

## LOYALTY AMONG GOVERNMENT EMPLOYEES

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### I. BACKGROUND

MOUNTING tensions in our society have brought us to a critical point in the matter of political and civil rights. The stresses are in large measure internal. They grow out of the accelerating movement to effect far-reaching changes in our economic and social structure, a movement which evokes ever-increasing resistance. As the conflicts sharpen, there is rising pressure to discard or undermine the basic principles embodied in the democratic concept of freedom for political opposition.

Maintenance of free institutions in a period of deepening crisis would be difficult enough if the struggle were confined to our shores. But the domestic problem is only an element of the world problem. Large areas of the world have abandoned the system of capitalism in favor of socialism. Other areas are far advanced in economic and social change. Everywhere there is struggle, uncertainty, fear and confusion. Protagonists of the more militant economic and social philosophies are organized into political parties which have their offshoots and counterparts in other countries, including our own. As a result, the preservation of political freedom, the right to hold and express opinions diverging from the opinion of the majority, is often made to appear incompatible with the overriding requirements of "loyalty," "patriotism," "national security" and the like. The danger of "foreign ideologies," "infiltration," "subversion" and "espionage" are invoked to justify the suspension of traditional rights and freedoms.

If we look to our basic traditions and attend the counsel of our wisest forbears, the path before us should be reasonably clear. Recognizing that no political organism can survive without evolution and change, we must face change with courage and imagination. The journey towards a new destination must be undertaken within the framework of the democratic process. We must seek to plot our course through rational and intelligent discussion. We must encourage the fullest

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participation of all elements in our society. We must be willing to compromise when the road ahead is obscure and to advance firmly when the road is clear.

There are tragic signs that this is not our course, that we have lost the path. The opponents of change have resorted increasingly to the delusively simple expedient of cutting off political opposition or of hounding it out of existence through appeals to irrationalism and prejudice. For ten years now the House Committee on Un-American Activities has spearheaded a drive which, while largely failing in its announced objective of exposing the activities of "subversive groups," has undoubtedly succeeded in arousing fierce and emotional opposition to progressive ideas and organizations. In the Alien Registration Act of 1940 Congress enacted an anti-sedition law comparable in sweep with the Alien and Sedition Acts of 1798. In Section 304 of the Taft-Hartley Act Congress undertook to emasculate the political power of labor by prohibiting expenditures for political purposes by labor organizations. The dangerously increasing ascendancy of the military in our national life is not only a threat to representative government but reflects a serious weakening of democratic vitality. And recent proposed legislation, aimed ostensibly at the Communist Party, threatens the existence of all political organizations not adhering to orthodox views.

These and other manifestations of the trend have aroused a number of open minded citizens to warn publicly against the rising threat to democratic institutions.<sup>1</sup> And certainly the danger is real. The suppression of political opposition is opposed to every tenet of democracy. It entails, among other things, the retention of outworn institutions, the elimination of every possibility of compromise and mutual adjustment, and the fomenting of class hatred, racial and religious prejudice, and allied social disorders. It must lead inevitably to an internal explosion in the form of revolt or an external explosion in the form of war.

The fear of "disloyalty" and "subversion" among the government bureaucracy is a modern aspect of the problem, brought to the fore by the greatly expanded function assumed by the executive in recent years. But the underlying issues are not new to America. Our history has been marked by a never ending struggle between the ideal of freedom in political expression and the efforts of temporarily dominant groups, particularly in periods of crisis, to demand rigid political or-

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1. See, e.g., TO SECURE THESE RIGHTS, REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 13-95 (1947); CUSHMAN, NEW THREATS TO AMERICAN FREEDOMS (1948); AMERICAN CIVIL LIBERTIES UNION, OUR UNCERTAIN LIBERTIES (1948); Gellhorn, *The Challenge to Civil Liberties*, 15 CONGRESS WEEKLY No. 15, p. 11 (April 10, 1948); Commager, *Who Is Loyal to America?*, 195 HARPER'S 193 (Sept. 1947); Gillmor, *Guilt By Gossip*, 118 NEW REPUBLIC No. 22, p. 15 (May 31, 1948); letter from 22 members of the faculty of the Yale Law School to the President, the Secretary of State and the Speaker of the House of Representatives, N. Y. Herald-Tribune, Nov. 27, 1947, p. 1, col. 6.

thodoxy. An invariable attribute of the struggle has been the stigmatization of the non-conformists as "disloyal." This is the typical behavior of standpatters, moved by fear and hostility toward the forces of change. Its malignance has been accentuated in the United States by the constant flow into a new and developing country of people and ideas from foreign lands.

The founders of our government, successful in their revolution against established governmental authority, embodied the principles of free political expression in the new Constitution. Two features of that document are noteworthy here. The provision on treason was designed to insure that the government's right to protection against treasonable acts would never be perverted, as it had been in England, to a weapon for the outlawing of political opposition. Secondly, the First Amendment constituted an express guarantee that the rights essential to the exercise of political freedom would be protected.

Within a decade after adoption of the Constitution these principles were put to a severe test. The period was in many respects similar to our own. Relations between the United States and France were critical. When President Adams publicized the notorious X.Y.Z. papers, anti-French and anti-foreign hatred was aroused to a frenzied pitch. The pro-British Federalists, who despised French libertarianism, fanned the flames with wild stories of French invasion plans. Federalist teachers, preachers and judges aroused the people with clamor for war. The Federalists contended that the French government was spreading pro-French propaganda through paid agents and sowing revolutionary doctrine. This hysteria even seized some of the Republicans, normally pro-French and anti-monarchist. Thus divided, the Republicans were easy prey. Denouncing all opposition as "disloyalty," the Federalists forced through Congress the Alien and Sedition Laws.<sup>2</sup>

The Alien Act was designed to harry the revolutionary Irish immigrant as well as the French, both of whom were attracted to the libertarian Jeffersonian Party. It provided for the imprisonment or expulsion of "enemy aliens" at the President's discretion. The Sedition Act was even more severe. It provided fines and imprisonment for the publication of any "false, scandalous and malicious writing" against the Government, or which brought officers of the government "into contempt or disrepute," provisions which would effectively seal opposition lips, even including members of Congress.

Even the hardbitten arch-Federalist Hamilton was amazed at the ruthlessness of the measures. But his counsel of moderation was ignored and the Acts were vigorously enforced against indignant and alarmed Republicans. One major objective of the campaign was

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2. Act of June 25, 1798, 1 STAT. 570; Act of July 14, 1798, 1 STAT. 596. For excellent histories of the period see generally BOWERS, *JEFFERSON AND HAMILTON* (1923); BOWERS, *JEFFERSON IN POWER* (1936); 1 BEARD, *THE RISE OF AMERICAN CIVILIZATION*: (1928).

to eliminate Republican office-holders. Thus the first prosecution under the Sedition Act was against a Republican member of Congress running for re-election.

The constitutionality of the Sedition Act was sustained in the lower federal courts and by three Supreme Court justices sitting in circuit, but the issue of constitutionality never reached the Supreme Court.<sup>3</sup> Jefferson and Madison, in the Kentucky and Virginia Resolutions of 1799, attacked the laws as unconstitutional. Regardless of their legality, the harsh enforcement of the Acts stunned the American people, and the legislation seems to have been a major reason for the defeat of the Federalists in 1800.<sup>4</sup>

Upon the accession of the Republicans to power, the Alien and Sedition Acts were repealed and Jefferson pardoned the persons—all Republicans—convicted under them. In his inaugural address Jefferson boldly reaffirmed the ideal of political freedom:

“If there be any among us who wish to dissolve this Union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.”<sup>5</sup>

Thus the first experiment with “loyalty” as a weapon in political struggles came to a happy end. But the issue arose in another form shortly afterwards. Nativist anti-foreign bias flared up again with the addition of Louisiana to the Union in 1803. The different national loyalties of the polyglot population of the new territory created much concern. Fortunately this was short-lived.<sup>6</sup> But in the 1830's nativism fastened upon the Catholics from Ireland and Germany. The legend spread that the Leopold Association, an Austrian missionary society, was “pouring gold into America to undermine the Protestant faith.”<sup>7</sup> Prominent citizens denounced Catholic immigrants, the Papacy and the church hierarchy; mobs rioted at Catholic churches; there was a demand for a twenty-one year probationary period before immigrants could become citizens. The loyalty of the foreign-born and especially of Catholics was impugned and it was suggested that these groups be denied access to political office. When a well-known Catholic was

3. For an account of the cases under the Alien and Sedition Acts see Anderson, *The Enforcement of the Alien and Sedition Laws*, ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 115 (1912).

4. Historians disagree as to the effect of the Alien and Sedition Laws on the elections. Compare 4 CHANNING, *HISTORY OF THE UNITED STATES* 232 (1929) and Anderson, *A Contemporary View of the Virginia and Kentucky Resolutions*, 5 AM. HIST. REV. 45 and 225 (1899-1900) with 1 BEARD, *RISE OF AMERICAN CIVILIZATION* 377 (1928) and Cushman, *Alien and Sedition Acts*, 1 ENCYC. SOC. SCI. 635 (1930).

5. 8 JEFFERSON, *WRITINGS* 1, 3 (1897).

6. CURTI, *THE ROOTS OF AMERICAN LOYALTY* 75 (1946).

7. *Id.* at 77.



appointed Postmaster General by President Pierce the vituperation of the anti-Catholic Know-Nothings reached a new pitch. It was asserted that Catholics in the Post Office would become members of a spy ring for the Pope, and it was solemnly claimed that Catholic immigrants were not and could not be loyal to the nation.<sup>8</sup>

With the coming of the Civil War loyalty to the Union once more became a crucial matter. Congress passed stringent legislation granting the President discretionary power "to suspend the privilege of the writ of habeas corpus in any case throughout the United States."<sup>9</sup> Harsh accusations of disloyalty were levelled against Democratic army officers because many Democrats at home opposed continuation of the war, and there were demands for stern measures of repression.<sup>10</sup> But even in the heat of war "disloyalty," short of actual treason, was not invoked to bar government employees or elected officials from office.<sup>11</sup> The wise and tolerant leadership of President Lincoln was a significant factor in minimizing infringements on democratic liberties.

In the bitterness of reconstruction following the Civil War, Congress and some of the states passed legislation requiring various forms of loyalty oaths as a condition to practicing certain professions. These laws were struck down by the Supreme Court as bills of attainder and *ex post facto* legislation.<sup>12</sup>

The issue of disloyalty among government employees and officeholders was not seriously raised again until the First World War. Indeed, affirmative steps were taken under the Civil Service Act, passed in 1883, to assure political independence among government employees. Civil Service Rule I, issued in 1884, required that "no question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced."<sup>13</sup>

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8. MYERS, *HISTORY OF BIGOTRY IN THE UNITED STATES 187-9* (1943).

9. 12 STAT. 755 (1863). For an account of the thousands of political prisoners arrested under this statute, see WHIPPLE, *THE STORY OF CIVIL LIBERTY IN THE UNITED STATES 133 et seq.* (1927).

10. GRAY, *THE HIDDEN CIVIL WAR 127* (1942).

11. CHAFEE, *FREE SPEECH IN THE UNITED STATES 263* (1941).

12. *Cummings v. Missouri*, 4 Wall. 277 (1867); *Ex Parte Garland*, 4 Wall. 333 (1867).

13. Presidential promulgation, April 15, 1903, under authority of 22 STAT. 403 (1883), 5 U.S.C. 633 (1946). But *cf.* Report of President's Temporary Commission on Employee Loyalty, Appendix B, p. 3 (1947). While the President's Temporary Committee contended that Rule I was intended only to remove partisan politics from the Civil Service and not to exclude "all questions designed to uncover adherence to ideologies inimical to our form of government," analysis of the Civil Service Act of January 16, 1883 confirms the conclusion that Congress intended a complete bar to political investigation, regardless of context. In practice, the Commission's selection of Federal employees was based solely on technical qualifications and character.

In World War I military tensions again inflamed suspicion and distrust of those who might hinder the war effort. Public attention centered on foreign-born groups, particularly the Germans, even though many were citizens and had been assimilated into the American culture. Government activity concentrated on aliens, who were suspected of potential disloyalty, and numerous deportations took place.<sup>14</sup> While government employees as a class escaped notice, certain elected officials did not. In the early stages of the war Victor Berger, elected to Congress as a Socialist, was denied his seat because of his opposition to war.<sup>15</sup>

The Berger affair gave impetus to the doctrine that "disloyalty" was a legitimate basis for barring duly elected representatives from public office. Shortly after the war the New York Assembly expelled, without hearing, five members elected on the Socialist slate. The grounds were that the five were "disloyal" to the American government, and that the Socialist Party was not a political party but in reality a subversive organization which adhered to the revolutionary principles of Soviet Russia. A half-hearted allegation was made that the five had violated the Espionage Act, but the charge was not supported. They never regained their seats.<sup>16</sup>

Political suppression reached flood-tide with the widespread raids of A. Mitchell Palmer, U. S. Attorney General, whose dragnet swept thousands of "disloyal" aliens into prison.<sup>17</sup> At the same time, the Lusk Committee in New York, which fathered the expulsion of the Socialists from the New York legislature, forced the enactment of legislation drastically curtailing political expression. Teachers, usually the first group of government employees subject to attention, felt the sting of the Loyalty Oath and those suspected of radicalism were dismissed.<sup>18</sup>

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14. See Post, *DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY* (1923).

15. Berger was indicted for conspiracy under the Espionage Act and convicted, but his conviction was later reversed. In 1923, after the Department of Justice had dropped espionage charges, Berger took his Congressional seat without dissent. A comprehensive discussion of the Berger incident is to be found in CHAFEE, *op. cit. supra* note 11, at 247-269.

16. See O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592, 592-594 (1948) and CHAFEE, *op. cit. supra* note 11, at 269-282. For a vivid picture of the prevailing emotional attitude of the early 20's, see Brown, *The Disloyalty of Socialism*, 53 AM. L. REV. 681 (1919).

17. For a re-telling of the Palmer raids story, see CUMMINGS AND MCFARLAND, *FEDERAL JUSTICE* 429-30 (1937) and LABOR RESEARCH ASSOCIATION, *THE PALMER RAIDS* (1948). See also *Colyer v. Skeffington*, 265 Fed. 17 (D. Mass. 1920).

18. See AMERICAN CIVIL LIBERTIES UNION, *THE GAG ON TEACHING* (1931). Excellent analyses of teachers' oaths are found in Friedrich, *Teachers' Oaths*, 172 HARPERS' 171 (1936); *Remarks by Samuel E. Morison, at Hearings on Bill to Repeal the Teachers' Oath Act*, 21 MASS. L. Q. No. 3, 61 (1936). For a constitutional discussion, see Gardner and Post, *The Constitutional Questions Raised by the Flag Salute and Teachers' Oath Acts in Massachusetts*, 16 B. U. L. REV. 803 (1936). By 1940 some 21 states had enacted

The reaction to these moves was not long in coming. The Bar Association of the City of New York protested the expulsion of the Socialist Assemblymen and issued a memorial, written principally by Charles Evans Hughes, later Chief Justice of the United States Supreme Court, strongly condemning the action of the legislature. Most of the victims of the Palmer raids were released and the charges against them dropped. The fever of the post-war years slowly ebbed. In 1923 Governor Smith signed the repeal of the Lusk Anti-Sedition statutes.<sup>19</sup> The country seemed to take to heart, at least for the time being, the words of Justice Holmes reaffirming the American tradition:

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." <sup>20</sup>

It is in the light of this background that one must consider the current programs and proposals to maintain a constant and intensive check on the loyalty of all government employees. The specific issues raised by the loyalty check are particularly significant for a number of reasons.

The problem is important, first, because of the number of persons involved. During the war the civilian payroll of the Federal Government included over 3,000,000 employees; it is now somewhat over 2,000,000. To this number must be added 3,400,000 state and local government employees. Together with their families these civil servants represent a substantial segment of the population. Post-war reductions have now ceased and the number of government workers is again on the increase. With the development of government owned plants for the production of atomic energy, not to mention the possibility of nationalization of certain basic industries, the numbers involved would be even larger. Furthermore the loyalty program directly affects many thousands of employees of private employers operating under government contract.

Second, the standard set by the Government in this area has an incalculable effect upon the attitude of the country as a whole. Calm and

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legislation requiring special oaths of loyalty from teachers. The statutes are collected in AMERICAN CIVIL LIBERTIES UNION, *THE GAG ON TEACHING* 62-3 (1940).

19. Governor Smith pointed out that the laws were "repugnant to the fundamentals of American democracy. Under the laws repealed, teachers, in order to exercise their honorable calling, were in effect compelled to hold opinions deemed by a State officer consistent with loyalty . . ." SMITH, *PUBLIC PAPERS* 292 (1923).

20. Dissenting in *Abrams v. United States*, 250 U.S. 616, 630 (1919). Generally on the history of civil liberties in the United States see CHAFEE, *op. cit. supra* note 11; AMERICAN CIVIL LIBERTIES UNION, *ANNUAL REPORTS* (1921-1948); *The Constitutional Right to Advocate Political, Social and Economic Change*, 7 *LAW GUILD REV.* 57 (1947).

intelligent action by government sets a healthy example. Witch-hunts officially sponsored must breed imitations throughout the nation. In a period of rising tension the government has a special obligation to hold firm to a reasoned course in the best tradition of political democracy.

Third, the issue posed is one that goes deep into the foundations of political freedom in a modern industrial state. The political theory of our founding fathers predicated freedom of political institutions upon a groundwork of economic freedom. The vast accumulations of capital which have marked the growth of modern industry have largely removed this underpinning of economic independence. Hence the basic problem of modern democracy is to preserve political independence for large masses of citizens who do not have a source of strength in the ownership of small units of productive enterprise. This problem is particularly acute in the case of the government employee, who is peculiarly lacking in economic independence. Establishment of a firm foundation of political freedom for the government worker would constitute a significant advance toward solution of the broader underlying issue.

Finally, the loyalty program must be considered in its effect upon the morale and efficiency of the government service. The government bureaucracy is an indispensable tool in the modern world and the quality of its performance becomes more and more vital to the welfare of all. Forces are constantly at work in any large organization seeking to dull, to ossify, to strait-jacket its activity. Only a thoughtful and continuous effort can prevent government bureaucracy from degenerating to a moribund level where it becomes incapable of handling the novel and complicated matters with which it must deal. Our government has the exacting task of recruiting competent men and women and the equally difficult task of retaining the services of its ablest officials. A loyalty program which gives rise to fear and uncertainty places a premium upon conformity and mediocrity. It will determine, as much as any single element, the capacity of government to function as a vigorous, effective force in modern society.

## II. DEVELOPMENT OF THE CURRENT LOYALTY PROGRAM

### *Impact of the House Committee on Un-American Activities*

The most important element in the development of our present policy on employee loyalty has been the House Committee on Un-American Activities. It is necessary, therefore, to trace the influence of this Committee in some detail.

From its inception in 1938 the Committee, particularly through its first chairman, Congressman Dies, preached to Congress, the President, and the general public the necessity for ridding the government

of "subversive" employees. At frequent intervals Dies warned of the "Trojan horse" tactics of Communists and "subversives" in the government service; also a source of danger were the "bureaucrats," "crackpots," "internationalists" and "anti-parliamentarians."<sup>21</sup> Dies asserted, and soon convinced the majority of his associates in the House, that disloyal employees were endangering the entire governmental structure. At first the executive agencies refused to dismiss employees charged with disloyalty by the Dies Committee. The consensus in the Administration was that the Committee's standards for determining loyalty were vague and uncertain, that its procedures were unfair, and that the central purpose of the Committee was to discredit the New Deal. Over the years, however, the Committee was to be largely successful in forcing its premises and standards of loyalty upon the executive arm of the Government.

During the first two years of the Committee's existence, Dies established the basic elements of his attack: the doctrine of guilt by association, unsupported charges against highly placed Government officers, denial of the opportunity to rebut published accusations and repeated public assertions that there was a mass infiltration into the government by "subversives." At its hearings in October 1938, involving Communist activities in Detroit, the Committee first utilized the doctrine of guilt by association. Teachers in the school system were exposed for having *attended* public meetings sponsored by alleged Communist "front" organizations.<sup>22</sup> In November of the same year, Dies demanded the resignation of Secretaries Ickes and Perkins and Works Progress Administrator Hopkins on the ground that they were exponents of a philosophy of "class hatred."<sup>23</sup> Similar criticism was levelled at lesser figures in the Government.<sup>24</sup>

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21. See, e.g., OGDEN, *THE DIES COMMITTEE*, 57, 59, 60, 87, 90, 91, 92, 157, 224, 231, 240, 246, 248, 251, 260, 270, 271 (1945); GELLERMANN, *MARTIN DIES*, 94, 103, 104, 151, 166, 184, 185, 214, 222, 243, 244, 245, 250-4 (1944). In the main Dies concentrated his criticism on alleged Communist or Communist-influenced employees.

22. *Hearings before a Special Committee on Un-American Activities on H.R. 282, 75th Cong., 3rd Sess. 1297 et seq. (1938)* (hereafter cited as *Hearings on Un-American Activities*).

23. Dies: "Such resignation would restore . . . confidence in government." *N.Y. Times*, Nov. 25, 1938, p. 3, col. 6-7.

24. E.g., Aubrey Williams, at that time W.P.A. Deputy Administrator, was attacked for saying, "I am not so sure that class warfare is not all right." *Hearings on Un-American Activities*, 2427-9 (1938). Williams' version of his statement was: "I stated class warfare is a fait accompli—something that is already here—something not involving force. I meant such things as collective bargaining, clashes of groups of employee and employer, or one industrial group against another." *N.Y. Times*, Nov. 23, 1938, p. 15, col. 1.

Congressman Mason, a member of the Committee, attacked a projected series of forums as being organized by a Communist front organization. He listed the following Government officials as sponsors: William O. Douglas and Jerome Frank, S.E.C. Commissioners; Edwin S. Smith, N.L.R.B. member; Corrington Gill, Ass't W.P.A. Administrator; Nathan R. Margold, Solicitor of the Dept. of Interior. *Ibid.* In accordance with

To support his claim that the Government was in imminent danger, Dies, in October 1939, released to the press a list of over 500 federal employees who were charged with being members of the American League for Peace and Democracy.<sup>25</sup> It was later established that many of those on the list had never belonged to the organization.<sup>26</sup> Since the denials and defenses were not as widely publicized as the charges made by Dies, the popular impression largely remained that the Federal Government was saturated with subversive agents in the guise of loyal employees. No opportunity was ever given the accused employees to appear before the Committee and answer its charges.<sup>27</sup> President Roosevelt characterized the publication of the list as a "sordid procedure."<sup>28</sup> Dies' defense was scarcely responsive; he asserted that his Committee had clearly established, a year prior to publication of the list, that the League was a Communist front and that government workers who had not taken the opportunity to resign in the intervening period ought to be exposed.<sup>29</sup> Some seven months later Congressman Van Zandt criticized the President for not having removed any of the "exposed" employees.<sup>30</sup>

That the motivation of the attack was primarily political was clearly shown by the statement of Congressman J. Parnell Thomas, then a member and subsequently chairman of the Committee, em-

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general Committee practice neither Williams nor those named as sponsors of the "subversive" forum series were given an opportunity to explain or defend themselves against the accusations.

25. *Hearings on Un-American Activities*, 6403 *et seq.* (1939).

26. Congressman Dempsey: "The Dies Committee made no effort to ascertain whether or not a single person named on that list actually was a member. . . ." 85 Cong. Rec. 1033 (1939). Congressman Mason, in rebuttal: "It is too bad an innocent person will be hurt, but that is not the fault of the Dies Committee." *Id.* at 1053.

27. ". . . [The] Committee had become, more than anything else, a denunciatory agency. Dies seemed to be attempting to inaugurate a system whereby a federal employee could be dismissed without the least opportunity to defend himself." OGDEN, *op. cit. supra* note 21, at 249. For a recent critical analysis of the Committee's procedure in another area of its activity, see Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 HARV. L. REV. 1193 (1947).

28. N.Y. Times, Oct. 28, 1939, p. 1, col. 7.

29. *Hearings on Un-American Activities* 6403-4 (1939). Dies, in a radio speech, reiterated his position: "I know . . . there are hundreds, yes thousands, of members of the Communist-controlled organizations scattered throughout the departments and agencies of our Federal Government and nothing will deter me from apprising the American people of this fact." N.Y. Times, Oct. 29, 1939, p. 27, col. 1.

30. ". . . [T]he Federal Treasury should not be supporting directly hundreds of organized sympathizers and supporters of international revolutionary Communism." N.Y. Times, June 10, 1940, p. 8, col. 2. The technique of making unsupported charges of disloyalty against federal employees, followed by attacks on the Administration for not dismissing the victims, was to be used repeatedly in the ensuing years by the Committee and its supporters.

phasizing the Committee's intention to extirpate the "fifth column" from the public service:

"In some respects it [the fifth column] is synonymous to the New Deal, so the surest way to removing the fifth column from our shores is to remove the New Deal from the seat of government."<sup>31</sup>

This political motivation was further demonstrated by the fact that the Committee directed its efforts mainly against the more controversial agencies of the New Deal. Thus hearings were held on Communist penetration into the T.V.A. and resulted in the allegation that twelve (minor) employees out of 3,500 employed by the Authority were Communists.<sup>32</sup> Without offering evidence which might be scrutinized, the Committee's 1940 Report to the House claimed that investigation had revealed an "alarming penetration by the Communist Party into the ranks of . . . governmental agencies."<sup>33</sup> Congressman Voorhis, a member of the Committee, strongly objected to such a charge as "not supported by evidence,"<sup>34</sup> but reasoned rebuttal again was to prove unavailing in the face of the Committee's assertions and accusations. Fortunately for the Committee, its charges were in harmony with the editorial position of a majority of the press and hence were rarely subjected to effective critical analysis.

In 1941 the Committee, its life extended for another year by the House,<sup>35</sup> renewed and intensified its charges. As part of an indirect attack on the OPA Dies demanded the discharge of Price Administrator Leon Henderson and a number of his aides, asserting that they were either members of Communist-dominated organizations or infected with "un-American" views.<sup>36</sup> He also strenuously criticized the Federal Communications Commission for appointing Goodwin Watson; Watson was alleged to be a member of numerous "front organizations

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31. *Ibid.*

32. *Hearings on Un-American Activities* 655-745 (in executive session) (1940).

33. 86 Cong. Rec. 579 (1940).

34. . . . "[T]he old charge about there being large numbers of Communists employed by our Government has been reiterated again today. Such a charge is not supported by evidence before the Committee, nor should such a loose charge ever be made by anyone until he is ready to be specific and to name names and give his evidence." *Id.* at 583.

35. 87 Cong. Rec. 899 (1941).

36. Henderson was accused of being a member of "five Communist-controlled organizations." Congressman Dies failed to name the organizations at the time, but later he charged Henderson with heading the Washington Branch of the Spanish Refugee Relief Campaign. *N.Y. Times*, Sept. 8, 1941, p. 1, col. 1. One of Henderson's aides, Robert A. Brady, was held suspect for having written *THE SPIRIT AND STRUCTURE OF FASCISM* (1937), sections of which Dies held to be "un-American." Another aide, Mildred E. Brady, was charged with having been an editor on the magazine *FRIDAY*. *N.Y. Times*, Sept. 8, 1941, p. 1, col. 1. On January 15, 1942 Dies was able to point with pride to the decision of the Civil Service Commission which had recommended both Bradys for dismissal. 88 Cong. Rec. 408 (1942). It was the first time that the Committee had succeeded in causing employees to be removed from the federal service.

of the Communist party" and to have written "numerous articles in praise of the Soviet way of life."<sup>37</sup> In addition Dies sent a list of 1,121 persons in federal posts to the Attorney General charging that they were either "Communists or affiliates of subversive organizations." In a letter accompanying the list he urged the need for "appropriate action":

"The retention on the Federal payroll of several thousand persons who, to put the matter mildly, have strong leanings toward Moscow will confirm the widely held suspicion that a large and influential sector of official Washington is utilizing the national emergency for undermining the American system of democratic government."<sup>38</sup>

To insure a thorough investigation of this and other groups of alleged subversives, Congress appropriated \$100,000 and directed a check by the Federal Bureau of Investigation.<sup>39</sup> Additional measures were threatened if the executive branch continued in its failure to act against subversives in the Government service.<sup>40</sup>

In September 1942 the Attorney General reported back to Congress on the results of the FBI investigation of the 1,121 alleged "subversives."<sup>41</sup> With most of the investigations completed, the evidence uncovered by the FBI had resulted in the dismissal of two employees and the taking of disciplinary action against one other.<sup>42</sup> The Attorney General and his Interdepartmental Committee on Investigations took sharp issue with the Un-American Activities Committee, asserting that "sweeping charges of disloyalty in the federal service have not been substantiated," and that the FBI investigation "should not be continued as a broad personnel inquiry."<sup>43</sup> Dies rejoined by asserting again the validity of his charges and accusing the Attorney General of using a Congressional appropriation to discredit his Committee.<sup>44</sup>

37. N.Y. Times, Nov. 19, 1941, p. 8, col. 6-7. The F.C.C., making a vigorous defense of Watson, refused to discharge him. See *infra* note 51.

38. N. Y. Times, Oct. 20, 1941, p. 1. col. 3.

39. Department of Justice Appropriation Act, 1942, 55 STAT. 289 (1941).

40. See speech by Congressman Ford, 87 CONG. REC. 7543 (1941). See also H. R. Rep. No. 1 of the Special Comm. on Un-American Activities, 77th Cong., 1st Sess. 25 (1941), recommending legislation to deny Governmental employment to any person "who has been and is now active in any political organization which is found to be under the control and guidance of a foreign government."

41. H. R. Doc. No. 833, 77th Cong., 2d Sess. (1942). The Document consists of a letter of transmittal by the Attorney General, the FBI report, and the report of the Attorney General's Interdepartmental Committee on Investigations.

42. *Id.* at 14-16.

43. *Id.* at 27. Subsequent reports on the results of the FBI investigation were submitted in January and April 1943. H. R. Docs. No. 51 and 162, 78th Cong., 1st Sess. (1943). For a further discussion of all these reports see *infra* pp. 54-5.

44. 88 Cong. Rec. App. 3231-3 (1942).



Following another renewal of the life of his Committee in January 1943 Dies continued his attacks. In a long speech on the floor of Congress he publicly denounced 38 Federal employees, giving their salaries and "subversive affiliations."<sup>45</sup> The cumulative effect of tolling off one suspected employee after another was to impress on his Congressional auditors a picture of a government loaded with "subversives" in key positions. It was essential, he argued, to cleanse the government of all such "subversives."<sup>46</sup> To that end a motion was offered to eliminate the salaries of the accused 38 by amending a current appropriation bill.<sup>47</sup> This was felt to be an effective device for by-passing an uncooperative executive. After extended debate the motion was defeated, primarily on the ground that it would be unfair to dismiss the named employees without giving them a hearing.<sup>48</sup> Instead, the House delegated to a sub-committee of the Appropriations Committee responsibility to hear and make a determination as to the "subversive" nature of each of the accused employees.<sup>49</sup>

Hearings by this sub-committee, headed by Congressman Kerr, were held in secret. The accused were denied the right to counsel and were afforded no particulars of the charges against them. They were not permitted to produce witnesses, to cross-examine their accusers, or to use compulsory process. The sub-committee found that three of the accused 38—Robert Morse Lovett, Goodwin B. Watson and William E. Dodd, Jr.—were sufficiently suspect to warrant dismissal.<sup>50</sup> This finding was reached in the face of vigorous affirmation by the employing agencies of the loyalty of the accused.<sup>51</sup> In spite of strong opposition from both the Senate and the President the House succeeded in attaching a rider to the Urgent Deficiency Appropriation Act forbidding the payment of compensation for any government position to the three officials found by the sub-committee to have been "subversive."<sup>52</sup> Three years later the Supreme Court struck down this action as a bill of attainder.<sup>53</sup>

Following the end of the war the Committee on Un-American Activities, now under a new chairman, returned to the offensive. Shortly

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45. 89 Cong. Rec. 479-84 (1943).

46. *Id.* at 485.

47. *Id.* at 645.

48. *Id.* at 656.

49. *Id.* at 734 *et seq.*

50. *Id.* at 4581 *et seq.* (1943).

51. See Report of the F.C.C. refusing to discharge Watson and Dodd, printed in full in 89 Cong. Rec. 4588 *et seq.* (1943), and defense of Lovett made by Sec. Ickes before the Senate Appropriations Committee, May 20, 1943 (Dept. of Interior Press Release).

52. 57 STAT. 450 (1943). For an historical and legal analysis of the rider, see Schuman, "Bill of Attainder" in the Seventy-Eighth Congress, 37 AM. POL. SCI. REV. 819 (1943).

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

after V-J Day the Committee demanded that President Truman direct certain of the war agencies to turn over their complete personnel files to it.<sup>54</sup> In the early part of 1947 the Committee again reported to Congress that Communists were "entrenched in government."<sup>55</sup> It recommended as a remedial measure the establishment of an independent commission with authority to discharge any Government employee "whose loyalty to the United States is found to be in doubt."<sup>56</sup>

*The Development of Legislative and Executive Policy From the Hatch Act to the Loyalty Order*

Under the spurs of the Committee on Un-American Activities a new legislative and executive policy on employee loyalty was gradually developed. The first concrete action by Congress came in the Hatch Act, passed in August 1939. Section 9A of this legislation provided:

"(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

"(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person."<sup>57</sup>

The following year the Civil Service Commission, in Departmental Circular No. 222 issued to all federal employing agencies, stated:

"The Civil Service Commission has implemented Section 9A of the Hatch Act by ruling that as a matter of official policy, it will not certify to any department or agency the name of any person when it has been established that he is a member of the Communist Party, the German Bund, or any other Communist, Nazi, or Fascist organization."<sup>58</sup>

54. N.Y. Times, Sept. 27, 1945, p. 1, col. 6. Similar pressures on the executive branch were now being exerted by other committees. Thus in April 1946, following testimony of Congressman May that the intelligence unit of the State Department had been hiring employees with "pro-Soviet sympathies," the House Appropriations Committee voted to deprive the unit of its entire appropriation. N.Y. Times, April 10, 1946, p. 21, col. 1.

55. N.Y. Times, Jan. 3, 1947, p. 2, col. 2.

56. *Ibid.* For a full account of the proposal see N.Y. Times, Feb. 27, 1947, p. 14, col. 2.

57. 53 STAT. 1147, 1148 (1939), 18 U.S.C. § 61 i (1946).

58. Issued June 20, 1940. The ruling was based in part on the parallel action of Congress in prohibiting work on relief projects to aliens, Communists and any member of a Nazi Bund organization. Emergency Relief Appropriation Act, 54 STAT. 620 (1941). Shortly afterwards, in the Selective Service Act of September 16, 1940, Congress included a provision stating it to be "the expressed policy of the Congress that whenever a

Beginning in 1941 Congress began the practice of attaching to all appropriation acts a provision specifying that no part of the funds appropriated should

“be used 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.”<sup>59</sup>

The Hatch Act and these appropriation acts constituted, until issuance of the Loyalty Order in March 1947, the major legal framework upon which the loyalty program, so far as it affected the bulk of employees already in Government service, was predicated.<sup>63</sup> Under these provisions, as well as under Civil Service regulations, final decision as to whether an employee should be dismissed rested with the employing agency. Originally investigations of employees were made by the employing agency or by the FBI at the request of the employing agency. Attitudes and procedures of the employing agencies in applying the statutory provisions naturally differed.

A higher degree of centralization in the investigative process and increased uniformity of standards for removal by the various employing agencies were made necessary through the action of Congress in

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vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of any employee . . . such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund.” 54 STAT. 890 (1940) 50 U.S.C. App. § 308(i) (1946). See *infra* note 232.

59. First incorporated in 55 STAT. 5, 6 (1941). Similar provisions have appeared in all subsequent appropriation acts. H.R. Rep. No. 616, 80th Cong., 1st Sess. 4 (1947).

Earlier, in 1939, Congress attached a rider to the District of Columbia Appropriations Act, which provided that no salary should be paid to any teacher “teaching or advocating communism.” The rider was repealed two years later. BUNTING, LIBERTY AND LEARNING 59 (1942).

60. In Departmental Circular No. 222, *op. cit. supra* note 58, the Civil Service Commission advised the employing agencies that they were entitled to dismiss employees on disloyalty charges under Rule XII, Section 1 of the Civil Service Regulations, authorizing removal “for such cause as will promote the efficiency of the service.” Rule XII is in turn based on the Lloyd-La Follette Act, 37 STAT. 555 (1912), 5 U.S.C. 652 (1946). Departmental Circular No. 222 was the first time the Civil Service Commission correlated loyalty and efficiency. In at least one case an employee charged with being a leader in organizations dominated by Communists and accepting the Party’s discipline was removed by the Secretary of Labor under this provision. *Matter of Miller* (opinion of Secretary of Labor, Aug. 1, 1941). Likewise the provision adopted by the Civil Service Commission in its War Service Regulations, *infra* note 68, authorized removal of employees already in Government service. On the whole, however, the employing agencies and the interdepartmental coordinating committees seem to have operated primarily under the Hatch Act and appropriation acts. See *infra* note 81.

For discussion of the provisions relating to applicants for federal employment, to transfers within the Government, and to employees in the so-called “sensitive” agencies, see *infra* pp. 17-18.

June 1941 in appropriating \$100,000 for the use of the FBI.<sup>61</sup> That agency was directed to investigate employees "who are members of subversive organizations or advocate the overthrow of the Federal Government."<sup>62</sup> Shortly afterwards the Attorney General instructed the FBI to commence investigations without notice to the employing agency upon receipt of "information or complaints showing reasonable grounds for taking action."<sup>63</sup> As before, FBI reports were submitted to the employing agency for such action as it thought required by the statutory provisions.

In April 1942 the Attorney General appointed his Interdepartmental Committee on Investigations, consisting of representatives of the Department of Justice and four other agencies. The function of this committee was to advise and assist the FBI in its investigations and the employing agencies in their administration of the statutory requirements.<sup>64</sup> As already pointed out, this committee in September 1942 filed a report, endorsed by the Attorney General, urging discontinuance of any "broad personnel inquiry" and the restriction of investigations "to those instances in which there is substantial reason for suspecting that there has been a violation of law requiring prosecution or dismissal from the federal service."<sup>65</sup>

By Executive Order 9300, issued February 5, 1943, the President replaced the Attorney General's Committee with a new Interdepartmental Committee on Employee Investigations.<sup>66</sup> This committee, like its predecessor, was designed to serve as a policy-making, coordinating and advisory agency on all matters relating to "subversive" activities of federal employees. It continued to function until promulgation of the Loyalty Order in March 1947.

Both the Attorney General's and the President's Committees, operating under the Hatch Act and appropriation acts, employed the same basic standard for determining the issue of dismissal from Government service. An employee was held to come within the ban of the statutes only if (1) he was a member of an organization advocating the overthrow of the Government by force or violence, or (2) he personally advocated the use of force or violence to change the form of government.<sup>67</sup>

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61. *Supra* note 39.

62. 55 STAT. 292 (1941). The following year Congress appropriated an additional \$200,000 for the same purpose, adding the words "by force" after "overthrow of the Federal Government." 56 STAT. 482 (1942).

63. Letter from the Attorney General, H.R. Doc. No. 833, 77th Cong., 2d Sess. 9 (1942).

64. *Id.* at 1-2, 12, 23-6.

65. *Id.* at 26-8. See *supra* note 41.

66. 8 FED. REG. 1701 (1943).

67. See Report of the President's Temporary Commission on Employee Loyalty, p. 7; Report to the Honorable Francis Biddle, Attorney General of the United States, from

Meanwhile a more elastic standard—one more in harmony with the views of the Un-American Activities Committee—was promulgated for testing the loyalty of applicants for Government employment. In March 1942 the Civil Service Commission, with the approval of the President, issued War Service Regulations providing that an applicant would be denied clearance by the Civil Service Commission where there existed “a reasonable doubt as to his loyalty to the Government of the United States.”<sup>68</sup> Under this formula the Commission decided all questions of loyalty with respect to millions of employees entering federal service during the war years.<sup>69</sup>

A different standard was likewise established by legislation for certain so-called “sensitive agencies.” As early as June 1940 Congress authorized the War and Navy Departments and the Coast Guard to remove an employee summarily when such “immediate removal is, in the opinion of the Secretary concerned, warranted by the demands of national security.”<sup>70</sup> Similar authority was extended to the State Department by the McCarran rider, passed in July 1946, providing that the Secretary of State “may, in his absolute discretion . . . terminate the employment of any officer or employee . . . whenever he shall deem such termination necessary or advisable in the interests of the United States.”<sup>71</sup> Under these provisions the “sensitive agencies” were enabled to discharge an employee, apart from any question as to his loyalty in terms of the Hatch Act, the normal appropriation

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the Interdepartmental Committee on Investigations, H.R. Doc. No. 833, 77th Cong., 2d Sess. 19 (1942); Interdepartmental Committee on Employee Investigations, General Memorandum No. 6 (Sept. 1, 1943), quoted in 47 COL. L. REV. 1172-3 (1947). The number of employees discharged under these statutes is discussed *infra* pp. 54-6.

68. 7 FED. REG. 7723, § 18.2(c) (7) (1942). This applied also to Civil Service clearance of transfers within the Government. The Regulations were apparently applicable also to employees with permanent status, but, as noted *supra* note 60, the interdepartmental committees and the employing agencies seem to have relied upon the Hatch Act and appropriation provisions.

69. The War Service Regulations applied only to applicants subject to Civil Service clearance, but these included all but a small proportion of the total number employed. A frequent practice was for the Commission to give clearance subject to a subsequent loyalty check. Thus an individual would be employed on a probational basis, often for some period of time, pending Civil Service investigation and decision on the loyalty issue. For further discussion of the standard employed by the Commission and the results of its application see *infra* pp. 44 and 46.

70. 54 STAT. 679, 713 (1940), 50 U.S.C. App. § 1156 (1946). This removal power was extended for the duration of the war, 56 STAT. 1053 (1942), 5 U.S.C. § 652 (1946), and is still in effect.

71. Pub. L. 490, 79th Cong., approved July 5, 1946; 60 STAT. 453; extended by Pub. L. 166, 80th Cong., 1st Sess. approved July 8, 1947; further extended until June 30, 1949, by Pub. L. 597, 80th Cong., 2d Sess. approved June 3, 1948. Similar authority was given to the Central Intelligence Agency by Pub. L. 253, 80th Cong., 1st Sess. approved July 26, 1947.

acts, or the War Service Regulations, on the ground that he constituted "a security risk."<sup>72</sup>

With the end of the war, pressures from Congress to remove "subversive" employees from government service redoubled. On July 2, 1946, the House Civil Service Committee appointed a sub-committee to make an investigation "with respect to employee loyalty and employment policies and practices in the Government of the United States."<sup>73</sup> The subcommittee conducted rapid-fire hearings and filed its report on July 20, 1946. The report acknowledged that "the length of the committee's hearing prevented it from making a thorough and exhaustive inquiry" and that "Congress has not thoroughly studied the problem."<sup>74</sup> It nevertheless criticized certain aspects of the existing situation, including the difference in standards employed by the President's Interdepartmental Committee and the Civil Service Commission, the lack of uniform standards and procedures in use by the various agencies, and other "existing inadequacies of protection afforded to this Government from disloyal persons employed or to be employed."<sup>75</sup> It added significantly:

"The reason for comparatively few decisions of eligibility on loyalty grounds resulting in the actual removal of employees from Government service should be given study and the reason therefore clearly stated."<sup>76</sup>

The sub-committee concluded that there was "immediate necessity for certain action" and recommended that a commission be established, composed of officials from the Government agencies with the most experienced investigating staffs, to make a study of existing legislation and procedures and present to Congress "a complete and unified program that will give adequate protection to our Government against individuals whose primary loyalty is to governments other than our own."<sup>77</sup> The Republican member of the sub-committee, Congressman Rees, filed a supplemental report, considerably more critical of the Administration's program, in which he urged that a "full and complete investigation," with recommendations for action, be undertaken by the House Civil Service Commission.<sup>78</sup>

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72. The Atomic Energy Act of 1946 provided that, "except as authorized by the Commission in case of emergency, no individual shall be employed by the Commission until the Federal Bureau of Investigation shall have made an investigation and report to the Commission on the character, associations, and loyalty of such individual." 60 STAT. 766 (1946), 42 U.S.C. 1810 (1946).

