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PROBLEMS IN THE REMOVAL OF FEDERAL CIVIL SERVANTS*

Ivor L. M. Richardson†

THE publicity given in the past few years to the loyalty and security program has brought the civil servant of the federal government increasingly before the public eye. At the same time little attention has been paid to the plight of a civil servant who is dismissed from his post for reasons other than those relating to loyalty and security. It is the purpose of this paper to consider different aspects of the removal of civil servants. We shall discuss (1) the government's power to remove civil servants both at common law and under statutes which deal with the exercise of the removal power, (2) the procedural remedies available to a government worker ousted from office, (3) the loyalty program, and (4) the effect of the invocation by a civil servant of the privilege against self-incrimination.

A. General

In the absence of a statute regulating removal the power to remove is unlimited¹ and, failing a constitutional or statutory provision to the contrary, is exercisable by the appointing officer as an incident of the power to appoint.² The grant of a general power to remove carries with it the right to remove at any time or in any manner deemed best with or without notice³ but, on the other hand, where the causes for which an officer may be removed are specified in a statute or in the Constitution, notice and hearing are essential.⁴

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¹ Ex parte Hennen, 13 Pet. (38 U.S.) 225 (1839).

² Keim v. United States, 177 U.S. 290, 20 S.Ct. 574 (1900); Bratton v. United States, 90 Ct. Cl. 604 (1940); Levy v. Woods, (D.C. Cir. 1948) 171 F. (2d) 145.

³ In an unusual case, United States ex rel. Brown v. Lane, 40 App. D.C. 533 (1913), the court said that, since the statute gave the Secretary of the Interior authority to remove from a tribal council any member or members "for good cause to be by him determined," he might remove such members without notice or hearing. However, the court pointed out that had the statute stopped at the words "for good cause" a different case would have been presented.

⁴ Reagan v. United States, 182 U.S. 419, 21 S.Ct. 842 (1901); Shurtleff v. United States, 189 U.S. 311, 23 S.Ct. 535 (1903); Kalbfus v. Siddons, 42 App. D.C. 310 (1914).

As well as numerous special statutes affecting particular offices and employments, there are five statutes dealing with the exercise of the removal power, each with its own procedure for effecting removals: the Hatch Act⁵ relating to removals for political activity; the Civil Service Act of 1912⁶ and the Veterans Preference Act⁷ restricting the removal of civil service employees to dismissal for cause; section 12 of the latter statute⁸ regulating reductions in force such as layoffs and demotions for reasons of economy; the

⁵ 53 Stat. L. 1148 (1939), as amended, 5 U.S.C. (1952) § 118 (i). For procedure, see 5 C.F.R. §§4.1 to 4.108 (1949) as amended.

⁶ 37 Stat. L. 555 (1912), as amended, 5 U.S.C. (1952) §652. The section provides: "No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision of such answer. No examination of witnesses nor any trial or hearing shall be required except in the direction of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal of suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. . . ." The courts have generally interpreted this section as requiring notice both of reasons for removal and of the charges against the employee [e.g., *Bennett v. United States*, 89 Ct. Cl. 322 (1939)] but this is not so. The section refers to two general groups, (1) persons removed by the appointing power "for reasons given in writing" and (2) persons removed by the appointing power upon "charges." In either case the removal is authorized only "for such cause as will promote the efficiency of such service" [*Arant v. United States*, 55 Ct. Cl. 327 (1920)]. Admittedly the statutory regulations [5 C.F.R. §§9.101 and 9.102 (1949) as amended] require the employing agency to give notice both of the reasons for dismissal and of the charges, but it is not settled if such regulations can give civil servants greater protection than that required by statute; the general rule has been that they cannot (see the cases cited in note 53 *infra*). Even *United States v. Wickersham*, 201 U.S. 390, 26 S.Ct. 469 (1906), has been interpreted to accord to this view—*Simon v. United States*, 113 Ct. Cl. 182 (1949). The reason for this is that such regulations are ultra vires the statutory rule-making power, and though ". . . the President . . . has the right to establish regulations for the guidance of his subordinates in deciding upon those who shall be removed . . . [he] has no power to say that if these regulations are not followed the United States shall be pecuniarily liable to the employee. Only Congress can say this. . . ." *Simon v. United States*, *supra* at 204.

⁷ 58 Stat. L. 390 (1944), as amended, 5 U.S.C. (1952) §863. The largest class covered by this statute is that of honorably discharged servicemen and women who have permanent or indefinite civil service appointments to positions in the executive branch of the government. The procedural requirements are greater than under the 1912 statute as they also require thirty days written notice and provide for appeal to the Civil Service Commission on substantive as well as procedural grounds.

⁸ The section applies to all persons employed in a civil capacity in the executive branch of the government except those appointed by the President alone or with the consent of the Senate. It provides that reduction-in-force programs shall be implemented, having regard to tenure of employment, military preference, length of service and efficiency ratings, and there is a similar provision for thirty days written notice and appeal to the Civil Service Commission.

1950 statute⁹ authorizing summary suspension and removal of persons in certain sensitive departments and agencies for reasons of national security. It is not proposed to consider these statutory provisions in detail¹⁰ as the same legal principles are applied in each case.

In general,¹¹ the only two grounds upon which a federal employee may successfully attack the validity of his dismissal are (1) where the procedural requirements incident to his removal were not complied with, and (2) where the action of the removing officer was taken in bad faith or was arbitrary and capricious. The power to review a case to see if it meets the procedural requirements extends no further than that,¹² although it must be admitted that even minor procedural irregularities are sufficient to invalidate dismissals.¹³ Furthermore, the courts will exercise jurisdiction if the stated cause is one made invalid by statute or regulation,¹⁴ but in this connection it is important to note that, even where causes for removal are specifically stated, the appointing officer will almost invariably be held to have a further right of removal at his pleasure unless the grounds for removal are expressly restricted by statute.¹⁵

⁹ 64 Stat. L. 476 (1950), 5 U.S.C. (1952) §22. The act authorizes departmental or agency heads to suspend employees in particular departments and agencies when it is deemed necessary in the interests of national security. Such suspension is at the absolute discretion of the departmental or agency head and must be followed either by reinstatement or by final removal according to prescribed procedures.

¹⁰ For an excellent summary see note, 52 Col. L. Rev. 787 (1952).

¹¹ One exception to this is in reduction-in-force cases where the courts will also review an alleged violation of the employee's statutory right to be retained in preference to persons in inferior categories. See *Hilton v. Sullivan*, 334 U.S. 323, 68 S.Ct. 1020 (1948); *Asher v. Forrestal*, (D.C. D.C. 1947) 71 F. Supp. 470. But note the restrictive effect in this connection of the decision in *Elder v. Brannan*, 341 U.S. 277, 71 S.Ct. 685 (1951).

¹² *Elchibegoff v. United States*, 123 Ct. Cl. 709 (1952); *Love v. United States*, (Ct. Cl. 1951) 98 F. Supp. 770; *Powell v. Brannan*, (D.C. Cir. 1952) 196 F. (2d) 871. The general principle is that "The determination of whether or not a person's discharge would promote the efficiency of the Government service is vested in the administrative officer and no court has power to review his action if that action was taken in good faith." *Gadsden v. United States*, 111 Ct. Cl. 487 at 489, 78 F. Supp. 126 (1948).

¹³ Thus, in *Stringer v. United States*, 117 Ct. Cl. 30, 90 F. Supp. 375 (1950), 29 days written notice preceded by several days verbal notice did not satisfy the statutory requirement of 30 days adverse written notice. And see *Norden v. Royall*, (D.C. D.C. 1949) 90 F. Supp. 834; and *Deak v. Pace*, (D.C. Cir. 1950) 185 F. (2d) 997. It should be noted, however, that proceedings involving the "selection or tenure of an officer or employee of the United States" are specifically exempted from the provisions of the Administrative Procedure Act which establishes a code of minimum procedural requirements for administrative adjudications. 60 Stat. L. 237 at 239 (1946), as amended, 5 U.S.C. (1952) §1001.

¹⁴ *Levine v. Farley*, (D.C. Cir. 1939) 107 F. (2d) 186 at 190-191. Again, the removal is invalid if made by someone other than the appropriate officer (who is usually the appointing officer). *Stilling v. United States*, 41 Ct. Cl. 61 (1906); *United States v. Wickersham*, 201 U.S. 390, 26 S.Ct. 469 (1906).

¹⁵ *Shurtleff v. United States*, 189 U.S. 311, 23 S.Ct. 535 (1903); *Morgan v. T.V.A.*, (6th Cir. 1940) 115 F. (2d) 990.

Where the procedural requirements have been complied with in the removal of a federal employee, the action of the administrative officer can be set aside only if it is shown that it was not taken in good faith. But the courts have not been at all consistent in determining the protection which this requirement confers on federal employees.¹⁶ It is clear that the acquittal of a government servant upon criminal charges preferred against him is not sufficient to establish that his removal "to promote the efficiency of the service" was arbitrary.¹⁷ Furthermore, the fact that the President and the Civil Service Commission consider that the charges against the employee are not substantiated and that there exists no proper cause for his removal is irrelevant, since that matter is for the removing officer to decide.¹⁸ In some cases the courts have tended to overlook the good faith requirement altogether¹⁹ and with unbecoming judicial self-abnegation have ruled that, if the formal procedural steps are satisfied, judicial inquiry is absolutely foreclosed.²⁰ However, in the more recent cases²¹ there seems to

¹⁶ Cf. *Golding v. United States*, 78 Ct. Cl. 682 (1934), with *Gadsden v. United States*, 111 Ct. Cl. 487, 78 F. Supp. 126 (1948).

¹⁷ *Croghan v. United States*, 116 Ct. Cl. 577, 89 F. Supp. 1002 (1950); *Bryant v. United States*, 122 Ct. Cl. 460 (1952). This is because the considerations which enter into an administrative determination of whether an employee has been guilty of such misconduct or delinquency in the performance of the duties of his position as to justify his removal for the good of the service are entirely dissimilar to those necessarily involved in the conviction of a person of a criminal offense beyond a reasonable doubt. Although government servants need not be perfect nonentities so far as political expression is concerned, the removing officer may well take the view that the fact of having had such charges levelled against him (and in the case of a jury trial a *prima facie* case has first been made against him) may constitute reasonable cause for removing an employee.

¹⁸ *Eberlein v. United States*, 53 Ct. Cl. 466 (1918); *Morse v. United States*, 59 Ct. Cl. 139 (1924). And see 30 Op. Atty. Gen. 79 at 83 (1913), confirming 21 Op. Atty. Gen. 356 (1896).

¹⁹ *Asher v. Forrestal*, (D.C. D.C. 1947) 71 F. Supp. 470 at 471; *Levine v. Farley*, (D.C. Cir. 1939) 107 F. (2d) 186 at 191; and, in particular, *Golding v. United States*, 78 Ct. Cl. 682 (1934).

