In The

SUPREME COURT OF THE UNITED STATES

October Term, 1954

Washington, D. C.

April 19, 1955

JOHN P. PETERS,

Petitioner,

v.

OVETA CULP HOBBY, et al.,

Respondents.

No. 376

WARD & PAUL
1760 PENNSYLVANIA AVE., N. W.
WASHINGTON, D. C.

NATIONAL 8-4266
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v.	:	No. 376
OVETA CULP HOBBY, et al., Respondents.	:	

Washington, D. C.,

Tuesday, April 19, 1955

The above-entitled cause came on for oral argument at 1:55 o'clock p.m.

PRESENT:

The Chief Justice, Honorable Earl Warren, and Associate Justices Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton, and Harlan.

APPEARANCES:

On behalf of Petitioner:

THURMAN ARNOLD, ESQ.,
and
PAUL A. PORTER, ESQ.

On behalf of Respondents:

WARREN E. BURGER, ESQ.

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ARGUMENT ON BEHALF OF PETITIONER

By Mr. Arnold

Mr. Arnold: Mr. Chief Justice and Members of the Court: I think it relevant to start out by describing the man against whom the nation's security is being protected in these proceedings.

He is an eminent physician, a senior Professor of Medicine at Yale. For some years prior to 1951 he was consultant with the Federal Security Agency, which has now been absorbed by the Department of Health, Education, and Welfare.

His work was as special consultant, advising directly with the Surgeon General. His sole functions related to advice on proposals for Federal assistance for medical research funds under the Public Health law.

His field was nutrition and metabolism. His position was nonsensitive. He had no access to confidential or strategic information. He came to Washington only for four to ten days a year. He worked on a per diem basis. He had no supervisory capacity. He could give no orders. He could not even get to see the Surgeon General except by appointment. This was the danger of subversion to which the Department of Health, Education and Welfare was subjected to.

I will now discuss the steps taken by the Government to mitigate or remove that danger. They started in January, 1949, when an examiner of the Board of Inquiry on Employee Loyalty

informed Dr. Peters that there was derogatory information against him. They gave him detailed interrogatories which he answered on those. He was cleared without the necessity of a hearing, which may indicate that they must have been pretty careless in those days, probably lulled into a false sense of security by Dr. Peters' eminence.

The case was reopened in March, 1952. Sixteen charges, including membership in the Communist Party, sponsorship of certain petitions, affiliations with certain organizations and association with certain people, were presented against him. The petitioner denied all of the charges under oath.

In April, 1952 there were hearings at New Haven. Dr. Peters was then informed that secret evidence would be considered from informants, some of whom were not even known to the Board. At that hearing Dr. Peters testified under oath that he had never been a member of the Communist Party, and also with respect to the other charges. He did not refuse to answer any questions. He called eighteen persons as witnesses and submitted affidavits from forty others.

On May 23rd, 1952 the Board of Inquiry informed Peters that it had determined on the evidence, on all the evidence, that no reasonable doubt existed as to his loyalty. That was the second time he was cleared.

Almost a year later the case was reopened by the Loyalty Review Board under a new standard. The old standard had been

reasonable doubt as to loyalty. The order was amended so that the Board should have no reasonable doubt as to disloyalty. I don't know what the difference is except the second appears to be a tougher standard, and the cases were constantly reopened under it.

He was heard by a panel on this charge, and he introduced evidence, and he was cleared again.

Then came the final hearing. The Board of Review opened that for what they call a post audit.

The Chief Justice: We will recess now.

(Recess.)

After Recess:

The Chief Justice: Mr. Arnold, you may proceed.

Mr. Arnold: May it please the Court, when you recessed, I was half way through describing the efforts of the Government to protect the Department of Health, Education, and Welfare from the subversive influence of an eminent Professor of Medicine at Yale. I had pointed out that he had been cleared in 1949 without a hearing; that he had been cleared in 1952 with a hearing; that the case had been reopened in 1953 by the Board for a post audit.

In 1953 the case was tried by a new panel. Again Dr. Peters testified under oath. Again witnesses as to his character and eminence, such as President Seymour, Judge Charles Clark of the Second District, and others, testified as to their firm

conviction of his absolute loyalty. Again secret evidence was considered and the record stipulates that the secret evidence, the names of some of the informers would not be disclosed by the FBI to the Board.