73. COMMITTEE ON THE CIVIL SERVICE, REPORT OF INVESTIGATION WITH RESPECT TO EMPLOYEE LOYALTY AND EMPLOYMENT POLICIES AND PRACTICES IN THE GOVERNMENT OF THE UNITED STATES, 79th Cong., 2d Sess. 1 (1946).

74. *Id.* at 1, 6.

75. *Id.* at 6.

76. *Ibid.*

77. *Id.* at 7.

78. *Id.* at 8-9.

The report was a blunt threat to the executive that, unless a stricter and more productive loyalty program was immediately instituted, Congress would undertake to do the job itself. The Administration was subjected to additional pressures in the ensuing election campaign in which the Republican party made a major issue of the alleged existence of "subversive elements" in the federal service.<sup>79</sup>

Following the election, which resulted in substantial Republican gains, President Truman accepted the recommendation of the July report and created a Temporary Commission on Employee Loyalty.<sup>80</sup> This Commission was directed to make a full study of the problem and to recommend specific action.

The Report of the Temporary Commission, released by the President in March 1947, criticized sharply the adequacy of the Hatch Act and appropriation provisions, saying:

"These laws served successfully to proscribe persons whose loyalties adhered to our recognized enemies in time of war, but in their practical application failed to encompass other subverters."<sup>81</sup>

And again:

"Although these efforts to prevent disloyal persons from either obtaining or retaining Government employment were well intended, they were ineffective in dealing with subversive activities which employ subterfuge, propaganda, infiltration and deception."<sup>82</sup>

The Commission concluded that "the narrow limitations of the present statutory standards generally used for determining disloyalty, render it prudent to provide additional and more flexible criteria."<sup>83</sup>

The Commission also found that "existing security procedures in the Executive Branch of the government" do not "furnish adequate protection against the employment or continuance in employment of disloyal or subversive persons."<sup>84</sup> It therefore recommended a comprehensive, affirmative program for assuring protection against such dangers.

The recommendations of the Commission were incorporated in

79. See comment of Carroll Reece, Chairman of the Republican National Committee, *infra* note 87.

80. Exec. Order No. 9806, 11 FED. REG. 13863 (1946). The Commission consisted of representatives from the Civil Service Commission, the Department of Justice, and the Treasury, State, War and Navy Departments, as recommended in the July report. It will be noted that the first three are agencies possessing large professional investigating staffs, and that the last three are so-called "sensitive" agencies.

81. REPORT OF THE PRESIDENT'S TEMPORARY COMMISSION ON EMPLOYEE LOYALTY 4 (1947).

82. *Id.* at 7.

83. *Id.* at 30.

84. *Id.* at 25.

Executive Order 9835, known as the Loyalty Order, issued March 22, 1947.<sup>85</sup> In October the State Department published an elaborate regulation embodying a statement of standards and procedures for eliminating "security risks" under the McCarran rider.<sup>86</sup>

Publication of the Commission's Report, promulgation of the Loyalty Order, and issuance of the State Department regulation, completed the turnabout of the Administration's policy. Starting with resistance to Congressional pressure, gradually changing to a policy of acquiescence in Congressional views, the Administration had now shifted to complete acceptance of the position that a stricter, better coordinated, aggressive program for dealing with "subversive elements" was needed.<sup>87</sup>

This Administration program is analyzed in the succeeding section. Meanwhile developments following adoption of the new program require brief review.

#### *Developments Following Adoption of the Loyalty Order*

Despite promulgation of the Administration's new loyalty program the Republican majority in the House of Representatives continued to press for legislation. In June of 1947 a sub-committee of the House Committee on Post Office and Civil Service held hearings on the Rees bill, which embodied in substance the Loyalty Order.<sup>88</sup> The bill was reported favorably and was passed by the House in July.<sup>89</sup> The Administration opposed the bill, primarily upon the ground that legislation was unnecessary in view of the Executive Order. As stated by Congressman Sabath, one of the chief Administration supporters:

"The President's Executive Order stole the Republican thunder. This bill is merely a belated effort of the Republicans to get back in the groove of their Red-baiting campaign."<sup>90</sup>

85. 12 FED. REG. 1935 (1947), hereafter cited as E.O. 9835.

86. N.Y. Times, Oct. 8, 1947, p. 8, col. 4.

87. The acceptance by the Administration of the legislative policy on loyalty was noted in a number of statements made by Republican leaders upon issuance of the Loyalty Order. N.Y. Times, March 23, 1947, p. 48, col. 4. *E.g.*, Carrol Reece: "I am glad the President, however belatedly, has adopted this important part of the program supported by the Republican party and its candidates in the 1946 campaign." House Speaker Martin: ". . . [I]t is good to see that he has finally awakened to the truth of what we have been telling him for the last few years." Representative Mundt: "The President's program is almost precisely that which the House Committee on Un-American activities has been advocating for at least four years." See also statement of Congressman Rees taking credit for compelling issuance of Executive Order 9835. *Hearings Before Committee on Post Office and Civil Service on H.R. 3588*, 80th Cong., 1st Sess. 66 (1947).

88. *Hearings Before Committee on Post Office and Civil Service on H.R. 3588*, 80th Cong., 1st Sess. (1947).

89. H.R. Rep. No. 616, 80th Cong., 1st Sess. (1947); 93 Cong. Rec. 8979 (1947). See *infra* pp. 58-9.

90. 93 Cong. Rec. 8943 (1947). For the Administration viewpoint see also *Hearings, op. cit. supra* note 88, at 15-67; 93 Cong. Rec. 8942 *et seq.* (1947).



The Senate took no action on the Rees bill.

In the spring of 1948 the Committee on Un-American Activities reported out the so-called Mundt bill, "to protect the United States against un-American and subversive activities."<sup>91</sup> One section of this bill made it unlawful for any member of "a communist political organization" to "hold any non-elective office or employment under the United States," and for any officer or employee of the United States "to appoint or employ" any individual "knowing or believing that such individual is a member of a communist political organization."<sup>92</sup> The Mundt bill passed the House, over Administration opposition, but did not come to a vote in the Senate.<sup>93</sup>

In other legislation Congress supported, and extended, the principles of the Administration's loyalty program. The Foreign Assistance Act of 1948, establishing a program of economic aid to Europe, included a provision that no individual could be employed in the administration of the program unless he had been "investigated as to loyalty and security by the Federal Bureau of Investigation" and unless the head of the employing agency certified that, "after full consideration of such report, he believes such individual is loyal to the United States, its Constitution, and form of government, and is not now and has never been a member of any organization advocating contrary views."<sup>94</sup>

In July of 1948 President Truman, at the close of the Democratic Party Convention, announced that a special session of Congress would be called to act upon various legislative proposals. As the special session got under way two Congressional committees opened a series of hearings which were to prove the most spectacular and controversial of any that had been held.

The principal evidence before the Committee on Un-American Activities, in the first phase of its hearings, was given by two former members of the Communist Party. One of these, Whittaker Chambers, testified that from 1934 until 1937 he had been in contact with a group

91. H.R. 5852, 80th Cong., 2d Sess. (1948); H.R. Rep. No. 1844, 80th Cong., 2d Sess. (1948).

92. Sec. 6. The term "communist political organization" was defined as "any organization in the United States having some, but not necessarily all, of the ordinary and usual characteristics of a political party, with respect to which, having regard to some or all [of various enumerated considerations] . . . it is reasonable to conclude (i) that it is under the control of such foreign government or foreign governmental or political organization, or (ii) that it is one of the principal instrumentalities utilized by the world communist movement in carrying out its objectives." Sec. 3(3).

93. The House debate is recorded at 94 Cong. Rec. 6256-6302 (May 19, 1948, temporary copy).

94. § 110(c), 16 L.W. 43, 46 (April 6, 1948). It will be noted that the disqualification for past activity in effect embodies a principle of perpetual guilt. For legislation extending the removal power of the "sensitive agencies" see *supra* note 71.

of Government employees who were clandestine members of the Communist Party. He named 9 individuals, some of whom had held important federal posts. Chambers made no charge of espionage or other unlawful activity.<sup>95</sup> The other witness, Miss Elizabeth Bentley, testified that she had been courier for a group of federal employees, most of them members of the Communist Party, who had carried on espionage in behalf of the Soviet Union during the early forties until 1945. Miss Bentley named 30 employees, some of whom had likewise held high positions.<sup>96</sup> The Committee also heard other testimony designed to corroborate the Chambers and Bentley charges.<sup>97</sup>

Only two of the individuals named were still employed by the Government at the time of the hearings, and these had already been suspended.<sup>98</sup> All the former government employees called before the Committee—a total of 19—denied that they had engaged in espionage or other unlawful activity; 9 of them likewise denied being members of or affiliated with the Communist Party; 9 refused to answer questions relating to Communist membership or associations on constitutional grounds, including the right to protection against self-incrimination.<sup>99</sup> None of the accused had opportunity to question or cross-examine his accusers.<sup>100</sup>

The accusations of both Chambers and Miss Bentley had been made to the FBI some years before and had been investigated by that organization.<sup>101</sup> All the evidence indicating violation of law had been presented to a federal grand jury in New York prior to the Committee's hearings; the grand jury, after an inquiry of some 14 months, had not returned any indictment.<sup>102</sup>

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95. According to Chambers, the purpose of the underground group "was not primarily espionage. Its original purpose was the Communist infiltration of the American Government. But espionage was certainly one of its eventual objectives." N.Y. Times, Aug. 4, 1948, p. 1, col. 1, p. 3, col. 5.

96. N.Y. Times, Aug. 1, 1948, p. 1, col. 4.

97. N.Y. Times, Aug. 24, 1948, p. 1, col. 5; N.Y. Times, Aug. 27, 1948, p. 1, col. 4. In addition to corroborating the testimony of Chambers and Bentley, Louis F. Budenz, former Communist Party official, charged that "the Russian fifth column" had placed "perhaps thousands" of its members in federal positions. N.Y. Times, Aug. 3, 1948, p. 1, col. 1. The Committee's summary of the testimony is set forth in its Interim Report on Hearings Regarding Communist Espionage in the United States Government, Aug. 28, 1948 (Committee Print) pp. 4-10. See also Straight, *Editorial: Trial by Congress*, 119 New Republic No. 7. p. 6 (Aug. 16, 1948).

98. Statements of President Truman, N.Y. Times, Aug. 6, 1948, p. 1, col. 8; N.Y. Times, Aug. 20, 1948, p. 1, col. 2.

99. N.Y. Times for the following dates: Aug. 1, p. 3, cols. 4-5; Aug. 5, p. 1, col. 8; Aug. 6, p. 1, col. 8; Aug. 10, p. 1, col. 6; Aug. 11, p. 3, col. 2; Aug. 13, p. 2, col. 2; Aug. 14, p. 1, col. 5; Aug. 21, p. 1, col. 4; Interim Report, *supra* note 97.

100. See N.Y. Times, Aug. 14, 1948, p. 2, col. 5; N.Y. Star, Aug. 26, 1948, p. 5, col. 1.

101. Statements of President Truman, *supra* note 98; reiterated by Attorney General Clark, N.Y. Times, Sept. 24, 1948, p. 20, col. 3; see also Interim Report, *supra* note 97, at pp. 7-8.

102. *Ibid.* This grand jury had indicted 12 leaders of the Communist Party for violation

On August 28 the Committee issued an Interim Report in which it stated:

“(1) It is now definitely established that during the late war and since then, there have been numerous Communist espionage rings at work in our executive agencies which have worked with and through the American Communist party and its agents to relay to Russia vital information essential to our national defense and security. Russian Communists have worked hand in hand with American Communists in these espionage activities.

“(2) It is established beyond doubt that there is grave need for vigorous, persistent and courageous continued investigation to determine the identity of those guilty of past offenses, the methods employed in the past and at present to move carefully selected Communists and their sympathizers into key positions of government, and to break up all Communist espionage conspiracies and activities prevailing at this time.”<sup>103</sup>

A second phase of the Committee's hearings related to alleged war-time espionage involving the development of atomic energy. Hearings were held in secret, the Committee giving as its reason the fear of disclosing information vital to national security. On September 28 the Committee issued a report, together with certain excerpts from the hearings.<sup>104</sup> The Committee asserted that “during the war, diplomatic representatives of the Russian Government in the United States organized and directed several espionage groups made up of American Communists” and that these groups succeeded in obtaining and transmitting to Russia “secret information concerning the atomic bomb.” The Committee could not “accurately evaluate the importance or volume” of the data conveyed to Russia but stated that some of it was “vital” and “has been and will be of assistance to the Russians.”<sup>105</sup> The report called for the indictment of 5 persons, two of whom were

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of the Alien Registration Act. N.Y. Times, July 21, 1948, p. 1, col. 8; N.Y. Times, Aug. 28, 1948, p. 5, col. 4. For discussion of this indictment see *infra* p. 64.

103. Interim Report, *supra* note 97, at pp. 13-14; N.Y. Times, Aug. 29, 1948, p. 3, col. 2.

The Report also stated: “It is also true that in many instances the crimes of treason and espionage are so difficult to punish by conviction because of technical devices and the necessity of so tightly defining these crimes, that if *near treason* and “*virtual espionage*” and “*cold-war treason or espionage*” are to be safeguarded against it is imperative that not only must the power of public opinion be marshaled against these disloyal and self-serving practices but legislation must be enacted which will provide appropriate punishment for these specific direlctions. To do less than that is to deny to the people generally the protection and security they have a right to expect from alert public officials.” (p. 3) (Italics supplied).

104. Report on Soviet Espionage Activities in Connection with the Atom Bomb, Sept. 28, 1948 (Committee Print); Excerpts from Hearings Regarding Investigation of Communist Activities in Connection with The Atom Bomb, Sept. 9, 14 and 16, 1948. The full text of the report is printed in N. Y. Times, Sept. 28, 1948, pp. 28 and 29.

105. Report, *supra* note 104, at p. 1.

scientists associated with the Manhattan Engineering District Project, the army operation that had developed the atomic bomb. The Committee charged that all the facts revealed by it had long been known to President Roosevelt and President Truman and attacked the failure of the Administration to bring any criminal prosecution. It added that its investigation would continue and that its report "tells only a very small part of the complete story of Russian espionage activities against the United States during the war."<sup>106</sup>

Meanwhile a sub-committee of the Senate Committee on Expenditures in the Executive Departments, under the chairmanship of Senator Ferguson, had been conducting an investigation into the operation of the Administration's loyalty program. In a report issued September 4 this sub-committee severely criticized the program on grounds, among others, of delay in making investigations, ambiguities in policy directives, and a tendency to "minimize charges" lodged against employees.<sup>107</sup> "Only the naive could be satisfied with our present loyalty program," the sub-committee declared, urging immediate measures to improve "what to date has been a lagging and uncertain effort."<sup>108</sup>

The activities of both committees were flamboyantly reported in the nation's press.<sup>109</sup> In addition, certain Committee members made a practice of releasing information concerning evidence expected from witnesses at future hearings, or given at secret hearings, thus creating great confusion as to what facts had actually been the subject of sworn testimony.<sup>110</sup> All in all the public once again received the impression that the Federal Government was honeycombed with Communist espionage agents.

Perceiving the political implications of this situation, the Administration reverted to its previous policy of counter-attack. On August 6 President Truman denounced the Chambers-Bentley hearings as a "red herring," "designed to detract public attention from the snubbing by the Republican-controlled extra session of his program to curb inflation," and asserted that the only "Communist spy ring" operating in Washington "was in Congressman Mundt's mind."<sup>111</sup> In a formal

106. *Ibid.*

107. Investigations Sub-committee of the Committee on Expenditures in the Executive Departments, Investigation of Federal Employees Loyalty Program, Sen. Rep. No. 1775, 80th Cong., 2d Sess., pp. 21-2.

108. *Id.* at 2.

109. For one account of the character of the reporting see Liebling, *The Wayward Press*, 24 *The New Yorker* No. 27, p. 51 (Aug. 28, 1948).

110. See, e.g., *N.Y. Star*, Aug. 5, 1948, p. 4, col. 2; *N.Y. Times*, Aug. 10, 1948, p. 1, col. 6.

111. *N.Y. Times*, Aug. 6, 1948, p. 1, col. 8. The quotations are from the *N.Y. Times* report, not directly from the President. The rule in White House press conferences is that statements of the President may be used with quotation marks only where specifically authorized.

statement the President, after pointing out that all the evidence produced before the Committee had previously been presented to the FBI and the grand jury, but found insufficient to justify an indictment, declared:

"The public hearings now under way are serving no useful purpose. On the contrary, they are doing irreparable harm to certain persons, seriously impairing the morale of federal employees, and undermining public confidence in the Government."<sup>112</sup>

A week later the President reiterated his "red-herring" charge.<sup>113</sup> Subsequently he accused the Committee of infringing upon the Bill of Rights and defended the operation of the Administration's loyalty program.<sup>114</sup>

In similar vein Attorney General Clark challenged the Republicans "to name any Communists now in the executive branch of the Federal government."<sup>115</sup> Subsequently he charged the Ferguson sub-committee with making "a mass of incorrect and misleading statements," decried its "unfair and uninformed criticism," and answered each of the charges made in the sub-committee's report.<sup>116</sup> The Attorney General also denounced the atomic espionage report of the Committee on Un-American Activities, asserting that the Department of Justice would not "institute prosecutions to justify the publicity seekers":

"There is absolutely no competent proof here, so far as appears from the report and excerpts of testimony quoted therein, of the actual or attempted communication, delivery or transmittal of information relating to the national defense to a foreign government or to one of its representatives. That is required by Section 2 of the Espionage Act, which is quoted by the committee in making its demand for prosecution. Hearsay testimony and committee conclusions cannot be substituted for legal proof.

" . . . these matters were carefully studied by the Criminal Divi-

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112. N.Y. Times, Aug. 6, 1948, p. 1, col. 8.

113. N.Y. Times, Aug. 13, 1948, p. 1, col. 5. The N.Y. Times dispatch stated: "The President added today that he viewed it as being one of the strongest type you can smell."

114. N.Y. Times, Aug. 20, 1948, p. 1, col. 2. On September 2 the President repeated the "red-herring" charge and, permitting direct quotation, declared that the accusation that he was "protecting" Communists in the government was "just a plain lie out of the whole cloth." N.Y. Times, Sept. 3, 1948, p. 1, col. 1. In a major speech on September 28 the President attacked the Republican leaders as "thinking more about the November election than about the welfare of the loyalty program." N.Y. Times, Sept. 29, 1948, p. 25, col. 1.

115. N.Y. Times, Sept. 7, 1948, p. 38, col. 8. For a similar statement see N.Y. Times, Sept. 19, 1948, p. 26, col. 1.

116. N.Y. Times, Sept. 20, 1948, p. 14, col. 1. On September 23 Clark again accused Senator Ferguson of making "reckless, misleading and inflammatory statements in his attempt to win support in his political campaign." N. Y. Times, Sept. 24, 1948, p. 20, col. 3.

sion of the department on two separate occasions. In both instances prosecution was found unwarranted. It has also been the considered judgment of two successive assistant attorneys general who studied the facts available, independently and at different times, that the evidence was insufficient for successful prosecution."<sup>117</sup>

In December Whittaker Chambers, reversing his earlier testimony, charged that in 1937 and 1938 Alger Hiss, then a high official in the State Department, had supplied him with "a fairly consistent flow" of important secret documents taken from the State Department files for delivery to an agent of the Soviet Union. He also accused Henry J. Wadleigh, then an economist in the State Department, and William W. Pigman, then a chemist in the Bureau of Standards, with furnishing similar information. Chambers produced copies and microfilms of several hundred documents, allegedly supplied by these sources, still in his possession. Hiss and Pigman issued public denials; Wadleigh, denying before the Un-American Activities Committee that he was or had been a member of the Communist Party or had "followed the program of the party," refused to answer questions relating to delivery of information. The Committee in a formal statement asserted that the discovery of the documents established that Soviet espionage "has been amazingly successful for over ten years" and that the Administration's loyalty program "is inadequate to provide the type of security needed." On December 15 the New York grand jury, acting on the final day of its existence, returned an indictment against Hiss. The indictment alleged that Hiss had committed perjury before the grand jury in denying that he had transmitted numerous secret documents to Chambers and in denying that he had seen Chambers in 1937 and 1938. Hiss pleaded not guilty. Thus the matter stands as this article goes to press.<sup>118</sup>

The foregoing events make clear that the adoption of the Administration's loyalty program has not relieved the pressure from the Committee on Un-American Activities or from proponents of more severe measures. While the possibility of a more stringent and aggressive loyalty program thus remains, we shall nevertheless consider, as a basis for discussion, the Administration program in its present form. We turn, therefore, to an analysis of that program.<sup>119</sup>

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117. N.Y. Times, Sept. 30, 1948, p. 15, col. 2. For a detailed analysis of the Committee's report see the series of articles by I. F. Stone in N.Y. Star, Sept. 29, 30, Oct. 1, 3, 1948.

118. The summary in this paragraph is taken from reports in the New York Times from December 4, 1948 through December 17, 1948. The Committee's statement is quoted in full in N. Y. Times, Dec. 15, 1948, p. 24, col. 2; the indictment of Hiss is quoted in full in N.Y. Times, Dec. 16, 1948, p. 3, col. 2.

119. There has been some tendency for state and local governments to institute loyalty programs fashioned after the federal model. Such a program has been put in operation by the County of Los Angeles. AMERICAN CIVIL LIBERTIES UNION, OUR UNCERTAIN LIBERTIES 17, 26 (1948).

### III. THE LOYALTY PROGRAM

#### *Existing Legislation*

In order to understand the significance of the Administration's loyalty program, it is necessary to review briefly the protective measures already available to the government at the time the program was launched. Apart from the Hatch Act, the appropriation riders, and the legislation relating to the "sensitive agencies," there existed a body of statute and administrative law which afforded the government broad authority to deal with "disloyal" employees.

Sabotage in the form of willful injury or destruction of any national defense material, or the defective making of any national defense material, is punishable as a criminal offense.<sup>120</sup> Likewise, theft of, injury to or depredation against any property of the United States is punishable.<sup>121</sup>

The espionage statutes provide penalties not only for the intentional communication to a foreign power of information relating to national defense, to the injury of the United States or advantage of a foreign power, but also for willful communication of such information to any person not entitled to receive it and for gross negligence in allowing such information to be delivered to any one in violation of trust or to be lost, stolen, abstracted or destroyed.<sup>122</sup> The Atomic Energy Act of 1946 includes a series of carefully prepared provisions designed to control the dissemination of data relating to atomic energy where disclosure would adversely affect the common defense and security.<sup>123</sup>

Treason consists of levying war against the United States or giving aid and comfort to its enemies; concealment of treason is also subject to punishment.<sup>124</sup> In addition, correspondence or intercourse with a foreign government, or counseling, advising or assisting in such correspondence, with the intent to influence the conduct of such foreign government in relation to any dispute with the United States or to defeat the measures of the United States Government, would subject an employee to criminal penalties.<sup>125</sup>

With respect to sedition, the Alien Registration Act makes it an offense "to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;" or,

120. 54 STAT. 1220-1 (1940), 50 U.S.C. §§ 104-6 (1946). Other provisions of the same character apply to war materials in time of war, 40 STAT. 534 (1918), as amended, 50 U.S.C. §§ 101-3 (1946), and also to trespass upon, injury or destruction of fortifications or harbor-defense systems, 30 STAT. 717 (1898), as amended, 18 U.S.C. § 96 (1946).

121. 35 STAT. 1095 (1909), as amended, 18 U.S.C. § 82 (1946).

122. 40 STAT. 217-8 (1917), 50 U.S.C. §§ 31-2 (1946). See also 40 STAT. 219 (1917), 50 U.S.C. § 33 (1946); 40 STAT. 226, 230 (1917), 18 U.S.C. § 98 (1946).

123. 60 STAT. 766 (1946), 40 U.S.C.A. 1810 (Supp. 1947).

124. 35 STAT. 1088 (1909), 18 U.S.C. §§ 1-3 (1946).

125. 35 STAT. 1088 (1909), 18 U.S.C. § 5 (1946).

knowing its purposes, to organize, join or affiliate with any society or group having such objectives.<sup>126</sup>

A conspiracy to engage in any of the foregoing acts is punishable under the general conspiracy statute and, in some cases, under specific conspiracy provisions.<sup>127</sup>

Under the McCormack Act any individual acting as agent for a foreign principal must register with the Attorney General.<sup>128</sup> This would include any person who collects information for, or reports it to, a foreign principal. The Voorhis Act requires every organization, including an organization subject to foreign control, which aims wholly or in part to control by force or overthrow the government, to file a registration statement with the Attorney General including, among other data, the name and address of every officer and contributor.<sup>129</sup>

In addition to these criminal statutes the government possesses broad powers to dismiss or discipline employees for incompetence, insubordination, failure to follow established policy, or other infraction of office rules. The great bulk of Federal employees are under the civil service system and, subject to certain limitations on discharge for religious or political reasons, may be removed "for such cause as will promote the efficiency of the service."<sup>130</sup> Where the civil service laws are not applicable, the executive power of removal for normal administrative reasons is virtually unlimited.<sup>131</sup>

126. 54 STAT. 671 (1940), 18 U.S.C. § 10 (1946), applied in *Dunne v. United States*, 138 F. 2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943). See also 35 STAT. 1088 (1909), 18 U.S.C. § 4 (1946) (inciting rebellion or insurrection); 35 STAT. 1089 (1909), 18 U.S.C. § 7 (1946) (recruiting for service against the United States); 54 STAT. 670 (1940), 18 U.S.C. § 9 (1946) (undermining the loyalty, morale or discipline of the armed forces).

127. 35 STAT. 1096 (1909), 18 U.S.C. § 88 (1946); 54 STAT. 671 (1940), 18 U.S.C. § 11 (1946); 40 STAT. 219 (1917), 50 U.S.C. § 34 (1946).

128. 40 STAT. 226 (1917), 22 U.S.C. § 601 (1946), and 56 STAT. 248-58 (1942), 22 U.S.C. § 611-21 (1946).

129. 54 STAT. 670-1 (1940), 18 U.S.C. §§ 9-11 (1946).

In general see Gibbons, *Recent Legislative Attempts to Curb Subversive Activities in the United States*, 10 GEO. WASH. L. REV. 104 (1941); Note, *Restraints on American Communist Activities*, 96 U. OF PA. L. REV. 381 (1948). For comparable state legislation see Groner, *State Control of Subversive Activities in the United States*, 9 FED. BAR J. 61 (1947).

130. 37 STAT. 555 (1912), 5 U.S.C. § 652 (1946). For the political and religious limitations see *supra* note 13. With respect to the procedure for removal see *infra* note 360.

131. *Myers v. United States*, 272 U.S. 52 (1926). Removal of top quasi-judicial officers is subject to some degree of legislative control. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *cf.* *Morgan v. T.V.A.*, 115 F. 2d 990 (6th Cir. 1940), *cert. denied* 312 U.S. 701 (1941). An employee whose appointment is delegated by Congress to inferior executive officers is likewise subject to removal for reasons specified by the legislature. *United States v. Perkins*, 116 U.S. 483 (1886); *Myers v. United States*, 272 U.S. 52, 160-1 (1926). See generally Note, *Constitutional Limitations on Political Discrimination in Public Employment*, 60 HARV. L. REV. 779 (1947); Note, *Restrictions*



Measures directed specifically at "disloyalty" among Federal employees are significant because they have been superimposed upon this existing body of statutory and executive authority and are designed to achieve further purposes.

### *The Loyalty Order*

Executive Order 9835 has a threefold purpose. It establishes the standard for testing qualification for government employment. It sets up administrative machinery to operate the program. And it prescribes the procedure by which decisions on loyalty are to be made.

*Standard.* The standard for refusing employment or removing from employment is simply that

"on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." (Pt. V. Sec. 1.)

The Order then goes on to provide:

"Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

- a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;
- b. Treason or sedition or advocacy thereof;
- c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;
- d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

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on the *Civil Rights of Federal Employees*, 47 COL. L. REV. 1161 (1947). These limitations on executive powers of removal are of no practical significance in connection with the problems discussed in this article. For constitutional limitations growing out of the First Amendment and the due process clause, see *infra* pp. 79-94.

In addition other statutory provisions are applicable to Federal employees. See, e.g., 35 STAT. 1095 (1909), as amended 18 U.S.C. 80 (1946) (statute penalizing false statements made to government agencies), which was the basis of prosecution in *United States v. Marzani*, 71 F. Supp. 615 (D.C. D.C. 1947), *aff'd* 168 F.2d 133 (1948), *aff'd* by an equally divided Supreme Court, N.Y. Times, Dec. 21, 1948, p. 45, col. 4; accord, *United States v. Schneider*, 45 F. Supp. 848 (D.C. Wisc. 1942). *But cf.* *United States v. Hautau*, 43 F. Supp. 507 (D.C. N.J. 1942).

The oath of office required of all Federal Employees is:

"I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." 23 STAT. 22 (1884), 5 U.S.C. § 16 (1946).

- e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interest of the United States;
- f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General 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 other persons 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." (Pt. V. Sec. 2.)

*Administration.* The Order provides that "there shall be a loyalty investigation of every person entering the civilian employment" of the Federal government. (Pt. I, Sec. 1.) This investigation shall be made with the aid of "all available pertinent sources of information," including the files of the House Committee on Un-American Activities. (Pt. I, Sec. 3.) Whenever "derogatory information with respect to loyalty of an applicant is revealed," or on request of the employing agency, "a full field investigation shall be conducted." (Pt. I, Sec. 4.)

As to individuals already employed by the government the Order makes the head of each employing agency "personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment." (Pt. II, Sec. 1.) Every agency head is required to submit to the FBI the names and identifying materials of all incumbent employees. (Pt. VI, Sec. 1.) The FBI is directed to check these names against its records and to notify the employing agency of any substantial evidence indicating disloyal activity or association. (*Ibid.*) The employing agency, upon receipt of the FBI report, may request further investigation if, from the data in the report, this seems advisable. (Pt. VI, Sec. 1.) In practice, if the preliminary investigation turns up unfavorable information the FBI apparently proceeds with further inquiry upon its own initiative.<sup>132</sup> And the FBI also investigates on its own motion "upon receipt of a complaint indicating disloyal activities."<sup>133</sup>

Although the Order authorizes investigations to be made by the Civil Service Commission or by the employing agency (Pt. I, Sec. 1), the President has announced that all investigations shall be conducted by the FBI.<sup>134</sup> In submitting its report, the FBI may refuse to disclose "the names of confidential informants." (Pt. IV, Sec. 2.)

The Civil Service Commission is directed to maintain a "central

132. Statement of the Director of the Federal Bureau of Investigation, N.Y. Herald Tribune, Nov. 16, 1947, p. 1, col. 2.

133. *Ibid.*

134. Statement of President Truman, N.Y. Times, Nov. 15, 1947, p. 2, col. 2.

master index" of all persons regarding whom loyalty investigations have been made. (Pt. III, Sec. 2.) Each agency is required to maintain "a staff specially trained in security techniques" and "an effective security control system." (Pt. IV, Sec. 3.)

*Procedure.* The final decision with respect to loyalty rests with the employing agency or, in the case of applicants entering the competitive service, with the Civil Service Commission. (Pt. II, Sec. 1; Pt. I, Sec. 1.) The initial decision is made by a loyalty board of three or more representatives of the agency or of the Commission and is based upon the results of the investigation. (Pt. II, Sec. 2.) If the decision is adverse, the subject is served with a written notice setting forth the charges "as specifically and completely as, in the discretion of the . . . agency, security considerations permit." (Pt. II, Sec. 2(b).) The individual is given the right to reply in writing to the charges and is also entitled to an "administrative hearing" before the loyalty board at which he may appear "personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit." (*Ibid.*)

The recommendation of the loyalty board, if adverse, may be appealed to the head of the agency, in the case of an employee, or to the Commission by an applicant. (Pt. II, Sec. 3.) Further appeal may be taken to the Loyalty Review Board set up in the Commission (Pt. II, Sec. 3), and the agency or Commission may refer cases to the Board on its own motion. (Pt. III, Sec. 1.) Decisions of the Loyalty Review Board are technically only advisory but in practice are binding upon the employing agency and the Commission.<sup>135</sup> An employee may be suspended at any time pending final determination. (Pt. II, Sec. 4.)

No provision is made for judicial review.

The Loyalty Review Board is empowered to make rules and regulations "to implement statutes and Executive orders relating to employee loyalty" and it has general authority to "coordinate the employee policies and procedures of the several departments and agencies." (Pt. III, Sec. 1(b) and (c).)

The Department of Justice is directed to refer to the Loyalty Review Board, which in turn disseminates the information to all agencies, the name of each organization or group which, "after appropriate investigation and determination," the Attorney General designates as "totalitarian, fascist, communist or subversive" or otherwise within the terms of subsection f quoted above. (Pt. III, Sec. 3.) No provision is made for hearing or similar procedure prior to this designation.

The Order is inapplicable to persons summarily removed under

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135. Pt. II, Sec. 3; Pt. III, Sec. 1; Statement of President Truman, *N.Y. Times*, Nov. 15, 1947, p. 2, col. 2.

existing or future statutes providing for such removal. (Pt. VI, Sec. 3.)<sup>136</sup>

### *Administration of Program to Date*

Shortly after issuing the Loyalty Order, the President submitted to Congress a request for an appropriation of \$24,900,000 for administration of the program.<sup>137</sup> Of this amount \$16,160,000 was earmarked for the Civil Service Commission and \$8,740,000 for the FBI. Congress eventually appropriated \$11,000,000, of which \$7,500,000 went to the FBI and \$3,500,000 to the Commission.<sup>138</sup> For the following fiscal year, ending June 30, 1949, the appropriation was \$6,606,000.<sup>139</sup>

In November 1947 the Civil Service Commission announced the appointment of a group of prominent citizens to serve on the Loyalty Review Board.<sup>140</sup> In December the Board issued a statement of general policy and a series of regulations.<sup>141</sup> At about the same time the Attorney General, without hearing or other formal procedure, made public a list of more than 80 organizations which he had transmitted to the Loyalty Review Board as falling within the terms of subsection f.<sup>142</sup> Subsequently the Attorney General submitted supplemental lists, also without notice or hearing, bringing the total number of designated groups up to 123.<sup>143</sup>

Meanwhile, all employees subject to the Loyalty Order were instructed to answer questionnaires calling for various background data.<sup>144</sup> The completed questionnaires, together with the employees' fingerprints were forwarded to the FBI for the preliminary check required by the Order. As of the middle of September, 1948, the FBI had checked virtually all employees subject to the Order. It had found "no derogatory information" concerning 2,110,521 employees and had instituted full investigations of the remaining 6,344. Of these latter

136. The Rees Bill, passed by the House in July, *supra* p. 20, is substantially similar to Executive Order 9835, much of the language being identical. It differs from the Order in (1) establishing the Loyalty Review Board as an independent agency rather than in the Civil Service Commission; (2) centralizing decisions on loyalty in the Loyalty Review Board and subordinate boards; (3) providing for somewhat different types of investigations.

137. White House Release, May 9, 1947.

138. *Report of the Investigations Subcommittee on Expenditures, Investigation of Federal Employees Loyalty Program*, SEN. REP. No. 1775, 80th Cong. 2d Sess. 5 (1948).

139. *Ibid.*

140. Press Release, Nov. 7, 1947; N.Y. Times, Nov. 9, 1947, p. 1, col. 2.

141. Statement by Seth Richardson, Chairman, Loyalty Review Board; Statement of Loyalty Review Board; Regulations, 13 FED. REG. 253 *et seq.* (1947).

142. N.Y. Times, Dec. 5, 1947, p. 1, col. 4; PM, Dec. 5, 1947, p. 7, col. 1.

143. N.Y. Times, May 29, 1948, p. 1, col. 2; N.Y. Times, Sept. 26, 1948, p. 22, col. 1.

144. Standard Form 84, promulgated Aug. 4, 1947, by Civil Service Commission. The United Public Workers, C.I.O., protested vigorously because this form requires disclosure of union membership. PM, Sept. 5, 1947, p. 3, col. 2.

cases, 619 employees had resigned during the course of the investigation, 44 were found to be no longer in government employment, and 923 investigations had not been completed. The remaining 4758 cases were referred to the Civil Service Commission and the employing agencies for adjudication.<sup>145</sup>

Figures released by the Civil Service Commission show the disposition, as of September 18, 1948, of 4390 of the cases referred by the FBI for adjudication. Some 2648 of these were still pending decision and 1747 had been processed. Of the latter there had been determinations favorable to the employee in 1281 cases, unfavorable determinations in 86 cases and the matter closed for other reasons (apparently resignation) in 380 cases. Of the 86 unfavorable determinations, 36 had been appealed to the agency head. Of these 36 appeals, in 15 the loyalty board's decision had been sustained, in 6 reversed, and 15 were still pending. The Loyalty Review Board itself had received 24 appeals (including requests by the Civil Service Commission for advisory opinions) and had decided 10 of them. Out of the 10 the Loyalty Review Board sustained the decision in 6, reversed in 2, and rendered 2 advisory opinions.<sup>146</sup>

### *The "Sensitive Agencies"*

The Loyalty Order, as previously noted, exempts from its provisions the employees of "sensitive agencies" where special legislation authorizes summary removal.<sup>147</sup> Consequently these agencies—the State Department, the National Defense Department, the Coast Guard and the Central Intelligence Agency—are authorized to operate under separate standards and procedures. The Atomic Energy Commission is likewise governed by special legislative provision.<sup>148</sup>

On October 7, 1947 the State Department issued regulations, under the McCarran rider, providing that the Department "will immediately terminate the employment of any officer or employee of the Department of State or of the foreign service who is deemed to constitute a security risk."<sup>149</sup> "Security risk" was defined in some detail, as were the "factors" which were to be taken into account in making the deter-

145. These figures were released by the FBI, as reported in the *New York Times*, Sept. 12, 1948, p. 56, col. 4.

146. These figures are from a mimeographed release issued by the Civil Service Commission. The discrepancy between the total referrals (4390) and the sum of pending and processed cases (4395) is not explained.

For a critical account of the administration of the loyalty program up to September 1948 see *Investigations Subcommittee of the Committee on Expenditures in the Executive Departments, Investigation of Federal Employees Loyalty Program*, SEN. REP. No. 1775, 80th Cong., 2d Sess. (1948).

147. *Supra* pp. 17-18.

148. *Supra* note 72.

149. *N.Y. Times*, Oct. 8, 1947, p. 8, col. 4.

mination.<sup>150</sup> Among the "factors" were "written evidences or oral

150. "C. As used herein an officer or employee constitutes a security risk when he falls into one or more of the following categories: when he is—

1. A person who engages in, supports or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi or Fascist parties, or of any foreign or domestic party, organization, movement, group or combination of persons which seeks to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently believes in or supports the ideologies and policies of such a party, organization, movement, group or combination of persons.

2. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interests of the United States.

3. A person who has knowingly divulged classified information without authority and with the knowledge or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of a foreign government, or who is so consistently irresponsible in the handling of classified information as to compel the conclusion of extreme lack of care or judgment.

4. A person who has habitual or close association with persons believed to be in categories 1 or 2 above to an extent which would justify the conclusion that he might through such association voluntarily or involuntarily divulge classified information without authority.

5. A person who has such basic weakness of character or lack of judgment as reasonably to justify the fear that he might be led into any course of action specified above.

D. In the determination of the question whether a person is a security risk the following factors, among others, will be taken into account together with such mitigating circumstances as may exist.

1. Participation in one or more of the parties or organizations referred to above, or in organizations which are "fronts" for, or are controlled by, such party or organization, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party, to public office or to accomplish any other purpose supported by such a party; or written evidences or oral expressions by speeches or otherwise, of political, economic or social views;

2. Service in the Government or armed forces of enemy countries, or other voluntary activities in support of foreign Governments;

3. Violations of security regulations;

4. Voluntary association with persons in categories C (1) or C(2);

5. Habitual drunkenness, sexual perversion, moral turpitude, financial responsibility or criminal record.

In weighing the evidence on any charges that a person constitutes risk the following considerations will obtain:

2. There will be no presumption of truth in favor of statements of the witnesses in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt and unequivocal acts.

2. There will be no presumption of truth in favor of statements of the witnesses in any hearing on security risk, but their statements will be weighed with all the other evidence before the hearing board, and the conclusion will be drawn by the board.

expressions by speeches or otherwise, or political, economic or social views." The regulations set forth relevant procedures.<sup>151</sup>

On May 20, 1948, the Atomic Energy Commission announced an interim procedure for local security boards, but failed to clarify the criteria for judgment.<sup>152</sup>

Standards and procedures employed by the other "sensitive" agencies have not been officially published.

### *Characteristics of the Loyalty Program*

From the foregoing account the basic characteristics of the Administration's loyalty program emerge:

(1) The criteria for disqualification from government service are designed to secure—in a degree not clearly defined—additional protection to government operations beyond that afforded by existing penal statutes on treason, sedition, espionage and the like, and beyond that afforded by customary rules of office discipline. In securing this protection the criteria are intended—again in a degree not clearly defined—to reach well beyond the limits of the Hatch Act and the appropriation riders.

(2) Machinery is created for maintaining a far-flung, intimate and continuous check over the activities of all Federal employees.

(3) The procedure of the program, while superior in some respects to prior procedures, falls far short of providing the safeguards established by the Administrative Procedure Act for other types of administrative proceedings.

Any attempt to study or appraise the loyalty program faces at the outset an almost insurmountable barrier. That is the difficulty or impossibility of obtaining information with regard to the character of decisions being rendered under the program. Hearings of the loyalty boards are not public and transcripts are available, if at all, only to the employee under investigation. Access to the transcript is of little use in any event because it does not reveal much of the evidence upon which the loyalty board rests its decision, the government's evidence

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3. If a reasonable doubt exists as to whether the person falls into one of the categories listed in Paragraph I C, the department will be given the benefit of the doubt, and the person will be deemed a security risk." *N. Y. Times* Oct. 8, 1947, p. 8, cols. 5-6.

151. See *infra* pp. 101-2.

152. The announcement merely noted that the Atomic Energy Act required an FBI investigation and report to the Atomic Energy Commission "on the character, associations and loyalty of each employee of the Commission, and also on each employee of Commission contractors or licensees who is to have access to restricted data." 4 *BULL. OF THE ATOMIC SCIENTISTS* 198 (1948). For a newspaper account of standards and procedures employed by the National Military Establishment in considering the loyalty of employees of private contractors engaged in government work, see *N.Y. Star*, Oct. 22, 1948, p. 1, col. 5.

remaining largely undisclosed in the boards' files. Decisions of the loyalty boards consist solely of the final conclusion reached; there are no findings of fact, no analysis of the evidence, no statement of reasons. Nor are the decisions made public. It is seldom that one encounters in public affairs such a blanket of darkness as covers the operation of the loyalty program.