²⁰ E.g., "The allegations that the plaintiff was innocent of the charges preferred against him, that his removal was the result of a concerted action by certain individuals and officials who had entered into a conspiracy to cause his removal, that his removal was based on perjurious statements obtained through duress and undue influence, and that the investigation which resulted in his removal was biased, prejudiced, and unfair, are immaterial. It is not within the jurisdiction of the court to inquire into the guilt or innocence of the plaintiff as to the charges upon which he was removed from office. . . . It appearing from the averments of the petition that every step requisite to the removal from office of an employee of the Government in the classified civil service was taken by Bureau officials in the plaintiff's case, action in removing him from office is conclusive and is not subject to review by the court." *Golding v. United States*, 78 Ct. Cl. 682 at 685 (1934).

²¹ E.g., *Gadsden v. United States*, 111 Ct. Cl. 487, 78 F. Supp. 126 (1948); *Levy v. United States*, 118 Ct. Cl. 106 (1950); *Vallesteros v. United States*, 125 Ct. Cl. 218 (1953); *Knotts v. United States*, 128 Ct. Cl. 489, 121 F. Supp. 630 (1954).

have been a greater willingness to insist upon the actual and not merely nominal compliance with the requirement of good faith—to assert that when discretion is conferred on an administrative officer it must be honestly exercised and that, if his decision is arbitrary or capricious or in bad faith, the courts have power to review it and to set it aside.²²

B. Remedies

Scanty though it is, the protection afforded the government employee by the statutory provisions is greater in theory than in practice. For he encounters many pitfalls when he attempts to secure judicial review of his removal. When a government servant has been separated in violation of either a statute or a statutory regulation the Court of Claims has jurisdiction²³ to award him his salary during the period of unjustified removal. But, as a result of an almost unbelievably crass misconstruction of an earlier decision, the court for a while effectively prevented employees from recovering compensation for removals violating statutory procedural requirements. The discharged employee had almost invariably been replaced by the time his action was heard and consequently the court said that his remedy was an appropriate proceeding to try the right to office so that his successor might also be heard as to his right to the compensation provided and to the office itself.²⁴ This meant that the discharged employee

²² Thus, where a civil servant has been discharged not for a cause that promoted the efficiency of the service, but maliciously, merely because his superior did not like him, or merely because he wanted his job for a friend, the discharge is wrongful and illegal and the employee is entitled to recover whatever loss he may have suffered therefrom. *Gadsden v. United States*, 111 Ct. Cl. 487, 78 F. Supp. 126 at 127 (1948). See too *Knotts v. United States*, 128 Ct. Cl. 489, 121 F. Supp. 630 (1954).

²³ 28 U.S.C. (1952) §1491.

²⁴ See, e.g., *Goodwin v. United States*, 76 Ct. Cl. 218 (1932), in which the court applied dicta from *O'Neil v. United States*, 56 Ct. Cl. 89 (1921) which was properly dependent for its validity on the fact that it concerned an executive regulation relating to removals which was ultra vires the statutory rule-making power under the 1883 statute and before the 1912 statute. This same doctrine was followed in numerous other cases, e.g., *Wilmeth v. United States*, 64 Ct. Cl. 368 (1928); *O'Leary v. United States*, 77 Ct. Cl. 635 (1933); *Hart v. United States*, 91 Ct. Cl. 308 (1940). And see Westwood, "The 'Right' of an Employee of the United States Against Arbitrary Discharge," 7 GEO. WASH. L. REV. 212 (1938). Also compare this practice with the dictum of a district court in *Curran v. Higginson*. (D.C. Mass. 1937) 18 F. Supp. 969 at 970: "The generally accepted method of testing the right of a federal official to hold office is to sue at law in the Court of Claims for salary. Such a remedy is plain, adequate, and complete."

had to begin again in another court because the Court of Claims has no jurisdiction to determine the title to office. However, since 1946²⁵ the court has conveniently ignored the reasoning of the earlier decisions and without considering whether or not the claimant has in fact been replaced has, in several cases,²⁶ allowed a civil servant removed in violation of a statutory provision to recover his compensation.

Again, many employees have fallen at the final hurdle when the government met them with the defense of laches.²⁷ Admittedly, no matter however unjust and unwarranted the removal or suspension of a public officer may be, public policy requires that he should promptly take any action necessary to assert his rights²⁸ to the end that, if he is successful in his action, the government service may be disturbed as little as possible and two salaries shall not be paid for a single service.²⁹ But to foreclose relief on this ground when the delay amounted to a few months only indicates unnecessary solicitude for the government's interests.³⁰

The federal employee also encounters difficulties if he commences an action in the district court. His available remedies are quo warranto, mandamus and injunction depending on the circumstances of the case. Quo warranto has long been considered

²⁵ *Elchibegoff v. United States*, 106 Ct. Cl. 541 (1946).

²⁶ *Simon v. United States*, 113 Ct. Cl. 182 (1949); *Gadsden v. United States*, 111 Ct. Cl. 487, 78 F. Supp. 126 (1948). Reinstatement of the employee or an offer to do so is not a prerequisite to recovery. See *Blackmar v. United States*, 128 Ct. Cl. 693, 120 F. Supp. 408 (1954).

²⁷ The employee must also, of course, be careful to join all interested persons or bodies as parties to the action. Thus, the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising a power lodged in him or having a subordinate exercise it for him. See *Williams v. Fanning*, 332 U.S. 490, 68 S.Ct. 188 (1947).

²⁸ *Caswell v. Morgenthau*, (D.C. Cir. 1938) 98 F. (2d) 296 (eighteen months delay too long); *United States ex rel. Arant v. Lane*, 249 U.S. 367, 39 S.Ct. 293 (1919) (twenty months too long).

²⁹ *Farley v. Abbetmeier*, (D.C. Cir. 1940) 114 F. (2d) 569. But it may reasonably be argued that (1) the government has itself done wrong in paying A's salary to B, and (2) in the case where the office has not been filled, the government is also paying a salary for no service.

³⁰ Thus, in *Norris v. United States*, 257 U.S. 77 at 81, 42 S.Ct. 9 (1921), eleven months delay was considered too long as the facts did not disclose "that exercise of reasonable diligence . . . which the law imposes upon him as a duty if he would recover compensation for services in an office which the Government might fill with another. . . ." But it was found that Norris was ready, willing and able to discharge the duties of the office at all times, and eleven months delay does not seem very long when we bear in mind that his discharge had occurred only six months after the enactment of the statute guaranteeing him notice and a chance to answer.

the proper remedy for trying title to a public office.³¹ But the absence of cases in which it has been utilized indicates that its practical value is slight. The two main disadvantages³² of bringing a quo warranto action are that it is not available where no successor has been named, as the present incumbent is the proper party defendant,³³ and that, although the judgment in quo warranto provides for the ouster of the defendant, it is very doubtful if it can secure the reinstatement of the removed officer.³⁴

Where quo warranto does not afford the desired relief mandamus is the proper legal remedy for seeking restoration to office. It too is hedged around with procedural niceties which frequently prove fatal to petitioning government employees. In the first place, district courts of the United States other than the district court of the District of Columbia³⁵ have no jurisdiction to hear original claims for a writ of mandamus,³⁶ nor will an action seeking similar relief fare any better if dressed up as a mandatory injunction³⁷ or a declaratory judgment³⁸ because the courts cannot do indirectly what they have no authority to do directly.³⁹ Secondly, the writ is not available where someone is in *de jure*,⁴⁰ or apparently even *de facto*⁴¹ possession of the office, as in such

³¹ See comment, 30 ILL. L. REV. 1037 at 1045 ff. (1936).

³² Another drawback is that, absent statutory provision, quo warranto does not lie in respect of an employment as distinguished from an office. See FERRIS, EXTRAORDINARY LEGAL REMEDIES 166-167 (1926); 2 BAILEY, HABEAS CORPUS 1259-1260 (1913).

³³ This follows from *United States v. Malmin*, (3d Cir. 1921) 272 F. 785. And see FERRIS, EXTRAORDINARY LEGAL REMEDIES 148 (1926).

³⁴ Although it has been argued that quo warranto can restore a removed officer to his office [30 ILL. L. REV. 1037 at 1050-1051 (1936)], it appears that this is not so. See *Kalbfus v. Siddons*, 42 App. D.C. 310 at 319-321 (1941); *Priddie v. Thompson*, (C.C. W.Va. 1897) 82 F. 186 at 189.

³⁵ *United States v. Schurz*, 102 U.S. 378 (1880); *Kendall v. United States*, 12 Pet. (37 U.S.) 524 (1838).

³⁶ *Petrowski v. Nutt*, (9th Cir. 1947) 161 F. (2d) 938. The reason for this lack of jurisdiction is the absence of constitutional or statutory provisions conferring authority to issue such writs. The district court of the District of Columbia is in a special position. The court, in addition to being a federal court, is also charged with the enforcement of the domestic law, and by the Act of 1801 (2 Stat. L. 103) creating the courts, it inherited jurisdiction in accordance with the laws of the State of Maryland then existing in the ceded area, which includes jurisdiction to issue writs of mandamus in original proceedings.

³⁷ *Alley v. Craig*, (D.C. Me. 1951) 97 F. Supp. 576.

³⁸ *Palmer v. Walsh*, (D.C. Ore. 1948) 78 F. Supp. 64.

³⁹ *Ibid.* And see *Fredericks v. Rossell*, (D.C. N.Y. 1950) 95 F. Supp. 754.

⁴⁰ *United States v. Malmin*, (3d Cir. 1921) 272 F. 785 at 790-791; *United States ex rel. Crow v. Mitchell*, (D.C. Cir. 1937) 89 F. (2d) 805 at 809. *Contra*, *Kalbfus v. Siddons*, 42 App. D.C. 310 (1914).

⁴¹ *People ex rel. McLaughlin v. Board of Police*, 174 N.Y. 450, 67 N.E. 78 (1903) [cited in *United States ex rel. Crow v. Mitchell*, (D.C. Cir. 1937) 89 F. (2d) 805]; *United States v. Malmin*, (3d Cir. 1921) 272 F. 785 at 791.

a case the title to office is in dispute and is within the province of quo warranto.

Again, the issue of a writ lies in the discretion of the court⁴² and it is not demandable as of right; and its effectiveness has been circumscribed by the reluctance of the courts to interfere in the affairs of the executive branch of the government.⁴³ Consequently, the writ will not normally issue unless the duty of the officer to act is clearly established and plainly defined and unless the obligation to act is preemptory.⁴⁴ But, the judicial aura of protection of official actions of the executive branch of the government should not prevent mandamus issuing where an officer has wrongly interpreted the law when performing an official duty. Earlier cases⁴⁵ suggested that mandamus could never control an executive officer in such a case, but there is a hint in a more recent case⁴⁶ that an officer's interpretation of the law may be questioned if it is clearly wrong and the official action is arbitrary and capricious. This is a move in the right direction because, admitting that mandamus should not issue against an administrative officer where an exercise of judgment or discretion is necessary in determining his duty, it is equally clear that an officer should not be able to rely upon the mere necessity of reading the statutes in respect of their applicability to facts before him and thereby, under the claim of exercising discretion, avoid plain duty.⁴⁷

⁴² *United States v. Malmin*, (3d Cir. 1921) 272 F. 785 at 789.