As a result of that hearing on May 22nd, 1953, Chairman McElvain informed the petitioner that the panel had determined "on all the evidence there is a reasonable doubt as to Dr. Peters' loyalty to the United States."

He was dismissed with what the Court has called a badge of infamy. He was barred from the Federal service for a period of three years.

Thus, the Department of Health, Education, and Welfare was saved in the nick of time from a danger that had existed, apparently, since 1949.

They were saved by a secret informant or secret informants, some of whom were unknown even to the Board.

It was apparent that Dr. Peters had the ability to fool the eminent people he had known all his life, and without this secret informant, he might still be pouring Soviet theory on metabolism and nutrition into the attentive and gullible ear of the Surgeon General of the United States.

The Attorney General of the United States is here saying that that process is necessary because, if these secret informants were produced, they wouldn't talk. They wouldn't give the information. In addition to that, they might be

discredited, and therefore convictions like that of Dr. Peters could not be obtained.

We say we are not interested in the secret information which the FBI gathers, although we are somewhat skeptical of the utility of much of it, as recent disclosures have indicated. But we do say that it cannot be used, as it is used here, to pin the badge of infamy on an American citizen. That is the difference between us.

As to how this case got here, in February, 1954 we brought a declaratory judgment action, and it was stipulated between us and the Government that the case presented the identical issues as were presented to the Court in the Bailey v. Richardson. Thereupon the District Court, below, and the Court of Appeals sustained a judgment for the Government without argument.

What are the issues in this case? They are simply --

Justice Reed: What were the charges?

Mr. Arnold: There were sixteen charges. I mentioned them before. There were sixteen charges.

Justice Reed: Where do I find those in the brief?

Mr. Arnold: You will find those in the Government brief.

Briefly, he was charged with being a Communist. He was charged with contributing to organizations. The names of the organizations are not disclosed. He was charged with associating with individuals and joining and affiliating with organizations and individuals who were suspected of being subversive.

The names of the organizations are not listed.

It is on page 4 of the record.

We say that under those circumstances --

Justice Reed: I wondered what the specific charges in the letter of charges were.

Mr. Arnold: Your Honor, we did not produce the record. We stipulated as to this case that the same issue was involved here as in the Bailey case. We named one charge, that of being a member of the Communist Party. We named in general terms, stipulated with the Government, on the other charges, namely, organizations, contributions to individuals.

Justice Reed: Were the organizations named?

Mr. Arnold: Not in this record.

Justice Reed: I know, but were they named in the charges?

Mr. Arnold: Yes.

He was informed as to the organizations. There is no doubt about that.

Justice Frankfurter: But in the Bailey case we did have the record.

Mr. Arnold: In the Bailey case we did have the record. In this case, for reasons that we think the Court can understand, we did not want to produce all the charges in a newspaper atmosphere, and the Government was kind enough to agree with us, and present the record without the names of those organizations.

Justice Reed: You make no contention that you weren't fully advised as to the charges?

Mr. Arnold: No. We make no contention we weren't fully advised as to the charges. It is the identical issue as to the Bailey case.

Justice Frankfurter: Did the Bailey case arise after the amended Executive Order?

Mr. Arnold: No; it was prior to that.

Justice Frankfurter. So it cannot be the identical case.

Mr. Arnold: I would argue that it was, because the difference between --

Justice Frankfurter: You shaped the litigation, not I.

Mr. Arnold: I would argue that the difference between the two -- this case does not arise under the Executive Order of President Eisenhower. It arises under the amendments of President Truman.

Justice Frankfurter: Was that involved in the Bailey case?

Mr. Arnold: No. The Bailey case was prior to the amendments. The difference is reasonable doubt of loyalty and no reasonable doubt of disloyalty. The second made the case somewhat tougher, but I, for one, can see no difference in practice, can see no difference in practical effect. But President Eisenhower's Order is not involved in this case, except by implication, because the same procedure is being used.

Justice Frankfurter: Is this the same procedure?