Despite the impossibility of subjecting actual loyalty decisions to critical analysis there are various aspects of the program which are open to scrutiny. An underlying problem arises out of the vagueness of the term "disloyalty." Our first inquiry therefore must deal with the standards for determining disloyalty. In the following section, an attempt is made to analyze the criteria of disloyalty formerly and presently employed and to suggest a more specific set of possible standards, some or all of which might be adopted in a loyalty program.

Clarification of the criteria of loyalty is but a beginning step. Other features of a loyalty program must be considered. Hence Part V reviews the evidence relating to the actual danger from disloyal employees under existing conditions, and Part VI considers the practical administration of a loyalty program. With these factors in mind it becomes possible to discuss the constitutional limitations upon the criteria of disloyalty. This is done in Part VII.

In Part VIII we take up questions of procedure, including the constitutional issues, and in Part IX we summarize the experience of certain foreign countries in dealing with loyalty issues. The final section attempts to evaluate all the foregoing and to state our conclusions.

#### IV. CRITERIA OF DISLOYALTY

Our first inquiry then is, what is meant by "loyalty" as applied to the relationship between an individual and his government. This is a matter that has received more attention from philosophers than from lawyers.

In popular usage "loyalty" is a term of the broadest abstraction, —uncertain and shifting in its meaning. Under American political traditions "loyalty" plainly does not demand unthinking and unquestioning acquiescence in the policies of the sovereign. On the contrary it surely embraces a wide area of disagreement. But just where does disagreement that is "loyal" pass over into disagreement that is "disloyal"? There is no simple answer.

Throughout our political history, as we have seen, the term "disloyalty" has been used primarily as an epithet. Like the word "radical" at the turn of the century, and the word "Bolshevik" in the 1920's, it



has been hurled against the new, the unknown and the feared. Its content has been emotional, rather than rational.<sup>153</sup>

Popular and historical usage is therefore no guide when the term "loyalty" is employed in a legal context—in legislation or in an executive order. Probably it would be better to dispense with the concept entirely for legal purposes. The real problem is to decide what dangers the government faces from the conduct or character of its employees and what measures should be taken to safeguard the interests of all concerned. But if the issue is to be framed in terms of "disloyalty" then precise criteria of "disloyalty" must be formulated which will give specific, even if arbitrary, meaning to that term.

Before attempting to suggest such criteria, it is important to examine the efforts made in the Loyalty Order and elsewhere to clarify the concept of "disloyalty."

### *The Loyalty Order*

One of the striking features of the Loyalty Order is that it does not define "disloyalty." Under the Order the right of a person to become or to remain a Federal employee turns upon a legal finding as to whether "reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." Despite the controversy that had raged for the previous ten years over the meaning of "disloyal," draftsmen of the Order preferred to use the word without definition.

The Order does set forth "activities and associations" which "may be considered in connection with the determination of disloyalty." But this list of "activities and associations" is in no sense intended to be inclusive.<sup>154</sup> And the crucial categories in the list are scarcely more precise than the term "disloyalty" itself.

The first three groups of "activities" are sabotage, espionage, treason, sedition, and advocacy of revolution, force or violence to alter the constitutional form of government. These terms have received some measure of judicial interpretation. As pointed out above, however, such conduct is in the main punishable under existing penal

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153. Nor have the scientists supplied a definite meaning for "loyalty." Prof. Harold D. Lasswell, in a statement to the authors, puts the matter thus: "The term loyalty does not figure as a key word in most textbooks and treatises on the psychology of society. This is to be attributed in part to the spread of such expressions as 'identifications' from the vocabulary of clinical psychology into neighboring fields. It is also to be explained by the reluctance of social psychologists to employ for serious scientific purposes any word that has become sentimentalized in popular usage."

154. This has been confirmed in statements of the President and the Loyalty Review Board, both pointing out that "membership, affiliation or sympathetic association is simply one piece of evidence which may or may not be helpful in arriving at a conclusion. . . ." Statement of President Truman, N.Y. Times, Nov. 15, 1947, p. 2, col. 3; Regulations for the Operations of the Loyalty Review Board § 11, 13 FED. REG. 253 (1948).

statutes. Refusal of government employment or dismissal from government employment is hardly a satisfactory method of dealing with matters of this kind. It is hard to believe that Executive Order 9835 was seriously intended as a method of penalizing such activity.

The same may be said of the fourth category—disclosure of confidential documents or information obtained as a result of government employment. Violation of office rules against disclosure is a valid ground for discharge, and has always been so considered, whether it involves a question of loyalty or not. The elaborate machinery of the Executive Order is scarcely necessary to invoke penalties against such action; nor was it conceived for that purpose.

There remain two categories which are designed to afford additional protection to the government, extending beyond existing statutory and administrative authority. These provisions constitute the heart of the loyalty program. The fifth category is "performing or attempting to perform his duties, or otherwise acting, so as to serve the interest of another government in preference to the interests of the United States." How this criterion should be applied is altogether unclear. Would the transfer of 50 destroyers to Great Britain in 1940 serve the interests of that country in preference to the United States? Many people thought it did. What about military aid to Greece or Turkey? Or economic aid to Russia? Does not every issue of foreign policy raise a question as to the interest of the United States in relation to foreign countries, and does not the answer turn upon a complicated political judgment as to which people may differ in good faith? Nothing is said about motive or intent. Is this meant to be the touchstone? If so, just what is the requisite evil intent? And how is it to be shown or proved?

The sixth category is equally ambiguous:

"Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General 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 other persons 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."

The key words in this crucial category are not further defined and have, of course, no settled meaning. Funk & Wagnall's *New Standard Dictionary* defines "totalitarian" as "all-embracing, as a government so organized as to be dominated by one political party, power, or organization." The *American College Dictionary* definition is "pertaining to a centralized form of government in which those in control grant neither recognition nor tolerance to parties of differing opinion." Presumably the term would include an organization advocating a

form of government based upon a single party system. Beyond this, its interpretation is a matter of speculation. The term as used in American political parlance has countless shades of meaning. Thus the New Deal has frequently been described as "totalitarian."<sup>155</sup>

The terms "fascist" and "communist" would clearly apply to a limited number of organizations such as the German-American Bund and the Communist Party. But beyond this narrow area the words lose all meaning. Political writers are far from agreement as to the fundamental characteristics of fascism and communism. It is often said that there is no difference between the two systems, a view which would make the use of both words mere repetition. Even if there were agreement on the basic meaning of fascism or communism, the difficult question of whether any particular organization is in fact "fascist" or "communist" remains to be answered. Here, also, the terms have been used on the American political scene with a broad and shifting meaning.<sup>156</sup>

The most ambiguous of all the terms is "subversive." Funk & Wagnall's New Standard Dictionary defines "subversive" as "tending to subvert; militating strongly against something specified; destructive; subversionary." And its definition of "subvert" is "to overthrow from or as from the foundation; utterly destroy; bring to ruin." A good share of normal political opposition could be brought within this definition. In common political usage the word "subversive" usually carries the implication of illegal methods. As used in the Order, however, the term must mean more than "advocating or approving the commission of acts of force or violence" or "seeking to alter the form of government of the United States by unconstitutional means," for these activities are listed as separate and independent factors evidencing disloyalty. Presumably, therefore, the term was intended to add something to the normal concept of illegal method. But just what?

Repeated use of the word has, of course, not served to clarify its meaning. The President's Temporary Commission on Employee Loyalty, in its report which laid the basis for Executive Order 9835, consistently refers to "subversive *or* disloyal" employees, thus attributing to "subversive" some meaning other than disloyal.<sup>157</sup> The Committee on Un-American Activities repeatedly branded various

155. See, *e.g.*, HOOVER, AMERICAN IDEALS VERSUS THE NEW DEAL (1936); HOOVER, THE CHALLENGE TO LIBERTY (1934); Mathews and Shallcross, *Must America Go Fascist?* 169 HARPER'S 1 (1934); Sokolsky, *America Drifts Toward Fascism*, 32 AM. MERCURY 257 (1934). At the 1948 Republican Convention ex-President Hoover attacked the "totalitarian liberals" and characterized the New Deal as "totalitarian economics." N.Y. Times, June 23, 1948, p. 8, col. 5.

156. See, *e.g.*, *United States v. Hautau*, 43 F. Supp. 507 (D.C. N.J. 1942).

157. REPORT OF THE PRESIDENT'S TEMPORARY COMMISSION ON EMPLOYEE LOYALTY 23, 24, 25 (1947).

New Deal personalities and policies as "subversive."<sup>158</sup> On the other hand, President Truman, in a formal message to Congress on the Rent Control Extension Act, described the activities of the real estate lobby as "subversive."<sup>159</sup> And Mrs. Eleanor Roosevelt recently described the attack of the Un-American Activities Committee on Dr. Edward U. Condon, head of the Bureau of Standards, as "really subversive in its effect."<sup>160</sup> Mr. Justice Jackson, when Attorney General, accurately summed up the situation:

"Activities which seem helpful or benevolent to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as 'subversive' by those whose property interests might be affected thereby. Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as 'subversive.'"<sup>161</sup>

The other provisions of subdivision f also leave undecided important questions of interpretation. The Attorney General is authorized to designate any combination of persons who have "adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States." Does this include those state Democratic parties whose leaders openly or covertly suggest the use of violence to prevent Negro citizens from voting?<sup>162</sup> Would the whole Democratic party be tainted by the activities of certain of its local organizations? And what about advocacy of force or violence as a purely defensive measure? What of the phrase "seeking to alter the form of government of the United States by unconstitutional means"? Does this embrace an organization advocating Federal anti-poll tax legislation if the Attorney General considers such legislation unconstitutional?

For the agency loyalty boards and the Loyalty Review Board, as distinct from the Attorney General, these ambiguities are com-

158. See *supra* pp. 9-14.

159. N.Y. Times, July 1, 1947, p. 20, col. 8.

160. *My Day*, March 9, 1948.

161. Speech to Conference of United States Attorneys, April 1, 1940. For a further discussion of the lack of meaning in the term "subversive" see Judge Clark's dissent in *United States v. Josephson*, 165 F.2d 82, 94-5 (2d Cir. 1947), *cert. denied*, 68 Sup. Ct. 609 (1948); and Judge Edgerton's dissent in *Barsky v. United States*, 167 F.2d 241, 260-3 (D.C. Cir. 1948), *cert. denied* 16 U.S.L. Week 3340 (1948). See also Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 Col. L. Rev. 416, 419-22 (1947).

162. *E.g.*: "White supremacy will be maintained in our primaries. Let the chips fall where they may!" Speech of Governor of South Carolina, quoted in *Elmore v. Rice*, 72 F. Supp. 516, 520 (D.C. S.C. 1947), *aff'd.*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 68 Sup. Ct. 905 (1948). See also REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS—TO SECURE THESE RIGHTS 35-40 (1947); Note, *Negro Disenfranchisement—A Challenge to the Constitution*, 47 Col. L. Rev. 76, 78-80 (1947).

pounded. The Attorney General transmits to the loyalty boards a list of the organizations he has proscribed. The loyalty boards must then consider membership in, affiliation with, or sympathetic association with these organizations "in connection with the determination of disloyalty." But how is the loyalty board to evaluate this evidence if it does not know the criteria by which the Attorney General has reached his decision? A statement of findings made by the Attorney General or the reasons for his action might be helpful, but no provision for such procedure is made in the Order and, with the exception of a letter dealing with the Communist Party, no such findings or rationale have been forthcoming.<sup>163</sup>

"Membership" in a proscribed organization raises an issue more susceptible of definite proof. Proof of "affiliation" is less simple, although the Supreme Court has laid down a working rule for such determinations in the *Bridges* case.<sup>164</sup> But what is "sympathetic association," and how is it to be shown? The term is wholly novel in American law. Does it include normal social contacts with members of proscribed organizations? Professional or scientific association? Business dealings? Are the relatives of a member of a proscribed organization its sympathetic associates? Does the term outlaw all united fronts which include "subversive" groups? And how far back does the taint of association run?

The Loyalty Review Board realizes that it is operating under an almost unlimited charter. While it has not undertaken to define "disloyalty" it has attempted to narrow the area of ambiguity by a statement issued in connection with the promulgation of its initial regulations:

"Advocacy of whatever change in the form of government or the economic system of the United States, or both, however far-reaching such change may be, is not disloyalty, unless that advocacy is coupled with the advocacy or approval, either singly or in concert with others, of the use of unconstitutional means to effect such change."<sup>165</sup>

This is not an unreasonable stand. Yet difficulties remain. On its face the Board's statement seems to confine the criteria for determining disloyalty to the last clause of subdivision f. Does the Board mean that it is disregarding the other criteria of subdivision f and attributing no meaning to the categories "totalitarian," "communist,"

163. See *infra* note 430.

164. "Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition." *Bridges v. Wixon*, 326 U.S. 135, 143-4 (1945).

165. Statement of Loyalty Review Board, issued Dec. 23, 1947.

"fascist," "subversive" or "advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution?" And was its statement meant as a mandate to the Attorney General, whose function it is to determine whether a particular organization or other combination falls within the proscriptions of subdivision f? Moreover, the position of the Board is confused by another attempt at definition in the same statement. This time the Board introduces a new concept,—“allegiance to some foreign power or influence”—as a criterion of disloyalty:

“. . . persons holding beliefs calling for a change in our form of government through the use of force or other unconstitutional means, who indicate these beliefs by association or conduct, *and persons who demonstrate their allegiance is primarily to some foreign power or influence*, and that they desire to overthrow our Government, have no constitutional or moral right to remain in, or enter upon the service of our Nation.”<sup>166</sup>

The Board's use of the phrase “desire to overthrow our Government” must be taken as meaning “desire to change by lawful means”; otherwise it would be merely repetitive of the previous category of persons “calling for a change . . . through the use of force or other unconstitutional means.” The Board must intend to say, then, that persons who seek change in government through democratic methods but whose “allegiance is primarily to some foreign power or influence” are disloyal. But what does this mean? Would it include members of the Roman Catholic Church whose leaders in the Vatican issue warnings to Catholics not to vote for certain types of candidates?<sup>167</sup> Would it include a person whose philosophy of government is influenced by British views of the separation of powers? Or by Keynes' economic theories?

It seems evident, therefore, that neither the Loyalty Order nor the Loyalty Review Board's interpretation of it thus far satisfactorily answers the need for specific criteria of “disloyalty.”<sup>168</sup>

#### *Other Attempts at Formulation of Criteria*

The failure of the Loyalty Order to develop an understandable definition of “disloyalty” or its cognate terms repeats the record of the

166. *Id.* at 10. Italics supplied.

167. See Associated Press dispatch from Vatican City, PM, March 4, 1948, p. 7, col. 1. A recent series of articles concluded that there is a basic incompatibility and continuing conflict between the institution of the Catholic Church and American democracy. Blanshard, *The Catholic Church and Democracy*, 116 NATION 601, 630 (1948).

168. For further discussion of the looseness of terms such as those used in the Loyalty Order, see Note, 47 COL. L. REV. 1161; letter from Dean Griswold and Profs. Chafce, Katz and Scott of the Harvard Law School, N.Y. Times, Apr. 13, 1947, § 4, p. 8, col. 5; AMERICAN CIVIL LIBERTIES UNION, STATEMENT ON LOYALTY TESTS FOR FEDERAL EMPLOYMENT, adopted by Board of Directors, Apr. 7, 1947.

various committees, commissions, agencies and individuals who have devoted their time and attention to the problem.

The Committee on Un-American Activities has never formulated any consistent or meaningful definition of "Un-American," "subversive," or similar terms either in connection with the qualifications that should be demanded of government employees or for other purposes.<sup>169</sup> Invariably the Committee uses the terms in an opprobrious sense, to characterize political activity or views to which the Committee, or its chairman, is opposed.<sup>170</sup>

In 1943 the Kerr Committee was entrusted with the function of determining whether the 38 Federal employees named by the Dies Committee were "subversive to the Government."<sup>171</sup> This Committee undertook what the Dies Committee had never seriously attempted—to define the term "subversive activity." Its definition was:

"Subversive activity . . . derives from conduct intentionally destructive of or inimical to the Government of the United States—that which seeks to undermine its institutions, or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all."<sup>172</sup>

On its face this definition would embrace any opposition to the status quo, regardless of methods employed, subject perhaps to the final qualification "the ultimate end being to overturn it all." How much of a limitation this was meant to be is not clear. The Committee's first, and only, application of the standard was to three typical New Dealers, Lovett, Watson and Dodd.<sup>173</sup> So little impressed was the Supreme Court with the Committee's definition that in the *Lovett* case the majority opinion quoted the Committee's test but consistently used the word "subversive" in quotation marks.<sup>174</sup>

The Civil Service Commission, which was responsible for originat-

169. Recognizing the absence of controlling standards, the Committee in 1945 sought definitions of "Un-American" from prominent Americans, but accepted none that were offered. N.Y. Times, Mar. 31, 1945, p. 32, col. 4. For a recital of various amorphous criteria which the Committee has used at different times to define the scope of its investigations, see Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 COL. L. REV. 416, 422-3 (1947). On July 18, 1946, the Chief Counsel of the Committee stated that it "has adopted no definition of subversive or Un-American activities. . . ." *Ibid.*, n. 63.

170. ". . . Dies and his committee feel that 'Americanism' requires the preservation of the status quo, and label as 'Un-American' whatever seems to threaten the status quo no matter how constitutional be the means whereby it is proposed." GELLERMANN, *Martin Dies* 141 (1944). See *supra* pp. 8-14.

171. H. R. RES. 105, 78th Cong., 1st Sess., 89 CONG. REC. 734, 742 (1943). See *supra* p. 13.

172. H.R. REP. No. 448, 78th Cong., 1st Sess. 5 (1943).

173. See *supra* p. 13.

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

ing the standard of "reasonable doubt as to . . . loyalty to the Government" in 1942 and which decided some thousands of cases in subsequent years on the basis of this formula, has likewise never promulgated any clear definition of the term "loyalty." In 1943 the Commission, after a leak to the press had occurred, made public its instructions to investigators on this matter:

"The Commission, on the basis of its experience in handling thousands of these cases, has developed certain policy standards. It is of primary importance to record the fact that the Civil Service Commission will not consider charges against persons who are found merely to possess a progressive interest in seeking changes in the country's economic and political structure but who adhere firmly to the principle that such changes are only to be brought about through orderly democratic processes.

"On the other side of the picture, there have evolved certain fairly well-defined categories, where, assuming adequate evidence, a negative conclusion follows. Typical of these latter categories are the following:

"Persons who have advocated revolution or the use of force, if necessary, in order to bring about political or economic changes.

"Persons whose association with organizations in agreement with the attitudes and policies of the Nazis, Fascists, or Communists, has been such as to indicate sympathy with the programs of the Nazis, Fascists, or Communists.

"Persons who have expressed a desire to see the Axis Nations emerge as the victor in the present conflict.

"Persons whose record shows that they are more concerned with the success or failure of a foreign government or a foreign political system than with the welfare of the United States Government.

"It is clear, of course, that tied up with the last point mentioned above is the whole question of communism. In connection with the handling of these cases, the Commission has issued the following instructions to its staff:

"A good definition of a Communist is 'one who has followed the Communist Party line through one or more changes.' The Communist Party line is the policy advocated by the various factions of the [C]omintern. It is the policy of preserving and protecting the Soviet Union by whatever means are determined by its leaders."<sup>176</sup>

Plainly the standard of "sympathy with the programs of the Nazis, Fascists or Communists" is limitless in application. Equally inclusive is the definition of a Communist, which would embrace anyone who changed his mind as to the character of the war after Germany's attack on Russia in June 1941.<sup>176</sup> This test would include such a well-

175. 89 CONG. REC. 10254 (1943). The full instructions are reprinted at 89 CONG. REC. 10253-5 (1943).

176. See COMMITTEE ON CIVIL SERVICE, REPORT OF INVESTIGATION WITH RESPECT TO EMPLOYEE LOYALTY AND EMPLOYMENT PRACTICES IN THE GOVERNMENT OF THE UNITED



known figure as Chester Bowles, formerly OPA Administrator.<sup>177</sup> The Commission's test would also include literally millions of Americans, for within three weeks of the Nazi attack on Russia 8 percent of the American people changed their attitude from one of non-participation to a desire to aid in the war against Germany.<sup>178</sup>

The Federal Bureau of Investigation has also dealt with the issue of loyalty in the course of numerous investigations of government employees. But it has conceived its function as that of gathering facts rather than drawing conclusions and hence has never officially formulated criteria of loyalty.<sup>179</sup> Nor has the Attorney General undertaken publicly to define "disloyalty" or other similar terms.

The Attorney General's and the President's Interdepartmental Committees, as already noted, did adopt restricted and rather clear cut definitions under the Hatch Act and appropriation riders.<sup>180</sup> These definitions were ignored by the Civil Service Commission and swept into discard by the Loyalty Order.

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STATES, 79th Cong., 2d Sess. 3 (1946). The Civil Service Commission employed this test in the case of Morton Friedman. See *Friedman v. Schwellenbach*, 159 F.2d 22, *cert. denied*, 330 U.S. 848 (1947); *reh'g denied*, 331 U.S. 865 (1947).

177. Bowles supported the America First position until Germany's attack on Russia. "Until 1941 I thought of it [Hitlerism] as a passing phase, a local middle-European phenomenon, a bad answer to prolonged economic misery. When Hitler invaded Russia, although I am certainly no Communist, I realized that here was proof that it was more than an ordinary clash of old world powers." *P.M. Sunday Magazine*, Oct. 20, 1946, p. 16. Similar considerations motivated Judge Jerome Frank to advocate United States participation in the war immediately after the fall of France, while George Wharton Pepper was moved to change his anti-war position by the spectacle of Britain standing alone against the Nazis. See FRANK, *IF MEN WERE ANGELS* 332 n. (1942); PEPPER, *PHILADELPHIA LAWYER* 272-3 (1944). Conceivably, these citizens could be condemned for following a "French Party Line" or a "British Party Line."

178. See Gallup Poll appearing in the *Washington Post*, July 11, 1941.

179. "The FBI does not make policy, recommendations, conclusions or rulings based upon our investigations. The FBI, since I became its Director in 1924, has adhered strictly to the premise that it is a fact-finding agency." Statement of J. Edgar Hoover, reprinted in ANDREWS, *WASHINGTON WITCH HUNT* 93 (1948). The truth is, of course, that in deciding what facts to report the FBI makes constant judgments of relevancy. See *infra* pp. 101-4.

In testimony before the Un-American Activities Committee Mr. Hoover did undertake to give 14 "easy tests" by which to detect a Communist "front" organization. Typical of these tests are the first three: "1. Does the group espouse the cause of Americanism or the cause of Soviet Russia? 2. Does the organization feature as speakers at its meetings known Communist sympathizers or fellow travellers? 3. Does the organization shift when the party line shifts?" Other tests were "Does the organization receive consistent favorable mention in Communist publications?" "Have outstanding leaders in public life openly renounced affiliation with the organization?" "Does the organization have a consistent record of support of the American viewpoint over the years?" *Menace of Communism*, Statement of J. Edgar Hoover before *Committee on Un-American Activities*, SEN. DOC. No. 26, 80th Cong., 1st Sess. 10 (1947). The tests are reprinted in full in 47 *COL. L. REV.* 1161, 1172 (1947).

180. *Supra* pp. 14-16.

The President's Temporary Commission on Employee Loyalty was directed, among its other functions, to study the entire problem of "standards."<sup>181</sup> It recommended adoption of the criterion embodied in the Loyalty Order, but made no effort to analyze or explain its meaning. Similarly the House Committee on Post Office and Civil Service, after hearings, reported out the Rees bill containing identical language.<sup>182</sup> But again there was no effort made to explain the criterion. In the debate on the floor of the House opposition members repeatedly pointed out the lack of clarity in the standards of loyalty.<sup>183</sup> Nothing in the speeches of proponents of the bill served to achieve greater precision.<sup>184</sup>

The State Department, in its regulations already mentioned, established an elaborate definition of "security risk."<sup>185</sup> Although parts of this definition are specific, many of the terms—such as "subversion," action "to serve the interests of another government," and the like—are hopelessly vague. And the total effect of the definition is so broad and far-reaching as to include virtually any meaning with which the administrator of its provisions might care to endow it.

Nor have the courts thus far succeeded in filling the gaps left by the legislative and executive branches. Only one case raising the precise issue of "disloyalty" as a disqualification for government employment has reached the judiciary. In that case—*Friedman v. Schwellenbach*—the Court of Appeals for the District of Columbia took the position that it was "not concerned here with the question as to whether Friedman was in fact disloyal," holding that the Civil Service Commission's

181. Exec. Order No. 9806, 11 FED. REG. 13863 (1946).

182. H. R. REP. 616, 80th Cong., 1st Sess. (1947).

183. 93 CONG. REC. 8942-9 (1947).

184. Two other bills dealing with "disloyal" or "subversive" government employees have received some attention. The Thomas bill, H.R. 2275, 80th Cong., 1st Sess. (1946), made no effort to define these terms. The Hobbs bill, H.R. 1103, 80th Cong., 1st Sess. (1946), included the following definition:

"Sec. 4. That the phrase 'subversive of the Government of the United States' as used in this Act shall mean any act or conduct, membership, or association, or advocacy of principle or doctrine inimical to the Government of the United States or the tendency of which is to undermine any of the institutions or to distort any of the functions or to impede any of the projects or to lessen any of the efforts of the Government of the United States; whether any such subversive influence exerted or sought to be exerted be open or direct or subtle or indirect, whether such subversive activity may have been spoken or written words or by acts or conduct, and whether or not such subversive activity produced subversive result."

This definition is based on that of the Kerr Committee, *supra* note 172, but omits the final qualification. It would obviously include virtually all political opposition to the status quo.

185. *Supra* note 150.

finding on that point was conclusive.<sup>186</sup> The Supreme Court denied certiorari.<sup>187</sup>

Finally, none of the unofficial commentators on the problem have thus far come forth with a satisfactory answer. The usual approach has been to accept the customary generalization that "disloyal" individuals are not qualified for government service. But the underlying premises of this statement have never been adequately explored.<sup>188</sup>

This use of sweeping and undefined standards in loyalty cases carries with it grave dangers. The history of the Alien and Sedition Acts and of the Espionage Act in the first world war period abundantly demonstrates the abuses inherent in broad legislation restricting freedom of political expression, particularly in times of internal stress.<sup>189</sup> There is evidence in the loyalty program of a similar tendency for the term "loyalty" to degenerate into a rigid authoritarian concept. The absence of definite criteria inevitably results in the use of the word in its vague popular sense, as an epithet indicating political disagreement. Hence "loyalty" comes more and more to mean simply adherence, in action and thought, to the conventional premises underlying the status quo. This tendency has been described by Henry Steele Commager:

"What is the new loyalty? It is, above all, conformity. It is the uncritical and unquestioning acceptance of America as it is—the political institutions, the social relationships, the economic practices. It rejects inquiry into the race question or socialized medi-

186. 159 F.2d 22, 25 (D.C. Cir. 1946).

187. 67 Sup. Ct. 979 (1947); *reh'g denied*, 67 Sup. Ct. 1302 (1947), Black and Douglas, JJ., dissenting. In *Schneiderman v. U.S.*, 320 U.S. 118 (1947), the Supreme Court considered a somewhat analogous problem,—whether a naturalization certificate could be set aside subsequently upon the ground that the individual, a member of the predecessor to the Communist Party at the time of his naturalization, was not at that time "attached to the principles of the Constitution of the United States." The Court divided sharply upon the meaning of this phrase. For tests employed in earlier denaturalization proceedings, see cases collected in 18 A.L.R. 1185 (1922); 75 L.Ed. 1316 (1931). See also *Wixman v. United States*, 17 U.S.L. Week 3165 (U.S. Dec. 6, 1948).

188. See Cushman, *The President's Loyalty Purge*, 36 SURVEY GRAPHIC 233 (1947); AMERICAN CIVIL LIBERTIES UNION, STATEMENT ON LOYALTY TESTS FOR FEDERAL EMPLOYMENT, adopted by Board of Directors April 7, 1947; *The Constitutional Right to Advocate Political, Social and Economic Change—An Essential of American Democracy*, 7 LAW GUILD REV. 47 (1947); TO SECURE THESE RIGHTS—REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 49-51 (1947); Kaplan, *Loyalty Review of Federal Employees*, 23 N.Y.U.L.Q. REV. 437 (1948). Cf. Note, 47 COL. L. REV. 1161, 1170 (1947).

189. CHAFEE, FREE SPEECH IN THE UNITED STATES, 36-232 (1941); references cited *supra* notes 2 and 16. Compare with the Loyalty Order the provision of the Alien Act: ". . . it shall be lawful for the President of the United States at any time during the continuance of this act, to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States. . . ." 1 STAT. 570-1 (1793).

cine, or public housing, or into the wisdom or validity of our foreign policy. It regards as particularly heinous any challenge to what is called 'the system of private enterprise,' identifying that system with Americanism. It abandons evolution, it repudiates the once popular concept of progress, and regards America as a finished product, perfect and complete."<sup>190</sup>

The broader, the more fruitful, the dynamic aspects of loyalty have tended to become submerged. Again Professor Commager writes with eloquence of this other view of loyalty:

"It is a tradition, an ideal, and a principle. It is a willingness to subordinate every private advantage for the larger good. It is an appreciation of the rich and diverse contributions that can come from the most varied sources. It is allegiance to the traditions that have guided our greatest statesmen and inspired our most eloquent poets—the traditions of freedom, equality, democracy, tolerance, the tradition of the higher law, of experimentation, co-operation, and pluralism. It is a realization that America was born of revolt, flourished on dissent, became great through experimentation."<sup>191</sup>

Is it possible then to develop a concept of loyalty in government service that will embrace the positive and living aspects of the idea, that will avoid corruption in day-to-day application, that will adequately protect the legitimate interests of the government, that will serve as a useful tool of the law?

#### *Possible Criteria of Disloyalty*

Any attempt to establish more precisely the criteria of disloyalty must start with an analysis of the dangers which the government faces from the conduct or beliefs of its employees, stated in relation to the concrete political struggles of the day. What is it that sponsors of the loyalty program are seeking to guard against? What specific actions on the part of government employees do they fear will endanger the operation of government? What beliefs or sympathies or traits of character in government workers do they feel must be eliminated or avoided? Once this analysis has been made it becomes possible to formulate definite criteria which could be employed as a basis for disqualification from government service.

Examination of the efforts thus far made to exclude or remove certain individuals from the government service seems to indicate that the dangers from which protection is sought break down into the following categories: (1) unauthorized disclosure of information; (2) physical

190. Commager, *Who is Loyal to America*, 195 HARPER'S MAGAZINE 193, 195 (1947). For examples of the tendency described by Commager see *infra* pp. 68-75.

191. *Id.* at 198. See also Boyd, *Subversive of What?*, ATL. MONTHLY, Aug., 1948, p. 19; Merriam, *Some Aspects of Loyalty*, 8 PUB. ADMIN. REV. 81 (1948).

sabotage; (3) participation in a conspiracy to change or overthrow the government by violent or illegal methods; (4) making official decisions under direction of a foreign country or group; (5) attempting to bring about changes in governmental policy or in the form of government by methods not involving violence or illegality.

*Unauthorized Disclosure of Information.* The danger that government employees will reveal confidential or secret information, obtained in the course of their employment, has come to be a matter of major concern within the past decade. The problem has its roots in the nature of modern total war. Military strength has come more and more to depend upon the development of new and increasingly lethal weapons fashioned originally in scientific laboratories and brought into practical use through engineering methods of mass production. Atomic bombs, radar and rockets as used in the past war, and the guided missiles, atomic clouds and bacteria destined for use in the next conflict, are among the more spectacular examples. As a result, those charged with our military security have thought it necessary to take increasingly drastic steps to prevent information with respect to such developments from reaching potential enemies. The fact that the attempt to stop the dissemination of such information in itself retards and endangers scientific progress, and that much of the advantage possessed by any nation rests upon its technological and productive capacity rather than upon strict "secrets" of invention, complicates but does not eliminate the problem.<sup>192</sup>

Furthermore, under conditions of present day warfare, military intelligence requires the accumulation of information with respect to every aspect of the economic, social, political and psychological life of the potential enemy. Modern intelligence methods are based upon the piecing together of isolated scraps of knowledge about every conceivable feature of life in the opposing nation.<sup>193</sup> Hence, even the most innocuous information acquired by government employees becomes a potential source of danger if transmitted to enemy agents, or to other persons through whom it may reach the enemy.

The possibility that government employees may disclose information of value to a potential enemy has strongly influenced the course of development of the Federal loyalty program. Disclosures in connection with the Canadian spy ring have been repeatedly cited as proof of the reality of the danger.<sup>194</sup> The President's Temporary Commission on Employee Loyalty, as well as Congressional reports and debates,

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192. For an excellent discussion of this issue in connection with the development of atomic energy, see NEWMAN AND MILLER, *THE CONTROL OF ATOMIC ENERGY* c. 10 (1948).

193. See PETTEE, *THE FUTURE OF AMERICAN SECRET INTELLIGENCE* c. 5, esp. 73-85 (1946).

194. See *supra* pp. 58-9.

have stressed the importance of strict safeguards at this point in our defenses. And the Chambers-Hiss hearings of the Committee on Un-American Activities have, of course, presented the issue in dramatic form.<sup>195</sup>

A loyalty program designed to meet this danger could conceivably encompass a variety of measures. First there is the necessity of uprooting actual espionage activity. This involves the elimination from government service of out-and-out foreign agents or of any person who deliberately conveys information to such an agent. A second step might be the removal of persons who have inadvertently disclosed important information without any intention of harming the United States. Subsequent steps take us into the area of prevention through a process of advance screening. Thus it is possible to undertake the elimination of employees who are members of organizations, or associate with other persons, of such a character as to give rise to the inference that they *may* intentionally or inadvertently disclose information to individuals through whom it will reach a foreign power. Similarly, it is possible to attempt the elimination of employees who hold beliefs or opinions from which an inference may be drawn that such persons are likely to disclose information.

Methods of accomplishing these various results, as we shall see, necessarily entail different problems of administration.

*Sabotage.* The danger of sabotage—in the sense of willful physical destruction of property—is significant only in a period of acute internal crisis or war. While certain Congressmen have expressed fear of sabotage from disloyal government employees,<sup>196</sup> this danger has not figured prominently in most discussions of the loyalty program.

*Participation in a Conspiracy to Change or Overthrow the Government by Violent or Illegal Means.* The danger from this source is considered to arise primarily from the activities of the Communist Party,—a question which is discussed at a later point. Here we simply undertake an analysis of the various measures which might be taken to protect the government against such a danger.

Obviously the most direct way of dealing with a conspiracy to overthrow the government by violent or illegal means is through criminal prosecution of the members of the conspiracy, whether in government service or out.<sup>197</sup> Apart from criminal action, it is possible to develop various tests which might be employed to eliminate from government service persons who are or might become associated, in a direct or remote degree, with such a conspiracy. Possible tests of disqualification might be:

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195. See *supra* p. 26.

196. See, *e.g.*, speech by House Speaker Martin at the 1948 Republican Convention, N.Y. Times, June 23, 1948, p. 10, col. 3.

197. For the applicable statutes see *supra* pp. 27-9.

(1) Personal advocacy of or belief in the overthrow or change of government by violent or other illegal means.

(2) Membership, open or concealed, in an organization which advocates the overthrow or change of government by violent or other illegal means.

(3) Membership in an organization which includes, to a greater or lesser degree, members of a conspiratorial organization, or persons who personally advocate or believe in the overthrow or change of government by violent or illegal means.

(4) Personal advocacy of or belief in all or some of the program of the conspiratorial organization but not in the policy of violence or illegal method.

(5) Personal advocacy or beliefs of a character from which the inference may be drawn that such person may at a later date become a member or support a conspiratorial organization.

(6) Association with any of the organizations or persons included in the foregoing.

*Acting Under Direction of a Foreign Power.* A recurrent theme in discussions of the loyalty program is the danger to the government of retaining in its service individuals who "owe allegiance to a foreign power" or "act in the interest of a foreign power." Except in the case of a paid agent of a foreign power, reduction of these generalities to concrete terms is a baffling problem.

The issue today centers partly around the influence of "foreign ideologies" upon individuals, but the chief concern is with the relationship of individuals to organizations or organized movements. Here again the principal source of danger is considered to be the Communist Party. There are, however, other international organizations which include among their membership American citizens who support programs of a political nature that may have been shaped in large measure by non-American members. These would include such organizations as the Roman Catholic Church, the World Zionist Congress, the World Federation of Trade Unions, the world organization of Socialist parties, and international cartels. In so far as the policies of such organizations affect political matters, it is possible that some danger to the United States government would arise from employees who were members of these organizations or supported their programs.

The tests which might conceivably be used in determining disqualification for government employment can be stated as follows:

(1) Membership in a political organization whose major policies are directed by an organization or group operating outside the United States.

(2) Membership in a similar organization, primarily non-political in character, but which participates to some extent in political matters.

(3) Membership in a political organization having any affiliation

with an organization or group operating outside the United States, or which adheres to policies originated or developed by an organization or group operating outside the United States.

(4) Personal advocacy of or belief in all or some of the program of a political organization operating outside the United States.

(5) Personal advocacy of or belief in policies or views originating or developed by individuals or groups outside the United States.

(6) Associations with any of the organizations or persons included in the foregoing.

*Attempting to Bring about Changes in Governmental Policies or Organization by Methods Not Involving Violence or Illegality.* Many of the persons characterized as "disloyal" or "subversive" in the past ten years have done no more than to advocate changes in government policy or organization through legal methods.<sup>198</sup> The Committee on Un-American Activities, as well as others, have regarded such individuals as constituting a serious threat to our government. But the Civil Service Commission and the Loyalty Review Board, among others, have acknowledged that any possible danger from this source does not justify disqualification from government employment.<sup>199</sup> The latter proposition seems unassailable. We therefore make no attempt to suggest possible criteria of disloyalty based upon these grounds.

*Variations in the Nature of the Employment.* Up to this point it has been assumed that the criteria for determining eligibility for government employment are equally applicable to all employees regardless of the nature of the positions they hold. Proper account must be taken, however, of the differences between various kinds of government employment. This involves consideration of variations between the functions of the different agencies as well as between different jobs within the same agency.

#### *Conclusion as to Criteria*

This analysis of possible criteria of disloyalty by no means removes all the ambiguities. But it does reduce the problem to more manageable proportions. The decision as to which, if any, of the possible criteria should be employed in a loyalty program turns upon the factors now to be considered—the actual extent of the danger, practical results of administration, constitutional limitations, and the procedures available.

The foregoing analysis, moreover, serves to clarify the basic objec-

198. See *supra* pp. 9-14. Criticism of existing social conditions has frequently resulted in the dismissal of public school teachers on grounds of disloyalty. See, *e.g.*, BUNTING, LIBERTY AND LEARNING Ch. IV (1942); AMERICAN CIVIL LIBERTIES UNION, WHAT FREEDOM IN NEW YORK SCHOOLS (1931).

199. See *supra* pp. 41 and 44.



tives of the Administration's program. We have seen that existing legislation, apart from any loyalty measures, affords the government protection against certain dangers, including conduct constituting treason, espionage, sabotage, sedition and the like. And the normal procedures for disciplining government workers provide a potent weapon not only for protection against action in violation of statute but for all cases of incompetence, insubordination, violation of agency rules and similar matters. These legislative and administrative powers operate by way of punishment, taking effect after an overt act has been committed. They also operate as a deterrent, of course, in the same manner as any criminal or penal provision of law.

The Administration's loyalty program is based essentially upon another approach. It seeks to avoid any danger by screening out in advance individuals who might in the future be guilty of dangerous conduct. It is thus more in the nature of a licensing system,—an attempt to eliminate, prior to any overt action, persons who are conceived to have dangerous tendencies. In the phrase of President Truman it is designed to weed out the "potentially disloyal."<sup>200</sup>

#### V. HOW GREAT IS THE ACTUAL DANGER

How extensive and how threatening are the actual dangers from which the government seeks to protect itself through the loyalty program? Is there substantial danger of disruption of government operations through espionage or sabotage? Is there a serious conspiracy within the government to overthrow it by force or violence, or is there likelihood that one will develop? How dangerous is the possibility that government decisions will be made by employees acting under direction of a foreign power?

Unfortunately satisfactory evidence bearing on these questions is not readily available. No comprehensive and objective study of the problems has yet been made public. And the failure to define concretely what is meant by "disloyalty" has so obscured the issues as to make impossible a clear appraisal of such results and conclusions as have been announced. Reserving for the moment the narrower question as to the presence of Communist Party members in government service, let us examine the available data.

The House Committee on Un-American Activities has been the major sources of contention that the dangers are widespread and immediate. But the essential meaninglessness of the words "subversive," "Un-American" and "disloyal," customarily used by the Committee to describe those whom it accuses, renders its generalizations worthless. The untrustworthiness of the Committee is well illustrated by the episode, already referred to, in which it submitted the names of 1121

200. Statement of President Truman, N.Y. Times, Nov. 15, 1947, p. 2, col. 2.

Federal employees to the Attorney General as proof of an "influx of subversive elements into official Washington."<sup>201</sup> After a full check by the FBI the evidence was found to justify the dismissal of only a handful of the total stigmatized by the Committee. With such a record it becomes impossible to accept the sweeping assertions of the Un-American Activities Committee as well founded.<sup>202</sup> The recent disclosures of the Committee with respect to specific acts of espionage are considered subsequently.

Some light is thrown upon the danger from mass infiltration of "disloyal" employees by the additional investigations of 2175 Federal employees conducted by the FBI pursuant to the appropriation acts under which it checked the Dies list. This was a more carefully selected group, based upon information "developed by the Federal Bureau of Investigation from other sources."<sup>203</sup> Reporting in April, 1943, the FBI disclosed that it had determined without field investigation that the complaints "were definitely unsubstantiated and obviously nebulous in character" in the case of 537 employees, and that it had made investigations and reported to the employing agencies in 1638 cases. Of these the employing agencies discharged 43 employees and took other "administrative action" against 39.<sup>204</sup>

Reporting on the results of the FBI investigations under this appropriation, the Attorney General's Interdepartmental Committee on Investigations reached the following conclusion:

"Upon review of experience with the project to date, however, we conclude that it should not be continued as a broad personnel inquiry. Results achieved have been utterly disproportionate to resources expended. Sweeping charges of disloyalty in the Federal service have not been substantiated. The futility and harmful character of a broad personnel inquiry have been too amply demonstrated. We respectfully urge that the project be reorganized

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201. Quoted in Letter from the Attorney General, H.R. Doc. No. 833, 77th Cong., 2d Sess. 3 (1942). See *supra* p. 12.

202. This conclusion is fully confirmed in an analysis made by Prof. Walter Gellhorn of a more recent report of the Committee. Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 HARV. L. REV. 1193 (1947). See also Statement of the Board of Directors of the American Civil Liberties Union, Jan. 20, 1947, quoted in Gellhorn, *op. cit.* at 1234; Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 COL. L. REV. 418 *et seq.* (1947); OGDEN, *THE DIES COMMITTEE* (1945); GELLERMANN, *MARTIN DIES* (1944); Dickinson, *Political Subversives: An Appraisal of Recent Experience and Forecast of Things to Come*, 2 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 350, 360 (1947).

