On Federal Employee Loyalty

Date: 1950-02-23

THE NEED FOR ADDED SAFEGUARDS[2]

Investigation of "loyalty" did not begin with the executive order issued by Harry Truman on March 21. As far as the present generation of government employees is concerned, such inquiries became systematic and widespread during the early months of the Nazi-Soviet pact. They were carried on throughout the war. In the war years the Civil Service Commission itself investigated 395,000 employees. Of these 1,300 were removed because there appeared "reasonable ground" for doubting their loyalty. Approximately 700 of this group were in the Communist category. The FBI, Military and Naval intelligence, and other groups staged similar inquiries. There were absurdities committed, as anybody who inhabited wartime Washington knows. Yet in perspective it may appear more significant that we waged the most far-flung war in our history without even faintly resembling a police state, that the sporadic "terror" was usually more foolish than fierce, and that our liberties survived the war without major scars.

All of which merely suggests that the fact of investigation does not automatically breed a disastrous witch hunt, and that a human equation - such as the presence of such conscientious people as Arthur S. Flemming, Harry B. Mitchell, and Frances Perkins as heads of the Civil Service Commission - can keep it from going to excesses. But our wartime experience underlines the nature of the risks involved and the character of the safeguards that must be invoked. From what we have learned it now seems clear that the success or failure of the "loyalty" inquiry will be determined by the resolution of these two unsettled questions:

1. Will accused employees receive protections that genuinely protect, inspiring the confidence of honest men rather than offering a field day for amateur and professional heresy hunters?

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2 From "How to Rid the Government of Communists," by James A. Wechsler, former staff member of Nation AND PM, now in the Washington Bureau of the New York Post. Harper's Magazine, 195:438-43. November, 1947. Reprinted by permission.

2. Will we evolve criteria of judgment that plainly differentiate non-conformists(on the left or right) from participants in underground conspiratorial movements run from a foreign capital or - as in the case of pro-Fascists - clearly identified with the now homeless Nazi international?

With respect to both questions the program enunciated by President Truman on March 21 was ...unsatisfactory and inadequate. But the door is still wide open to elaboration and refinement of that order. A good many of the wiser officials in the capital have been sweating over these questions ever since the statement was promulgated. The important facts about contemporary Washington are that persons like Flemming , Mitchell and Miss Perkins are deeply sensitive to the complexity of the issues and that the administration itself has shown little of the zeal for irresponsible persecution suggested by some of the more thunderous outcries on the left. Both Attorney General Clark and J. Edgar Hoover have manifested visible concern over liberal criticisms leveled against the terms of the program. While some conscientious detractors have hinted that this concern was "purely political," it is slightly gratuitous to complain when men in high office view liberal politics as sound politics.

As the loyalty machinery now operates more than a million federal employees will be subjected to at least routine review. (It is not true, as generally imagined that all of them were investigated in wartime; tens of thousands went on the government pay roll in those hectic years without any scrutiny). The FBI checks their names against its own records and all other current dossiers of subversion , including the notoriously unreliable files compiled by the peerless peep-hole artists of the House Un-American Activities Committee. If any "derogatory information" is revealed in any of these documents, the FBI conducts further inquiry, forwards a report - without recommendation - to the Civil Service Commission, which transmits the findings to the agency involved. If the administrator decides to act upon the data(and in the current political weather the pressure to do so will be strong) he must give the accused a summary of the charges, a chance to testify before counsel before a de-partmental review board, and an opportunity to seek personal review by the agency head. Then, finally, the case may be carried to a new, over-all Civil Service Commission review body which will presumably be composed of outstanding, disinterested citizens.

So far all this might be classified as progress; it formalizes heretofore shadowy rights of review and appeal and creates a supreme tribunal that is dependent on neither Congress nor government for favor. But the order also contains this crucial joker:

> The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit.

In effect, this means that the FBI will retain its authority to decide how much of its case shall be disclosed. It means the victim may receive only the most fragmentary picture of the evidence on which he is being convicted and utterly no chance to confront the witnesses whose words may exile him from government.