⁴³ E.g., *United States ex rel. Crow v. Mitchell*, (D.C. Cir. 1937) 89 F. (2d) 805 at 809-810: "... courts always should proceed with extreme caution where the granting of the writ would result in interference by the judicial department with the management of the executive department of the government . . . even where the petition for the writ is to perform a purely ministerial act. . . ." And see *Decatur v. Paulding*, 14 Pet. (39 U.S.) 497 at 515-516 (1840); *Borak v. Biddle*, (D.C. Cir. 1944) 141 F. (2d) 278. In view of this rather natural deference to the executive and under its discretionary power to refuse to issue the writ, the court would probably never mandamus the President. See comment, 30 ILL. L. REV. 1037 at 1052-1053 (1936) where the matter is fully discussed.

⁴⁴ *Hammond v. Hull*, (D.C. Cir. 1942) 131 F. (2d) 23 at 25. Furthermore, it is only in clear cases of the illegality of action that courts will intervene to displace the judgments of administrative officers or bodies.

⁴⁵ *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 9 S.Ct. 12 (1888); *United States ex rel. Crow v. Mitchell*, (D.C. Cir. 1937) 89 F. (2d) 805 at 809.

⁴⁶ *Hammond v. Hull*, (D.C. Cir. 1942) 131 F. (2d) 23 at 25.

⁴⁷ *United States ex rel. Rhodes v. Helvering*, (D.C. Cir. 1936) 84 F. (2d) 270 at 272, per Stephens, C.J., dissenting. And see *Roberts v. United States*, 176 U.S. 221, 20 S.Ct. 376 (1900). In *Ginn v. United States*, 110 Ct. Cl. 637 (1948), Ginn, who had been suspended from duty without pay for over a year pending investigation and decision of his citizenship and charges of fraudulent conduct in connection therewith, was held not entitled to recover his salary although the citizenship questions were resolved in his favor by another court, because of the commissioner's discretionary power to remove (and

Finally, the practical value of a successful action for a writ of mandamus is not very great. If the writ is granted because of the failure to satisfy the procedural requirements relating to removal, it is no trouble for the appropriate officer immediately to dismiss the employee, this time taking care to follow the prescribed procedure.⁴⁸ It is obvious then that mandamus is not the panacea which the court of appeals claimed it to be in *Kalbfus v. Siddons*.⁴⁹

Certiorari is not the proper remedy to obtain reinstatement into office,⁵⁰ and prohibition will probably not lie in such a case. Although there is a conflict of authority in state courts⁵¹ it seems that federal courts would refuse to issue the writ on the grounds that the officer or board in hearing charges against a government servant and conducting proceedings for his removal acts in an executive rather than in a judicial capacity.⁵²

The other remedy available to the government employee is to seek an injunction and, although the advantages of being able to enjoin a proposed and unjustified removal over other remedies are obvious, the practical value of this type of relief is limited by two factors. In a succession of cases⁵³ at the turn of the century

incidentally, suspend) for cause. But, should this be so if the cause involved solely a question of law and the officer came to a wrong conclusion in law, for it is ludicrous to say that the fact of having had a question as to his citizenship raised may constitute reasonable cause for removing an employee. See note 17 *supra*.

⁴⁸ See *Kaufman v. United States*, 118 Ct. Cl. 91 at 104, 93 F. Supp. 1019 (1950).

⁴⁹ 42 App. D.C. 310 (1914). It was asserted in that case that mandamus is the complete remedy and it was said, too, that it could aid a person illegally removed from office without notice and hearing since, the order of removal being void, the attempted appointment of a successor is a nullity.

⁵⁰ Because, on the one hand, the purpose of certiorari is to bring for review before a superior court the proceedings and judgments of inferior courts and tribunals clothed with authority to act judicially and, on the other hand, certiorari will not normally lie when there is another adequate remedy. See generally FERRIS, *EXTRAORDINARY LEGAL REMEDIES*, Part III (1926).

⁵¹ See 115 A.L.R. 3 at 28 (1938).

⁵² But in that legal "white elephant," *Kalbfus v. Siddons*, 42 App. D.C. 210 (1914), it was held that proceedings for the removal of a public officer are adversary or judicial in character and, if the organic law of the governmental entity is silent as to the mode of procedure, that the substantial principles of the common law as to proceedings affecting private rights must be observed.

⁵³ *Morgan v. Nunn*, (C.C. Tenn. 1898) 84 F. 551; *Page v. Moffett*, (C.C. N.J. 1898) 85 F. 38; *Taylor v. Kercheval*, (C.C. Ind. 1897) 82 F. 497; *Flemming v. Stahl*, (C.C. Ark. 1897) 83 F. 940; *Couper v. Smyth*, (C.C. Ga. 1897) 84 F. 757. Two contrary decisions were given by Jackson, D.J., in *Priddie v. Thompson*, (C.C. W.Va. 1897) 82 F. 186, and *Butler v. White*, (C.C. W.Va. 1897) 83 F. 578, but the latter case was reversed on appeal [171 U.S. 379, 18 S.Ct. 949 (1898)].

it was held that a court of equity could not enjoin an officer or board from removing officers, particularly where the removal was in the discretion of the removing authority. The decisions were based partly on the ground that the removed officer was presumed to have adequate protection by mandamus or quo warranto if he wished to contest the validity of his removal or the right of his successor to the office, and partly on the ground that equity could protect only property rights,⁵⁴ and an officer had no such rights in his office.⁵⁵

At the present time, however, the chief reason why injunctions are of such little use is that all administrative remedies must usually be exhausted before a writ will issue⁵⁶ and, in the case of a removal from office, by that time it is too late. There is one exception to this which, though couched in general terms, has thus far been applied only in reduction in force cases. It has been held that, where the evidence tended to show that the removal of civil servants from their positions with the Veterans Administration would be in violation of their rights under the Veterans Preference Act, the civil servants, who were faced with immediate discharge, were not required to exhaust administrative remedies prior to institution of their actions for declaratory judgments declaring their proposed removal to be void.⁵⁷ It is not easy to reconcile this exercise of jurisdiction with the refusal of jurisdiction in earlier cases, unless we say that rights have some quality of "property" when granted by a statute which they lack when set forth in the Civil Service Regulations.⁵⁸ It may well be due

⁵⁴ Applying *In re Sawyer*, 124 U.S. 200, 8 S.Ct. 482 (1888).

⁵⁵ In *Page v. Moffett*, (C.C. N.J. 1898) 85 F. 38, the court went so far as to say that, while the President has the constitutional power to make regulations controlling the removal power of his subordinates, such regulations could never be regarded as laws because they were subject to modification or revocation at his whim.

⁵⁶ *Asher v. Forrester*, (D.C. D.C. 1947) 71 F. Supp. 470; *Hammond v. Hull*, (D.C. Cir. 1942) 131 F. (2d) 23 at 25.

⁵⁷ *Reeber v. Rossell*, (D.C. N.Y. 1950) 91 F. Supp. 108; *Wettre v. Hague*, (1st Cir. 1948) 168 F. (2d) 825; *Farrell v. Moomau*, (D.C. Cal. 1948) 85 F. Supp. 125. And see *Fischer v. Haerberle*, (D.C. N.Y. 1948) 80 F. Supp. 652. But cf. *Longfellow v. Gudger*, (D.C. Cir. 1926) 16 F. (2d) 653, where the requirement that employees with military preferences should be the last dismissed was completely disregarded and the plaintiff had no remedy from the courts.

⁵⁸ In *Wettre v. Hague*, (1st Cir. 1948) 168 F. (2d) 825 at 826, the court was content to adopt a citation from *Order of Railway Conductors of America v. Pitney*, 326 U.S. 561 at 566, 66 S.Ct. 322 (1946) that, "Of course, where the statute is so obviously violated that a 'sacrifice or obliteration of a right which Congress . . . created' to protect the interest of individuals or the public is clearly shown, a court of equity could, in a proper case, intervene."

to a question of interpretation. Regulations confer some discretion on the Civil Service Commission and the courts may have considered that, in view of the discretionary nature of the regulations, the "rights" were not set forth clearly enough to justify judicial interference in executive affairs.

The protection of the Civil Service Act applies to all persons in the classified civil service but it is a simple matter for Congress or the President to exclude particular classes of civil servants from the benefits of those statutory provisions designed to prevent arbitrary removals. In order to be in the classified civil service a person must not only have a competitive status but must also be in the service.⁵⁹ Competitive status is one which permits promotion, transfer, reassignment or reinstatement without competitive examination⁶⁰ and is usually acquired by receiving a probationary appointment after having passed a competitive examination. A person is in the classified civil service when he has a competitive status and occupies a classified position in the executive branch of the government.⁶¹ All persons in the executive branch of the government are in the classified civil service unless excluded by statute or executive order,⁶² but the Civil Service Commission has power to except positions from the classified service.⁶³ Furthermore, on the basis of an opinion of an attorney general⁶⁴ it seemed that the President might at any time circumvent the restrictions on removal imposed by the act by placing positions, the occupants of which in theory still retain their civil service status, under the several schedules to the statute.⁶⁵ The control is not as to indi-

⁵⁹ See generally *Bailey v. Richardson*, (D.C. Cir. 1950) 182 F. (2d) 46 at 52-54, affirmed by equally divided court, 341 U.S. 918, 71 S.Ct. 669 (1951). The term service refers to positions or offices; classified service, competitive service, classified (competitive) service, and classified civil service are interchangeable terms.

⁶⁰ 5 C.F.R. §4.301 (a)5 (1949).

⁶¹ 5 C.F.R. §4.301 (a)4 (1949).

⁶² But temporary appointees and probationers are excepted from the classified service [5 C.F.R. §§2.113 (a), 2.114 (a), 9.103, and §§2.114, 9.102 (a), 22.1 (a) (1949) as amended]. However, regulations also confer the benefit of the civil service statute on employees having competitive status and occupying positions which though excepted from the classified civil service either by statute or executive order are not of a confidential or policy-determining character [5 C.F.R. §§9.101 (b) (1), 9.102 (a) (1949) as amended] and also on those employees who hold indefinite appointments to positions in the classified civil service whether or not they have competitive status [5 C.F.R. §2.114 (h)].

⁶³ 5 C.F.R. §§6.1 to 6.300 (1949) as amended.

⁶⁴ 37 Op. Atty. Gen. 567 (1934).

⁶⁵ When a position is excepted from the competitive civil service under authority of an executive order, it is placed on Schedules A, B, or C, and it will depend on which schedule the position is what civil service rules and regulations are applicable. Of course, absent a statutory provision, the President may by executive order transfer a position from one schedule to another or reclassify it back into the competitive civil service.

viduals but as to classes of government servants. But, the Court of Appeals for the District of Columbia recently held in *Roth v. Brownell*⁶⁶ that, even though positions had been excepted by the President from the provisions of the civil service statute, the removal procedures of that act still applied to the incumbents of the positions. Congress could, of course, afford even greater protection to civil servants in this regard but, as a concomitant of this power, it could also at any time abolish positions or achieve the same result as far as the displaced employee is concerned by shortening his term of appointment to office sufficiently to make it expire.

