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INTRODUCTION

In this post World War II period it is increasingly evident that the East is taking advantage of the weaknesses of the Western nations by utilizing political and economic pressure tactics as well as military force. One of the most effective methods of applying such pressure is that of subversive activity. The ability to control subversive activity and thereby resist one form of political and economic pressure is as much a sign of national strength as the ability to resist military force.

THE AUTHOR (B.S., M.A., Ph.D., Cornell University) is Assistant Professor of Political Science, Western Reserve University.

Controlling subversive activity in democratic countries presents a two-sided problem. On the one hand, the democratic creed and procedures invite internal subversion. Free speech, the right to assemble, and the right to move about the country without first obtaining a permit from the police provide a favorable environment for those who wish to engage in disloyal acts. On the other hand, democratic countries would be defeating their own objectives if they resorted to totalitarian techniques in their attempt to curb internal subversion.

The scope of this paper will be limited to an examination of this basic democratic dilemma as it has been manifested in the federal government's civilian employee loyalty-security program.[1] The thesis of this paper is that the federal loyalty program has become so intertwined with narrow partisan politics that traditional American values in general and civil liberties in particular have been endangered. The program will be examined

1. "There are now several personnel security programs. One is the program for Federal civilian employees under Executive Order 10450, which is applicable to 2,300,000 persons. A second is the Industrial Security Program of the Department of Defense. It covers the nearly 3,000,000 persons who, as employees of contractors with the military departments, have access to classified information. A third program is that of the Atomic Energy Commission, which extends to its own employees and to those of its contractors' employees who have access to classified information. They come to about 80,000 persons. Then there is the Port Security Program which applies to about 800,000 seamen and longshoremen. Finally, there is the International Organization Employees Program which extends to over 3,000 Americans in the employ of these organizations." REPORT OF THE SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 4 (1956). This brief report on the Eisenhower loyalty program is here presented to show the breadth of the loyalty program under one administration. This paper, however, will be concerned with only the first type of program mentioned in the report, the federal civilian employee loyalty-security program. And the scope of its examination will not be confined merely to the Eisenhower period but will include the years from 1939 to the present.

during three specific periods: the period beginning in 1938 and ending during the spring of 1947; the period between the spring of 1947 and the close of President Truman's administration in 1952; and the period beginning with President Eisenhower's administration to the present.

HISTORICAL BACKGROUND

Although the history of the civilian employee loyalty-security program now in operation is generally considered to have begun with the Hatch Act in 1939,[2] executive and legislative concern with the problem of loyalty appeared during both the Revolutionary and Civil Wars.[3] During these two wars tens of thousands of Americans were involved in loyalty controversies.[4] At the time of the American Revolution, there was anxiety in the Continental Congress over loyalist activities in the South and in some northeastern strongholds of Toryism, such as New York.[5] In 1776 Congress made up a list of persons who were declared to be outside the protection of the United Colonies and forbade trade and intercourse with those listed.[6] In 1778 Congress established a loyalty test to be administered to all civil and military officers in order to "prevent persons disaffected to the interest of the United States from being employed in any of the important offices thereof."[7] This loyalty test was ultimately considered a failure, for American traitors of the time had been fully sworn to loyalty by its formula.[8]

In the Civil War, loyalty-testing occurred both in the North and the South.[9] "Loyalty was a factor in the lives of millions, second only to the paramount fact of the war itself."[10] In the South no loyalty tests were developed other than those imposed by the local police.[11] In the North, however, Lincoln suspended the writ of habeas corpus soon after the war began, and Northern police and army officials arrested hundreds of suspected civilians on the general charge of disloyalty.[12] Government employees were required to re-swear their oaths of allegiance,[13] and each

2. Hatch Political Activity Act, 53 Stat. 1148 (1939), 5 U.S.C. § 118(i) (1952) [hereinafter referred to as the Hatch Act].

3. HYMAN, TO TRY MEN'S SOULS 23-61, 139-219 (1959).

4. *Id.* at 329.

5. Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 ILL. L. REV. 81 (1908).

6. *Id.* at 86.

7. HYMAN, TO TRY MEN'S SOULS 82 (1959).

8. *Id.* at 84.

9. *Id.* at 139.

10. *Ibid.*

11. *Id.* at 139.

12. *Id.* at 140.

13. *Id.* at 154.

cabinet officer was given discretion to add to the oath requirements.[14] Federal employees who refused to swear to such oaths were denied their salaries.[15] Those dismissed for disloyalty usually went to jail.[16] Moreover, there was no rule or standard providing the accused employees with the opportunity to seek redress. If an employee could not convince the bureau head or other high official of his loyalty, he was without remedy, for there was no appeal to the courts.[17]

The ultimate rationale for the rigorous program of military arrests and detention was made by Lincoln himself in 1863:

> The military arrests and detentions . . . have been for *prevention,* and not for *punishment* as injunctions, to stay injury, as proceedings to keep the peace — and hence, . . . they have not been accompanied with indictment, or trials by juries, nor in a single case by any punishment whatever, beyond what is purely incidental to the prevention.[18]

The same rationale of "prevention" could be made to justify the arbitrary dismissal of federal employees.

Between 1865 and the beginning of World War I the national interest did not call for a federal loyalty program or for the investigation of subversive conduct on the part of federal employees. In fact, Civil Service Rule VIII forbade questions calling "for the expression or disclosure of any political . . . opinion or affiliation, and if such opinion or affiliation be known, no discrimination shall be made by reason thereof by the examiners, the Commission or the appointing power."[19] Character examinations were made by the Civil Service Commission, but loyalty was presumed if character was found to be good.[20] Indeed, the very purpose behind the adoption of the Civil Service Act in 1883 was to exclude the personal and political beliefs of an applicant.[21] This policy was maintained without any significant breach until World War I.

During World War I there were more than 2,500 indictments under security statutes, mostly under the Espionage and Sedition Acts.[22] There was also a specific federal loyalty-employment program.[23] Like Lincoln, Wilson insisted on executive leadership of the war effort despite the de-

14. *Ibid.*
15. *Ibid.*
16. *Id.* at 155.
17. *Ibid.*
18. *Id.* at 141.
19. Civil Service Act, 22 Stat. 403 (1883), 5 U.S.C. §§ 632, 633, 635, 637, 638, 640, 642 (1958).
20. *Ibid.*
21. *Ibid.*
22. Espionage Act, 40 Stat. 217 (1917); Sedition Act, 40 Stat. 553 (1918).
23. HYMAN, TO TRY MEN'S SOULS 268, 329 (1959).

mands of Congress for control.[24] Four days after war was declared, Wilson obtained authority from Congress to establish loyalty standards for all civil servants.[25] Under this authority the Civil Service Commission assumed the power to refuse all applications for employment "if there was a reasonable belief that appointment was inimical to the public interest owing to lack of loyalty."[26] A total of 135 loyalty investigations were conducted in 1917, and 2,537 in 1918.[27] There were 660 dismissals.[28] However, only a small percentage of the total number of federal workers were actually affected by this program.[29] There were many agencies not under commission control,[30] and federal departments employed tens of thousands of workers outside civil service procedures.[31] Thus, the program was only partially effective.

