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CONSTITUTIONAL LAW--THE PRESIDENT'S LOYALTY ORDER--STANDARDS, PROCEDURE AND CONSTITUTIONAL ASPECTS

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CONSTITUTIONAL LAW—THE PRESIDENT'S LOYALTY ORDER—STANDARDS, PROCEDURE AND CONSTITUTIONAL ASPECTS—In the most recent of the efforts of the last several years to protect the ranks of officers and employees of the federal government from infiltration by foreign agents and persons whose interests are inimical to those of the United States, President Truman, on March 21, 1947, issued his "Loyalty Order."[1] The first item in the pattern of statutes, orders, and regulations which supplies the background for the controversial Order No. 9835 was the Hatch Act of 1939,[2] by which Congress prohibited federal employees from membership in organizations advocating the overthrow of the constitutional form of government. One year later, an addition to the Civil Service Act conferred on the War and Navy Departments the power to remove from the classified civil service anyone guilty of conduct opposed to public interest in the defense program,[3] and this was followed in 1941 by the initiation of the now routine Congressional practice of attaching to appropriations bills, provisos that no funds should be paid to anyone advocating the overthrow of the government by force.[4] Under the authority of two preceding Executive Orders, the Civil Service Commission, in March, 1942, issued its War

[51] In re Epstein, (D.C. Pa. 1913) 206 F. 568, affd., Epstein v. Steinfeld, (C.C.A. 3d, 1914) 210 F. 236, quoted by Chief Justice Taft in the Oriel case, 278 U.S. 358 at 366.

[52] One facet of that hardship may be deduced from the fact that bankruptcy no longer carries the social stigma that imprisonment does. See Radin, "Debt," 5 ENCYC. SOC. SCI. 2 at 38 (1931).

[53] The easiest way out, of course, is to apply the presumption of continued possession and the contempt committal only to those who are guilty and who still have the goods.

[1] Executive Order No. 9835, March 25, 1947, 12 FED. REG. 1935 (1947). The order has been implemented by a Congressional appropriation of $11,000,000 for its enforcement. P.L. 299, 80th Cong., 1st sess., c. 414 (H.R. 4347) (July 31, 1947).

[2] 53 Stat. L. 1148 (1939), 18 U.S.C. (1940) § 61(i).

[3] 54 Stat. L. 713 (1940), 5 U.S.C. (1940) § 653.

[4] But where the statute named the employees to whom payment was to be denied, the Supreme Court held it invalid as a bill of attainder. 57 Stat. L. 431 at 450 (1943); United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073 (1946).

Service Regulations, denying examination or appointment in the classified civil service, if there were a reasonable doubt as to the loyalty of the individual to the United States.[5] To implement further these statutes and regulations, the Federal Bureau of Investigation was authorized to investigate federal employees who were members of subversive organizations or who allegedly advocated the overthrow of the federal government by force.[6] No consideration of the background of the order would be complete without including the work of the House Un-American Activities Committee, which from its inception in 1938 has exerted a substantial force in the direction of anti-subversive measures.[7] The last measure in the overture to Order No. 9835 came late in 1946 with the establishment of the President's Temporary Commission on Employee Loyalty, to investigate and determine whether security provisions in the executive branch afforded adequate protection against disloyal and subversive persons, and to recommend procedures and standards for judging the loyalty of employees and applicants.[8] Acting upon the report of this commission,[9] the President issued his Order, *Prescribing Procedures for the Administration of an Employee Loyalty Program in the Executive Branch of the Government.*

1. *The Program: Its Scope, Procedure, and Aims*

The Order, on its face, applies to all civilian employees of the executive branch.[10] At present there are approximately 2,000,000 individuals within the scope of the program,[11] excluding employees of the

[5] F.R. Doc. 42-9671, § 18.2(c)(7), 7 FED. REG. 7723 (Sept., 1942); The upholding of this regulation by the federal courts supplies strong precedent for the validity of Order 9835. Friedman v. Schwellenbach, (D.C. App. 1946) 159 F. (2d) 22, cert. den., 330 U.S. 838, 67 S.Ct. 979 (1947). As a result of the wartime investigations by the Civil Service Commission, of 395,000 federal employees investigated, 1300 were removed because of a reasonable ground for believing them disloyal. Of these, about 700 were in the Communist category. Wechsler, "How to Rid the Government of Communists," HARPER'S MAGAZINE 438 (November, 1947).