C. *Some Loyalty Problems*

As was indicated earlier a civil servant's "lot is not a happy one," but insecurity of tenure has been aggravated by the implementation of the loyalty program designed to remove from the government service those persons whose loyalty to the United States is doubtful. We have already noted the Hatch Act, the purpose of which is to restrict the political activities of government servants,⁶⁷ and the statute authorizing the suspension and removal for security reasons of persons in particular departments. That statute may generally be considered to apply to certain "sensitive positions" in the government service,⁶⁸ but it should be noted that if implemented to cover the whole of the civil service (and the unfettered power of doing this is lodged in the President⁶⁹), it would have the effect of scrapping the merit system in government employment.

However, most problems arise under the executive orders issued in 1947⁷⁰ and 1953.⁷¹ The earlier order was issued by President Truman and provided for the refusal of employment and the removal from the government service where "on all the evidence there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."⁷² The stand-

⁶⁶ (D.C. Cir. 1954) 215 F. (2d) 500.

⁶⁷ Note 5 *supra*.

⁶⁸ Note 9 *supra*.

⁶⁹ 64 Stat. L. 477, §3 (1950), 5 U.S.C. (1952) §22 (3).

⁷⁰ No. 9835 dated March 21, 1947, amended by Exec. Order No. 10241 dated April 28, 1951.

⁷¹ No. 10450 dated April 27, 1953, amended by Exec. Order No. 10491 dated Oct. 13, 1953.

⁷² *Supra* note 70, Part V, §1.

ard set by the 1953 order which supplanted the earlier one is that the termination of the employment is, in the opinion of the head of the department or agency concerned, "necessary or advisable in the interests of the national security."⁷³ Thus the government has a wider discretion under the later order and, conversely, under it the civil servant has less protection than under the 1947 order. Under both the old and the current order certain activities and associations of the employee or applicant for employment are considered in this connection. The only three of these which need concern us at all here are (1) serving "the interests of another government in preference to the interests of the United States," (2) "sympathetic association with . . . any representative of a foreign nation whose interests may be inimical to the interests of the United States," and (3) "membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which . . . seeks to alter the form of government of the United States by unconstitutional means."⁷⁴

But, rather than consider these provisions at this stage it will be more useful to analyze the constitutional issues under the following heads: (1) the President's power to issue the orders; (2) their constitutionality under the First Amendment; (3) the possible application to them or to either of them of the due process clause of the Fifth Amendment; (4) their validity in the light of the provisions of the Sixth Amendment. The two executive orders do not require separate treatment since they differ in detail and not in principle and, for the sake of simplicity, the terms "order" or "executive order" when used in the following analysis may be taken to refer to either or both of the orders.

1. The first constitutional question is the source of the President's power to issue the order. The broadest basis for this is the executive power, and in *Myers v. United States*,⁷⁵ as modified by *Humphrey's Executor (Rathbun) v. United States*,⁷⁶ the Supreme Court emphasized that, under his duty to supervise the administration of the executive branch of the government, the President

⁷³ Supra note 71, §6. The section provides for suspension and then either reinstatement or removal in accordance with the prescribed procedure (§1).

⁷⁴ Id., now §8.

⁷⁵ 272 U.S. 52, 47 S.Ct. 21 (1926).

⁷⁶ 295 U.S. 602, 55 S.Ct. 869 (1935).

has an illimitable power of removal of persons filling predominantly executive positions in the government service.⁷⁷ This power of removal does not directly⁷⁸ extend to include the vast majority of government servants who are either inferior officers appointed by the President alone, the courts of law or the heads of departments, or employees of the United States wherever Congress has vested their appointment. It may be noted too that Congress may prescribe the conditions of employment and limit the grounds of removal of such government servants.⁷⁹

But these restrictions would not appear to affect the President's power to promulgate the executive order as he also has a twin statutory source of power. First, the Hatch Act provides for the removal of federal servants who are members of organizations advocating the overthrow by force of the constitutional form of government,⁸⁰ and a 1950 statute⁸¹ provides for the suspension and removal of persons in certain departments and agencies for national security reasons. Secondly, under the 1871 statute the President may "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."⁸² Under the 1883 act he may promulgate regulations prepared by the Civil Service Commission necessary for the establishment and maintenance of the merit system.⁸³ But, there is a limit to his powers in this regard in that the 1912 amendment to the civil service statute restricts the removal of persons in the classified

⁷⁷ Myers' case applied this principle to all executive officers, but in Rathbun's case it was held that the President's illimitable removal power did not extend to persons in quasi-legislative or quasi-judicial positions in government. Thus, the President's removal power extends to all persons performing predominantly executive functions. Of course, Congress may, under the civil service laws, deprive the President of the power to remove minor officers and employees. See generally CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 428, n. 80 (1948).

⁷⁸ It is clear that Congress may deprive the President of his power of removal except in the case of officers whose appointments are made by him with the consent of the Senate [See *Ex parte Hennen*, 13 Pet. (38 U.S.) 225 (1839); *United States v. Perkins*, 116 U.S. 483, 6 S.Ct. 449 (1886)]. But the President, by bringing pressure to bear upon the appropriate departmental head, may achieve the desired result indirectly.

⁷⁹ E.g., see *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556 (1947); *Ex parte Curtis*, 106 U.S. 371, 1 S.Ct. 381 (1882); *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21 (1926).

⁸⁰ See note 5 *supra*, §9A (1).

⁸¹ 64 Stat. L. 476 (1950), 5 U.S.C. (1952) §22.

⁸² Rev. Stat. §1753 (1875), 5 U.S.C. (1952) §631.

⁸³ 22 Stat. L. 403 (1883), 5 U.S.C. (1952) §633.

civil service to "such cause as will promote the efficiency of said service."⁸⁴

While in view of these provisions an order designed to secure the removal of a certain class of government servants because of their political beliefs would be ultra vires the statutory rule-making power (and to a certain extent in conflict with one of the Civil Service Rules⁸⁵), presidential regulations, aimed at ridding the government of persons as to whose loyalty there is a reasonable doubt, have been rightly upheld.⁸⁶ The true rationale for this is that discharge of or refusal of employment to such persons has a reasonable relation to the promotion of the efficiency of the service.⁸⁷ On this view the executive order cannot be assailed as a usurpation of legislative power⁸⁸ and the standards for employment in, and removal from, the government prescribed therein must therefore be attacked on the constitutionality of their content rather than on the validity of their origin.

2. The guarantees of the First Amendment have always been held to include freedom of political thought and expression,⁸⁹ but

⁸⁴ See note 6 supra, at 555.

⁸⁵ 5 C.F.R. (Supp. 1955) §04.2: "No person employed in the executive branch of the Federal Government who has authority to take or recommend any personnel action with respect to any person who is an employee in the competitive service or any eligible or applicant for a position in the competitive service shall make any inquiry concerning the race, political affiliation or religious beliefs of any such employee, eligible, or applicant. All disclosures concerning such matters shall be ignored, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive branch of the Federal Government against or in favor of any employee in the competitive service, or any eligible or applicant for a position in the competitive service because of his race, political affiliation or religious beliefs, except as may be authorized or required by law."

⁸⁶ In *Friedman v. Schwellenbach*, (D.C. Cir. 1946) 159 F. (2d) 22, it was held that a war service regulation permitting the removal from the federal service of one concerning whose loyalty to the government the Civil Service Commission entertained a reasonable doubt, was reasonable and proper and the making thereof was within the scope of the authority conferred on the Commission by the civil service act and certain executive orders. Likewise see *Washington v. Clark*, (D.C. D.C. 1949) 84 F. Supp. 964; and *Bailey v. Richardson*, (D.C. Cir. 1950) 182 F. (2d) 46. However, in *Peters v. Hobby*, 349 U.S. 331 at 350, 75 S.Ct. 790 (1955), Black, J., expressed grave doubts as to whether the presidential order had been authorized by an act of Congress and furthermore doubted if Congress could have given the President such a power.

⁸⁷ *Friedman v. Schwellenbach*, (D.C. Cir. 1946) 159 F. (2d) 22. In *Kutcher v. Gray*, (D.C. Cir. 1952) 199 F. (2d) 783 at 786, it was specifically held that "the efficiency of the service" would be promoted by the removal of a disloyal federal civil service employee.

⁸⁸ *Contra*, "The Constitutional Right to Advocate Political, Social and Economic Change—An Essential of American Democracy," 7 LAW. GUILD. REV. 57 at 69 (1947).

⁸⁹ E.g., *Stromberg v. California*, 283 U.S. 359 at 369, 51 S.Ct. 532 (1931), per Hughes, C.J.: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained

none of the First Amendment liberties are absolutes⁹⁰ and, in any case, the amendment prohibits only congressional action.⁹¹ Nevertheless, it seems clear that the First Amendment operates indirectly as a limitation on the executive as well as on the legislative power and, consequently, the executive order must be subject to its restrictions. Insofar as the executive order represents the exercise of the President's statutory rule-making power, it is obviously subject to the First Amendment.⁹² Again, it may reasonably be argued in the light of dicta in earlier decisions⁹³ that, insofar as it represents an exercise of the executive power granted to the President by the Constitution, it is subject to a like restriction. Alternatively, the First Amendment will be applicable if there is any foundation for the invocation of the due process clause of the Fifth Amendment. For it has been held by a lower court that each liberty specified in the First Amendment is a liberty which is secured to all persons by the due process clause of the Fifth Amendment.⁹⁴ It may also be maintained that, although the "liberty" guaranteed by the Fifth Amendment is different from the "liberty" guaranteed by the Fourteenth Amendment, the due process clause of the former amendment should apply to executive action and render the First Amendment applicable. Certainly there have been frequent holdings that the due process clause of

by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

⁹⁰ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 at 571-572, 62 S.Ct. 766 (1942). In more recent decisions [e.g., *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857 (1951); *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725 (1952)] the Supreme Court has retreated from the position that freedom of speech and expression occupies a preferred place in the constitutional scheme. For, as Jackson, J., succinctly remarked in *Brinegar v. United States*, 338 U.S. 160 at 180, 69 S.Ct. 1302 (1949), "We cannot give some constitutional rights a preferred position without relegating others to a deferred position." And see *Frankfurter, J.*, in *Kovacs v. Cooper*, 336 U.S. 77 at 88, 69 S.Ct. 448 (1949). In practice, what is meant by the preferred place of First Amendment freedoms is that the government must show that it had reasonable grounds to pass any statute abridging such freedoms, i.e., it is more a question of the burden of proof than a presumption of validity or invalidity.

⁹¹ U.S. CONST., amend. I provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

⁹² And see *Ex parte Mitsuye Endo*, 323 U.S. 283, 65 S.Ct. 208 (1944).

