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TENANT'S LOYALTY OATHS

I

Unfortunately, the question has arisen[1] whether the federal government can require "loyalty oaths" of tenants in designated housing projects which were constructed with assistance from the federal government.[2] The general scheme of the "loyalty oath" requirement is that each tenant or prospective tenant must certify that neither he nor, to the best of his knowledge, any person who is to occupy his housing accommodations is a member of any one of some 200 named organizations. Failure to execute such an oath subjects the tenant to immediate eviction or denial of the application of the prospective tenant.

Perhaps our initial question might be refined by examining in turn: (1) the nature of the Congressional requirement under legislation now in existence and (2) possible Congressional requirements under existing constitutional doctrine.

The interest of the federal government in a program of low rent housing dates from the United States Housing Act of 1937 whose stated purpose was:

> It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions

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[1] The refusal of the Supreme Court to grant certiorari in Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N.W.2d 605, *cert. denied,* 76 S. Ct. 135 (1955), which held invalid the "loyalty oath" for tenants is no occasion to change the tense of the verb! Indeed, this action of the Supreme Court may have aggravated the problem. The Public Housing Agency has taken the position that the requirement will be enforced in the 47 states other than Wisconsin. The PHA assistant general counsel has been quoted as stating that PHA would welcome a Supreme Court opinion on the law, which he called a " 'headache.' " N.Y. Times, Nov. 9, 1955, p. 26, col. 8.

to alleviate present and recurring unemployment and remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation.[3]

The low rent housing program employs the grant-in-aid

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[2] Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955), *reversing*, 105 A.2d 741 (Mun. Ct. D. C. 1954); Housing Authority of Los Angeles v. Cordova, 130 Cal. App.2d 883, 279 P.2d 215 (1955); Chicago Housing Authority v. Blackman, 4 Ill.2d 319, 122 N.E.2d 522 (1954); Peters v. New York City Housing Authority, 307 N.Y. 519, 121 N.E.2d 529, *reversing*, 283 App. Div. 801, 128 N.Y.S. 2d 712 (2d Dep't), *modifying and affirming*, 128 N.Y.S. 2d 224 (1954). See 53 COLUM. L. REV. 1166 (1953); Weixel v. New York City Housing Authority, 143 N.Y.S.2d 589 (Sup. Ct. 1955), *appeal pending;* Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 76 S. Ct. 135 (1955).

> The Illinois General Assembly in 1953 required that: "Every tenant in any dwelling in a housing project shall take and subscribe an oath or affirmation in substantially the following terms:
> . . . . I, ..., do swear that I am a citizen of the United States and the State of Illinois, that I am not affiliated directly or indirectly with any communist organization or any communist front organization, or any foreign political agency, party, organization or government which advocates the overthrow of constitutional government by force or other means not permitted under the Constitution of the United States or the constitution of this State; that I do not directly or indirectly teach or advocate the overthrow of the government of the United States or of this State or any unlawful change in the form of the governments thereof by force or any unlawful means."

ILL. ANN. STAT. c. 67½, § 25.01 (Smith-Hurd, Supp. 1954).

The Illinois Supreme Court in Chicago Housing Authority v. Blackman, *supra*, following Wieman v. Updegraff, 344 U.S. 183 (1952), held this requirement unconstitutional, at 122 N.E.2d 525:

> "[I]t requires . . . [the tenant] to know as a matter of certainty whether every organization to which he belongs in fact advocates the overthrow of constitutional government by force or other unlawful means. Unless he is sure that it does not he cannot conscientiously take the oath, and as a result he is excluded from the public housing accommodations. It is clear that under the authority of the Wieman case the present requirement violates due process of law and is void."

A proposal for "loyalty oaths" by tenants of public housing in New York was defeated in 1952 in a New York Senate Committee. Statement of Arthur Schutzer, *Hearings Before the Subcommittee on House Report 7072 of the Senate Committee on Appropriations*, 82d Cong., 2d Sess. at 1088 (1952).

[3] 50 STAT. 888 (1937), 42 U.S.C. § 1401 (1952).

device of federal-state cooperation.[4] The state must enact enabling legislation permitting local governing bodies such as cities and counties to create local housing authorities with such power as provided in the state act. Once such legislation becomes effective the states direct participation usually ends. The federal government through the Public Housing Administration deals directly with the local housing authorities on fiscal as well as other problems.

The federal government makes and guarantees loans and makes annual contributions to local housing authorities for the construction and management of low rent housing projects. The need for public housing for low income families in each locality is determined by the local housing authority in conjunction with and subject to the approval of the local governing body of the locality. The local housing authority then makes application to the federal government for financial assistance. When a local housing authority demonstrates to the satisfaction of the Public Housing Administration that there is a need for low rent public housing which is not being met by private enterprise the federal government makes a preliminary loan to cover the cost of surveys and planning of the specific housing developments.

If the federal government approves the proposed housing project it enters into a contract with the local housing authority for financial assistance in the development and operation of the housing project. The contract between local housing authority and the federal government provides that the federal government (1) will if necessary lend funds for development of the housing up to 90 per cent of the cost, and (2) will make annual contributions for a period not exceeding 40 years in an amount sufficient to

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4 See COMMISSION ON INTERGOVERNMENTAL RELATIONS, A DESCRIPTION OF TWENTY FIVE FEDERAL GRANT-IN-AID PROGRAMS, c. 22 (1955). See also Robinson and Weinstein, *The Federal Government and Housing*, 1952 WIS. L. REV 581.

cover the difference between expenses of operation, including debt service, and the rental that low income families can afford to pay up to a specified maximum. The maximum annual federal contribution equals level debt service on the development cost of the housing for a period not exceeding 40 years.

No provision exists for the withholding of the payment of the annual contribution but the federal government may take over the operation of a local project in the case of gross inefficiency or mismanagement. Thus far no projects have required this type of corrective action and in fact the threat of such action is rarely if ever used.

