The Loyalty Defendants

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Defendants, Real and Quasi

Any person, no matter how vicious and depraved, who has been accused of a crime, however shocking to the community, is entitled to all of the guarantees with which the law surrounds him, ranging from the presumption of innocence to a fair trial on specific charges. This is well established, and while it cannot be said that the law is enforced with an equal hand for all defendants in all parts of the country all the time, there is, nevertheless, a substantial uniformity in the American acknowledgement of what justice requires. But the term "defendant" has acquired a technical meaning, since it refers only to one accused of having committed a crime, which, in turn, is also a technical concept describing an offense against society for which punishment may be inflicted. The term "punishment" has also taken on a technical meaning, and refers generally to incarceration in jail or a money fine.

Many people get into difficulties with government, however, and are exposed to the danger of suffering the most severe penalties, without being in a position to claim the defendant's rights. Public employees, aliens held for exclusion or deportation, persons investigated by legislative committees, and applicants for passports are, among others, often put in the position of a defendant in a criminal case without having the benefit of the procedures which historic experience teaches are absolutely indispensable if justice is to be done. They are at best only quasi-defendants, and therefore, to paraphrase Justice Holmes, their rights are shaded by a quasi.

The government employee who is charged with disloyalty is a good case in point. Since prevailing doctrine holds that public employment is a privilege,[1] and that dismissal from that employ-

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[1] See Dotson, *The Emerging Doctrine of Privilege in Public Employment*, 15 PUB. ADMIN. REV. 77 (1955). On this point the classic citation has come to be Justice Holmes' opinion in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892), in which he made the oft-quoted remark that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

ment is not punishment within the scope of the criminal law, the government employee is not entitled to the procedures which ordinary defendants enjoy as of right. The government job being a privilege, the employee is not deprived of any legal right, so the dominant doctrine holds, when he is discharged for any reason which the government finds to be relevant to the question of his fitness, and as a consequence of a procedure which does not stand serious comparison with a trial in court.

This doctrine, however, flies in the face of the hard fact that in reality, as Justice Douglas has noted, "a disloyalty trial is the most crucial event in the life of a public servant. If condemned, he is branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice."[2] Justice Clark has also drawn attention to the consequences of a finding that a government employee is a security risk: "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy.' "[3]

While the doctrine that public employment is a privilege, discharge from which does not constitute punishment, entails serious procedural consequences for the public employee, it should be noted, however, that he is by no means altogether outside the protection of constitutional law. For example, when the Supreme Court upheld the Hatch Act prohibition of political activity on the part of federal employees, it was careful to point out, by way of dictum, that the power of Congress over public employees is not unlimited, so that, for example, a statute barring Negroes, Jews, Catholics or Republicans from public employment would not be reasonable and would therefore be unconstitutional.[4] While there may not be, in the present state of the law, any constitutional right *to* public employment, there is constitutional right *in* public employment. That is to say, government is not at liberty to treat public servants arbitrarily or unreasonably. Thus a congressional

[2] Concurring in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 180 (1951).

[3] Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952).

[4] United Public Workers v. Mitchell, 330 U. S. 75, 100 (1947).

statute permanently barring three named persons from public employment has been held to be an unconstitutional bill of attainder, Justice Black observing that "permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type."[5] Furthermore, while the state may discharge a person from public employment on the ground of his associations with subversive groups,[6] it acts unreasonably if membership is set up as a conclusive presumption of disloyalty, since membership may be innocent.[7] The "indiscriminate classification of innocent with knowing activity," said Justice Clark, "must fall as an assertion of arbitrary power"[8] offensive to due process. It is unreasonable to deny the public servant an opportunity to rebut the unfavorable inference that may be drawn from the nature of his associations and memberships.

Rise of the Federal Loyalty Program

A number of federal loyalty programs, as well as other security programs, have been adopted since the beginning of the Cold War.[9] These are a response to the challenging menace of Communism, the nature of which has been documented many times and in many

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[5] United States v. Lovett, 328 U.S. 303, 316 (1946).

[6] Garner v. Board of Public Works, 341 U.S. 716 (1951); Adler v. Board of Education, 342 U.S. 485 (1952).

[7] Wieman v. Updegraff, 344 U.S. 183 (1952).

[8] *Id.* at 191.

[9] There is now an immense literature on the federal loyalty programs. See: BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM (1953); SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE FEDERAL LOYALTY-SECURITY PROGRAM (1956); O'BRIAN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM (1955); GOLDBLOOM, AMERICAN SECURITY AND FREEDOM (1954); WESTIN, THE CONSTITUTION AND LOYALTY PROGRAMS (1954); YARMOLINSKY, CASE STUDIES IN PERSONNEL SECURITY (1955); WEINSTEIN & BROWN, PERSONNEL SECURITY PROGRAMS OF THE FEDERAL GOVERNMENT (1954). For leading articles see: Emerson and Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1 (1948); Cushman, *The Purge of Federal Employees Accused of Disloyalty*, 3 PUB. ADMIN. REV. 297 (1943); Fraenkel, *Law and Loyalty*, 37 IOWA L. REV. 153 (1952). An important document is the Report of a Subcommittee of the Senate Committee on Post Office and Civil Service, *Administration of the Federal Employees' Security Program*, 84th Cong., 2d Sess. (1956). A vast amount of information will be found in *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess. (1955), and in *Hearings Before the Subcommittee on Reorganization of the Senate Committee on Government Operations*, 84th Cong., 1st Sess. (1955). For collections of documents see *Internal Security Manual, Revised*, S. Doc. No. 40, 84th Cong., 1st Sess. (1955) and FUND FOR THE REPUBLIC, DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES (1955). There have been many symposia in various journals of which see: *Internal Security and Civil Rights*, 300 ANNALS 1 (1955); *Secrecy, Security, and Loyalty*, 11 BULLETIN OF THE ATOMIC SCIENTISTS 106 (1955); *Security in a Free Society*, 29 CURRENT HISTORY 197 (1955).

ways by various government agencies.[10] In the opening section of the Subversive Activities Control Act of 1950[11] Congress formally recorded its findings as to the nature of the Communist movement. It declared that it is a world-wide revolutionary movement whose purpose is to establish totalitarian dictatorship throughout the world by any means, including treachery, deceit, infiltration, espionage and terrorism. The establishment of such a dictatorship in any country results in the suppression of all opposition to the party in power and the denial of fundamental rights and liberties. Congress also concluded that domestic Communists, who are "rigidly and ruthlessly disciplined," in effect repudiate their allegiance to the United States in working for the objectives of a foreign country which directs the worldwide revolutionary conspiracy against the free world. These findings are supported by those of Mr. J. Edgar Hoover, long-time director of the Federal Bureau of Investigation, who has upon numerous occasions analyzed the nature and scope of the Communist movement in this country.[12] He has often testified, as he did in 1953, that

> the extent of potential dangerousness of the Communist Party, U.S.A., and its security threat to the Nation should not be judged merely by the extent of its membership. It has a strong fifth-column strength. As open party membership ebbs more and more, reliance is placed upon (1) underground leadership, (2) concealed members, (3) front groups, (4) fellow travelers, (5) Communist sympathizers, and (6) dupes.[13]

Such views are held by people who entertain the most diverse

[10] See Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, *Public Policy and Communist Domination of Certain Unions*, S. Doc. No. 26, 83d Cong., 1st Sess. (1953); House Committee on Un-American Activities, *Organized Communism in the United States* (1953), *Guide to Subversive Organizations and Publications* H.R. Doc. No. 137, 82d Cong., 1st Sess. (1951), *The Communist Party of the United States as an Agent of a Foreign Power*, H.R. Doc. No. 209, 80th Cong., 1st Sess. (1947); Subcommittee on Internal Security Laws of the Senate Judiciary Committee, *Interlocking Subversion in Government Departments*, 83d Cong., 1st Sess. (1953); Legislative Reference Service, *Communism in Action*, H.R. Doc. No. 754, 79th Cong., 2d Sess. (1946). See also: FUND FOR THE REPUBLIC, BIBLIOGRAPHY ON THE COMMUNIST PROBLEM IN THE UNITED STATES (1955); WEYL, THE BATTLE AGAINST DISLOYALTY (1951); CHASE, SECURITY AND LIBERTY: THE PROBLEM OF NATIVE COMMUNISTS, 1947-1955 (1955); HAWKINS, COMMUNISM: CHALLENGE TO AMERICANS (1953); EBENSTEIN, TODAY'S ISMS (1954); ALMOND, THE APPEALS OF COMMUNISM (1954).

[11] 64 STAT. 987 (1950), 50 U.S.C. § 781 (1952).

[12] See especially his *Statement on "Menance of Communism," Before the House Committee on Un-American Activities*, S. Doc. No. 26, 80th Cong., 1st Sess. (1947).

[13] *Hearings Before the Subcommittee on the Department of Justice of the House Committee on Appropriations*, 83d Cong., 2d Sess. 161 (1955).

political views. A leading libertarian organization, the American Civil Liberties Union, issued a statement in 1953 which affirmed

> that the American Communist Party is distinctively and essentially characterized both by extreme antidemocratic doctrine and practice and by obedience to the government of the Soviet Union, a despotic foreign power which dominates a world-wide revolutionary movement unprecedentedly threatening the national independence and individual civil liberties of all other countries. It is thus sharply differentiated from traditional American political parties, and all of its present adherents are to some degree involved in its distinctive and essential character.