⁹³ *Ex parte Milligan*, 4 Wall. (71 U.S.) 2 at 124-125 (1866); *Ex parte Quirin*, 317 U.S. 1 at 25, 63 S.Ct. 1 (1942). This power was presumed by the court to exist in *Washington v. Clark*, (D.C. D.C. 1949) 84 F. Supp. 964, and *Bailey v. Richardson*, (D.C. Cir. 1950) 182 F. (2d) 46.

⁹⁴ *United States v. Korner*, (D.C. Cal. 1944) 56 F. Supp. 242.

the Fourteenth Amendment incorporates the First Amendment⁹⁵ and that it restricts all state action whether legislative, judicial or executive.⁹⁶

As we have already intimated, the First Amendment does not give an absolute right to freedom of speech, assembly, or of political expression.⁹⁷ In the case of the government servant restrictions on those rights have been justified from two points of view.⁹⁸ The first is that by accepting government employment a person may have to waive certain rights which he would otherwise have as an ordinary citizen. While this approach has the authority of Justice Holmes' famous epigram that a person "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,"⁹⁹ it is specious and, although constantly appearing in the judgments of the courts, is not justified by the decisions themselves. In fact, the courts have always required that any encroachment upon the liberties of government servants should bear a reasonable relation to proper governmental activities.¹⁰⁰

The fallacy in the first approach lies in the attempt to treat the government as an ordinary employer of labor. The point is that the federal government derives its powers from the Constitution and, as shown by the decision of the Court in *United Public Workers v. Mitchell*,¹⁰¹ the Constitution does not authorize discrimination against federal employees in the exercise of personal freedoms. Admittedly, the government, as any other employer, is under no obligation to hire as an employee anyone who does not come up to certain standards. Nevertheless, not only must the same basic standard be applied to all comers¹⁰² but also the stand-

⁹⁵ *Gitlow v. New York*, 268 U.S. 652 at 666, 45 S.Ct. 625 (1925).

⁹⁶ E.g., *DeJonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255 (1937).

⁹⁷ See note 90 *supra*.

⁹⁸ See generally note, 47 *Col. L. Rev.* 1161 (1947).

⁹⁹ *McAuliffe v. New Bedford*, 155 Mass. 216 at 220, 29 N.E. 517 (1892).

¹⁰⁰ E.g., *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556 (1947). Indeed in *McAuliffe's* case Holmes, J., appeared to recognize the same qualification for he said (*supra* note 99, at 220): "On the same principle, the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here."

¹⁰¹ 330 U.S. 75, 67 S.Ct. 556 (1947).

¹⁰² *Ibid.*

ards set must meet the test of reasonableness and appropriateness.¹⁰³

The second point of view is that certain limitations may always be imposed on the exercise of First Amendment freedoms. But, as the *United Public Workers* case¹⁰⁴ shows, the test for the validity of restrictions on government employees' activities in this direction is not the commonly applied clear-and-present-danger test but is the criterion of reasonable relation. In the first place, it was indicated in *American Communications Association v. Douds*¹⁰⁵ that the clear-and-present-danger test is confined to cases where the government's objective is to curtail speech for its own sake and on that reasoning it was not available in the *United Public Workers* case. Secondly, the dissents of Justices Black and Douglas overlook the long history of regulations designed to promote impartiality in the civil service and the application to them of the "reasonableness" test in *Ex parte Curtis*.¹⁰⁶ Thirdly, there are numerous areas where the Supreme Court has deferred to the legislative judgment and ignored the clear-and-present-danger test, adopting instead the criterion of reasonableness.¹⁰⁷ Finally, it may be pointed out that the loyalty program was not initiated to control political beliefs but to ensure against the infiltration and retention in government employment of persons whose loyalty could reasonably be doubted or whose presence there might not be clearly consistent with the interests of the national security. It can hardly be denied that the program bears a reasonable relation to the admittedly proper purpose of ensuring that the government of the country is managed by persons of unquestionable

¹⁰³ See note 100 supra. Of course, it is clear that the Executive can discriminate for political reasons in selecting personnel. See *Bailey v. Richardson*, (D.C. Cir. 1950) 182 F. (2d) 46 at 63. Thus, a Republican president may appoint few, if any, Democrats to office without violating any provision of the Constitution.

¹⁰⁴ *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556 (1946).

¹⁰⁵ 339 U.S. 382 at 396, 70 S.Ct. 674 (1950).

¹⁰⁶ 106 U.S. 371, 1 S.Ct. 381 (1882). Admittedly *Curtis'* case was decided before *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247 (1919), where the clear-and-present danger test was first applied.

¹⁰⁷ See (1) *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193 (1944); and *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375 (1943) and like Japanese exclusion cases based on national self-preservation in wartime; (2) *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299 (1890) (statute denying polygamists or members of such an organization the right to vote and to hold office upheld); (3) *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358 (1905) (upholding constitutionality of compulsory vaccination provision even though it restricted liberty of the person). And see *Friedman v. Schwellenbach*, (D.C. Cir. 1946) 159 F. (2d) 22.

loyalty,¹⁰⁸ and so the public interest in a loyal and efficient civil service will outbalance the public interest in freedom of speech.¹⁰⁹

3. Even if we assume for the moment that there is a foundation for the invocation of the clause, it seems that to attack the executive order as violative of due process affords little more chance of success. The three objections which could be raised are that it imputes guilt by association, that it is void for vagueness, and that it does not satisfy procedural due process requirements.

Admittedly, if membership in one of the listed organizations were in itself taken to establish a reasonable ground for belief in an employee's lack of loyalty, guilt by association, which has been considered as violating "one of the most fundamental principles of our jurisprudence,"¹¹⁰ would result. However, proceedings under the loyalty program are not criminal and it would seem from the cases that they are not sufficiently analogous to criminal proceedings to warrant the application of a principle which has thus far been restricted to criminal proceedings.¹¹¹ In any case both the President¹¹² and an attorney general¹¹³ have emphasized that membership in, affiliation or sympathetic association with, a designated 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. In a recent decision¹¹⁴ a federal civil service employee had been

¹⁰⁸ In *Friedman v. Schwellenbach*, (D.C. Cir. 1946) 159 F. (2d) 22, the court squarely held that an employee may be dismissed because of his views, opinions, or affiliations, and in so doing clearly applied the reasonable relation test. See *Washington v. Clark*, (D.C. D.C. 1949) 84 F. Supp. 964; *Sherman*, "Loyalty and the Civil Servant," 20 *Rocky Mt. L. Rev.* 381 (1948) (advocating the application of the clear and present danger test); *Emerson and Helfeld*, "Loyalty Among Government Employees," 58 *YALE L.J.* 1 at 85 ff. (1948).

¹⁰⁹ Chafee suggests that the boundary line of the First Amendment should be fixed by the balancing of the two very important social interests in the search for truth and in the public safety. See CHAFEE, *FREE SPEECH IN THE UNITED STATES* 35 (1948).

¹¹⁰ *Bridges v. Wixon*, 326 U.S. 135 at 163, 65 S.Ct. 1443 (1945). See, too, *Schneiderman v. United States*, 320 U.S. 118 at 136 and at 154, 63 S.Ct. 1333 (1943); and *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239 (1945), where it was said at 772: "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application."

¹¹¹ This follows from our discussion of the applicability of the Sixth Amendment below.

¹¹² 5 C.F.R. §200.1 (1949), revoked, 18 *FED. REG.* 5699 (Sept. 25, 1953).

¹¹³ Letter to Loyalty Review Board quoted in *Kutcher v. Gray*, (D.C. Cir. 1952) 199 F. (2d) 783 at 788.

¹¹⁴ *Kutcher v. Gray*, (D.C. Cir. 1952) 199 F. (2d) 783. The memorandum of the Loyalty Review Board was void because it was ultra vires the statutory rule-making authority of the Board. It was on the same grounds that the Court decided the first case of *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624 (1951).

discharged in pursuance of a Loyalty Review Board memorandum ordaining removal on a finding that he was a member of an organization which had been designated by the attorney general as an organization seeking to overthrow the United States Government by unconstitutional means. The court of appeals held the discharge to be improper (and the memorandum to be absolutely void) in the absence of a specific finding by the administrator of the agency in which the employee worked that, upon such evidence, reasonable grounds existed for a belief that the employee was disloyal to the United States.

Nor can the executive order be impugned on the ground of vagueness. Although a statute will be void for vagueness when the courts feel that it sets no standards at all¹¹⁵ or amounts to the delegation of legislative power to non-legislative bodies,¹¹⁶ and although the courts have been inclined to prescribe higher standards of definiteness and certainty in the case of legislation affecting civil and political rights,¹¹⁷ this contention should receive short shrift. First, this is executive and not legislative delegation and, in view of the scope of his duties, it cannot plausibly be maintained that the President's directives to his own agents should conform to legally ascertainable standards of certainty. Secondly, the terms "communist," "fascist," "subversive," "totalitarian," "sympathetic association" and "affiliation," which may be considered too indefinite, are used with reference to organizations which are publicly listed by the attorney general.¹¹⁸ Furthermore, the attorney general can be required at the suit of such an organization to show a reasonable basis for making the designation.¹¹⁹ This should constitute adequate notice. The only other terms which may be questioned are "loyalty" and "interests of national security." The former term may have many meanings but, since it has thus far defied acceptable definition and since it is obvious that disloyal employees should not be retained in the government service,¹²⁰ it seems straining at gnats to attack the

¹¹⁵ *United States v. Cohen Grocery*, 255 U.S. 81, 41 S.Ct. 298 (1921); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532 (1931). For a general discussion on this point see note, 47 *Col. L. Rev.* 1161 at 1170-1171 (1947).

¹¹⁶ *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935).

¹¹⁷ *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665 (1948); *Thornhill v. Alabama*, 310 U.S. 88 at 101, 60 S.Ct. 736 (1940).

¹¹⁸ The publicity requirement is imposed under ¶3 of Part III of the former 1947 order and by §12 of the 1953 order. See notes 70-71 *supra*.

¹¹⁹ See *Joint Anti-Fascist Refugee Committee v. McGrath*, (D.C. D.C. 1952) 104 F. Supp. 567.

¹²⁰ This was clearly the view of the court in such cases as *Bailey v. Richardson*, (D.C. Cir. 1950) 182 F. (2d) 46, and *Friedman v. Schwellenbach*, (D.C. Cir. 1946) 159 F. (2d) 22.

order on this ground. The latter term may sound more vague but less stigma should attach to a removal thereunder since disloyalty is not the only ground, and it too should escape condemnation on the score of vagueness.