Mr. Arnold: The procedure for the use --

Justice Frankfurter: I mean, is there not a change in some aspects of the procedure under the Eisenhower Order?

Mr. Arnold: Yes, Your Honor.

Justice Frankfurter: It is important not to make things that are a little different the same.

Mr. Arnold: Well, Your Honor, if I may explain it this way, the thing that we are arguing here is the right of confrontation of witnesses, to be free from secret informants, and in that respect, we think it is the same. Your Honor might see some other difference, but the Eisenhower Order is only involved by implication in this case.

Justice Frankfurter: Is that the only point you are making in this case? Is that the only matter you are presenting to the Court?

Mr. Arnold: I am presenting to the Court the right of confrontation.

Justice Frankfurter: Is that the only question?

Mr. Arnold: Yes, that is the only question.

Justice Frankfurter: There is no question as to whether there was a fulfillment of the procedure required, no question at all concerning that; just the question of confrontation?

Mr. Arnold: Your Honor, it is the constitutionality of this Order, which is directly involved in this case. I would hope, and I would indicate that I think, that the whole trial of

a man's character is not due process, that to go over a man's life even with confrontation would not be due process. I am not compelled to argue that here. You might say it is a side issue, a broader aspect of the case. The case precisely presents only the right to confrontation.

Justice Burton: Do you concede, Mr. Arnold, in this case all of the requirements of existing statutes and regulations were conformed with?

Mr. Arnold: Yes, we do. The requirements were conformed with. We argued in the Bailey case that the requirements of the Order were not conformed with.

Justice Burton: Yes.

Mr. Arnold: We are raising that point here, but we are not arguing it. It is the same point as in the Bailey case.

Justice Burton: When you say you are raising it, do you consider it as in this case or not in this case, the conformity with the regulations?

Mr. Arnold: I think the Government makes a pretty good -- we are talking about the secret evidence -- the Government makes a pretty good showing that the regional loyalty order contemplated the use of secret evidence. The point is not as sharp as it was before we discovered the memorandum prior to that Order.

We would still say that the term "all the evidence" could not be degraded thus far, but I think the intention of the words was to use secret evidence.

Justice Burton: So this case has to be decided on the Constitutional ground.

Mr. Arnold: I would think so, Your Honor, although it could be decided on the ground that when the President used the words "all the evidence," that could not be construed, even if he had intended to do it, it was not a normal construction. You could escape the Constitutional ground on that basis.

Justice Black: May I ask you this question:

On page 18 of the brief there seems to be the argument that the Order should be construed as not requiring this procedure.

Mr. Arnold: Yes, Your Honor; we make that argument, but I am frank to say that the argument on which I rely and hope this Court will decide is the Constitutional question.

Justice Reed: You certainly wouldn't go to a Constitutional question if the other questions were possible as a basis for a decision.

Mr. Arnold: No, Your Honor. The other question is more difficult than it was in the Bailey case.

Justice Frankfurter: It is an administrative question.

Mr. Arnold: Yes, an administrative question. The Government has shown that it was the intention when this Order was signed, to rely on the secret evidence, but we are reduced to arguing that, regardless of the President's intention, those words cannot be construed that way.

Justice Reed: Do you concede that the Board of Review and Inquiry had the power under the Executive Order to review this hearing?

Mr. Arnold: No, we do not concede it. I am giving you my appraisal of the issues that I would think would be presented to me if I were on the bench. I do not concede, but I do not think it is as strong a point as it was in the Bailey case.

Justice Reed: I understood you didn't think it was as strong a point as far as the question of secret evidence is concerned. I am not asking about that.

I am asking whether the Review Board had authority on its own motion to take up a case that wasn't appealed to it.

Mr. Arnold: We have not raised that question. We are raising the question of confrontation. That is a narrow question. We have raised the question in the periphery as to whether a character trial can take place.

Justice Frankfurter: I should think that is the broader question and not a narrower question.

Mr. Arnold: I said in the periphery. I meant to say it was the larger question.

Justice Minton: Does it make any difference that Dr. Peters wasn't employed by the Government?

Mr. Arnold: It makes a great deal of difference in showing that this case is really a punative procedure and not a protective procedure.