Subsequent to World War I, government workers were protected against removal from their positions without explanation by the procedural provisions of the Lloyd-LaFollette Act[32] and the Veterans' Preference Act.[33] Under the former act, classified service employees could only be dismissed to promote the efficiency of the service.[34] Although the Act provided that "no witness nor any trial or hearing shall be required except in the discretion of the officer making the removal,"[35] it did require that prior to dismissal the employee be presented with a written statement of the charges against him and be given a reasonable time in which to answer the charges in writing.[36] The Veterans' Preference Act provided that preference eligibles be given thirty days in which to reply to charges,[37] and provided further that the charges themselves must state "any and all reasons, specifically and in detail, for any such proposed action."[38] Although these acts are still in effect today, the extent of their coverage has been modified both by executive order and legislative enactment.[39]

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24. *Id.* at 268.
25. *Ibid.*
26. *Id.* at 269.
27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. *Ibid.*
31. *Ibid.*
32. 37 Stat. 555 (1912), 5 U.S.C. § 652 (1952) [hereinafter referred to as the Lloyd-LaFollette Act].
33. 58 Stat. 390 (1949), 5 U.S.C. 863 (1952).
34. Lloyd-LaFollette Act § 6, 37 Stat. 555 (1912), 5 U.S.C. § 652(a) (1952).
35. *Ibid.*
36. *Ibid.*
37. 58 Stat. 390 (1949), 5 U.S.C. § 863 (1952).
38. *Ibid.*
39. See discussion in text *infra.*

1938 TO 1947: THE DIES COMMITTEE

In 1938 Congressman Martin Dies used the House Committee on Un-Amerian Activities (of which he was chairman) as "the forum for his attack on Government employees as Communists or Communist sympathizers."[40] The year 1938 also marked the adoption of the united front policy by world communism,[41] and Communists the world over joined forces with reformers and liberals to work for common objectives.[42] For example, if liberals were to work for a policy of no discrimination in employment, then the Communists were to join their movement and work with them. Perhaps this united front policy of the Communists added to the difficulties Congressmen Dies encountered when he attempted to make a distinction between liberals and Communists. Furthermore, as he was unable to obtain lists of Communist Party members, Dies simply lumped Communists and reformers together, implying that if one Communist was in an organization, then all others in the group must be either Communists or Communist sympathizers.[43]

The adoption of such a policy was not without political motivation. In 1939 Earl Browder, onetime National Chairman of the Communist Party in America, testified before the Dies Committee to the effect that any group which the Communists even attempted to infiltrate could be called a "transmission belt" for subversive information to Moscow.[44] Thereafter the Committee read into the record the names of Roosevelt cabinet members and other high officials "who had sent greetings to or spoken before meetings of these groups."[45] Under the circumstances, it is not surprising that:

> . . . the result of these proceedings was to implant firmly in the minds of the members of the Roosevelt Administration and of liberals throughout the country the conviction that the purposes of the Dies Committee were chiefly political and had little to do with a genuine search for subversion but much with partisan attack upon the Administration.[46]

Although unable to convince the administration that a problem of subversion existed, Dies was able to get some support from Congress in the form of the Hatch Act passed in 1939.[47] The Hatch Act was designed primarily to control corrupt politics in the civil service by forbidding government employees from engaging in politics. The Act was

40. BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 8 (1953). See also Emerson & Helfeld, *Loyalty Among Government Employees*, 58 YALE L. J. 1 (1948).

41. BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 8 (1953).

42. *Ibid.*

43. GELLERMAN, MARTIN DIES 102, 103 (1944).

44. OGDEN, THE DIES COMMITTEE 135, 136 (1945).

45. BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 8, 9 (1953).

46. *Id.* at 9.

47. 53 Stat. 1148 (1939), 5 U.S.C. § 118(i) (1952).

amended from the floor to include section 9-A, which forbade the employment of any person who was *currently* a member of "any political party or organization which advocates the overthrow of our constitutional form of government."[48] At this time Congress also passed a rider to the appropriation bill for the Emergency Cargo Ship Construction Act which forbade the use of monies appropriated "to pay the salary or wages of any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence."[49] Similar language has been incorporated in subsequent appropriation acts. Congress also enacted legislation permitting the so-called secret agencies to dismiss suspected employees without going through the regular civil service procedures.[50]

These statutes compelled executive action with regard to a loyalty program. Under presidential authority, the task of keeping subversives out of the government rested with the Civil Service Commission in so far as new applicants were concerned.[51] All applicants were to fill out a long questionnaire; if facts of a suspicious nature were uncovered, a detailed investigation was ordered.[52] The Commission also issued Circular No. 222 on June 20, 1940, by which members of "the Communist Party, the German Bund, or any other Communist, Nazi or Fascist organization" could be removed by agency heads under Rule 12, which permitted removals "to promote the efficiency of the service."[53]

The task of finding subversives among those already employed was delegated to each of the agencies of the government.[54] Upon the request of an agency, the Department of Justice conducted investigations, but keeping within the terms of section 9-A of the Hatch Act and the appropriation bill rider, the department limited its reports to a determination of membership in an organization which advocated the overthrow of the government.[55]

The Attorney General cooperated with the Dies committee as well as with agency heads in expediting loyalty cases.[56] Dies submitted to the Attorney General a list of 1,121 names of persons who he said were disloyal.[57] But out of this long list, only two were ultimately dismissed.[58]

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48. 53 Stat. 1148 (1939), 5 U.S.C. § 118(j) (1952).
49. 55 Stat. 5 (1941), 46 U.S.C. § 1119(a) (1958).
50. 54 Stat. 713 (1940).
51. Civil Service War Service Regulations, 7 Fed. Reg. 7723 (1942).
52. *Ibid.*
53. Quoted in BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 285-87 (1953).
54. Emerson & Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1, 15 (1948).
55. *Id.* at 16.
56. Letter from the Attorney General, H.R. DOC. NO. 833, 77th Cong., 2d Sess. 9 (1942).
57. BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 10 (1953).

To Congress, the final action taken on the Dies Committee list seemed like a whitewash for the benefit of the Executive.[59]

On February 5, 1943, President Roosevelt further implemented the loyalty program when he issued Executive Order 9300, "Establishing the President's Interdepartmental Committee within the Department of Justice to Advise the Agencies in Connection with Complaints of Subversive Activities on the Part of Government Employees."[60] This interdepartmental committee also defined subversive activity in terms of the definition contained within the Hatch Act.[61] It set up a procedure for the Department of Justice and the agencies to follow in their investigations, circulated instructions on the use of the FBI reports that were given to the agencies when they requested them, and acted as a review board.[62]

However, Congressman Dies remained dissatisfied with the response of the Administration. He charged the President with glossing over the Communist menace in that findings of disloyalty were not made in regard to all of the names submitted to the Attorney General.[63] Dies this time turned to Congress.