II

During the consideration by the House of Representatives of the appropriations act which carried funds for the Public Housing Administration for the fiscal year 1953, Congressman Ralph H. Gwinn offered the following amendment:

> *Provided further,* That no part of any appropriation contained in this section shall be used to pay annual contributions on any housing unit of a project assisted under the United States Housing Act of 1937, as amended, which is occupied by a person who is a member of an organization designated as subversive by the Attorney General.[5]

We may never know the motive which prompted Congressman Gwinn's amendment. In his statement to the House he characterized low rent public housing as "socialized housing" and pointed out in comparison with slum areas ". . . [P]ublic housing has developed worse slums and diseases of the Socialists and Communists themselves living in the very heart and center of the American housing projects. Everywhere the staff of the Un-American Activities Committee has been able to examine, they are

[5] 98 CONG. REC. 2639 (1952).

there."[6] Mr. Gwinn alluded to press accounts dating back to 1950 of instances in which Communists were reported to be living in housing projects assisted by federal funds. He also pointed out that local housing authorities were unable to bar or evict Communists from their projects and he added that his amendment gave the housing authorities the necessary power. "It requires the authority to evict Communists if the authority wants to collect subsidies from the general taxpayer."[7] Mr. Gwinn concluded his plea in support of his amendment by a general attack on "socialized" housing. The chairman of the committee in charge of the bill accepted the proposed amendment and it was adopted by the House without debate.[8]

The reaction to the Gwinn proposal was hardly short of electrifying. The Public Housing Administration shortly after the action by the House issued a statement urging the postponement of the sale of housing authority bonds originally scheduled for April 15, 1952, on the ground that, were the Gwinn Amendment to become law, it would cast a " 'technical shadow on the availability of funds to meet the unconditional obligation of the Federal Government to pay the annual contributions to be pledged as security for the new housing authority bonds.' "[9] Public Housing Administration officials expressed sympathy with the objective of the Gwinn Amendment but felt that policing would be too great a job and that buyers of bonds would be hesitant less the bonds be attacked as "illegal" financing by the government. The Administration expressed the view that the technical effect on the availability of federal funds was " 'wholly inadvertent and unintentional' " but that Congress should remove the doubt.[10]

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6 *Ibid.*

7 *Ibid.*

8 *Id.* at 2640.

9 N.Y. Times, Apr. 3, 1952, p. 55, col. 8.

10 *Ibid.*

The staff director and housing expert of the Senate Banking Committee, Joseph P. McMurray, was reported to have told the Mortgage Bankers Association in New York that the Gwinn Amendment would threaten public housing and Federal Housing Agency and Veterans Administration housing programs as well. He pointed out that Congress could hardly avoid imposing the same requirement for FHA and VA housing as the Gwinn Amendment required for PHA housing.[11]

The reaction of the administrative agency charged with the administration of the public housing program and the banking interests only prompted Mr. Gwinn to insist that if low rent housing raised doubt in the bankers' minds they might well question whether public housing was desirable and worthy of their support.[12]

When the appropriation bill which contained the Gwinn Amendment was being considered by the Senate Committee on Appropriations statements in opposition to the proposal were made by the Federal Housing Agency, a group of investment bankers, the National Association of Housing Officials, and the New York State Executive Secretary of the American Labor Party. The objections to the amendment voiced by the Federal Housing Agency were substantially those which had been expressed earlier.[13] The bankers expressed concern as to the effect of the Gwinn Amendment on the unconditional obligation of the United States with respect to housing authority bonds.[14] The National Association of Housing Officials was concerned lest the housing program be jeopardized by the failure of the United States unconditionally to pay its obligations.[15] Only the representative of the American

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[11] N.Y. Times, Apr. 20, 1952, § 8, p. 1, col. 4.

[12] 98 CONG. REC. A2498 (1952).

[13] *Hearings Before the Subcommittee on House Report 7072 of the Senate Committee on Appropriations*, 82d Cong., 2d Sess. at 1097 (1952).

[14] *Id.* at 1041.

[15] *Id.* at 1056.

Labor Party expressed opposition to the Gwinn proposal on the grounds that liberties of the citizens would be violated.[16]

The Senate Appropriations Committee reported the appropriation bill with an amendment to strike the language of the Gwinn Amendment.[17] The Senate followed the recommendation of its committee without discussion on this point.[18] It should be noted that, in view of the pending legislative situation, the Gwinn Amendment was relatively speaking a minor matter. The big issue was the extent, if any, to which public housing might be expanded or even continued.

The committee on conference which considered the measure to which the Gwinn Amendment had been offered in the House of Representatives technically did not have the Gwinn Amendment language before it, but there is no doubt that the Gwinn Amendment was thoroughly discussed in the conference committee. When the conference report was offered in the House, on the motion of the chairman of the committee in charge of the bill, the House adopted the conference committee report with an amendment which contained the language which became the Gwinn Amendment as we now know it.[19]

Senator Maybank, who was chairman of the subcommittee of the Senate Committee on Appropriations which had charge of the conference report of the appropriations bill in question explained in connection with a discussion of the new language of the Gwinn Amendment that although the language of the amendment related only to the low rent public housing program the committee on conference felt that if any such provision was to be included it should be applied uniformly to any housing which the

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16 *Id.* at 1088.

17 98 CONG. REC. 6455 (1952).

18 *Id.* at 6461.

19 *Id.* at 9003.

government assists directly or indirectly.[20] Senator Maybank pointed out that the amendment applied to less than five per cent of the total housing program but the committee felt that of course the same restrictions should apply to all federally aided housing. He continued:

> . . . I am thoroughly satisfied that the other agencies of the Government which are administering programs for insuring or guaranteeing loans for housing, such as the Federal Housing Administration, the Veterans' Administration, and the Farmers Home Administration of the Department of Agriculture, can, without any serious difficulty, adopt procedures which will make this principle apply effectively to their programs. . . .
>
> I can see no particular difficulty involved in such a procedure. Therefore, I shall certainly expect the agencies to comply with the clear intent of the Congress in this matter.[21]

The Senate accepted the language of the revised Gwinn Amendment without question.

The language which has come to be known as the Gwinn Amendment follows:

> *Provided further,* That no housing unit constructed under the United States Housing Act of 1937, as amended, shall be occupied by a person who is a member of an organization designated as subversive by the Attorney General: *Provided further,* That the foregoing prohibition shall be enforced by the local housing authority, and that such prohibition shall not impair or effect the powers or obligations of the Public Housing Administration with respect to the making of loans and annual contributions under the United States Housing Act of 1937, as amended.[22]

The appropriation bill which became the act that provided funds for the Public Housing Administration for the 1954 fiscal year contained the language of the Gwinn

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20 *Id.* at 8908.

21 *Id.* at 8909.

22 66 STAT. 403 (1952), 42 U.S.C. § 1411c (1952).