203. Letter from the Attorney General, H.R. Doc. No. 162, 78th Cong., 1st Sess. 4 (1943).

204. *Id.* at 4-5. No replies had been received from the employing agencies in the case of 156.

promptly to exclude all but matters clearly pertinent to the vital problem of internal security.”<sup>205</sup>

The Committee therefore recommended:

“That hereafter investigations of Federal employees be restricted to those instances in which there is substantial reason for suspecting that there has been a violation of law requiring prosecution or dismissal from the Federal service.”<sup>206</sup>

The data is obscure as to the number of employees dismissed on loyalty grounds by employing agencies in the period following the general FBI investigation. However, the President's Temporary Commission on Employee Loyalty does give figures showing the total number discharged as a result of FBI investigations during the four years from July 1, 1942 to June 30, 1946. Some 6,193 cases were referred to the FBI for investigation during this period. These cases were disposed of as follows:

No longer employed by Federal Government	1906
Investigation disclosed complaints “totally unfounded”	1114
Discharged by employing agency	101
Employing agencies did not consider facts required any action	2785
Administrative action by employing agency, other than discharge	75
Resigned while investigation in progress	21
Still under consideration by employing agency	122
Investigation not completed by FBI	69
Total	<u>6193<sup>207</sup></u>

These figures, it will be noted, include the investigations conducted by the FBI in the courses of its general survey just discussed.

The President's Commission also reported the results of cases considered by the President's Interdepartmental Committee. Out of 729 cases handled from February 5, 1944 to December 2, 1946, some 24 resulted in dismissals and 3 in other disciplinary action.<sup>208</sup> These cases included some or all of the FBI cases, though the extent of overlapping is not revealed.

205. Letter from the Attorney General, H. R. Doc. No. 833, 77th Cong., 2d Sess. 26-7 (1942).

206. *Id.* at 28.

207. REPORT OF THE PRESIDENT'S TEMPORARY COMMISSION ON EMPLOYEE LOYALTY 16-17 (1947). These figures do not show the number dismissed by employing agencies without an FBI investigation. It is unlikely that this number is large. Substantially the same figures, bringing the record up to December 1, 1947, are given in Mr. J. Edgar Hoover's testimony before the House Appropriations Committee. *Hearings on Department of Justice Appropriation Bill*, 80th Cong., 2d Sess. 244-5 (1947).

208. *Id.* at 20.

It is thus apparent that the dismissals which took place prior to Executive Order 9835, under the standards of the Hatch Act and the routine appropriation acts, revealed a very small incidence of "disloyalty."

Meanwhile the Civil Service Commission had been screening applicants for government employment on loyalty grounds. Following the adoption of the War Service Regulations in 1942 the Commission judged the qualification of an applicant by the formula of "reasonable doubt as to his loyalty." In the period from July 1, 1940 through March 31, 1947, the Civil Service Commission placed 7,000,000 employees in Federal service, conducting loyalty investigations of 395,000. Of these it held 1313 ineligible on loyalty grounds, of whom 714 were rated ineligible "because they were either Communists or followers of the Communists Party line."<sup>209</sup> The absence of a clear definition of the standard used by the Civil Service Commission makes evaluation of these figures difficult.<sup>210</sup>

Throughout this period the War and Navy Departments, and later the State Department, the Atomic Energy Commission and a few other agencies, operated under the much stricter standards of the special legislation authorizing discharge of "security risks." The number of dismissals by these agencies seems to have been substantially greater. Thus the Civil Service Commission reported in July and August 1947 that the government had discharged 831 as "disloyal" in the 9 months from July 1, 1946 to March 31, 1947; of these, some 760 were dismissed by the War Department, 23 by the Navy and 20 by the State Department.<sup>211</sup> Again in the absence of more precise

209. *Hearings before Committee on Post Office and Civil Service on H.R. 3588*, 80th Cong., 1st Sess. 54 (1947). The same figures, broken down by years, were given by the Civil Service Commission to the House Appropriations Committee. *Hearings before Sub-Committee of Committee on Appropriations on the Independent Offices Appropriation Bill for 1948*, 1134-5 (1948). Figures for a slightly earlier period are given in the REPORT OF THE PRESIDENT'S TEMPORARY COMMISSION ON EMPLOYEE LOYALTY 17-19 (1947). The only major divergence in the two sets of figures is that the President's Commission estimates the number of placements at 9,600,000.

210. Of the many determinations made by the Civil Service Commission the only available official record, from which a judgment can be made as to the justification for the finding of disloyalty, is in the case of Morton Friedman, reviewed in *Friedman v. Schwellenbach*, 159 F.2d 22 (D.C. Cir. 1946), *cert. denied*, 331 U.S. 838, 865 (1947), discussed *supra* pp. 46-7. It should be noted that in this case two government agencies by which Friedman was employed—the Office for Emergency Management and the War Manpower Commission—as well as the Civil Service Commission's own Board of Appeals and Review disagreed with the conclusion of the Civil Service Commission and recommended that Friedman be retained in government service. Brief for Appellant, pp. 5-10.

211. *New York Times*, July 18, 1947, p. 1, col. 2; Aug. 15, 1947, p. 8, col. 5. The War Department figures were said to be an "estimate." Out of 54 agencies covered in the report, 46 had not discharged any employees on grounds of disloyalty. Three agencies, including the Atomic Energy Commission, were not included. During the same period the agencies reporting had denied employment to 73 persons for reasons of disloyalty.

standards one is unable to judge to what extent dismissals were justified.

The President's Temporary Commission on Employee Loyalty, which was entrusted with the task of studying the entire problem of employee loyalty, made some attempt to appraise the actual degree of danger from "subversive or disloyal" employees in government service. Unfortunately its findings in this regard are sketchy and inconclusive.

The Commission initiated its inquiry by addressing letters to the FBI, the Office of Naval Intelligence, and the Military Intelligence Division of the War Department, requesting, among other things, information on "the extent to which the subversive or disloyal employee constitutes a problem in, or a threat to, the federal service."<sup>212</sup> While it also requested other information from 50 other government agencies, it did not ask for data from them on this subject. In addition, the Attorney General, the Assistant Director of the FBI, and the Chairman of the Interdepartmental Committee on Employee Investigations testified before the Commission. The reports of the three intelligence agencies and the testimony of the above witnesses were attached as exhibits to the original report sent to the President, but were not issued to the public and are not available for public scrutiny. The Report as issued merely states that the information contained in the three reports "indicates that these three intelligence services recognize the existence of a threat within the government service to the internal security of the United States by reason of the employment of subversive persons."<sup>213</sup>

In summarizing its conclusions the Report gives its judgment of the danger as follows:

"While the Commission believes that the employment of disloyal or subversive persons presents more than a speculative threat to our system of government, it is unable, based on the facts presented to it, to state with any degree of certainty how far reaching that threat is. Certainly, the recent Canadian Espionage expose, the Communist Party Line activities of some of the leaders and some of the members of a government employee organization, and current disclosures of disloyal employees provide sufficient evidence to convince a fairminded person that a threat exists."<sup>214</sup>

And the Report concludes:

"The Commission is convinced that the combination of these two means [counter-espionage and a loyalty program] provides our

212. REPORT OF THE PRESIDENT'S TEMPORARY COMMISSION ON EMPLOYEE LOYALTY 10-11 (1947).

213. *Id.* at 12.

214. *Id.* at 21.

best protection from a danger *which can develop into a real threat* to our national security." 215 (Italics supplied)

The Congressional committees which considered legislation to establish a loyalty program likewise failed to give any concrete data revealing the extent of the danger against which the proposed legislation is directed. The sub-committee of the House Civil Service Committee, whose report prodded the President into appointing his Temporary Commission, "limited the scope of the investigation to an inquiry into the practices, procedures and standards" employed by the various government agencies in screening and investigating the loyalty of government employees.<sup>216</sup> Although it stated that "testimony submitted during the hearings is sufficient to indicate the immediate necessity for certain action and to warrant further study and inquiry into the problem," it gave no substantiating details.<sup>217</sup>

The Rees sub-committee, which held hearings on the Rees bill and reported it to the House, provided no enlightenment. Its hearings disclosed nothing new and its report merely stated:

"The committee devoted much study to the problem of disloyalty among Federal employees and regret such legislation is necessary. However, that such legislation is required has been shown the American people in recent reports of the Royal Canadian Commission, the President's Committee on Loyalty, and the House Committee on Civil Service in the Seventy-ninth Congress. In view of these developments, and in consideration of the facts and circumstances outlined in such widely recognized and highly regarded reports, it is important that the problem be faced realistically." 218

Thus, apart from the dismissals already discussed, the principal evidence of danger publicly advanced by sponsors of the loyalty program was the Report of the Royal Commission upon the Canadian spy ring<sup>219</sup> and the "Communist Party Line activities of some of the

215. *Id.* at 23.

216. H. R. REP. OF INVESTIGATION WITH RESPECT TO EMPLOYEE LOYALTY AND EMPLOYMENT POLICIES AND PRACTICES IN THE GOVERNMENT OF THE UNITED STATES, 79th Cong., 2d Sess. 1 (1946).

217. *Id.* at 5. The sub-committee also stated that "Congress has not thoroughly studied the problem or provided well directed and adequate legislation." *Id.* at 6. The hearings conducted by the sub-committee, on which its report is based, have not been printed.

218. H.R. REP. No. 616, 80th Cong., 1st Sess. 2 (1947). The reference to the "President's Committee on Loyalty" is to the President's Temporary Commission, and the reference to the report of the "House Committee on Civil Service" is to the sub-committee report, *op. cit. supra* note 216. The debate in the House on the Rees Bill provided no additional information.

219. THE REPORT OF THE ROYAL COMMISSION, TO INVESTIGATE THE FACTS RELATING TO AND THE CIRCUMSTANCES SURROUNDING THE COMMUNICATION BY PUBLIC OFFICIALS AND OTHER PERSONS IN POSITIONS OF TRUST OF SECRET AND CONFIDENTIAL INFORMATION TO AGENTS OF A FOREIGN POWER (1946).

leaders and some of the members of a government employee organization." The Canadian report undoubtedly supports the need for professional counter-espionage activity; but whether it establishes the necessity for a comprehensive loyalty program affecting all government employees is questionable. The Canadian Government has not concluded from its experience that such a program is appropriate or desirable.<sup>220</sup> As to the "government employee organization," further details have not been made public. No such organization has appeared upon the list of groups designated by the Attorney General as falling within subsection f of the Loyalty Order.

The fact seems to be that the authors of the loyalty program were proceeding upon the basic assumption that the presence in the government of a single "disloyal" person constituted a serious danger. The President's Temporary Commission, after confessing its inability to appraise the threat, emphasized in its statement of conclusions:

"The presence within the government of *any* disloyal or subversive persons, or the attempt by *any* such persons to obtain government employment, presents a problem of such importance that it must be dealt with vigorously and effectively."<sup>221</sup> (Italics in original.)

The same position was taken in the preamble to Executive Order 9835 and in the preamble to the Rees bill:

"Whereas, although the loyalty of by far the over-whelming majority of all Government employees is beyond question, the presence within the government service of *any* disloyal or subversive person constitutes a threat to our democratic processes."<sup>222</sup> (Italics supplied.)

The same point was stressed in the House Committee Report and in the debate on the Rees bill.<sup>223</sup>

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220. See DAWSON, *THE GOVERNMENT OF CANADA* 294-312 (1947). A more limited program has recently been established in Canada. On June 23, 1948 the New York Times reported that the Canadian Minister of Justice announced to the House of Commons that no Communists or Fascists would be allowed to hold any position of trust in the Canadian Civil Service. An interdepartmental panel was set up to advise on methods of carrying out inquiries. Shortly before this announcement the Department of Defense and External Affairs and the National Research Council ("sensitive agencies" in American parlance) had circulated questionnaires to their employees seeking information bearing on loyalty. N. Y. Times, June 23, 1948, p. 5, col. 5.

221. REPORT OF THE PRESIDENT'S TEMPORARY COMMISSION ON EMPLOYEE LOYALTY 23 (1947).

222. Exec. Order No. 9835, 12 FED. REG. 1935 (1947). The preamble of the Rees bill makes the same statement except that the concluding phrase is "a threat to our security and democratic processes."

223. H.R. REP. NO. 616, 80th Cong., 1st Sess. 2 (1947); 93 CONG. REC. 9132 (1947). See also testimony of Attorney General Clark, *Hearings before Sub-committee on Legislation of the Committee on Un-American Activities on H.R. 4422 and H.R. 4581*, 80th

It is thus apparent that the framers of the loyalty program did not feel that any widespread or extensive danger need be shown. They acted upon the premise that the existence of even an isolated disloyal element constituted a menace sufficient to justify the measures taken.

Nor have the results of the Administration's program thus far revealed any widespread problem. Out of 2,116,865 employees checked by the FBI, in only 6344 cases was any evidence of "disloyalty" disclosed requiring further investigation. While many of these cases are still pending, of the 1747 thus far processed by the loyalty boards the employee was exonerated in 1281, the case closed for other reasons in 380, and the employee found disloyal in only 86. Of this latter figure 6 cases were reversed by the agency head and 2 more by the Loyalty Review Board. Other appeals are pending. Apart from resignations, some of which undoubtedly averted adverse decisions, the net result is that out of a check of more than 2,000,000 employees about 200 to 250 will have been found "disloyal." Since the records and decisions in these cases have not been made public the grounds for determination of "disloyalty" cannot be subjected to critical analysis.<sup>224</sup>

With regard to the specific danger of espionage, the recent disclosure that numerous documents were copied or removed from the State Department, together with the indictment of Alger Hiss for perjury, furnish tangible proof that the danger from this quarter is real. It is important, however, that the problem be viewed with calmness and in proper perspective. It may be assumed that all the major nations of the world are the objects of similar efforts of espionage, some of which are undoubtedly successful. Certainly the extreme and hysterical pronouncements of the Committee on Un-American Activities, such as that "there have been numerous Communist espionage rings at work in our executive agencies," are scarcely borne out by the facts thus far revealed.<sup>225</sup> All the evidence presented by the Committee at the Chambers-Bentley hearings, apart from the actual production of documents in December, had been thoroughly investigated by the FBI and submitted to a Federal grand jury, which found it insufficient to return an indictment. Similarly all the evidence revealed by the Committee with regard to atomic energy had been known to the Adminis-

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Cong., 2nd Sess. 18 (1948); J. Edgar Hoover: "One disloyal local, county, state or Federal employee can do an irreparable harm by acts of disloyalty or by indoctrinating others with a Marxian philosophy." *Newsweek*, June 9, 1947, p. 31, col. 2.

224. ". . . the Loyalty Review Board does not publish its decisions and its decisions in particular cases cannot be made available." Communication to the authors from the Loyalty Review Board, Oct. 20, 1948.

225. *Supra* pp. 21-6. The Committee's statement on the production of the State Department documents was: "In our opinion this conspiracy comprises one of the most serious, if not the most serious series of treasonable activities which has been launched against the Government in the history of America." *N.Y. Times*, Dec. 15, 1948, p. 24, col. 4.



tration for several years, again with no indictment forthcoming.<sup>225</sup> Even allowing for laxity or incompetence on the part of enforcement officials it can hardly be maintained that the situation represents cause for widespread alarm.<sup>227</sup>

In any event the question remains whether a comprehensive loyalty program is the most effective or desirable method of coping with the danger of espionage. Consideration of this issue must be postponed to a later point.

### *The Communist Party*

The most troublesome aspect of the whole problem of assessing the danger to government service from "disloyal" employees arises out of the existence and activities of the Communist Party. Proponents of a strict loyalty program take the position that the Communist Party is a world-wide conspiracy to overthrow non-communist governments by force and violence, and that the Communist Party of the United States is a part of this conspiracy. They also assert that the Communist Party of the United States operates under instructions, direct or indirect, of the Communist Party of the U.S.S.R. Thus it is argued that the existence in government service of Communist Party members presents a serious danger in that such persons (1) are members of a conspiracy aiming at the overthrow of the government by illegal methods, (2) "owe allegiance to a foreign power," (3) provide information for transmission to the Soviet Union, and (4) are prepared, if it will serve the Soviet Union, to engage in sabotage or obstruction.

It is also urged that membership in the Communist Party is frequently concealed and difficult to establish, and that there exist on the fringes of the Communist movement individuals and organizations that subscribe to some or all of its tenets without directly participating in Communist Party activities. Hence it is asserted that a government employee who advocates all or some of the Communist Party policies or believes in them, or belongs to an organization that does, represents a danger almost as serious as an actual Party member.

The facts with respect to the activities, motives and objectives of the Communist Party in the United States are not easy of exact determination. The Party does not now openly advocate overthrow of the government by illegal means; on the contrary it asserts its adherence to peaceful and democratic methods.<sup>228</sup> Its constitution expressly

226. *Supra* pp. 23-6.

227. In November 1947, J. Edgar Hoover, Director of the FBI, said: ". . . [T]his nation came through the war with no enemy-directed acts of sabotage. The enemy espionage efforts were thwarted. . . ." N.Y. Herald Tribune, Nov. 16, 1947, p. 45, col. 3. For a similar statement by President Truman see N. Y. Times, Sept. 29, 1948, p. 25, col. 1.

228. See DENNIS, *IS COMMUNISM UN-AMERICAN?* (1947); FOSTER, *AMERICAN TRADE UNIONISM* (1947). For collection of the evidence tending to show past adherence to violent methods see *Schneiderman v. United States*, 320 U.S. 118 (1943).

provides that "adherence to or participation in the activities of any clique, group, circle, faction or party which conspires or acts to subvert, weaken or overthrow any or all institutions of American democracy, whereby the majority of the American people can maintain their right to determine their destinies in any degree, shall be punished by immediate expulsion."<sup>229</sup> Nor does the Party admit to taking instructions from abroad.<sup>230</sup>

On the other hand Congress and various of its Committees have frequently taken the position that the Communist party of the United States does constitute a conspiracy to overthrow the government by illegal means, and is in fact the agent of a foreign power. The first legislation based on this theory was the Emergency Relief Act of 1941, which expressly prohibited relief employment to any "Communist" or "member of any Nazi Bund organization."<sup>231</sup> Since then several statutes, including the Taft-Hartley Act, have expressly imposed restrictions on members of the Communist Party upon similar grounds.<sup>232</sup>

229. Constitution of the Communist Party of the U.S.A. Art. IX, § 2 (1945). See also Preamble and Art. II, § 1.

230. Statement of William Z. Foster, Chairman of the Communist Party of the United States, in ANDREWS, WASHINGTON WITCH HUNT 163, 202-3 (1948). In general on the tactics and objectives of the Communist Party see O'NEAL AND WARNER, AMERICAN COMMUNISM (1947); Moore, *The Communist Party of the U.S.A. An Analysis of a Social Movement*, 39 AM. POL. SCI. REV. 31 (1945); Ward, *The Communist Party and the Ballot*, 1 BILL OF RIGHTS REV. 286 (1941); GITLOW, I CONFESS (1940); BROWDER, COMMUNISM IN THE UNITED STATES (1935); FOSTER, TOWARD SOVIET AMERICA (1932); H.R. REP. 209, COMMITTEE ON UN-AMERICAN ACTIVITIES, *The Communist Party of the United States as an Agent of a Foreign Power*, 80th Cong., 1st Sess. (1947); H.R. REP. 1920, COMMITTEE ON UN-AMERICAN ACTIVITIES, REPORT ON THE COMMUNIST PARTY OF THE UNITED STATES AS AN ADVOCATE OF OVERTHROW OF GOVERNMENT BY FORCE AND VIOLENCE, 80th Cong., 2d Sess. (1948); H.R. DOC. NO. 619, COMMITTEE ON FOREIGN AFFAIRS, *The Strategy and Tactics of World Communism*, 80th Cong., 2d Sess. (1948). See also Ellis, *American Civil Rights in a Revolutionary Age—The Problem of Loyalty*, 109 FORUM 193 (1948); Wechsler, *How to Rid the Government of Communists*, 195 HARPER'S 438 (1947); Nevins, *What is a Communist? How Can You Spot Him?* N.Y. Times Magazine Section, May 2, 1948, p. 9.

231. H. J. Res. 544, June 26, 1940, Sec. 15 (f), 54 STAT. 611, 620. The Act did not expressly find that the Communist Party advocates overthrow of the government by illegal means, but this was clearly the basis of Congressional action. The provision was declared invalid in *United States v. Schneider*, 45 F. Supp. 848 (E.D. Wis. 1942).

232. Selective Service Act of September 16, 1940, 54 STAT. 892, 50 U.S.C. § 308 (1) (see Justice Black's concurring opinion in *Keegan v. United States*, 325 U.S. 478, 495-8 (1945), pointing out that such restrictions were unconstitutional as a bill of attainder); Taft-Hartley Act, 61 STAT. 143, 29 U.S.C. § 159(h) (Supp. July, 1947). The Taft-Hartley provision has been held constitutional in *National Maritime Union v. Herzog*, 78 F. Supp. 146 (D.C. 1948), *aff'd* as to §§ 159(f) and 159(g), 334 U.S. 854 (1948); *Wholesale Workers Union v. Douds*, 22 LAB. REL. REP. (Lab. Rel. Ref. Man.) 2276 (S.D.N.Y. 1948); *Inland Steel Co. v. National Labor Relations Board*, 22 LAB. REL. REP. (Lab. Rel. Ref. Man.) 2506 (7th Cir. 1948). Cf. *Oil Workers International Union v. Elliott*, 73 F. Supp. 942 (N.D. Tex. 1947). See also Note, *Constitutionality of the Taft-Hartley Non-Communist Affidavit Provision*, 48 COL. L. REV. 253 (1948).

The Committee on Un-American Activities has consistently and vigorously urged this position.<sup>233</sup> And the Mundt Bill, recently passed by the House, contains a legislative finding to this effect.<sup>234</sup>

The executive branch of the government has often made the same determination. In 1940 the Civil Service Commission ruled that membership in the Communist party or "any other Communist . . . organization" disqualified an individual from employment under Section 9A of the Hatch Act.<sup>235</sup> Similar rulings followed from the Attorney General,<sup>236</sup> the Attorney General's Interdepartmental Committee on Investigations,<sup>237</sup> and the President's Interdepartmental Committee on Employee Investigations.<sup>238</sup> The President's Temporary Commission on Employee Loyalty agreed with this view.<sup>239</sup> The Department of Justice recently initiated a series of deportation cases based upon the same premise.<sup>240</sup> And the Communist Party was designated by the Attorney General as an organization falling within the ban of Executive Order 9835.<sup>241</sup>

Until recently the Department of Justice had made no effort to prosecute the Communist Party or its members under the Alien Registration Act of 1940, the McCormack Act or the Voorhis Act.<sup>242</sup> In

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233. "The Communist movement is, in fact, a world-wide revolutionary political movement, whose purpose is by treachery, deceit, infiltration, espionage, sabotage, terrorism, and any other means, legal or illegal, to establish a Communist totalitarian dictatorship in the United States, and all other countries of the world which will be subservient to the master conspirators in Moscow." REPORT OF SUB-COMMITTEE ON LEGISLATION OF THE COMMITTEE ON UN-AMERICAN ACTIVITIES ON PROPOSED LEGISLATION TO CONTROL SUBVERSIVE COMMUNIST ACTIVITIES IN THE UNITED STATES 1-2 (1948). See also the reports of the committees cited *supra* note 230.

234. H.R. 5852, 80th Cong., 2d Sess., passed the House May 19, 1948. See *supra* p. 21.

235. Departmental Circular No. 222, issued June 20, 1940, *supra* p. 14.

236. Letter from the Attorney General, H.R. Doc. No. 833, 77th Cong., 2d Sess. 19 (1942).

237. *Id.* at 20.

238. See Letter of Attorney General Clark to Loyalty Review Board, PM, Dec. 5, 1947, p. 7.

239. REPORT OF THE PRESIDENT'S TEMPORARY COMMISSION ON EMPLOYEE LOYALTY 21, 24 (1947).

240. Testimony of Attorney General Clark in *Hearings before Sub-Committee on Legislation of the Committee on Un-American Activities on H.R. 4422 and H.R. 4581*, 80th Cong., 2d Sess. 23 (1948). During the months February through May of 1948 the Justice Department arrested more than 100 alleged alien Communists for deportation. PM, June 2, 1948, p. 9, col. 5. See also *Bridges v. Wixon*, 326 U.S. 135 (1945).

241. PM, Dec. 5, 1947, p. 7, col. 1. See also Letter from Attorney General Clark to the Chairman of the Loyalty Review Board, N.Y. Times, May 28, 1948, p. 12, col. 5. For the FBI view see *Menace of Communism*, Statement of J. Edgar Hoover before the Committee on Un-American Activities, SEN. DOC. NO. 26, 80th Cong., 1st Sess. (Mar. 26, 1947).

242. See *supra* pp. 27-8.

July of 1948, however, the government obtained an indictment from a Federal grand jury in New York charging 12 top officials in the Communist Party with conspiracy in violation of the Alien Registration Act. The indictment alleged that the defendants conspired "to organize as the Communist Party of the United States a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence."<sup>243</sup> It is to be noted that the indictment is limited to teaching and advocating overthrow of the government by force and violence, and makes no charge of the actual use of force or violence.

The Supreme Court has never squarely decided whether an adequate factual basis exists to support the repeated legislative and executive determinations as to the nature of the Communist Party.<sup>244</sup> Ultimately the Court must make this decision.<sup>245</sup> Meanwhile, in view of

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243. N.Y. Times, July 21, 1948, p. 1, col. 8.

244. The nearest approach to a ruling on the issue has been in *Schneiderman v. United States*, 320 U.S. 118 (1943). In that case the government sued to cancel Schneiderman's certificate of citizenship, granted 12 years before, on the ground that Schneiderman was not "attached to the principles of the Constitution" at the time of his naturalization. The government contended, among other things, that Schneiderman had been a member of the Communist Party (then called the Workers Party) and that the Communist Party advocated overthrow of the government by force and violence. The District Court upheld the government on this point and cancelled the certificate. The Circuit Court of Appeals affirmed. The Supreme Court reversed. In its decision the Court examined the evidence which the government had produced to show that the Communist Party advocated the use of force and violence up to 1927, the date of naturalization, and refused to find the evidence sufficient to support the government's position. However, the Court also refused to decide "what interpretation of the Party's attitude toward force and violence is the most probable on the basis of the present record" (*Id.* at 158). It rested its decision on the narrow ground that where two interpretations were possible the courts will not cancel a certificate of citizenship "by imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation" (*Id.* at 158-9). See also *Kessler v. Stecker*, 307 U.S. 22 (1939); *Bridges v. Wixon*, 326 U.S. 135 (1945).

The decisions of the lower Federal courts—most of them upholding administrative findings that the Communist Party advocates overthrow of the government by force and violence—are collected in the Schneiderman opinion, 320 U.S. 147-8, and in H.R. REP. NO. 1920, COMMITTEE ON UN-AMERICAN ACTIVITIES, REPORT ON THE COMMUNIST PARTY OF THE UNITED STATES AS AN ADVOCATE OF OVERTHROW OF GOVERNMENT BY FORCE AND VIOLENCE, 80th Cong., 2d Sess., 138-44 (1948). See also Note, *Constitutionality of the Taft-Hartley Non-Communist Affidavit Provision*, 48 COL. L. REV. 253, 259-61; Note, *Restraints on American Communist Activities*, 96 U. OF PA. L. REV. 381 (1948).

245. Conceivably the factual basis necessary to support legislative or executive action might depend upon the type of action involved. Thus proof required to justify a withdrawal of naturalization, legislation removing the Communist Party from the ballot; or making membership therein illegal, might be greater than that required to sustain

the consistent position of Congress and the Administration, we will assume for purposes of this article that the views of these branches of government with respect to the aims of the Communist Party are correct.

On this assumption the presence of Communist Party members in government service would constitute a clear danger. The degree of the danger depends, of course, upon the number present, the nature of the positions held, and similar factors. Reliable information on these matters is, once again, difficult to obtain.

Since enactment of the Hatch Act in 1939 it has, of course, been unlawful for members of the Communist Party to hold positions in the executive branch of the government. It would be idle to speculate about the dangers which might have developed in the absence of the Hatch Act prohibition. We are concerned therefore with the evidence disclosing the presence of Communist employees in the government in spite of the Hatch Act. Was the danger so extensive as to require additional measures, such as those promulgated in the Loyalty Order?

Broad generalizations of the Committee on Un-American Activities, such as that the Communist Party is "firmly entrenched in . . . the Government,"<sup>246</sup> are not supported by proof and, for reasons already stated, are entitled to small credence.<sup>247</sup> The principal evidence of a detailed character emanating from the Committee came in the Chambers-Bentley hearings. But the reliability of much of the Committee's evidence is open to serious question. In any event all but two of the persons mentioned were no longer in Federal employment at the time of the hearings, and these two had been suspended.<sup>248</sup>

In November 1947 J. Edgar Hoover stated:

"The Communist Party has long regarded infiltration of the Government Service as a project carrying the highest priority. They have sought to accomplish this under the guise of secrecy. Several months ago high officials of the Party, recognizing the growing sentiment against the Party and anticipating vigorous protective action, issued instructions that Party members in the Government and in other strategic positions were not to attend Party organizational meetings. Informal social meetings which could not be identified as Communist meetings were permitted. Party members in the Government and in other strategic positions were ordered to destroy their Party membership cards and under no consideration were their names to be carried on Party rolls nor

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disqualification from government. Compare *Schneiderman v. United States*, 330 U.S. 118 (1943) with *United States v. Mitchell*, 330 U.S. 75 (1947). See dissenting opinion of Judge Prettyman in *National Maritime Union v. Herzog*, 78 F. Supp. 146, 183 (D.C. 1948).

246. H.R. REP. 209, *op. cit. supra* note 230, at 1.

247. See *supra* pp. 53-5.

248. See *supra* pp. 21-6.

were they to be openly contacted by high Party functionaries. This emphasis upon secrecy, it appears to me, is a confession on the part of the Communists that they have something to conceal."<sup>249</sup>

The inference from this statement is that a number of Communist Party members still hold government positions, despite the FBI's efforts to root them out. But Hoover does not tell how many Communists he believes are in the government or how serious from a quantitative point of view he considers the danger to be. On the contrary he falls back to the same position noted above,—that the existence of a single Communist in the government is a serious menace:

"One person whose loyalty to the Communist cause exceeded his loyalty to the United States properly placed could do irreparable harm to our security and should there ever be another grave emergency he could conceivably be responsible for the loss of American lives."<sup>250</sup>

Neither the Report of the President's Temporary Commission on Employee Loyalty nor the other evidence summarized above reveals the existence of widespread Communist infiltration.<sup>251</sup>

Upon all the information available it seems reasonable to conclude that the presence of Communists in Federal employment was not a matter of serious proportions at the time of issuance of the Loyalty Order.<sup>252</sup>

249. N.Y. Herald Tribune, Nov. 16, 1947, p. 44, col. 3. For a similar statement see *Menace of Communism*, *op. cit. supra* note 241, at 8.

250. *Ibid.*

251. Dean Edwin D. Dickinson, who was closely connected with the loyalty activities of the Department of Justice during the war period, writes: "Actually we have never had many [Communists or genuine fellow travellers in the public service] and those whom we have suffered have been with singularly few exceptions the small and inconsequential fry of a rapidly expanding bureaucracy." Dickinson, *Political Subversives: An Appraisal of Recent Experience and Forecast of Things to Come*, 2 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 350, 357 (1947).

252. Attorney General Clark has repeatedly insisted that there are no Communists in the government at the present time. Challenging his Republican critics during the election campaign in the fall of 1948 to name any Communists in Federal employment, he said:

"I pleaded with them for many months to do this; but at this time I have not received one name from them. While highly paid investigators have used millions of dollars of the people's money, as yet they have failed to uncover one Communist presently working for the Federal Government." N.Y. Times, Sept. 19, 1948, p. 26, col. 1.

Shortly afterwards President Truman said:

"Our Government is not endangered by Communist infiltration. It has preserved its integrity, and it will continue to preserve its integrity as long as I'm President." N.Y. Times, Sept. 29, 1948, p. 25, col. 1.

## VI. ADMINISTRATIVE IMPLICATIONS OF THE LOYALTY PROGRAM

The administrative features of a loyalty program deserve careful scrutiny. Even if the information were available, the impact of the program could not be judged exclusively by an examination of those cases where all formal procedures were completed and the employee was finally cleared or dismissed from government service. Perhaps even more significant is the day-to-day functioning of the elaborate machinery out of which the formal results are eventually culled. This involves a consideration of such matters as the size of the staff utilized in the program, the character of the investigations made, the informal and practical effects of the program's operation, the atmosphere engendered, and the effect upon the morale of employees and upon the efficient performance of government functions.

These administrative implications assume particular significance in a program of the character now being pursued. Protection against actual espionage, sabotage, the existence of an illegal underground conspiracy, or the presence of employees who operate under instructions from a foreign power, requires one kind of operation. Such dangers come, by and large, from a small number of persons who infiltrate into key positions. They involve mostly the commission of overt acts, subject to traditional methods of detection and proof. In general the danger from these sources is most effectively met through a small staff of highly trained counter-espionage agents or the adoption of special clearance procedures as a condition of access to vital secret information.

A different type of administration is needed to carry out a program based upon eliminating from government service persons who have committed none of these overt acts but who may do so in the future. Detection of the "potentially disloyal" requires an initial screening and continuous surveillance of all applicants and employees. It entails the maintenance of a large investigative force which can obtain information from all possible sources about the daily life and thoughts of numerous individuals who depart in some way from the established norm.<sup>253</sup>

For administration of the Loyalty Order the President asked for a budget of \$24,900,000 for the first year; Congress allowed \$11,000,000

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253. Note the statement in the REPORT OF THE PRESIDENT'S TEMPORARY COMMISSION ON EMPLOYEE LOYALTY 23 (1947): "Whatever their number [*i.e.*, the "disloyal group"], the internal security of the government demands continuous screening, scrutiny and surveillance of present and prospective employees." To the same effect see testimony of Arthur S. Flemming, then member of the Civil Service Commission, *Hearings before Committee on Post Office and Civil Service on H. R. 3538*, 80th Cong., 1st Sess. 15 *et seq.* (1947); Statement of Seth W. Richardson, Chairman of the Loyalty Review Board, *N.Y. Times*, Dec. 28, 1947, p. 28, col. 2.

for the first year and \$6,606,000 for the second.<sup>254</sup> This compares with a budget of \$2,991,000 for the National Labor Relations Board, with a staff of 1033 employees; a budget of \$5,560,000 for the Federal Communications Commission, with a staff of 1422 employees; a budget of \$2,519,120 for the Federal Trade Commission, with a staff of 582 employees.<sup>255</sup>

In addition the Loyalty Order stipulates that each government agency "should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques."<sup>256</sup> The very existence of an investigating system of these proportions, maintained for inquiry into political expression, is cause for the gravest concern.

The authority of the FBI to undertake an investigation is, for all practical purposes, unlimited. Investigations may be commenced if the preliminary check of any employee or applicant reveals "derogatory information."<sup>257</sup> Any agency may likewise request the FBI to undertake the investigation of any applicant or employee.<sup>258</sup> In addition the FBI investigates on its own motion in any case where it receives "information or a complaint which, if established, would come within the Directive set forth in the President's Executive Order."<sup>259</sup>

Adequate information concerning the investigative methods of the FBI and other government intelligence services is not obtainable. Reports are, of course, kept confidential. But certain facts are available which illustrate the dangers inevitable in loyalty investigations.

An extreme example of the sort of information which the FBI, at least during one period, considered worth assembling is furnished by the famous letter addressed by J. Edgar Hoover to J. Warren Madden, then Chairman of the National Labor Relations Board. The complete letter is as follows:

"I wish to advise you information has been received by this Bureau to the effect that Mr. [X], a field examiner connected with the National Labor Relations Board at \_\_\_\_\_ is known to have radical tendencies leading toward Communism.

"It is further reported that [X] has studied anthropology and has been affiliated with the National Labor Relations Board for three years.

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254. *Supra* p. 32.

255. THE BUDGET OF THE UNITED STATES GOVERNMENT FOR THE FISCAL YEAR ENDING JUNE 30, 1948, pp. 115-6, 89-90, 96-7 (1947).

256. Exec. Order 9835, Pt. IV, Sec. 3, 12 FED. REG. 1935, 1938 (1947).

257. See *supra* notes 138, 139.

258. Exec. Order 9835, Pt. I, 12 FED. REG. 1935 (1947). See also testimony of J. Edgar Hoover before *House Appropriations Committee, Hearings on Department of Justice Appropriation Bill*, 80th Cong., 2d Sess. 248-9 (1947).

259. Statement of J. Edgar Hoover, N.Y. Herald Tribune, Nov. 16, 1947, p. 42, col. 3.



"It was also reported that [X] visited Mexico City, Mexico, to observe the presidential election in that country, in July, 1940.

"The above information is submitted for your consideration and whatever action you deem appropriate.

(s) J. Edgar Hoover" <sup>260</sup>

More recent examples of information considered relevant by the FBI, though not involving government employees, have been furnished by Commissioner Clifford J. Durr of the Federal Communications Commission:

"It therefore seems to me that it is of little help to the Commission to be informed that an applicant was, in 1944, at the height of the war, reported by an unidentified source as being in contact with another unidentified individual 'who was *suspected of possible pro-Russian activity*'; or that the applicant was reported by an unidentified informant to have been a visitor in the residence of another individual who was reported by another unidentified source to have been identified by still another unidentified source with Communistic activities; or that it has been reported by an unidentified source that several members of the Board of Directors of an organization with which the applicant is connected have been reported by another unidentified source as being associated with the Communist movement; . . . or that another unidentified source has described such organization 'as a Communist infiltrated and/or influenced organization'; or that another organization politically active in support of the Democratic presidential nominee 'has been reportedly subjected to Communist infiltration'; . . . or that an unidentified 'reliable source' has provided a reprint of an article written by the applicant and originally carried in the *New Republic*, which article 'is reported to be an indictment of anti-labor radio broadcasts, including news commentators and sponsors of such programs'; . . . or that the applicant has been reported by an unidentified source to have been a member of the committee to greet the late president of a large labor union; or that an applicant spoke at a testimonial dinner for the retiring president of a lawyers' organization; or that the applicant spoke on a forum on American-Russian Cultural Exchange sponsored by Phi Beta Kappa." <sup>261</sup>

In another case, known personally to one of the authors, the FBI

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260. Letter dated Nov. 14, 1940. *Hearings Before the Special Committee to Investigate the National Labor Relations Board*, 76th Cong., 3d Sess., vol. 28, pp. 7296-7 (1940).

261. Statement of Clifford J. Durr, from minutes of Commission action on letter to J. Edgar Hoover, Dec. 1, 1947, pp. 1-2 (mimeographed); reported in *PM*, Dec. 2, 1947, p. 4, col. 1-3. Commissioner Durr's statement was made in connection with the F.C.C.'s action in writing Hoover that the Commission desired to continue to receive from the FBI "information concerning matters within the jurisdiction of the Commission." Commissioner Jones also filed a separate statement taking issue with Commissioner Durr and charging that the material referred to by the latter was "completely out of context."

report included a statement from the landlady of the subject under investigation asserting that the subject kept a number of books on Russia next to his easy chair; and a statement from the subject's doctor to the effect that the subject believed in socialized medicine.

A further indication of the same type of investigation appears in the list of reasons given by the War Department for dismissal of one of its employees:

"Mrs. [Y] lived for approximately ten months in a boarding house at 1736 P Street, Northwest, from about October 1936 to June 1937, and that her landlady's interest was aroused by her frequent meetings held in her rooms.

"Later Mrs. [Y's] mailing address coincided with that of an organization, some of the members of which are generally considered to have beliefs detrimental to the interests of National Defense.

"Mrs. [Y] subsequently lived at 2106 F Street, Northwest, from which place she was requested to move because she insisted upon holding mixed meetings of radical groups of people in her apartment.

"Mrs. [Y] then moved to 2316 F Street, Northwest, where she lived for approximately ten months. She and the people living with her were generally considered to be Communists by neighbors, and they held mixed meetings of radical groups of people, distributed handbills, and possessed communistic literature.

"After this, Mrs. [Y] lived in a small apartment at 5410 Third Street, Northwest, where she received communistic literature addressed to her and to other girls with whom she lived and who were all considered by the neighbors to be communists."<sup>262</sup>

An investigation of this character obviously has neither logic nor limits. It embraces not only membership and activity in organizations, including labor unions, but private beliefs, reading habits, receipt of mail, associations and personal affairs. According to persistent reports investigators have asked such questions as: What newspapers do you read? Do you read the *New Republic*? What do you think of Henry Wallace? Did you contribute to the Spanish Loyalists? Did you ever discuss the relative merits of the United States' and Russia's economic and social systems? How do you feel about Russia's economic and social systems? How do you feel about Russia and what she is doing in the United Nations? Are you in favor of appeasement? Do you think we should share the atomic bomb? Are you in favor of racial segregation? Why were you divorced? Can you think of anything bad to say about him?<sup>263</sup>

262. Quoted in letter from Hugh Miller to Secretary of War Stimson, dated March 3, 1941, issued by Washington Committee for Democratic Action.

263. The statements in this paragraph are based in part upon memoranda in the possession of the authors prepared by employees immediately after investigation or hearing;

FBI methods include the use of paid informers.<sup>264</sup> Persons making statements are not under oath and are assured that their identity will not be revealed.<sup>265</sup> The reports transmitted to the employing agency usually refer to the source of information by symbols only.<sup>266</sup> Although the FBI denies that it taps telephones,<sup>267</sup> instances of that practice have been reported and it is widely believed in Washington that many telephones are in fact tapped.<sup>268</sup> The FBI maintains files on numerous individuals,<sup>269</sup> and the Loyalty Order directs the Civil Service Commission to keep a master index of all information obtained with respect to Federal employees.<sup>270</sup>

The FBI asserts that its investigators are carefully trained, that they are instructed to get all the facts on both sides, that they are not to inquire whether a Federal employee reads liberal or other publications, that they are directed to point out any personal bias of persons giving information, and that they do not violate civil rights.<sup>271</sup> Mr.

in part upon reports of Jerry Klutz, in the *Washington Post*, quoted in Cushman, *The President's Loyalty Purge*, 36 SURVEY GRAPHIC 283, (1947); Alexander Uhl, PM, Aug. 17, 1947, p. 2; Eugene Warner, *Washington Times Herald*, Nov. 22, 1940; Henry F. Pringle, *Snooping on the Potomac*, SATURDAY EVENING POST, Jan. 15, 1944, pp. 9, 93-4; Carroll Kilpatrick, *Washington Worry-Go-Round*, '48 MAGAZINE, March 1948, pp. 126-32.

264. Letter from Attorney General, H.R. Doc. No. 833, 77th Cong., 2d Sess. 23 (1942).

265. *Ibid.*

266. *Ibid.*

267. Statement of J. Edgar Hoover, N.Y. Herald Tribune, Nov. 16, 1947, p. 42, col. 4.

268. ". . . telephone wires in the room of Harry Bridges in the Edison Hotel in New York City, having interstate connections, were tapped by agents of the Federal Bureau of Investigation from August 5, 1941, to August 22, 1941, so that communications by telephone were intercepted and heard by agents of the FBI." Sears, In the Matter of Harry Renton Bridges, Memorandum of Decision 183-4 (1941). See also Kilpatrick, *op. cit. supra* note 263, at 127, 132; Richards, *Is Your Phone Tapped?*, N.Y. Star, Sept. 27, 28, 29, 30, and Oct. 1, 1948.

For criticisms of FBI methods in the past see CHAFEE, FREEDOM OF SPEECH IN THE UNITED STATES 204-18 (1941); 9 Int'l Jurid. Ass'n Bull. (1941); 8 Int'l Jurid. Ass'n Bull. 104 (1940); NATIONAL POPULAR GOVERNMENT LEAGUE, REPORT ON THE ILLEGAL ACTIVITIES OF THE U. S. DEPARTMENT OF JUSTICE (May 1920); *Illegal Practices of the Department of Justice, Hearings before the Sub-Committee of the Senate Judiciary Committee*, 66th Cong., 3d Sess. (1921); *Colyer v. Skeffington*, 265 Fed. 17 (D. Mass. 1920).