On February 1, 1943, Dies spoke in Congress for two hours charging that thirty-nine federal employees were "irresponsible, unrepresentative, crackpot, radical bureaucrats" and were members of "communist front organizations" as well.[64] He claimed that all thirty-nine persons were, at that time, working for the Treasury and Post Office Departments, and he urged that the House pass a rider to the Treasury-Post Office Appropriation Bill, then under consideration, to the effect that none of the monies appropriated be used to pay the salaries of the thirty-nine employees.[65] However, it was discovered that of the thirty-nine only one was employed by either of the two departments he had designated, and

58. H.R. Doc. No. 833, 77th Cong., 2d Sess. 9 (1942).

59. Testimony of Arthur Fleming, *Hearings on the Independent Offices Appropriation Bill for 1945 Before a Subcommittee of the House Committee on Appropriations*, 78th Cong., 2d Sess. 1082 (1944).

60. 8 Fed. Reg. 1701 (1943).

61. Section 9(A) of the Hatch Act, 53 Stat. 1148 (1939), 5 U.S.C. § 118(j) (1952), referred to those having "membership in any political party or organization which advocates the overthrow of our constitutional form of government. . . ." Bontecou points out that the interdepartmental committee ". . . limited its work to cases in which there was credible evidence of membership in organizations authoritatively held to be subversive or of personal advocacy by the accused employee of the overthrow of the Government by force and violence. The committee recognized that other matters which would warrant discharge of an employee, including primary allegiance to a foreign power, might be uncovered by the investigation. It concluded that these matters were not covered by the Hatch Act and must be dealt with directly by the employing agency since they were outside the province of the Interdepartmental Committee." BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 19 (1953).

62. Exec. Order No. 9300 § 9, 8 Fed. Reg. 1701 (1943).

63. H.R. Rep. No. 2748, 77th Cong., 2d Sess. 1-16 (1943).

64. 89 Cong. Rec. 474, 486 (1943).

65. 89 Cong. Rec. 486 (1943).

this one was a Negro.[66] Among other charges, one of discrimination was raised against Dies.[67] As a result, the House passed a resolution authorizing the Appropriations Committee to establish a subcommittee under the chairmanship of Congressman Kerr to examine the charges.[68]

Instead of submitting all thirty-nine cases to the Kerr subcommittee, Dies gave it only nine names.[69] Of these, the subcommittee found only three men to be guilty of "subversive activity within the definition adopted by the Committee."[70] Section 304 was then added as an amendment to the Urgent Deficiency Appropriation Act of 1943, prohibiting the payment of salaries to the three men after November 15, 1943, unless prior to that date they were again appointed to their jobs by the President with the consent of the Senate.[71] The President reluctantly signed the Act, because passage of this legislation was urgently needed for the war effort.[72] The three men were, however, retained by the agencies as neither the agencies nor the President desired their dismissal.[73] Thereafter, the three men, Lovett, Watson, and Dodd, brought suit in the Court of Claims for compensation for the time worked subsequent to November 15, 1943.[74] They contended that section 304 was unconstitutional as a bill of attainder, as an interference by the legislative branch with the authority of the executive, and as a denial of due process under the fifth amendment. After the Solicitor General joined the dismissed employees in the first two of these contentions, Congress appointed a special counsel to appear on its behalf. The argument of Congress was that section 304 was a valid exercise of Congressional authority under its power to lay and collect taxes, that it involved simply an exercise of congressional powers over appropriations which were not subject to judicial review, and that no justiciable controversy had been raised. The Court

66. William Pickens was the only Negro whom Dies named in his two hour indictment of February 1, 1943. 89 CONG. REC. 474-83 (1943). On February 8, Dies spoke of Pickens again, charging him with perjury. 89 CONG. REC. 698-701 (1943). At the conclusion of Dies' attack Representative Knutson rose to his feet charging Dies with racial discrimination. 89 CONG. REC. 702 (1943). Three days previously the House had voted to exclude only Pickens from employment, by means of a House appropriations bill. 89 CONG. REC. 657 (1943). Knutson brought an indictment against the entire House: "[w]hen the name of this man Pickens came up, a colored man, a descendant from people who were brought here in chains and against their will, brought here in servitude, this great body singled out a poor colored man for punishment and practically gave what amounts to a whitewash to the 37 white companions who were equally or more guilty. My God, that is almost lynch law." 89 CONG. REC. 702 (1943).

67. See note 66 *supra.*

68. 89 CONG. REC. 709 (1943) (remarks of Representative Cannon).

69. See OGDEN, THE DIES COMMITTEE 275-76 (1945).

70. H.R. REP. NO. 448, 78th Cong., 1st Sess. (1943).

71. Urgent Deficiency Appropriation Act § 304, 57 Stat. 431, 450 (1943).

72. See United States v. Lovett, 328 U.S. 303, 313 (1946).

73. *Id.* at 305, 313.

74. *Id.* at 305.

of Claims held against Congress.[75] On certiorari, the Supreme Court of the United States affirmed.[76] The Court held that section 304 was not merely an appropriations measure or "a mere stoppage of the disbursing routine,"[77] but was in fact a permanent bar from federal employment and thus presented a justiciable controversy. The Court said that the employees' contracts with the government were actually breached, and, therefore, section 304 of the Appropriation Act was subject to judicial review.

Then the Court considered some of the constitutional questions raised in the Court of Claims, although it managed to avoid the issues of separation of powers and due process. Instead, the Court found that section 304 operated as a legislative decree of perpetual exclusion and as such was a punishment of named individuals without a trial. The Court held section 304 to be a bill of attainder prohibited by the Constitution.

Since section 304 was held to be a bill of attainder, it was not necessary to decide whether it also constituted an interference by the legislative branch with the authority of the executive branch. The effect of the decision was, however, to prohibit interference of this nature. The Court also stated that "section 304 . . . does not stand as an obstacle to payment of compensation to Lovett, Watson and Dodd."[78] Compensation was the only relief asked for by these employees; they had not brought suit for reinstatement. Had the dismissed employees sought and been granted reinstatement, the significance of a decision in their favor as an effective bar against legislative interference with the authority of the executive would have been even stronger. In reality, the Court had resolved on narrow constitutional grounds (bill of attainder) a question of far-reaching import involving the relationship of the executive and legislative branches. As for Congressman Dies, the Supreme Court's decision should have led many to believe that he had used the term "subversive" as a weapon in his fight with those who held political views different from his own.

The World War II phase of the federal loyalty program may be considered to have ended on November 25, 1946, when President Truman issued Executive Order 9806 which created the President's Temporary Commission on Employee Loyalty to review the effectiveness of the administration's loyalty program.[79] At that time the President determined that the government security program lacked uniformity in administra-

75. Lovett v. United States, 66 F. Supp. 142 (Ct. Cl. 1945).
76. United States v. Lovett, 328 U.S. 303 (1946).
77. *Id.* at 313.
78. *Id.* at 318.
79. Exec. Order No. 9806, 11 Fed. Reg. 13863 (1946).

tion because each agency followed its own procedure.[80] In retrospect it appears that the President's concern for uniformity of standards revealed a broader concern for a fair and effective loyalty program. The President later wrote:

> It is one of the tragedies of our time that the security program of the U.S. has been wickedly used by demagogues and sensational newspapers in an attempt to frighten and mislead the American people. . . . The McCarthys, the McCarrans, the Jenners, the Parnell Thomases, the Veldes have waged a relentless attack, raising doubts in the minds of people about the loyalty of most employees in government. . . .[81]

President Truman wanted to create a new and intelligent loyalty program which would meet the increased Soviet threat and which would at the same time restore the confidence of the country in the government and the government employee.[82] Subsequent events would prove how successful he was in achieving these two goals.