The traditional defense for this course is that a security agency often cannot reveal the sources of its information - or even the full facts at its command -without permanently destroying the usefulness of its informers. Since stoll pigeons are the key figures in most investigative cases, this explanation cannot glibly be thrown out of court.

But the exclusion of any man or woman from government service is also serious business. Moreover, there are many cases in which informants are local janitors, women scorned, and village idiots who have no just claim to anonymity. Conceding that the problem isn't simple, the solution clearly rests in the hands of the proposed national review board and its regional counterparts.

This board must be empowered, in cases that it holds doubtful and inconclusive, to require the FBI to produce the full details of its findings and the witnesses from whom it was obtained. Admittedly this may make life tougher for the political G-men. But once again alternatives must be closely weighed.

The board's activities will also be gravely hampered if no records are kept of the lower-level hearings that precede final appeal. Each case will come up cold, with only the bare outline of general charge and categorical denial. All the previous appeals will be little more than waste motion.

Technically the decisions of the top board will be only "advisory." However, this is probably a verbal quibble, since few administrators will be likely to defy its conclusion, and most of them will welcome its existence as a powerful moral backstop for themselves.

Given these procedural weapons the review board can become a decisive restraint on reckless congressional clamor for a wholesale purge. It can help to take the issue of national security out of the dreary realm of partisan politics. It can give renewed courage to administrators who now defend the suspect at the risk of their own necks. And it can undermine the impresssion widely whispered in government circles that an argument with the FBI(or Congress) is a form of administrative suicide. For while the FBI reports are deadpan and no recommendation is set forth, their existence periodically "leaks" in wondrous ways. Congressmen can demand them and congressional "sources" are often remarkably outspoken.

Simultaneously the standards set forth in the order must be painstakingly clarified. Actually the Civil Service Commission made substantial progress in this direction during the war. Its progress may be nullified by some of the loose language in the loyalty order. Back in March 1942 President Roosevelt issued war service regulations which held that one of the grounds for disqualification for a federal employee was "the existence of a reasonable doubt of his loyalty to the government of the United States."But loyalty, as Professor Commager pointed out, has become a badly battered word. What we really mean is the existence of a competing allegiance so strong and clear that the person involved cannot be trusted inside a government office.

This problem is enormously complicated by emergence of the "fellow traveler" as a classic political phenomenon of our times. As the Canadian spy revelations showed, the fellow traveler may in some instances be just a well-intentioned fellow whose thoughts have been traveling along paths parallel to Communist lines; he may, however, be a clandestine party member who, for reasons of safety, is spared the formality of signing a party card.

Because the Communists, like the Nazis, have leaned so heavily on men who lead political lives, it is not enough to say that full proof of membership in the Communist party must be shown before any dismissal can occur. Under this criteria some of the most elusive and important Communist operatives might escape, while the clumsiest and least significant were apprehended.

In an effort to resolve this difficulty the loyalty order invoked the dangerous doctrine of guilt by association. The Department of Justice is now preparing a list of "proscribed" organizations held to be Communist or Fascist fronts. The Attorney General, in response to protests, has indicated that a least some of these organizations will be given a hearing before he hands down his ruling. But that doesn't settle everything. The crucial question is the significance that will be attached to membership in one of the organizations listed.

Mr. Clark might hold with some justification that the Southern Conference for Human Welfare has been utilized as a front for the Communists. Does that mean that Dr. Frank Graham, who has bitterly fought the Communists for control of the Conference but refused to abandon his membership in it, shall be barred from government employment? The question suggests the possible absurdity of the standard.

Mr. Flemming has indicated a far more plausible approach. "An employee will be dismissed only if evidence of membership in such an organization, plus all the other evidence in the case, leads to the conclusion that reasonable grounds exist for believing that he is disloyal to the government of the United States", he said recently. The order uses similar language, but it is later clouded by extensive reference to "association."

