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however, or where a substantial part of the assets is located out of state,⁴² bankruptcy probably remains the more efficacious method for administering the insolvent estate. In those situations the alert creditor will refuse to cooperate with the assignment and initiate steps for its timely displacement by bankruptcy proceedings under the provisions of the Bankruptcy Act.⁴³

*M. L. Lieberman**

CIVIL SERVICE: VALIDITY OF LOYALTY TESTS FOR FEDERAL EMPLOYEES

The President's loyalty program, established by executive order on March 12, 1947,¹ is the most comprehensive of a series of steps taken in recent years to weed out disloyal federal employees. Prior to 1939 the Civil Service Rules directed that no discrimination be exercised because of political opinions or affiliations.² A new policy was inaugurated in that year, when the Hatch Act³ made it "unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States."⁴ Shortly thereafter, the Civil Service Commission announced it would refuse to certify the name of any member of the Communist

adjustment. In those cases the higher cost of the bankruptcy proceeding is the price of the added protection it gives to the creditors. See Billig, *supra* note 8; also GLENN, *op. cit. supra* note 13, § 119.

⁴² While common law assignments are generally given extra-territorial effect, foreign-made statutory assignments are held invalid against local creditors subsequently attaching. The resulting discrimination in favor of local creditors makes a unified administration of the assets for the equal benefit of all creditors impossible. For a detailed discussion see GLENN, *op. cit. supra* note 13, § 589; 6 C. J. S. 1305.

⁴³ See text at note 11 *supra*; also note 31 *supra*.

* Member third-year class.

¹ Exec. Order No. 9835, 12 FED. REG. 1935. See (1947) 47 COL. L. REV. 1161; (1947) 7 LAWYER'S GUILD REV. 57; (1948) N. Y. UNIV. LAW QUART. 427; (1948) 46 MICH. L. REV. 942.

² Civil Service Rule I, § 1.2, which dates back to 1903, provides: "No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or in favor of any applicant, eligible, or employee in the classified service because of his political or religious opinions or affiliations." 5 CODE FED. REGS. § 1.2 (1938). This section was amended subsequent to the passage of the Hatch Act. See *infra* note 5.

³ (1939) 53 STAT. 1147, 18 U. S. C. § 61 (1946).

⁴ (1939) 53 STAT. 1147, 18 U. S. C. § 61(i) (1) (1946). The penalty provided to enforce this section is as follows: "Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part

Party, the German-American Bund, or any other Communist, Nazi, or Fascist organization.⁵

In 1941, Congress earmarked an appropriation to the F.B.I. for investigation of "subversives" on the federal payroll,⁶ and began adding to other appropriation acts a proviso that no funds be used to pay "any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States."⁷ In 1942 the Attorney-General set up an Interdepartmental Committee on Investigations to handle 4112 alleged cases of subversive activity among federal employees,⁸ and the Civil Service Commission issued the War Service Regulations, providing that an applicant might be denied examination and an eligible denied appointment if there existed "a reasonable doubt as to his loyalty to the government of the United States."⁹ In 1943 President Roosevelt replaced

of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person." 18 U. S. C. § 61(i) (2) (1946).

Compare the following statutes which appear to cover the same acts: subversive activities (1940) 54 STAT. 671, 18 U. S. C. § 10(a) (3) (1946); seditious conspiracy (1909) 35 STAT. 1089, 18 U. S. C. § 6 (1946).

⁵ 57th ANN. REP. CIV. SERV. COMM'N. 21 (1940). Section 2 of Civil Service Rule I, *supra* note 2, was amended on Nov. 7, 1940, by the incorporation therein of the provisions of § 9A(1) of the Hatch Act. 5 CODE FED. REGS. § 1.2 (Cum. Supp. 1943).

Apart from the information required by the Hatch Act, inquiries into political beliefs were still prohibited. The manual of instructions furnished to all of the Commission's investigators contained the following paragraph: "Matters which may not be inquired into in any type of investigation are matters pertaining to race, color, religion, political or union or fraternal affiliations of the person under investigation except that in cases where an employee has been accused of improper political activity or in cases where an applicant may have been affiliated with a political party advocating the overthrow of the United States Government by force or violence, inquiry may be made into political matters . . ." 60th ANN. REP. CIV. SERV. COMM'N 14 (1943).