1947 TO 1952: THE TRUMAN LOYALTY PROGRAM

Executive Order 9835, issued by President Truman on March 21, 1947, established the first comprehensive loyalty program for federal employees.[83] The basic provisions of the executive order including those recommended by the Temporary Commission on Employee Loyalty,[84] were as follows:

(1) All applicants for government jobs were to be screened by the Civil Service Commission.
(2) Those already employed by the government were to be screened by the agency for which they worked.
(3) When these initial investigations turned up derogatory information, full field investigations were to be instituted, with the help of the FBI.
(4) Applicants for certain sensitive positions were to be given full field investigations automatically.
(5) Agency heads were given the responsibility for weeding out the disloyal. (Ultimately some 150 loyalty boards were established in the various agencies.)
(6) Accused persons were entitled to a hearing before the board at which they were permitted counsel, they were permitted to produce witnesses and affidavits, and were to be notified in writing of the charges against them.
(7) The Civil Service Commission was to establish a Loyalty Review Board superior to the agency boards; the accused had the right to appeal to it.

80. 2 TRUMAN, MEMOIRS 279 (1956).
81. *Id.* at 284.
82. KOENIG, THE TRUMAN ADMINISTRATION: ITS PRINCIPLES AND PRACTICE 59 (1956).
83. Exec. Order No. 9835, 12 Fed. Reg. 1935 (1947).
84. BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 26 (1953).

This program was modified somewhat by Congress in 1950.[85] Until that year President Truman had sought a middle ground. He had attempted to remove the loyalty program from politics and had appointed prominent Republicans to the Loyalty Review Board and to investigating committees.[86] He had tried to guarantee the loyalty of the government worker to the public and in so doing had resisted attacks from both the House and Senate — he had even gone so far as to refuse to turn over his records to the House Un-American Activities Committee.[87] Nevertheless, pressures from the conservatives in Congress and the changed political climate brought about by the Korean War resulted in legislation modifying the Truman loyalty-security program.[88]

The Act of August 26, 1950, Public Law 733 of the 81st Congress, authorized a summary suspension of those employees working in some eleven "sensitive" agencies who were considered by the agency heads to endanger "national security."[89] With regard to suspensions under this law there was no right to a hearing nor to an appeal[90] although provision was made for a hearing prior to dismissal at the discretion of the agency.[91] Furthermore, section 3 authorized the President to extend the list of sensitive agencies, from time to time, when necessary in the best interests of national security.[92]

The basic standard of Executive Order 9835 used to determine disloyalty was that "on all the evidence, *reasonable grounds exist for the belief* that the person involved is disloyal to the Government of the United States."[93] This standard was amended on April 28, 1951 by Executive Order 10241.[94] The same pressures which had brought about the enactment of Public Law 733 were forceful enough now to require a stricter and more rigorous standard in the executive order itself.[95] As amended, the standard to be applied was whether, "on all the evidence,

85. 64 Stat. 476 (1950), 5 U.S.C. §§ 22-1 — 22-3 (1952). [Hereinafter referred to as Public Law 733]. This act gave authority to eleven sensitive agencies to suspend summarily employees who were considered by these agencies to endanger national security.

86. 2 TRUMAN, MEMOIRS 290 (1956).

87. KOENIG, THE TRUMAN ADMINISTRATION: ITS PRINCIPLES AND PRACTICE 59, 63 (1956).

88. See debate in the House of Representatives, 96 CONG. REC. 10015-36 (1950).

89. 64 Stat. 476 (1950), 5 U.S.C. § 22-1 — 22-3 (1952). The following agencies were considered sensitive: Department of State, Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, and National Advisory Committee for Aeronautics.

90. Public Law 733, § 1, 64 Stat. 476 (1950), 5 U.S.C. § 22-1 (1952).

91. *Ibid.*

92. Public Law 733, § 3, 64 Stat. 476 (1950), 5 U.S.C. § 22-3 (1952).

93. Exec. Order No. 9835, Pt. V (1), 12 Fed. Reg. 1935, 1938 (1947) (emphasis added).

94. Exec. Order No. 10241, 16 Fed. Reg. 3690 (1951).

95. See note 92 *supra.*

there is a *reasonable doubt* as to the loyalty of the person involved to the Government of the United States."[96] The distinction in the application of these two standards was clarified in *Service v. Dulles*.[97]

John S. Service, a career Foreign Service Officer, was accorded successive clearances in the years 1945, 1946, 1947, and 1949 by the State Department's Loyalty Review Board. However, in 1950 the Loyalty Review Board of the Civil Service Commission ordered a post-audit under the more stringent "reasonable doubt" standard of Executive Order 10241 and, after a hearing, found that there was reasonable doubt as to his loyalty.[98] Thus, Service was discharged by Secretary of State Acheson as a loyalty risk under the second executive standard whereas he had been cleared under the first. Although later this dismissal was struck down by the Supreme Court of the United States on other grounds, the applicability of the two standards as discussed here was not questioned.[99]

Executive Order 9835 also provided that, in connection with the determination of disloyalty, the administrative tribunal charged with the execution of the program might take into consideration membership in or affiliation with a group designated by the Attorney General as Communist.[100] It was the practice of the Attorney General to list organizations found by him to be Communistic without giving such organizations notice or hearing.[101] The list was transmitted to the Loyalty Review Board and disseminated by the Board to all government departments and agencies for use in administrative proceedings under the program.[102]

The discharge of employees on grounds of disloyalty under Executive Order 9835 was sustained against various constitutional objections in *Bailey v. Richardson*[103] and in *Washington v. McGrath*[104] although the government's informants did not appear either in person or by affidavit and the administrative order was based on evidence not disclosed to the employees charged. On the other hand, the organizations which, without notice or hearing, were designated as Communist by the Attorney General and placed on his proscribed list, were held in *Joint Anti-Fascist Refugee Committee v. McGrath*[105] to have standing to sue the Attorney

96. Exec. Order No. 10241, 16 Fed. Reg. 3690 (1951) (emphasis added).

97. 354 U.S. 363 (1957).

98. *Id.* at 366.

99. The Court held that Service's discharge was in violation of the Loyalty and Security Regulations of the Department of State and that the Secretary was bound by these Regulations.

100. Exec. Order No. 9835, Pt. V (2) (f), 12 Fed. Reg. 1935, 1938 (1947).

101. BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 37 (1953).

102. Exec. Order No. 9835, Pt. III (2), 12 Fed. Reg. 1935, 1938 (1947).

103. 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).

104. 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).