Justice Minton: They couldn't punish somebody that wasn't employed by the Government.

Mr. Arnold: He was a consultant. He wasn't on the payroll.

Justice Minton: They just had the right to call him when they wanted to, and pay him according to an agreement, per diem?

Mr. Arnold: That is right.

I use that point in my brief in this way, Your Honor. We state that the fact that they imposed this stigma on Dr. Peters under those circumstances, where there was no possible necessity of doing it in the interest of national security, shows that the loyalty program is punative and not an exercise of the managerial power. I will come to that point later. That is how we use that.

We raise no question about the authority of the Board to discharge a man who is not on the payroll. Of course they can do that.

Justice Harlan: Mr. Arnold, before you go to the broader question, Part 3, paragraph 1, subdivision (a) of the Loyalty Order gives jurisdiction to the Board to review cases involving persons recommended for dismissal.

Mr. Arnold: Right.

Justice Harlan: As I understand it, the agency security organization below this Board has cleared Dr. Peters.

Mr. Arnold: That is right.

Justice Harlan: What authority does the Review Board therefore have, this having been dismissed, to conduct a post-audit reinvestigation?

Mr. Arnold: I think they have every authority, Your Honor.

Justice Harlan: Where do you find it?

Mr. Arnold: Your Honor, I had assumed that, frankly. The question came up in the Court of Appeals as to whether a Presidential Order, whether a man can be tried over and over again, under a Presidential Order. The Court of Appeals, Judge Edgerton dissenting, held that it could. It is the universal practice. I had not raised that point.

Justice Frankfurter: Is this a question of over and over? The point that Justice Harlan raises is the authority of the Review Board. The Review Board can only review when there is a

dismissal, not when there is a favorable verdict.

It is a question of Executive Order.

Mr. Arnold: I will read the Order again, Your Honor.

I suppose that the point could be taken, although we have not raised it.

Justice Reed: You have the following paragraph on page 114.

Mr. Arnold: "The Loyalty Board shall also advise all departments and agencies on all problems -- "

Justice Reed: "b".

Mr. Arnold: "The Board shall make rules and regulations not inconsistent with the provisions of this Order deemed necessary to implement statutes and Executive Orders relating to employee loyalty."

Justice Reed: Do you know whether such a rule was issued, that they would take up questions of that type?

Justice Harlan: Doesn't Rule 14 purport --

Mr. Arnold: Pardon me. Were you asking a question?

Justice Harlan: Doesn't Rule 14 purport to extend the jurisdiction of the Board to this kind of a case, but in your judgment, is that kind of an extension of jurisdiction valid in the face of the limitation of the Order and the statement that the rules should not be inconsistent with the Order?

Mr. Arnold: It depends on whether you construe it broadly or narrowly. I would prefer not to in this case. I would

prefer not to argue on that particular narrow ground.

Justice Frankfurter: The question is not what you would like to whittle it down to, or not. The problem before this Court is to decide all legal questions that arise on this record and to reach Constitutional questions last, not first.

Mr. Arnold: All right, Your Honor.

Justice Burton: Wasn't there an Executive Order 10450 effective May 27, 1953, which extended for 120 days the time in which they could reconsider these very matters that you raised?

Mr. Arnold: There was.

Justice Frankfurter: I thought it was not subject to that Order.

Mr. Arnold: That is an Executive Order.

If Your Honor will bear with me a moment, when the new Order, the number of which I have forgotten, which is called President Eisenhower's Order, was put into effect, the authority of the old Loyalty Board was extended for 120 days, and this was the old Loyalty Board operating after the new Order was issued by President Eisenhower.

Justice Frankfurter: Justice Harlan called your attention to the limitation upon the Loyalty Board's jurisdiction under the old Order, no matter how long it was extended.

Mr. Arnold: Yes, Your Honor, he did. If this Court holds that the Review Board had no authority to pass on a former Board

that had acquitted him, then that case may be decided on that narrow ground.

Your Honor, that is not the issue in this case, as I see it. I think that the issue is, rather, this.

We say that the Government cannot, by a formal hearing before what is alleged to be an independent Board, try and condemn a citizen for disloyalty to his country, an offense involving infamy, and ruin, without due process of law.