[6] 55 Stat. L. 265 at 292 (1941); 56 Stat. L. 468 at 482 (1942); United States v. Marzani, (D.C. D.C. 1947) 71 F. Supp. 615. The investigative power of the bureau has been defined further by statutes creating particularly sensitive agencies which provide for investigation of all personnel prior to employment. See, for instance, the U.S. Information and Educational Exchange Act of 1948, P.L. 402, 80th Cong., 2d sess. (H.R. 3342) (Jan. 27, 1948).

[7] For a discussion of the history of the committee and the constitutionality of its investigations, see 14 UNIV. CHI. L. REV. 256 (1947) and 46 MICH. L. REV. 521 (1948).

[8] Executive Order No. 9806, Nov. 25, 1946, 11 FED. REG. 13863 (1946).

[9] See, Report of President's Temporary Commission on Employee Loyalty (1947).

[10] Exec. Order No. 9835, Part I, § 1, 12 FED. REG. 1935 (March, 1947).

[11] Statement by Seth W. Richardson, chairman of the Loyalty Review Board of the Civil Service Commission; N.Y. TIMES, Dec. 28, 1947, p. 28:2.

State, Army, Navy, and Air Force Departments, and of the Atomic Energy Commission.[12]

Each employee or applicant for employment in a department or agency included in the program is checked initially by the Federal Bureau of Investigation. The investigative assistance of the bureau is regarded as essential because of its facilities and able personnel. If any "derogatory matter" is disclosed by the preliminary reports of its agents, the bureau is obliged to make a complete investigation of the individual's record. The results of this inquiry are forwarded to the proper department or agency in the case of an employee, or to a regional office of the Civil Service Commission in the case of an applicant. There, a primary hearing on the question of disloyalty is held before a board appointed by the head of the department or by the commission, as the case may be. The report of the bureau is not binding on the board, and if it finds no reasonable basis for questioning the loyalty of the investigated party, the matter is closed. Up to this point, all the proceedings are secret and are probably unknown even to the employee or applicant. If the loyalty board decides that there are derogatory facts requiring explanation, it prepares a statement of charges, setting forth the facts on which the question of disloyalty depends. The discretion of the board governs the specificity with which the charges are stated.[13] After being served with this statement the employee is entitled to a hearing before the board, at which he may be assisted by counsel and may introduce evidence. The hearing is private, and the proceedings are transcribed. The employee is not allowed to see the

[12] Statement by President Truman in the N.Y. TIMES, Nov. 15, 1947, p. 1:6. 56 Stat. L. 1053, § 3 (1942), 5 U.S.C. (Supp. V, 1946) 562, note, withdraws employees of the War and Navy Departments from the operation of the Civil Service Act [37 Stat. L. 555, 5 U.S.C. (1940) § 652] and allows the secretary to remove anyone whose dismissal he deems warranted by the demands of national security. 60 Stat. L. 753, § 12(4) confers similar power on the Atomic Energy Commission. Under the McCarran Amendment to the Department of State Appropriation Act of 1947 [60 Stat. L. 446 at 458 (1946)], the secretary may terminate the employment of any officer or employee of the State Department if he deems it advisable in the interests of the United States. It is specified that such termination does not affect the right of persons removed to accept employment in other government departments. A similar provision was contained in the Department of State Appropriation Act of 1948, omitting, however, any reference to reemployment in other departments. P.L. 166, 80th Cong., 1st sess., c. 211, p. 12 (H.R. 3311) (1947). The Loyalty Review Board of the Civil Service Commission refused to assume jurisdiction in the case of ten State Department employees dismissed under the McCarran Amendment, although the department indicated a desire to be included within the President's program. N. Y. TIMES, Nov. 18, 1947, p. 1:6: As a substitute, the Department has promulgated its own Security Principles, establishing standards and procedure for removals. N. Y. TIMES, Oct. 8, 1947, p. 1:6 at 8:4.