Courts, too, are aware of the proportions of the Communist problem. In the leading prosecution of domestic Communist leaders, Judge Medina instructed the jury that as a matter of law the Communist conspiracy posed a sufficient danger of serious evil to the country to justify the application of the Smith Act under the First Amendment.[14] In sustaining this ruling at the Court of Appeals, Judge Learned Hand said: "Nothing short of a revived doctrine of *laissez faire,* which would have amazed even the Manchester School at its apogee, can fail to realize that such a conspiracy creates a danger of the utmost gravity and of enough probability to justify its suppression. We hold that it is a danger 'clear and present.' "[15] The Supreme Court agreed that the danger was substantial enough to meet the "clear and present danger" test, since it was a highly organized conspiracy of rigidly disciplined members dedicated to the overthrow of the government in the context of a world crisis.[16] Courts do not function in a vacuum, and judges are acquainted with current history. The view is widely held, to quote the words of Circuit Judge Albert Lee Stephens, that "the existence as of today of a world-wide conspiracy against free democratic government by a major world power using as its vehicle the establishment of Communism by force and violence, is perfectly clear and incontrovertible."[17]

The federal loyalty program—and there are also state loyalty programs as well, far too numerous and complex to be examined here[18]—is a response to this widespread apprehension of Communist

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[14] United States v. Foster, 9 F.R.D. 367, 392 (1949).
[15] United States v. Dennis, 183 F.2d 201, 213 (2d Cir. 1950).
[16] Dennis v. United States, 341 U.S. 494, 511 (1951).
[17] Carlson v. Landon, 187 F.2d 991, 997 (9th Cir. 1951).
[18] See GELLHORN, THE STATES AND SUBVERSION (1952); Prendergast, *State Legislatures and Communism: The Current Scene,* 44 AM. POL. SCI. REV. 556 (1950); Note, 28 IND. L.J. 492 (1953).

designs. We have moved a long distance from the position taken by Civil Service Rule No. I, issued in 1884 under the Civil Service Act of 1883,[19] which declared that no question in any form of application or in any examination shall be so framed as to elicit information concerning the political opinions or affiliations of any applicant.[20] The first sign of formal congressional concern about the loyalty of government employees was expressed in 1939 in Section 9A of the Hatch Act,[21] which made it unlawful for any employee "to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States." Beginning in 1941,[22] Congress began the practice, continued ever since, of attaching a proviso to every appropriation act stipulating that no part of it is to be paid to any employee who advocates the overthrow of government by force or violence or belongs to an organization having such an aim. Then in June 1941 Congress appropriated $100,000 to the FBI to finance the investigation of subversiveness among workers.[23] In 1942 an additional $200,000 were appropriated for this purpose,[24] and many millions have been spent since then.

In the summer of 1941 the Attorney General ordered the FBI to investigate all loyalty complaints regarding individual federal civil servants, and in April 1942 he established an Interdepartmental Committee on Investigations.[25] By executive order,[26] on February 5, 1943, the President created a new Interdepartmental Committee on Employee Investigations which functioned until March, 1947. Early in the war, in March 1942, the Civil Service Commission adopted War Service Regulations providing that clearance should be denied in any case where there is reasonable doubt of loyalty,[27] and from time to time Congress enacted statutes

[19] 22 STAT. 403 (1883).

[20] 5 C.F.R. § 1.2 (1938).

[21] 53 STAT. 1147 (1939), 18 U.S.C. § 594 (1952).

[22] 55 STAT. 5-6 (1941).

[23] 55 STAT. 292 (1941).

[24] 56 STAT 482 (1942).

[25] See Federal Bureau of Investigation, H.R. Doc. No. 833, 77th Cong., 2d Sess. 23-26 (1942).

[26] Exec. Order No. 9300, 8 FED. REG. 1701 (1943).

[27] 5 C.F.R. § 18.2(c)(7) (Supp. 1943). This regulation, authorized by Exec. Order No. 9063, 7 FED. REG. 1075 (1942), was upheld in Friedman v. Schwellenbach, 65 F. Supp. 254 (D.D.C. 1946), *aff'd*, 159 F.2d 22 (D.C. Cir. 1946), *cert. denied*, 330 U.S. 838 (1947).

giving the power of summary removal to selected "sensitive" agencies, such as the military departments,[28] the State Department,[29] and the Central Intelligence Agency.[30]

President Truman set up a Temporary Commission on Employee Loyalty in November 1946,[31] whose report found existing arrangements inadequate, and resulted in the issuance of the Truman Loyalty Order of 1947.[32] A number of events immediately preceded the adoption of this sweeping program: the uproar over the *Amerasia* case in the fall of 1945, involving the misuse of secret documents, the discovery of the presence of several Communists in the State Department, the *Marzani* case,[33] and the publication in June 1946, of the report of the Canadian Royal Commission which investigated the Soviet spy ring, and which touched upon organized espionage in the United States as well as in Canada and Great Britain. In addition, by this time those two extraordinary witnesses, Elizabeth Bentley and Whittaker Chambers,[34] had gone to the FBI. Relations with the Soviet Union were deteriorating rapidly, tension was high, the Cold War was on.

Congress supplied a clear statutory basis for a general loyalty program with Public Law 733, adopted August 26, 1950.[35] This statute authorized the heads of eleven "sensitive" agencies, such as the State and military departments, and the Atomic Energy Commission, to suspend summarily without pay any civilian employee when they deem it necessary in the interests of national security. The President was empowered to extend the provisions of the Act to other departments or agencies. In addition the Internal Security Act of 1950 provided that no member of an organization which is registered with the Subversive Activities Control Board as a Communist organization may work for the government, or apply for such work.[36] Finally, many special statutes have been

[28] 54 STAT. 679 (1940), 50 U.S.C. APP. § 1156 (1952); 54 STAT. 713 (1940), 5 U.S.C. § 653 (1952); 56 STAT. 1053 (1942), 5 U.S.C. § 652 (1952).

[29] 60 STAT. 458 (1946).

[30] 61 STAT. 498 (1947).

[31] Exec. Order No. 9806, 11 FED. REG. 13863 (1946).

[32] Exec. Order No. 9835, 12 FED. REG. 1935 (1947).

[33] See Marzani v. United States, 168 F.2d 133 (D.C. Cir. 1948), *aff'd* by an evenly divided Court, 335 U.S. 895 (1948), 336 U.S. 922 (1949).

[34] See CHAMBERS, WITNESS (1952); BENTLEY, OUT OF BONDAGE (1951).

[35] 64 STAT. 476 (1950), 5 U.S.C. § 22-1 (1952).

[36] 64 STAT. 992 (1950), 50 U.S.C. § 784 (1952).

passed by Congress authorizing loyalty investigations by particular agencies.[37]

The overriding purpose of the Truman Loyalty Order was to rid the government of disloyal employees and to block the recruitment of disloyal applicants. Certain procedures, including hearing procedures and appeal to a central Loyalty Review Board, were established. The standard for refusing employment or for removal was that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States."[38] This required those responsible for the decisions to make in each instance a positive finding of a reasonable belief of disloyalty. On April 28, 1951, however, the President changed the standard to "reasonable doubt as to the loyalty of the person involved."[39] Without question, and such was its purpose, this change in the standard, in the words of Mr. Seth W. Richardson, then Chairman of the Loyalty Review Board, "lessens the degree of proof . . . ."[40] It is clear that it is easier to justify a doubt than to support a positive finding. It is difficult to say just what led to this change, but it is to be noted that the Korean War had reached a new level of intensity with the entry of China, that many people were dissatisfied with the small number of scalps hitherto secured, that there was heavy political pressure from those who wanted a more vigorous program, that several cases, such as those involving Hiss; Coplon and the Rosenbergs, had drawn enormous attention to the problem of disloyalty, and that Senator McCarthy had begun to sound his alarm. Investigations had also drawn attention to Communist infiltration into the government by various groups.

While the loyalty order recited a number of factors which were to be taken into consideration in deciding upon the question of loyalty, such as espionage, advocacy of sedition or revolution, and the like, it quickly became apparent that the main criterion was "membership in, affiliation with or sympathetic association with"

[37] See, *e.g.*, 62 STAT. 13 (1948), as amended, 66 STAT. 43 (1952) (personnel assigned to foreign information and cultural exchange program); 60 STAT. 766 (1946), as amended, 66 STAT. 43 (1952), 67 STAT. 240 (1953) (employees of Atomic Energy Commission and others having access to atomic data).

[38] 12 FED. REG. 1938 (1947). For the operational mechanics of the Truman loyalty program see 13 FED. REG. 9365 (1948).

[39] Exec. Order No. 10241, 16 FED. REG. 3690 (1951).