⁶ (1941) 55 STAT. 292.

⁷ *E.g.*, (1941) 55 STAT. 123, 131; (1941) 55 STAT. 265, 292; (1941) 55 STAT. 303, 361; H. R. REP. NO. 616, 80th Cong., 1st Sess. 4 (1947).

⁸ N. Y. Times, Sept. 23, 1942, p. 15, col. 2.

⁹ 5 CODE FED. REGS., § 18.2(c) (7) (Cum. Supp. 1943). This regulation was added under authority of Exec. Order 9063, 3 CODE FED. REGS. 1091 (Cum. Supp. 1943) and Exec. Order 9067, 3 CODE FED. REGS. 1094 (Cum. Supp. 1943). These executive orders were issued under authority of the Civil Service Act of 1883, *infra* note 19, and do not specifically refer to employee loyalty. The War Service Regulations have since been superseded by Temporary Civil Service Regulations but the quoted section was retained. 5 CODE FED. REGS. § 27.5(c) (7) (Supp. 1946).

The Civil Service Commission regulation was upheld in *Friedman v. Schwellenbach* (1946) 65 F. Supp. 254, *aff'd* (App. D. C. 1946) 159 F. (2d) 22, *cert. denied* (1947) 330 U. S. 838, *reh'g denied* (1947) 331 U. S. 865. Note that the regulation applies only to applicants, not to incumbents. The President's order of March 12, 1947, applies to both.

The Commission has reported that as a result of investigations carried out under its regulation in 1944, 1945, and the first half of 1946, 580 persons were rated ineligible on loyalty grounds. Of these, 263 were found to be pro-Fascist, pro-Nazi or pro-Japanese or "otherwise of questionable loyalty," while 317 were found to be members of the Communist Party or "active in support of those basic principles of the Communist Party which gave evidence of adherence to the Communist 'party line'." 63rd ANN. REP. CIV. SERV. COMM'N 20 (1946).

the Attorney-General's Committee with a similar committee to serve as an advisory agency on matters relating to subversive activity among federal employees, with actual loyalty hearings to be conducted by the individual agencies to which the employees are attached.¹⁰

Meanwhile, special legislation had been worked out for the most sensitive departments. Statutes passed in 1940 and 1942 make possible summary removal of employees of the War or Navy Departments when "in the opinion of the Secretary concerned, [it is] warranted by the demands of national security."¹¹ In 1946 the Secretary of State was given authority to terminate the employment of any employee of his Department or the Foreign Service "whenever he shall deem such termination necessary or advisable in the interests of the United States."¹²

Finally, in 1946 President Truman established a Temporary Commission on Employee Loyalty to survey the entire problem.¹³ The result of its report was Executive Order 9835,¹⁴ establishing the present loyalty program.

This order calls for an F.B.I. file check on all incumbent employees, followed by a full field investigation whenever derogatory information is revealed. The results are referred to loyalty boards established within each agency. These loyalty boards are the mainspring of the entire program. Their members hear all cases and recommend removal where necessary. An employee may appeal from an adverse decision to the head of the agency, and from him (but for an advisory recommendation only) to a Loyalty Review Board established in the Civil Service Commission. Actual responsibility for the decision is placed on the agency head.

An employee charged with disloyalty must be informed of the nature of the charges against him in sufficient detail to prepare his defense, may appear before the agency board accompanied by counsel, and may present evidence on his own behalf, through witnesses or by affidavit. The charges, however, are to be stated only as specifically and completely as, *in the discretion of the agency, security considerations permit*. Moreover, investigative agencies, such as the F.B.I., may refuse to disclose to operating agencies the names of confidential

¹⁰ Exec. Order 9300, 3 CODE FED. REGS. 1252 (Cum. Supp. 1945).

¹¹ (1942) 56 STAT. 1053, 5 U.S.C. § 652 (1946); (1940) 54 STAT. 713, 5 U.S.C. § 653 (1946).