[13] Exec. Order No. 9835, Part II, § 2b, 12 FED. REG. 1935 at 1937 (March, 1947).

report of the bureau, however, nor can he confront and cross-examine his accuser.[14] It is argued that without this prohibition it is impossible for the program to have the benefit of skilled investigations, because the bureau obtains its information from confidential quarters, closely connected with national security.[15]

If the conclusion of the loyalty board is unfavorable to the employee, the order provides the right of appeal to the head of the department or agency, with a further right of appeal to the eighteen-man Loyalty Review Board of the Civil Service Commission. Under the terms of the order, the review board is also charged with the overall administration of the program. The procedure here presented has been developed by that board from the outline sketched in the President's Order.

The aim of the program is the elimination of disloyal officers and employees from government employment. To this end, the order requires for a determination of disloyalty, a finding that ". . . on all the evidence, reasonable grounds exist for belief that the person involved is disloyal."[16] Six activities are specified which may be considered in making this determination.[17]

> "a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;
>
> "b. Treason or sedition or advocacy thereof;
>
> "c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;
>
> "d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character, obtained by the person making the disclosure as a result of his employment by the Government of the United States.
>
> "e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.
>
> "f. Membership in, affiliation with, or sympathetic association with any foreign or domestic organization . . . designated by the attorney general as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States by unconstitutional means."

[14] Part IV, § 2, id. at 1938.

[15] Mr. Richardson, in the N.Y. TIMES, Dec. 28, 1947, p. 28:2.

[16] Part V, § 1, 12 FED. REG. 1935 at 1938 (March, 1947).

[17] Part V, § 2, ibid.

In connection with the last of these, the Department of Justice is required to furnish the Loyalty Review Board with the name of each foreign and domestic organization ". . . which the attorney general, after appropriate investigation and determination, designates as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."[18] The first four of the activities mentioned surely would be adequate indications of disloyalty.[19] To the fifth, the chief objection is its vagueness. But it is the sixth for which the most severe criticism is reserved. It is argued that to establish a standard such as this invites a political "inquisition," ". . . so extensive as to create a probability of the large scale establishment of political police."[20] On the other hand, we have the assurance of the review board that the program will not degenerate into a "witch hunt," and that mere membership in an organization branded as subversive by the Department of Justice will not suffice for a finding of disloyalty, but will be only one piece in the "mosaic of evidence."[21]

That the ultimate aims of the Order are legitimate and probably vital, is a view which almost all would share. From the response which it has evoked there would appear to be an equally widespread belief that the program is unsatisfactory in its present form.[22] One of the arguments which has been put forward in defense of the program rests on the avoidance through this action by the President of much more stringent action by Congress.[23] But if it were to be done, the enact-

[18] Part III, § 3, ibid.

[19] They are, in fact, punishable as crimes under the U.S. Criminal Code: 35 Stat. L. 1088 (1909), 18 U.S.C. (1940) §§ 1, 5; 35 Stat. L. 1089 (1909), 18 U.S.C. (1940) § 6; 40 Stat. L. 230 (1917), 18 U.S.C. (1940) § 98; 54 Stat. L. 671 (1940), 18 U.S.C. (1940) § 10; 53 Stat. L. 1148 (1939), 18 U.S.C. (1940) § 61(i).

[20] "The Constitutional Right to Advocate Political, Social, and Economic Change—An Essential of American Democracy," 7 LAWYERS GUILD REV. 57 (1947). The authors also submit that the excessive authority vested in the attorney general makes him in effect a political censor. It is suggested that since designation by him apparently makes past membership in a subversive organization evidence of disloyalty, the penalty of removal may be regarded as an ex post facto law.