In effect Mr. Flemming is saying that the total pattern of behavior of the accused will be reviewed and a wide variety of human experience evaluated. Such subtleties are the qualities that distinguish reasonable inquiry from frenzied inquisition. Yet it should also be noted at this point that the Attorney General is given enormous "blacklist" authority, since membership in a front organization is the equivalent of at least one strike on the employee. Certainly the projected review board should have the right to make this final determination of "proscribed"

groups, perhaps with the Attorney General occupying the role of prosecutor once he has reached his own decisions.

The recent dismissal of ten State Department employees - without hearings or even recitation of charges - forcibly dramatized the need for the safeguards outlined here. It also underlined what is not generally appreciated - that State, the military departments, and the Atomic Energy Commission run their own "purges" and more than 500,000 employees are thus not currently covered by even the limited protections of the President's executive order. State's arbitrary powers to fire(which the Department itself apparently reconsidered and modified in the case of the ten) derive from a congressional rider to its apropriation. The armed services invoke a wartime security statute. Atomic Energy similarly conducts its own security affairs by congressional sanction(or demand). There is little justification for this separation. The guarantees that preserve integrity and imagination in government are surely no less needed in the State Department than in agencies far removed from the diplomatic battlefield; and the same thing applies to the domain of the brass and braid.

There are some who contend that the whole loyalty program should be applied only to "sensitive" agencies, pointing out that the Labor Department or, let us say, the Fish and Wild Life Service would offer poor hunting ground for a foreign agent. Since military intelligence is primarily the art of correlating strangely diverse data, the argument is more entertaining than valid. Yet the review board might appropriately fix tighter standards for State, Atomic Energy, and the armed services than for clearly peripheral agencies. It could be plausibly argued that the "burden of proof" rests on the government in a non-security agency but that "reasonable doubt" would justify dismissal in the more strategic areas. It would also seem sensible to permit resignation without prejudice in any case short of an overt act.

In most of these matters the soundest course would be to let the review board draw these faint shadings rather than seek an advance blueprint.

The risks projected when police methods are applied to government will not be dissipated overnight even if the proposed review board consists of twenty of our wisest Solomons. Perhaps the most serious threat is the least tangible - the possibility that men in government will strive ostentatiously to conform, that the super-patrioteer will become a model public servant and the unorthodox mind will seek more congenial surroundings.

Dramatic and affirmative effort by the administration is plainly needed in view of the deepening demoralization in the government service. The caliber of the men appointed to the review board will decisively affect this atmosphere. They must command sufficient respect to withstand a change in national administration. They must dwarf the professional "know-nothings" in Congress. I know that such men are being earnestly sought. Their appointment must be accompanied by an emphatic clarification of the language used in the loyalty order, a swift assertion of the powers they will invoke, and a revised statement of the objectives of the inquiry.

With such moves the Washington air could be freshened The petty bureaucrats who view the loyalty probe as a chance to plant knives in the back of competitors might be seriously discouraged; the citizen who wants to work for his government would no longer feel he was helpless prey for invisible informers. The "know-nothins" would promptly charge that the administration was "softening" again; the Communists would cry that these are empty bourgeois gestures. But the instinctive decency of American opinion would be crystallized. The same Gallup polls that show widespread support for exclusions of Communists from government also endorse full hearings for the accused.

The resilience of democratic society has repeatedly proved greater than the extreme right and extreme left have acknowledged. It faces a new test now. But on the basis of the evidence so far, the reports of democracy's death have once again been exaggerated. The loyalty program, despite a bad beginning, can still make sense.

Relationship of the Loyalty Program to the Hatch Act, Section 9(a) and the various appropriations acts

Section 9(a) of the Hatch Act makes it unlawful for any employee of the Federal Government to have membership in any political party or organization which advocates the overthrow of our Constitutional form of government in the United States. The Attorney General has designated certain organizations, which he lists from time to time, as being within the scope of the Hatch Act. He has also designated certain additional organizations in accordance with the provisions of Executive Order 9835 as organizations which seek to alter the form of the government of the United States by unconstitutional means.