105. 341 U.S. 123 (1951).

General for the purpose of showing that they were not, in fact, Communist groups.

The *Bailey* case[106] defines the judicial approach to the constitutional problem which regards the rights of the individual employee as opposed to those of the group. Miss Bailey held membership in several organizations on the list of the Attorney General. Although she was permitted to present witnesses in her behalf, she was not confronted with specific charges nor was she permitted to confront her accusers and cross-examine them. Although the court invalidated her three-year bar from the federal service on the ground that it was a punishment applied to an individual and thus subject to the rule in the *Lovett* case,[107] the court denied that any other constitutional right had been abridged:

> 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 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.[108]

The rationale for this approach was as follows: since the President had responsibility for the employee, the courts did not have the right to intervene when the President dismissed a suspect employee, even if this removal action caused injury to the employee. Nor could the employee complain, for he did not have a right to federal employment; rather a government job was a privilege held at the discretion of the executive. Consequently, the court in the *Bailey* case denied that dismissal from government service on loyalty grounds was a punishment *requiring a jury trial* under the sixth amendment; denied that the due process clause of the fifth amendment required specific charges to be made, or granted the accused employee the right to confront and cross-examine witnesses; and denied that the first amendment bars discrimination against government employees because of their political views.

The same constitutional issues involved in *Bailey* were again raised in *Peters v. Hobby*,[109] but the Court rested its decision on other grounds. Dr. Peters, a physician in the Public Health Service, had twice been cleared by agency loyalty boards, first under the provisions of Executive Order 9835 and later under the less favorable standard of Executive Order 10241. Nevertheless, the Loyalty Review Board of the Civil Service

106. Bailey v. Richardson, 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).

107. United States v. Lovett, 328 U.S. 303 (1946).

108. Bailey v. Richardson, 182 F.2d 46, 65 (D.C. Cir. 1959), *aff'd by an equally divided court with Mr. Justice Clark not participating*, 341 U.S. 918 (1951).

109. 349 U.S. 331 (1955).

Commission ordered a post-audit of his case, and as a result, Dr. Peters was discharged. The Supreme Court of the United States ignored the constitutional issues but refused to uphold the dismissal because of an error on a procedural technicality.

Executive Order 9835 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. . . .[110]

The Court construed the executive order as authorizing an appeal from the findings of an agency board to the Loyalty Review Board merely "for an advisory recommendation."[111] As the Loyalty Review Board ordered the post-audit on its own motion and not when asked for a recommendation by either the agency or employee involved, the Court said the Loyalty Review Board had no jurisdiction to order dismissal. The doctrines set forth in the opinion in *Bailey v. Richardson* regarding the absence of specific charges and the denial of the right to confront the accusers were not questioned in *Peters v. Hobby* as they were not even considered. Rather the decision in *Peters v. Hobby* rested on the ground of the Loyalty Review Board's failure to comply with the literal terms of the Executive Order. Thus *Bailey* was still controlling, yet strict compliance with the provisions of the Executive Order was now mandatory. The aggrieved employee's principal remedy lay in challenging his dismissal as not complying with the Executive Order rather than in challenging the entire dismissal proceedings on constitutional grounds.

The Truman loyalty program remained intact in the face of constitutional challenge. In *Bailey* constitutional questions were subordinated to the privilege doctrine of federal employment, and the broad removal powers of the executive were sustained. *Peters* merely required strict statutory compliance. In *Joint Anti-Fascist Refugee Committee v. McGrath*,[112] the right to a hearing was provided for those organizations proscribed by the Attorney General. But federal employees still had no ground either for challenging the black-listing of organizations or for proving the innocence of their association with the blacklisted organizations.

Criticism of the Loyalty Program Under President Truman

Two major criticisms can be made of the loyalty program under President Truman. The first involves the use of information that a fed-

110. Exec. Order No. 9835, Pt. III (1) (a), 12 Fed. Reg. 1935, 1938 (1947).

111. Peters v. Hobby, 349 U.S. 331, 339 (1955).

112. 341 U.S. 123 (1951).

eral employee was a member of one or more organizations proscribed by the Attorney General. While membership in a proscribed organization was theoretically not conclusive proof of disloyalty,[113] the doctrine of "guilt by association" did emerge in the implementation of the program. Disloyalty was determined not only by the action and words of the federal employee himself but also by the action and words of those with whom he associated.

The second major criticism involves the burden of proof the accused employee was required to sustain in demonstrating his loyalty. This burden was all the more difficult to sustain when the employee was not permitted to confront his accusers or was not even told who they were. Often the members of the loyalty boards reviewing the case did not even know who had made the original complaint to the FBI investigators.[114] It should also be remembered that the members of the loyalty boards themselves had to be cleared and that they were operating in an atmosphere charged with political strife.

THE EISENHOWER PERIOD

During the last years of the Truman Administration the names of Alger Hiss, Judith Coplon, Harry Dexter White and Owen Lattimore became familiar to everyone who read the newspapers. The party which had served for two decades as the loyal opposition now had found a political issue upon which it could pin its hope for victory in 1952 — the Truman Administration was "soft" on Communism.

On February 7, 1950, the Republican members of the House and Senate issued a statement on the loyalty program which was agreed to by the Republican National Committee:

> We denounce the soft attitude of this administration toward Government employees and officials who hold or support Communist attitudes. We pledge immediate action to bring about:
>
> (A) The complete overhaul of the so-called loyalty and security checks of Federal personnel.
>
> (B) The prompt elimination of all Communists, fellow travelers and Communist sympathizers from our Federal payroll.
>
> (C) Closer coordination between our intelligence agencies, with full use of the facilities of the FBI for protecting our security.[115]

These principles were embraced by the Republican Party 1952 Campaign Platform:

> By the administration's appeasement of Communism at home and abroad it has permitted Communists and their fellow travelers to serve in many key agencies and to infiltrate our American life. . . .

113. BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 32 (1953).

114. *Id.* at 60, 246 (1953).

115. N.Y. Times, Feb. 7, 1950, p. 20, col. 8.

> A Republican President will appoint only persons of unquestioned loyalty. We will overhaul loyalty and security programs. . . .[116]

Then on October 4, 1952, in a speech in Milwaukee, General Eisenhower endorsed the candidacy of Senator McCarthy, stating that although there was a difference between himself and the Senator in method, their goals were the same. Candidate Eisenhower, paraphrasing existing judicial doctrine, added:

> To work for the United States Government is a privilege, not a right. And it is the prerogative of the Government to set the strictest test upon the loyalty and the patriotism of those entrusted with our nation's safety.[117]

After the Republican victory, campaign pledges were quickly implemented. On April 27, 1953, President Eisenhower issued Executive Order 10450 which revoked President Truman's Executive Order 9835 and established a new and more rigorous loyalty program under the title, "Security Requirements for Government Employment."[118] Executive Order 10450 contained these basic innovations:

First, the standard of federal employment was changed from "reasonable doubt as to the loyalty of the person involved"[119] to that which requires employment to be "clearly consistent with the interests of national security."[120] This latter standard was borrowed from Public Law 733 which was embraced by Executive Order 10450.[121]

Second, the summary suspension powers of Public Law 733 were extended to cover all of the federal agencies. This act authorized a summary suspension of those employees working in some eleven "sensitive" agencies — those agencies whose activities directly concerned the national security as opposed to those agencies whose activities concerned the general health and welfare.[122] Section 3 of the Act authorized the President to extend the list of sensitive agencies, from time to time, when necessary in the best interests of national security.[123] President Eisenhower thought

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116. N.Y. Times, July 11, 1952, p. 8, col. 3.