[21] Mr. Richardson, in the N.Y. TIMES, Dec. 28, 1947, p. 28:2 at 28:6.

[22] For example, see the treatment of the question in 47 COL. L. REV. 1161 (1948).

[23] Much legislation on this subject has been proposed recently. The argument that the President's Order forestalls stricter measures by Congress would appear to have been refuted by the recent refusal of the House Un-American Activities Committee to accept a finding by the loyalty board of the Commerce Department that one of its officers was not disloyal. The demand by Chairman Thomas for the files of the board

ment of well considered legislation, limited to the more positive manifestations of disloyalty and the more strategic agencies of the government, would be a step toward the solution of the present difficulties.[24] One of the ablest discussions of the entire program criticizes the President's order for its failure to distinguish mere non-conformists from the participants in foreign-born conspiracies, or to differentiate between communism as an idea and communist parties as agencies of Soviet espionage.[25] The difficulty of making this distinction, however, may present us with the dilemma of electing a liberal policy with the risk of overlooking some individuals of the conspiratorial stripe or of following the path on which we now move at the risk of eliminating those who are merely non-conformists. The task of balancing such significant interests as these would seem to be one which should be exercised by the legislature.

2. *Constitutional Aspects*

The President's Order, whether issued under the basic responsibility for the execution of the laws imposed on him by the Constitution,[26] or the delegations of power by Congress contained in the Civil Service Act,[27] is an executive act, and as such may well be immune to judicial review. Any assault on Order No. 9835 will be met at the outset by this reluctance of the courts to interfere with the exercise of executive power, or to substitute their judgment for that of the executive officer causing the removal.[28] The underlying theory seems to be that where neither Constitution nor statute limits tenure or prescribes the standards for removal, it may be assumed that it was not intended that the appointee hold office for life. From this, it follows that the appointing officer must have the discretionary power of removal.[29]

Where, however, Congress has established such criteria for removal

presaged a conflict between Congress and the executive branch which seems to indicate another weakness of the present program. N.Y. TIMES, March 3, 1948, p. 1:2, et seq.

[24] Compare the federal program to that recently initiated by the British government. Removals are apparently limited to Communists employed in the departments where security is most important, and an effort is made to find the discharged employee a job in some less vulnerable part of the government. 51 TIME 40 (March 29, 1948).

[25] Wechsler, "How to Rid the Government of Communists," HARPER'S MAGAZINE 438 (November, 1947).

[26] Art. 2, § 3.

[27] Rev. Stat. 1753 (1878), 5 U.S.C. (1940) § 631; 22 Stat. L. 403 (1883), 5 U.S.C. (1940) § 632.

[28] Parsons v. United States, 167 U.S. 324, 17 S.Ct. 880 (1897); Keim v. United States, 177 U.S. 290, 20 S.Ct. 574 (1900); Reagan v. United States, 182 U.S. 419, 21 S.Ct. 842 (1901); Eberlein v. United States, 257 U.S. 82, 42 S.Ct. 12 (1921); Burnap v. United States, 252 U.S. 512, 40 S.Ct. 374 (1920).

[29] Matter of Hennen, 13 Pet. (38 U.S.) 230 at 259 (1839).

as it does by the Civil Service Acts,[30] the courts will interfere to assure the employee of notice and hearing in the determination of those causes.[31] Since there is no constitutional right against the discretionary acts of the appointing officer, the courts are merely carrying out the expression or implication of the statute.[32] If a standard is set up, there must be some procedure for determining whether that standard has been met. Proceeding, however, from this basic assumption that the power of removal is discretionary, at least within the area allowed by statute, it may be consistent that the procedure followed is not circumscribed by the requirements of procedural due process[33] nor by any other constitutional provision.