Amendment as found in the 1952 Act. [23] There was no discussion of the Gwinn Amendment language in either house.[24]

The language of the Gwinn Amendment was contained in the appropriation bill to provide funds for the Public Housing Administration for the 1955 fiscal year.[25] During the consideration by the House of Representatives, a point of order was made against the Gwinn Amendment language on the ground that it was legislation on an appropriation bill. The point of order was sustained.[26]

A few days after the Gwinn Amendment language in the appropriation bill had been stricken on a point of order, Congressman Gwinn offered the following as an amendment to the bill which became the Housing Act of 1954:

> Section 15-7 of the United States Housing Act of 1937, as amended, is further amended by adding the following proviso: *Provided,* That no unit in a low-rent housing project shall be occupied by a person who is a member of an organization designated as subversive by the Attorney General of the United States.[27]

Mr. Gwinn explained that he was introducing the amendment at that time for the purpose of making it a part of the permanent legislation regarding public housing so that it would not be subject to a point of order as it had been during consideration of the appropriation bill. Two Congressmen offered personal "testimony" that local housing officials about the country wanting power to exclude Communists and that they had no means of getting rid of Communists in the absence of legislation.[28]

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23 67 STAT. 307 (1953), 42 U.S.C. § 1411c (Supp. 1954).

24 99 CONG. REC. 4977, 5195, 5196, 5221 (Senate debates) and 9417 (House conference report) (1953).

25 H. R. 8583, 83d Cong., 2d Sess. (1954).

26 100 CONG. REC. 4108, 4109 (1954).

27 *Id.* at 4478.

28 *Id.* at 4478 and 4479. Mr. Gwinn and other congressmen apparently did not appreciate that the Gwinn Amendment would be regarded as permanent legislation despite its enactment in an appropriation bill. The Com-

Congressman John W. McCormack of Massachusetts offered a substitute to the pending Gwinn proposal which had for its effect the imposing of the same conditions as to "loyalty" of beneficiaries of all housing programs assisted in any way by federal funds.[29] Mr. McCormack explained that his substitute would ". . . treat all persons with

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[28] *continued*
missioner, Public Housing Administration, in a letter to Congressman Ralph W. Gwinn, Aug. 4, 1954, stated: "The Gwinn Amendment as included in the pertinent 1953 appropriation act is permanent legislation. . . .[T]he Gwinn Amendment language, as contained in the 1953 and 1954 appropriation acts, remains in full force and effect, and, of course, will be fully observed by the Public Housing Administration." PUBLIC HOUSING ADMINISTRATION CIRCULAR (Aug. 16, 1954). The Supreme Court has had occasion several times to pass on the question of whether permanent legislation may be enacted in an appropriation bill. Its most recent decision upholding such legislation is United States v. Dickerson, 310 U.S. 554 (1940). See the opinion of Mr. Justice Story in Minis v. United States, 40 U.S. (15 Pet.) 421, 445 (1841).

[29] 100 CONG. REC. 4479 (1954). The text of the substitute amendment offered by Mr. McCormack is: "On page 204 after line 8 add the following:

> "Sec.——. (a) No Federal department or agency shall hereafter make, or contract to make, any loan, grant, annual contribution, advance, or other financial assistance available for or with respect to any housing unit or units, or guarantee or insure, or contract to guarantee or insure, any loan made for any housing unit or units unless the owner or owners thereof agrees (or, in the case of any loan which is guaranteed or insured, the lender agrees to require such owner or owners to agree) that (1) prior to the admission of any person to occupy any such housing unit or prior to the sale of any such housing unit for occupancy by the purchaser such owner or owners will obtain from the prospective occupant or purchaser a certificate (to which the provisions of section 1001 of title 18, United States Code, are hereby expressly made applicable) that he is not a member of any organization which, for purposes of this act, the Attorney General designates as subversive and, if the owner or owners occupies a housing unit or units, he will execute such certificate, and (2) such owner or owners will require any purchaser of any such housing unit or units to agree to comply with the requirements of clause (1) in the same manner as though the purchaser were the owner first subject thereto: *Provided,* That this act shall not affect the validity of, or the powers and obligations of any Federal department or agency of the United States under any contract with respect to the making of loans, grants, annual contributions, advances, or other financial assistance, or the guaranty or insurance of loans.
>
> "(b) Each Federal department or agency is hereby authorized, with respect to any housing assisted by it, to issue such regulations and procedures as it shall deem advisable for the purpose of carrying out the provisions of this section, including requirements with respect to the holding or filing of agreements and certificates made or executed pursuant to the preceding sentence; and, with respect

equality and equal punishment under the law."[30] The McCormack substitute was adopted without further debate.[31]

When the Senate Banking and Currency Committee, to which the bill which became the Housing Act of 1954 was referred, reported the bill to the Senate it recommended an amendment which in effect would only require that tenants of low rent public housing projects should be citizens of the United States.[32] The Banking and Currency Committee explained to the Senate that the proposal it was making was in accordance with the view of the "ad-

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29 *continued*

to any housing owned by the United States, the Federal department or agency having jurisdiction thereof shall issue regulations or procedures requiring an occupant or purchaser of such housing to execute an agreement or certificate similar to the agreements or certificates which occupants or purchasers would execute under subsection 901 (a) of this act.

"As used in this section, the term 'Federal department or agency' shall mean any department, agency, corporation, or officer in the executive branch of the United States Government, including the Federal Home Loan Banks."

30 *Ibid.*

31 *Id.* at 7298.

32 *Ibid.* The text of the committee amendment follows:

"Sec. 405. (a) The sixth and seventh provisos under the heading "Public Housing Administration," "Annual Contributions" in the First Independent Offices Appropriation Act, 1954, and the fifth and sixth provisos under the same heading in the Independent Offices Appropriation Act, 1953, are hereby repealed.

(b) Section 10 of the United States Housing Act of 1937, as amended, is hereby amended by adding the following subsections:

"(k) No part of any appropriation for the payment of annual contributions under any contract therefore entered into after April 17, 1940, shall be available for payment to any public-housing agency for expenditure in connection with any low-rent housing project, unless the public housing agency shall have adopted regulations prohibiting as a tenant of any such project by rental or occupancy any person other than a citizen of the United States, or a person who has made application for citizenship, but such prohibition shall not be applicable in the case of a family of any serviceman or the family of any veteran who has been discharged (other than dishonorably) from, or the family of any serviceman who died in, the Armed Forces of the United States within 4 years prior to the date of application for admission to such housing."

Subsection (a) suggests that the Gwinn Amendment was considered to be permanent legislation.

ministration"[33] that the "loyalty oath" requirement would impose a heavy administrative burden and expense far in excess of the results which can be expected. The committee report continued: "[W]hile no expense should be spared in eliminating and reducing the threat to our system of government which the subversive organizations present, whatever money and effort are spent to root these groups and their influence from our national life should be used in the most efficient and effective manner possible."[34]

During the Senate consideration of the Housing Act of 1954 no attention was given to the problem raised by the Gwinn Amendment. It should be noted of course that the overriding question before the Senate was how much, if any, public housing there should be instead of the problems of the "loyalty" of whatever tenants might be involved.