117. N.Y. Times, Oct. 4, 1952, p. 8, col. 5.

118. Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953).

119. Exec. Order No. 10241, 16 Fed. Reg. 3690 (1951).

120. Exec. Order No. 10450 § 2, 18 Fed. Reg. 2489 (1953).

121. Public Law 733, 64 Stat. 476 (1950), 5 U.S.C. § 22-1 (1952), provides that the "agency head concerned may . . . terminate the employment of such suspended employee whenever he shall determine such termination necessary or advisable in the interest of national security. . . ." Section 1 of Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953), provides that: "In addition to the departments and agencies specified in the said act of August 26, 1950 . . . the provisions of that act shall apply to all other departments and agencies of the Government."

122. See footnote 89 *supra.*

123. 64 Stat. 476 (1950), 5 U.S.C. § 22-3 (1952).

it necessary to make "the provisions of the act apply to all other departments and agencies of the government."[124]

As a result of this executive action, which extended summary dismissal procedures to all federal agencies, the distinction between the standard of loyalty required by the general agencies and the standard of loyalty required by the sensitive agencies disappeared. The two different procedures were replaced by a single standard and a single summary procedure.

Third, the term "security" rather than the term "loyalty" was used in the Executive Order, and it was made all inclusive so as to embrace within its scope a multitude of new sins as grounds for suspension or dismissal. These included: unreliable behavior, activities, or associations; deliberate misrepresentations, falsifications, or omissions of material facts; criminal, infamous, dishonest, immoral or notoriously disgraceful conduct; habitual use of intoxicants to excess, drug addiction, or sexual perversion; evidence of mental disorder; and finally, any facts which furnish reasonable evidence to indicate that an individual may be subject to coercion, influence, or pressure which may cause him to act contrary to the best interests of national security. Also, continued from the Truman program as grounds of dismissal, but now coming within the scope of the term "security," were espionage, treason, sedition, the advocacy of force and violence to overthrow the government, and membership in or sympathy with an organization which is Fascist, Communist, totalitarian, or "subversive." In addition, the intentional unauthorized disclosure of security information and activities which aided another government in preference to the interests of the United States was continued as grounds for dismissal.[125]

Fourth, no public disclosure was to be made as to whether an employee had been discharged on the grounds of disloyalty or on one of the other grounds now included in the category of "security risk."[126]

Finally, as the Loyalty Review Board was abolished, there was no longer a right of appeal beyond the agency level — in contrast to the Truman program where appeals were made from the agency directly to the Loyalty Review Board.[127] As a result, each agency head could make his own interpretation of "security risk" and set his own standards for dismissal proceedings within the limits of Executive Order 10450. Similarly, discretion was vested in each agency head to classify the degree of sensitivity for each job in the agency.[128]

124. Exec. Order No. 10450 § 1, 18 Fed. Reg. 2489 (1953).

125. Section 8 of Executive Order Number 10450, 18 Fed. Reg. 2489, 2491 (1953), lists the grounds for dismissal.

126. Exec. Order No. 10450 § 9(c), 18 Fed. Reg. 2489, 2492 (1953).

127. Compare Exec. Order No. 10450 § 12, 18 Fed. Reg. 2489, 2492 (1953) with Exec. Order 9835, 12 Fed. Reg. 1935 (1947).

128. Exec. Order No. 10450 § 3(b), 18 Fed. Reg. 2489 (1953).

The Numbers Game

Perhaps the most important criticism that can be made of the Eisenhower loyalty program concerns its deliberate failure to distinguish between an employee who was a security risk and one who was disloyal or subversive. By enlarging the scope of the term "security risk" to include activities other than those that were strictly subversive, Executive Order 10450 set the stage for a new political game.[129]

On October 23, 1953, the White House announced that 1,456 employees had been released during the first four months of the Administration's Federal Employee Security Program.[130] On January 7, 1954, in his State of the Union message President Eisenhower stated that "under the standards established for the new employee security program, more than 2,200 employees have been separated from the Federal government."[131] In the very next paragraph, he spoke about the "subversive character of the Communist Party in the United States."[132] On October 11, 1954, the Civil Service Commission announced that 6,926 persons had been dismissed between May 28, 1953 and June 30, 1954 as security risks or had resigned with derogatory information in their files; of these, 1,743 were subversives.[133]

While President Eisenhower *may* have been referring to security risks and not to persons who were disloyal, he was not very explicit on this point. Meanwhile, other Republican leaders — such as Attorney General Herbert Brownell, Governor Thomas E. Dewey, and National Republican Chairman Leonard Hall all spoke in terms which equated security risks with subversives and persons who were disloyal.[134] Thus, high ranking members of the Administration were, in effect, confusing the public so that it would believe that a federal employee had been dismissed on grounds of disloyalty when in reality he had been discharged on some other ground. This confusion was further compounded by the fact that when President Eisenhower's Executive Order 10450 was released, it was asserted that there would be no public statement made revealing on what specific grounds an employee had been dismissed as a "security risk."[135]

129. Exec. Order No. 10450 § 8, 18 Fed. Reg. 2489, 2491 (1953).
130. N.Y. Times, Oct. 24, 1953, p. 1, col. 8.
131. N.Y. Times, Jan. 8, 1954, p. 10, col. 3.
132. *Ibid.*
133. N.Y. Times, Oct. 12, 1954, p. 1, col. 1.
134. Typical of these statements is that of Attorney General Brownell, who said, "One thousand four hundred and fifty six persons have been ejected from the Government service because they were found to be security risks. . . . We are going to have no more Communist infiltration in the Government and we are steadily getting rid of those who are security risks." N.Y. Times, Nov. 7, 1953, p. 11, col. 4. For the statement of Thomas Dewey, see N.Y. Times, Dec. 17, 1954, p. 27, col. 4; for the statement of Leonard Hall, see N.Y. Times, Oct. 12, 1954, p. 21, col. 1.
135. Exec. Order No. 10450 § 9(c), 18 Fed. Reg. 2489, 2491 (1953).

When the White House released the statement that 1,456 employees had been dismissed under the security program, an inquisitive press began to question the figure, and then began what has since been known as the "numbers game." The demand for further information increased when the President referred in his State of the Union address to the 2,200 employees who had already been dismissed or suspended.[136] The Washington Press Corps began asking administration officials a number of questions: were these employees hired under the Truman or the Eisenhower administrations? How many were security risks and how many were loyalty risks? How many were fired and how many had resigned? Of those who resigned, how many knew that their files contained derogatory information? How many had been accorded a hearing? What were the figures for each of the departments and agencies? How many had, in fact, not left the government service but had transferred to other positions?