Although compliance with the statutory procedure will be insisted upon, findings of fact by the executive officer in these removal cases have always been treated as conclusive.[34] It may be conceded that a government employee has no property right in his position, and therefore has no right to appeal to the courts when that is all that is denied to him.[35] But if the removal is used to implement the denial of a right guaranteed by the Constitution against deprivation by federal action, it would seem to come within the jurisdiction of the courts. This may appear inconsistent with the idea of executive discretion, but the argument is predicated on the theory that the discretion is not absolute. It

[30] 37 Stat. L. 555 (1912), 5 U.S.C. (1940) § 652. Removals from the classified civil service are allowed only for such cause as will promote the efficiency of the service.

[31] Borak v. Biddle, (App. D.C. 1944) 141 F. (2d) 278, cert. den., 323 U.S. 738, 65 S.Ct. 42 (1944); Walker v. Popenoe, (App. D.C. 1945) 149 F. (2d) 511.

[32] United States ex rel. Brown v. Lane, 232 U.S. 598, 34 S.Ct. 449 (1914); where the statute, although providing grounds for removal, was interpreted as requiring neither notice nor hearing, it was held that relator was entitled to neither under the Fifth Amendment.

[33] The provisions of the Civil Service Act in this respect would not seem to measure up to the standards of the Fifth Amendment, since they require ". . . no examination of witnesses nor any trial or hearing . . . except in the discretion of the officer making the removal." 37 Stat. L. 555 (1912), 5 U.S.C. (1940) § 652. It will be noted by comparison that the order establishes a hearing as a matter of right. It must also be remembered that a large number of federal employees are not included in the classified civil service and therefore have not even the protection afforded by the Civil Service Act. In Dec., 1940, 26.6 per cent of the executive civil service was unclassified. HISTORY OF THE FEDERAL CIVIL SERVICE, United States Civil Service Commission (1941).

[34] Levine v. Farley, (App. D.C. 1939) 107 F. (2d) 186, cert. den., 308 U.S. 622, 60 S.Ct. 377 (1940); Friedman v. Schwellenbach, (App. D.C. 1946) 159 F. (2d) 22, cert. den., 330 U.S. 838, 67 S.Ct. 979 (1947); Asher v. Forrestal, (D.C. D.C. 1947) 71 F. Supp. 470.

[35] Crenshaw v. United States, 134 U.S. 99 at 108, 10 S.Ct. 431 (1890); Taylor v. Beckham, 178 U.S. 548 at 577, 20 S.Ct. 890 (1900); Dodge v. Board of Education, 302 U.S. 74, 58 S.Ct. 98 (1937); 99 A.L.R. 336 at 341 (1935).

is confined to cases where removal is actually based upon the efficient operation of the department or agency, and within that area it seems proper that the courts should not intervene except to enforce the statutory procedure. When removal, although motivated by the desire to promote the welfare of the agency, is based upon factors which lie outside the scope of employment activity, it may be that the act of removal is not exclusively an executive function.[36] The problem may be analogized to that of the Congressional power of investigation. So long as it is exercised to assist in the legislative process, it is not within the purview of the courts. But it is within the judicial province to prevent these investigations from becoming mere "fishing expeditions" having no legislative purpose, and therefore lying without the scope of that branch of the government.[37] It seems well established that one may be denied his liberty if he is punished for exercising it.[38] May not removal from office come within this punishment category when it is based upon the exercise by the employee of a constitutional right?

Applying these principles to the President's "Loyalty Order," if the employee is to have his freedom of thought and association protected against action by his superiors, and if the Court properly may assume jurisdiction over removals in this extra-managerial area, should not the loyalty program be required to measure up to the established tests of substantive due process? [39] The most vulnerable point of the Order in this respect is the indefiniteness of the standards which it sets up for determining disloyalty. Such vagueness in itself has been held sufficient to deny due process.[40] It is true that this requirement of

[36] The Constitution expressly prohibits discrimination in giving employment in the federal government on account of religion (Art. VI). May not this set the pattern for constitutional protection against discrimination on account of an exercise of the general freedom of thought and association?

[37] See 46 MICH. L. REV. 521 (1948).