The Housing Act of 1954 went to the Committee of Conference after the Senate had followed the recommendation of its Committee on Banking and Currency by requiring only that tenants in public housing projects be citizens of the United States.[35] The Conference Committee reported out the measure without either the language adopted by the Senate or the House of Representatives with respect to citizenship or "loyalty" of tenants in public housing projects.[36]

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33 Presumably, the Public Housing Administration.

34 S. REP. No. 1472, 83d Cong., 2d Sess. (1954), 2 U.S. CODE CONG. AND ADM. NEWS 2765 (1954).

35 100 CONG. REC. 7609, 7624 (1954).

36 *Id.* at 11085. The author has been unable to ascertain the considerations which influenced the conference committee in its decision. Perhaps an important factor was the realization that every appropriation act since 1940 which implemented the United States Housing Act contained the requirement that occupancy be limited to United States citizens. Whether members of the conference committee appreciated that the Gwinn Amendment language which was contained in the appropriations bills enacted in 1952 and 1953 was permanent legislation is not clear. See note 28 *supra*.

III

Soon after the Gwinn Amendment became law, the Public Housing Administration directed on November 17, 1952, that all housing authorities under low rent housing program require:

> All families admitted or reexamined subsequent to the receipt of this release shall be required to sign a certificate which is in the form shown in Exhibit 1 . . . [which incorporated the list of organizations under Executive Order 9835]. Also, as the local authority receives notice from the PHA of any changes in the list, such changes shall be incorporated in the certificate required for all subsequent admissions or reexaminations. The new list and any subsequent changes shall be posted on the bulletin board or otherwise be made known to all tenants so that they may be informed at all times of the current list.[37]

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[37] See PUBLIC HOUSING ADMINISTRATION LOW RENT HOUSING MANUAL § 403.1 (Dec. 18, 1953) replacing the issue of Nov. 17, 1952. The certificate required of tenants (except for the reference to a different Executive Order) follows:

CERTIFICATION OF NONMEMBERSHIP IN SUBVERSIVE ORGANIZATIONS

I hereby certify that I am not a member of any of the organizations listed in the document entitled "Consolidated List of Organizations Designated by the Attorney General of the United States as within Executive Order No. 10450," and that, to the best of my knowledge, information, and belief, no person who is to occupy the housing accommodations in connection with which this certificate is furnished (that is, the accommodations for which I am making, or have made, application) is a member of any such organization. I hereby further certify that I have carefully read or had read to me the document referred to in the preceding sentence.

Signature

WITNESS:

Date

Many local housing authorities also required each tenant to warrant that neither he nor any person who is to occupy the leased premises is a member of an organization designated by the Attorney General as in the Executive Order No. 10450 and the tenant was required to agree that if the warranty is false or if he or any person who is to occupy the premises becomes or continues to be a member of any organization now or thereafter so designated he would vacate the premises. See also Note, 53 COLUM. L. REV. 1166, 1168 (1953).

The *New York Times*[38] observed: "Prospects for lively activity in connection with the certificate seem to be numerous. For instance, two of the Newark [New Jersey housing] authority's tenants have been listed in the past as officials of the Communist party."

An examination of the Gwinn Amendment against the background of its legislative history immediately suggests three questions: (1) what does the amendment mean by the words "organization designated as subsersive by the Attorney General"? (2) to whom does the amendment apply, or to state it another way, what is meant by the words "housing unit constructed under the United States Housing Act of 1937, as amended"? and (3) by whom is the Gwinn Amendment to be enforced and what are the sanctions for its violation?

Although the legislative history of the Gwinn Amendment leaves much to be desired it will be recalled that the phrase "subversive organizations" had considerable currency prior to early 1952. The President, on March 21, 1947, by means of Executive Order 9835[39] had promulgated what has come to be known as the "loyalty oath" for federal employees. In connection with that program the President had directed that the Department of Justice currently furnish the Loyalty Review Board:

> . . . the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.[40]

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38 N.Y. Times, December 18, 1952, p. 24, col. 3.

39 12 FED. REG. 1935 (1947). See Note, 29 TEMP. L. Q. 94 (1955).

40 Exec. Order No. 9835, 12 FED. REG. 1935, 1938 (1947).

Although there can be little doubt that the term "subversive organization" was popularly used to refer to all organizations listed by the Attorney General in response to Executive Order 9835 it will be noted that the Executive Order itself provided for five other kinds of organization in addition to those that were "subversive." As a matter of fact, the differentiation between "subversive" and other organizations under Executive Order 9835 was expressed by the Attorney General:

> Applying the elementary rule of statutory construction, each of these classifications [listed in Executive Order 9835] must be taken to be independent and mutually exclusive of the others. It may well be that a designated organization, by reason of origin, leadership, control, purposes, policies or activities, alone or in combination may fall within more than one of these specified classifications. In such cases a reasonable interpretation of the Executive order would seem to require that designation be predicated upon its dominant characteristics rather than extended to include all other classifications possible on the basis of what may be subordinate attributes of the group. In classifying the designated organizations the Attorney General has been guided by this policy. Accordingly, it should not be assumed that an organization's dominant characteristic is its only characteristic.[41]

That the words "organization designated as subsersive by the Attorney General" would not necessarily refer to the entire list of organizations designated under Executive Order 9835 seems inescapable. One might suggest that the Gwinn Amendment required the Attorney General specifi-

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[41] 5 C.F.R. § 210, App. A (1949). (List of Organizations Designated by the Attorney General Pursuant to Executive Order No. 9835). The original list published by the Attorney General was broken down into the various groups designated in the Executive Order. A breakdown in the list appears not to have been made in connection with any listing under Executive Order 9835 used by housing authorities or by the Attorney General under Executive Order 10450 which supplanted Executive Order 9835. See 3 C.F.R. 72 (Supp. 1953). The writer's inquiry to the Attorney General as to the basis for the change in policy with respect to classifying organizations under these executive orders remains unanswered.

cally to designate organizations within the meaning of the Gwinn Amendment language. As a matter of fact, shortly after the Gwinn Amendment became law the Attorney General ruled that the phrase "organizations designated as subversive by the Attorney General" refers to and includes all organizations designated by him pursuant to Executive Order 9835.[42] When Executive Order 10450 supplanted Executive Order 9835 for purposes of the federal employees' loyalty program, the Attorney General ruled that the organizations designated pursuant to Executive Order 10450 are those "organizations designated subversive by the Attorney General" as that phrase is used in the Gwinn Amendment.[43]

When one considers the question to whom does the Gwinn Amendment apply, several subsidiary questions immediately occur. A simple reading of the Gwinn Amendment would suggest that it would apply only to tenants occupying a housing unit constructed under the United States Housing Act of 1937, as amended. A further question immediately would arise: whether the Gwinn Amendment would apply only with respect to tenants of the housing units constructed subsequently to its enactment. The problem is far from purely academic as there are low rent housing projects administered by the Public Housing Administration which were originally constructed under some six statutes, only three of which by any stretch of the imagination could be characterized as the United States Housing Act of 1937, as amended.[44] The Public Housing Administration, however, immediately after the enactment of the Gwinn Amendment announced an in-

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42 PUBLIC HOUSING ADMINISTRATION, SIXTH ANNUAL REPORT 21 (1952). The Assistant Attorney General (Office of Legal Counsel) has informed the writer that the document embodying the reasoning of the Department of Justice in this connection is "not available." Letter of Assistant Attorney General (Office of Legal Counsel) to the writer, October 21, 1955.