[40] Richardson, *The Federal Employee Loyalty Program*, 51 COLUM. L. REV. 546, 555 (1951). The amended standard was described as "a more rigid test of suitability for government employment" in Jason v. Summerfield, 214 F.2d 273, 276 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 840 (1954).

any organization designated by the Attorney General as subversive. This provision of the Order made official a list first drawn up by Attorney General Biddle in 1946 as an informal guide for government agencies.[41] Originally organizations were listed without prior hearing, but following an unfavorable court decision,[42] the Attorney General issued regulations on May 6, 1953, granting a hearing to listed organizations.[43]

The measure of success of the Truman loyalty order has been the subject of endless and acrimonious debate. Between 1947 and the end of the program in August 1953, the loyalty forms of 4,756,-705 individuals were checked. Loyalty boards had cleared 16,503 persons, and 560 had been removed or denied employment on grounds relating to loyalty.[44] In any event, President Eisenhower promulgated a new loyalty order on April 27, 1953.[45] This order extended Public Law 733 to all departments and agencies of the government. The old Loyalty Review Board was abolished, and the responsibility for final decision was vested in the head of each department or agency. A new standard was adopted, "whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of national security."[46] Lumped together were various types of behavior, arranged in seven categories, relating to trustworthiness, criminal, immoral or disgraceful conduct (such as drug addiction, alcoholism or sexual perversion), mental incapacity, amenability to pressures, sabotage, espionage or sedition, bad associations and memberships, advocacy of unconstitutional overthrow of government, unauthorized disclosure of security information, and serving a foreign government in preference to the interests of the United States. On October 13, 1953, another category was added—refusal by the individual, upon the ground of the constitutional privilege against self-incrimination, to testify before a congressional committee on charges of disloyalty or other misconduct.[47] It should be added that on July 9, 1954, Attorney General Brownell created a new Internal Security Division in the Department of Justice, with an Assistant Attorney General in charge.

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[41] The first list under the 1947 Order was published March 20, 1948, 13 FED. REG. 1471.

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

[43] 28 C.F.R. §§ 41.1-41.11 (Supp. 1956).

[44] U.S. CIVIL SERVICE COMMISSION ANN. REP. 29-32 (1953).

[45] Exec. Order No. 10450, 18 FED. REG. 2489 (1953).

[46] *Id.*, 18 FED. REG. at 2491.

[47] Exec. Order No. 10491, 18 FED. REG. 6583 (1953).

The Various Programs

There are today several different federal security programs. One covers civilian government employees, reaching about 2,400,000 people. A second program is available for the armed forces, affecting about 3,500,000. A third, the industrial security program, applies to about 3,000,000 persons who, as employees of contractors working for the military departments, have access to classified material. The Atomic Energy Commission has a separate program, both for its own personnel and contractors' employees having access to classified information. In addition, the Coast Guard administers a port security program which affects about 800,000 sailors and water-front workers. Finally, there is a special program extending to some 3,000 Americans who work for international organizations.

While these programs have many common characteristics, there are also differences among them. Thus the Atomic Energy Commission[48] gives a full background investigation to all of its own employees, and those employees of its contractors who have positions requiring access to restricted data, and has a full FBI investigation for all persons holding important or sensitive positions.[49] Unlike all other government agencies (except the Air Force), the Commission provides an administrative hearing for applicants as well as for employees. Local boards whose members are drawn from outside the Commission are utilized, but it also makes review available by a Personnel Security Review Board. The Commission issued new rules governing security clearance on May 7, 1956, for the announced purpose of carrying out its responsibility "in a manner consistent with traditional American concepts of justice."[50] Its criteria for determining eligibility for security clearance are a far cry from the reasonable doubt doctrine. The new rule says:

> The decision as to security clearance is a comprehensive, common sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether or

[48] Senator Hubert Humphrey, March 9, 1955: "The more I look into this problem, the more I find that we have created over here almost a separate principality in the Atomic Energy Commission." *Hearings Before the Subcommittee on Reorganization of the Senate Committee on Government Operations,* 84th Cong., 1st Sess., at 184 (1955), on S.J. Res. 21, hereafter referred to as the *Humphrey Hearings.*

[49] John A. Waters, Director of the Division of Security of AEC, testified on March 10, 1955, that since January 1, 1947 the Commission had completed 503,810 investigations, and that 494 people had been denied clearance. The eligibility of 5,532 had been questioned. *Humphrey Hearings* at 293-94.

[50] 21 FED. REG. 3105, § 4.4 (1956).

> not the granting of security clearance would endanger the common defense and security.[51]

The requirement that favorable as well as unfavorable information should be considered is especially note-worthy.

As regards confrontation and cross-examination of hostile witnesses, the new rules encourage the boards to request the presence of witnesses whose testimony is important, and to subject them to cross-examination.[52] If a witness is unavailable, the board is required to take that into consideration. Where confrontation is not possible because of the confidential nature of the sources of information, the board may request witnesses to testify privately, and be subject to "thorough questioning" by the board and its counsel.

The employees of all defense contractors, other than those dealing with AEC, are subject to the regulations of the Department of Defense.[53] First of all, the government agency makes an administrative determination that the company can be trusted with classified information, through an investigation of the owners, officers and key employees as well as a survey of the physical plant. Following this facility security clearance, the company enters into a security agreement by which it is bound contractually to abide by security rules. Those employees who will have access to top secret information must be given a full background and field investigation. Those who will see secret data are put through a national agency check, that is, through the various files of the FBI, the defense departments, the Civil Service Commission, the House Committee on Un-American Activities, and other agencies. Citizens having access only to confidential information can be cleared by the contractor, but if derogatory information turns up later the company is required to submit it immediately to the security office of the appropriate military department. The contractor may not revoke a confidential clearance he had previously granted without processing it through regular governmental security procedures. Since April 1, 1955, a new review system has included Personnel Security Boards sitting in New York, Chicago and San Francisco, and a Central Review Board to consider novel questions and cases where hearing boards are divided. A Central Screening Board determines the weight of charges initially.

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[51] *Id.*, § 4.10(a).
[52] *Id.* at 3107, § 4.27(m).
[53] Armed Forces Industrial Security Regulation, 18 FED. REG. 6528 (1953).

The law does not require a defense contractor to discharge an employee who has been denied clearance, but actually employers seem to prefer this to transferring the worker to non-secret work. "[W]e feel," the Director of Security for the Douglas Aircraft Company, Mr. Bernard F. Fitzsimons, recently testified, "that if an individual is a potential or an actual security risk insofar as his access to classified information and material of the Department of Defense is concerned, he is a potential or an actual security risk wherever he is in our plants or on our premises."[54] Indeed, wholly apart from defense establishments, many employers not bound contractually at all have adopted various loyalty procedures of their own. It has been noted that

> there are few, if any, real restrictions on private employer loyalty measures today. Courts are not inclined to interpret existing statutes so as to restrain such programs. Arbitrators also are increasingly upholding discharges of suspected subversives where the employer's action is not arbitrary. And the NLRB is apparently no longer suspicious of all disloyalty charges.[55]

Thus it has been held that fair employment practices acts and statutes forbidding employer coercion of political activities of employees do not forbid or restrict the discharge of suspected subversives.[56] The California Supreme Court recently ruled that a private employer's discharge of a Communist employee was for "just cause" within the meaning of a valid collective-bargaining agreement,[57] and the Supreme Court took the position that such a case presented to it no substantial federal question for review, but only one of state construction of a local contract under local law.[58] Recent studies have drawn attention to the widespread use of loyalty tests for employment in the entertainment industry, which in many instances amounts to blacklisting.[59] "Trials" are held by employers or by private organizations without the guidance of clearly-formulated standards, without procedures which assure even elementary fairness, and without effective legal controls.

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[54] *Humphrey Hearings* at 362-63.

[55] Comment, 62 YALE L.J. 954, 983 (1953).

[56] See Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, 171 P.2d 21 (1946).

[57] Black v. Cutter Laboratories, 43 Cal.2d 788, 278 P.2d 905 (1955). The court held that an arbitration award directing that a member of the Communist Party be reinstated in a plant producing antibiotics for both military and civilian use was against public policy, as expressed in federal and state laws.

[58] Black v. Cutter Laboratories, 351 U.S. 292 (1956). Three Justices dissented.

[59] See COGLEY, REPORT ON BLACKLISTING, vol. I, *Movies*, vol. II, *Radio-Television* (1956).

Indeed, the standard is not only disloyalty or possible disloyalty, but also, and primarily, a public relations risk, the test being "controversiality."[60]

The port security program, which is administered by the Commandant of the Coast Guard, had its beginnings soon after the beginning of the Korean War by voluntary agreement between management and labor. Communists were strong in several unions of sailors and longshoremen, and indeed a few were expelled from the CIO in 1950 during its purge of Communist-dominated unions. The screening of maritime workers was made official with the adoption of the Magnuson Act of 1950[61] and its implementation by executive order.[62] Under this program appeals lie to tripartite boards sitting in each Coast Guard District. The basic standard, as amended by executive order in 1951,[63] is that clearance will not be granted to an applicant "unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States." Accordingly, the Commandant must make an affirmative decision that the applicant is reliable.

The procedures of the port security program have the usual shortcomings which are to be found in the loyalty field. The individual does not see the file on the basis of which the board questions him and in part at least makes its judgment. In the first determination of ineligibility the seaman has no voice at all; in fact, he is not even notified until clearance has been denied. He has no right to a bill of particulars, nor the right to confront his accusers. The Commandant, who decides but does not hear, makes the final decision. "The whole tenor of the Coast Guard scheme is that the seaman's opportunity to speak is to be considered an appeal from action already taken on undisclosed evidence."[64]

But it must be noted that this program deals with private employment, and that it therefore is beyond the reach of the privilege doctrine which relates to public employment. In 1953 the Court of Appeals for the Ninth Circuit affirmed a dismissal of criminal

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[60] Horowitz, *Loyalty Tests for Employment in the Motion Picture Industry*, 6 STAN. L. REV. 438 (1954).