269. Statement of J. Edgar Hoover, Herald Tribune, Nov. 16, 1947, p. 43, col. 4. Hoover testified before the House Appropriations Committee that the FBI files "include everybody who had been involved in any activities of a subversive nature," or who "would be potentially dangerous." *Hearings on Department of Justice Appropriation Bill*, 80th Cong., 2d Sess. 248 (1947).

270. Exec. Order 9835, Pt. III, Sec. 2, 12 FED. REG. 1935, 1938 (1947). The Committee on Un-American Activities maintains files on more than one million individuals and organizations. H.R. REP. NO. 2748, 77th Cong., 2d Sess. 2 (1943); see also H.R. REP. NO. 2742, 79th Cong., 2d Sess. 16 (1947). See Sancton, *Dossiers for the Millions*, 167 NATION 336 (1948).

271. Statement of J. Edgar Hoover, N.Y. Herald Tribune, Nov. 16, 1947, pp. 42-3. For instructions to Civil Service Commission investigators see 89 CONG. REC. 10253-5 (1943).

Hoover also states that "we always check on allegations of improper conduct on the part of our agents."<sup>272</sup> And the Chairman of the Loyalty Review Board has testified to "the general public confidence in the Federal Bureau of Investigation."<sup>273</sup>

Nevertheless, in large part the abuses revealed in the history of loyalty investigations are inherent in the character of the enterprise. The results sought—screening out of the "potentially disloyal"—necessarily lead to the kind of questions asked and information collected. The average FBI agent can hardly be expected to possess the political education necessary to distinguish between "radicalism" and "subversion"; he must be instructed to secure all scraps of information available. The collection of gossip, rumor, and data on private affairs becomes an inevitable part of the process. Errors and abuses are particularly difficult to weed out of secret investigations.

Furthermore one must take into account certain ineluctable laws of large organizations. A sizable staff of investigators is prone to develop aggressive methods and a prosecutor's bias. Efficiency ratings tend to turn upon how much "derogatory information" a particular investigator uncovers. This sort of bias is even more likely to flourish where the results of investigation are not subject to judicial scrutiny. Nor can one normally expect to spend \$11,000,000 in the Federal government without some results to show for it, particularly when members of Congress are clamoring for action. Thus there are constant pressures created out of the very existence of the loyalty program driving toward militant investigation and tangible results.

The dangers inherent in the investigating process are found also in the proceedings before the loyalty boards. Again adequate information is difficult to obtain. But the following charges filed against scientists at the Oak Ridge atomic energy operation suffice to illuminate the problem:

#### "CASE I

"1. A former landlord of yours has reported that in 1943, after you moved from the premises in which you had been residing certain magazines and pamphlets which may have been left on the premises by you may have included a copy of the magazine *New Masses*.

"2. A neighbor has stated that she believes (a close relative of yours by marriage) is a Communist.

"3. (Another close relative by marriage) was reported in 1944 to have been active on the \_\_\_\_\_ Committee of the Joint Anti-Fascist Refugee Committee. The Joint Anti-Fascist Refugee Com-

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272. *Ibid.* But cf. Pringle, *op.cit. supra* note 263, at 94: "It is almost impossible, however, to get evidence on the misconduct or stupidity of their agents. Terrified employees are not likely to come forward. The Hoover-Flemming strictures are repeatedly violated."

273. Richardson statement, N.Y. Times, Dec. 28, 1947, p. 28, col. 6.

mittee is on the list of organizations designated by the Attorney-General as subversive.

"4. (Still another close relative by marriage) is reported to admit membership in the \_\_\_\_\_ Camp, which organization has been reported to have communistic connections.

#### "CASE II

"1. A person with whom you associated closely in the years 1943-47 said you were very enthusiastic about Russia and seemed to be pro-Russian in your point of view." <sup>274</sup>

Equally significant are the following extracts from a loyalty board hearing involving a manual worker at a government navy yard:

Bd.: Have you ever belonged to or participated in the activities of organizations, clubs, or associations which were or are sympathetic to Communist doctrines?

M.: I don't know if this is sympathetic. I have belonged to the C.I.O.

Bd.: Which branch?

M.: The local union in the Yard.

Bd.: In your recollection, do you recall ever discussing any topic which might be sympathetic to Communist doctrine?

M.: Yes.

Bd.: Would you care to state what it was and who it was made to?

M.: I have been sick for years and so I have discussed what they call nationalized medicine. I have been thinking about that for a long time. I would like free medicine.

. . . .

Bd.: Have you ever spoken favorably about the Russian form of government?

M.: On that point, yes.

Bd.: I mean aside from that.

M.: No.

. . . .

Bd.: Have you read any of Feuchtwanger?

M.: No.

Bd.: Howard Fast?

M.: I don't know him. Never heard of him.

Bd.: What kind of books did you get from them? [Literary Guild Book Club]

M.: There was quite a few, mostly fiction.

Bd.: Do you recall any of the authors other than what I have mentioned? . . .

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274. *The Charges Presented in Oak Ridge Cases*, 4 BULL. OF THE ATOMIC SCIENTISTS 196 (1948). Similar charges against an employee of a private contractor are summarized in N.Y. Star, Oct. 22, 1948, p. 1, col. 5, Oct. 24, 1948, p. 1, col. 1.

Bd.: Your wife is a church-goer?  
 M.: That's right.  
 Bd.: I understand that you are a Protestant.  
 M.: Yes.

Bd.: Do either you or your wife have any relations who are sympathetic to Communist doctrine?  
 M.: No. They are all religious—Roman Catholic. I am Protestant and my daughter joined the Roman Catholic Church. They are all religious.

Bd.: What do you think of the third party formed by Henry Wallace?  
 M.: I don't know. I don't think there is anything to it. I don't think it will ever become a party.  
 Bd.: He has some of the Democrats worried from what I read in the newspapers.  
 M.: Well, I would vote for Truman any day, as long as you people know that I am a Democrat.

Bd.: Have you ever discussed the Truman doctrine?  
 M.: Yes, a little bit.  
 Bd.: What do you think of it?  
 M.: Well, I went fifty-fifty on that. <sup>275</sup>

Other questions included:

Do you think the political structure in Greece has improved since that time?  
 What do you think of the Italian situation?  
 What do you think of Togliatti?  
 To what do you attribute the recent swing to the "left" in France?  
 Do you feel that Jacques Duclos or DeGaulle would offer France a greater opportunity for recuperation?  
 Do you think the Soviet was justified in taking back that part of Finland?  
 Do you think the recent election in Poland was democratic? <sup>276</sup>

In another case the employee was asked by the loyalty board:

Is it true that you were present at a meeting of radicals in Madison Sq. Garden during the war?  
 Have you ever associated with any employees who, because of their political tendencies, might be considered Communist?

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275. Transcript of hearing in the case of M—, before Brooklyn Navy Yard Loyalty Board, February, 1948. M was found disloyal. His case is being appealed.

276. *Ibid.*

Do you now have or were any of your relatives active in Communist Party activities?  
 Which newspaper do you read?  
 Are you a member of the Progressive Citizens of America?  
 Have you attended any of their meetings?  
 Do you subscribe to their literature?  
 Did you ever attend any social affairs with your wife—organizations or associations where Communist Party doctrines were discussed? Or liberal views were discussed?  
 Would you say that your wife has liberal political viewpoints?<sup>277</sup>

The procedures employed by the loyalty boards, discussed in a subsequent section, contribute to the general effect of the program. Thus, the refusal to inform an accused employee of the evidence against him creates a pervading influence of secrecy and fear.

The administrative impact of the loyalty program is also directly dependent, of course, upon the strictness with which the standards of loyalty are applied in concrete cases. When employees are dismissed on vague charges of membership in "front" organizations, association with individuals or groups labelled "subversive," or advocacy of "subversive ideas," the stories spread through the government service, often in exaggerated form, and darken the atmosphere in which the government employee lives and works.<sup>278</sup>

It is necessary, also, to take into account the cases which are handled on an informal basis without application of the formal standards or procedures. In the administration of any law many, often most, deci-

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277. Transcript of hearing in the case of R—, before the Brooklyn Navy Yard Loyalty Board, December 1947. R was found disloyal. His case is being appealed. For a newspaper account of a hearing at which similar questions were asked see N.Y. Star, Oct. 24, 1948, p. 1, col. 1.

278. Consider the effect on government employees of the discharge of two scientists employed by the Atomic Energy Commission, as reported in Miller and Brown, *Loyalty Procedures of the A.E.C.*, 4 BULLETIN OF THE ATOMIC SCIENTISTS 45 (1948): "During the procedure neither man was informed of the charges against him. The intimation was made to one of the men that it might be 'associations' rather than loyalty. The intimation was made to the other man that in his case it might be 'character' rather than loyalty. A representative of the A.E.C. is reported by one of the men to have elaborated on this by stating in substance that the Commission was attempting to see into the future and predict his actions in time of 'serious stress,' on the basis of his previous behavior, specifically in regard to his ability to keep important secrets."

Significant of the atmosphere in Washington was the resignation of John C. Virden, Cleveland industrialist, from his position as head of the Office of Industry Cooperation in the Department of Commerce after Congressional attack on the ground that his daughter was employed by Tass, the Soviet news agency. Virden and his daughter had had a "complete break" some months before. N.Y. Times, May 22, 1948, p. 17, col. 7. Upon receiving the support of the Secretary of Commerce and President Truman, Virden subsequently withdrew his resignation, N.Y. Times, May 27, 1948, p. 10, col. 5.

See also the accounts of the various Washington reporters cited *supra* note 263; Arnold, *How Not to Get Investigated*, 197 HARPER'S 61 (1948).

sions are made outside the scope of formal action. So under a loyalty program, employees resign rather than submit to formal investigation, are dismissed ostensibly on grounds other than loyalty, or are urged to withdraw rather than risk formal dismissal.<sup>279</sup>

The cumulative influence of all these factors bears heavily upon the average government employee. He must, of course, avoid at all costs activity which may bring him within the area of disqualification established by the program. But more important, he must avoid even the *appearance or suspicion* of such activity. He is acutely aware that an FBI investigation can be initiated upon the basis of a complaint made by any unfriendly or psychopathic acquaintance. He knows that such an inquiry means probing among his friends, neighbors, enemies and business acquaintances. And he knows also that any "derogatory information," not to say rumor and gossip, will be permanently recorded.<sup>280</sup> This may well mean that he will be the first to go at the next tightening of the loyalty standards. Similarly, few government workers want to take the risk of incurring a hearing before a loyalty board. It involves time, energy, intense nervous strain and insecurity. More, it leaves a stigma which even exoneration cannot entirely wipe out.

For these reasons the normal government worker, faced with such conditions, avoids joining organizations, attending meetings, associating with others, reading literature, or holding views that might be considered questionable.<sup>281</sup> He shrinks from making unorthodox proposals in his work or suggesting experimentation. He is under constant pressure to conform to the conventional and safe. He is placed in fear of exhibiting the very qualities most sought after by competent administrators in private industry as well as in government.

Equal pressures play upon the employing officials. It is not advisable to have too many subordinates who are under suspicion.

The total impact upon morale in the Federal service has been well described by John Lord O'Brian, speaking out of his own experience:

"No one familiar with the administration of a government department, however, can doubt that the mere existence of any law or order authorizing secret investigations will encourage suspicion, distrust, gossip, malevolent talebearing, character assassination and a general undermining of morale."<sup>282</sup>

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279. See, e.g., *Loyalty Clearance Procedures in Research Laboratories*, 4 BULL. OF THE ATOMIC SCIENTISTS 111, 112 (1948).

280. An amusing illustration of the reaction to a government personnel investigation is afforded by the anguished protests of Congressman Hoffman and Busbey to the news that the Civil Service Commission files contained information about them. As a result of their vigorous objection the Commission agreed to destroy these records. N.Y. Times, Oct. 8, 1947, p. 8, col. 3.

281. See, e.g., New Republic, May 26, 1947, p. 30: "But the witch hunt is hotter now; many government workers were afraid to attend a dinner of the Southern Conference for Human Welfare a few weeks ago."

282. O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592, 598



Similarly the administration of a loyalty program has a profound effect upon recruitment for government service. Under the Loyalty Order any applicant whose name is listed unfavorably in the files of the Committee on Un-American Activities is at once a suspect and subject to an intensive FBI investigation. Applicants are also fully aware of the possibility of running afoul of the program at any point in their government career. Both factors discourage individuals of independent and vigorous views from seeking or accepting positions in the government.

Exclusion on an informal basis undoubtedly plays a particularly significant role in the case of applicants. Where "derogatory information" appears in an applicant's record, or where the FBI investigation reveals such information, there is a strong tendency for employing officials to drop the matter at that point without carrying the case through the formal procedures.<sup>283</sup> It is unlikely that there will be an extensive use of the formal procedures in the case of prospective employees. In effect this places a veto power on government employment in the hands of the FBI.

That these effects of a strict loyalty program are not illusory or fictitious is attested by numerous reliable reporters of the Washington scene, both within and without the government. One of the earliest to call attention to the dangers was Attorney General Biddle, reporting on the first comprehensive FBI investigation in 1942:

"It is inevitable that such sweeping investigations should take on an appearance of inquisitorial action alien to our traditions. They create disturbance and unrest, hurt esprit de corps, and produce a feeling of uneasiness and insecurity. This impression is heightened by the occasional complaint which has obviously been inspired by the jealousy or malice of a fellow employee who knows that his identity as an informant will remain undisclosed."<sup>284</sup>

Henry F. Pringle, writing on the problem in 1944, concluded:

"The effect of all this on Washington nerves, drawn taut already by congestion and shortages, has been catastrophic in some cases.

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(1948). The intimate relationship between morale and discipline has been noted by leading students of public administration. See, e.g., MORSTEIN MARN (ED.), ELEMENTS OF PUBLIC ADMINISTRATION ch. 21 (1946); MOSHER AND KINGSLEY, PUBLIC PERSONNEL ADMINISTRATION ch. 17 (1936). The Federal employee views the loyalty program as part of the disciplinary process.

283. See, e.g., Kilpatrick, *op. cit. supra* note 263, at 127 *et seq.*

284. Letter from the Attorney General, H.R. Doc. 833, 77th Cong., 2d Sess. 4 (1942). The Attorney General's Interdepartmental Committee reached the same conclusion: "The nature and scope of the project have been such as to require a method of reporting information gathered from anonymous sources which is satisfactory neither to the employing departments or agencies, the employees investigated, nor to the Federal Bureau of Investigation." *Id.* at 27.

"The result has been that harassed and badgered employees work less efficiently or resign in disgust. The Government is denied men and women it sorely needs."<sup>285</sup>

Congressman Sabath, during the debate on the Rees bill, charged that "Federal employees are living now in an atmosphere of fear and apprehension."<sup>286</sup> And Professor Robert E. Cushman, a close student of government affairs, sounded the same warning shortly after promulgation of the Loyalty Order:

"... there is grave danger that the new program, even under the most favorable circumstances, will have a shattering effect upon the morale of the federal service. It will create an atmosphere of constant surveillance and suspicion. Every vigorous, liberal-minded employee, especially among these who associated themselves with the social philosophy of the New Deal, will have real cause to worry whether suspicion is going to fall upon him."<sup>287</sup>

The impact of the loyalty program has been particularly serious among scientists employed by the government or on government financed projects. The evidence is overwhelming that loyalty investigations, both under the Administration's loyalty program and by the Committee on Un-American Activities, have seriously impaired the morale and effectiveness of government scientists and have driven many of them from Federal service.<sup>288</sup>

It is true that the Loyalty Order, in setting up uniform procedures

285. Pringle, *op. cit. supra* note 263, at 93.

286. 93 Cong. Rec. 8943 (1947).

287. Cushman, *The President's Loyalty Purge*, 36 SURVEY GRAPHIC 283, 284 (1947). For similar statements as to the effect of the loyalty program see I. F. Stone, PM, July 2, 1947, p. 2, PM, Oct. 26, 1947, p. 20; Representative Kefauver, 93 CONG. REC. 8945 (1947); Hanson W. Baldwin, N.Y. Times Mar. 2, 1948, p. 8, col. 3; Kilpatrick, *op. cit. supra* note 263, at 132; Speech of Commissioner Clifford Durr of the F.C.C. before the National Citizens Conference on Civil Liberties, April 14, 1948. But cf. Ellis, *American Civil Rights in a Revolutionary Age—The Problem of Loyalty*, 109 FORUM 193 (1948); Wechsler, *How to Rid the Government of Communists*, 195 HARPER'S 438 (1947).

288. Compton, *Science Fears an Iron Curtain*, 36 NATION'S BUSINESS 47 (June 1948); Engle, *Fear in Our Laboratories*, 166 NATION 63 (1948); Gehman, *Oak Ridge Witch Hunt*, NEW REPUBLIC, July 5, 1948, p. 12; Star, *Loyalty Investigations, A Poll of Atomic Scientists*, 4 BULL. OF THE ATOMIC SCIENTISTS 218 (1948); *Loyalty Clearance Procedures in Research Laboratories*, 4 BULL. OF THE ATOMIC SCIENTISTS 111 (1948); N.Y. Times, Sept. 19, 1948, § 4, p. 7, col. 1; Deutch, *Smears Drive A-Experts into Industry*, N.Y. Star, Sept. 16, 1948, p. 2, col. 1; speech of President Truman, Sept. 14, 1948, p. 1, col. 1; *How Far Should Military Censorship Extend*, 4 BULL. OF THE ATOMIC SCIENTISTS 163 (1948); letter of 8 leading atomic scientists to President Truman, N.Y. Times, Sept. 7, 1948, p. 20, col. 2; PM, Apr. 23, 1948, p. 3, col. 1; letter of Dr. Condon to Joint Congressional Committee on Atomic Energy, N.Y. Times, Mar. 5, 1948, p. 4, col. 2. For a full account of the Condon case, see ANDREWS, WASHINGTON WITCH HUNT, Ch. 4 (1948). The Committee on Secrecy and Clearance of the Federation of American Scientists has collected 76 cases of allegedly unfair clearance proceedings. *Some Individual Cases of Clearance Procedures*, 4 BULL. OF THE ATOMIC SCIENTISTS 281 (1948).

for determination of disloyalty, has been helpful in coordinating policies and in removing some of the pressure from employing officials.<sup>289</sup> Administration leaders have stated that government employees should not "fear they are the objects of any 'witch hunt.'" <sup>290</sup> And the Loyalty Review Board, so far as its actions have been made public, seems to have operated with moderation. Nevertheless, the establishment of broad standards of disloyalty in the Loyalty Order and by the "sensitive" agencies, the creation of a large staff to administer the loyalty program, the aggressive execution of the program at the lower levels, the intensification of the international crisis, and allied causes have more than offset such benefits as might accrue through the formalization of procedures and reassurances by top officials now in charge of the program. All the evidence seems to show that the demoralizing features of a loyalty check are present in the current program in acute and dangerous form.

### VII. CONSTITUTIONAL LIMITATIONS ON CRITERIA OF DISLOYALTY

Are there constitutional limitations within which a Federal loyalty program must operate? If so, what are they? Here we are concerned with possible limitations on the criteria for judging disqualification for government service. In the succeeding section we consider constitutional requirements in connection with the procedure by which decisions on loyalty are made.

The present loyalty program is based upon the legal premise that Federal employees are entitled to no constitutional protection. ". . . [T]he Board is of the opinion," the Chairman of the Loyalty Review Board has said, "that, legally, the Government is entitled to discharge any employe for reasons which seem sufficient to the Government, and without extending to such employe any hearing whatsoever."<sup>291</sup> And the Board in its own statement has reiterated: "No person has an inherent or constitutional right to public employment; public employment is a privilege, not a right."<sup>292</sup> The same view of the constitutional question has been taken by Congressional supporters of the Rees bill.<sup>293</sup>

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289. That considerable pressure remains is evident from the action of the Committee on Un-American Activities in attempting to force the ouster of Dr. Edward U. Condon, Director of the Bureau of Standards, despite his clearance by the agency loyalty board. *N.Y. Times*, Mar. 2, 1948, p. 1, col. 4. See also Kluttz, *Washington Post*, Sept. 24, 1948: "Frankly, the loyalty policy is in the hot cross-fire of partisan politics. It's difficult to keep anything on an even keel when that happens."

290. Statement of President Truman, *N.Y. Times*, Nov. 15, 1947, p. 2; see also Statement of Seth Richardson, Chairman of Loyalty Review Board, *N.Y. Times*, Dec. 28, 1947, p. 28, col. 6.

291. Richardson, *Aims and Procedures of Loyalty Review Board*, *N. Y. Times*, Dec. 28, 1947, p. 28, col. 5.

292. Mimeographed statement of Loyalty Review Board, December 17, 1947, p. 3.

293. H. R. REP. NO. 616, 80th Cong., 1st Sess. 4 (1947).

This position seems to be based upon the aphorism of Justice Holmes in the *McAuliffe* case: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>294</sup> The Supreme Court itself has stated that government employees enjoy only "a privilege revocable by the sovereignty at will."<sup>295</sup> And certainly the courts have in the past consistently upheld the government in the exercise of sweeping power over the affairs of its employees, including their right to hold a job. The tradition was sustained in the recent decision in *United Public Workers v. Mitchell*, where the Supreme Court found no constitutional objection to provisions of the Hatch Act which drastically limit the right of government employees to engage in political activity.<sup>296</sup>

Nevertheless the government's offhand exclusion of constitutional considerations in the administration of the loyalty program is plainly erroneous. In the *Mitchell* case itself, Justice Reed was at pains to concede that "there are some limitations," and that "none would deny" the incapacity of Congress to "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work."<sup>297</sup> A similar statement had previously been made by Justice Cardozo for the New York Court of Appeals:

"A citizen may not be disqualified because of faith or color from service as a juror. . . . For like reasons we assume that he may not be disqualified because of faith or color from serving the state in public office or employment. It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as a contractor by the government. It does not follow, however, that he may be declared *disqualified* from service, unless the proscription bears some relation to the advancement of the public welfare."<sup>298</sup>

The point is obvious, and is consistent with a long series of cases restricting the power of the legislature to attach certain kinds of conditions to privileges extended by the government to its citizens.<sup>299</sup>

294. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892).

295. *Crenshaw v. United States*, 134 U.S. 99, 108 (1890).

296. 330 U.S. 75 (1947); *cf.* *Friedman v. Schwellenbach*, 159 F.2d 22, (D.C. Cir. 1946), *cert. denied*, 330 U.S. 838 (1947), *reh'g denied*, 331 U.S. 865 (1947). For a detailed recital of the authorities indicating that "government employees do not occupy a favored position in the eyes of the law," see Note, *Restrictions on the Civil Rights of Federal Employees*, 47 COL. L. REV. 1161 (1947). See also Note, *Constitutional Limitations on Political Discrimination in Public Employment*, 60 HARV. L. REV. 779 (1947).

297. 330 U.S. 75, 100 (1947) (court quoting from brief for appellants).

298. *People v. Crane*, 214 N.Y. 154, 168, 108 N.E. 427, 431, *aff'd*, 239 U.S. 195 (1915). *Cf.* *United States v. Lovett*, 328 U.S. 303 (1946); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

299. *E.g.*, *Frost v. Railroad Commission of California*, 271 U.S. 583 (1926); *Missouri*

Recent increases in the volume of government employment, coupled with the likelihood of still further expansion, give added significance to the position.

What are the constitutional limitations, then, which circumscribe the power of the government arbitrarily to fix its hiring and firing policies and to prescribe the conduct of its employees? Most clearly applicable is the right to freedom of political expression embodied in the First Amendment. In addition, the due process clause of the Fifth Amendment, with its prohibition against unreasonable or discriminatory treatment, its limitation upon "guilt by association," and its requirement of definiteness, comes into play. Other possible sources of constitutional restriction are the prohibitions against *ex post facto* laws and bills of attainder.<sup>300</sup>

Before attempting to appraise these constitutional limitations, it is important to have a realistic understanding of the powers wielded by the government under the loyalty program in their impact upon individuals, organizations and the political community as a whole.

To the individual applicant or employee the force of an official determination that he is "disloyal" carries far beyond the mere loss of his government position. President Truman, demonstrating an aptitude for understatement, has spoken of "the stigma attached to a

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*ex rel. Gaines v. Canada*, 305 U. S. 337 (1938); *Hannegan v. Esquire*, 327 U.S. 146, 156 (1946) ("grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever"); cf. Hale, *Conditions and Constitutional Rights*, 35 Col. L. Rev. 321 (1935). A recent state case is *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885 (1946).

300. The *ex post facto* prohibition would appear to be applicable where past actions were made conclusive grounds for disqualification, rather than considered merely as evidence of present "disloyalty." *Cummings v. Missouri*, 4 Wall. 277 (1866); *Ex Parte Garland*, 4 Wall. 333 (1866); *United States v. Lovett*, 328 U.S. 303 (1946); Note, *Restrictions on the Civil Rights of Federal Employees*, 47 Col. L. Rev. 1161, 1173 (1947). The bill of attainder provision is of doubtful applicability to executive action. In any event, these provisions would probably not play the major role in constitutional battles over the loyalty program and hence they are not further considered here.

Since the present loyalty program is implemented by a Presidential Executive Order rather than by Congressional legislation, a further question arises as to the validity of the executive power in this area. It has been suggested in *United States v. Perkins*, 116 U.S. 483 (1886) and *Myers v. United States*, 272 U.S. 52 (1926) that Congress may prescribe the sole grounds for removal of inferior executive officials whose appointments have been entrusted to department heads. Inasmuch as Congress has provided express standards in Section 9A of the Hatch Act (53 STAT. 1148 (1939), as amended, 18 USC § 61h (1946)) governing the removal of such inferior federal employees, it may be argued that the broader standards of the Executive Order fall in the conflict. It seems unlikely, however, that the Supreme Court would so restrict the executive power over removal of the great mass of Federal employees. In any event this issue could be, and undoubtedly would be, quickly resolved by Congressional action creating standards equivalent to those in the Executive Order.

removal for disloyalty."<sup>301</sup> The Supreme Court in the case of similar action against Lovett, Watson and Dodd pointed out that it "stigmatized their reputation and seriously impaired their chance to earn a living," and held it legally equivalent to punishment for a crime.<sup>302</sup> In fact, the determination that a person is "disloyal" is closely akin to a finding of treason—a crime which the framers of the constitution took pains to define most narrowly and to hedge with restrictions.<sup>303</sup>

A person branded as "disloyal" finds it impossible to obtain employment either in the Federal government or in state or local government. His opportunities for private employment are either seriously jeopardized or completely extinguished. In many professional fields—atomic energy is but one example—a person dismissed for disloyalty must abandon his life's work.<sup>304</sup> The motion picture industry, which has officially refused to employ Communists and has undertaken a campaign to "eliminate any subversives," is closed to him.<sup>305</sup> Other industries unofficially refuse to admit him.<sup>306</sup> On the personal level, his reputation is blighted and the happiness and social status of his family ruined. Marked for life, he is likely to be relegated to a second-class citizenship.<sup>307</sup>

The impact of a finding by the Attorney General that an entire organization is "subversive" is equally damaging. Such a finding strikes hard in two vital areas: membership and funds. An organization is likely to lose all but its most hardy members; potential members do not join. The organization has great difficulty in raising money. It may lose its tax exemption, local licenses or other privileges. It encounters increasing resistance in its efforts to obtain meeting places and speakers for its meetings. In practical terms the organization has been gravely stricken, perhaps may be forced out of existence.<sup>308</sup>

301. N. Y. Times Nov. 15, 1947, p. 2, col. 3.

302. 328 U.S. 303, 314 (1946). "The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal." *Id.* at 316.

303. U. S. CONST. Art. III, § 3. See Stone, *The Founding Fathers and the Loyalty Purge*, PM Jan. 4, 1948, p. 13.

304. See, e.g., *Some Individual Cases of Clearance Procedures*, 4 BULL. OF THE ATOMIC SCIENTISTS 281, 283-4 (1948).

305. N. Y. Times, Nov. 26, 1947, p. 27, col. 2.

306. See e.g., Engel, *Fear in Our Laboratories*, 166 NATION, 63 (1948).

307. See letter from Dean Griswold and Professors Scott, Katz and Chafee of the Harvard Law School, N.Y. Times, Apr. 13, 1947, § 4, p. 8, col. 5; charges of Messrs. Arnold, Fortas and Porter, N. Y. Times, Nov. 4, 1947, p. 15, col. 2; remarks of Congressmen Holifield, Cooley and McCormack, 93 CONG. REC. 8965, 8967-68, 8974 (1947); Pringle, *Snooping on the Potomac*, SATURDAY EVENING POST, Jan. 15, 1944, pp. 19, 93-4. For a vivid account of the problems encountered by "Mr. Blank," an employee discharged by the State Department on loyalty grounds, see ANDREWS, WASHINGTON WITCH HUNT 61-73 (1948).

308. For an account of some of the actual effects of the Attorney General's ruling that certain organizations were "subversive" see PM, Feb. 5, 1948, p. 2, col. 1; Stone,

These are matters of the utmost consequence to the entire nation. Unwarranted charges of disloyalty against government employees affect every citizen. As the story spreads there develops a fear of refusing to conform, a fear of speaking, a fear of signing a petition or a letter to a Congressman—all for fear of being declared subversive, of losing a job, or position in society.

Unjustified charges against an organization are even more fraught with danger to the public welfare. Modern society functions largely through organizations; it is only by organizing and associating with others that the individual can match his strength against other groups or against government. The extent to which the government tolerates or thwarts organizations of citizens is a measure of its regard for democratic processes. Government suppression of organizations, particularly when the power is placed in the hands of a single official, thus raises questions that penetrate to the core of our democratic way of life.<sup>309</sup>

### *Freedom of Political Expression*

Out of the specific guarantees of freedom of speech, freedom of the press, the right of assembly and the right to petition the government—all expressly protected in the First Amendment—there emerges a clear-cut composite concept of the right to freedom in political expression.<sup>310</sup> The right is basic, in the deepest sense, for it underlies the whole theory of democracy,—that all citizens are entitled to participate in the for-

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*The Fight Against the Blacklist Goes to the Courts*, PM, Feb. 11, 1948, p. 4; New Haven Register December 6, 1947, p. 3, col. 4 (denial of use of Bond Hotel in Hartford for meeting, the manager saying: "The place for them to meet is in Russia"); N.Y. Times, Oct. 22, 1948, p. 17, col. 1 (8 designated organizations removed from tax exempt status). See also the affidavits filed by the plaintiff in Joint Anti-Fascist Refugee Committee v. Clark (D.D.C., decided without opinion June 4, 1948).

309. See Wyzanski, *The Open Window and the Open Door*, 35 CALIF. L. REV. 336 (1947).

310. "Congress shall make no law . . . 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." U. S. CONST. AMEND. I. Since the First Amendment prohibits only action by Congress, a preliminary question arises as to whether it governs in the case of Presidential action under Executive Order. Where the President's power is derived from Congress the application of the First Amendment is clear. See, *Ex Parte Mitsuye Endo*, 323 U.S. 283, 298-9 (1945). Where the President's action is based on executive power derived directly from the Constitution there would seem to be little doubt that the Court would also consider the First Amendment directly applicable. See, *Ex Parte Milligan*, 4 Wall. 2, 124-5 (1866); *Ex Parte Quirin*, 317 U.S. 1, 25 (1942). Alternatively it can be argued that the due process clause of the Fifth Amendment is applicable; that this clause must have the same meaning in this connection as the due process clause in the Fourteenth Amendment; that the latter incorporates the First Amendment (*Gitlow v. New York*, 268 U.S. 652, 666 (1925)); and that therefore the issue under the Fifth Amendment is the same as under the First. Cf. *Hurd v. Hodge*, 68 S. Ct. 847, 853 (1948).

mation of their government and the framing of their laws. Embedded in the philosophy of those who framed the Bill of Rights this principle has, since the decision in *Stromberg v. California*,<sup>311</sup> received increasingly firm and aggressive protection from the Supreme Court. "The maintenance of the opportunity for free political discussion," said Chief Justice Hughes in the *Stromberg* case, "to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."<sup>312</sup>

That the principle outlaws efforts by the government to prescribe political orthodoxy was made clear in the oft-quoted statement of Justice Jackson in the *Barnette* case:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." <sup>313</sup>

So fundamental does the Court consider protection of this right that it has rejected, even reversed, the normal presumption of constitutionality in such cases:

". . . the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."<sup>314</sup>

And the same approach has been taken by the Court where the specific issue of loyalty has been involved:

"Ill-tempered expressions, extreme views, even the promotion of ideas which run counter to our American ideals, are not to be given disloyal connotations in absence of solid, convincing evidence that that is their significance."<sup>315</sup>

311. 283 U. S. 359 (1931).

312. *Id.* at 369. The proposition had been stated with equal clarity and force by Justice Brandeis in his dissent in *Pierce v. United States*, 252 U.S. 239, 273 (1920) and in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 372 (1927). *Cf.* *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940); *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

313. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

314. *Thomas v. Collins*, 323 U.S. 516, 529-530 (1945). The doctrine that the Court would scrutinize with greater care legislation infringing upon the freedoms guaranteed in the Bill of Rights was first suggested in a footnote by Chief Justice Stone in *United States v. Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938). *Cf. Ex Parte Mitsuye Endo*, 323 U. S. 283, 299 (1944); 40 *Col. L. Rev.* 531 (1940). For a recent statement of the doctrine see the concurring opinion in *United States v. Congress of Industrial Organizations*, 68 S. Ct. 1349, 1366-7 (1948): "The presumption, rather, is against the legislative intrusion into these domains [of free expression]."

315. *Knauer v. United States*, 328 U. S. 654, 658 (1946). *Cf. Schneiderman v. United*



That the current loyalty program infringes upon freedom of political expression is obvious from the prior discussion. It imposes serious restrictions upon government employees, prospective employees, and organizations; it affects deeply the operation of government and the political life of the nation. How, then, do we determine the point at which the acknowledged authority of the government to protect itself from the danger of "disloyal" employees runs into conflict with the constitutional guarantee of freedom in political expression? By what method are we to balance the competing constitutional doctrines?

There are two legal formulae available for resolving the conflict. One is the "reasonableness" test; the other is the touchstone of "clear and present danger."

The test of "reasonableness" was applied by the Supreme Court in its 4 to 3 decision in the *Mitchell* case.<sup>316</sup> That case involved the provisions of the Hatch Act prohibiting Federal employees from taking "any active part in political management or political campaigns."<sup>317</sup> The employee whose case was considered had been a committeeman for the Democratic Party in his ward, had been a worker at the polls, and had assisted in the distribution of funds to pay party workers on election day. Justice Reed, speaking for the majority, pointed out that the problem before the Court was to "balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government." In resolving this issue he held the test to be: "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." Applying this formula he found the legislation to be constitutional.

The "clear and present danger" rule, originally enunciated by Justice Holmes in the *Schenck* case, has been frequently employed to strike a balance between the exercise of governmental authority and the protection of rights guaranteed in the First Amendment.<sup>318</sup> A modern statement of the rule, expressly distinguishing it from the test

States, 320 U. S. 118 (1943). See generally, on the right to freedom of political expression, *The Constitutional Right to Advocate Political, Social and Economic Change—An Essential of American Democracy*, 7 LAW. GUILD REV. 57 (1947).

316. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). The same test was applied in the Japanese exclusion cases. *Hirabayashi v. United States*, 320 U.S. 81, 93, 95, 98, 101 (1943).

317. 53 STAT. 1148 (1939), as amended, 18 U.S.C. § 61 (h) (1946).

318. In *Schenck v. United States*, 249 U.S. 47 (1919) the Court upheld a conviction under the Espionage Act for circulating pamphlets to draftees denouncing conscription. The original statement of the clear and present danger rule was as follows: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52.

of "reasonableness," was given by the Supreme Court in *Thomas v. Collins*:

"For these reasons any attempt to restrict those liberties [the indispensable democratic freedoms secured by the First Amendment] must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. *The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice.* These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."<sup>319</sup> (Italics supplied.)

Justice Douglas, partially dissenting in the *Mitchell* case, urged the application of the clear and present danger test. In his view the Hatch Act was invalid insofar as it limited the political rights of industrial, as distinguished from administrative, workers in government. "Those rights," he said, "are too basic and fundamental in our democratic political society to be sacrificed or qualified for anything short of a clear and present danger to the civil service system. No such showing has been made in the case of these industrial workers. . . ." <sup>320</sup>

Both the test of "reasonableness" and the test of "clear and present danger" are broad formulae which do not decide concrete cases. Upon analysis both resolve into issues of balancing competing values. Yet the "clear and present danger" rule implies a different social and political philosophy in approaching the constitutional issue. It implies that the courts will insist upon a stronger, more positive justification for governmental infringement upon freedoms guaranteed by the First Amendment. It expresses an attitude which regards these freedoms as fundamental to our framework of democracy and holds it the function of the courts to demand more than a mere showing of rationality before such rights may be sacrificed.

It seems clear that the Supreme Court should adopt the "clear and present danger" philosophy in judging the constitutional limitations of the loyalty program. Its failure to take this attitude in the *Mitchell* case is perhaps to be explained, though not justified, by the fact that the provisions of the Hatch Act there involved represented part of a

319. 323 U.S. 516, 530 (1945). For a similar statement of the rule, distinguishing it from the "rational basis" test, see *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943). Recent applications of the clear and present danger test may also be found in *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Bridges v. California*, 314 U.S. 252 (1941). *Craig v. Harney*, 331 U.S. 367 (1947), decided two months after the *Mitchell* Case, reaffirmed the clear and present danger test.

320. 330 U.S. 75, 126 (1947).

historic campaign to eliminate the spoils system and political corruption from the Federal service. Long tradition has sanctioned the extensive use of government power in the interest of good government and clean politics.<sup>321</sup> However that may be, the issues under the loyalty program are as basic to the democratic process as any to which the "clear and present danger" approach has been applied in the past.

One further matter bearing upon the general nature of the constitutional issue requires consideration. The main thrust of the loyalty program, as has been already observed, is to prevent any possible danger to the government by eliminating in advance all individuals who might in the future engage in dangerous activities. It is primarily in this respect that the current program goes beyond existing legislation and administrative regulation designed to punish past action injurious to the Federal service. The Supreme Court has always looked with particular disfavor upon regulation of this character where it curtails the rights protected by the First Amendment.

Previous restraint upon freedom of expression was considered abhorrent even in the days of Blackstone.<sup>322</sup> Modern objection was strongly expressed in *Near v. Minnesota*, where the Supreme Court invalidated an attempt to eliminate possible abuse of the press through the device of prior censorship.<sup>323</sup> Since the *Near* case the Court has extended the principle to other fields. Thus in *Schneider v. New Jersey*, where an ordinance prohibited the distribution of leaflets in order to prevent littering of the streets, the Court had no hesitation in striking down the regulation and limiting the government to subsequent punishment of those who did in fact litter the streets.<sup>324</sup> Similarly in *Thornhill v. Alabama* the Court invalidated a state law which prohibited picketing, refusing to sanction a sweeping prior restraint and relegating the government to action by way of subsequent punishment where abuses developed.<sup>325</sup> And in the *Thomas* case the Court invalidated an ordinance requiring labor union organizers to register as a condition to soliciting membership, again considering prior interference with freedom of expression unwarranted and subsequent punishment ample protection.<sup>326</sup>

These decisions are simply one aspect of the broader doctrine that government regulation infringing upon civil or political rights must be "narrowly drawn" to meet only the essential danger and may not un-

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321. See Note, *Political Sterilization of Federal Employees*, 47 COL. L. REV. 295 (1947).

322. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 9-22 (1941).

323. 283 U.S. 697 (1931).

324. 308 U.S. 147 (1939); *accord*, *Lovell v. Griffin*, 303 U.S. 444 (1933); *Hague v. C.I.O.*, 307 U.S. 496 (1939).

325. 310 U.S. 88 (1940).

326. *Thomas v. Collins*, 323 U.S. 516 (1945); *cf.* *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Herdon v. Lowry*, 301 U.S. 242 (1937); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Saia v. New York*, 68 S. Ct. 1148 (1948).

necessarily sweep within its orbit a wide range of other activities under the protection of the First Amendment.<sup>327</sup> "Certainly laws which restrict the liberties guaranteed by the First Amendment" said Justice Black in the *Mitchell* case, "should be narrowly drawn to meet the evil aimed at and to affect only the minimum number of people imperatively necessary to prevent a grave and imminent danger to the public."<sup>328</sup>

It is in the light of these doctrines that the constitutional balance must be struck, by weighing fact and value, between governmental protection and the right of political expression.

On the one hand the government is surely entitled to erect safeguards against dangers that are clear, immediate and significant. In establishing standards of disqualification for government employment it may undoubtedly take into account forms of activity which could not be penalized if engaged in by the ordinary citizen. And certainly the tradition of minimum interference by the judiciary with internal management problems of the executive, as well as the deference due to legislative and executive judgment, are sound principles and entitled to due consideration.

On the other hand must be weighed many of the other factors that have been developed in the previous discussion: the drastic interference with freedom of expression; the lack of clear and convincing proof that the dangers are as serious as charged; the administrative impact of the program upon the morale, efficiency and vitality of the government service; the catastrophic consequences to individual and organization of adverse government action; the fact that the problem is not only one of internal management but acutely affects the nation as a whole.

Just where the Supreme Court will draw the line, it is of course impossible to predict. Nevertheless a general thesis with respect to the constitutional limitations under the First Amendment may be suggested.

Certainly there is no doubt of the validity of standards requiring disqualification for overt acts of espionage, unauthorized disclosure of information, sabotage, or participation in a conspiracy to overthrow the government by violent or other illegal means. Similarly there would be little questioning of a standard disqualifying individuals who personally advocate overthrow or change of government by violent or illegal means. Less clear, but nevertheless still within the bounds of probable constitutionality, are standards disqualifying upon proof of mere membership in an organization which advocates the overthrow or change of government by violent or illegal means, or membership in a

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327. *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Bridges v. California*, 314 U.S. 252 (1941). See concurring opinion in *United States v. Congress of Industrial Organizations*, 68 S. Ct. 1349, 1367-74 (1948).

328. 330 U.S. 75, 110 (1947). The same views were expressed by Justice Douglas. *Id.* at 126.

political organization whose major policies are directed by an organization or group operating outside the United States.

Beyond this point, however, grave doubts of constitutionality arise. The validity of disqualification for membership in an organization engaged in lawful activities but including among its members persons who are also members of a conspiratorial organization might depend upon the particular facts of the case, including the nature of the government position in question. Activity in support of such an organization, but not amounting to membership, would constitute a standard of dubious validity. In this area the kind of job involved—whether a key position in a “sensitive” agency or a low-level position in a routine agency—might be the decisive factor.

Advocacy or belief in policies, other than the use of violence or illegal methods, which coincided with policies of a conspiratorial or other organization, would clearly seem to be invalid as a standard. So would the other possible criteria listed in the previous discussion.<sup>329</sup> Certainly a standard excluding individuals who simply attempted to bring about changes in government form or policy through lawful methods, not involving insubordination, would definitely run afoul of constitutional limitations.

These conclusions are not offered as proposals for legislative or executive policy, but rather as marking broadly the judicial limitations within which the legislative or executive program would be required to operate under the First Amendment.