Likewise it seems to be too late now to assail the order as violating procedural due process. The courts have always treated the removal of government servants as an executive and not as a judicial or quasi-judicial matter.¹²¹ We saw earlier in this article that the courts will not interfere provided the prescribed procedure is followed and provided there is no lack of good faith. The justification for this is more firmly founded than in the simple disinclination of the judiciary to meddle in the affairs of the executive branch of the government. It springs from the principle of inherent discretionary power reposing in the President enunciated in the *Myers* case,¹²² the exercise of which power would be inconsistent with a non-statutory requirement of compliance with due process of law in such matters as adequacy of evidence and disclosure of names and the like. It should be noted, however, that, in line with their usual practice,¹²³ the courts will insist on the scrupulous observance of the procedural requirements of the executive order. In *Deak v. Pace*,¹²⁴ which effectively limits the implications of some of the dicta in *Bailey v. Richardson*, an order of the Secretary of War removing civilian employees of the War Department from service on the ground that such action was warranted by demands of national security, in that the employees allegedly attended Communist meetings and were interested in communist activities, was held not to comply with the statute requiring the employees to be informed with reasonable certainty and precision of the cause for removal, where no details as to times, places and organizations were furnished.¹²⁵ The terms

Thus, in *Kutcher v. Gray*, (D.C. Cir. 1952) 199 F. (2d) 783 at 786, it was said, "... it cannot be argued that removal of a disloyal employee is not promotive of the 'efficiency of the service.'"

¹²¹ See discussion *supra* and *Washington v. Clark*, (D.C. D.C. 1949) 84 F. Supp. 964, which involved the loyalty program.

¹²² *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21 (1926).

¹²³ See note 13 *supra*.

¹²⁴ (D.C. Cir. 1950) 185 F. (2d) 997.

¹²⁵ It is quite possible that, should the question arise, the Court would overrule the decision in *Deak v. Pace*, (D.C. Cir. 1950) 185 F. (2d) 997. *Prettyman, C.J.*, in his dissenting opinion, which closely follows the reasoning of the court in *Bailey v. Richardson*, (D.C. Cir. 1950) 182 F. (2d) 46, argues that the court could not force the Secretary of the Army to furnish "additional information" because the decision as to what data should be furnished lay in his judgment as to the national security. The court should not take it upon itself to decide that the "additional information" which it required to be furnished would not involve any security risk.

of the controlling statute in that case are so similar to those of both the executive orders, and in fact are identical with those of the current order, that the requirement of some reasonable measure of specificity of charges should apply to removals under the loyalty program.

In order for the due process clause to be applicable to a situation there must be a deprivation of "life, liberty or property"¹²⁶ and, except when considering procedural due process, we have assumed thus far that the federal servant's "right" to his job comes within this provision. In numerous cases it has been considered that offices and employments are not property¹²⁷ or contractual¹²⁸ rights within the meaning and protection of the Constitution, and the court of appeals in *Bailey v. Richardson*¹²⁹ took this view in holding that there was no foundation for the invocation of the due process clause of the Fifth Amendment.

The effects of a dismissal under the loyalty program and the removed employee's struggles to obtain employment thereafter may be depicted in graphic and appealing colors.¹³⁰ It may, therefore, be argued that the consequent loss of reputation amounts to the deprivation of a substantial property right,¹³¹ and that this is borne out by the fact that calling a person a communist or communist sympathizer is libelous per se.¹³² It may be contended that an administrative finding of disloyalty is equivalent to a judicial verdict of treason in the eyes of the world, but the clear fact remains that, if the government in the valid exercise of a governmental power injures an individual, that person has no redress.¹³³ It is just as untenable to maintain that dismissals under

¹²⁶ U.S. CONST., amend. V provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

¹²⁷ E.g., *Butler v. Pennsylvania*, 10 How. (51 U.S.) 402 (1850); *Taylor and Marshall v. Beckham*, 178 U.S. 548 at 577, 20 S.Ct. 1009 (1900).

¹²⁸ E.g., *Crenshaw v. United States*, 134 U.S. 99, 10 S.Ct. 431 (1890); *Field v. Giegenack*, (D.C. Cir. 1934) 73 F. (2d) 945.

¹²⁹ Despite numerous dicta to the contrary in earlier cases [e.g., *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 at 162 (1803); *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 at 320 (1866)] the clear weight of authority supports the view taken by the court and it is now too late to hope that the court will hold otherwise.

¹³⁰ For a general discussion of the question, see the articles referred to in note 108 *supra*, and also Kaplan, "Loyalty Review of Federal Employees," 23 N.Y. UNIV. L.Q. REV. 437 (1948), and O'Brian, "Loyalty Tests and Guilt by Association," 61 HARV. L. REV. 592 (1948).

¹³¹ See note, 65 HARV. L. REV. 107 at 156-158 (1951). *Contra*, *Angilly v. United States*, (2d Cir. 1952) 199 F. (2d) 642 at 644, per Augustus Hand, J.

¹³² *Spanel v. Pegler*, (7th Cir. 1947) 160 F. (2d) 619 at 621, citing cases from other jurisdictions.

¹³³ *United States v. Sanders*, (10th Cir. 1944) 145 F. (2d) 458; *Bailey v. Richardson*, (D.C. Cir. 1950) 182 F. (2d) 46; *Cochran v. Couzens*, (D.C. D.C. 1930) 42 F. (2d) 783

the loyalty program must constitute an exception to the general rule since they are damaging to reputation, subject the removed employee to moral obloquy and are injurious to his prospects of future employment. But, so are dismissals for accepting bribes,¹³⁴ for repeated attempts at seduction by force,¹³⁵ for malfeasance in office,¹³⁶ yet the government's right to dismiss employees on those grounds without the safeguards of due process has not been seriously questioned.

Again, it may be argued that there is no deprivation of liberty because the government is entitled to insist on the continuing faithfulness of its servants, and because those persons who are in effect labeled as disloyal are still free to hold their particular political philosophies outside government employment. For obvious reasons every citizen cannot demand that the government employ him in some capacity. Nevertheless, this does not mean that an applicant for a position and a person holding a position have no rights. One reason for the failure to appreciate this distinction is that the apparent lack of a ready remedy often connotes the nonexistence of a right. But this is not necessarily so.

Let us consider this first from the point of view of the applicant for office. Both *United States v. Lovett*¹³⁷ and *Bailey v. Richardson*¹³⁸ recognized that a bar to future employment may amount to punishment—if a legislative act, such a bar may be a bill of attainder,¹³⁹ and if an executive act it may amount to punishment within the meaning of, and so subject to, the Sixth Amendment.¹⁴⁰ This is not the whole answer. In the first place, a qualification or disqualification must bear some reasonable relation to the advancement of the public welfare¹⁴¹ and, although

(holding that anyone may be attacked with impunity by a congressman while he is on the floor of Congress).

¹³⁴ *Eberlein v. United States*, 53 Ct. Cl. 466 (1918).

¹³⁵ *Golding v. United States*, 78 Ct. Cl. 682 (1934).

¹³⁶ *Kent v. United States*, 105 Ct. Cl. 280 (1946). And see *Angilly v. United States*, (2d Cir. 1952) 199 F. (2d) 642.

¹³⁷ 328 U.S. 303, 66 S.Ct. 1073 (1946).

¹³⁸ (D.C. Cir. 1950) 182 F. (2d) 46.

¹³⁹ *United States v. Lovett*, 328 U.S. 303, 66 S.Ct. 1073 (1946).

¹⁴⁰ *Bailey v. Richardson*, (D.C. Cir. 1950) 182 F. (2d) 46.

¹⁴¹ *People v. Crane*, 214 N.Y. 154 at 161, 108 N.E. 427 (1915), per Cardozo, J.: "Since government, in expending public moneys, is expending the money of its citizens, it may not by arbitrary discriminations having no relation to the public welfare, foster the employment of one class of its citizens and discourage the employment of others." However, as we noted (supra note 103), the Executive can discriminate in public employment for political reasons. Still, once a person is in the classified civil service, he can be removed only under the provisions of the civil service statute.

not material to the present inquiry, this does indicate that the applicant for employment is not destitute of legal rights. Furthermore, though a person does not have an absolute right to a position in the government service, yet as between himself and other applicants he cannot be disqualified on illegal grounds.¹⁴² Thus, Congress cannot provide that "no Republican, Jew or Negro shall be appointed to federal office."¹⁴³ In other words, a person has the constitutional right to the opportunity to compete equally with others for a position and not to be adjudged ineligible illegally. It may reasonably be argued that these rights should come within the meaning of "liberty" in the due process clause.¹⁴⁴

We may now consider in this light the position of a federal servant. Like most aphorisms, Chief Justice Fuller's remark in *Grenshaw v. United States*,¹⁴⁵ that an officer enjoys a privilege revocable by the sovereignty at will, is not completely accurate. It has been suggested¹⁴⁶ that, applying the principle that one may be denied his liberty if he is punished for exercising it,¹⁴⁷ removal from office should come within this category when it is based upon the exercise by the employee of a constitutional right. Thus, in his concurring opinion in the recent case of *Peters v. Hobby*¹⁴⁸ (which, however, was decided by the Court on another ground¹⁴⁹), Justice Douglas said: "It [the practice of using 'faceless informers'] deprives men of 'liberty' within the meaning of the Fifth Amendment, for one of men's most precious liberties is his right to work. When a man is deprived of that 'liberty' without a fair trial, he is denied due process." It is better,¹⁵⁰ however, to approach the problem from the point of view of the "privilege" of

¹⁴² *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624 (1951) [citing *Perkins v. Elg*, 307 U.S. 325, 59 S.Ct. 884 (1939)]: "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally."

¹⁴³ *United Public Workers v. Mitchell*, 330 U.S. 75 at 79, 67 S.Ct. 556 (1947).

¹⁴⁴ This was suggested in *Rogers v. Common Council of Buffalo*, 123 N.Y. 173 at 186, 25 N.E. 274 (1890).

¹⁴⁵ 134 U.S. 99 at 108, 10 S.Ct. 431 (1890).

¹⁴⁶ Comment, 46 MICH. L. REV. 942 at 948 ff. (1948).

¹⁴⁷ *Bomar v. Keyes*, (2d Cir. 1947) 162 F. (2d) 136 at 139; *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877 (1943).

¹⁴⁸ 349 U.S. 331 at 350, 75 S.Ct. 790 (1955).

¹⁴⁹ The Court avoided the constitutional issues and decided the case simply on the ground that the Loyalty Review Board had no power under the executive order to conduct a "post-audit" of Peters' case on its own motion, after the agency loyalty board had twice ruled there was no reasonable ground to doubt Peters' loyalty.

¹⁵⁰ One disadvantage of the suggested test is that it ignores the fact that in both *Lovett's case*, 328 U.S. 303, 66 S.Ct. 1073 (1946), and *Bailey's case*, (D.C. Cir. 1950) 182 F. (2d) 46, it was not the dismissal on loyalty grounds but the bar to future employment which was invalidated by the courts: another is that it is subject to the same objections which have been sufficient to deny relief in other cases.

working for the government. For although, as was pointed out in *Friedman v. Schwellenbach*,¹⁵¹ the power to appoint includes the power to condition or qualify the appointment, it does not follow that every denial of a privilege is constitutional.