[61] 64 STAT. 427. See Brown and Fassett, *Security Tests for Maritime Workers: Due Process under the Port Security Program*, 62 YALE L.J. 1163 (1953).

[62] Exec. Order No. 10173, 15 FED. REG. 7005 (1950).

[63] Exec. Order No. 10277, 16 FED. REG. 7537, § 6.10-1 (1951).

[64] Brown and Fassett, *supra* note 61, at 1179.

charges brought against several seamen for accepting employment on U.S. merchant vessels after having been denied the documents required by the port security program.[65] The court merely held that the charges were too general, so general indeed that all the persons involved could do was deny them.

Two years later this court went much farther in ruling that this program did not afford the sort of notice and hearing that Fifth Amendment due process of law requires.[66] While it took the position that the screening of security risks is permissible as a matter of substantive due process, it believed that proper notice and hearing, as required by procedural due process, would not destroy the program. The procedure was held defective in that neither the accused nor the board knew the identity of the informers or accusers, and that the board did not know who evaluated the information in the files, and how it was done. The court rejected the argument that otherwise the sources of information would dry up with the observation that this was mere speculation regarding something that had not yet been tried. Judge Pope pointed out that "in the procuring of evidence for the prosecution of criminal cases, the Federal Bureau of Investigation has shown no signs of collapsing because proof of guilt must be furnished by witnesses who must appear for confrontation and cross-examination."[67] He asked:

> Is this system of secret informers, whisperers and tale-bearers of such vital importance to the public welfare that it must be preserved at the cost of denying to the citizen even a modicum of the protection traditionally associated with due process?[68]

While the court conceded the possibility that disclosure of sources might make a certain amount of information unavailable, it felt that

> it is unbelievable that the result will prevent able officials from procuring proof any more than those officials are now helpless to procure proof for criminal prosecutions. But surely it is better that these agencies suffer some handicap than that the citizens of a freedom loving country shall be denied that which has always been considered their birthright. Indeed, it may well be that in the long run nothing but beneficial results will come from a lessening of such talebearing. It is a matter of public record that the somewhat comparable security risk pro-

[65] United States v. Gray, 207 F.2d 237 (9th Cir. 1953).
[66] Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).
[67] *Id.* at 718.
[68] *Id.* at 719.

gram directed at Government employees has been used to victimize perfectly innocent men.[69]

Finally, it was emphasized that the rights in question were fundamental, and that if merchant seamen do not have them, no one else has them. If Congress can do this to seamen, then it can do the same to trainmen, all factory workers, and so forth. The time has not yet come, the court said, when we have to abandon a system of liberty which is ordained by the Constitution and which we are sworn to uphold for one modeled after that of the Communists.

Military personnel are not covered by the 1953 Executive Order of President Eisenhower, but the criteria are very much the same. The present rules, in turn an outgrowth of previous rules and practices dating from 1948, were adopted April 7, 1954,[70] but were substantially revised on October 17, 1955 and June 20, 1956. The armed forces do not take subversives, whether by way of volunteering or induction through conscription. Men already in the service are entitled to hearings and appeals before discharge on disloyalty grounds. Since draftees are involved in this security program involuntarily, they have posed a special problem.[71] A man's pre-induction activities were, until very recently, considered in deciding whether he should be inducted and whether he should be allowed to continue in service after having been drafted for active service. Under the 1955 revision of the rules, the security investigation must be completed before a registrant is inducted. Previously service men were getting less than honorable discharges, in spite of honorable service, because their pre-service associations were deemed to be in the security risk category.[72] On June 19, 1956, the Department of Defense announced a further revision of procedures which grants the right of a hearing to draftees rejected on loyalty grounds before induction.[73] Thus the selective service registrant is given an opportunity to wipe out the stigma of having been rejected for military service as a security risk.

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[69] *Id.* at 720.

[70] Department of Defense Directive 5210.9. For the text see *Internal Security Manual, Revised, supra* note 9, at 272-80.

[71] See WATTS, THE DRAFTEE AND INTERNAL SECURITY (1955), for a study of 110 draftee security cases.

[72] It has been held that an honorable discharge is both a property and civil right which falls within the constitutional protection of due process of law, and that denial of such a discharge because of non-criminal acts committed prior to induction, in spite of a meritorious military service record, is "offensive to our notions of rudimentary fairness." Bernstein v. Herren, 136 F. Supp. 493, 497 (S.D.N.Y. 1955).

[73] Department of Defense Directive 5210.9, Military Personnel Security Program.

The Procedure under Executive Order 10450

The federal loyalty program for the civilian employees, which has drawn more attention than any other, depends upon investigation rather than upon oaths and declarations. All persons in the federal service and all who apply for positions therein are put through a name check, which means that a search is made for "derogatory information" in the various files, mainly those of the FBI, the Civil Service Commission, the offices of military intelligence, and the House Committee on Un-American Activities. There is a vast number of dossiers in Washington these days. In the fall of 1955 the Civil Service Commission reported that it had a card index file with the names of about 2,000,000 persons allegedly affiliated with some sort of subversive organization or activity, and also a central security index of some 5,000,000 government personnel investigations made since 1939.[74] For all sensitive positions, including all positions in the State Department, and for all cases where "derogatory information" has turned up, there is a full field investigation by the FBI.

One of the critical steps in the whole procedure is the evaluation of the FBI reports by the security officers of the various agencies. Under Executive Order 10450 the security officer must make an affirmative finding that retention or hiring of the individual concerned is consistent with national security. After examining the FBI report the security officer may decide to do nothing, but it has been observed that "doing nothing requires a modest degree of bureaucratic fortitude, since the employee's retention may later be criticized and that criticism reflected onto the security officer."[75] Certainly there is a strong temptation to fire or not to hire, since this course of action will almost never get the security officer into trouble.

The evaluation of the FBI report is no simple matter, since the security officer often does not know the identity of many FBI sources. It is the FBI agent who evaluates the degree of reliability of the source, and there are great differences among the agents as to ability, education, political sophistication and point of view. Mr. J. Edgar Hoover has often insisted that

> the role of the FBI in security investigations, as in criminal cases, is to adhere strictly to its position as a fact-finding agency only, leaving to other legally constituted authority the responsi-

[74] N.Y. Times, Nov. 16, 1955, p. 8, col. 4.

[75] Brown, *The Operation of Personnel Security Programs*, 300 ANNALS 94, 96 (1955).

> bility for making decisions as to action to be taken on the facts developed.[76]

But in actuality, reporting the facts is not a mechanical operation: facts must be selected and sorted out, "raw files" must be edited, and sources must be evaluated.

The security officer may, on the strength of the FBI report, disqualify the employee or summarily reject the applicant. Applicants are given hearings only by the Atomic Energy Commission and the Air Force. Before deciding the security officer may hold an informal conference with the individual concerned, or as is done more often, submit the derogatory information to the employee, in the nature of interrogatories, for written comment. In more than one way the security officer exercises decisive authority. He may deny hearings to applicants and probationary employees. He may suspend anyone, without pay, against whom charges have been brought. He may, without bringing charges or holding a hearing, deny access to classified material. He is also in a good position to pressure employees into resigning, thus circumventing all of the hearings and review procedures.

Following an adverse decision of the hearing officer against an employee, the latter has a right to a hearing and to appeal. Under the Eisenhower loyalty program the members of the hearing board must be drawn from outside the agency of the person concerned, that is to say, from other government agencies. Under the Truman program appeals could be taken to a central Loyalty Review Board, but this was abolished by the 1953 loyalty order, which vested final responsibility in the head of the department or agency.

The procedures available to government employees, especially when viewed in the perspective of rights secured to defendants in criminal cases, leave much to be desired. As recently as March 4, 1955, Attorney General Brownell wrote to the President, following a review of the employee security program by the Internal Security Division of the Department of Justice, suggesting seven procedural improvements.[77] In the interest of protecting the rights of employees as well as the national security he recommended that charges should be drawn "as specifically as possible, consistent with the requirements of protecting the national security,"[78] and that

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[76] Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 IOWA L. REV. 175, 188 (1951).

[77] For the text of the letter see SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE FEDERAL LOYALTY-SECURITY PROGRAM 280-88 (1956).

[78] *Id.* at 281.

in all cases the agency's top legal officer should be consulted on the drafting of the statement of charges so that "the charges are specific enough to be meaningful to the employee."[79] He recommended "meticulous care" in suspending employees, and suggested that in most instances a previous personal interview would be helpful. After securing the opinion of the agency's highest legal office, the final decision to suspend, he thought, ought not to be delegated below the assistant secretary level. It was urged that a legal officer ought to be present at security board hearings to advise the board and also the employee if unrepresented by counsel. Greater efforts should be made, particularly through periodical personal review by the agency head, to secure high quality men for the hearing boards, men possessing "the highest degree of integrity, ability, and good judgment."[80] When an agency head decides to make an adverse finding with respect to a person who had previously been cleared by another agency head, Attorney General Brownell recommended consultation between them to avoid conflicting evaluations not based on a difference in the sensitivity of the jobs. Even though the statute does not give the boards the power to summon witnesses by subpoena, he urged that every effort be made to produce witnesses at the hearings to testify in behalf of the government, so that such witnesses may be confronted and subjected to cross-examination, consistently, of course, with the requirements of national security. Finally it was suggested that all violations of law as disclosed in investigations or proceedings should be reported immediately to the Division of Internal Security of the Department of Justice. The President promptly registered his approval of all these recommendations.