### *Due Process*

Three pertinent questions arise under the due process clause of the Fifth Amendment: (1) whether the restrictions are unreasonable or discriminatory in nature; (2) whether the application of “guilt by association” is contrary to the constitutional prohibition; and (3) whether the restrictions are stated with sufficient definiteness and certainty. At the outset, however, a preliminary question requires brief attention,—whether the individual or organization is being deprived of “liberty” or “property” within the meaning of the Fifth Amendment.<sup>330</sup>

The answer to this introductory question appears to be in the affirmative. Although the Supreme Court has said that a government employee has no contract or property right in his position such as to assure him protection against a routine dismissal,<sup>331</sup> it seems clear that

329. *Supra* pp. 50-2.

330. “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. AMEND. V.

331. *Crenshaw v. United States*, 134 U.S. 99 (1890); *Taylor and Marshall v. Beckham* (No. 1), 178 U.S. 548 (1900); *Wetzel v. McNutt*, 4 F. Supp. 233 (S.D. Ind. 1933). See Note, *Restrictions on the Civil Rights of Federal Employees*, 47 Col. L. Rev. 1161, 1162

a dismissal on grounds of disloyalty is in a different category. This follows from the fact that a dismissal for disloyalty has far reaching consequences, including curtailment of the employee's opportunity for further employment and serious prejudice to his future earning status. The Supreme Court has, in a comparable situation, recognized that "the right to work for a living . . . is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."<sup>332</sup> The injury suffered by an organization under the loyalty program would likewise seem to give it abundant standing to claim loss of significant property rights. The case of an applicant rejected upon a finding of disloyalty might be less clear; but even here such an individual might be damaged in a manner not unlike that of a discharged employee. It is also entirely reasonable to argue that both individuals and organizations have suffered loss of "liberty" under the Fifth Amendment.<sup>333</sup> Thus, standing to invoke the due process protection seems assured.

### *Unreasonable or Discriminatory Regulation*

Assuming the due process clause to be applicable, the first inquiry is whether the restrictions imposed by the loyalty regulations are reasonably related to substantial dangers, or whether persons holding particular views or engaging in certain activities are being made the objects of unreasonable discrimination.<sup>334</sup> The considerations entering into this judgment are substantially the same as those arising under the First Amendment. But the due process clause of the Fifth Amendment calls attention even more sharply to the discriminatory flavor of legislation which penalizes only the political activities of a special group.

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(1947). On the other hand some of the state courts have held that a government employee possesses something "in the nature" of a property right in his job. *Fugate v. Weston*, 156 Va. 107, 157 S.E. 736 (1931); *State ex rel. Rodd v. Verage*, 177 Wis. 295, 187 N.W. 830 (1922); *Ekern v. McGovern*, 154 Wis. 157, 142 N.W. 595 (1913); *State ex rel. Childs v. Wadhams*, 64 Minn. 318, 324, 67 N.W. 64, 67 (1896). See also Dawley, *The Governors' Constitutional Powers of Appointment and Removal*, 22 MINN. L. REV. 451, 474 (1938); Westwood, *The "Right" of an Employee of the United States against Arbitrary Discharge*, 7 GEO. WASH. L. REV. 212 (1938).

332. *Truax v. Raich*, 239 U.S. 33, 41 (1915); *cf. Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

333. See Note, *Constitutional Limitations on Political Discrimination in Public Employment*, 60 HARV. L. REV. 779, 782 (1947).

334. In this respect the nature of the inquiry would be similar to that arising under the equal protection clause of the Fourteenth Amendment. See *Steward Machine Co. v. Davis*, 301 U.S. 548, 584 (1937); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *United States v. Petrillo*, 332 U.S. 1 (1947); *United States v. Schneider*, 45 F. Supp. 848 (E.D. Wis. 1942); *but cf. Truax v. Corrigan*, 257 U.S. 312, 332 (1921). See generally Note, *Constitutionality of the Taft-Hartley Non-Communist Affidavit Provision*, 48 COL. L. REV. 253, 256-7 (1948). On the application of the equal protection clause to state employment see *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947).

Here, in contrast with the *Mitchell* case, the regulation applies not to all government workers alike but discriminates against those who hold certain opinions or join certain organizations. Protection against unfair or unwarranted discrimination remains a vital function of the due process clause. The Supreme Court would clearly not tolerate a regulation permitting government workers of orthodox views to join organizations and express attitudes with relative freedom but forcing the unorthodox to remain silent or risk discharge.

### *Guilt by Association*

To what extent, under the due process clause, may disqualification for Federal service be based upon mere association with organizations or individuals? This element of association plays an important part in the loyalty program. Under the Loyalty Order "sympathetic association" with designated organizations is one of the facts "which may be considered in connection with the determination of disloyalty."<sup>335</sup> In practice a finding of "sympathetic association" with a group named by the Attorney General as "communist," "fascist," or "subversive" would almost certainly result in disqualification for government employment. Congressman Rees during the debate on his bill referred to the "sympathetic association" clause as "the heart of the thing."<sup>336</sup> The State Department regulations make various types of associations not only evidence of disloyalty but absolute grounds for removal.<sup>337</sup> And throughout the operation of the program the question of association has been foremost in the minds of Federal employees.

The courts have frequently rejected efforts to apply doctrines of "guilt by association" and have repeatedly asserted that under Anglo-American traditions guilt is a personal matter. "Guilt with us remains individual and personal . . .," the Supreme Court recently said.<sup>338</sup> Justice Murphy, concurring in *Bridges v. Wixon*, condemned guilt by association even more vigorously, "The doctrine of personal guilt is one of the fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law."<sup>339</sup>

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335. Exec. Order No. 9835, Pt. V, Sec. 2f, 12 FED. REG. 1935, 1938 (1947). Compare: "Personal or political relations with enemies of the working class and nation are incompatible with membership in the Communist Party." Constitution of the Communist Party of the U.S.A., Art. IX, § 4 (1945).

336. 93 CONG. REC. 8977 (1947).

337. *Supra* note 150.

338. *Kotteakos v. United States*, 328 U.S. 750, 772 (1946).

339. 326 U.S. 135, 163 (1945). For an excellent discussion of the problem of guilt by association as related to the President's Executive Order, see O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592 (1948). See also, Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 HARV. L. REV. 1193, 1217-24

The issue of guilt by association has arisen in two connections. One is where a statute makes the association itself an offense. Thus state legislation has attempted to make association with criminals, without more, a crime. The courts have generally refused to uphold such legislation.<sup>340</sup>

In other cases the attempt has been made to impute to an individual the motives, objectives or actions of an organization or group with which he has been in some way connected. Here the offense is not the mere association, but something else, and the association is used to establish the offense. In this situation, the courts have refused to impute the activities of the organization to the individual and have insisted upon separate proof of the individual's culpability. Thus in the *DeJonge* case the Supreme Court refused to attribute to DeJonge, a member of the Communist Party, the ideas of the Party, but held that only what DeJonge actually said at a meeting was of legal consequence.<sup>341</sup> More recently in the *Schneiderman* case the Court, deciding whether Schneiderman was attached to the principles of the constitution, rejected the government's interpretation of Communist Party utterances and insisted upon clear proof of Schneiderman's personal position.<sup>342</sup> "Under our traditions," said Justice Murphy, "beliefs are personal and not a matter of mere association . . . [M]en in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."<sup>343</sup>

The doctrine of guilt by association has been effectively utilized in totalitarian countries.<sup>344</sup> It is noteworthy that in the Nueremberg Trials the principle was rejected. Mere membership in Nazi organizations was not there accepted as proof of war guilt without further evidence showing personal participation.<sup>345</sup>

How do these principles apply to the loyalty program? The issues here are not identical with those arising in cases where association is made a criminal offense or where proof of "disloyalty" for deportation

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(1947). See as well Note, *Constitutionality of the Taft-Hartley Non-Communist Affidavit Provision*, 48 COL. L. REV. 253, 261-3 (1948); CHAFEE, *FREE SPEECH IN THE UNITED STATES*, 470-84 (1941).

340. Note cases cited in Gellhorn, *supra* note 339, at 1223. Compare the use of the conspiracy charge as once used against labor unions. A discussion of the conspiracy doctrine and its development may be found in WITTE, *THE GOVERNMENT AND LABOR DISPUTES* (1932) 46-54.

341. *DeJonge v. Oregon*, 299 U.S. 353 (1937). Accord: *Herndon v. Lowry*, 301 U.S. 242 (1937); but *cf.* *Whitney v. California*, 274 U.S. 357 (1927).

342. *Schneiderman v. United States*, 320 U.S. 118 (1943).

343. *Id.* at 136; *cf.* *Bridges v. Wixon*, 326 U.S. 135 (1945); *Knauer v. United States*, 328 U.S. 654 (1946). Compare *Tot v. United States*, 319 U.S. 463 (1943).

344. *Infra* pp. 126-32. See also O'Brien, *supra* note 339.

345. The Nurnberg Trial, 6 F.R.D. 69, 111-2, 131-2, 160, 165-7, 180, 182, 187 (1946); Wechsler, *The Issues of the Nuremberg Trial*, 62 POL. SCI. Q. 11 (1947). Compare JACKSON, *THE NURNBERG CASE* 88-9, 103-11 (1947).



or denaturalization purposes is involved. It is undoubtedly proper for the government to scrutinize more closely the associations of its employees and to impose a stricter standard in judging the consequences of such association. But the principle of personal rather than vicarious culpability is one that springs directly from the values placed upon individual worth and independence by a democratic society and in this respect judicial abhorrence of guilt by association is equally applicable in the field of tests for government employment.

More concretely, the greater leeway permitted the government in measuring the qualifications of its employees would probably sanction a rule making certain kinds of associations in themselves a bar to government employment. Thus it is unlikely that a court would strike down a regulation forbidding employment to a member of a conspiratorial group seeking the overthrow of the government by violent or illegal means, even though there were no further proof that the individual personally shared or supported the objectives of the organization. The same would be true of membership in an organization, political in nature, whose major policies are directed by an organization or group operating outside the United States. But to extend the disqualification to members of an organization which is engaged in wholly lawful activity but which includes in its membership persons who are also members of a conspiratorial organization, would appear to be more dubious. Such disqualification might well be permitted only in the case of employees holding positions particularly vital to national security. To broaden the taint of association so as to disqualify a Federal employee because his second cousin was reputed to have been connected with a "communist-front" organization, as certain members of Congress recently urged, would constitute full acceptance of the most ancient and vicious tenets of witch-hunting.<sup>345</sup>

In cases where the government does not make associations a disqualification in itself, but attempts to use it in order to impute to the individual the opinions or activities of his associates, the principles expressed in the *Schneiderman* and other cases seem to apply with full force. A loyalty proceeding, as we point out later, does not differ so markedly from a denaturalization or deportation proceeding that the presumptions and evidence outlawed in one should be permitted in the other.

In the case of organizations charged with being "subversive" a reverse twist of the doctrine has sometimes been applied, the guilt of the individual being imputed to the organization. Walter Gellhorn has described how this process was employed by the Committee on Un-American Activities in finding the Southern Conference for Human Welfare to be a "Communist-front organization":

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346. See ANDREWS, WASHINGTON WITCH HUNT 74 (1948). Note also the *Virden* case, *supra* note 278.

"This device involves, first, seeking to establish a tie, however tenuous, between an unpopular individual or organization and some person connected with the Southern Conference; second, ascribing to that person all the undesirable qualities of the individual or organization with whom he has been momentarily linked; and finally, attributing to the Southern Conference the qualities which have been acquired by infection, as it were, by these intermediate persons. Of course, the process is an endless one, for any individual who becomes associated with the Southern Conference will in turn acquire that organization's derivative taint and will transmit it to all other organizations he may later support."<sup>347</sup>

It would seem clear that the courts would not permit such an application of guilt by association. Here again the doctrine of the *Schneiderman* case, and indeed the underlying objections to the whole theory, seem fully applicable.

### *The Rule against Vagueness*

A third issue of due process arises out of the vagueness and uncertainties of the terms used in the loyalty regulations. The extreme ambiguity of the basic criterion of "disloyalty," as well as the secondary standards of "totalitarian," "communist," "fascist" and "subversive," has already been made clear.<sup>348</sup>

The rule against vagueness invalidates a statute which is "so vague that men of common intelligence must necessarily guess at its meaning."<sup>349</sup> The rule has received particular application in cases involving infringement upon civil and political rights.<sup>350</sup> For in that area it is of special significance that men be not restrained through uncertainty of what is prohibited.

The loyalty program seems highly vulnerable to constitutional at-

347. Gellhorn, *supra* note 339, at 1217-8. Thus, the fact that a Justice of the Supreme Court and William Z. Foster (head of the American Communist Party) were at the same time officers in the American Civil Liberties Union might serve as the basis for a judgment that both the Justice and the Union were biased in favor of communist ideology. See BUNTING, LIBERTY AND LEARNING 109 (1942).

348. *Supra* pp. 36-42.

349. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The rule has been applied mainly in criminal cases but it is applicable in civil cases as well. *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925).

350. *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Herndon v. Lowry*, 301 U.S. 242, 259 (1937); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940); *State v. Klapprott*, 127 N.J.L. 395 (1941); *Winters v. New York*, 68 S. Ct. 665 (1948). See concurring opinion in *United States v. Congress of Industrial Organizations*, 68 S. Ct. 1349, 1367-74 (1948). *But cf.* *United States v. Petrillo*, 332 U.S. 1 (1947). Justice Black, in his dissent in the *Mitchell* case, urged that the legislation there was "too broad, ambiguous, and uncertain in its consequences to be made the basis of removing deserving employees from their jobs." *United Public Workers v. Mitchell*, 330 U.S. 75, 110 (1947).

tack on these grounds. A Federal employee must necessarily speculate as to the meaning of the controlling regulations. Hence the safest course of action for him is to avoid any activity which might subject him to the penalties of infringement. As the Court said in the *Thomas* case, the existence of the regulation permits "no security for free discussion. In these conditions it blankets with uncertainty whatever may be said."<sup>351</sup>

The vagueness of the standards gives to the administrators of the loyalty program the opportunity to probe the minds and sift the associations of government employees with little guide other than their own notions of what is "disloyal" or "subversive." The meaning of the words can shift with the winds of doctrine or the storms of increasing tension. All the dangers that underlie sweeping and amorphous restrictions upon sensitive areas of civil liberties are present here. It is difficult to believe that the Supreme Court will not require a considerably greater degree of clarity and precision as a condition of constitutional sanction.

### VIII. PROCEDURE

Anglo-American jurisprudence has always taken special pride in its procedures. The great procedural principles underlying our judicial system—a full hearing upon an open record, the right to representation by counsel, the right of cross-examination, and numerous others—have been sympathetically developed and sternly administered by our courts. The judiciary has shown equal concern over the procedures employed by executive officers in the performance of their administrative functions. Indeed as modern administration has become increasingly complex the courts have tended to accept as their chief function in the process, not the substitution of judicial for administrative judgment on issues of substance, but rather the maintenance of strict adherence to procedural safeguards.

The development of fair procedures in the administration of a loyalty program is no less important than in other fields of government. The interests at stake—that of the individual or organization in a just adjudication, of the government in the maintenance of high morale and effective operation, of the general public in the preservation of free political expression—are such as require the most careful examination of procedural methods.

Two closely related problems arise. One involves the procedural rights of individual employees and applicants; the other the rights of organizations designated by the Attorney General as subversive. The basic policy considerations are much the same for both. Since the legal

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351. 323 U.S. 516, 535 (1945).

issues arise in somewhat different form, however, the two problems will be treated separately.

### *Procedural Rights of Individuals*

We start with a fundamental inquiry, the answer to which will largely determine subsidiary issues of procedural detail. Is a proceeding in which the government undertakes to disqualify an employee from government service on grounds of disloyalty one to which the basic procedural safeguards developed over the years are applicable? Is it a proceeding comparable to a criminal proceeding or to those types of administrative proceedings in which the legislature and courts have in the past imposed significant procedural limitations? Or is it, on the other hand, merely an internal management problem of government, to be determined by summary methods?

Sponsors of the current loyalty program take a clear stand that the government is under no legal obligation to follow time-honored procedures. "Public employment," they argue, "is a privilege, not a right" and hence there is no obligation to extend "any hearing whatsoever." The procedural safeguards actually provided by the Loyalty Order they consider solely a matter of governmental grace.<sup>352</sup>

This position seems erroneous. The adjudication of loyalty cases is comparable, if not strictly to a criminal proceeding, at least to the kind of administrative action where both legislatures and courts have insisted upon stringent procedural protections. The reasons for this have in large part already been given. The proceeding is akin to a determination of treason. It entails grave and lasting consequences.<sup>353</sup> It would be anomalous to require less exacting standards of procedure under these circumstances than have always been applicable in such proceedings as rate making, administrative imposition of cease and desist orders, or deportation.

As a matter of fact the *Lovett* case constitutes a decisive ruling of the Supreme Court upon this very issue. In that case the legislature made a determination that three employees had engaged in "subversive activities" and undertook to bar them from Federal employment. The Court, after pointing to the impact of this law upon the individuals, ruled that such action was a bill of attainder in that it "clearly accomplishes the punishment of named individuals without a judicial trial." The fatal defect was that the procedure employed had denied the right to "certain tested safeguards":

"An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charges against him, the law which he is charged with violating

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352. *Supra* pp. 79-80.

353. *Supra* pp. 81-2.

must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him.”<sup>354</sup>

The Court thus held that an adjudication of disloyalty, resulting in disqualification for government employment, is legally equivalent to punishment for crime. A proceeding leading to this result, in the Court's view, is one that requires the strictest kind of procedural safeguards. The fact that under the loyalty program the proceeding is conducted by an administrative rather than a legislative or judicial agency plainly does not alter this conclusion.

The main current of recent decisions fully supports this view of what a loyalty proceeding should be. Thus in *Bridges v. Wixon* the Court took the same approach on a comparable issue in a deportation case. In language that is equally applicable to a loyalty matter the Court insisted upon the most rigid standards of fair hearing:

“Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.”<sup>355</sup>

And again in the *Schneiderman* case the government's contention that Schneiderman had illegally procured United States citizenship, not being “attached to the principles of the Constitution,” was rejected on the ground that denaturalization was such a serious penalty it should not be undertaken “without the clearest sort of justification and proof.”<sup>356</sup>

The Japanese exclusion cases stand in sharp contrast to the *Lovett*, *Bridges* and *Schneiderman* cases. Here a presumption of disloyalty against an entire race was accepted by the Court, and no procedural safeguards were afforded or required. The military program included at first a discriminatory curfew against all Japanese, and later their ex-

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354. 328 U.S. 303, 317-18 (1946). Cf. *Cummings v. Missouri*, 4 Wall. 277 (1866); *Ex Parte Garland*, 4 Wall. 333 (1866).

355. 326 U.S. 135, 154 (1945); cf. *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

356. *Schneiderman v. U.S.*, 320 U.S. 118, 122 (1943). For other cases, not in the loyalty field, in which the court has insisted upon rigid procedural protection by administrative agencies where important property rights were at stake, see e.g. *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945); *Stark v. Wickard*, 321 U.S. 288 (1944); *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942); *Walker v. Popenoe*, 149 F.2d 511 (D.C. Cir. 1945). See also *Morgan v. United States*, 298 U.S. 468 (1936); *Morgan v. United States*, 304 U.S. 1 (1938).

clusion from the West Coast, their confinement pending investigations of "loyalty," and the indefinite incarceration of those found to be "disloyal."<sup>357</sup> In passing favorably on this program the Court necessarily ratified the complete denial of procedural due process involved. The cases are to be explained by the exigencies of a threatening war situation. Even so it would seem that the arbitrary treatment of Japanese-Americans countenanced by the Court is highly aberrational and outside the main stream of American judicial tradition.<sup>358</sup>

The courts have likewise sanctioned the use of summary procedure, and even the complete absence of procedure, in the case of government employees discharged for incompetence or other reasons not involving disloyalty. Thus under the Lloyd-La Follette Act of 1912 Federal employees in the classified civil service may be removed provided only they are served with written notice of the charges and given an opportunity to answer in writing.<sup>359</sup> This procedure has been accepted by the courts without question.<sup>360</sup> Sound reasons of personnel administration dictate a wide measure of executive discretion, both as to procedure and substance, where normal issues of government tenure are involved. For the reasons already stated, however, disqualification on loyalty grounds raises a different kind of problem. This was fully recognized in the *Lovett* case.

It is true that in *Friedman v. Schwellenbach* the Court of Appeals for

357. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); cf. *Ex Parte Mitsuye Endo*, 323 U.S. 283 (1944). These cases were followed in *Von Knorr v. Miles*, 60 F. Supp. 962 (D. Mass. 1945), *aff'd on other grounds*, 156 F.2d 287 (1st Cir. 1946), in which the court upheld the right of the War Department to exclude the employee of a war contractor from a war plant, on grounds that the employee was subversive, without prior notice or hearing. *But cf. Scherzberg v. Maderia*, 57 F. Supp. 42 (E. D. Pa. 1944); *Ebel v. Drum*, 52 F. Supp. 189 (D. Mass. 1943); *Schueller v. Drum*, 51 F. Supp. 383 (E. D. Pa. 1943).

358. ". . . [I]t is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, . . . I need hardly labor the conclusion that Constitutional rights have been violated." Roberts, J., dissenting, *Korematsu v. United States*, 323 U.S. 214, 226 (1944). For a critical study of the Japanese exclusion cases see Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L. J. 489 (1945).

359. 37 STAT. 555 (1912), 5 U.S.C. § 652 (1946).

360. *Eberlein v. U.S.*, 257 U.S. 82 (1921); *Borak v. Biddle*, 141 F.2d 278 (D.C. Cir. 1944), *cert. denied*, 323 U.S. 738 (1944); *Levine v. Farley*, 107 F.2d 186 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 622 (1940). Prior to the Lloyd-LaFollette Act the courts had ruled that where an employee was discharged for reasons set forth in a statute, notice and hearing were necessary, but that a discharge on non-statutory grounds did not require notice or hearing. *Shurtleff v. United States*, 189 U.S. 311 (1903); *Reagan v. United States*, 182 U.S. 419 (1901). See Note, *Constitutional Limitations on Political Discrimination in Public Employment*, 60 HARV. L. REV. 779, 784-5 (1947). It is apparent from the cases under the Lloyd-LaFollette Act, however, that the "notice and hearing" required could be summary in character. With respect to judicial review see *infra* p. 110-14.

the District of Columbia approved the use of the Lloyd-La Follette procedure in a loyalty case.<sup>361</sup> That decision, however, is hardly conclusive. The basic procedural issue, centering around the lack of a full hearing, was raised only incidentally in Friedman's reply brief. Under the circumstances the Supreme Court's denial of certiorari would appear to leave the matter still unresolved.<sup>362</sup>

If we turn from judicial decision to legislative policy we find, again with occasional lapses, the same scrupulous concern for the procedural rights of persons importantly affected by government action. Almost every significant piece of legislation enacted in recent years delegating either rulemaking or adjudicatory power to administrative agencies has included elaborate provisions affording full procedural protection to persons affected.<sup>363</sup> Recently in the Administrative Procedure Act Congress consolidated and amplified these provisions, establishing in effect a code of minimum procedural requirements.<sup>364</sup> This code, so far as it affects adjudicatory proceedings, imposes strict standards for a full and fair hearing and decision.<sup>365</sup> It is true that the Administrative

361. 159 F.2d 22 (D.C. Cir. 1946). See *supra* pp. 46-7. See also *Galardi v. Hague*, 15 U.S. L. WEEK 2469 (U.S., D. Mass. Feb. 25, 1947), mentioned in Wyzanski, *The Open Window and the Open Door*, 35 CALIF. L. REV. 336, 339 (1947).

362. 330 U.S. 838 (1947), *reh'g denied*, 331 U.S. 865 (1947), Justices Black and Douglas dissenting. The denial of certiorari may have been due in part to the fact that Friedman held only a probationary war position, subject to the results of the Civil Service Commission's loyalty investigation. He was thus in the position of an applicant rather than an employee. Although in our view an applicant should be accorded the same procedural rights as an employee it must be recognized that the constitutional issue is not as clear in such a case.

Some courts have laid down minimal procedural practices which must be followed prior to expelling members from beneficial associations. In a recent case plaintiffs were expelled from their union without a hearing. The court ordered them reinstated. "It has been settled by a long line of decisions that, whether or not the by-laws of an association provide for it, a member is entitled to know the charges against him in an expulsion proceeding, to an opportunity to be heard, and to a fair trial. . . . The proceeding need not take on the formalities of a court proceeding, but it must satisfy these elementary requirements of any judicial proceeding. The importance of such procedure is manifest where, as here, employment is dependent upon membership and the power to expel is the power to deprive men of their livelihood." *Glauber v. Patof*, 47 N. Y. S.2d 762, 763-4, 183 Misc. 400, 402 (1944); *aff'd* 54 N. Y. S. 2d 384, 269 App. Div. 687 (1945); *reversed only with regard to the damages awarded*, 294 N.Y. 583, 63 N. E.2d 181 (1945). See cases collected in Note, *Procedural "Due Process" in Union Disciplinary Proceedings*, 57 YALE L. J. 1302, 1312 n. 34 (1948). In other instances courts have reacted to cases of denial of due process in union expulsion proceedings with doctrinal propositions denying jurisdiction. *Id.* at 1307-11. Cf. *Raynovic v. Vrlnic*, 334 Pa. 529, 6 A.2d 288 (1939); *Kramer v. Slovenian Ladies Soc.*, 14 Cal. App.2d 384, 58 P.2d 176 (1936).

363. Perhaps the outstanding exception is the provision of the Second War Powers Act under which wartime allocation and rationing was conducted. 56 STAT. 176 (1942), 50 U.S.C. § 633 (1946). Even here, however, the agencies administering the power established careful safeguards. See *e.g.*, *L.P. Steuart & Bro. v. Bowles*, 322 U.S. 398 (1944).

364. 60 STAT. 237, 5 U.S.C. § 1001 (1946).

365. 60 STAT. 241, 242, 5 U.S.C. §§ 1006, 1007 (1946).

Procedure Act exempts from these provisions proceedings involving the "selection or tenure of an officer or employee of the United States." But this was directed at the normal conduct of government hiring, discipline and discharge; there is nothing to indicate that Congress had in mind the loyalty problem.<sup>366</sup> Considerations already stated, as well as those developed subsequently, disclose no reason why these minimum procedural safeguards are not as fully applicable in loyalty proceedings as in the proceedings involving property and personal rights so carefully protected by that legislation.

It may be concluded, therefore, that the adjudication of employee loyalty falls within that category of proceedings which by tradition, constitutional precept and legislative policy have been surrounded with procedural requirements characteristic of the more formal kind of administrative proceedings. It is noteworthy that there has been almost universal condemnation of the current loyalty program for its failure to accept this principle.<sup>367</sup>

In what respects, then, does the Loyalty Order fall short of meeting traditional requirements? Are there sufficient reasons for relaxing any of these restrictions in the case of loyalty proceedings?

It should be observed that the procedures established by the Loyalty Order are, in some respects, an improvement over the loyalty practices prevailing before 1947. Prior to the Order, as just noted, a Federal employee in the classified civil service could be removed on loyalty grounds subject only to the limitations imposed upon dismissal for routine administrative reasons. The various agencies differed in the actual administration of these provisions. And employees not in the classified civil service possessed no procedural rights whatever.<sup>368</sup>

The Loyalty Order, in contrast, sets up a uniform procedure, under

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366. The explanation for the exemption offered by the Senate Judiciary Committee bears this out: ". . . because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing." ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY, SEN. DOC. NO. 248, 79th Cong., 2d Sess. 22 (1946). See also *id.* at 202, 261.

In the Rees bill (*supra* p. 20) the House did not adhere to the usual Congressional insistence upon strict procedural protection. This action, as in the legislation involving Lovett, should perhaps be classified as aberrational.

367. See, e.g., Board of Directors, American Civil Liberties Union, *Statement on Loyalty Tests for Federal Employment*, April 7, 1947 (mimeographed); letter from Dean Griswold and Professors Chafee, Katz and Scott of the Harvard Law School, N. Y. Times, Apr. 13, 1947, § 4, p. 8, col. 5; letter from 33 citizens to Seth Richardson, N. Y. Times, Jan. 12, 1948, p. 10, col. 3; Schlesinger, Jr., *What is Loyalty? A Difficult Question*, N. Y. Times Nov. 2, 1947, § 6, p. 7; Miller and Brown, *Loyalty Procedures of the A.E.C.*, 4 BULL. OF THE ATOMIC SCIENTISTS 45 (1948); Kaplan, *Loyalty Review of Federal Employees*, 23 N. Y. U. L. Q. REV. 437 (1948).

368. Except possibly in rare instances where statutory causes for removal existed. See *supra* note 360.



the supervision of the Loyalty Review Board, and provides for the right to counsel, a limited hearing, the calling of witnesses in the employee's behalf, a transcript of the hearing, and an appeal to the agency head and to the Loyalty Review Board.<sup>369</sup> Despite these safeguards, the Order conflicts at major points with traditional principles of procedural fairness. The most significant defects are:

(1) The failure to provide for complete notice of the charges and for full disclosure of the evidence upon which the decision is reached, these deficiencies resulting in denial of the traditional rights of rebuttal, confrontation and cross-examination.

(2) The failure to provide for judicial review.

The "sensitive agencies" are authorized to dismiss "security risks" without charges, hearing or any other kind of procedure. In practise, most of these agencies seem to follow procedures similar to those required by the Loyalty Order.<sup>370</sup>

*Failure to Reveal the Charges or Disclose the Evidence.* The loyalty Order provides that an employee accused of disloyalty shall be informed of the charges in writing, but the charges need only be "stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit."<sup>371</sup> There is no provision in the Order requiring disclosure of the evidence upon which the government relies, or for the presentation of the government's case through the sworn testimony of witnesses in open hearing, or for cross-examination of witnesses. On the contrary the procedure established under the Order contemplates that the government's case against the employee will consist largely or wholly of the FBI report.<sup>372</sup> This report need not include, and in practice does not normally include, the names of the persons from whom information was obtained or other

369. The procedural provisions of the Order are summarized *supra* at pp. 31-2.

370. State Department Regulations, N. Y. Times, Oct. 8, 1947, p. 8, col. 4; Transcript of hearing in case of M——, before Brooklyn Navy Yard Loyalty Board, February 1948; *AEC Interim Procedure for Local Security Boards*, 4 BULL. OF THE ATOMIC SCIENTISTS 198 (1948). Apparently the Army at times does not even have a hearing. See AMERICAN CIVIL LIBERTIES UNION, OUR UNCERTAIN LIBERTIES 24 (1948).

371. Exec. Order No. 9835, Pt. II, § 2b, 12 FED. REG. 1937 (1947).

372. Richardson, *Aims and Procedures of Loyalty Review Board*, N. Y. Times, Dec. 28, 1947, p. 28, col. 4. Recently the Loyalty Review Board promulgated the following changes in procedure:

" . . . the Agency or Regional Loyalty Board is authorized, in its discretion, to invite any person not a confidential informant to appear before the Board and testify. . . .

" . . . any non-confidential witness called to testify may be interrogated as to whether such witness has theretofore been interviewed by the Federal Bureau of Investigation and, if so, as to what statements such witness may have made to the Federal Bureau of Investigation." Memorandum No. 27, Loyalty Review Board, Nov. 2, 1948 (Mimeographed).

It should be noted that Agency Boards are permitted to apply these rules at their discretion, that Agency Boards do not have the power of compulsory process, and finally, that it is the FBI which classifies an informant as "confidential" or "non-confidential." Compare notes 265, 375, 379, 388, 389.

disclosure of sources.<sup>373</sup> The report is not made accessible to the employee.<sup>374</sup> This failure to disclose the Government's evidence, according to the frank statement of the Chairman of the Loyalty Review Board, will occur "in the great majority of the cases."<sup>375</sup>

Faced with the task of defending himself under such circumstances the accused is confronted with almost unsurmountable obstacles. He is rarely able to form a clear impression of the nature of the case which the FBI report makes out against him. It is quite conceivable that he may prepare his entire defense on an erroneous inference. It is possible that he may not be able to formulate any defensive position whatever. His only defense may have to be an affirmative statement of loyalty, buttressed by as many statements of his good character as he can obtain. It is impossible for him to know when he has sustained a burden of proof sufficient to result in a determination of loyalty. The employee's opportunity to defend his reputation may thus be hopeless. He finds that he is taking part in an insane grotesque of the trial process.

Bert Andrews in his *Washington Witch Hunt* has furnished a dramatic illustration of what this procedure means in practice. Andrews succeeded in gaining access to the secret transcript of a "hearing" given to "Mr. Blank," a State Department employee dismissed on loyalty grounds. Attempting to establish his loyalty the employee was bedeviled by the fact that he never heard any of the evidence against him. Accused of being a "poor security risk," he professed his loyalty and requested repeatedly that specific charges be made so that he could defend himself. The best reply he received to this request was:

"Well, we realize the difficulty you are in, in this position; on the other hand, I'd suggest that you might think back over your own career and perhaps in your own mind delve into some of the factors that have gone into your career which you think might have been subject to question, and see what they are and see whether you'd like to explain or make any statement with regard

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373. *Ibid.*; Exec. Order No. 9835, Pt. IV, §2, 12 FED. REG. 1938 (1947). See *infra* note 396.

374. Richardson, *Aims and Procedures of Loyalty Review Board*, N. Y. Times, Dec. 28, 1947, p. 28, col. 4.

375. *Ibid.* The procedure under State Department regulations is similar: "Evidence on behalf of the Department of State shall be presented to said [loyalty] board by CON [office of controls] in advance of said hearing, and shall not be presented at said hearing. For security reasons the officer or employe, his representative or counsel, cannot be permitted to hear or examine such evidence, which shall be classified as confidential or secret. . . ." N. Y. Times, Oct. 8, 1947, p. 8, col. 7.

With respect to charges of membership in, affiliation with, or sympathetic association with organizations designated by the Attorney General under subsection f of the Loyalty Order, the employee is not only without any information as to the basis of the Attorney General's action, but he is not permitted to introduce any evidence contradicting the Attorney General's designation. See *infra* note 430.

to any of them—that is about the best I can do as far as helping you along that line.”<sup>376</sup>

As a matter of fact the agency loyalty board, as well as the Loyalty Review Board on appeal, find themselves in an almost equally untenable position. Again the chief source of difficulty is the report of the FBI. In attempting to evaluate the Government's evidence of disloyalty the Board discovers that informers are referred to by symbols, T-1, T-2, etc.; that the use of such symbols and the indiscriminate scrambling together of casual and careful remarks make the report difficult to interpret; and that a report will rarely show a clear case of guilt. The problem of reaching a sound conclusion under these conditions was pointed out by Attorney General Biddle's Inter-departmental Committee early in the development of the loyalty program:

“[T]he Bureau's reports generally designated informants by symbols only. Moreover, in using such reports, the credibility of informants could ordinarily be appraised only by noting position held, relation to the subject, opportunities for observing, the nature of the information supplied, and any further clues as to credibility which the report itself might contain. In no circumstances did the report indicate conclusions or make recommendations. While a report might be so consistently negative as to point clearly to exoneration by the employing department or agency, it was rarely so consistently or clearly positive as to create more than a prima facie case for dismissal.”<sup>377</sup>

The Loyalty Order does provide that the FBI must furnish the agency board “sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them.”<sup>378</sup> And the Director of FBI has stated that “a representative of the FBI will be available to confer with other government officials or a Loyalty Hearing Board and evaluate the source of the information by describing the degree of reliability.”<sup>379</sup> A procedure by which the investigat-

376. ANDREWS, WASHINGTON WITCH HUNT 30 (1948). Another reply to the employee's request for specific charges: “. . . [T]he only way I can suggest helping you is that you just go ahead and spill your feelings about all the things that you might think might have been involved.” *Id.* at 31. Andrews' story of “Mr. Blank” was originally published in N. Y. Herald Tribune, Nov. 2, 1947, p. 36, col. 4.

Compare this procedure with English criminal trial practice early in the 17th century. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 349-50 (1883).

The State Department Regulations, issued subsequent to the “Blank” case, authorized a statement of the charges but continued the policy of not revealing the government's evidence. See *supra*, note 375.

377. Report to Attorney General Biddle from the Interdepartmental Committee on Investigations, in H.R. Doc. No. 833, 77th Cong., 2d Sess. 23 (1942).

378. Exec. Order No. 9835, Pt. IV, § 2, 12 FED. REG. 1938 (1947).

379. Mimeographed Statement of J. Edgar Hoover, Nov. 17, 1947, p. 2.

ing or prosecuting officers confer *ex parte* with adjudicating officers regarding the credibility of witness is, to say the least, an unusual one. In practical effect it transfers the judge's mantle from the loyalty board to the FBI.<sup>380</sup>

The courts have never tolerated the failure to produce in open hearing any part of the evidence upon which the deciding official relies in an administrative adjudication requiring a fair hearing. In a rate adjudication early in the history of the Interstate Commerce Commission, the Supreme Court summarily rejected such a proposition:

"The Government further insists that the Commerce Act (36 Stat. 743) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of § 12 may be used as basis for instituting prosecutions for violation of the law, and for many other

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380. See, *e.g.*, examination of an accused employee in a loyalty hearing:

"Bd. Did you ever act as an organizer for the Communist Party or attempt to recruit others?

G. No. . . .

Bd. [That you have] has been corroborated, checked, and verified.

Atty. for G. By whom?

Bd. I can't tell you.

Atty. for G. . . . When you say that it has been verified and corroborated, it is by some source other than the material that the Loyalty Board has available even to it?

Bd. That is right.

Atty. for G. The Loyalty Board is supposed to pass on this man's loyalty on the basis of evidence that it does not even have before it?

Bd. . . . We don't even know who the accuser is."

Transcript of hearing in the case of G. . . . , before Brooklyn Navy Yard Loyalty Board, December, 1947.

Perhaps the best known trial on undisclosed evidence is the Dreyfus case. Dreyfus was tried *in camera*, secret documents were utilized as basis for judgment without affording the accused an opportunity to scrutinize them, and the reported statement of an informer was admitted as evidence despite the fact that the prosecution refused to name its source of information. Throughout the proceedings military intelligence exercised a continuing pressure on the judges. Dreyfus was convicted twice of treason. He was later vindicated after it had been made clear that the secret documents were either forgeries or not probative evidence, that the informer was non-existent, and that in fact another officer had committed the treasonable act for which Dreyfus had been convicted. Dreyfus had been the victim of a conspiracy of high military officers which probably would have failed if there had been adherence to normal procedural safeguards. *KAYSER, THE DREYFUS AFFAIR* (1931).

purposes, but is not available, as such, in cases where the party is entitled to a hearing. . . . In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding. . . ." <sup>331</sup>

The principle has been consistently reiterated, both in criminal cases<sup>332</sup> and in cases of administrative adjudication.<sup>333</sup> Such exceptions as have been permitted—in cases of inspections, official notice, or rule-making—have no application to loyalty adjudications.<sup>334</sup> The Administrative Procedure Act codifies for federal agencies the established law.<sup>335</sup> If we are correct that a determination of disloyalty requires a fair administrative hearing, the failure to disclose the evidence is a gross and fatal defect.

No less fatal to the fairness of the procedure under the Loyalty Order is denial of the right to cross-examination. Reliance upon the FBI report as the basis of the Government's case of course precludes any possibility of cross-examination.<sup>336</sup> The result, once again, is to frustrate the accused in making a satisfactory defense and to thwart the deciding officials in reaching a satisfactory judgment. It is difficult to conceive of a situation where the right of cross-examination is more essential.

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381. *I.C.C. v. Louisville & Nashville R.R.*, 227 U.S. 88, 93 (1913). Similarly the California Supreme Court rejected a like proposal in an early workmen's compensation case: "The suggestion that the succeeding passage [of the statute] gives power to the commission to take evidence secretly, without notice to either party, and to consider it without even giving the parties an opportunity to read the report of it, or to meet it in any reasonable way, is contrary to all principles of justice and fairness. It cannot be entertained for a moment. Even if the language were capable to such an interpretation, it would be a clear violation of the right to due process of law to follow it. . . . But we do not think the section, when given a reasonable interpretation, authorizes such star-chamber proceedings." *Carstens v. Pillsbury*, 172 Cal. 572, 577-8, 158 Pac. 218, 220 (1916).

382. *E.g.*, in *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937): "Conviction upon a charge not made would be sheer denial of due process."

383. *United States v. Abilene & Southern Ry.*, 265 U.S. 274 (1924); *Ohio Bell Telephone Co. v. Public Utilities Comm'n.*, 301 U.S. 292 (1937); *Morgan v. United States*, 304 U.S. 1 (1938); *Chew Hoy Quong v. White*, 249 Fed. 869 (9th Cir. 1918); *Colyer v. Skeffington*, 265 Fed. 17 (D. Mass. 1920). The cases are collected in GELLHORN, *ADMINISTRATIVE LAW*, 512-601 (2d ed. 1947). See also Davis, *The Requirement of Opportunity to be Heard in the Administrative Process*, 51 *YALE L.J.* 1093 (1942).

384. For cases involving inspections and official notice, see GELLHORN, *op. cit. supra* note 383 at 236-44, 553-601. For a unique case involving rule making see *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933).

385. 60 *STAT.* 237, 5 *U.S.C.* § 1001 (1946).

386. Richardson, *Aims and Procedures of Loyalty Review Board*, *N.Y. Times*, Dec. 28, 1947, p. 28, col. 4.

Mere perusal of the FBI report affords little opportunity for evaluating the competence or credibility of informants or judging the reliability of interviewing methods. Clearly the manner of questioning used by the FBI agent may be extremely suggestive and may influence the informant to make statements which he would not make on reflection.<sup>387</sup> Such a result is even more likely where the informant has been promised that his identity will be kept secret and that he will not be required to appear before the agency loyalty board.<sup>388</sup> Moreover, the report which reaches the board does not contain the questions asked, but rather consists of selected answers synthesized so as to make up a running narrative. The possibility of distortion is thus plain. An additional difficulty—one of semantics—is present to a high degree in loyalty matters. There is no way of telling whether investigator and informant understand each other when they use words like "loyalty" and "subversive." Yet on such evidence the board must decide the issue of loyalty.

Under these conditions the policy basis for confrontation and cross-examination becomes manifest. Perhaps the witness is a complete fabricator. Perhaps his imagination has been inflamed by politically lurid accounts in the newspapers of mass subversive infiltration into the Government service. Perhaps he has only given a partial account of an incident. His statements may be hearsay, biased, distorted. All these factors can be brought out through the cross-examination process. It provides an opportunity essential for refutation or confirmation of the Government's case.<sup>389</sup>

In all comparable adversary proceedings cross-examination is considered a necessary element. In administrative hearings conducted by such agencies as the National Labor Relations Board and the Federal Trade Commission the right to cross-examine is not questioned.<sup>390</sup>

387. See WIGMORE, *THE PRINCIPLES OF JUDICIAL PROOF* § 214 (2d ed. 1931).

388. *Id.* at § 213.

A recent case before a U.S. Department of Labor Loyalty Board, in which an accused employee was permitted to confront and cross-examine a government witness, (see *supra* note 372), bears this point out ". . . one of the charges against the employee was that he was a regular reader of the *Daily Worker*, Communist newspaper. The Government presented as its informant in this matter the janitor in the apartment house in which the defendant had lived.

"The janitor is a naturalized citizen of German origin, whose sympathies were alleged to have been pro-Nazi before the U.S. entered the war. The defendant is a Jew. The story the janitor told the FBI appears to have differed radically from the story he was willing to testify to under oath.

"Under oath, the janitor would not testify that the accused was a regular reader of the *Daily Worker*, but limited himself to stating that he had found the newspaper in the accused's garbage pail 'once or twice' in the course of two years." *N.Y. Star*, Oct. 29, 1948, p. 4, col. 4.