President Eisenhower at first refused to authorize an analysis of the figures; he claimed that a breakdown could not be made.[137] The press rejected this position as untenable for it concluded that the raw information which had served to make a finished compilation could also serve to make an analysis and breakdown. It was the first time since the election that the Eisenhower Administration had been confronted with a hostile press. The President changed his mind.

On October 17, 1954, Philip Young, Presidential Advisor on Personnel Management and Chairman of the Civil Service Commission, announced that a breakdown would soon be forthcoming. He stated that:

> . . . a classification according to the particular reasons for regarding these individuals as security risks would be neither feasible nor in the public interest. However, a classification according to broad categories of information in the individual's files is feasible. . . . There are many criteria for determining the security reliability of employees. A person not measuring up to those standards *may have voluntarily resigned his position* or may have been discharged. In either case he is no longer on

136. N.Y. Times, Jan. 8, 1954, p. 10, col. 3.

137. James Reston reported in the New York Times on January 28, 1954, that: "President Eisenhower was visibly embarrassed at his news conference today by what is becoming almost a weekly question: How about an explanation of the 2,200 security risks discharged by the Government in the last year?

"For three months now the reporters, and more recently Congress, have been trying to get the President to explain how many of these 2,200 were discharged as Communists, former Communists or fellow travelers, and how many were ousted for lying, drinking or other character defects.

"At the start of this period the President referred the questioners to Herbert Brownell, Jr., the Attorney General, who referred them to Phillip Young, the head of the Civil Service Commission, who referred them back to the White House. That is where they were this morning.

" 'We are going around in circles, are we not, sir?' asked Robert L. Riggs of the Louisville Courier-Journal. The President smiled and said he didn't know whether there could ever be the kind of breakdown the reporters wanted." N.Y. Times, Jan. 28, 1954, p. 14, col. 7.

> the Federal payroll in a job in which he might endanger the national security. . . .[138] (Emphasis added.)

This was the first official hint from the Civil Service Commission that, included in the "released under the security program" figures, were at least some who had left voluntarily.

At this point, the Democratic Party as the loyal opposition dealt itself into the numbers game. As each of the heads of the various administrative agencies appeared before the appropriations subcommittees for budget hearings for his agency's funds, the Democratic members questioned him about the breakdown.[139]

From these Congressional hearings, with the press paving the way, some interesting information was acquired. First, while some Republican leaders had been using the statistics loosely so that security risk and subversive seemed to be equated, the actual figures indicated that only a small percentage of the total involved subversion.[140] Second, while the agency heads reported the results for their individual agencies and the Civil Service Commission presented the consolidated results, the Commission and the individual agencies could not agree as to what the figures were.[141]

Mr. Philip Young, Chairman of the Civil Service Commission, kept his promise to the press and presented a partial breakdown of the figures. He reported that between May 27, 1953 (when the Eisenhower Executive Order went into effect) and December 31, 1953, a total of 2,727 employees either were dismissed or had resigned under the program according to the following classification:[142]

Subversive information	429
Sex perversion	207
Felonies and misdemeanors	636
Other	1,455

Of these 2,727 dismissals or resignations there was derogatory information in the personnel files of 2,486.[143]

It is suggested that a classification in which the largest category was

138. N.Y. Times, Feb. 18, 1954, p. 14, col. 5.

139. N.Y. Times, Feb. 16, 1954, p. 1, col. 2.

140. See *Ibid.*

141. For example, the State Department reported dismissals of 590 security risks of whom 11 were subversive while the Civil Service Commission reported 117 security risk cases for the State Department of whom 43 were subversive. *Hearings on Department of State and United States Information Agency Appropriations for 1955 Before the Subcommittee on Department of State, Justice, and Commerce of the House Committee on Appropriations,* 83d Cong., 2d Sess. 45, 388, 405 (1945).

142. N.Y. Times, March 5, 1954, p. 1, col. 2; *Hearings Before the Subcommittee on the Administration of the Federal Employees' Security Program of the Senate Committee on Post Office and Civil Service,* 84th Cong., 1st Sess., pt. 1, app. A, 973-1048 (1956) [hereinafter cited as 1956 Senate Hearings].

143. See 1956 Senate Hearings, note 142 *supra.*

a miscellaneous group, which was greater than all the other groups combined, was not a very useful breakdown. Equally unsatisfactory was the category entitled "subversive information" — employees whose personnel files contained "information indicating, in varying degrees, subversive associations or membership in subversive organizations."[144] Mr. Young, was either unwilling or unable to provide the Committee with a more detailed breakdown of the 429 employees in the "subversive" category. He insisted that the 429 figure did not mean that 429 persons had been separated for subversive activities, but rather, at the time of leaving the government service, 429 persons had serious derogatory information of a subversive nature in their personnel files.[145] Yet, he was unable to state how many had been separated because of disloyalty and how many for other reasons.[146] He could not state how many of the 429 had been discharged and how many had resigned.[147] He did not know how many of those who resigned knew that their personnel files contained information questioning their loyalty.[148] He did not know how many of the 429 had been given a hearing.[149] He was unable to testify as to how many of the 429 had been hired by the Eisenhower Administration.[150] He did not know if there were any Communists among them.[151] He did not know if a single Communist had been prosecuted for falsely signing a job application form.[152]

Furthermore, in his prepared opening statement to a Senate committee on Post Office and Civil Service appropriations on March 10, 1954, Mr. Young stated that: "The bulk of the terminations under the employee security program has been effected through normal civil-service removal procedures."[153] The import of this statement was not noticed by the Committee, and Mr. Young did not volunteer any further information. The full implication of this point came up when Mr. Wilbur M. Brucker, general counsel in charge of security of the Department of Defense, and Mr. Fred Ayer, chief security officer for the Air Force, testified on March 9, 1955 at Senate hearings. Their testimony was to the effect that "a substantial number" of those reported by the Civil Service Commission as separated from the Defense Department as security risks were, in fact, discharged

144. *Ibid.*
145. 1956 Senate Hearings at 1019.
146. 1956 Senate Hearings at 1020.
147. 1956 Senate Hearings at 1015.
148. 1956 Senate Hearings at 1018.
149. *Ibid.*
150. 1956 Senate Hearings at 1021.
151. 1956 Senate Hearings at 1020.
152. 1956 Senate Hearings at 1010.
153. 1956 Senate Hearings at 1012.

under normal Civil Service rules for "unsuitability" reasons.[154] In the case of probationary employees, this was done summarily, without a hearing. For those who were permanent employees in non-sensitive positions (approximately two-thirds of the civilian employee positions were classified non-sensitive) hearings, as required by Civil Service procedures, were afforded. The choice of whether to separate under the security program or regular civil service procedure was left to the discretion of the individual security officers. The listing of all separations as security risks was done at the order of the Civil Service Commission. Mr. Ayer was quoted as saying during the lunch-time recess "that he would 'bet' as many as 95 per cent of these [risk dismissals credited to his service] were in this 'unsuitability' category."[155] This testimony before Senate committee hearings and the off-the-record remarks of Mr. Ayer suggest that the security program separation figures were deliberately padded.