These recommendations for reform, coming so many years and so many thousands of cases after inauguration of the employee security program, serve to underscore some of the main deficiencies of the program. The procedural points most debated have been the following:

(1) *Adequacy of Standards.* The standards by which decisions are made in individual cases have very little of the specificity which constitutional law demands in criminal proceedings. It must be remembered, as John Lord O'Brian has pointed out, that "in reality we have been establishing something like a new system of preventive law applicable to the field of ideas and essentially different

[79] *Ibid.* On the necessity of informing the employee "with reasonable certainty and precision" of the cause of his removal see Deak v. Pace, 185 F.2d 997, 999 (D.C. Cir. 1950).
[80] *Id.* at 282.

from traditional American procedures."[81] This system of protective action not only involves some guess as to the nature of future behavior, but also entails what is essentially a character trial. Whether public officials should be authorized to pronounce official judgment on the character of individuals in a democracy is a fairly debatable question. For, as Thurman Arnold has observed, the power to make such judgments and to impose disgrace through them is "the most utterly corrupting power in the world."[82]

While the standards for judgment include specific criteria, such as espionage, it is noteworthy that the employee security program does not seem to have uncovered a single case where espionage was the basis of judgment.[83] All active espionage cases of the post-war period were worked up by ordinary police methods. The principal criteria seem to involve inquiry into miscellaneous opinions and associations. One may wonder whether the men who make the decisions operate upon any other basis than personal predilection and subjective judgment when they ask such questions as: "What do you think of female chastity?"[84] "[A]re you in sympathy with [the] underprivileged?"[85] "Have you ever had Negroes in your home?"[86] "Are your friends . . . clever?"[87] "Did you ever write a letter to the Red Cross about the segregation of blood?"[88] "Do you read a good many books?"[89] "What magazines and newspapers do you read?"[90] It is reported that one board informed the suspected employee that it "'has received information that you frequently would be coming home late in the evenings and arguing politics

[81] O'BRIAN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 22 (1955). The logic of this development is reflected in section 103(a) of the Emergency Detention Act, 64 STAT. 987 (1950), 50 U.S.C. § 813 (1952), which authorizes the Attorney General, whenever the President proclaims the existence of an "Internal Security Emergency" (invasion, war or insurrection), to "apprehend and . . . detain . . . each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage. . . ."

[82] Arnold, *Due Process in Trials*, 300 ANNALS 123, 126 (1955).

[83] So the first chairman of the Loyalty Review Board, Mr. Seth W. Richardson, testified in 1950. *Hearings Before Subcommittee (Tydings) of Senate Foreign Relations Committee*, 81st Cong., 2d Sess., pt. I, at 409 (1950). See Brown, *supra* note 75, at 97: "We find no responsible claims that the loyalty-security programs have caught a single known spy."

[84] YARMOLINSKY, CASE STUDIES IN PERSONNEL SECURITY 12, Case No. 10 (1955).

[85] Nikoloric, *The Government Loyalty Program*, 19 AMERICAN SCHOLAR 285, 294 (1950).

[86] *Ibid.*

[87] *Ibid.*

[88] Judge Edgerton, dissenting in Bailey v. Richardson, 182 F.2d 46, 73 (D.C. Cir. 1950).

[89] Cushman, *Freedom vs. Security*, 2 PHYSICS TODAY 14, 18 (1949).

[90] *Ibid.*

loudly in the hall with young men."[91] On one occasion, in reporting that a particular employee had radical tendencies, the Director of the FBI solemnly reported, *inter alia,* that the suspect had studied anthropology.[92] An atmosphere which spawned such questions and observations as these explains why, early in 1955, during Bill of Rights Week, the head of the California Division of Architecture in Los Angeles refused to permit the posting of the Bill of Rights on the office bulletin board because he regarded it as a controversial document.

The Department of Justice has defended the asserted vagueness and uncertainty of these standards on the ground that they are not deficient if measured, not by the standards required in criminal proceedings, but by those traditionally applied in cases involving government employment.[93] Since all employees hold office at the pleasure of the appointing authority, it argues, definite standards for removal are not necessary. The Lloyd-La Follette Act of 1912[94] provided for removals from the federal service only "for such cause as will promote the efficiency of the service." The Department maintained that it had never been suggested that this standard was void for indefiniteness. Considering the nature of internal Communism as a secret and conspiratorial movement, it asserted, direct and conclusive proof is often difficult to get, and incontrovertible proof is unnecessary.

Apparently, guilt is more often established by association than by any other means. The Supreme Court has endorsed the proposition that "one's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps."[95] On one occasion Justice Jackson observed:

> "Guilt by association" is an epithet frequently used and little explained, except that it is generally accompanied by another slogan, "guilt is personal." Of course it is; but personal guilt may be incurred by joining a conspiracy. That act of association makes one responsible for the acts of others committed in

[91] BONTECOU, *op. cit. supra* note 9, at 142.

[92] *Hearings Before the Special Committee to Investigate the National Labor Relations Board,* 76th Cong., 3d Sess., vol. 28, 7296-97 (1940), quoted by Emerson and Helfeld, *supra* note 9, at 68-69.

[93] Brief for the Government, pp. 89-91, Peters v. Hobby, 349 U.S. 331 (1955).

[94] 37 STAT. 555 (1912), 5 U.S.C. § 652 (1952).

[95] Adler v. Board of Education, 342 U.S. 485, 493 (1952).

pursuance of the association. It is wholly a question of the sufficiency of evidence of association to imply conspiracy.[96]

Nevertheless it is still true that the doctrine of personal guilt is "one of the most fundamental principles of our jurisprudence,"[97] and that the associational test of guilt must be applied with great caution. That is why President Truman, at the very beginning of the program in 1947, warned that "membership in an organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case."[98] For membership may be innocent or even accidental, or merely the result of curiosity or lonesomeness. One may belong to an organization without endorsing all of its views. Indeed, one may join an organization for the purpose of opposing its leadership. Membership may also be temporary, although most agencies seem to follow the rule that past membership in the Communist Party creates a presumption of continuing membership which the employee must clearly overcome.[99] Furthermore, organizations change as leadership changes, so that a "good" organization may become "bad," or a "bad" one "good". Certainly board members should have the full history of each organization available in all cases.

Unfortunately, the concept of guilt by association often takes the form of "guilt by coincidence."[100] According to this view, for example, since Communists are known to favor fair employment practices legislation, an unfavorable inference of Communistic leanings is drawn with regard to one who is known to favor such legislation. This has been characterized by Stuart Chase as "guilt by verbal association."[101] A competent lawyer with wide experience in this field has called attention to all of the presumptions that militate against the suspect in loyalty cases.[102] It is presumed that adverse information is trustworthy while favorable information is not. It is presumed that the suspect shares all the views expressed

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[96] Concurring in American Communications Association v. Douds, 339 U.S. 382, 433 (1950).

[97] Justice Murphy, concurring in Bridges v. Wixon, 326 U.S. 135, 163 (1945). See on this point CUSHMAN, CIVIL LIBERTIES IN THE UNITED STATES, c. VII (1956).

[98] N.Y. Times, Nov. 15, 1947, p. 2, col. 2-3.

[99] BONTECOU, *op. cit. supra* note 9, at 66.

[100] See CUSHMAN, GUILT BY ASSOCIATION: THE GAME OF PRESUMPTIONS, THE STATE OF THE SOCIAL SCIENCES 457 (White ed. 1956); O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV L. REV. 592 (1948).

[101] Chase, *Language and Loyalty*, 15 THE PROGRESSIVE 13 (1951).

[102] Gressman, *So You're Having a Loyalty Hearing*, 126 NEW REPUBLIC 10 (1952).

in any publication which he has read and which is thought to be radical. It is assumed that if he read respectable publications, he was entirely unaffected by them. It is assumed that any contact with radicals, however slight, is contagious. On the other hand, contact with good people never seems to create a presumption of innocence. It is assumed that the suspect shares all the views ever entertained by any organization he ever belonged to. It is assumed that any questionable views which the suspect once may have entertained are forever after part of his intellectual baggage. In short, in security cases the suspect does not enjoy the protection of the presumption of innocence, but rather, after being accused, carries the burden of clearing himself. If anything, the presumption is that of guilt.[103]

The criteria of judgment are so meaninglessly vague that, in the words of Dean McGeorge Bundy of Harvard College, "the program has become, in effect, no program at all, but a patchwork of the individual judgments of men who too often seem to have only a fragmentary understanding of what they are doing."[104] One is reminded of the famous remark of Justice Matthews that "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."[105]

The searching inquiries into character which are the substance of the loyalty investigations must be viewed in the light of the fact that "not all of the men whose services are valuable to the government have lived such lily-pure lives or can present unblemished records, or records which will appear unblemished to persons of different political opinions, or which contain no false, trivial, or misinterpreted allegations."[106] It has also often been noted that a certain type of person seems to get involved in loyalty difficulties: the unorthodox dissenters, people who in the maturation process were idealistic and in the perspective of hindsight naive, people who are concerned with the social sciences, and are often unusually sensitive to life's travails, people who were particularly alert to the

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[103] O'BRIAN, *op. cit. supra* note 81, at 64. Mr. R. W. Scott McLeod, security chief of the State Department, has stated frankly: "[W]e are supposed to give the Government the benefit of any doubt. . . ." *Humphrey Hearings* at 327.