We say that they cannot try him and come out to a favorable result. We say that that process of the lower Board and the other Board would be equally unconstitutional. Even the Board below which considered the evidence and acquitted him is equally unconstitutional. Regardless of how this Order is to be construed, you are faced with the question as to whether either of these trials on secret evidence was without due process of law, because a trial is a very serious thing.

We have appended to this brief the story of Beatrice Murphy Campbell, who was acquitted. It appeared in the Post. It is a dramatic illustration of the issue which is raised in this case, that she went through a terrible experience, although she was acquitted. While it is a recognized duty for the Court to pass only on Constitutional questions where necessary, I say that it is necessary to decide whether these proceedings are due process.

The Government doesn't raise the point you have just made.

They depend upon another theory. They say it is true that the ordinary citizen cannot be subjected to a trial without due process, but when he accepts Government employment, his position is changed, and he loses his rights to trial without due process.

Let me emphasize the thing that I am objecting to here is the trial itself. For instance, an official of General Motors could not be subjected to this trial, and it would be unconstitutional whether he was convicted or acquitted. But if the Attorney General's recommendation is granted by Congress, if concerns with Government contracts be included, then an official of General Motors may be tried by this method.

Justice Minton: An official of General Motors could not be compelled to appear before the Committee.

Mr. Arnold: I suppose if he were working on Government contracts, he could be discharged from his work on Government contracts. The Attorney General takes the position that if there is a power of the Government to discharge -- and I would see no difference between discharge from employment and discharge of a contract --

Justice Minton: Except there is a legal relation that exists between an employer and an employee, and there isn't between one who seeks a job, seeks employment.

Mr. Arnold: I think it is the same, because General Motors is engaged in Government work, the official is engaged in Government work.

Justice Minton: Take somebody who isn't.

Mr. Arnold: What?

Justice Minton: Take Corporation X that is not engaged in Government work.

Mr. Arnold: It could not be extended to anyone who is not engaged in Government work.

Justice Minton: This man wasn't engaged in Government work.

Mr. Arnold: He had an appointment with the Government from which he was dismissed.

Justice Minton: What was his appointment?

Mr. Arnold: His appointment was as a consultant.

Justice Minton: For how long?

Mr. Arnold: Two years. It had a definite expiration date. The thing expired in December after he was discharged.

Justice Reed: Did his commission run out?

Mr. Arnold: No. He was dismissed.

Justice Reed: But how long was he in for?

Mr. Arnold: It would have expired about three months later. It would have expired three months later if he had not been dismissed.

Justice Reed: Except he couldn't be restored then.

Mr. Arnold: No, not either as a theoretical matter or as a practical matter.

Justice Reed: That is moot, then?

Mr. Arnold: Yes.

Justice Reed: Yes.

Mr. Arnold: The argument that the Government makes is very simple. Dismissal of an employee is part of the managerial function of the Government and the Government can determine qualifications and loyalty is a qualification, and therefore the power to discharge an employee as unsuitable for a particular job includes the power to stigmatize him during that process by a formal hearing, and the Government asserts, we think, that there are no procedural limitations whatever which restrict it when it determines to impose disgrace and ruin on any of its citizens who hold Government employment.

The issue therefore between us and the Government -- and we are talking about the power to hold these trials -- acquitted or not acquitted -- is clearcut. We concede that when the Government is acting under personnel management, selecting qualified employees as such managers do, it would mean chaos from an administrative point of view if the Court interfered.

But by the initiation of these hearings, by this elaborate panolpy of boards and appeals, the Board has set up a system which is an adjudication. It is not a managerial function. No manager would ever think of putting it in. It is punative. What possible motive could the Government have in the Peters case except a punative proceeding.

These cases arise out of our well-justified hatred of

Communism. We want examples of people who have been thrown out of the Government because of Communist tendency, and that is what we are trying to get, whether we admit it or not. That is the real purpose of these hearings.

It reminds me of my early practice in Wyoming, when the people were stealing homesteaders' cabins. The defendent was indicted for stealing a cabin. He was convicted on practically no evidence. The attorney for the defendent protested. He said, "Didn't you know the man was innocent?" The foreman of the jury said, "Yes, but we have to have an example so we can stop this kind of thing."