¹² (1946) 60 STAT. 458. A similar provision is contained in the Dept. of State Appr. Act. of 1948, Pub. L. No. 166, 80th Cong., 1st Sess. (July 9, 1947). This provision expired on June 30, 1948. Senate Bill 1561, introduced in the 80th Congress, would have given the Secretary of State permanent authority to summarily dismiss State Department employees whenever he deemed it necessary in the interest of national security. Congress adjourned without acting on the bill.

¹³ Exec. Order 9806, Nov. 25, 1946; 11 FED. REG. 13863.

¹⁴ *Supra* note 1.

informants, provided they give sufficient information about such informants to make possible adequate evaluation of their information.

"Loyalty" is nowhere defined, but Part V of the order is titled "Standards" and reads as follows:

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.
2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:
 - a. Sabotage, espionage, or attempts or preparations thereof, or knowingly associating with spies or saboteurs;
 - b. Treason or sedition or advocacy thereof;
 - c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;
 - d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;
 - e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;
 - f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney-General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

The first four of these subsections add nothing to our law. Espionage¹⁵ and treason¹⁶ are punished by penalties far more severe than dismissal from government employment; advocacy of revolution or the use of force or violence to alter the constitutional form of government of the United States likewise is prohibited by other legislation;¹⁷ and few will argue that intentional unauthorized disclosure

¹⁵ (1917) 40 STAT. 217, 50 U. S. C. §§ 31, 32 (1946).

¹⁶ (1909) 35 STAT. 1088, 18 U. S. C. § 1 (1946).

¹⁷ (1940) 54 STAT. 671, 18 U. S. C. § 10(a)(1) (1946).

of restricted information is not a cause for dismissal.¹⁸ There has been much discussion, however, of the fifth and sixth subsections and of the procedure under which the loyalty hearings are to be conducted.

We shall consider (1) the President's authority to issue the loyalty order, (2) the loyalty order and free speech, (3) the loyalty order and due process, and (4) certain policy questions raised by the order.

1. *The President's Authority to Issue the Loyalty Order.*

The loyalty order was issued under the authority of the Civil Service Act of 1883,¹⁹ Section 9A of the Hatch Act,²⁰ and under the President's constitutional authority as Chief Executive of the United States.

The Hatch Act provides for the discharge of a federal employee who is a *member* of an organization advocating the overthrow of our constitutional form of government. The Civil Service Act authorizes the President to "prescribe such regulations for the *admission* of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability. . . ."²¹ A 1912 amendment²² provides that "no person in the classified civil service shall be removed therefrom except for such cause as will promote the efficiency of said service." It seems likely that these statutes would be liberally construed to give the President power to prescribe standards for removal, or that the President would be held to have constitutional power to prescribe such standards.²³ The standards, if they are to be attacked, must be attacked on the validity of their content, rather than the authority of their source.

2. *The Loyalty Order and Free Speech.*

There is no doubt that the President's order has the effect of curtailing the freedom of expression of federal employees, a not inconsid-

¹⁸ Members of the classified civil service may be removed "for cause." (1912) 37 STAT. 555, 5 U. S. C. § 652 (1940).

¹⁹ (1883) 22 STAT. 403, 5 U. S. C. § 632 (1940).

²⁰ *Supra* note 3.

²¹ (Emphasis added) 5 U. S. C. § 631 (1940). This provision is actually derived from the Act of March, 1871, which preceded the Act of 1883.

²² *Supra* note 18.

²³ U. S. CONST. ART. II, § 2 provides: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Here we are dealing with inferior officers whose appointment Congress has vested in department heads, and it is usually said that the power of appointment includes the power of removal. *Ex parte Hennen* (1839) 13 Pet. 230; *Myers v. U. S.* (1926) 272 U. S.

erable segment of our population. "Acting so as to serve the interests of another government in preference to the interests of the United States" and "sympathetic association" with any group designated by the Attorney-General as "subversive" may result in discharge from the government service. Precisely because these prohibitions are vague, their effect is clear. A federal employee may say or write certain things (just what things it is hard to say) only at the risk of losing his job. And a discharge for disloyalty, with the *de facto* blacklisting it entails,²⁴ is a far more drastic curb than a light fine or a short jail sentence. That the aim of the order is not to prevent the speech or punish the speaker cannot alter this.