43 PUBLIC HOUSING ADMINISTRATION LOW RENT HOUSING MANUAL § 403.1 (1953).

44 PUBLIC HOUSING ADMINISTRATION, SIXTH ANNUAL REPORT 17 (1952).

terpretation of it which can best be described in the words of the PHA official statement:

> PHA has required that all contribution contracts entered into or amended after July 5, 1952, [the effective date of the Gwinn Amendment] must contain provision giving full effect to the Gwinn Amendment. This requirement was later extended to all low-rent contracts between PHA and local housing authorities (including leases) which were entered into, revised, or amended after the effective date of the Gwinn Amendment, regardless of whether the housing involved was constructed under the United States Housing Act of 1937, as amended, or under other enabling legislation.[45]

When one analyzes the problems raised by the question of by whom and how is the Gwinn Amendment to be enforced one need recall that the text of the Gwinn Amendment very clearly provided that it would be enforced ". . . by the local housing authority, and that such prohibition shall not impair or affect the powers or obligations of the Public Housing Administration with respect to the making of loans and annual contribution under the United States Housing Act of 1937, as amended."[46] Despite the language in the Gwinn Amendment, the Public Hous-

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[45] *Id.* at 21. The Acting Commissioner, Public Housing Administration, in a letter of October 21, 1955, explained to the writer:

> "The extending of the substance of the provision of the Gwinn Amendment to this housing [which was not constructed under the United States Housing Act of 1937, as amended] which does not actually come within the purview of such Act was not done as a result of any misinterpretation of this law but was undertaken solely on the basis that it was administratively desirable."

This may indicate a new constitutional theory of federal law. In defense of the Public Housing Administration one should note that the United States Housing Act of 1937 provided "The [Public Housing] Authority may from time to time make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of the Act." 50 STAT. 891 (1937), 42 U.S.C. § 1408 (1952). The Gwinn Amendment although enacted in an appropriation act became a part of the housing act. Whether the quoted language would justify the Gwinn Amendment type of regulation will be discussed *infra*.

[46] Text at note 18 *supra*. The reader will recall that this language may have been motivated by the desire to avoid any question as to the binding effect of the United States commitment with respect to annual contributions to local housing authorities. See text at note 5 *supra*.

ing Administration has taken a very active part in implementing the Gwinn Amendment, at least to the extent of requiring local housing authorities to incorporate the "loyalty oath" in tenant's contracts, and "in the case of low rent projects covered by contracts in which the provisions of the Gwinn Amendment are not incorporated, PHA has strongly urged each local housing authority to put into effect promptly, by its own resolution or ordinance, the provisions of the Gwinn Amendment."[47]

Patently, the authority for this action by Public Housing Administration must be found other than in the Gwinn Amendment. Whether the general authority of the Administration to make rules and regulations as may be necessary to carry out the provisions of the Housing Act would afford a basis for the Gwinn Amendment type provision is at least debatable.

Assuming that the Public Housing Administration has authority by rule or regulation to require "loyalty oaths" by tenants, the question would still arise as to what sanction might be applied by the Public Housing Administration for the non-compliance with the regulation by the tenant. The Gwinn Amendment very clearly indicates that the power or obligation of the Public Housing Administration with respect to the making of loans and annual contributions shall not be affected by the amendment.

IV

The question of who may seek a judicial review of the application of the Gwinn Amendment and the regulations made thereunder is one of considerable interest.[48] Pre-

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[47] Public Housing Administration, Sixth Annual Report 21 (1952).

[48] Had the original Gwinn proposal (text at note 5 *supra*) been adopted, presumably holders of housing bonds, the debt service on which was guaranteed by PHA, would have also been in a position to question the validity of the Gwinn Amendment. A person with an esoteric sense of humor might find some delight in contemplating investment bankers seeking a declaration of invalidity of a requirement designed to keep "subversives" out of public housing projects.

sumably local housing authorities who were required by the Public Housing Administration to compel tenants to execute "loyalty oaths" might seek a judicial interpretation of the authority of the Public Housing Administration to promulgate its regulations to implement the Gwinn Amendment. In all reported cases, however, tenants have raised legal questions as to the application and validity of the regulations made pursuant to the Gwinn Amendment.[49]

Questions of statutory interpretation may require judicial determination not only for the purpose of ascertaining the meaning of the statute but also with the view of arriving at an interpretation so as to avoid possible unconstitutionality of the statute. The regulations issued by the Public Housing Administration purporting to implement the Gwinn Amendment must, of course, conform to the statute as well as to the Constitution.

Any tenant to whom the regulations under the Gwinn Amendment were attempted to be applied probably would be able to raise the question of whether the statutory language authorized the application of the regulations to him. Certainly any tenant who was a member of an organization on the Attorney General's list could raise the question of whether the statutory language in the Gwinn Amendment applied to him.

As suggested above[50] the many possible different situations to which the regulations of the Public Housing Administration are being applied might very well present instances in which the regulation as applied in a particular case would be found not to be authorized by the statute. For example, whether the Public Housing Administration may require "loyalty oaths" of tenants in projects originally constructed under authority of acts other than the United States Housing Act of 1937, as amended, would

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[49] See note 2 *supra*.

[50] Text at note 44 *supra*.

raise a real problem of statutory construction. Similarly, the Gwinn Amendment would seem to require judicial construction as to whether it applies to housing projects constructed prior to the effective date of the Gwinn Amendment.

In addition to problems of statutory interpretation there may be questions of constitutionality of the Gwinn Amendment and regulations thereunder.[51] The initial problem is whether any constitutional issues could be involved with respect to the requirements of tenants to execute "loyalty oaths."

The Supreme Court of Wisconsin stated the position of the local housing authority as being that: "[I]t stands in the same category as any non-governmental landlord, and is subject to no restrictions in choosing the persons it desires as tenants of its housing project, which would not be applicable to landlords generally, except only such as are specifically prescribed [by statute with respect to the income of the tenants]."[52] The difficulty, of course, with this type of argument is that housing authorities are governmental agencies and thus constitutional restrictions which are not applicable to non-governmental landlords do apply.