That punative purpose is what we say underlies these boards.

But whether the punative purpose exists or not --

Justice Reed: How are we to accept that, that the Government of the United States undertakes to punish people? Suppose they want to. There is no proof in your record, nothing to show that except an accusation.

Mr. Arnold: Your Honor, I don't think the Government attempts to punish people. There is a hazard in all economic life of losing your job. If the Government calls in John Jones and says, "I don't trust you anymore, you are unsuitable," and then gives him a chance to explain, that is one of the hazards that has gone on since the beginning of our Government. Suddenly something new has been added, and that is this tremendous

hearing procedure.

Justice Harlan: Does that mean that if the Government on this same secret information has chosen to discharge Dr. Peters without according him any hearing, that you would concede that you have no complaint?

Mr. Arnold: Yes, if they had said, "Dr. Peters, we don't want you down here. We have some information about you. We don't want you to come here any more." He would say, "Thank you."

That would be what a manager does.

Justice Harlan: You would concede the dismissal was proper under those circumstances?

Mr. Arnold: Under those circumstances.

Take this case which is up here now, as I understand, the Arcadi case. This has no Constitutional issue whatever. There the Government promised a hearing by an independent board. They were entitled to it. An alien was entitled to the independent judgment of that board, although he had no Constitutional rights whatever.

There are two interests here, Your Honor, following Justice Frankfurter's decision in the Joint Anti-Fascist Refugee Case, which the Government has taken as a text. There is first the interest of the accused in his career and reputation. Justice Frankfurter points out that in his opinion there is the interest of the United States in decent, fair procedure.

While that Acardi case is now up here on a different point, the question is whether the Board was actually influenced by the lists which the Attorney General gave them.

In this case there is no question but what the Board can only decide upon the secret evidence, the secret information, because all of the information deduced publicly, openly, was evidence on behalf of the plaintiff.

We say that both of these interests are violated.

We understand that you can get a twilight zone --

Justice Reed: Wouldn't you really have to go a great deal further than that to show unjust treatment? But you haven't said that it was unconstitutional.

Mr. Arnold: Your Honor, I am complaining about a process. I have no hope --

Justice Reed: But you may not like many processes. Many processes you wouldn't practice because you do not like. We have to consider the Constitutionality of the matter.

Mr. Arnold: That is what I am arguing. Of course, employers treat their employees unjustly, but the sacred tradition of an American trial cannot be degraded, and that is what is happening here.

Justice Reed: What kind of a trial? What sort of a trial is this? What is he going to be punished for?

Mr. Arnold: This Court has recognized it is a badge of infamy in the Wieman case, which it has pinned on Dr. Peters by

this process.

Justice Reed: What happens as a result of that badge of infamy?

Mr. Arnold: Your career is gone; your reputation is gone.

Justice Reed: Suppose you have an immunity statute. A man is asked to testify as to matters which involve a badge of infamy. Would he have to do it?

Mr. Arnold: Certainly he would have to testify. This is the conviction of a man, not on testimony, but on secret information.

Justice Reed: What was the punishment?

Mr. Arnold: The punishment is a badge of infamy, and in many of these cases the absolute ruin of the man's career. I think if you say that is not a punishment, you completely disagree with me. I can imagine no worse punishment.

In the case of most of these people it is agony, it is disgrace, it is lack of employment. If you don't call that a punishment, then I am wrong, but I wouldn't be able to see how you can do that.

Justice Reed: Would you call it a legal punishment?

Mr. Arnold: I would call it a punishment.

Justice Reed: But not a legal punishment?

Mr. Arnold: I would call it a punishment imposed by the Executive for punative purposes under the form but not the substance of a trial.

I would say that process is not a process which can be Constitutionally engaged in by the Executive, and I say that it cannot be defended by the interests of national security or anything else, because I think it is destroying the feeling of national security.

Justice Burton: Is it your position if he were dismissed, it would not be a punishment, but if he is dismissed for disloyalty, it is a punishment?

Mr. Arnold: Exactly. Let me give you some hypothetical examples. I call a man in and say, "Mr. Jones, I have some information which I cannot tell you about, which concerns your loyalty."