[104] *Humphrey Hearings* at 473.

[105] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[106] Du Bridge, *What Is a Securtiy Risk?*, 11 BULLETIN OF THE ATOMIC SCIENTISTS 163 (1955).

dangers of fascism in the thirties, or are concerned with achieving equal opportunities for minority groups.[107]

The associational aspect of this problem is complicated by the existence of the Attorney General's list of subversive organizations. Although in 1951 the Supreme Court expressed its disapproval of listing organizations without prior hearing,[108] and although the rules of the Department of Justice now provide for hearings, still it remains true that none on the present very long list had a hearing. The list was issued piecemeal, and includes many which have been defunct for many years. It includes organizations which at their inception were patently acceptable, and were taken over by undesirable elements only after a process of infiltration. The list does not record differences of time and degree. While the government has insisted that it is not a "blacklist," and is not conclusive evidence of disloyalty,[109] still there is reason to believe that it has been put to such uses. Certainly the list has no place as evidence in a court of law, since, as Judge Swann of the Second Circuit has ruled, it is "a purely hearsay declaration" without any probative value in a trial.[110]

(2) *The Issue of Confrontation.* The crux of the problem of a fair hearing in loyalty cases lies in the issue of confrontation. The hearing boards make use of secret evidence not disclosed to the suspect. The unsworn testimony of all sorts of confidential informants, whether undercover agents, professional informers or merely individuals, such as landladies, neighbors, janitors and former wives, is utilized by the boards. But the identity of these people is not usually known by the suspect, and he has no right to confront them and subject them to the rigors of cross-examination. It should be noted, however, that FBI agents describe informants in their reports, and often testify as to their reliability, and that the boards are instructed to take into consideration the handicap which the employee has as a result of his inability to confront his accusers. Whether the boards actually do so, however, there is no way of knowing. The boards have from the beginning been willing

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[107] See David A. Rose, *Humphrey Hearings* at 497; BONTECOU, *op. cit. supra* note 9, at 147-48; Arnold, *supra* note 82; Elson, *People, Government and Security*, 51 Nw. U.L. REV. 83, 87 (1956).

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

[109] Brief for the Government, pp. 17-20, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). See Kutcher v. Gray, 199 F.2d 783 (D.C. Cir. 1952), holding that membership in an organization on the Attorney General's list is merely a factor to be considered, and is not in and of itself a cause for removal. On Kutcher's case see Goldbloom, *A Case Study in Due Process*, 21 COMMENTARY 250 (1956).

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

to hear witnesses on both sides, but they have no power to compel attendance and no money with which to pay the expenses of willing witnesses. It is reported that some boards have questioned informants in secret who refused to testify otherwise.[111] In 1950 the Review Board urged the boards to make every reasonable effort to persuade non-confidential adverse witnesses to attend the hearings and submit to cross-examination. Mr. Philip Young, Chairman of the Civil Service Commission, testified on March 16, 1955, that in five of twelve cases in which hearing boards were convened, adverse witnesses were identified in the reports of investigators, that fifteen witnesses were invited to appear, and that six witnesses actually showed up in four cases; three did not reply to the invitation, one was dead, one letter was returned as undeliverable, and three were out of town and could not afford to come to the hearing.[112]

Mr. J. Edgar Hoover has often defended the government's position on the issue of confrontation.[113] He has insisted that the FBI must use confidential sources, and that far from exposing the employee to accusations by unstable or unreliable witnesses, the FBI, through "careful, exact and fair investigations" protects both the employee's civil liberties and the national security. He has argued that only by keeping confidential information out of the hands of unauthorized persons can vigilante action be prevented and the citizen's confidence be promoted. In any intelligence operation, he maintains, security of information is a primary concern.

Mr. Seth W. Richardson conceded that the absence of confrontation "smacks of unfairness and does not jibe with what is usually done in court," but he justified the practice as being legal, and on the FBI's insistence that investigative reports must include statements from confidential sources, either to protect the usefulness and safety of secret agents, or to prevent sources of information from drying up.[114] Furthermore, as Mr. R. W. Scott McLeod, chief of security for the State Department, has testified, the Department

[111] BONTECOU, *op. cit. supra* note 9, at 125-26; Biddle, *Subversives in Government*, 300 ANNALS 50 (1955).

[112] *Humphrey Hearings* at 523.

[113] See the following by Mr. Hoover: *Statement on "Menace of Communism" Before House Committee on Un-American Activities*, S. Doc. No. 26, 80th Cong., 1st Sess. (1947); Hoover, *A Comment on the Article, "Loyalty Among Government Employees"*, 58 YALE L.J. 401 (1949); Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 IOWA L. REV. 175 (1951); Hoover, *Role of the FBI in the Federal Employee Security Program*, 49 NW. U.L. REV. 333 (1954).

[114] Richardson, *The Federal Employee Loyalty Program*, 51 COLUM. L. REV. 546 (1951).

is not opposed to confrontation as a policy and always endeavors to secure witnesses if possible.[115] The Department of Justice has taken the position that, considering the fact that vital national interests are involved, the seriousness of the problem of disloyalty, and the fact that crime is not being charged, due process does not require confrontation.[116] "A large area of vital government intelligence," it has declared, "depends on undercover agents, paid informers, and casual informers who must be guaranteed anonymity."[117]

On the other hand, the use of secret evidence is always hazardous, and especially when the justification is national security. The right to confront adverse witnesses in court trials, the Supreme Court has ruled, is part of the basic minimum required by our system of jurisprudence.[118] "The plea that evidence of guilt must be secret," Justice Jackson once wrote, "is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected."[119] The use of secret evidence in the interests of security, he pointed out, is characteristic of police states. And Justice Douglas has drawn attention to the fact that the board

> convicts on evidence which it cannot even appraise. The critical evidence may be the word of an unknown witness who is "a paragon of veracity, a knave, or the village idiot." His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judge and to the accused. The accused has no opportunity to show that the witness lied or was prejudiced or venal.[120]

On another occasion Justice Douglas said:

> The use of statements by informers who need not confront the person under investigation or accusation has such an infamous history that it should be rooted out from our procedure. A hearing at which these faceless people are allowed to present their whispered rumors and yet escape the test and torture of cross-examination is not a hearing in the Anglo-American sense. We should be done with the practice—whether the life of a man is at stake, or his reputation, or any matter touching

[115] *Humphrey Hearings* at 341.
[116] Brief for the Government, pp. 21-24, 61-69, Peters v. Hobby, 349 U.S. 331 (1955).
[117] *Id.* at 105.
[118] *In re* Oliver, 333 U.S. 257, 273 (1948).
[119] Dissenting in United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950).
[120] Concurring in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 180 (1951).

upon his status or his rights . . . . Without the identity of the informer the person investigated or accused stands helpless. The prejudices, the credibility, the passions, the perjury of the informer are never known. If they were exposed, the whole charge might wither under the cross-examination."[121]

(3) *The Persistence of Jeopardy.* A basic rule of constitutional law is that a person cannot be harassed by repeated trials for the same offense. He cannot be placed in double jeopardy. No such protection is afforded the government worker. Cases are constantly being reopened, for a variety of purported reasons, the discovery of new evidence, transfer to another agency, change in security rules or personnel, or congressional pressure. The determination of employee qualifications is an executive function, and the general rule is that no rights vest in an executive decision.[122] The Supreme Court held in 1955, however, without even discussing constitutional issues, that under the terms of the 1947 loyalty order the Loyalty Review Board had no authority to review any case unless the employee himself or the agency brought it up for review; it could not review on its own motion.[123] But this ruling had only temporary significance, since the Review Board was abolished by President Eisenhower's 1953 loyalty order.

There have been many instances of repeated adjudications in the federal employee security program.[124] Dr. Oppenheimer was cleared four times before an adverse decision was finally made. John S. Service was cleared seven times by his departmental board before he was dismissed. Dr. Edward U. Condon had been cleared four times before his clearance was revoked. John Paton Davies had been cleared eight times; he was fired after 23 years of service on the ninth try. Dr. Peters had been cleared twice. Most of the individuals who were involved in the Fort Monmouth difficulties had been cleared several times. This cloud of perpetual jeopardy breeds delay and worry, is hard on morale and efficiency, and is expensive for all concerned. It is a curious paradox, John Lord O'Brian has observed, that instead of promoting security, this program has had "the opposite effect of spreading doubt, suspicion,

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[121] Dissenting in United States v. Nugent, 346 U.S. 1, 13 (1953).

[122] Comment, 20 U. CHI L. REV. 570 (1953).