In the case of the postal system the courts have frequently held¹⁵² that the use of the mails, though a privilege, is not one which may be extended or withheld on any grounds. The government is under no obligation to establish a post office in a particular locality but once it does so it cannot arbitrarily pick and choose those members of the public whom it will serve.¹⁵³ Again, in determining whether any publication is obscene the postmaster general necessarily passes on a question involving the fundamental liberties of the citizen, which is a judicial and not an executive function and must be exercised according to the ideas of due process implicit in the Fifth Amendment.¹⁵⁴

Another analogy is from the Supreme Court decision in *Frost v. Railroad Commission of California*.¹⁵⁵ In that case the Court held that, assuming that the use of its highways by private carriers for hire is a privilege which the state may deny, it cannot constitutionally affix to that privilege the unconstitutional condition that the carrier shall assume against his will the burdens and duties of a common carrier. The rationale of the Court is particularly pertinent to the present discussion. Justice Sutherland, delivering the opinion of the Court, said:

¹⁵¹ (D.C. Cir. 1946) 159 F. (2d) 22 at 24.

¹⁵² *United States ex rel. Milwaukee Social Democrat Publishing Co. v. Burleson*, 255 U.S. 407, 41 S.Ct. 352 (1921); *Pike v. Walker*, (D.C. Cir. 1941) 121 F. (2d) 37; *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 66 S.Ct. 456 (1946).

¹⁵³ See *Pike v. Walker*, (D.C. Cir. 1941) 121 F. (2d) 37 at 39. It is this factor which disproves the validity of an analogy drawn from the oft-quoted dicta in *Packard v. Banton*, 264 U.S. 140 at 145, 44 S.Ct. 257 (1924), that "a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former." It may also be argued that there is an essential distinction between the mail service and public employment which nullifies the validity of the analogy. The postal system is a monopoly which the government enforces through statutes forbidding the carrying of letters by other means whereas people do not have to work for the government. But, in view of the relation of allegiance and its correlative existing between the citizen and his government, and of the fact that the government is by far the largest employer of labor in the country and plays such a dominant part in the lives of the people, this argument should not be deemed controlling.

¹⁵⁴ *Walker v. Popenoe*, (D.C. Cir. 1945) 149 F. (2d) 511. And, in *Hannegan v. Esquire, Inc.*, 327 U.S. 146 at 151, 66 S.Ct. 456 (1945), the Court characterized the power of censorship to be "a power . . . so abhorrent to our traditions" and said that a purpose on the part of Congress to grant that power to the Postmaster General was not lightly to be inferred.

¹⁵⁵ 271 U.S. 583, 46 S.Ct. 605 (1926).

"It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But, the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."¹⁵⁶

On this basis it may reasonably be maintained (though the proposition is not free from difficulties¹⁵⁷) that the "right" to, or "privilege" of government employment is one of the liberties protected by the due process clause, and that removals under the loyalty program must satisfy both substantive and procedural due process. However, this argument has little chance of prevailing in the courtroom. On the one hand, there is only a tenuous connection between the "right" or "privilege" of government employment and "liberty or property" within the meaning of the Fifth Amendment. On the other hand, if that connection was considered sufficient to require the application of due process requirements, it would be necessary not only to overturn literally dozens of cases¹⁵⁸ and, furthermore, to hold the Lloyd-La Follette Act which was originally enacted as a concession to civil servants unconstitutional as not affording them sufficient protection,¹⁵⁹ but also to scrap part of the theory of executive power and administrative supervision explained in the *Myers* case. Therefore, it is highly unlikely that the courts would venture into such uncharted and hazardous waters.

The dictum in the *United Public Workers* case¹⁶⁰ that arbitrary discrimination between classes of citizens in the matter of

¹⁵⁶ *Id.* at 593-594.

¹⁵⁷ The chief difficulty is in discounting the argument that the government may reasonably require its employees to be of unquestionable loyalty, and that the application of the theory of the separation of powers demands that the management of internal affairs of the executive branch of the government shall not be controlled by the judiciary.

¹⁵⁸ E.g., see the list of cases cited in *Bailey v. Richardson*, (D.C. Cir. 1950) 182 F. (2d) 46 at 64, n. 34.

¹⁵⁹ See note 6 *supra*. It will be recalled that confrontation of witnesses and granting of a hearing under the statute are in the discretion of the removing officer.

¹⁶⁰ *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556 (1947).

public employment is unconstitutional and the corollary that there must be a reasonable relation between qualifications and disqualifications for employment and the needs of the public service indicate that action violative thereof would be an infringement of due process. The importance of this lies not in its application to the loyalty program—for, although the earlier executive order distinguished loyal and disloyal employees, the classification could not be considered an arbitrary one—but in the indication it gives that there are some rights attaching to employment under the federal government.

4. The final constitutional issue is whether or not the executive order violates the Sixth Amendment.¹⁶¹ The argument for the application of the constitutional provision is that a dismissal on loyalty grounds is punishment and consequently can be inflicted only upon compliance with the Sixth Amendment. It is clear that the deprivation of a privilege may amount to punishment within the protection of the clause in the Constitution prohibiting bills of attainder¹⁶² but the courts have in recent years narrowed the definition of punishment for this purpose. The combined effect of *United States v. Lovett* and *Bailey v. Richardson* indicates beyond reasonable doubt that dismissals on loyalty grounds will not be considered punishment either within the bills of attainder clause of the Constitution or within the scope of the Sixth Amendment.

In *Lovett's* case an appropriation statute prohibited the payment of salary or compensation out of moneys then or thereafter to be appropriated (except for services as jurors or members of the armed forces) of the three plaintiffs unless they were again appointed by the President with the consent of the Senate. The plaintiffs sued in the Court of Claims for services rendered subsequent to the effective date of the statute and on appeal the

¹⁶¹ The amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." In both *Lovett's* and *Bailey's* cases it was held that punishment can be inflicted lawfully only upon compliance with the amendment.

¹⁶² E.g., *American Communications Association v. Douds*, 339 U.S. 382 at 389-390, 70 S.Ct. 674 (1950); *Wieman v. Updegraff*, 344 U.S. 183 at 192, 73 S.Ct. 215 (1952); *United Public Workers v. Mitchell*, 330 U.S. 75 at 100, 67 S.Ct. 556 (1946); *United States v. Lovett*, 328 U.S. 303 at 316, 66 S.Ct. 1073 (1946).

Supreme Court held that the act was a bill of attainder and not a mere appropriation measure over which Congress has complete control. The decision was rested on the grounds that "permanent proscription from any opportunity to serve the Government is punishment,"¹⁶³ and the fact that punishment is inflicted through the instrumentality of an act specifically cutting off the pay of certain named individuals found by Congress to be guilty of disloyalty makes it no less effective than if it had been done by a statute which designated the conduct as criminal.

Four years later in *Bailey v. Richardson*¹⁶⁴ the Court of Appeals for the District of Columbia applied the reasoning in *Lovett's* case to invalidate an order of the Loyalty Review Board barring her from the federal service for three years as amounting to punishment within the aegis of the Sixth Amendment. However, the court rested its decision squarely on the fact that dismissal itself does not amount to punishment—it was the proscriptive nature of the order which did that.¹⁶⁵

Professor Gardner¹⁶⁶ develops the interesting thesis from these decisions that the essential constituent of punishment is not the infliction of physical hardship but the expression of the community's hatred, fear or contempt, and thus that, "Any official decision which passes a moral judgment on a named individual and, as a consequence of that judgment, deprives the individual of the opportunity to associate, cooperate, and compete with his fellow citizens on a basis of complete equality, has the character of a criminal judgment, and may therefore be rendered only after a public trial upon such evidence as would be admissible in a criminal case."¹⁶⁷ This approach derives some support from *Bridges v. Wixon*¹⁶⁸ and *Schneiderman v. United States*¹⁶⁹ where deportation, though not technically a criminal proceeding, was held, because of its penal nature, to have to comply with the most rigid standards of a fair hearing. On the other hand, in the

¹⁶³ 328 U.S. 303 at 316, 66 S.Ct. 1073 (1946).

¹⁶⁴ (D.C. Cir. 1950) 182 F. (2d) 46.

¹⁶⁵ Although it may be argued that in practice a finding of disloyalty, which no other board would be likely to reject later, is as permanent a bar from federal employment as that condemned in *Lovett's* case, the fact remains that in law there is a distinction and the distinction saves both the employer's inherent right to discharge and the applicant's inherent right to be considered and not adjudged ineligible illegally.

¹⁶⁶ Gardner, "Bailey v. Richardson and the Constitution of the United States," 33 BOST. UNIV. L. REV. 176 (1953).

¹⁶⁷ *Id.* at 191.

¹⁶⁸ 326 U.S. 135, 65 S.Ct. 1443 (1945).

¹⁶⁹ 320 U.S. 118, 63 S.Ct. 1333 (1943).

Japanese exclusion cases¹⁷⁰ no procedural safeguards were required by the courts even though the decisions involved the admission of a presumption of disloyalty against the Japanese race—a presumption which had originally been invoked by the executive and legislature. Again, the provision in the Labor-Management Relations (Taft-Hartley) Act¹⁷¹ denying the benefits of the statute to labor unions unless their officers file non-Communist affidavits was upheld in *American Communications Association v. Douds*.¹⁷² Referring to the Japanese exclusion cases, the Court said that, if accidents of birth and ancestry under some circumstances justify an inference concerning future conduct, it can hardly be doubted that voluntary affiliations and beliefs justify a similar inference when drawn by the legislature on the basis of its investigations. Furthermore, the court in *Bailey v. Richardson* stressed the fact that proscription for a short period of time may not always amount to punishment.¹⁷³

There is a further reason why Professor Gardner's thesis must be rejected. The judicial process requirements of the Sixth Amendment are not applicable to an honest exercise of executive power such as the discharge of an employee performing predominantly executive functions,¹⁷⁴ and the extension of judicial interference impliedly advocated by Professor Gardner would be contrary to the basic concept of the separation of powers in that it would have the effect of forcing the President to retain the services of persons whose loyalty he reasonably doubts.¹⁷⁵

Even though the wisdom of implementing the loyalty program may be doubted, even if it promotes only witch-hunting, disillusionment and fear, even if it sterilizes the civil service, induces conformity to set standards and muzzles the freedom of political

¹⁷⁰ E.g., *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375 (1942).

¹⁷¹ 61 Stat. L. 136 at 146 (1947), 29 U.S.C. (1952) §141 et seq.

¹⁷² 339 U.S. 382, 70 S.Ct. 674 (1950).

¹⁷³ *Bailey v. Richardson*, (D.C. Cir. 1950) 182 F. (2d) 46 at 55: "A general order that no person who is denied permanent employment after a conditional appointment be reemployed for three years might well be valid. The bar in the present proceeding appears on the record to be one imposed by the Board upon this particular individual in this particular case as a matter of individual adjudication."

¹⁷⁴ Thus, in *Kutcher v. Gray*, (D.C. Cir. 1952) 199 F. (2d) 783, it was held that proceedings involving an employee under the loyalty program are purely administrative in character, in no sense criminal, and do not require the constitutional and traditional safeguards of a judicial trial.