389. For a full statement of the case for cross-examination see 5 WIGMORE, *EVIDENCE* § 1368 (3d ed. 1940).

390. *Segal Lock & Hardware Co. v. F.T.C.*, 143 F.2d 935 (2d Cir. 1944), *cert. denied*, 323 U.S. 791 (1945).

Even in rate making proceedings, where the use of statistical data makes cross-examination less significant, the right has been carefully preserved.<sup>391</sup> Exceptions to the general principle, such as in cases of official notice or the use of official records,<sup>392</sup> reliance upon written data in rule making proceedings,<sup>393</sup> and acceptance of hearsay,<sup>394</sup> have never gone to the point of sanctioning the complete absence of cross-examination in adversary proceedings. Here also legislative policy supports judicial policy. The Administrative Procedure Act expressly guarantees in cases of adjudication the right "to conduct such cross-examination as may be required for a full and true disclosure of the facts."<sup>395</sup>

The Chairman of the Loyalty Review Board has acknowledged that objections based upon the failure to disclose evidence and the denial of cross-examination have "obvious force" and present "grave considerations." And he has entered the following plea of confession and avoidance:

"In nearly all cases the bureau [FBI] secures the facts for inclusion in its reports from confidential sources, many of them closely connected with considerations sounding in national security. We are advised by the bureau, that, in its experienced opinion, practically none of the evidential sources available will continue to be available to the bureau if proper secrecy and confidence cannot at all times be maintained with respect to the original source of information, and that if the source of such information is to be disclosed—save in the exceptional cases—the bureau can be of much less service to the board in making the essential basic investigation."

"We have given the matter the most careful consideration, and we can see no way in which the loyalty program may have the benefit of the skilled investigation of any competent investigative agency, and particularly of the Federal Bureau of Investigation, unless the facts received in confidence by the investigators can be kept entirely confidential at all times and under all conditions.

"We were, therefore, faced with the decision whether to refuse at all times to disclose the Bureau report to the employee—save in the exceptional cases noted above—or to advise the Civil Service

391. Cases cited *supra* note 383; *Powhatan Mining Co. v. Ickes*, 118 F.2d 105 (6th Cir. 1941). The cases are collected in GELLHORN, *op. cit. supra* note 383, at 512-626.

392. *Market Street Ry. v. Railroad Commission of California*, 324 U.S. 548 (1945); *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946).

393. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933); *Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division*, 312 U.S. 126 (1941); *Yakus v. United States*, 321 U.S. 414 (1944).

394. *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197 (1938); *N.L.R.B. v. Remington Rand, Inc.*, 94 F.2d 862 (2d Cir. 1938), *cert. denied*, 304 U.S. 576, 585 (1938).

395. 60 STAT. 241, 5 U.S.C. § 1006 (c) (1946).

Commission that, in our opinion, the proposed loyalty program as planned should not be permitted to function.

"After the most careful consideration, we have concluded that the objection to non-confrontation and no cross-examination, while important, is not essentially controlling."<sup>396</sup>

One finds it difficult to accept this position or reconcile it with accepted standards of fairness in the administration of law. Public prosecutors and police officials have often advanced the same argument as a reason for dispensing with traditional safeguards. Thus they have urged that convictions in vice and narcotic cases are difficult to obtain because of the rules of evidence. Without calling informers to take the stand, it is argued, conviction is frequently impossible for want of evidence; but if informers are used as witnesses the defendant impeaches their character before the jury.<sup>397</sup> Yet this dilemma of the prosecution has never been accepted as justification for relaxing evidentiary safeguards. And prosecuting officials, forced to accede, have found a solution in using the informer for leads to other evidence that is less vulnerable in open court.

The same argument has also been urged in behalf of third degree methods for procuring evidence.<sup>398</sup> But the courts have never been willing to countenance confessions extracted by duress, regardless of the advantage that laxity in such regard would afford in securing convictions.<sup>399</sup> And recently the Supreme Court in the *McNabb* case sought to give further and more adequate protection against such methods by ruling that admissions or confessions obtained while a defendant was being held incommunicado, contrary to statutory provisions for prompt arraignment, were not admissible in evidence.<sup>400</sup> Despite the anguished outcries of prosecuting officials, Congress failed to change this rule and it was incorporated into the new Rules of the Federal Criminal Procedure.<sup>401</sup>

The difficulties confronting the FBI do not seem more insuperable, nor the reasons for preserving adequate safeguards less cogent, in loyalty cases than in the usual criminal proceeding. So far as concerns

396. Richardson, *Aims and Procedures of Loyalty Review Board*, N.Y. Times, Dec. 28, 1947, p. 28, cols. 4 and 5. For the F.B.I. defense of the practice see testimony of J. Edgar Hoover before House Appropriations Committee, Hearings on Department of Justice Appropriation Bill, 80th Cong., 2d Sess. 245-7 (1947).

397. For a typical statement of the police viewpoint, see VOLLMER, *THE POLICE AND MODERN SOCIETY* 87, 110-1 (1936).

398. See Warner, *How Can the Third Degree Be Eliminated?*, 1 BILL OF RIGHTS REV. 24 (1940).

399. See, e.g., *Chambers v. Florida*, 309 U.S. 227 (1940); *Haley v. Ohio*, 68 S. Ct. 302 (1948).

400. *McNabb v. United States*, 318 U.S. 332 (1943); *Anderson v. United States*, 318 U.S. 350 (1943).

401. See Dession, *The New Federal Rules of Criminal Procedure*, 55 YALE L. J. 694, 706-13 (1946).



the information obtained by the FBI from the average citizen, that agency would still be free to collect all the data it could from housewives, landladies, neighbors and acquaintances of the employee under investigation. This information could be used as leads to further inquiry. But where the Government seeks to rely upon it to prove a serious charge of disloyalty it does not seem unreasonable to require that the evidence be brought into the light of day and put to the test of rebuttal and cross-examination. It hardly seems too much to ask that an investigating agency of the FBI's reputed competence take on such additional burden as these standards of fairness demand.

With respect to investigations aimed at discovery of more sinister activity, involving the use of professional informers or the surveillance of an under-cover conspiracy, the problem is no different from that facing any police official. A judgment must be made as to when to draw the net and "break the case." In such a situation the very filing of charges against a particular employee would serve to warn his confederates. The withholding of evidence might protect confidential sources of information for a longer period but the preservation of traditional American rights must be taken into consideration more than the convenience of the FBI. The record of the FBI in preventing espionage and sabotage during the recent war, despite adherence to evidentiary safeguards, demonstrates that the problem can be solved without shocking departures from conventional methods.

The Supreme Court has recently taken occasion to reiterate that enforcement officials must mould their methods to the requirements of due process. In the case of *In re Oliver* the defendant had been convicted of contempt by a Michigan one man judge-grand jury. On appeal the prosecution attempted to justify an incomplete record of the contempt proceeding upon the ground that full disclosure of all the evidence would seriously hamper the investigative activities of the grand jury. The Court rejected such a rationale of expedience as a violation of due process. Justice Black defined the minimal rights of the accused in language fully applicable to loyalty proceedings:

"We . . . hold that failure to afford the petitioner reasonable opportunity to defend himself . . . was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."<sup>402</sup>

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402. *In re Oliver*, 68 S. Ct. 499, 507-8 (1948).

Of course various intermediate procedures, midway between full disclosure and the present practice, are possible. Miller and Brown have suggested that the agency loyalty board be given full access to all the evidence, secret or otherwise, and that where evidence is withheld from the employee, the board should appoint a supplementary defense counsel

*Judicial Review.* Does an employee discharged from government employment on loyalty grounds have a legal right to judicial review? Should judicial review be afforded as a matter of sound government policy? If review is made available, what should be its scope? These questions turn upon a variety of considerations, most important of which are the nature of the interests involved and the role which the courts are equipped to play in relation to the employing agencies. We turn first to an examination of legislative and judicial policy.

The Loyalty Order makes no express provision for participation by the courts in adjudications of disloyalty. Nor is such participation contemplated. The evidence supporting a determination of disloyalty is, as stated, not available for inspection by the employee or the public. Furthermore, the regulations of the Loyalty Review Board provide that the decision by agency loyalty boards "shall state merely the action taken," thus forbidding issuance of findings of fact or a statement of reasons.<sup>403</sup> Hence there is no possibility for judicial review of the merits of a decision upon the record before the administrative agency. Likewise there is no provision in the federal civil service statutes which purports to afford review.<sup>404</sup>

The absence of administrative or statutory provision does not, of course, preclude the courts from making judicial review available. Quite apart from such provision the right may be founded upon the constitutional protection of due process or upon the general jurisdiction of the courts. In deciding issues of this nature the courts have usually not distinguished clearly between these two grounds for review.

Where government employees have been dismissed or disciplined for incompetence, insubordination or other reasons not involving loyalty, the federal courts have consistently taken the position that judicial review will be limited to the question of whether statutory procedures have been followed. No issue going to the merits of the dismissal will be considered.<sup>405</sup> Many state courts have adopted the same practice,<sup>406</sup> although some have granted liberal review on substantive issues.<sup>407</sup> In

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who should have access to all the evidence and who may request supplementary investigation and file a special brief without disclosure to the employee. Miller and Brown, *Loyalty Procedures of the A.E.C.*, 4 BULL. OF THE ATOMIC SCIENTISTS 45 (1948).

403. Directives to the Regional Loyalty Boards, 13 FED. REG. 257, 259 (1948).

404. During House debate upon the Rees Bill an express provision for judicial review was rejected. 93 CONG. REC. 8979 (1947).

405. See cases cited *supra* note 360.

406. *E.g.*, State v. McDonald, 154 Fla. 456, 18 So.2d 16 (1944); Nider v. City Commission of Fresno, 36 Cal. App.2d 14, 97 P.2d 293 (1939).

407. *E.g.*, Horvat v. Jenkins Twp. School Dist., 337 Pa. 193, 10 A.2d 390 (1940) (plaintiff, the principal of a school with a three year contract, was dismissed for political reasons; in granting his claim for all money due the court refused to be bound by the "technical" grounds for dismissal given by the school board); Anderson v. Board of Civil Service Commissioners, 227 Iowa 1164, 1167, 290 N.W. 493, 494 (1940) ("The burden of proving incompetency or misconduct rests on the party alleging the same");

*Friedman v. Schwellenbach* the court applied the rule of limited review to a loyalty dismissal, rejecting the plea that it consider whether the discharge was substantively justified under federal statutes.<sup>403</sup>

While it is clear from these decisions that at least a limited judicial review is available in loyalty cases, the practical protection afforded employees by such review is slight. The real issue is whether the review should be sufficiently broad in scope to embrace substantive questions.

The Supreme Court has rightly been reluctant to extend judicial review to matters of purely internal government management. In *Perkins v. Lukens Steel Co.* it went so far as to deny any right of review to determinations by the Secretary of Labor fixing the wage rates which government contractors were required to meet under the Walsh-Healy Act.<sup>409</sup> The narrow limits it has placed upon review of ordinary discharge cases is a manifestation of the same viewpoint. The position of the Court in these cases seems entirely sound. The protection which might be afforded through judicial supervision is heavily outweighed by the practical difficulties of government operation if resort to the courts is permitted and by the lesser importance attaching to the interests at stake.

The Court has likewise tended to withhold the right of judicial review in cases involving a simple grant of government gratuities or privileges. Thus it has declined review in pension cases<sup>410</sup> and in cases arising under legislation affording relief to business enterprises for losses incurred in war operations.<sup>411</sup> On the other hand where a system of government privileges has become an integral part of the economic structure and important interests are involved, the Court has not hesitated to afford judicial relief from improper administrative action. Thus it has consistently reviewed action of the Post Office Department in denying use of mailing privileges under the postal laws.<sup>412</sup>

The Court has shown a disinclination to extend judicial review to

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*State v. Williams*, 149 Fla. 48, 58, 5 So.2d 269, 273 (1941) (appellate court granted certiorari on the ground that the personnel officer had certified petitioner's service rating to be 100 per cent; the Court stated that it found "no evidence that tends to overcome this rating or even to challenge it"). See also recent Virginia legislation which provides for a judicial trial de novo for employees dismissed on charges of taking part in a strike. Va. Code § 2695i (1948). Cf. New York Civil Service Act, which grants only limited review. L 1947, c. 391, (1947).

408. 159 F.2d 22 (D.C. Cir. 1946); see notes 361 and 362 *supra*.

409. 310 U.S. 113 (1940).

410. *Decatur v. Paulding*, 14 Peters 496 (1840); but cf. *Dismuke v. United States*, 297 U.S. 167 (1936).

411. *Butte, A. & P. Ry. v. United States*, 290 U.S. 127 (1933); *Work v. Rives*, 267 U.S. 175 (1925).

412. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902); *Hannegan v. Esquire*, 327 U.S. 146 (1946).

certain administrative actions involving labor disputes,<sup>413</sup> or to situations where the interests affected are indirect or remote.<sup>414</sup> But in the field of business regulation it has in recent years taken increasing pains to assure judicial review to persons whose interests are directly and substantially affected.<sup>415</sup>

Under the principles of the foregoing decisions the case for judicial review in loyalty adjudications is a persuasive one. The practical reasons for denying review in matters of internal government operation are not serious if review be confined to loyalty issues. The cases have not been so numerous as to obstruct governmental machinery. The decision does not turn on subtle issues of workmanship largely within the sole competence of the employing agency. On the other hand the interests at stake are vital, as the *Lovett* case recognized, and reach far beyond narrow limits of personnel administration. The major considerations which have led to granting review in the past are thus present to a high degree in loyalty adjudications.

Indeed there are certain factors which make judicial review particularly appropriate in loyalty cases. Judicial review, by its very nature, operates as a block upon administrative action. It is not adapted to securing affirmative results. Its function is rather a negative one; by imposing the judgment of two bodies before final action can be taken it serves as a double check on the possibility of wrongful action. This characteristic of judicial review is of doubtful advantage in many government operations where regulation of property rights is involved and the need for swift and positive accomplishment is imperative. But where rights under the First Amendment are at stake—rights to which the courts have consistently given a preferred constitutional status—the negative features of judicial review serve an especially useful purpose. In such situations the presumption of administrative legality is reversed, or at least neutral, and careful scrutiny by a second agency becomes of positive value.

It is possible to trace a recognition of this principle in the Supreme Court decisions dealing with judicial review of civil rights. An outstanding example is the attitude of the Court toward the attempted

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413. *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943); *General Committee v. M-K-T Ry.*, 320 U.S. 323 (1943); *American Federation of Labor v. N.L.R.B.*, 308 U.S. 401 (1940); *N.L.R.B. v. International Brotherhood of Electrical Workers*, 308 U.S. 413 (1940); *Inland Empire District Council v. Millis*, 325 U.S. 697 (1945); and cases cited *infra* note 435.

414. *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Tennessee Power Co. v. T.V.A.*, 306 U.S. 118 (1939); *Standard Scale Co. v. Farrell*, 249 U.S. 571 (1919).

415. *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942); *Stark v. Wickard*, 321 U.S. 288 (1944); *L. P. Steuart & Bro. v. Bowles*, 322 U.S. 398 (1944); *Board of Governors v. Agnew*, 329 U.S. 441 (1947); *Parker v. Fleming*, 329 U.S. 531 (1947); *Illinois Packing Co. v. Snyder*, 151 F.2d 337 (Emerg. Ct. App. 1945). *But cf.* *Chicago & So. Airlines v. Waterman S.S. Corp.*, 68 S. Ct. 431 (1948).

deportation of Harry Bridges, the west coast labor leader. Despite the fact that it was operating within the relatively narrow scope of review afforded by a habeas corpus proceeding the Court not only insisted upon rigid adherence to procedural standards in the administrative proceeding but virtually substituted its judgment for that of the Department of Justice on the substantive issue whether the evidence before that agency warranted deportation under the applicable statute.<sup>416</sup> The Court has likewise gone out of its way to assure judicial review in Selective Service cases.<sup>417</sup> And recently it has shown a similar concern on issues of freedom of the press.<sup>418</sup>

Legislative policy has paralleled the course of judicial decision in making court review increasingly available. Most legislation setting up machinery for business or other controls in recent years has made express provision for judicial review. And in the Administrative Procedure Act Congress codified and extended the right:

“Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

. . . .

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.”<sup>419</sup>

This provision would seem to apply to loyalty adjudications. In view of the constitutional rights involved it can scarcely be said that dismissal on loyalty grounds is an action “committed to agency discretion.” Under the *Lovett* case an employee so discharged would clearly have suffered a “legal wrong.” A proceeding, in the Court of Claims or elsewhere, which did not afford review on substantive issues would hardly constitute an “adequate remedy.” The requirements of the Act would thus seem fulfilled.

In view of the above considerations it is fair to conclude, not only that sound policy dictates judicial review on substantive issues in loyalty cases, but that judicial precedent and the Administrative

416. *Bridges v. Wixon*, 326 U.S. 135 (1945); *cf. Ng Fung Ho v. White*, 259 U.S. 276 (1922).

417. *Estep v. United States*, 327 U.S. 114 (1946); *Gibson v. United States*, 329 U.S. 338 (1946).

418. *Hannegan v. Esquire*, 327 U.S. 146 (1946). For a general summary of the Supreme Court decisions granting or denying judicial review of administrative action, see *Davis, Nonreviewable Administrative Action*, 96 U. OF PA. L. REV. 749 (1948).

419. 60 STAT. 243, 5 U.S.C. § 1009 (1946).

Procedure Act affords the right. Such review should be conducted on the basis of an open record made by the loyalty boards and should be as broad in scope as that provided in the Administrative Procedure Act.<sup>420</sup>

*Other Procedural Safeguards.* In addition to a full and open hearing, and to judicial review, there are certain other procedural protections which should be afforded an accused employee. These may be summarized briefly:

(1) The Loyalty Order provides that the basis for disqualification of an applicant or employee "shall be that, on all the evidence, *reasonable grounds exist for the belief* that the person involved is disloyal to the Government of the United States."<sup>421</sup> This standard of proof is unique in judicial and administrative adjudication. It requires the loyalty board to rule that an applicant or employee is disloyal, not on a preponderance of the evidence, but merely if any rational basis for that conclusion appears in the record. The Administrative Procedure Act stipulates that administrative adjudications shall be "in accordance with the reliable, probative, and substantial evidence."<sup>422</sup> No less stringent requirements should be imposed in loyalty cases.

(2) When an employee does not have the means to hire counsel, he ought to be furnished counsel at government expense.

(3) An employee should have the right to subpoena witnesses. The Attorney General has proposed something less than this: that the government pay traveling and other expenses of witnesses needed by the defense.<sup>423</sup>

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420. "SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 [Hearings] and 8 [Decisions] or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." 60 STAT. 243, 244, 5 U.S.C. § 1009 (e) (1946).

421. Exec. Order 9835, Pt. V, § 1, 12 FED. REG. 1938 (1947) (Italics supplied). In practice, the standard has been applied as follows: "In a loyalty hearing the employees can only be informed of the evidence against him in a general way. . . . Despite this, the employee has to assume the burden of proof in rebutting the information presented in his charge." Transcript of hearing in case of M——, before Brooklyn Navy Yard Loyalty Board, February 1948, p. 3.

422. 60 STAT. 241, 5 U.S.C. § 1006 (c) (1946).

423. N.Y. Times, Jan. 21, 1948, p. 13, col. 4. In Memorandum No. 13, July 7, 1948, the

(4) The testimony of all witnesses should be under oath. The requirement of an oath tends to impress on witnesses the seriousness of the proceeding as well as to lay a foundation for perjury.<sup>424</sup>

(5) The record of the proceeding should be made available to an accused employee. The State Department has refused to grant defending employees even transcripts of the hearing.<sup>425</sup>

(6) Provision should be made for the furnishing of a bill of particulars.

(7) An agency board decision on loyalty should contain a statement of the findings of fact and a statement of the reasons for the conclusion reached.

(8) A loyalty hearing should be public, at least to the extent of permitting the accused to invite close friends, relatives and observers.<sup>426</sup>

(9) Great care should be exercised in the selection of those who are to serve on the agency boards. It would be best to select individuals not in the public service, since they are not subject to the pressures of executive superiors or legislative investigators. A good source of selection might be from among retired civil servants. This seems to have been the experience of the British.<sup>427</sup>

(10) In cases where the Government feels that it is seriously endangered by the retention of an employee, the device of suspension, pending the results of an investigation and hearing, may be utilized.<sup>423</sup>

### *Procedural Rights of Organizations*

The authority conferred upon an administrative official to designate organizations or groups as subversive or disloyal raises novel issues of

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Loyalty Review Board enunciated the following principle: "If and when an employee is restored to duty on the ground that his suspension or removal was improperly made, it becomes the duty of the employing Department or Agency to pay him the salary or compensation that was lost."

424. Under the Loyalty Review Board's regulations such witnesses as are heard, primarily witnesses for the accused employee, are required to testify under oath. The Operations of the Loyalty Review Board, 13 FED. REG. 254, 255 (1948); Directives to the Departments and Agencies, 13 FED. REG. 255, 256 (1948).

425. N.Y. Times, Oct. 8, 1947, p. 8, col. 7. The Loyalty Review Board regulations provide that a copy of the transcript of the testimony taken at the oral hearing shall be furnished the employee. Directives to the Regional Loyalty Boards, 13 FED. REG. 257, 259 (1948).

426. See Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381 (1932) for an approach which might prove desirable in loyalty hearings. Loyalty Review Board Regulations now limit attendance to the employee, his counsel and the witness who is testifying. Directives to the Regional Loyalty Boards, *supra*, note 425.

427. See *infra* p. 126.

428. This is provided for in Exec. Order No. 9835, Pt. II, § 4, 12 FED. REG. 1937-38 (1947). For other suggestions with respect to procedure, including rotating membership on the agency loyalty boards, see the excellent discussion in Miller and Brown, *Loyalty Procedures of the A.E.C.*, 4 BULL. OF THE ATOMIC SCIENCES 45 (1948).

profound importance. No precedent exists, so far as we are aware, for the exercise of this far-reaching power by an executive officer.<sup>429</sup> The wisdom of utilizing the administrative process, rather than the more rigid procedures of the courts, to make adjudications in this sensitive and vital field of political liberty—adjudications that closely approach criminal proceedings—is open to grave question. That such authority should be placed in the Attorney General—Chief of the Government's prosecuting agency and ultimate director of its political intelligence bureau—seems plainly unsound.

Apart from this fundamental issue, however, there remain vital questions of procedure. The Loyalty Order places no procedural limitation upon the Attorney General's power to designate an organization or group as "totalitarian, fascist, communist or subversive," or otherwise within the ban of the Order. No provision is made for a hearing or any participation by the accused organization. In practice the Attorney General has made his determinations wholly without notice or hearing of any kind, and without making any findings or giving any statement of reasons for his action. He has simply published his list.<sup>430</sup>

This procedure—or rather lack of procedure—seems even less defensible on policy grounds than the partial hearing afforded an accused employee. The blow dealt to an organization by the Attorney General's designation is, as already pointed out, just as grave as in the case of the employee. The impairment of rights guaranteed by the First Amendment is more far-reaching in its consequences. It becomes particularly important that an open hearing be held so that the public may judge for itself the nature of the evidence and may take appropriate steps to protest or check the Attorney General's course of action. Likewise the need for protection through judicial review becomes more imperative.

The official justification for denial of hearing and review to organizations labelled subversive has never been clearly enunciated. It may be assumed that the framers of the Loyalty Order had in mind the

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429. A similar procedure for administrative determination that an organization is a "communist political organization" or a "communist front organization" was incorporated in Section 13 of the Mundt bill. H.R. 5852, 80th Cong., 2d Sess. 20 (1948). See *supra* p. 21.

430. See *supra* p. 32. The Order does not even require publication of the list, but the Attorney General has thus far made his designations public. The Attorney General, at the request of the Loyalty Review Board, wrote the Board a letter giving his reasons for designating the Communist Party. The letter recited prior legislative and administrative rulings, without giving specific factual data. Letter from Attorney General Clark to Seth W. Richardson, May 27, 1948 (mimeographed). In Memorandum No. 2, March 9, 1948, the Loyalty Review Board ruled that Agency Boards were not to "enter upon any evidential investigation . . . for the purpose of attacking, contradicting, or modifying the controlling conclusion reached by the Attorney General" regarding a designated organization. The ruling was repeated in Memorandum No. 12, June 23, 1948.



same considerations advanced in connection with the denial of similar rights to employees—the need to protect informers. But this argument has even less substance here. Where an entire organization is charged with disloyalty the use of informers as witnesses is a far less costly process than in the case of an individual. The convenience to enforcement officials must, in this situation again, be subordinated to the protection of basic rights.<sup>431</sup>

Certain additional legal questions arise out of the fact that designation by the Attorney General does not compel an organization to do or refrain from doing anything. It is therefore argued that the action is purely “informatory,” a simple finding of fact, with no “legal” consequences and giving rise to no “legal wrong.” It is also urged that the finding is made in connection with an internal problem of government administration and its impact on the organization is secondary and incidental. The argument concludes, upon the basis of these considerations, that a designated organization can make no assertion to a hearing or judicial review.<sup>432</sup>

It is true that the government undoubtedly has broad powers to conduct *ex parte* investigations and to publish its findings. Many government agencies, such as the Federal Trade Commission, the Securities and Exchange Commission, and the Bureau of Standards, commonly perform functions of this sort. Under many circumstances these inquiries should certainly give rise to no right of hearing or judicial review. The important power of the government to collect information and advise the public should not be hindered by formal requirements unless countervailing interests of the individual or the common welfare are compelling.

There have been a number of decisions in which the courts have refused to place procedural limitations on this fact-finding function of government. The leading case is *Standard Scale Co. v. Farrell*.<sup>433</sup> There the State Superintendent of Weights and Measures published in

431. It may be noted that the Mundt bill, which authorizes the Attorney General to designate “communist political organizations” and “communist front organizations,” thereby subjecting them to the requirement of registration and other severe restrictions, does make provision for a full hearing and judicial review. H.R. 5852, 80th Cong., 2d Sess., §§ 13(2), 14 (1948). The House Committee reporting the Mundt bill took the view that this procedure “will eventually replace the *ex parte* findings under the present loyalty order.” Report of the Subcommittee on Legislation of the Committee on Un-American Activities, 80th Cong., 2d Sess. 5 (1948) [committee print].

432. If the lack of adequate procedure is raised by a discharged employee in a proceeding to review his dismissal, the issue would be governed by the considerations just discussed. The question here goes to the rights of the organization itself to raise the matter in a suit for injunction or declaratory judgment. Several such suits, brought by organizations designated by the Attorney General, are now pending. See, *e.g.*, *Joint Anti-Fascist Refugee Committee v. Clark* (D. D.C., complaint dismissed without opinion June 4, 1948; now on appeal to the Court of Appeals for the District of Columbia).

433. 249 U.S. 571 (1919).

a monthly bulletin a statement of specifications which concluded that, in order to maintain accuracy, a certain kind of scale required an automatic device which would allow for changes in temperature. The Standard Scale Company, manufacturers of such scales, did not install this device and were adversely affected because city and county bureaus of weights and measures, basing their decisions on the specifications deemed necessary by the State Superintendent, refused to certify the company's scales as accurate. The Superintendent had held no formal hearing but he had published his opinion after "prolonged investigation and extensive experimentation" and had given the scale company opportunity to present its views both before and after publication. The company sued to have the Superintendent's statement of specifications declared void. The suit failed, the Supreme Court holding that the statement was not a formal regulation but merely "advisory" and "educational," not coercive in its effect.

Similarly the Supreme Court has held that there was no right to judicial review of the findings of the Railroad Labor Board, published in an effort to mediate a labor dispute and imposing no legal obligation upon the contestants.<sup>434</sup> During the war the courts likewise declined to review the decisions of the National War Labor Board, an agency established by Executive Order to adjust labor controversies in war industries.<sup>435</sup> And the Supreme Court has also refused to review preliminary or intermediate administrative action, subject to review at a later state of the administrative process, even though incidental injury, such as impairment of credit standing or cost of litigation, might result.<sup>436</sup>

In other situations, however, the Supreme Court has granted review of administrative action even though the individual invoking judicial protection was not compelled to act or to refrain from action. Thus in *Columbia Broadcasting System v. United States* the Court permitted a chain broadcasting system to seek review of regulations of the Federal Communications Commission which established conditions for licensing independent stations that had contractual relations with the system. The Court said:

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434. *Pennsylvania R.R. v. Railroad Labor Board*, 261 U.S. 72 (1923); *cf.* *Pennsylvania Railroad System v. Pennsylvania R.R.*, 267 U.S. 203 (1925).

435. *Employers Group of Motor Freight Carriers v. N.W.L.B.*, 143 F.2d 145 (D.C. Cir. 1944), *cert. denied*, 323 U.S. 735 (1944). The Executive Order creating the N.W.L.B. gave it no enforcing powers. The courts reached the same conclusion, however, even where a second Executive Order imposed the obligation on other agencies to enforce the Board's decisions through withdrawal of allocation of scarce materials and by other similar methods. *N.W.L.B. v. Montgomery Ward & Co.*, 144 F.2d 528 (D.C. Cir. 1944), *cert. denied*, 323 U.S. 774 (1944); *N.W.L.B. v. U.S. Gypsum Co.*, 145 F.2d 97 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 856 (1945).

436. *United States v. Los Angeles & S.L. R.R.*, 273 U.S. 299 (1927); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Macauley v. Waterman S.S. Corp.*, 327 U.S. 540 (1946).

"Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contract rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked."<sup>437</sup>

And in *Utah Fuel Co. v. National Bituminous Coal Commission* the Court granted judicial review to a group of corporations which asserted that they would be damaged from the release of information by an administrative agency. The Commission had collected data from various coal producers pertaining to production costs and prices. Thereafter it announced that these data would be made public in connection with a contemplated hearing on coal prices. Claiming that the information had been collected on a confidential basis and that the statute prohibited publication, certain coal producers filed suit to enjoin disclosure. The Court ruled that it possessed jurisdiction to review the Commission's action:

"Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity."<sup>438</sup>

It is thus apparent that the question whether action by an administrative agency in the nature of fact finding will be held subject to procedural safeguards will depend upon the character of the action and the nature of the interests affected. The action of the Attorney General in declaring organizations subversive seems scarcely comparable to that of the administrative officials in the *Standard Scale* case. The problem there was one of mechanical testing, capable of relatively precise determination through scientific methods. Furthermore no issue of civil rights was involved. In the labor cases the courts apparently felt that the matters in dispute were better handled through

437. 316 U.S. 407, 422 (1942). *But cf.* *Hearst Radio, Inc. v. Federal Communications Commission*, 167 F.2d 225 (D.C. Cir. 1948). *See Stark v. Wickard*, 321 U.S. 283 (1944).

438. 306 U.S. 56, 60 (1939). Other cases in which the courts have granted review of actions by administrative agencies in making information public are *Bank of America v. Douglas*, 105 F.2d 100 (D.C. Cir. 1939), and *American Sumatra Tobacco Corp. v. S.E.C.*, 93 F.2d 236 (D.C. Cir. 1937). In the latter case the court said: "Here the petitions for review allege irreparable injury through the threatened disclosure of the information. . . . In such case it is fundamental that the property rights of the citizen may not be put in jeopardy or destroyed in any proceeding before an administrative board without notice, hearing, and judicial review. . . ." *Id.* at 239. *Cf. Shields v. Utah Idaho Central R.R.*, 305 U.S. 177, 182 (1938).

mediation devices than through legal procedures. The cases refusing review at intermediate stages raise questions of exhausting administrative remedies.

On the other hand the interests involved in an administrative finding that a particular organization is subversive are of a totally different kind. The fact that the injury arises out of the publicity flowing from official action does not diminish its significance. On the contrary publicity has come to play an increasingly crucial role in government operations and is particularly effective in the civil rights area. To permit executive action of this sort, unrestrained by elemental safeguards of due process, is to jeopardize a most vital part of the democratic process.

Many years ago a keen observer of American democracy recognized the dangers in allowing unrestrained executive control over the right of free association:

"This is more especially true when the executive government has a discretionary power of allowing or prohibiting associations. When certain associations are simply prohibited by law, and the courts of justice have to punish infringements of that law, the evil is far less considerable. Then every citizen knows beforehand pretty nearly what he has to expect. . . . But if the legislature should invest a man with a power of ascertaining beforehand which associations are dangerous and which are useful and should authorize him to destroy all associations in the bud or to allow them to be formed, as nobody would be able to foresee in what cases associations might be established and in what cases they would be put down, the spirit of association would be entirely paralyzed. . . . I do not concede that any government has the right of enacting the latter."<sup>439</sup>

#### IX. THE EXPERIENCE OF OTHER COUNTRIES IN GRANTING POLITICAL LIBERTY TO CIVIL SERVANTS

Every country with a large scale governmental structure has faced the problem of the extent to which public employees should be granted political liberty.<sup>440</sup> The extreme democratic view, put forth by the French civil service unions, asserts that a civil servant has two roles, that of employee of the State and that of private citizen, and contends that a civil servant ought to have full political freedom when not formally serving the government.<sup>441</sup> At the other extreme is the

439. DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 117 n. 1 (Bradley ed., 1945).

440. See generally, MORSTEIN MARK, ELEMENTS OF PUBLIC ADMINISTRATION Ch. 21 (1946); KINGSLEY, REPRESENTATIVE BUREAUCRACY (1944); MORSTEIN MARK, PUBLIC MANAGEMENT IN THE NEW DEMOCRACY (1940); MOSHER AND KINGSLEY, PUBLIC PERSONNEL ADMINISTRATION Ch. xvi (1936); FINER, THE THEORY AND PRACTICE OF MODERN GOVERNMENT (Part VII) (1932).

441. SHARP, PUBLIC PERSONNEL MANAGEMENT IN FRANCE, in CIVIL SERVICE ABROAD 139-53 (1935).

totalitarian view. The Nazis looked on civil servants as "Hitler's soldiers in plain clothes."<sup>442</sup> Employment by the State was therefore conditioned on positive political support of the National Socialist Party.

A middle view urges the idea of political neutrality. This concept can, of course, be meaningful only in a democratic society. It is based on the theory that the civil service serves the nation, no matter which political party happens to be temporarily in power. Partisan political activity by government employees is considered damaging to public confidence in the civil service. Therefore it is felt that some degree of political liberty must be surrendered by the public servant. But this curtailment of liberty, being contrary to the main principles of a democratic society, should be held to the minimum consonant with maintaining public faith in the fairness of the government service.

The experience of four countries—France, Great Britain, Italy and Germany—will be explored to illustrate the differences between these approaches.<sup>443</sup>

### *France*

In the last ten years the French civil servant has known freedom of expression and organization under the Third Republic, followed by the repressive regime of Vichy, and finally a return to conditions approximating those of the Third Republic.

The government of the Third Republic granted its employees a maximum of political freedom. Membership in any legally recognized political party was an accepted right. In addition, civil servants were permitted to engage in party activities outside working hours, so long as their government work did not suffer.<sup>444</sup> A public employee could even run for office. If he wished to devote all his time to his campaign, he was granted a leave of absence. If he felt that his spare time was sufficient, he might maintain his position with full pay. Should his

442. MORSTEIN MARX, CIVIL SERVICE IN GERMANY, in CIVIL SERVICE ABROAD 266 (1935).

443. These four countries were selected primarily because of the availability of adequate data. The problem in the Soviet Union is somewhat different because of the high percentage of workers who are employees of the government. Detailed information with regard to standards and procedures applicable to that segment of the Soviet population which corresponds to the United States government working force could not be obtained. It is clear, of course, that employment in the Soviet government, as in all phases of Soviet life, demands full conformity with current political ideology. For a recent analysis, see the series of articles by Werth, *Russia, Plus and Minus*, 167 NATION 118, 156, 178, 207 (1948).

444. SEARF, PUBLIC PERSONNEL MANAGEMENT IN FRANCE, in CIVIL SERVICE ABROAD 151 (1935). "Although freedom of political thought and action was permitted, public expression of unpopular opinions on moral or patriotic matters might result in severe punishment. Thus, teachers have suffered dismissal for engaging in birth control propaganda or pacifist demonstrations." *Id.* at 151-2.

candidacy prove unsuccessful, he was entitled to full reinstatement.<sup>445</sup> Loyalty tests were unknown under the Third Republic.<sup>446</sup>

To protect the civil servant from abuse in the application of disciplinary standards, the civil service regulations and practices provided extensive procedural safeguards. A public employee accused of an act which would subject him to discipline had the right to inspect his personnel file, including all confidential documents made part of the record in his case.<sup>447</sup> At the trial before a specialized disciplinary board, composed of members selected from his department, a procedure analogous to that of courts was followed: "adverse pleadings, right of defense, obligation to give reasoned decisions, etc."<sup>448</sup> On appeal the Council of State, an administrative court which reviewed all serious disciplinary decisions, was empowered to revoke administrative judgments based on religion or politics. For instance, if a civil servant could show that his position was eliminated by his department head because of the employee's unorthodox political beliefs, the Council of State was required to reverse the change and return the public employee to his position.<sup>449</sup> Thus, "reasons of security" were not permitted to interfere with the government worker's right to defend his character and his position.

During the period of Petain's rule, public service workers were required to swear a number of oaths. The Vichy Civil Oath stated that the employee had never belonged to any of a listed number of organizations, including such groups as the Mixed International Order for Human Rights and the Theosophical Society. Past or present affiliation with such organizations was the basis for dismissal from the service.<sup>450</sup> In addition, the public servant was forced to swear an oath

445. *Ibid.* See generally pp. 139-153. So far was freedom of political action carried that Sharp concluded that "civic and political activity outside working hours has been only partially reconciled with the demands of efficiency and neutrality while on duty." *Ibid.*

446. "We do not know of any particular criterion of loyalty required of Civil Servants in France before the Vichy Government. Civil Servants in France have always been chosen by competitive examinations. The requirements, essentially, are that candidates have no police record, that they be French citizens, that they have the degrees required for the examinations to which they wish to present themselves. In the present Government, the pre-war criterion has been adhered to. . . ." Communication to the authors, from the Information Service of the French Embassy, Oct. 22, 1947.

447. Finance Law of April 23, 1905, Article 65.

448. Lefas, *The French Civil Service in White*, THE CIVIL SERVICE IN THE MODERN STATE 251-3 (1930).

449. *Id.* at 260.

450. The full oath reads as follows: "I the undersigned declare upon oath that I have never belonged to any one of the following societies under any designation whatever: the Grand Orient de France, Grande Loge de France, Grande Loge Nationale Indépendante, Ordre Mixte International du Droit Humain, Société Théosophique, Grand Prieuré de Gaules, or to any one of the branches or off-shoots of said societies whatever, or to any society prescribed by the law of August 14, 1940, and I pledge my word upon my honor

of allegiance to the person of Marshal Petain.<sup>451</sup> Should future investigation reveal that the oath was taken in bad faith the accused was liable to forfeit "his liberty, his life and his worldly possessions."<sup>452</sup>

Liberation wiped out the Vichy concept of loyalty. With the exception of the purge committees, which on an informal basis purified the public service of those employees who had willingly aided the Germans,<sup>453</sup> the government service revived the standards used to delimit political liberty and the procedural safeguards employed in pre-Vichy days.

### *Britain*

Tradition and custom, to a far greater extent than statute, shape standards of conduct and disciplinary practice in the British Civil Service.<sup>454</sup> The general attitude of the government service is that political rights must be tempered in the interest of preserving neutrality. The goal is to have an administrative instrument of an im-

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that I shall never make common cause with them in the event that they should be re-constituted either directly or indirectly."

The material for notes 450 through 453 was provided by the Information Service of the French Embassy.

451. "I swear fidelity to the person of the Chief of State and I promise to discharge my duties for the good of the State and in accordance with the laws of honor and of probity." *Ibid.*

452. Administrative Ruling, August 24, 1941. The Ruling also provides: "Outside of civil liability, penalties may constitute deprivation of political rights, placement under surveillance, administrative internment, and imprisonment [for those considered responsible for the recent war fiasco]. These penalties are to attach to every former Minister, high functionary and high dignitary in office within less than ten years. One may, however, in order to seek out those responsible for the war go back as far as 1931."

For a further account of measures taken by the Vichy Regime, see PERTINAX, *THE GRAVE DIGGERS OF FRANCE* 472-5 (1944).

453. Conduct warranting dismissal was defined generally as (1) "knowingly aiding the enemy or his allies; (2) directly or indirectly injuring the unity of the nation or the liberty of Frenchmen or the equality among the latter." Specific criteria were: "(1) participation in the Government or pseudo-Government during the period of enemy occupation; (2) having occupied a responsible executive function in the propaganda services of said Government; (3) having occupied a responsible function in the Department responsible for the regulation and liquidation of French and non-French Jews; (4) having become a member or having remained a member after January 1, 1941, even though without active participation in any collaborationist organization; (5) having participated in the organization of artistic, economic, political or any other manifestation in favor of collaboration with the enemy; (6) having published articles or made speeches in favor of the enemy, collaboration, racism or totalitarian doctrines." *The Repression of Collaborationist Acts* in DOCUMENTARY NOTES AND STUDIES No. 245, at 7-8 (French State Department of Information, 1946).

454. See generally, GLADDEN, *THE CIVIL SERVICE: ITS PROBLEMS AND FUTURE* (1945); GLADDEN, *CIVIL SERVICE STAFF RELATIONSHIPS* (1943); COHEN, *THE GROWTH OF THE BRITISH CIVIL SERVICE* (1941); FINER, *THE BRITISH CIVIL SERVICE* (1937); WHITE, *The British Civil Service* in *CIVIL SERVICE ABROAD* (1935); FINER, *THE BRITISH CIVIL SERVICE* (1927).

partial and efficient character which can serve any party that captures the support of the electorate. To achieve this end it is customary for civil servants not to take an "overt part in public political affairs."<sup>466</sup> It is considered proper to vote and to participate in party matters if a "certain reticence" is observed. However, should an employee of the government wish to run for Parliament, regulations require that he resign from his position as soon as he announces his candidacy.<sup>466</sup>

Faith in the "loyalty" of the British public employee was severely tested by the General Strike of 1926. As a result of the sympathetic acts of some of the civil service trade union officials and the demand of employee representatives that government employees not be used to fill the positions of strikers, the Conservative government in power included public employees in the Trade Disputes Act of 1927.<sup>467</sup> Clause V of that Act prohibited government workers from belonging to any union affiliated with unions of non-government workers or with any political party. This restraint on the right of civil servants to organize economically and politically was removed by the repeal of the Trade Disputes Act in 1946.<sup>468</sup>

With respect to procedures, in theory the department head has full power to discharge subordinates at will; there are no established procedural safeguards, and no appeal or judicial review.<sup>469</sup> Nevertheless, should a public service employee be dismissed on political grounds by his department head, he would not be in a hopeless position. The ag-

455. FINER, *THE BRITISH CIVIL SERVICE* 74-82 (1928). "By generations of custom and precedent, the loyalty of the civil service to the government of the day is universally accepted, both by ministers and by the service itself. . . . Members of the civil service may have private convictions of their own on matters of public policy, but they do not allow them to color the impartial advice which it is their duty to give to ministers." WHITE, *The British Civil Service in CIVIL SERVICE ABROAD* 44 *et seq.* (1935).

456. *Id.* at 46.

457. Trade Disputes and Trade Unions Act, 1927, 17 & 18 GEO. V, c. 22. For an account of the conduct of the Civil Service unions leading up to the passage of the Act, see WHITE, *THE BRITISH CIVIL SERVICE, in CIVIL SERVICE ABROAD* 48-51 (1935).

"After the strike the Whitley system was able to return to its ordinary function and to protect from possible victimization members of the staff who were liable to be subjected to the antagonisms engendered by the costly political experiment. Assurances were sought and obtained that references to the actions of individuals during the strike should not appear in their personal records and so affect their future careers." GLADDEN, *CIVIL SERVICE STAFF RELATIONSHIPS* 67 (1943).