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

[124] See Blumrosen, *Repeated Federal Employee Security Adjudications,* 1 WAYNE L. REV. 77 (1955). See also YARMOLINSKY, *op. cit. supra* note 84, Case No. 51.

and mistrust: and creating, particularly for those in government employ, a real and anxious sense of insecurity."[125]

(4) *The Scope of the Program.* Two important aspects of the Eisenhower loyalty program relate to the question of its proper scope. While the underlying act of Congress extended it to sensitive agencies by name, the President was authorized to extend it to other agencies. President Eisenhower's Executive Order 10450 brought all agencies of the federal government into the program, without regard to the question of sensitivity, and in disregard of the fact that most government positions are clearly nonsensitive in nature. It has been noted that not only does this simply increase the difficulty of the entire task,[126] but, "from the point of view of principle, it shifts the purpose of the investigation from that of protecting the government against a possible danger to that of punishing the individual."[127] On the other hand, Mr. Richardson has argued that there are "insuperable practical difficulties" in working out a formula that would separate sensitive from nonsensitive positions, and that "the presence in even a non-sensitive Government organization of a disaffected non-sensitive employee, might, through contact and association, lead to the infection of loyal, and possibly sensitive, employees."[128]

In *Cole v. Young,*[129] however, decided in 1956, the Supreme Court ruled by a 6-3 vote that since the underlying 1950 act of Congress authorizes dismissals only upon a determination that a dismissal is necessary or advisable in the interest of national security, the act was not intended to cover all government activities. The Court held that the statute relates only to activities which are directly concerned with the nation's safety as distinguished from the general welfare. Under previous personnel legislation, it has been clear since 1942, that government workers may be dismissed on loyalty grounds, but the issue in the *Cole* case was the extent to which the summary procedures authorized by the 1950 act were available. The Court thought it was "virtually conclusive" that had Congress intended to use the term "national security" in a sense broad enough to include all government activities, it would have

[125] O'BRIAN, *op. cit. supra* note 81, at 72.

[126] Professor J. H. Van Vleck of Harvard University has observed: "The moment we start guarding our toothbrushes and our diamond rings with equal zeal, we usually lose fewer toothbrushes but more diamond rings." Quoted by Dean McGeorge Bundy, *Humphrey Hearings* at 473.

[127] GOLDBLOOM, AMERICAN SECURITY AND FREEDOM 33 (1954).

[128] Richardson, *supra* note 114, at 553.

[129] 351 U.S. 536 (1956).

granted the power of summary dismissal to all agencies. "Indeed," said Justice Harlan, "in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets."[130]

In addition, the Eisenhower loyalty order lumped together all types of security risks, alcoholics, drug addicts, blabbermouths, and other undesirable characters, along with the disloyal. The announced purpose was to emphasize security and de-emphasize disloyalty. Actually the effect has been to spread wider the mantle of the disloyalty concept, a result due in part to the manner in which administration leaders have used the figures of dismissals from the government service to prove the success of the war against subversives.

(5) *Lack of Co-ordination.* A conspicuous failing of the employee loyalty program has been its lack of central direction, and the consequent lack of uniformity as to rules and operations among the agencies. The much-publicized case of Wolf Ladejinsky, who was dismissed by the Department of Agriculture as agricultural attaché at Tokyo as a security risk, and promptly hired by the Foreign Operations Administration to supervise land reform in South Vietnam, drew the public's attention to the absence of coordination in the program. Apparently each chief security officer follows his own course, security clearances are not transferable, and it would seem that the agencies do not trust each other on this question. Senator Humphrey asked Mr. McLeod the following question during the 1955 hearings: "Am I to understand, . . . that each security program is separate unto itself; that there is not any understanding of what the other departments do in this security program?" The reply: "Well, as long as the responsibility is in the head of an agency, I do not quite understand how it can be otherwise."[131] Greater uniformity and central direction through an overall personnel agency are widely regarded as desirable reforms.[132]

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[130] *Id.* at 546-47.

[131] *Humphrey Hearings* at 316.

[132] See Mankiewicz, Mangum and Moody, *The Federal Loyalty-Security Program: A Proposed Statute,* 44 CALIF. L. REV. 72 (1956); SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *op. cit. supra* note 9, at 137.

(6) *The Quality of Security Personnel.* There seems to be rather general agreement that on the whole the members of the hearing boards are drawn with care from the highest levels of the civil service, and that they are knowledgeable, fair-minded people. Miss Bontecou has described them as being, "for the most part, men of solid worth and humane qualities who have a lively sense of the responsibility they bear and of the possible impact of their activities on the lives of those who come before them."[133] Mr. A.A. Berle, Jr. has testified that in his experience the boards have been composed of "conscientious and careful men," who have endeavored to be "fair and understanding" within the limitations imposed on them.[134] Mr. David A. Rose of the Anti-Defamation League, reporting on a survey of some 450 cases handled by eight Washington law firms, has declared that "the lawyers all testified to the conscientious efforts on the part of present hearing board members to rule out prejudice and insure fair judgment. The few instances of malice or bigotry that cropped up were confined to informants, and the board members were alert to repudiate them when their motivation was revealed during the formal hearing."[135] Nevertheless, it must be remembered that board members are themselves government employees, subject to special pressures and having reason to be reluctant to bring in favorable decisions. A good argument can be made for having them appointed from outside the government service, perhaps by the federal judges, as special masters are selected, from distinguished members of the bar.

There are sharp differences of opinion about the qualities of investigators and security officers, though there seems to be general agreement as to the high quality and sound training of FBI agents. It has been pointed out that the job of investigator is not a very good one; it is without recognized professional status, the pay is low, the work is dull and routine, and the prospect of advancement being slight, there is a high turnover.[136] There do not seem to be any standards for the new profession of security officer. A distinguished lawyer has observed that "their level of education and intelligence is all too often far less than that of the employees whose files they evaluate. They are generally picked up from the ranks of former policemen, insurance company adjusters, collectors—anybody that has had to do with investigating people's

[133] BONTECOU, *op. cit. supra* note 9, at 47.
[134] THE TWENTIETH CENTURY CAPITALIST REVOLUTION 101 (1954).
[135] *Humphrey Hearings* at 497.
[136] BONTECOU, *op. cit. supra* note 9, at 80-81.

credit or claims."[137] A study of over 450 security cases handled by eight Washington law firms showed that after formal charges were filed, over 90 percent of the individuals involved were cleared. It has been suggested that this indicates that the security officers failed to exercise judgment, and preferred to let the issues go to the hearing boards. Sending along so many untenable charges led to "unnecessary hardship and heartache."[138] Furthermore, it is reported that security officers seem to be tempted to build up records for themselves by pressuring people into resigning from the service.[139]

(7) *The Question of Morale.* The effect of the security program upon the morale of the civil service is a much debated question, and one which needs empirical investigation. Far from impairing morale, Mr. Seth W. Richardson once argued that the loyalty program has immeasurably strengthened it because the reports show "an unexpectedly high standard of employee loyalty." He expressed doubt whether any other group of comparable size, if submitted to a similar examination, would measure up to such a high standard. The results, he asserted, have been a source of great satisfaction for most government employees.[140] Indeed, Mr. Richardson insists that the net result of the program has been "a very great relief" to the civil service.[141] It should be added that the loyalty program was approved by the National Federation of Federal Employees at its convention in Los Angeles in September 1950.

On the other hand, a competent social psychologist who seems to have studied the question of morale quite extensively has expressed the opinion that the morale of the entire civil service has probably been undermined, that the loyalty program has encouraged excessive conformity, that suspicion has replaced confidence in personal relations, and that members of marginal groups have been hit especially hard.[142] Five distinguished older career diplomatists of

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[137] Garrison, *Some Observations on the Loyalty-Security Program,* 23 U. CHI. L. REV. 1, 5 (1955).

[138] David A. Rose, *Humphrey Hearings* at 497.

[139] GOLDBLOOM, *op. cit. supra* note 127, at 30.

[140] Richardson, *supra* note 114, at 553-54.

[141] State Department Employee Loyalty Investigation, *Hearings Before the Subcommittee of the Senate Committee on Foreign Relations,* 81st Cong., 2d Sess., pt. 1, at 409 (1950).

[142] Jahoda, *Morale in the Federal Civil Service,* 300 ANNALS 110 (1955). See also Jahoda and Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs,* 61 YALE L.J. 295 (1952); BARTH, THE LOYALTY OF FREE MEN, c. 5 (1951).

unimpeachable reputation issued a statement on January 14, 1954, expressing the view that the attacks on the Foreign Service had had "sinister results" in inducing fear and conformity to such an extent as to threaten the national security.[143] Mr. Lloyd K. Garrison expressed the opinion of many observers when he wrote in 1955:

> This far-flung security system has resulted in the building up of a large establishment of secret police, the creation of a new profession of security officers with vested interests in perpetuating the existing regimes, the discouragement of some people from entering the service of the government, and the spreading abroad of a sense of timidity and fear—fear of speaking out publicly, fear even of speaking out privately on controversial topics, and fear of joining associations and organizations which have anything to do with controversial subjects."[144]

Academic and scientific people have testified that many scientists are now unwilling to enter government employment,[145] although it has not been established that the government is unable to supply its needs. Whether scientists of sufficiently high quality are available in adequate numbers for government work, however, does not seem to be known. But the view is often expressed that the loyalty program has overemphasized secrecy as a factor in security at the expense of scientific progress, and that it has encouraged "suspicion, distrust, gossip, malevolent talebearing, character assassination and a general undermining of morale."[146]

The task force of the second Hoover Commission took the position early in 1955 that it was clear that the security program had "undoubtedly damaged the morale of the Federal service."[147] It found that "there is fear that honest and loyal employees can be

[143] N.Y. Times, January 17, 1954. On morale in the State Department see Morgenthau, *A State of Insecurity*, 132 NEW REPUBLIC 8 (1955), and *Government Administration and Security*, 29 CURRENT HISTORY 210 (1955).

[144] Garrison, *supra* note 137, at 1.