¹⁷⁵ Professor Gardner's other thesis [*"Bailey v. Richardson and the Constitution of the United States,"* 33 BOST. UNIV. L. REV. 176 (1953)] is that there should be a distinction drawn between discharge for inefficient service and dismissal for dishonorable conduct deserves serious consideration.

expression of those in the employ of the government,¹⁷⁶ there is little chance, unless the courts are willing to make a radical departure not merely from decisions but from principles which have been the outgrowth of the basic theory of government, i.e., of the separation of powers, that in its present form it will be challenged successfully.

D. *The Civil Servant and the Privilege Against Self-Incrimination*

Another loyalty problem arises from the refusal by government employees or applicants for positions in the government service to give evidence on the grounds that it might tend to incriminate them. Does the invocation of the privilege against self-incrimination guaranteed by the Fifth Amendment¹⁷⁷ constitute grounds for the removal of a government servant or the disqualification of an applicant for federal employment? Although it is frequently done in practice, it is not proper to presume guilt from the silence of a person called upon to testify, for "The privilege is for the innocent as well as the guilty and no inference can be drawn against the person claiming it that he fears that he is 'engaged in doing something forbidden by federal law.'"¹⁷⁸ The point is that to infer guilt in such a case is not simply to deny a privilege guaranteed by the Constitution; it is also contrary to the popularly-respected principle that a person shall be presumed innocent until he is proved guilty. Admittedly there are no Supreme Court decisions which go so far as to say that the presumption of innocence is an established constitutional principle but there are certainly numerous federal and state statutes based on that premise. In fact, invocation of the privilege is very likely to raise a presumption of guilt¹⁷⁹ in the minds of the public, and there is no

¹⁷⁶ For a factual analysis of the loyalty program and its policy aspects, see BONTECOU, *THE FEDERAL LOYALTY-SECURITY PROGRAM* (1953).

¹⁷⁷ U.S. CONST., amend. V, provides: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

¹⁷⁸ *Spector v. United States*, (9th Cir. 1951) 193 F. (2d) 1002 at 1006. And see 8 WIGMORE, *EVIDENCE*, 3d ed., 276 ff. (1940), particularly §2251 where he summarizes the policy reasons for the privilege as "The truth is that the privilege exists for the sake of the innocent—or at least for reasons irrespective of the guilt of the accused."

¹⁷⁹ E.g., *In re Shorter*, 22 Fed. Cas. No. 12811 at 19 (D.C. Ala. 1865) (in denouncing a statute prescribing a test oath for attorneys wishing to practice in the federal courts): "The maxim of the law is, 'Accusare nemo debet se, nisi coram Deo.' The demand of this statute is that by the offer of affirmative proof of innocence the applicant for admission to practice shall create, as against himself, a presumption of guilt. . . . If he keep silence, he is thereby deprived of a constitutional right; if he speak, he becomes 'a witness against himself.'"

charge more difficult to refute than an allegation of disloyalty. The effect of this is aggravated by the fact that in times of crisis the easiest way to discredit and ruin a person in the eyes of the community is to brand him as disloyal.

What we have just said is not the whole answer to the problem. It is not sufficient to say that, even though public employment may be termed a privilege rather than a right, refusal of, or removal from government employment is necessarily unconstitutional if based on the invocation of the privilege against self-incrimination. The point is that the courts have (apparently conclusively) held that refusal of employment or dismissal from the government service is not in itself punishment calling for the application of due process or Sixth Amendment procedures. As we saw earlier, the government may require qualifications for federal employment so long as they bear reasonable relation to the work involved and to the efficiency of the service. There are some exceptions to this¹⁸⁰ but the only important one for our purposes is that the government cannot impose arbitrary discriminations. In *Wieman v. Updegraff*¹⁸¹ (which, however, concerned a state and not a federal employee) the Court said that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." It is not sufficient to answer that the government may dismiss persons whose loyalty is doubtful; the point is that a refusal to testify does not necessarily imply that the witness is disloyal,¹⁸² and it may be argued that it is "patently arbitrary" to dismiss an employee for the sole reason that he has claimed a privilege guaranteed to him by the Constitution.¹⁸³

¹⁸⁰ E.g., a disqualification will be invalid if it involves an executive or legislative determination of culpability. See *United States v. Lovett*, 328 U.S. 303, 66 S.Ct. 1073 (1946); *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 (1866).

¹⁸¹ 344 U.S. 183 at 192, 73 S.Ct. 215 (1952). And see *Steward Machine Co. v. Davis*, 301 U.S. 548 at 585, 57 S.Ct. 883 (1937), and *Curran v. Wallace*, 306 U.S. 1 at 14, 59 S.Ct. 379 (1939), which indicate that the protection of due process extends to any type of arbitrary discrimination by the government.

¹⁸² See Griswold, "The Fifth Amendment: An Old and Good Friend," 40 A.B.A.J. 502 (1954), where the author explains how a man may be quite innocent of any disloyalty and yet feel obliged to invoke the protection of the privilege. But the privilege is personal and may not be used simply to shield others. See *Saffo v. United States*, (8th Cir. 1954) 213 F. (2d) 131.

¹⁸³ See pp. 241-245 supra, where it is pointed out that, even where it grants a privilege, the government cannot impose conditions which require the relinquishment of constitutional rights. In view of this it is not clear that the government could insist on the waiver of the privilege as a condition of federal employment when making the original appointment to the government service. If the waiver requirement were restricted to matters

There have been two recent federal cases bearing directly on this point. In *Orloff v. Willoughby*¹⁸⁴ the plaintiff, a physician inducted into the Army under the Doctors' Draft Law, was denied a commission because of his refusal on grounds of possible self-incrimination to state in connection with his application therefor whether he was or had been a member of the Communist Party. In denying his petition for a commission and for an order of discharge from the Army the Court said that, although Orloff could not be punished for claiming a constitutional privilege, the President is not required to appoint to a position of honor and trust any person who refuses on grounds of possible self-incrimination to say whether he is or has been a member of the Communist Party.¹⁸⁵ Justice Black in his dissenting judgment inferred that the retention of Orloff in the Army in his then capacity was punishment and added: "And if some kind of punishment is to be imposed for asserting constitutional rights, it should not be imposed

relevant to the employee's position, it might well be considered constitutional. On the other hand, if the waiver requirement was absolute, it could reasonably be argued that it was invalid on the ground that it arbitrarily discriminated against persons in non-sensitive positions in the government service because it was not reasonably related to the due performance of their duties. Although a federal servant may invoke the privilege against self-incrimination [*Rogers v. United States*, (10th Cir. 1950) 179 F. (2d) 559], there are two points which support the view that the privilege is not an absolute right and, therefore, that the compulsory waiver of it by government workers as a condition of their employment may be subject to the "reasonable relation" test. In the first place, it is worth noting that the privilege is not safeguarded to the same extent as freedom of speech and religion [see *Palko v. Connecticut*, 302 U.S. 319 at 323-328, 58 S.Ct. 149 (1937)], nor is it considered an element of due process [*ibid.*; *Twining v. New Jersey*, 211 U.S. 78 at 91-98 and 106-114, 29 S.Ct. 14 (1908); *Adamson v. California*, 332 U.S. 46 at 50-55, 67 S.Ct. 1672 (1947)]. In the second place, the constitutional guarantees of the Fifth and Sixth Amendments relating to criminal prosecutions may not be invoked in cases arising in the land or naval forces of the United States. The military law is due process of law to those in the armed forces and it is sufficient if proceedings comply with the military law. *Ex parte Benton*, (D.C. Cal. 1945) 63 F. Supp. 808, and the authorities there cited; *Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045 (1953).

¹⁸⁴ 345 U.S. 83, 73 S.Ct. 534 (1953).

¹⁸⁵ *Id.* at 91-92, where the pith of the matter is well stated by Jackson, J., for the Court "... we cannot doubt that the President of the United States before certifying his confidence in an officer and appointing him to a commissioned rank, has the right to learn whatever facts the President thinks may affect his fitness. . . . [I]f there had never been an Attorney General's list the President would be within his rights in asking any questions he saw fit about the habits, associations and attitudes of the applicant for his trust and honor. Whether Orloff deserves appointment is not for judges to say. . . ." For the courts to interfere without further reason in that way would be unjustifiable prying into the affairs of the executive branch.

without a trial according to due process of law.”¹⁸⁶ The fallacy in this argument is the assumption that Orloff was suffering punishment in its legal sense. Of course, if the invocation of the privilege entailed not only dismissal but also permanent proscription from the government service, the statute imposing that requirement would be invalid as a bill of attainder.¹⁸⁷

Eighteen months later a district court in *Levin v. Gillespie*¹⁸⁸ held that a doctor's refusal to fill out a loyalty certificate in his application for an Army commission, claiming privilege against self-incrimination, furnished no grounds for his discharge from the service under conditions other than honorable following his induction under the Doctors' Draft Law for non-commissioned service. The court considered that no inferences unfavorable in character might be drawn from a resort to the constitutional privilege. Consequently, it held that there had been no finding regarding the doctor which would justify a conclusion that he had engaged in subversive activities or other conduct inimical to the welfare of the United States, so entitling the Army to give him a dishonorable discharge.

These decisions do not settle the issues but they do indicate that the courts will apply the principles suggested earlier and that they will uphold the discharge of a federal servant for refusing on claim of privilege to testify, so long as the removal both meets the test of reasonableness and is not patently arbitrary or discriminatory. In the event a statute¹⁸⁹ requiring dismissal of government servants who refuse to testify on the grounds of possible self-incrimination is held unconstitutional, the government could validly achieve the same result by the use of immunity statutes. The use of this device has the great advantage that under immunity statutes the privilege against self-incrimination cannot

¹⁸⁶ *Id.* at 97.

¹⁸⁷ *United States v. Lovett*, 328 U.S. 303, 66 S.Ct. 1073 (1946).

¹⁸⁸ (D.C. Cal. 1954) 121 F. Supp. 726.

¹⁸⁹ Although there is no federal statute prescribing removal for this reason, it is interesting to note that, under §8 (a) (8) of Exec. Order No. 10450 (1953), the refusal upon the ground of constitutional privilege against self-incrimination to testify before a congressional committee regarding charges of alleged disloyalty or other misconduct is one of the matters to be investigated in determining whether or not the employment of a person or his retention in the employment of the federal government is "clearly consistent with the interests of the national security."

be claimed. It follows that a dismissal based on the testimony of a government servant given under such a statute would be founded squarely on an admission of guilt and not on inferences drawn from the claim of constitutional privilege.¹⁹⁰

¹⁹⁰ This is the position under a recent Act of Congress—68 Stat. L. 745 (1954), 18 U.S.C.A. §3486. The statute empowers congressional committees, the federal courts or grand juries, to compel testimony on matters relating to treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of the government by force or violence; and in all cases there are at least two other independent but interested parties which must concur in the grant of immunity in order to meet the requirements of the statute.