[38] Bomar v. Keyes, (C.C.A. 2d, 1947) 162 F. (2d) 136 at 139, cert. den., (U.S. 1947) 68 S.Ct. 166; Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877 (1943). In United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073 (1946), the involuntary separation from federal employment was recognized as penal, in view of the stigma which it cast and the curtailment of the ability to earn a livelihood which it caused.

[39] Since the first amendment refers specifically to action by Congress, primary reliance must be placed upon the due process provisions of the Fifth Amendment as the protector of the personal right to free speech and association against deprivation except where it is necessary to prevent grave public danger. Justice Murphy, concurring, in Bridges v. Wixon, 326 U.S. 135 at 163, 65 S.Ct. 1443 (1945). See also, Justice Black's dissent in United Public Workers v. Mitchell, 330 U.S. 75 at 114, 67 S.Ct. 556 (1947). Although he was speaking there of rights guaranteed by the first amendment, his language is applicable to the problem of governmental interference in general.

[40] United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298 (1921); Connally v. Gen. Const. Co., 269 U.S. 385, 46 S.Ct. 126 (1926); Lanzetta v. New

definiteness is customarily associated with criminal statutes, but these disloyalty proceedings, although technically non-criminal in nature, cannot be regarded as ordinary civil actions, and may result in sanctions of greater impact than the imposition of a criminal sentence.[41] When these standards impinge upon the employee's liberty, they may also be subjected to the "clear and present" danger test, so often voiced by the Court where such rights are involved.[42] Disloyalty itself probably does present a clear and present danger of frustration of the government's activities, disclosure of its secrets, and exposure of its members to foreign propaganda. But it is another question whether one who is associated with ". . . a domestic organization designated by the attorney general as . . . subversive,"[43] can be said to represent such a menace. Some idea of the Court's reaction to these arguments can be had from the recent decision upholding the provision of the Hatch Act prohibiting political activity by federal employees.[44] The Court apparently gave no consideration to the "clear and present danger" test, applying only the somewhat vague standard, that such regulations must not pass ". . . beyond the general existing conception of governmental power," as developed from ". . . practice, history, and changing educational, social and economic conditions."[45]

Having assumed the answer to the major problem by the proposition that these extra-managerial removals must measure up to the requirements of the Fifth Amendment, it should follow that the standards of procedural due process must also be met, not merely in the narrow sense that the established procedure must be followed, but in the broader purport that this established procedure must conform to some superior concept of a fair hearing. This opens up the second

Jersey, 306 U.S. 451, 59 S.Ct. 618 (1939); Aigler, "Legislation in Vague or General Terms," 21 MICH. L. REV. 831 (1923).

[41] The disloyalty proceeding may at least be compared to a denaturalization suit, which the Supreme Court has treated as something akin to a criminal action. Schneiderman v. United States, 320 U.S. 118 at 160, 63 S.Ct. 1333 (1943), or to a deportation proceeding, where the comparison to a criminal action was made in a concurring opinion by Justice Murphy; Bridges v. Wixon, 326 U.S. 135 at 163, 65 S.Ct. 1443 (1945).

[42] Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247 (1919); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940); Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315 (1945).

[43] Exec. Order No. 9835, Part V, § 2, 12 FED. REG. 1935 at 1938 (March, 1947).

[44] 53 Stat. L. 1148 (1939), 18 U.S.C (1940) § 61(h). United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556 (1947). See also, Mosher, "Government Employees Under the Hatch Act," 22 N.Y. UNIV. L.Q. 233 (1947).