The Supreme Court and the Loyalty Program Under President Eisenhower

Because Executive Order 10450 embraced Public Law 733, the order likewise provided for the summary suspension of employees working in eleven sensitive agencies when such procedures were deemed necessary in the interests of national security.[156] Furthermore, under Executive Order 10450 President Eisenhower extended the summary procedure provisions of Public Law 733 to all federal agencies so that, in effect, all of these agencies were sensitive. In 1956 the Supreme Court of the United States in *Cole v. Young*[157] struck down this single standard and declared that a distinction between "sensitive" and "non-sensitive" must be made as it had been made under President Truman's loyalty program.

Cole, a veterans' preference eligible of the Department of Health, Education and Welfare, was suspended without pay from his job in November, 1953, because of his "close association with individuals reliably reported to be Communists," and because of his attendance at meetings of organizations proscribed by the Attorney General.[158] Cole declined to answer these charges and thereafter he was dismissed by the head of the department on the grounds that his continued employment was not "clearly consistent with the interests of national security."[159] Cole at-

154. *Hearings on the Commission of Government Security Before the Subcommittee on Reorganization of the Senate Committee on Government Operations,* 84th Cong., 1st Sess., 159-62, 184-86, 233-24 (1955).

155. N.Y. Times, March 10, 1955, p. 1, col. 7.

156. Exec. Order No. 10450 § 1, 18 Fed. Reg. 2489 (1953).

157. 351 U.S. 536 (1956).

158. Cole v. Young, 351 U.S. 535, 540 (1956).

159. *Id.* at 540.

tempted to appeal to the Civil Service Commission, but his appeal was denied on the ground that the Veterans' Preference Act,[160] under which the appeal was sought, had been superseded by Public Law 733.[161]

Cole brought an action for a declaratory judgement in the District Court of the District of Columbia. When the case finally reached the Supreme Court, the majority opinion held that Public Law 733 applied only to an employee whose position was such that his misconduct would affect the national security as distinguished from an employee whose misconduct might affect the general welfare. As no determination had been made that Cole's position affected the national security, the Court held his dismissal was not authorized by Public Law 733, and hence it was in violation of the Veterans' Preference Act.[162] In other words, the Court decided that Public Law 733 was applicable only to an employee whose position was one affecting the national security, and that it was not applicable to an employee in a non-sensitive governmental position. The term "sensitive" was construed so as to conform to the meaning of the same word in the phrase, "sensitive agencies," as originally used in Public Law 733 when there were only eleven such agencies in the Truman Administration. "Sensitive Agencies," the Court said, referred to agencies especially sensitive and vulnerable to subversive activities.

Public Law 733 was still to be applicable to all of the agencies through Executive Order 10450, but its summary procedures could only be used against employees within a given agency if they occupied positions whose sensitivity was such as to affect the national security. Thus, the distinction between sensitive and non-sensitive positions established by Congress during the Truman Administration, after the Supreme Court's decision, continued to be valid under the Eisenhower program. Equally important, a right to an appeal from a dismissal was no longer precluded under 10450 if the employee was working in a non-sensitive position and was protected by some pre-existing statute or regulation.

This principle that a pre-existing statute or regulation could protect an employee in a non-sensitive position was further amplified in *Vitarelli v. Seaton.*[163] Vitarelli, a non-sensitive employee of the Department of Interior whose employment rights were not protected by the Civil Service Act or any other federal statute, was discharged from service in the interests of national security after an administrative hearing. The Supreme Court held that even though the Secretary of Interior could ordinarily have discharged the employee summarily without giving reasons, because

160. 58 Stat. 390, 5 U.S.C. § 863 (1952).
161. Public Law 733, 64 Stat. 476 (1950), 5 U.S.C. §§ 22-1 through 22-3 (1952).
162. Cole v. Young, 351 U.S. 535, 558 (1956).
163. 359 U.S. 535 (1959).

the employee had no protected employment rights, he could not do so in this case. As Vitarelli was dismissed on security grounds, the Secretary was bound, the Court said, to conform to departmental procedural rules which had been specifically formulated for the dismissal of employees in this type of case. The procedural rules of the Department of Interior required specific charges to be made against the employee and granted him the right to cross-examine witnesses. As these procedures were not followed, the Court refused to uphold Vitarelli's dismissal. Thus, the right to be faced with specific charges as well as the right to cross-examine witnesses could not be denied by Executive Order 10450 to an employee in a non-sensitive position provided an existing departmental regulation set forth these procedural safeguards.

In the *Cole* and *Vitarelli* cases, the Supreme Court had protected federal employees in non-sensitive positions from the summary procedures authorized by Executive Order 10450 and had guaranteed them certain procedural rights (the right to specific charges, to confrontation and cross-examination of witnesses, and the right to appeal) when they were otherwise entitled to these rights under existing law — statute or regulation. In other words, the procedures set forth in pre-existing statutes and regulations were to be followed in preference to those set forth in Executive Order 10450 with regard to employees working in non-sensitive positions. Executive Order 10450 was still controlling in the case of an employee occupying a sensitive position regardless of the agency employing him.

Although the *Cole* and *Vitarelli* cases at first glance appeared to impose substantial limitations upon the Eisenhower loyalty program and to restore to the federal employee certain traditional procedural rights, it must be remembered that the limitations that were imposed and the rights that were restored did not involve the question of whether an employee can or cannot be dismissed on any of the loyalty-security grounds prescribed in Executive Order 10450. Rather the only question decided by the Court was the extent that the summary procedures of Public Law 733 could be implemented through Executive Order 10450. It must also be remembered that this protection did not emerge until some three years after the implementation of the Executive Order and that an employee whose position was now classified as "sensitive" by the government did not share this immunity from the summary procedures. In *Cole* and *Vitarelli,* the Supreme Court, as it had done more than ten years before in *United States v. Lovett,*[164] avoided a controversy of broad political import and based its decision on narrow legal grounds.

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164. 328 U.S. 303 (1946).

CONCLUSION

The task of a democracy in assuring the public that subversives are not occupying key positions in the federal government and at the same time in providing fair and equitable treatment for federal employees is often burdensome and replete with dangers. What the present security program tries to do is to predict possible future action based upon the thoughts and associations of the past. If it were to be assumed, *arguendo,* that such an approach is possible, even in the most favorable political climate, grave civil liberty problems relating to the rights of the employee are encountered. Such has been the case in the loyalty and security programs of Presidents Truman and Eisenhower.

Moreover, once partisan politics are introduced into this difficult area, the rights of the employee are increasingly endangered, and the objectivity and fairness of the entire program become open to question. While there has been somewhat less political maneuvering in this area in the last five years, the situation continues to remain potentially troublesome. The legal rights of the federal employee have never been amply defined; the constitutional issues, although raised, have never been resolved. In the loyalty cases that have been considered, the Supreme Court has based its decisions on narrow legal grounds. The road is still open for the unscrupulous politician and the overzealous administrator.