When we turn to the question of who may raise the constitutional issue considerably more difficulty is encountered. Among the cardinal principles of judicial policy[53] is the doctrine that one who benefits from a statute may not challenge its constitutionality. This so-called bounty theory has been raised in each of the reported cases involving the application of the Gwinn Amendment and in no instance has the court found it

[51] See Note, 69 HARV. L. REV. 551 (1956) for the view that ". . . the most substantial objections to the Gwinn Amendment are constitutional."

[52] Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N.W.2d 605, 607, *cert. denied,* 76 S. Ct. 135 (1955).

[53] See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (concurring opinion).

valid. The argument has taken several variations of the theme that since tenancy in public housing projects was on a month-to-month basis the housing authority might give notice of termination of occupancy for any reason, including failure to execute an oath of non-membership in proscribed organizations. The Supreme Court of Illinois summarized: "The argument, in other words, is that because the tenants have no legal right to occupy the housing accommodations, they cannot be deprived of any constitutional right by the requirements in question. The position is untenable."[54] The court continued: "Even though appellants have no right to remain as tenants of appellee, they may not, as a condition of continued occupancy, be required to comply with unconstitutional requirements."[55]

It is of course a truism to observe that the federal government has only delegated power, at least in the domestic field. The statute under which the United States launched into the low rent housing field purported to be predicated on the power of Congress to make appropriations for the general welfare.[56] The constitutionality of the housing act has been upheld.[57] The constitutional question with respect to the power of Congress to enact the Gwinn Amendment might simply be stated: Does the power of Congress to make all laws which may be necessary and proper for carrying into execution its power to make appropriation for the general welfare and all other powers vested by the Constitution in the government of the United States or any department or officer thereof authorizes the Congress to require "loyalty oaths" of tenants as a condition for their occupancy in low rent projects which were "con-

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[54] Chicago Housing Authority v. Blackman, 4 Ill.2d 319, 122 N.E.2d 522, 524 (1954).

[55] *Ibid.*

[56] See text at note 3 *supra.*

[57] City of Cleveland v. United States, 323 U.S. 329 (1945).

structed" under the United States Housing Act of 1937, as amended?

The Supreme Court of Wisconsin succinctly stated the problem: "Counsel for the defendant Authority have failed to point out to this court how the occupation of any units of a federally aided housing project by tenants who may be members of a subversive organization threatens the successful operation of such housing project."[58] Undoubtedly among other powers vested by the Constitution in the federal government is that to prevent its overthrow. The question might arise, however, whether ". . . the laudable purpose of combating the efforts of subversives is advanced by compelling them to live in slums or substandard housing accommodations."[59]

Unfortunately, perhaps, we have no reported case prior to the cases dealing with the Gwinn Amendment which furnish substantial light on the constitutional problem at hand. The Emergency Relief Appropriations Act for the fiscal year 1941 carried a provision: "No portion of the appropriation made under this joint resolution shall be used to pay any compensation to any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United State."[60] The only court which construed this require-

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[58] Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N.W.2d 605, 615, *cert. denied,* 76 S. Ct. 135 (1955).

[59] Housing Authority of Los Angeles v. Cordova, 130 Cal. App. 2d 890, 279 P.2d 215, 218 (1955).

[60] Section 17(b) in 54 STAT. 621, (1940). Section 15(f) in 54 STAT. 620 (1940) provided:

> "No alien, no Communist, and no member of any Nazi Bund Organization shall be given employment or continued in employment on any work project prosecuted under the appropriations contained in this joint resolution and no part of the money appropriated in this joint resolution shall be available to pay any person who has not made or who does not make affidavit as to United States citizenship and to the effect that he is not a Communist and not a member of any Nazi Bund Organization, such affidavit to be considered prima facie evidence of such citizenship, and that he is not a Communist, and not a member of any Nazi Bund Organization."

ment held it invalid and emphasized: "The purpose of the relief act was to alleviate human suffering throughout the United States. There is no necessary or logical connection between the political or social beliefs of a person and his distress."[61] The Supreme Court of California had occasion to consider whether a local school board could require as a condition for the use of the school auditorium that the applicant subscribe to the following oaths: " 'I do not advocate and I am not affiliated with any organization which advocates or has as its object or one of its objects the overthrow of the present Government of the United States or of any State by force or violence, or other unlawful means.' "[62] The Court concluded that such a requirement was unconstitutional:

> The state is under no duty to make school buildings available for public meetings. . . . If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. . . . Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property. . . .
>
> Since the state cannot compel "subversive elements" directly to renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building.[63]

The constitutional problem becomes increasingly involved when one envisions possible applications of the Gwinn Amendment. With reference to housing units which were constructed under the United States Housing Act of 1937, as amended, subsequently to 1952 and with respect to which grants are still being made the question is relatively simple: Does the power to make appropriations

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[61] United States v. Schneider, 45 F. Supp. 848, 850 (E.D. Wis. 1942).

[62] Danskin v. San Diego Unified School Dist., 28 Cal.2d 536. 171 P.2d 885, 888 (1946).

[63] *Id.* at 891.

carry with it authority to require "loyalty oaths"? Substantially the same question arises with respect to units which are owned and operated by the Public Housing Administration irrespective of when they may have been constructed provided they were constructed under the United States Housing Act. The question appears not to have arisen but the language of the amendment suggests that it was designed to apply to units which has been constructed under the United States Housing Act of 1937, as amended, regardless of present ownership. Such an application of the Gwinn Amendment would seem to raise very real questions as to due process of law.

The fact that the low rent housing program is to be executed by the use of a system of grants-in-aid suggests a further problem: Whether local housing authorities have the power under state law to implement the regulations of the Public Housing Administration under the Gwinn Amendment. State legislation establishing housing authorities is very similar in the various states, and in effect authorizes the local housing authorities to contract with the Public Housing Administration with respect to grants and annuities. Typical of the state legislation in this respect is an authorization of the local housing authorities ". . . to do any and all things necessary or desirable to secure the financial aid or cooperation of the Federal government. . . ." in furthering the purpose of the act providing for local housing authorities—to eradicate slum and provide housing for persons of low-income.[64] The Supreme Court of Illinois has stated: "It is evident that the exclusion of otherwise qualified persons solely because of membership in organizations designated as subversive by the Attorney General has no tendency whatever to further such purpose."[65] The court thus construed the enabling legislation to avoid questions of its constitution-

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[64] ILL. ANN. STAT. c. 67½ § 27 (Smith-Hurd, Supp. 1954).