[145] See GELLHORN, SECURITY, LOYALTY AND SCIENCE, c. 6 (1950); and see the testimony of Professor M. Stanley Livingston of MIT, Chairman of the Federation of American Scientists, *Humphrey Hearings* at 408-12, of Dean McGeorge Bundy of Harvard, *id.* at 465-67, of Dr. George V. LeRoy of the University of Chicago, *id.* at 392-93, and of William B. Harrell, Vice President of the University of Chicago, *id.* at 387: "Security procedures have undoubtedly made more difficult the recruitment, retention and effective use of the services of qualified scientists." See Livingston, *Science and Security*, 300 ANNALS 4 (1955); SHILS, THE TORMENT OF SECRECY (1955); Berkner, *Secrecy and Scientific Progress*, 123 SCIENCE 783 (1956).

[146] O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592, 598 (1948).

[147] Commission on Organization of the Executive Branch of the Government, *Task Force Report on Personnel and Civil Service* 121-22 (1955).

destroyed by unsupported or trivial derogatory charges; there is fear that security authorities can be stampeded; and there is fear that security charges are at times a means of making 'political' removals." It also found that there was a very general view within the service that determinations were not sufficiently judicial in character. The task force expressed no judgment, however, as to whether these fears were valid, but it also suggested that a thorough study of the administration of the security system is needed to clear the air. Such suggestions as these—and they came from many sources—led Congress to adopt a statute in August 1955, creating a twelve-member Commission on Government Security to study the entire federal program.[148]

The Road Ahead

Loyalty is an extremely complex thing.[149] A very wise political scientist once observed that loyalty is enhanced by the knowledge that one's rights are secure, and that greater loyalty among public servants would be promoted by giving them better compensation and working conditions, and broader opportunities for in-service training, and by a cessation of smear attacks upon them.[150]

In a speech which attracted a great deal of attention, ex-Senator Harry P. Cain, then a member of the Subversive Activities Control Board, drew attention in 1955 to many needed reforms in the fidelity program of the federal government.[151] He urged the establishment of training schools for security officers, a cessation of automatic suspension prior to hearing for persons holding nonsensitive positions, legal assistance for employees at government expense, greater opportunities for confrontation of adverse witnesses, greater uniformity and coordination of standards and procedures among the agencies, a cut-off date with regard to memberships in organizations on the Attorney General's list, and an early liquidation of the list, in favor of a list based on thorough adjudication.

But many other reforms are indicated. Greater attention should be given to the positive side of a man's life and work, and accordingly derogatory evidence should be weighed more carefully. Dissent should not be identified with disloyalty. Charges should be

[148] 69 STAT. 595 (1955).

[149] See GRODZINS, THE LOYAL AND THE DISLOYAL (1956); BIDDLE, THE FEAR OF FREEDOM (1951) (especially 182-245).

[150] Merriam, *Some Aspects of Loyalty*, 8 PUB. ADMIN. REV. 81 (1948).

[151] *Strong in Their Pride and Free*, reprinted in 101 CONG. REC. 3158 (1955).

given more careful preliminary evaluation, preferably through a central specialized agency. Hearing and adjudication procedures should be available to applicants as well as employees. Summary suspensions should be used only in cases of actual emergency. Multiple jeopardy should be ended. Procedures should be accelerated. There should be formal findings, statements of conclusions and written opinions in the security field, so that a coherent and intelligible body of doctrine might be built up. Witnesses testifying directly to facts they profess to know ought to be required to swear to such testimony. Where witnesses cannot, because of the interests of national security, be required to testify in public, hearing boards ought to be allowed to interrogate them in private, and at the very least they ought to be able to submit questions to them through the FBI. Charges should be complete and detailed and specific. It should be possible for people to purge themselves; repentance and salvation should be available to all sinners. And we should do nothing to discourage people from leaving the Communist Party, through imposition of social and economic ostracism upon former members.[151]

There is some due process of law in security cases; there ought to be a lot more. The government employee whose loyalty is challenged is not regarded as a defendant, in the eyes of the law, but he is in the same spot as a defendant, and has the same problems. Justice requires that he enjoy the same procedural rights. That the employee gets some sort of hearing is not enough, for a hearing is not necessarily a trial, and in the loyalty program the hearing is in fact nothing more than an inquiry, in which the burden of proof is on the suspect to prove that he is not a security risk. Charles P. Curtis has called attention to the importance of this crucial fact:

> Shift the burden of proof and you shift the responsibility. Lawyers, who are used to an adversary process of justice, take the come and go of the burden of proof lightly. Between adversaries the burden, one way or the other, simply makes it easier or harder to win the case. The presumption of innocence makes it harder to convict. A presumption of guilt simply makes it easier. But in an inquiry, when you shift the burden of proof you change the whole nature of the proceeding. The tribunal is no longer asked to seek the truth. It is told to stop as soon as it reaches a doubt. This is what it has been told to

[151] Ernst, *Some Affirmative Suggestions for a Loyalty Program*, 19 AMERICAN SCHOLAR 452 (1950).

look for, all it is expected to find. With the burden of proof, the burden of the inquiry itself has been laid on the defendant. For the only way to allay or dissipate a doubt is to demonstrate the truth. The roles are, in effect, reversed. The seeker after the truth becomes a man who has to be shown. It is then up to the truth to come to him. For he has been told not to pursue her.[153]

In fact, it has been observed by an astute student of this problem that there is great danger that since the employee has had a hearing before a board, the community gets

> the illusion of a result arrived at by an independent and informed deliberative body which has weighed the evidence and afforded the employee his day in court. The stigma of a discharge in such cases is greater than in a case involving summary dismissal, for the reason that the employee will be understood to have been dismissed, not arbitrarily, but after what appears to be a quasi-judicial hearing. The use of a hearing has significant political implications and deep psychological roots. It enables the Executive to appear just and righteous. It cloaks the proceedings in a mantle of fairness. Public criticism is deflected; the community's misgivings are quieted. Psychologically, a quasi-judicial hearing enables those responsible for the program to relieve the guilt and anxiety aroused by the "dirty business" in which they are engaged. They can comfort themselves with the fantasy that they are observing the ritual prescribed by the community for determining who is innocent and who shall be punished. Perhaps these same factors underlie the purge "trials" in totalitarian states.[154]

The Constitutional Question

It is clear that if the procedures of the employee fidelity program are to be improved, the initiative for change will have to come from Congress or the executive branch. While the courts have ruled on some aspects of the program, as already noted, they have only nibbled at its edges. In *Bailey v. Richardson,* the Court of Appeals of the District of Columbia, by a 2-1 vote, sustained the program against a number of fundamental constitutional objections.[155] This case was appealed to the Supreme Court, which affirmed the court of appeals by a 4-4 vote.[156] Unfortunately the

[153] CURTIS, OPPENHEIMER CASE 57 (1955).
[154] Krash, 65 YALE L.J. 565, 571-72 (1956).
[155] 182 F.2d 46 (D.C. Cir. 1950). This decision was foreshadowed by District Judge Holtzoff's opinion in Washington v. Clark, 84 F. Supp. 964 (D.D.C. 1949), and by the holding in Friedman v. Schwellenbach, 65 F. Supp. 254 (D.D.C. 1946). See Gardner, *Bailey v. Richardson and the Constitution of the United States,* 33 B.U.L. REV. 176 (1953).
[156] 341 U.S. 918 (1951).

Justices do not write opinions when the Court is evenly divided.

Dorothy Bailey had for some years been employed in a nonsensitive position as a staff-training officer in the U.S. Employment Service. She denied all charges of alleged Communist affiliation and beliefs, and vigorously asserted her loyalty at the hearing. Speaking for the court of appeals Judge Prettyman conceded that Miss Bailey's case was "undoubtedly appealing," since "she was not given a trial in any sense of the word, and she does not know who informed upon her."[157] But the court ruled that the President was not obliged to follow sixth amendment procedures in dismissing executive employees, for mere dismissal is not punishment. Since government employment is neither property nor a contract, it was held, due process has never in our history required a judicial hearing for dismissals. It is all a matter of confidence on the part of superior officials, and confidence is not controllable by process. Free speech objections were brushed aside with the observation that the first amendment does not guarantee government employment. Finally, the court refused to make an exception of dismissal on grounds of disloyalty, because of the public stigma involved and the impairment of the chances of making a living, since it is well established that there is no redress where government injures an individual in the exercise of a governmental power. "On behalf of the individual, our sense of justice rebels, but the counter-balancing essentials of effective government lead us to assent without equivocation to the rules of immunity."[158] In fact, in the absence of congressional restriction, the President is free to discharge any employee of the government without assigning any reason and without notice of any kind. There may be dangers involved in such a program, but a court is the wrong place to air them.

In dissenting, Judge Edgerton pointed out that four witnesses appeared in behalf of Miss Bailey at the hearing, that seventy persons filed affidavits in her defense, that no one testified at the hearing against her, that all the evidence in the record was favorable to her, while against her were only unsworn reports in secret files, the identity of adverse witnesses being unknown even to the board members who sat in judgment. He argued that Miss Bailey's dismissal violated both the executive order, which required a decision on "all the evidence," and the Constitution, since dis-

[157] Bailey v. Richardson, 182 F.2d 46, 51 (D.C. Cir. 1950).
[158] *Id.* at 64.

missal for disloyalty is punishment which requires all the safeguards of a judicial trial. He also thought that the dismissal abridged freedom of speech and assembly.

This is, however, a minority view. Since the federal judges have so far managed to square the main elements of the loyalty program with the requirements of the Constitution, the road to reform lies elsewhere.