The Loyalty Review Board has considered the language used in the Hatch Act, in the Executive Order and in the various appropriations acts which forbid payment of salary or wages to any person who advocates, or who is a member of an organization that advocates,the overthrow of the government of the United States by force or violence, and has determined that the language from each source has a common meaning and that such language should be similarly construed and applied in the adjudication of cases arising under Executive Order 9835.

Therefore, in accordance with the designation of the Attorney General, present membership in any of the organizations designated by the Attorney General as being within the scope of Section 9(a) of the Hatch Act, or as seeking to alter the form of government of the United States by unconstitutional means, or present advocacy by an individual of the overthrow of the government of the United States by force or violence, for the purpose of adjudication of cases under Executive Order 9835, should be considered as bringing the case within the purview of Section 9(a) of the Hatch Act and the various appropriations acts that are referred to; and, if in the consideration of a case, a Loyalty Review Board finds as a fact that en employee or an applicant is a member of such an organization, or that he advocates the overthrow of the government of the United States by force or violence, then the removal of the employee, or the refusal of the employee to the

applicant is mandatory.

The standard to be applied in determining loyalty

The standard to be employed for the refusal of employment or for the removal from employment in an executive department or agency on grounds relating to loyalty under Executive Order 9835 shall be that, on all the evidence, reasonable grounds exist for the belief that the person involved is disloyal to the government of the United States. The decision shall be reached after consideration of the complete file, arguments, briefs and testimony presented.

The Executive Order itself enumerates certain illustrative activities and associations which may be considered in connection with the determination of disloyalty. It is this portion of the Executive Order particularly paragraph 6 referring to membership in, affiliation with, or sympathetic association with organization, or a group of persons designated by the Attorney General as subversive which gives rise to the accusation that the whole program deals with guilt by association.

It is to be stressed, however, that membership, affiliation or sympathetic association is merely 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. Of course, if present membership in the Communist Party or organizations listed by the Attorney General as coming within the purview of the Hatch Act is found, then the refusal of employment or removal of employee is mandatory.

Contents of Interrogatory and Covering Letter

The interrogatory and covering letter, requested above, shall state:

(1) The nature of the evidence against him in factual detail, setting forth with particularity the facts and circumstances so far as security considerations permit in order to enable the applicant or appointee to submit his answer, defense or explanation.

(2) His right to reply to the interrogatory in writing, under oath or affirmation, within ten (10) calendar days of the date of receipt by him of the interrogatory.

(3) His right to have an administrative hearing on the issues before the Regional Loyalty Board, upon his request.

(4) His right to appear before such Board personally, to be represented by counsel or representative of his own choosing,and to present evidence in his behalf.

Contents of Notice of Proposed Removal Action

The notice of proposed removal action required on the preceding page shall state to the employee:

(1) The charges against him in factual detail, setting forth with particularity the facts and circumstances relating to the charges so far as security considerations will permit,in order to enable the employee to submit his answer, defense or explanation.

(2) His right to answer the charges in writing, under oath or affirmation, within a specified reasonable period of time, not less than ten(10) calendar days from the date of the receipt by the employee of the notice.

(3) His right to have an administrative hearing on the charges before a Loyalty ~~Review~~ Board in the Agency, upon his request.

(4) His right to appear before such Board personally, to be represented by counsel or representative of his own choosing, and to present evidence in his behalf.

(5) The work and pay status in which he will be carried during the period of the notice or until the determination of the Agency Loyalty Board.

(6) The fact that the proposed removal action will not become effective in less than thirty(30) calendar days from the date of receipt by the employee of the notice.

(7) The authority or authorities(Executive Order 9835 and any applicable statutes, such as section 9A of the Hatch Act and/or section 14 of the Veterans' Preference Act of 1944) under which the notice is being sent.