The First Amendment, however, has never been thought to guarantee to every individual an *absolute* right to say what he pleases; certain limitations have always been recognized.²⁵ There must be a balancing of interests—the individual and community interest in freedom of speech against the community interest in public safety.²⁶ To help strike this balance, the Supreme Court has developed the rule that to justify a speech restriction there must be a "clear and present danger" of a "substantive evil that Congress has a right to prevent."²⁷ This rule is generally accepted today,²⁸ possibly with the further requirement that "the substantive evil must be extremely serious and the degree of imminence extremely high."²⁹

Arguably, these conditions are met. It is reasonable to believe there is a clear and present danger that a few employees in the gov-

52. Some measure of removal power might be held to remain in the President, however, or, at the least, the President might be said to retain power to prescribe standards for removal which department heads would have to apply.

²⁴ BERT ANDREWS, *WASHINGTON WITCH HUNT* (1948) gives a vivid account of the plight of a State Department official discharged for alleged disloyalty, and of his unsuccessful attempts to find other employment.

²⁵ *E.g.*, CLARK AND MARSHALL, *CRIMES* § 469 (1940) (obscene libels); *Chaplinsky v. New Hampshire* (1942) 315 U. S. 568.

²⁶ CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941) 31-35.

²⁷ *Schenck v. United States* (1919) 249 U. S. 52.

²⁸ For some years, the status of the rule was in doubt. See *Abrams v. United States* (1919) 250 U. S. 616; *Schaefer v. United States* (1920) 251 U. S. 466, rejecting the rule. See also *Gitlow v. New York* (1925) 268 U. S. 652, where the majority limited it by saying that it did not apply where the legislative body itself had previously determined the danger of substantive evil arising from utterances of a specified character. This limitation was in turn qualified in *Whitney v. California* (1927) 274 U. S. 357, where the court said that while the determination of the legislature must be given great weight, the statute might still be invalid if, as applied, it was unreasonable or arbitrary. As qualified, the limitation may still retain force. The rule itself was reaffirmed in *Thornhill v. Alabama* (1940) 310 U. S. 88. For a review of these cases see Green, *Liberty Under the Fourteenth Amendment* (1942) 27 WASH. U. L. Q. 497, 539.

²⁹ *Bridges v. California* (1941) 314 U. S. 252, 263. This form of the rule was first suggested by Justice Brandeis in a concurring opinion in *Whitney v. California*, *supra* note 28.

ernment are disloyal,³⁰ and it might be said that the presence of even those few may be a serious evil. In any event, *United Public Workers v. Mitchell*,³¹ the leading case on political rights of government employees, indicates that the "clear and present danger" test may not be applicable in this field. In that case the Supreme Court upheld the constitutionality of Section 9 of the Hatch Act,³² which forbids federal employees from taking "any active part in political management or in political campaigns." Justice Reed, speaking for the majority,³³ made no mention of clear and present danger. Instead, he summarized as follows: "We have said that Congress may regulate the political conduct of government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power."³⁴

Obviously, the opinion does not mean that federal employees are to be denied the basic guaranties of the First Amendment, but it indicates that where a federal employee and his job are concerned, the balancing of interests involved in a free speech decision will be handled differently than in other instances. The effect is to make it fairly certain that the present Supreme Court will not invalidate the President's order because of its bearing on free speech.

3. *The Loyalty Order and Due Process.*

a. *Does the loyalty order violate the due process clause because it occasions arbitrary discrimination?*

The older cases indicate that the due process clause of the Fifth Amendment has no application because a government employee has no property interest in his job.³⁵ In the *Mitchell* case, however, the court, discussing the contention that Congress could not provide that

³⁰ Just how few was indicated by a recent F.B.I. announcement that a file check of over two million federal employees showed derogatory information sufficient to warrant further investigation in less than one-third of one per cent of the cases. *San Francisco Chronicle*, Sept. 11, 1948, p. 2, col. 8.

³¹ (1947) 330 U. S. 75.

³² *Supra* note 3.

³³ Justices Frankfurter, Burton and Chief Justice Vinson concurred. Justice Douglas wrote a dissent in which Justices Black and Rutledge concurred. Justices Jackson and Murphy did not participate.