[65] Chicago Housing Authority v. Blackman, 4 Ill.2d 319, 122 N.E.2d 522, 526 (1954).

ality.[66] The California court after referring to the Illinois decision observed:

> . . . [W]e fail to find in the act, pursuant to which plaintiff Housing Authority was created, anything to suggest that it is authorized to use the powers conferred upon it to punish subversives or discourage persons from entertaining subversive ideas by denying to such the right of occupying its facilities.[67]

No court which has considered the problem has attempted to find a legal basis of the local housing authority requirements of loyalty oaths other than in PHA regulations under the Gwinn Amendment.[68]

Assuming that the question of constitutional power of the Congress to enact the Gwinn Amendment has been resolved in favor of that power the question still remains as to possible constitutional limitations on the exercise of the power. Does the Gwinn Amendment or any proceedings authorized thereunder violate the due process of law clause?[69]

Increasing judicial deference to legislative judgment as to the appropriateness of means of executing lawful power perhaps should prompt one to hesitate to raise a question of substantive due process on the ground of there being no rational connection between the means applied and the objective sought. One does have some difficulty, however, in seeing any rational or indeed appreciable connection between the "loyalty" of tenants as measured by their willingness to subscribe to an oath of nonmembership in designated organizations and the objectives of the United States Housing Act. Even the undoubtedly legitimate objective of legislation to thwart possible overthrow of the government[70] could hardly justify the Gwinn

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66 *Ibid.*

67 Housing Authority of Los Angeles v. Cordova, 130 Cal. App. 2d 890, 279 P.2d ?15, 218 (1955).

68 See note 2 *supra.*

Amendment type of requirement for the reason as the California court suggested, "Nor is it apparent that the laudable purpose of combating the efforts of subversives is advanced by compelling them to live in slums or substandard housing accommodations."[71] There has been no suggestion of any connection between propensity to destroy fixtures or indeed the housing unit and membership in any

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[69] U. S. CONST. amend. V provides that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U. S. CONST. amend. XIV, § 1, provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The due process of law requirement of the Fifth Amendment would apply to the Gwinn Amendment and PHA regulations thereunder and the due process of law requirement of the Fourteenth Amendment would apply to action by local housing authorities. The meaning of "due process" in the two amendments is identical with respect to the problems at hand.

[70] Chief Justice Vinson wrote in Dennis v. United States, 341 U.S. 494, 501, (1951):

> "That it is within the *power* of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence. The question with which we are concerned here is not whether Congress has such *power*, but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution."

[71] Housing Authority of Los Angeles v. Cordova, 130 Cal. App. 2d 890, 279 P.2d 215, 218 (1955).

organization.

The Gwinn Amendment does not apply to all federally aided housing programs.[72] Doubtless the Congress has considerable latitude in selecting activities against which it will legislate. Yet the seriousness of the threat by "subversives" which the Gwinn Amendment presumably reflects may be doubted in view of the fact that possibly twenty times as many beneficiaries of federally aided housing programs are not required to sign "loyalty oaths" as are required under the Gwinn Amendment.[73]

At several points the question of procedural due process of law arises. With respect to the listing of organizations by the Attorney General it is clear that the listed organization is entitled to procedural due process in the listing.[74] Only organizations proposed for listing, however, can challenge their listing by the Attorney General. The individual members of such organizations cannot challenge the listing of the organization.[75] It is suggested that the inability of the individual to challenge the listing by the Attorney General in which membership would preclude his occupancy in a low rent public housing project offends constitutional due process requirements. For a variety of reasons the organization listed might not contest the listing but it would seem that the right of the individual to have procedural due process for the listing could not be waived by the organization.

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72 Text at note 21 *supra*.

73 *Ibid.*

74 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951). The regulations designed to afford procedural due process to the organizations proposed for listing are contained in 28 C.F.R. § 201.1-201.24 (Supp. 1955). The question of whether procedures under these regulations are constitutionally sufficient is in litigation. National Lawyers Guild v. Brownell, 225 F.2d 552 (D.C. Cir. 1955), *petition for cert. filed,* 24 U.S.L. WEEK 3123 (U.S. Oct. 28, 1955) (No. 496).

75 28 C.F.R., § 41.1 (Supp. 1955). *Cf.* 5 C.F.R. § 210, App. A (List of Organizations Designated by the Attorney General Pursuant to Executive Order No. 9835) (1949). Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court without opinion,* 341 U.S. 918 (1951).

Question of substantive due process would suggest itself were the Gwinn Amendment applied to tenants in buildings constructed prior to July 5, 1952, the effective date of the Gwinn Amendment, especially were such projects no longer receiving federal assistance. Serious due process objections would arise were the Gwinn Amendment and regulations thereunder applied to tenants of housing projects constructed under statutes other than the United States Housing Act of 1937, as amended.

The Gwinn Amendment makes non-membership in some 200 designated organizations the only test of tenants' "loyalty." This fact suggests grave due process objections. The fact must be kept in mind that the list of subversive organizations was originally compiled for purposes of the federal employees loyalty program. Even for purposes of that program membership in proscribed organizations was not in itself fatal. Membership in or affiliation with such organizations was to be but "one of the factors by which a department or agency" might reach its determination as to the security risk of a federal employee.[76] Indeed, the compiler of the list of proscribed organizations, the Attorney General of the United States,

> ... has pointed out, as the President had done previously, that it is entirely possible that many persons belonging to such organizations may be loyal to the United States; that membership in, affiliation with, or sympathetic association with, any organization designated is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action that is to be taken in a particular case. "Guilt by association" has never been one of the principles of our American jurisprudence.[77]

Chief Judge Swan of the Second Circuit has commented that the Attorney General's list of subversive organiza-

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[76] Order of the Attorney General Designating Organizations in connection with Federal Employee Security Programs, 18 FED. REG. 2741 (1953).

[77] 5 C.F.R., § 210, App. A. (List of Organizations Designated by the Attorney General Pursuant to Executive Order No. 9835) (1949).

tions, ". . . is a purely hearsay declaration by the Attorney General. . . . It has no competentcy to prove the subversive character of the listed associations. . . ."[78] Justice Clark has also had occasion to caution against the use of the Attorney General's list for other than its originally intended limited evidential use under the loyalty program.[79]

It will be noted that the Gwinn Amendment has the effect of excluding tenants from public housing projects not only if the tenants are members of proscribed organizations, but also if the tenant knows that any person who is to occupy the housing accommodation is a member of such organization. One might suggest that this is standard of "guilt" by consanguinity or cohabitation which suggests far-reaching due process objections.

