky, ed. 1955); Blank, Security Risk, Look, May 17, 1955, 25; Curtis, The Oppenheimer Case, (1955); Mason, Security Through Freedom, (1955); O'Brian, National Security and Individual Freedom, (1955); Hollander, Crisis in the Civil Service, (1955); and Society for Personnel Administration, The Federal Career Service 15 (Goode ed. 1954).

[96] Truax v. Raich, 239 U.S. 33, 41 (1915). Although this doctrine was laid down with respect to state power under the fourteenth amendment, the Supreme Court has also said: "The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . . But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

employed works for government in the United States such employment must be considered one of the "common occupations of the community." There is something stuffy about saying that government employment is a privilege.

It is to be hoped that the vast resources of corporate scholarship which have marked the recent report of the Bar Association of the City of New York [97] will be heeded by the executive and legislative branches of the government. The responsibility lies primarily with them. But it does not serve our traditions of fair play well to have the courts refuse to intervene in loyalty-security cases because the separation of powers forbids judicial interference with executive matters. The Bill of Rights is in the Constitution, too, and nowhere does it distinguish government employees from other "persons." There is, of course, a very great measure of wisdom in Justice Frankfurter's plea for judicial restraint. "Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society . . . History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." [98] Nevertheless, ethical values bred into the bone and marrow of the Anglo-Saxon tradition cannot be offered as timid sacrifices on the altar of political expediency. In our democratic society the judiciary has a noble calling which Justice Cardozo once stated with simple beauty:

> The great ideals of liberty and equality are preserved against the assaults of opportunism, the expedience of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders.[99]

[97] Report of Special Committee of the Association of the Bar of the City of New York, The Federal Loyalty-Security Program (1956). The recommendations are summarized in N.Y. Times, July 9, 1956, p. 18, col. 2.

[98] Dennis v. United States, 341 U.S. 494, 525 (1951).

[99] Cardozo, The Nature of the Judicial Process 92 (1921). To urge the adoption of this point of view is not to say that it has always prevailed with the Supreme Court, of course. See Sklar, The Fiction of the First Freedom, 6 Western Pol. Q. 302 (1953); Prichett, Civil Liberties and the Vinson Court, 239 (1954); Frank, Review and Basic Liberties, Supreme Court and Supreme Law 109-36 (Cahn, ed. 1954). It should be said in defense of the Supreme Court that its decision in United States v. Lovett, 328 U.S. 303 (1946) had the desireable effect of denying Congress entree into a lush position by removing "subversive" executive employees through the power of the purse.