³⁴ *Supra* note 31 at 102. The philosophy of the court seems similar to that of Justice Holmes in *McAuliffe v. New Bedford* (1891) 155 Mass. 216, 220, 29 N. E. 517. In sustaining the defendant's action in removing a policeman for political activity, Justice Holmes said: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Justice Reed quoted this epigram in footnote 34 of the *Mitchell* opinion.

³⁵ *Taylor & Marshal v. Beckham* (1899) 178 U. S. 548, 577.

"no Republican, Jew or Negro shall be appointed to federal office," said: "None would deny such limitations on congressional power."³⁶ This calculated statement, so strong that to term it dictum seems inappropriate, apparently rests on the theory that a person does have some rights in relation to public office to which the protection of the due process clause will be extended, and that arbitrary discrimination between classes of citizens in relation to those rights is a denial of due process.³⁷

The loyalty order treats federal employees differently from other people, and disloyal employees differently from other employees. Obviously these classifications are not arbitrary and do not occasion arbitrary discrimination. But if the Attorney-General, acting under the loyalty order, should make a patently unreasonable designation of a group as "subversive," an arbitrary discrimination argument might be made. Even then, however, it would be difficult. The courts would be faced with an administrative finding that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal."³⁸ Whether or not the finding is correct would be a question of fact, and a finding of fact by an administrative tribunal is usually said to be conclusive if supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³⁹ Thus, unless the record in a particular case were to show no substantial evidence other than membership in a group whose designation by the Attorney-General was so unreasonable as to amount to arbitrary discrimination, it is unlikely that the finding would be overturned.

b. Does the loyalty order violate the due process clause because it is "void for vagueness"?

It has been suggested that, arbitrary discrimination aside, the President's order violates due process because it is void for vagueness. That a too loosely worded statute may violate due process is a doctrine which has been erratically applied and is itself so vague that blocking out its limits is well-nigh impossible.⁴⁰ Roughly speaking, it may be said that a statute will not be held unconstitutional simply because it grants authority to draw an arbitrary line, making it hard

³⁶ *Supra* note 31 at 100.

³⁷ Some slight additional support for the latter proposition may be gleaned from a few opinions which have intimated that where discrimination is sufficiently arbitrary it will be considered a denial of due process. *Steward Machine Co. v. Davis* (1936) 301 U. S. 548, 585; *Hirabayashi v. United States* (1942) 320 U. S. 81, 100; *Currin v. Wallace* (1938) 306 U. S. 1, 14; *Carleton Screw Products Co. v. Fleming* (C. C. A. 8th 1942) 126 F. (2d) 537, 541.

³⁸ See text at note 14 *supra*.

³⁹ *Consolidated Edison Co. v. N.L.R.B.* (1938) 305 U. S. 197, 229.

⁴⁰ For discussion of the "Void for Vagueness" rule see GELLHORN, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 158 (2d ed. 1947); (1931) 45 *HARV. L. REV.* 160.

to tell on which side a particular act will fall;⁴¹ it will be void for vagueness only when courts feel that it sets no standard at all, that it is so formless as to be impossible to work with.⁴²

One phrase in particular, "sympathetic association," is far from precise. Sympathetic association with a subversive group, however, is not itself a ground for discharge;⁴³ it is merely something to be considered. The standard for removal is that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal."⁴⁴ Thus there are two answers to the argument that "sympathetic association" is void for vagueness. First, it has never been suggested that the void for vagueness rule be applied to evidence. Second (assuming questionable loyalty to be a valid ground for removal) even were the phrase "sympathetic association" not explicitly contained in the order, checking a person's loyalty would seem to involve examining all his associations.

There remains the possible contention that the word "loyalty" is void for vagueness. Doubtless, that term may mean many things.⁴⁵ But since it would be hard to define "loyalty" with much precision, and since nobody has argued that someone actually disloyal should be retained on the federal payroll,⁴⁶ it does not seem likely that the order will be invalidated on this ground.