Despite the doubts which have been expressed with respect not only to the authority of Congress to enact the Gwinn Amendment and the grave questions of constitutional due process in implementing the Gwinn Amendment, should these doubts be resolved in favor of the asserted power, the question would still arise whether the Gwinn Amendment and regulations thereunder infringe the freedom of speech and assembly clause.[80] Recent decisions[81] have undoubtedly produced a revision

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78 United States v. Remington, 191 F.2d 246, 252 (2d Cir. 1951).

79 Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

80 U.S. CONST. amend. I. It provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The freedoms of the First Amendment are among the liberties of the people protected against state interference by the due process of law clause of the Fourteenth Amendment (quoted in note 69 *supra*). Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) and Gitlow v. New York, 268 U.S. 652 (1925).

81 Adler v. Board of Education of City of New York, 342 U.S. 485 (1952); American Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382 (1950); Dennis v. United States, 341 U.S. 494 (1951). *Compare* Wieman v. Updegraff, 344 U.S. 183 (1952).

in the earlier applied "clear and present danger" test[82] as to the validity of legislation when measured against the requirements of the First Amendment. While the apparent departures from the "clear and present danger" standard can be explained by the presence of special factors: "great power over the economy" in the *Douds* case; "advocacy of overthrow of government" in the *Dennis* case; and "sensitive area in a school room" in the *Adler* case—we still have the question of what is the present standard to be applied in addition to whether the Gwinn Amendment measures up to the standard.

The Supreme Court of Wisconsin has presented a good statement of the currently applied test:

> Congress may impinge upon the freedoms guaranteed by the First amendment in order to prevent a substantial evil. No absolute test can be laid down in advance as to when such attempted abridgment by legislation of such freedoms is constitutional, and when not. This necessitates that whenever courts are called upon to pass upon the constitutionality of such type of legislation they weigh the substantiality of the evil sought to be prevented thereby against the harm that will result from the restriction imposed by such legislation upon freedom of speech and assembly. If the evil sought to be prevented is considered to be of sufficient substantiality to warrant the restriction, the legislation will be upheld as constitutional, otherwise not. In weighing the substantiality of the evil sought to be combated, considerable weight is to be accorded to any finding made by congress with respect thereto.[83]

The Supreme Court of Wisconsin then continued:

> This court deems the possible harm which might result in suppressing freedoms of the First amendment outweigh any threatened evil posed by the occupation by members of subversive organizations of units in federally

[82] Most recently applied in Craig v. Harney, 331 U.S. 367 (1947).

[83] Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N.W.2d 605, 614, *cert. denied,* 76 S. Ct. 135 (1955). For an excellent general discussion see Willcox, *Invasions of the First Amendment Through Conditioned Public Spending,* 41 CORNELL L.Q. 12 (1955).

> aided housing projects. For this reason we must hold Resolution 513 [of the Milwaukee Housing Authority] to the Gwinn Amendment to be unconstitutional and void.[84]

In *Peters v. New York City Housing Authority,* the appellants contended that.[85]

> If the "clear and present danger" test as a permissive exception to the First Amendment freedoms is to be abandoned, then these freedoms remain unimpaired and the tenants of public housing must be free to pursue their associations and beliefs. If the "clear and present danger" test is to be applied, what is the danger which the Congress has the power to control or prevent which empowers it to compel the housing authority to impose a political association test on people of low income who live in federally aided housing? Is it to be presumed that there is any danger, clear, present, probable or even uncertain in the political beliefs and associations of the low-cost housing tenants any more than those of any other kind of housing in which the poor live their humble, peaceful lives?

Perhaps the correct approach to applying the requirements of the First Amendment freedom is to suggest that with respect to "loyalty" of tenants in low rent housing projects "there is neither 'great power over the economy' as in Douds, nor 'advocacy of overthrow of the government' as in Dennis, nor even 'sensitive area in a school room,' as in Adler."[86]

V

In addition to the very grave doubts as to the constitutionality of the Gwinn Amendment and the regulations thereunder it is appropriate briefly to comment upon the policy considerations involved. If a policy of denying some of the benefits provided by our government to "subversive" minorities is ever justifiable, one is puzzled

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[84] Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N.W.2d 605, 615, *cert. denied,* 76 S. Ct. 135 (1955).

[85] Brief for Appellants, pp. 59, 60, Peters v. New York City Housing Authority, 307 N.Y. 519, 121 N.E.2d 529 (1954).

[86] *Id.* at 60.

as to the justification for withholding the benefits of only one of the various programs designed to assist housing. Assuming that the Gwinn Amendment requirement can be applied to all tenants in low rent housing projects, one wonders why in principle a similar requirement should not be extended to all those who benefit from various federal housing activities. Indeed, by the same reasoning one might raise the question of why exclude "subversive" minorities only from housing. There are of course many federal activities which are beneficial to the recipients and on policy considerations the exclusion of a minority from one benefit would seem to be as justifiable as for another.

Those who assume that the Gwinn Amendment type of requirement is constitutional perhaps reason in the following fashion: (1) Government can keep out of public housing those who are "subversive"; (2) Members of any one of the some 200 organizations designated by the Attorney General as "subversive" are "subversive"; *ergo,* (3) Government can keep out of public housing members of some 200 named organizations. The ironical aspects of the Gwinn Amendment type of requirement is that doubtless many tenants would be ineligible for membership in many of the organizations on the Attorney General's list. Certainly it is far from clear why tenants of low rent housing projects should be singled out for special tests of their "loyalty."

When one views the Gwinn Amendment type of requirement on "practical grounds" one must be forceably struck with the thought that a person who is truly "subversive" would hardly hesitate to sign a certificate to the effect that he was a member of no "subversive" organization. Perhaps the net effect of the Gwinn Amendment would be simply to open up the possibility of perjury convictions for those who may be members of any one of the 200 organizations designated by the Attorney General and refused to disclose such membership.

The fact that only a very, very small proportion of the tenants in some 282,000 units to which the Gwinn Amendment has been applied[87] in no way reflects the undesirable psychological effects which requirements of a "loyalty oath" has produced.[88]

*Henry N. Williams**

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87 A United Press survey in April, 1953 indicated that out of a sampling of 61,000 tenants in low-rent housing projects only 45 refused to sign the "loyalty oath." Of those who refused to sign 17 were tenants of housing projects in Los Angeles where "subversion" is reputed to be acute. N.Y. Times, April 26, 1953, § 8, p. 1, col. 8. By September, 1955, the New York Housing Authority had distributed certificate blanks to 30,000 tenants. Initially all but 21 of the tenants signed the required forms and of these 5 have since given up the fight, with only 16 tenants remaining who refuse to sign. N.Y. Times, Sept. 20, 1955, p. 33, col. 6.

88 See Jahoda and Cook, *Security Measures and Freedom of Thought: An Explanatory Study of the Impact of Loyalty and Security Programs*, 61 YALE L. J., 295 (1952).

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