He tries to explain. I then say that I am not convinced, that I will unfortunately have to terminate his services, although not with a finding of disloyalty, but as being unsuitable.

Take another step further. Suppose in the Wilson Administration --

Justice Burton: Let me follow the first example a little further. If the only testimony produced before the hearing officer is testimony of disloyalty, but the hearing officer, when he gets through says, "I discharge you for unsuitability," that is all right?

Mr. Arnold: Your Honor, I haven't gotten to the hearing yet. If you are going to give a formal hearing, a Civil Service man never gets a hearing. If you want to have a formal

hearing which ends with a finding of disloyalty, then you have transgressed the Constitution.

If we have this form of hearing with all its panolpy, and we dismiss it then for disloyalty or any cause, I say that the process which we have set up does not permit this kind of secrecy. If you want to act like a businessman hiring and firing employees, your Government may do so. There may be close cases, but I say that this case has pushed the thing completely over any possible argument, and we have set up a procedure which promises maximum protection to the Government and equal protection to the employee.

The informal procedure does not make such promises. It promises an independent judgment of the Board.

We have shown in the brief the valuation of this evidence by the FBI, the reliability and the methods by which it is gathered, render impossible any independent judgment of the Board.

Justice Harlan: Is it your point that having set its hand at the plow in choosing a hearing method, the Government is then stuck with a due process hearing, and nothing short of a due process hearing?

Mr. Arnold: I wish I had said it that briefly. That is precisely my point.

Justice Harlan: Does that mean if they had not chosen this route and called Dr. Peters in and said, "We have secret

information that convinces us you are disloyal," they could have dismissed him, discharged him?

Mr. Arnold: They could have discharged him. I would go so far, Your Honor, as to say they couldn't make a record even of a finding of disloyalty.

For instance, I don't like the Wilson Order. That is a close case. This case doesn't involve any twilight zone.

Justice Reed: You mean the competitive class Federal Civil Service procedure?

Mr. Arnold: There is no hearing there. You get a chance to explain.

Justice Reed: Do you accept that as satisfactory?

Mr. Arnold: You just get a chance to explain. There is no hearing. You are discharged.

Justice Reed: There is no hearing?

Mr. Arnold: You get a chance to explain. You could call that a hearing.

Justice Reed: You could call for a hearing, couldn't you?

Mr. Arnold: The hearing is entirely discretionary.

Justice Reed: But you can ask for it?

Mr. Arnold: You can ask for it. You may not get it.

Justice Reed: If they give you that hearing, is that a satisfactory hearing?

Mr. Arnold: If they do not make findings of record of disloyalty. Remember, that is efficiency.

Justice Reed: You mean this is only disloyalty to which this applies?

Mr. Arnold: It would apply to a finding of bribery. I don't think there is any danger of that thing mushrooming because the finding of disloyalty is a finding of a man's complete character.

Justice Reed: Does your position go so far as to apply to every crime, say a felony?

Mr. Arnold: What?

Justice Reed: Every felony.

Mr. Arnold: I would say if you were to discharge the man on the grounds and made a record that he was a murderer, you ought to give him a fair trial.

Justice Reed: You couldn't convict him of murder.

Mr. Arnold: I know. The Attorney General takes the position that anything goes on a discharge. These are public hearings. Dr. Peters had to see a hundred people. He had 40 affidavits. You are charging me with murder and you are going to make a finding. I have to get my friends to get all the counterevidence and get all that sort of thing. I say you'd better either not do that, or indict him for murder.

Justice Reed: But your charge is that he is unsuitable for employment.

Mr. Arnold: Right. I don't mind that.

Justice Reed: You proved that by proving that you are a murderer.

Mr. Arnold: I don't know that a murderer would necessarily be unsuitable for employment. There are many murderers who are employed when they get out of the penetentiary, manslaughter. I think that we cannot get down to precise distinctions in this.

The due process clause is not a precise instrument, and I say that these character trials do impose punishment. I see a great deal of damage, even more to those than in a murder

fols trial.