4. Policy Aspects of the Loyalty Program.

The discussion above indicates that the courts will probably uphold the President's order except in cases where the Attorney-General makes clearly arbitrary designation of an organization. This makes it particularly important that the procedure outlined in the order be carefully examined and improved wherever possible to insure that

⁴¹ *Nash v. United States* (1913) 229 U. S. 373, 377; *United States v. Petrillo* (1946) 332 U. S. 1, 7.

⁴² *United States v. Cohen Grocery* (1921) 255 U. S. 81, 89. Statutes bearing on civil liberties, however, will be held to a higher standard of definiteness. See *Winters v. New York* (1947) 333 U. S. 507.

⁴³ Under this order. Some agencies, however, appear to so construe it. The following remarks by Senator Ferguson and Federal Security Administrator Oscar Ewing at a recent hearing in Washington, D. C. are significant: "Ewing said the loyalty board 'has tried to make an honest determination if a man is sympathetic to the Communists.' Ferguson said: 'Is sympathy with Communism enough to remove him?' Ewing said: 'Yes. We are doing as careful a job as we can do get a Commie out of the agency.'" *San Francisco Chronicle*, Sept. 29, 1948, p. 26, col. 1-3.

⁴⁴ See text at note 14 *supra*.

⁴⁵ See (1947) 47 *COL. L. REV.* 1161, 1170, fn. 66 for discussion of several possible meanings of the term "loyalty."

⁴⁶ See (1947) 7 *LAWYER'S GUILD REV.* 57, 58. This article bitterly attacks the President's order, but concedes: "This in no way implies that [even] minor employees should hold government jobs if in fact disloyal to the government of the United States." And see *Friedman v. Schwellenbach* (1946) 65 F. Supp. 254, 257: "Plaintiff conceded that the right to disqualify Federal employees because of a reasonable doubt of their loyalty would seem obvious enough in time of war."

employees are treated fairly and to prevent "witch hunts." It must be remembered that, because the order does not make disloyalty a crime, an employee brought before his agency's loyalty board is not entitled to the safeguards which an accused may demand in a criminal trial. Yet it is plain that the practical effect of a discharge for disloyalty may be ruinous,⁴⁷ and the Supreme Court has stated that "proscription from any opportunity to serve the government is punishment, and of a most severe type."⁴⁸

Against this background, four aspects of the order deserve attention. First, "loyalty," however carefully defined, is essentially a state of mind. Thus people will be punished, and punished severely, not for overt acts but for attitudes. Second, insofar as an employee is judged by his acts, the most crucial factor, under the order, will be the organizations with which he is, or has been, connected. This verges on guilt by association, often criticized as repugnant to our democratic institutions.⁴⁹ Third, insofar as past association is used to determine a person's present loyalty, the procedure has some resemblance to an *ex post facto* law. Fourth, the provision that charges need be stated only as specifically and completely as, in the discretion of the agency, security considerations permit, and the allied provision that evidence provided by undisclosed informants not present at the hearing may be considered in determining loyalty, easily lend themselves to abuse.

It is true that if we are to have a loyalty program at all, the first of these features is unavoidable. Practically speaking, so are the second and third. A person's associations do provide some clue as to whether or not he is a security risk. It must be recognized, however, that people frequently join an organization without any clear idea of what its purposes are or by whom it is controlled. Further, many organizations, now reasonably suspect, were innocent in origin and remained so until "infiltrated" and "captured."⁵⁰ All of these things should be carefully weighed whenever an employee is accused of disloyalty, particularly where past association is involved. Mere membership should never be made conclusive; still less should "affiliation" or "sympathetic association."

As for the fourth feature, while conceivably in some instances security considerations may be so important that it is necessary to

⁴⁷ *Supra* note 24.

⁴⁸ *United States v. Lovett* (1945) 328 U. S. 303, 316.

⁴⁹ CHAFEE, *op. cit. supra* note 26, at 470.

⁵⁰ It may be doubted whether this is sufficiently recognized. A recent release setting forth the 123 organizations on the Attorney General's list of subversive organizations cited one organization as Communist "since 1935." *San Francisco Chronicle*, Sept. 26, 1948, p. 6, col. 1-2. No such qualification appeared after any other organization; the implication is that the Attorney General considers the other organizations to have been subversive throughout their entire history. This seems a very doubtful proposition.