[45] United Public Workers v. Mitchell, 330 U.S. 75 at 102, 67 S.Ct. 556 (1947). Three of the seven justices who heard the case, in two vigorous dissenting opinions, attacked the validity of the act.

questionable portion of the President's Order. The accused is to have no opportunity to confront or cross-examine those who testify against him.[46] Neither is it required that the employee be informed specifically of the charges against him.[47] Quite apart from the possible expediency of these provisions, a strong argument can be made that this is a denial of the fair hearing guaranteed by the Fifth Amendment.[48] The fact that removals will be supervised by high-minded individuals who have pledged that the investigations shall not degenerate into a "witch hunt" should not alter the picture; it would not seem that the requirements of due process can be compromised by the assurances of individuals, whatever their integrity.[49]

3. *Conclusion*

It appears somewhat doubtful that the Order will ever be passed on by the Supreme Court. Precedent indicates that the Court may find no question appropriate for judicial review.[50] And even if this barrier is overcome, the decision under the Hatch Act seems to establish that the Court is willing to allow a free reign in these matters.[51]

Admitting the likelihood of the program's legality, it is still open to question on the general ground of wise governmental policy. The impression of the widespread effect of the program should not be diminished by the fact that in only a very few cases will actual dismissal result.[52] The consequences of so detailed and personal an investi-

[46] Exec. Order No. 9806, Part IV, § 2, 12 FED. REG. 1935 at 1938 (March, 1947); the investigative agency may refuse to disclose the names of confidential informants, if it is "... essential to the protection of the informants or to the investigation of other cases."

[47] Part II, § 2b, id. at 1937; charges need to be stated only as " . . . specifically and completely as, in the discretion of the employing department or agency, security conditions permit. . . ."

[48] "A fact which can be primarily established only by witnesses can not be proved against an accused . . . except by witnesses who confront him at the trial . . . whom he is entitled to cross-examine, and whose testimony he may impeach. . . ." Kirby v. United States, 174 U.S. 47 at 55, 19 S.Ct. 574 (1899); Motes v. United States, 178 U.S. 458, 20 S.Ct. 993 (1900); ROTTSCHAEFER, CONSTITUTIONAL LAW 831 (1939). In a number of cases, orders of administrative tribunals have been set aside because the material on which they were based was not introduced satisfactorily as evidence at the hearing. United States v. Abilene & So. R. Co., 265 U.S. 274 at 289, 44 S.Ct. 565 (1924); Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773 (1938).

[49] ROTTSCHAEFER, CONSTITUTIONAL LAW 841 (1939). See also the dissenting opinion in Screws v. United States, 325 U.S. 91 at 160, 65 S.Ct. 1031 (1945).

[50] Friedman v. Schwellenbach, (App. D.C. 1946) 159 F. (2d) 22, cert. den., 330 U.S. 838, 67 S.Ct. 979 (1947), supra, note 5.

[51] United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556 (1947), supra, notes 44 and 45. In general, on the subject of constitutional limitations on political discrimination in public employment, see 60 HARV. L. REV. 779 (1947).

[52] Of nearly 420,000 federal employees examined up to March 1, 1948, only 399 were found to warrant further investigation. Of these, 66 were cleared and 25

gation cannot be measured by the number of removals which it occasions. By far the more significant results are the loss of reputation and the imputation of disloyalty to which the employee is exposed by the mere fact of his investigation, with the attendant effect of discouraging able men from entering government service.[53] The serious implications of allowing "guilt by association" with a group denominated as subversive by the attorney general, and of denying to the accused any opportunity of confrontation or cross-examination are pointed up eloquently in a recent statement by a group of prominent legal educators.[54]

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resigned while under investigation; evidence of disloyalty was found in only eight cases. 51 TIME 13 (March 1, 1948).

[53] See the letter from members of the faculty of Yale Law School to the President and the House of Representatives, N.Y. TIMES, Nov. 27, 1947, p. 38:4. Dr. Henry Steele Commager regards with apprehension the introduction of intellectual conformity as the new concept of loyalty and attacks the effort to confine Americanism to a single pattern as being itself a disloyalty to the American tradition. Commager, "Who is Loyal to America?" HARPER'S MAGAZINE 193 (Sept., 1947).

[54] See the letter from Professors Griswold, Scott, Katz, and Chafee of the Harvard Law School, appearing in the N.Y. TIMES, April 13, 1947, p. 8E:5.