458. The Trade Disputes and Trade Unions Act, 1946 9 & 10 GEO. 6, c. 52.

459. "Security of tenure rests entirely upon usage. . . . An interesting sidelight upon the peculiar nature of the civil servant's terms of tenure is reflected by the power of dismissal for delinquency or inefficiency which rests entirely with the head of the department. There is no appeal against his decision. It speaks volumes for the excellent spirit and atmosphere of goodwill that, despite this somewhat autocratic element in its organization, there is no strong demand in the Civil Service for the whole matter to be placed upon a more logical basis. In effect, the number of dismissals is not great and there is no evidence of any tendency to victimization." GLADDEN, *THE CIVIL SERVICE: ITS PROBLEMS AND FUTURE* 40-1 (1945). See FINER, *THE BRITISH CIVIL SERVICE* 166 (1937).



grieved employee can always turn to the Whitley Council in his department for redress. These councils are composed of members chosen equally from the staff and from the topmost policy-making officials. Most personnel grievances are resolved by them. While their decisions are not binding, in practice the party in power invariably supports them.<sup>460</sup> Any tendency to political victimization on the part of a high official would thus be quickly frustrated. The fact that very few cases of a political nature come before the councils indicates that administrators who have the power to dismiss rarely misuse it.<sup>461</sup> It is recognized that an opposite policy would have a deleterious affect on service morale.

Today, with the exception of those employed on "secret" government work, there is no limitation on the political freedom of government workers to join political parties of their choice—and this includes the Communist Party—provided that there is adherence to the canon of civil service respectability. In other words there is full political freedom limited by the injunction against public display.<sup>462</sup>

Recently the Prime Minister announced a new policy governing employees who handle "secret" State documents:

"The government have . . . reached the conclusion that the only prudent course to adopt is to insure that no one who is known to be a member of the Communist Party, or to be associated with it in a way to raise legitimate doubts about his or her reliability, is employed in connection with work, the nature of which is vital to the security of the State."<sup>463</sup>

The same rule applies to those actively associated with fascist or-

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460. WHITE, WHITLEY COUNCILS IN THE BRITISH CIVIL SERVICE 9-26 (1933). "It is usual for the Staff side . . . vigorously to pursue any cases where they imagine injustice to have been done." GLADDEN, CIVIL SERVICE STAFF RELATIONSHIPS 52-3 (1943).

461. GLADDEN, *op. cit. supra*, note 459.

462. Espionage activity, on the other hand, is treated as a serious crime: "A person who (1) uses information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety or interest of the State, or (2) makes for any purpose prejudicial to the safety or interests of the State any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy, or (3) for any purpose prejudicial to the safety or interests of the State obtains, collects, records, publishes or communicates to any other person any secret official code word or pass word, any sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to any enemy is guilty of a felony." MUSTOE, THE LAW AND ORGANIZATION OF THE BRITISH CIVIL SERVICE 113-4 *et seq.* (1932).

463. 83 Hansard 1704, March 1948. Preceding the exposition of the standard, the Prime Minister offered an explanation in justification: "It is not suggested that in matters affecting the security of the State all those who adhere to the Communist Party would allow themselves thus to forget their primary loyalty to the State. But there is no way of distinguishing such people from those who, if opportunity offered, would be prepared to endanger the security of the State in the interests of another power." *Ibid.*

ganizations. Wherever possible the Government will transfer an employee whose loyalty is in doubt to a position involving "non-secret Government work." Only if an equivalent non-secret position is not available will the employee be dismissed.<sup>464</sup> The machinery for determining disloyalty provides for a hearing before an impartial board, disclosure of the Government's case, and full opportunity to rebut.<sup>465</sup> Evidently, the British loyalty program affects only a very small number of government employees.<sup>466</sup>

### *Italy*

In a totalitarian state the highest value is placed on conformity with the principles of the party of the dictatorship.<sup>467</sup> Study of the basic civil service statute in Fascist Italy reveals this emphasis on conformity. An applicant for the Italian civil service, in addition to required moral and academic attributes, must have comported himself politically in a manner acceptable to the appointing authority.<sup>468</sup> Political orthodoxy was likewise demanded by the oath of allegiance:

"I swear that I do not belong to an association or party whose activities are not in harmony with my official duties, nor will I belong to one."<sup>469</sup>

To rid the service of disloyal elements, the Civil Service Code established extremely flexible criteria. These were sufficiently vague to allow department chiefs to discipline or dismiss employees without hav-

464. *Id.* at 1705. Recently, a leading atomic research scientist was removed from his government research post because of membership in the British Communist Party. The Government rejected his defense of having resigned from the party on accepting a government position. The scientist was, however, not dismissed, but suspended with full pay pending an effort to place him in some non-secret government work. *N.Y. Times*, Sept. 7, 1948, p. 10, col. 5.

465. "The security authorities are to be neither the judges nor the deciding factor. Where a Civil Servant's conduct is suspect, he is to be given an opportunity of studying the case against himself, of putting in his reply, and also of making his reply. Representations are to be considered by three retired Civil Servants of high repute. . . ." Communication to the authors from British Information Services, April 23, 1948. But see *N.Y. Times*, Mar. 18, 1948, p. 15, col. 3, which states that an employee transferred from secret work will receive the usual privilege of appealing to the Minister in his department. No mention of an impartial board is made.

466. A recent *New York Times* report on the administration of the "British Loyalty Order" concluded as follows: "Since the middle of May no civil servant has been dismissed under these provisions. It is believed that only twelve or fifteen men have been transferred to non-secret posts." *N.Y. Times*, Sept. 26, 1948, § 4, p. 4, col. 7.

467. See generally, BRAMSTEDT, *DICTATORSHIP AND POLITICAL POLICE* (1945); NEUMANN, *BEHEMOTH* (1944); EBENSTEIN, *FASCIST ITALY* (1939); STEINER, *GOVERNMENT IN FASCIST ITALY* (1938); ELWIN, *FASCISM AT WORK* (1934); *Symposium on the Totalitarian State*, 82 *AM. PHILO. SOC.* (1939).

468. Royal Decree, Dec. 30, 1923, Article 1. The entire statute is translated in WHITEN, *THE CIVIL SERVICE IN THE MODERN STATE* 318-39 (1930).

469. *Id.*, Article 6.

ing to offer detailed charges in justification. A public employee's salary could be reduced for "manifestations, acts or deeds inconvenient to the political, social, and administrative co-ordination of the state."<sup>470</sup> Hardly more dangerous conduct, "public manifestation of ideals contrary to existing institutions,"<sup>471</sup> was ground for the more serious punishment of dismissal. Further bases for dismissal were: "disloyal criticism . . . diminishing the prestige of the state;" "offense to the dignity of the administration;" and "offenses against honor."<sup>472</sup>

Loyalty to the State was thus only possible through loyalty to the principles of the Fascist Party. Membership in any other party was clear evidence of disloyalty. A law passed after the Civil Service Code further weakened security of tenure by authorizing the dismissal of civil and military personnel "who do not furnish full guarantees as to their loyal fulfillment of duty or who show a lack of sympathy towards the general political direction of the government."<sup>473</sup> Conformance thus gave way to active support of fascism as the accepted standard of conduct.

In paradoxical contrast to its vague standards of political reliability the Civil Service Code established certain important procedural safeguards. A charge was made only after a thorough investigation and hearing conducted by the personnel office of the department in which the accused employee worked.<sup>474</sup> During the period of investigation the accused "may be authorized to make a partial or total examination of the files in his case."<sup>475</sup> At the close of the investigation he was entitled to a copy of the report and a statement of the charges to be brought against him. Trial on the charges was had before a disciplinary commission of three civil servants appointed annually by the minister of each department. The personnel officer presented the results of his investigation; the accused was permitted to rebut and explain. Appeal was allowed to the Minister. Thus at the very least the accused had two opportunities to establish his innocence, at the hearing before the personnel officer and at the trial before the commission.<sup>476</sup>

These procedural safeguards undoubtedly proved to be paper guarantees in some instances. It was notorious that citizens were subject to a call from the political police, the OVRA, if they were considered "socially dangerous people," or if they associated with a politi-

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470. *Id.*, Article 59.

471. *Id.*, Article 65.

472. *Id.*, Articles 62, 64.

473. Law of December 24, 1925, quoted in EBENSTEIN, *FASCIST ITALY* 70 (1939).

474. Royal Decree, Dec. 30, 1923, Articles 60, 69.

475. *Id.*, Article 72.

476. *Id.*, Articles 74, 75. "Two years at least after disposition of a case, if the employee has given clear evidence of reform, the effects of any penalty may be made void . . ." *Id.*, Article 80.

cally suspect person.<sup>477</sup> Civil service employees, it appears, were similarly subject to the vagaries of the OVRA. Nevertheless, the inclusion of procedural protection in the Civil Code showed a recognition of its importance in securing good service morale.

### *Germany*

The change from Weimar democracy to the National Socialism of Hitler resulted in a radical alteration in the spirit and practice, if not the outward structure, of the German Civil Service. Equality for women employees, freedom of association and the ideal of political neutrality were all rejected by the Nazi Government.<sup>478</sup> The nature of the transformation is made clear by contrasting the civil service before and after the coming to power of the National Socialists.

Recruitment for the civil service during the Weimar Republic was based entirely on merit principles, the standard being set by the Constitution of 1919:

"All citizens without distinction are eligible for public office in accordance with the laws and according to their ability and services."<sup>479</sup>

Another article of the Constitution guaranteed life tenure and provided safeguards against arbitrary discipline.<sup>480</sup> The two values of neutrality and political freedom were protected by the following generalized proposition:

"The civil servants are servants of the whole community, not of a party.

"Freedom of political opinion and of association are assured to all civil servants."<sup>481</sup>

477. BRAMSTEDT, *DICTATORSHIPS AND POLITICAL POLICE* 61-66 (1945). "The 232 Articles of the Public Safety Act of November 25, 1926, comprise the complete machinery for the annihilation of the last remnants of personal liberty. . . . Danger arises not only from actual crimes against the State; it is sufficient for 'public opinion' to denounce a person as 'dangerous'." EBENSTEIN, *FASCIST ITALY* 72 (1939).

"The law requires citizens not to associate with a suspect person, and in the eyes of the Fascists friends of a suspect person become politically discredited from contact with him." *Id.* at 73.

478. For full accounts of the changes in the civil service see POLLOCK and BOERNER, *THE GERMAN CIVIL SERVICE ACT* 5-11 (1938); Morstein Marx, *German Bureaucracy in Transition*, 28 *AM. POL. SCI. REV.* 467 (1934).

479. Weimar Constitution, Article 128.

480. *Id.*, Article 129.

481. *Id.*, Article 130. In addition Article 39 provided that "civil servants . . . need no leave for the performance of their duties as members of the Reichstag or of a state diet. If they become candidates for election to these legislative bodies, leave must be granted them for the amount of time necessary to prepare for their election."

For an account of the rights granted to civil service employees, see MORSTEIN MARX, *CIVIL SERVICE IN GERMANY, in CIVIL SERVICE ABROAD* 195-243 (1935).

Conduct specifically required of the civil servant was set out in the Civil Service Code. He was obliged to uphold the constitutional republic in his official activities.<sup>482</sup> He was specifically forbidden to engage in revolutionary activity, to speak against the constitution while in an official capacity, and, whether within the service or when acting as a private citizen, to plot the destruction of the government.<sup>483</sup> These injunctions, it was hoped, would insure a necessary degree of neutrality. While on duty the civil servant was expected to act in a wholly impartial manner.<sup>484</sup> To this extent it was felt necessary to restrict his political freedom guaranteed by the Constitution. Some students of the service further contended that the constitutional guarantee referred only to freedom of conscience and that the ideal of neutrality in the civil service was important enough to justify a prohibition against mere membership in or support of a revolutionary party.<sup>485</sup> The courts, however, felt otherwise. Thus the Prussian Superior Administrative Court ruled that a civil servant could maintain his position and at the same time declare his support of the Communist Party:

“. . . [T]he disciplinary punishment of a civil servant because of the mere profession for a political party is excluded in all cases. A civil servant would commit disciplinary offense which might lead to dismissal from service only if he undertook to further by overt acts the achievement of the purpose of the party which is aiming at the forcible overthrow of the existing political order. . . .”<sup>486</sup>

In a later case the same court upheld the dismissal of a public employee who had actively and openly worked for the Communist Party.<sup>487</sup> Subsequently, partisan support or activity in behalf of an avowedly revolutionary party was prohibited by decree.<sup>488</sup>

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482. The National Civil Service Act, Article 10, translated in WHITE, *THE CIVIL SERVICE IN THE MODERN STATE* 398 *et seq.* (1930).

483. *Ibid.* In addition, Article 11 provided that a “civil servant must observe secrecy about all matters which have come to his knowledge by virtue of his office and which should remain secret either because of their very nature or because such secrecy has been prescribed by his superior.”

484. “In his official capacity the civil servant must pursue the common good, and not only remain impartial but not even endanger his impartiality or give occasion for distrust of it.” ARNDT, *DAS REICHSBEAMTENGESETZ* 33 (4th ed., 1931), quoted in *CIVIL SERVICE ABROAD* 245 (1935).

485. For an account of the clash of opinion on this matter see MORSTEIN MARX, *CIVIL SERVICE IN GERMANY*, in *CIVIL SERVICE ABROAD* 250-6 (1935).

486. An extract of the opinion is translated in WHITE, *THE CIVIL SERVICE IN THE MODERN STATE* 437 (1930).

487. “. . . activities of a civil servant on behalf of a party whose aim is the forcible overthrow of the existing political order is incompatible with the fulfillment of a public office.” *Id.* at 437-8.

488. *E.g.*, “With regard to the development of the National Socialist German Workers’ Party and the Communist Party, both parties must be considered as organizations aiming

Substantial procedural safeguards were provided by the Civil Service Code to protect the civil servant from wrongful discipline or dismissal. A basic protection was the guarantee that civil servants were to have access to all their personnel records.<sup>489</sup> Before a dismissal could take place there had to be a trial before the department disciplinary court.<sup>490</sup> This court was composed of judges and civil servants, with the latter in the majority. The trial was public, the subject matter being limited to the statement of written charges received by the employee.<sup>491</sup> After hearing the prosecutor, the accused (or his lawyer), and the testimony of the witnesses, the court pronounced sentence. Should the verdict be against the accused, he had the right to appeal to the National Supreme Disciplinary Court whose decision was final.<sup>492</sup>

The Nazi revolution resulted in immediate changes in the civil service. The emphasis shifted from neutrality to political reliability.<sup>493</sup> Every civil servant was required to fill out a questionnaire stating his training, war service, antecedents and party affiliations. With few exceptions those of "non-germanic" blood were immediately weeded out of the service. In addition, unreconstructed Communists, Socialists, liberals and pacifists, were dismissed from the government.<sup>494</sup> Political reliability, which meant unreserved identification with the goals of National Socialism, became the minimum requirement for maintaining government employment. This was also true of the universities where dissent came to be considered heresy which in turn was equated with treason.<sup>495</sup> Standards of unacceptable behavior became very broad. For example, the following acts were considered unbecoming conduct and ground for disciplinary action:

". . . buying at a Jewish store; expressing concern over the closing of denominational schools; pointing to any parallels be-

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at the overthrow of the present government by violence. A civil servant who participates in such an organization or supports it by action . . . violates the bond of loyalty toward the state which results from his position as civil servant, and is guilty of an offense against civil service discipline. It is, therefore, forbidden all public officers to participate in those organizations or to support them by action. . . ." Decree of Prussian State Cabinet, June 25, 1930.

489. Weimar Constitution, Article 129.

490. § 84 of the Civil Service Code.

491. See *id.* §§ 72-144 for a complete account of the disciplinary procedure.

492. *Id.* § 144. Judicial review was permitted in the case of "any decision by which a civil servant is declared responsible for the restitution of a deficiency."

493. "Officials who, because of their previous political activity, do not offer security that they will exert themselves for the national State without reservations may be discharged . . ." Federal Law, April 7, 1933, § 4. See also MORSTEIN MARX, *GOVERNMENT IN THE THIRD REICH* 132 *et seq.* (1937).

494. SCHUMAN, *THE NAZI DICTATORSHIP* 251 (1935).

495. See, *e.g.*, HARTSHORNE, *THE GERMAN UNIVERSITIES AND NATIONAL SOCIALISM* 153 (1937).

tween National Socialism and Communism; failing to protest against 'insults' to National Socialism uttered in the course of church services." 496

In the first period of the new regime the right to a hearing and appeal was abolished. Intrigue and espionage were encouraged. A wave of denunciations swept the desks of personnel officers. Those whose "inner conviction" was felt to be in opposition to the new order were in imminent danger of separation from the service.<sup>497</sup> Although at most only ten per cent were removed during the first two years of the new regime, demoralization resulted, and the service was on the verge of being destroyed as a useful instrument for carrying out the ends of the new order.<sup>498</sup> Since only four per cent of the civil service had enrolled in the National Socialist Party prior to its coming to power, it was necessary to give the remaining numbers a renewed sense of security if the service was to operate at its old efficiency. By early 1937 a marriage of compromise between the Party and the service had been worked out which resulted for the most part in maintaining the old civil service structure through which was suffused a new philosophy.<sup>499</sup>

The compromise was embodied in the Civil Service Code of 1937. In return for being a National Socialist "to the marrow of his bones" the civil servant was guaranteed life tenure.<sup>500</sup> Each employee had to swear the following oath:

"I swear: I will be true and obedient to the *Führer* of the German Reich and *Volk*, Adolph Hitler, respect the laws and fulfill my duties conscientiously, so help me God." 501

By the close of 1937 the marriage of party and service was complete: 28 per cent of the civil service belonged to the party and all belonged to the civil service union which was dominated by a high Nazi official.<sup>502</sup> It was no longer possible to enter the civil service without first

496. Morstein Marx, *Germany's New Civil Service Act*, 31 AM. POL. SCI. REV. 878-9 (1937).

497. Morstein Marx, *German Bureaucracy in Transition*, 28 AM. POL. SCI. REV. 477-9 (1934).

498. *Ibid.* See also MORSTEIN MARX, *GOVERNMENT IN THE THIRD REICH* 134 (1937).

499. POLLOCK AND BOERNER, *THE GERMAN CIVIL SERVICE ACT* 5-11 (1938).

500. Civil Service Code (*Reichsgesetzblatt*) §§ 27, 28 (1937).

501. *Id.*, at § 4. See also the statement of Pfundtner, Secretary of State in the Ministry of the Interior: "The German Civil Servant must . . . be a member of the party or of one of its formations. The state will primarily see to it that the Young Guard of the movement is directed toward a civil service career and also that the civil servant takes an active part in the party so that the political idea and service of the state become closely welded." Quoted in MURPHY, *NATIONAL SOCIALISM* 51 (U.S. Dept. State, 1943).

502. NEUMANN, *BEHEMOTH* 379 (1944); MORSTEIN MARX, *CIVIL SERVICE IN GERMANY*, in *CIVIL SERVICE ABROAD* 269 (1935). See also § 11 of the Civil Service Code (1937): "Permission is not required for the acceptance of an unsalaried office in the National Socialist German Workers' Party. . . ."

receiving the approval of the local party official.<sup>503</sup> Expulsion from the National Socialist Party automatically resulted in dismissal from the service.<sup>504</sup> The 1937 Code set out other causes for removal, including dismissal

“. . . if the official does not any longer give assurance of acting at all times in the interest of the National Socialist state.”<sup>505</sup>

Accompanying the vague standards was a provision guaranteeing the accused employee a trial. A disciplinary court procedure and appellate review somewhat similar to that of the Weimar Republic were instituted, and independence of the disciplinary courts guaranteed:

“The service disciplinary courts are independent and subject only to the law.

“The members of the disciplinary courts carry out their functions in judicial independence. Their retirement under section 71 [for political reasons] of the German Civil Service Act may not be based on the factual content of a decision rendered in the exercise of these functions.”<sup>506</sup>

Thus under National Socialism, as under Fascist Italy, one finds the phenomenon of broad and flexible standards of loyalty but, at least on paper, procedural safeguards affording the accused an opportunity to negative charges of unreliability and to establish his political respectability.<sup>507</sup>

### *Conclusions from Foreign Experience*

From this brief survey of foreign experience certain conclusions may be drawn:

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503. Morstein Marx, *Germany's New Civil Service Act*, 31 AM. POL. SCI. REV. 882 (1937).

504. Civil Service Code § 32.

505. Civil Service Code § 71 (1937). Prior to this, “in the summer of 1935 the Criminal Code was amended so as to penalize also acts not mentioned in it which ‘deserve punishment according to the fundamental idea underlying a provision of criminal law, or according to sound popular sentiment.’” Quoted in MORSTEIN MARX, *GOVERNMENT IN THE THIRD REICH* 93 (1937). Other standards of removal are given in §§ 51-72 of the Code.

There was some attempt, however, to promote morale by cutting down on denunciations of disloyalty made directly to the Party. Compare the statement of the head of the civil service union recognizing the “right and duty” of civil servants to keep party agencies informed on deviations from National Socialist Principles should such deviations occur in administrative departments (in *Frankfurter Zeitung*, July 1, 1934), *with*:

“The official has to bring requests and complaints by way of service channels. If he believes that he observes actions which might be injurious to the . . . Party, he must report them through official channels . . . or to the *Führer* and National Chancellor. For complaints of a personal nature, the service channels must be followed.” Civil Service Code § 42 (1937).

506. National Service Disciplinary Code § 31 (1937).

507. Under the pressures of war these remaining procedural safeguards were swept away. “In almost all spheres of administration the Gaulieter reigned supreme.” NEUMANN, *BEHEMOTH* 630 (1944).



In the first place the totalitarian states, which do not tolerate difference of political opinion in government service, enforce rigid political orthodoxy through the use of vague and sweeping standards of loyalty that are calculated to embrace any action or attitude offensive to the regime.

Secondly, even the totalitarian states have found it worth while to establish procedural safeguards which would afford substantial protection to an accused employee. At a minimum these procedures have embraced a full and open hearing, before an independent tribunal, with complete disclosure of the evidence against the accused. While such procedures have been subject to the overriding powers of the secret police, the fact that they have been formulated at all indicates their estimated importance in terms of employee morale and efficient government operation.

Thirdly, the democratic states have accorded government employees a maximum of political freedom consistent with varying concepts of a neutral civil service. Despite conditions of political instability far exceeding those in the United States, other democratic nations have not found it necessary to impose loyalty tests going beyond the standard of active participation in a revolutionary party, adopted by the Weimar republic, or the transfer of Communist employees to "non-secret" government work, recently instituted in England.

Lastly, no precedent is to be found in foreign experience, outside the totalitarian states, for a comprehensive, continuous system of loyalty surveillance similar to that instituted by the Loyalty Order in the United States.<sup>508</sup>

#### X. APPRAISAL AND CONCLUSIONS

In one sense the loyalty program appears as a new phenomenon in American government. It was unknown until a few years ago. In a deeper sense the controversy over loyalty among government employees simply raises in a current form the age old struggle between freedom and restriction in political expression. Charges of "disloyalty" have always been hurled at those who seek to change established modes of political life. It is hardly surprising that with the growth of modern government the public employee should become a focal point in this conflict.

This is not to say that a valid problem does not exist. Any government must always be able to protect itself against dangerous activity within its own ranks. The problem now has a new setting. International tensions, internal stresses, the nature of present day warfare and political tactics raise the issues in a new form. But it is most unfortu-

508. This conclusion is based upon a survey of available material relating to the following countries: Canada, Australia, Belgium, Switzerland, Norway, Sweden, New Zealand and Mexico.

nate that the President's Temporary Commission on Employee Loyalty, entrusted with the task of studying the entire situation, should have failed so deplorably to grasp the broader issues and should have recommended a solution so intolerant and repressive in its approach. It is tragic that the Administration should have accepted the Commission's report.

The program adopted by the Administration already goes substantially beyond any measures considered necessary by other democratic countries, even those troubled with much greater instability in government. It is more nearly comparable to the programs of totalitarian countries.

In essence the loyalty program is a comprehensive, continuing and aggressive effort to weed out the "potentially disloyal." Existing legislation and administrative regulation afford adequate protection against *actions* of public employees that are dangerous to the operation of government. The program is designed to purge from government service individuals whose ideas, associations and legal activities give rise to an inference that such persons may in the future engage in conduct injurious to the government.

It is this characteristic of the loyalty program which gives rise to its major difficulties. It is this factor which comes into immediate conflict with basic American traditions of freedom for speech and belief, freedom for political expression, freedom for experimentation. This factor is also largely responsible for the need of a large staff of secret police, the maintenance of a master file of "derogatory information," investigations and hearings which probe into every corner of a man's life for information on opinions, associations and personal habits. Similarly it produces many of the procedural difficulties; it lies, for instance, at the basis of the claim that sources of information and evidence itself cannot be disclosed to the individual under attack. And finally, since it is by nature illimitable, it tends irresistibly in practical administration toward excesses and abuse of power, toward ever increasing efforts to avoid all risk by eliminating any unorthodox or questionable element from the government service. Thus it brings with it the whole train of evils that result in demoralization of men and women, in suppression of ideas and experiment, in impairment of government service, and in making the Federal government an example of repression for the country as a whole.

The dramatic words of Edward Livingstone, uttered during the debate on the Alien Bill, have relevance today:

"The country will swarm with informers, spies, delators, and all the odious reptile tribe. . . . The hours of the most unsuspected confidence, the intimacies of friendship, or the recesses of domestic retirement, afford no security. The companion whom you must trust, the friend in whom you must confide, the domestic

who waits in your chamber, are all tempted to betray your imprudent or unguarded follies; to misrepresent your words; to convey them, distorted by calumny, to the secret tribunal where jealousy presides—where fear officiates as accuser, and suspicion is the only evidence that is heard. . . . Do not let us be told that we are to excite a fervor against a foreign aggression to establish a tyranny at home. . . .”<sup>599</sup>

Administration of the Loyalty Order thus far, due largely to public protest against the trend and to the restraining influence of the Loyalty Review Board, has not realized its worst possibilities. Nevertheless the vicious impact of the program upon the Federal service has remained and, at least in the case of the sensitive agencies, has grown worse. Congress continues to press for expansion of the program and stricter enforcement. And in any event the principles of the program remain on the books, and its machinery in readiness, with the possibility of more intensive application upon a change in administration or a heightening of the tensions that led to its development.

What, then, is the alternative? The problem is one of weighing the actual dangers confronting the government today against the heavy cost of a program designed to root out every trace of danger in advance. This issue must be considered not only in the light of basic constitutional limitations but in terms of the urgent need for a dynamic and progressive democracy.

#### *Is a General Loyalty Program Necessary?*

The first question is whether a general loyalty program, embracing all Federal employees, is necessary or desirable. The authors are of the opinion that no sufficient case for such a program has been demonstrated. No concrete showing of immediate and widespread danger, adequate to outweigh the price that must be paid in the loss of democratic values, has thus far been presented to the country. The contention of the Committee on Un-American Activities and of certain other members of Congress—that the government service is pervaded with “subversive” elements—has never been documented with specific and persuasive evidence. The official position of the Administration—that the dangers cannot be estimated but that the presence of *any* “disloyal” employee threatens the government—does not furnish an adequate justification for a sweeping and all-inclusive program. The recent allegations and disclosures of espionage, even if taken at face value, present a problem that is better handled by traditional counter-espionage methods and special clearance procedures.

As to the great mass of Federal employees there is no reason to believe that existing criminal statutes, plus the normal disciplinary

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509. Quoted in BOWERS, JEFFERSON AND HAMILTON 378 (1928).

powers of a government agency, are not sufficient to meet any present or immediately foreseeable danger. This includes the numerous employees engaged in ordinary clerical, minor administrative, maintenance and industrial positions. It includes the overwhelming bulk of employees in most of the Federal departments, such as the Post Office, Agriculture, Interior, the T.V.A. and many others. Attempts to predict dangerous behavior on the part of such employees, through a system of loyalty checks, simply produce a host of evils with little or no compensating benefit.

This leaves for consideration two groups of Federal employees. The first group consists of the limited number of persons occupying important policy-making positions; the second includes employees dealing directly with vital and highly secret matters of national defense, primarily in the Defense and State Departments and the Atomic Energy Commission.

As to the first group it seems doubtful whether, even here, a loyalty program is advisable under present conditions. These employees, also, must conform to the policies of their superiors, and overt acts of espionage, sabotage or conspiracy on their part can be dealt with by customary methods of detection and punishment. It is difficult to believe that any substantial number of such employees, operating within an agency on a satisfactory day-to-day basis, possess latent traits of "disloyalty" which could crop out and cause damage in a time of crisis. And even if such a danger exists it is highly doubtful that loyalty procedures will eliminate it.

Nevertheless the present temper of Congress, and perhaps of the country, seems to demand some action. We shall therefore consider, with respect to these key employees, whether standards and procedures can be developed which might assure a greater measure of protection and at the same time avoid some of the worst pitfalls of the current program.

As to the second group, considerations of national security warrant greater precautions than are applicable to ordinary employees. In large measure, if not entirely, this is a problem of adopting adequate methods of clearance for persons having access to highly secret data. The requirements for such clearance will necessarily include many elements apart from loyalty. Insofar as loyalty is involved the question is again one of developing satisfactory standards and procedures.<sup>510</sup>

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510. A fortiori there seems no need for any general loyalty program applicable to state or local employees. Special investigation of such employees in key positions would also seem unnecessary. See AMERICAN CIVIL LIBERTIES UNION, REPORT OF COMMITTEE ON EMPLOYEES' LOYALTY ON STATE AND LOCAL LOYALTY TEST (Jan. 28, 1948):

"The proposals in state and city legislatures for checks of loyalty of public employees would not appear to meet any practical need. Administrative officials are entirely capable of choosing employees on the basis of their fitness and of dismissing

*Criteria*

What should the Federal government demand, then, of employees occupying key positions? What activities, beliefs or associations should be considered so pregnant with danger as to constitute a disqualification from holding these positions? The problem must be considered in terms of the specific dangers against which protection is sought.

In the first place, no qualification or standard should be established to screen out individuals who advocate or believe in political, economic or social changes accomplished by peaceful, legal and democratic means. The extent of any change advocated or the intensity with which the views are held should be equally immaterial. If such advocacy or belief makes impossible the satisfactory performance of duties within the existing framework of organization and policy, then the government is protected by its authority to dismiss or discipline for incompetency or infraction of rules. And, of course, the President and his aides are entitled to the services of assistants who will vigorously carry out official policy. But these are questions of government administration within the civil service laws; they do not involve issues of loyalty to the United States and should not be incorporated in a loyalty program.

The establishment of criteria of such a character seems clearly in conflict with constitutional guarantees. They are not aimed at any clear and present danger, nor at a danger against which the government is entitled to protection. They are contrary to all traditions of a democratic form of government.

The Loyalty Review Board apparently accepts this principle. But the Loyalty Order, the Rees bill, the regulations of the "sensitive" agencies, the administration of the loyalty program in the past and its present administration at the lower levels, as well as the position of the Committee on Un-American Activities and of the other members of Congress, are all predicated upon contrary assumptions. Full acceptance of this restriction on loyalty review would change the whole nature of the current program.

A second issue relates to the extent of advance screening necessary to afford protection against espionage, disclosure of information, sabotage, and conspiracy to overthrow the government. In our judgment the standards for disqualification in this connection should be limited to two:

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those unfit. The application of a blanket loyalty test of all employees is both unnecessary and undesirable. Where conduct and associations are found demonstrating a loyalty to undemocratic principles or practices in conflict with the obligations of a particular job, an employee may properly be discharged. It is to be assumed that all discharges are based upon existing fair procedure."

(1) Personal advocacy of the overthrow or change of government by violent or other illegal means.

(2) Membership in an organization *after* such organization has been found, in accordance with appropriate procedures including court review, to advocate the overthrow or change of government by violent or other illegal means.<sup>511</sup>

The first is the primary standard. It is intended to eliminate those individuals who do not believe in peaceful, voluntary methods of arriving at common decisions through orderly governmental processes. Advocacy of violence or illegal methods carries with it a strong presumption that the individual is likely to engage in unlawful practices which no government can tolerate.

Proof that a particular individual falls within the ban should be based upon direct evidence inculcating that individual. Statements, oral or written, would constitute such evidence. Mere membership in an organization advocating violent or illegal methods should not, without more, be sufficient. Active participation with knowledge of the illegal objectives, or some further corroborating evidence, should be required.<sup>512</sup> Thus guilt by association would be avoided.

The second criterion is a corollary of the first. "Membership" should not be limited to actual card-holding but should include active participation in the activities or management of the organization regardless of formal status.<sup>513</sup> This standard does, to a degree, accept the principle of guilt by association. But continued membership in an organization after a formal finding of illegal advocacy carries a fair presumption that the individual accepts that position. Consequently the application of the doctrine of guilt by association is more apparent than real and, at least in the light of stricter standards applicable to government employment, would seem justified.

The process of investigation under the two suggested standards does raise some of the difficulties already pointed out. But the object of the investigation would be far more limited and, with only key employees involved, the impact of the whole program would be far less demoralizing.

The proposed standards omit various other factors which might have a bearing upon the likelihood of an employee engaging in the dangerous activities against which protection is sought. Thus the standards do not include participation in an organization which advocates entirely

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511. Obviously these criteria, while far more concrete and meaningful than the general standard of "disloyalty" or such terms as "subversive," present many questions of interpretation. Some of these issues are considered in the subsequent discussion. A complete analysis would carry us beyond the limits of this article.

512. This would set up a standard similar to that used in the Nuremberg trials.

513. The concept might be labelled "constructive membership." It would in effect include "affiliation" as defined by the Supreme Court in *Bridges v. Wixon*, 326 U.S. 135 (1945).

legitimate objectives but includes among its membership, to a greater or lesser extent, individuals who are members of another organization that does advocate illegal methods,—the problem of so-called “front organizations.” Nor do the standards include the holding or expression of views which are legitimate in themselves but coincide with the policies of an organization that also advocates violent or illegal methods,—the problem of so-called “fellow-travellers.” Not only should these activities not be established as criteria of disloyalty but they should not be determinative, at least by themselves, that the individual comes within the ban of the two proposed standards.

Activities of this nature are entirely consistent with full and honest belief in peaceful, democratic methods. In the absence of a further showing they do not establish such a strong likelihood that the employee will engage in illegal or unauthorized acts of espionage, disclosure, sabotage or conspiracy as to outweigh the dangers that their consideration necessarily entails. As soon as one enters this area it becomes impossible to draw a satisfactory line of limitation. One is drawn inevitably further and further into the position of penalizing actions or opinions which are wholly legitimate. Investigation delves further and further into the realm of lawful beliefs and associations. The whole process carries one irresistibly forward into the sweeping loyalty program which the Attorney General's Interdepartmental Committee warned against and which brings with it all the disabilities that have been noted above.

It will be conceded that the strict standards proposed do not eliminate all possible sources of danger. But the issue is one of balancing considerations. Not only does a probe beyond the limits suggested raise highly doubtful constitutional questions but it seems plainly unsound in terms of preserving the widest area of free expression and the most effective kind of government operation.

The final issue concerns the problem of “allegiance to a foreign power.” This raises the most vexing question of all. In our judgment disqualification on these grounds should be limited to membership in a political organization *after* it has been found, in accordance with appropriate procedures including court review, that the major policies of such organization are directed by an organization dominated by citizens and residents of a foreign country or countries.<sup>514</sup>

Membership of key government employees in a political organization committed in advance to policies determined in another country presents obvious dangers to our government. At least in the case of a highly disciplined organization it raises a strong presumption that decisions will be made upon the basis of policies formulated outside the

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514. The term “membership” should be defined as set forth above. As in the case of the prior standards numerous issues of interpretation, beyond the scope of this article, would arise in the application of this criterion.

functioning of the political process in this country. The government would seem entitled to draw its key employees from persons not committed in advance to policies thus determined. Further, the scope of investigation and proof required to establish the factual basis for application of the standard is relatively narrow and precise. The requirement of a prior decision as to the nature of the organization eliminates the worst features of guilt by association.

We believe, however, that the line should be drawn at this point. The standard should not include membership in an organization primarily non-political in character but possessing certain political aspects or objectives. Such membership might bear upon the appropriateness of particular assignments within the government; but it should not be a standard for complete disqualification from all government service. The standard should likewise not apply to membership in an organization which merely adheres to policies originated or developed outside the country where there is no proof that the domestic organization accepts direction from a foreign organization. Acceptance of foreign ideas, in the absence of foreign determination of specific policies, is not a danger of sufficient magnitude to warrant disqualification; and attempts to press the standard to this point would lead to a meaningless and dangerous effort to distinguish between "American" and "foreign" ideas. A fortiori the standard should not attempt to weed out individuals who have no membership in any organization but who may be said to hold ideas developed abroad or be influenced by "foreign ideologies." There would appear to be no real danger from such influences, but acute danger from attempting to eliminate them. Again, the standard should not reach to membership in domestic organizations dominated by non-citizens. Here the organization works within the domestic environment and presents no danger of a kind which the government is entitled to suppress.

A closer question arises in the case of persons who are not members of an organization coming within the proposed standard but who advocate the major policies of such an organization. This is again the question of the so-called "party liners." The fact that such persons do not accept the discipline of the party organization would seem to leave them sufficiently free intellectually to make decisions on a basis that does not raise serious dangers to the government. On the other hand the attempt to eliminate such persons poses an impossible decision in drawing a line and raises acutely the worst evils of a strict loyalty program. Dangers from this source can be handled in other ways. We would therefore not extend the standard to include these individuals.

With respect to employees dealing directly with secret matters of national security, in our judgment the foregoing criteria constitute adequate tests of clearance to meet any present danger. The British



seem to consider such standards satisfactory. Possibly stricter criteria would be justified in exceptional circumstances. But counter-espionage must be relied upon as a major source of protection in this area. In any event refusal of clearance should not involve disqualification from other government employment.

### *Administration*

Limitation of the loyalty program in the manner we have suggested should eliminate the worst features of administration. Two further suggestions to mitigate possible abuses in administration may be offered. The Loyalty Review Board, assuming it continues to be staffed with men of liberal and tolerant tendencies, should maintain affirmative supervision of the administration of the program. The Board should not confine its activities to appellate review of formal cases. It should undertake constant surveillance of the informal operation of the program. It should provide a sympathetic hearing to individuals who complain that abuses are occurring. It should create a positive atmosphere of reason and tolerance, and stand as a bulwark to strengthen and protect subordinate officials in the employing agencies who are more vulnerable to bigoted pressures.

Secondly, the FBI and other professional investigating agencies should be subjected to a greater degree of "civilian" control. The FBI, in particular, operates on a completely independent basis, acknowledging little or no responsibility to anyone outside its own organization. Inevitably such an institution develops an ingrown tradition of militant police methods. A secret police established to investigate the "loyalty" of American citizens can develop into a grave and ruthless menace to democratic processes. There are signs that the FBI is moving dangerously in this direction.

Like the military, a secret police must be guided and directed by "civilians" not subject to the traditions and disciplines of the professional organizations. The Attorney General should therefore set up machinery to maintain close supervision over the FBI,—over its recruitment of personnel, its investigating techniques, the atmosphere of its bureaucracy, its whole method of operation. Particularly is this essential as to its activities in the field of "loyalty" investigations. Only in this way can the abuses inherent in such an institution be effectively kept in check.

### *Procedure*

Our conclusions with respect to the formal procedures in loyalty cases, whatever the criteria of loyalty adopted, are readily apparent from the prior discussion. They may be summarized briefly as follows:

- (1) Application of loyalty standards to individual employees or

applicants should be made only within the strict confines of the procedure established for adjudication by the Administrative Procedure Act. This includes adequate notice; opportunity to know the evidence, to present testimony, to rebut, to confront witnesses, to cross-examine; and decision upon the record made at the hearing in accordance with the preponderance of the evidence. This is no more than seems guaranteed by the Constitution. In any event no democracy can afford to entrust such determinations to any administrative official except in accordance with the regular procedures of our Anglo-American tradition for making decisions of comparable weight and significance.

(2) Any determination with respect to the character of an organization or group should similarly be made in accordance with the Administrative Procedure Act. This is equally important, and for the same reasons.

(3) Decisions by administrative officials, both in the case of individuals and organizations, should be subject to court review in accordance with the standards laid down in the Administrative Procedure Act. For the reasons already made clear the courts can perform a particularly valuable function in maintaining supervision over executive action in this sensitive domain of civil liberties.

### *Conclusion*

The American people are confronted with a decision of far reaching proportions. The answer will vitally affect not only the character of our government service but of all democratic institutions.

The task of those who man the government service has steadily grown more difficult, more exacting, more in need of unconventional attack. The answer to the basic problem of our time—the development of national common control over the functioning of our economic system and at the same time the preservation and extension of individual freedoms—depends upon the evolution of new methods of government and the creation of an alert, flexible and tolerant staff of administrators.

There are those who feel that the problems of modern government are beyond the capacity of ordinary man. Certainly the job cannot be done in an atmosphere of distrust and fear. It cannot be done under a program that stifles initiative, experimentation, and the expression of new or unpopular views; that rigidly penalizes the questioning of policies laid down from the top; that discourages our best talent from entering government service at all. Time may well reveal that the major weakness of the totalitarian governments lies in the rigidity of their bureaucracy. The democracies, which cannot compete in terms of highly centralized discipline, must seek their strength in resourceful and imaginative administration. If this be true the loyalty program is

fast dissipating one of our most precious assets. What John Stuart Mill said of all citizens is peculiarly applicable to those who serve their government:

“ . . . a State which dwarfs its men, in order that they be more docile instruments in its hands even for beneficial purposes—will find that with small men no great thing can really be accomplished. . . . ”<sup>515</sup>

The problem extends beyond the government service. It raises in bold relief the broader issue whether democratic political institutions can readjust themselves to the forces that are reshaping the world today. If we succumb to the fears and passions of those who shun the new ideas and seek to postpone inevitable change by repressive measures, we shall deal a crippling blow to all democratic institutions and values.

The rapid growth of the loyalty program in the last decade, and its maintenance in the elaborate form in which it exists today, mark an ominous sign of the times. It is part of the whole development that focuses public attention and energy upon emotional appeals to maintain the status quo and obscures the real dangers that confront us. The problem of loyalty is of minor significance in a healthy society. It grows out of differences and tensions that spring from a failure to readjust our society to the demands of a new situation. In the end it will not be solved by elaboration of loyalty tests and creation of a gigantic machinery to ferret out “disloyal” elements. In the long run the issue can be met only by an intelligent solution of the real problems which give rise to the conflicts that are now mistakenly viewed as questions of loyalty.

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515. MILL, *ON LIBERTY* 141 (World's Classics ed. 1942).

Professor Chafee has pointed out the positive obligation of the government to involve loyalty:

“ . . . It is all very well to say that men ought to be loyal to the state. What do we mean by the state? After all, it comes right down to the government that we deal with, and the government comes down to the human beings that we deal with, which means those who will on occasion put us into the hands of the police. If the individuals in the legislatures and the departments of justice and on the bench do not stand for the best things men stand for—for the development of mind and spirit, and the search for truth—men begin to wonder whether, after all, that government ought to endure. We cannot love the state as a mystical unity if that unity as we actually face it prevents us from living a true human life. So, in order to make people loyal to the state, you must make the state the kind of institution that they want to be loyal to.” CHAFEE, *THE INQUIRING MIND* 224-5 (1928).

See also Merriam, *Some Aspects of Loyalty*, 8 *PUB. ADMIN. REV.* 81 (1948).