Justice Harlan: Your point, stated another way, is, if you have a trial, it is unconstitutional for the Government to misrepresent that the finding of disloyalty is the result of a trial if it hasn't been due process. So it is misrepresentation.

Mr. Arnold: Exactly, Your Honor.

Justice Harlan: That is constitutional.

Mr. Arnold: That is precisely what I say.

I will reserve fifteen minutes for Mr. Porter to rebut.

The Chief Justice: Very well.

Mr. Burger.

Mr. Burger, the Court would like to have you direct your argument, if you please, to the procedural question which was asked of Mr. Arnold.

ARGUMENT ON BEHALF OF RESPONDENTS

By Mr. Burger

Mr. Burger: If the Court please, I will be very happy to undertake to do that, if the Court will bear with me on one count, namely, that that subject not having been raised in any brief, we have not addressed ourselves as directly to it as we would, had it been so raised.

The point which I assume the Court wishes us to address ourselves is whether under the terms of 9835, as amended by Executive Order 10241, the Loyalty Review Board itself may by a process of administrative interpretation and regulation

enlarge, as it has been suggested, or extend the authority to conduct this post audit review.

First, I would say that on page 114 of the Appendix to the Government's brief, there is in paragraph B and subsequent parts of that section the statement that the Board shall make rules and regulations not inconsistent with the provisions of this Order deemed necessary to implement statutes and Executive Orders relating to employee loyalty. The Board shall also advise all departments and agencies on all problems relating to employee loyalty and take two or three other steps.

Going down to four, it shall make reports and submit recommendations to the Civil Service Commission from time to time, as may be necessary.

That Order, as the Court is aware, was promulgated by the President in 1947. In that same year the Loyalty Review Board, in issuing its regulation, the official citation of which I will give the Court in a moment -- I believe it is Chapter 11, Section 200.14 of the 1949 edition of the Code of Federal Regulations --

Justice Douglas: What year?

Mr. Burger: 1949, Your Honor.

That regulation provides that the Board or an executive committee of the Board shall, as deemed necessary from time to time, cause post audits to be made of the findings on loyalty cases decided by the employing department or agency or by a

regional loyalty board.

The Board or an executive committee of the Board or a duly constituted panel of the Board shall have the right in its discretion to call up for review any determination or decision made by any department or agency, loyalty board, or regional loyalty board, or any head of an employing agency or department, even though no appeal has been taken.

Any such review may be made by a panel of the Board and the panel, whether or not a hearing has been held in the case, may affirm the determination or decision or remand the case with appropriate instructions to the agency or regional loyalty board concerned for hearing or for such action or proceedings as the panel may determine.

In exceptional cases, if in the judgment of the panel the public interest requires it, the panel may hold a new hearing in the case, and after such hearing may affirm or reverse the determination or decision.

The Chief Justice: Does the agency have the right of appeal in the event of a decision of acquittal?

Mr. Burger: In the event of a decision in favor of the employee?

The Chief Justice: Yes.

Mr. Burger: I do not believe so. This is a review on its own motion by the Loyalty Review Board of the Civil Service Commission.

The Chief Justice: But the question was whether there is an appeal or not. I wanted to know whether that appeal referred only to the employee and not to the agency.

Mr. Burger: That is right. It refers only to the one. If the employee took an appeal, obviously they would have jurisdiction. If the employee did not take an appeal, the Loyalty Review Board could make a review on its own motion.

The Chief Justice: You read that even to mean that on an acquittal the Board can review the case on its own motion?

Mr. Burger: That is correct. That is the administrative procedure that has been followed under this Order since 1947 through its entire existence, I believe into mid-1953.

Justice Frankfurter: On its face, then, even though no appeal is taken, an appeal can only be taken by an employee to an adverse decision. Reading then on its face, it means that the Board can bring up a dismissal, although the employee may not seek an appeal by his own act.

Mr. Burger: I would not so read it.

Justice Frankfurter: Read it.

Mr. Burger: I would not so read it.

Justice Frankfurter: Read it.

Mr. Burger: I will read that section again.

"The Board or an executive committee of the Board shall, as deemed necessary from time to time, cause post audits to be made of the files on loyalty cases decided by the employing

department or agency or by a regional loyalty board"-- decided by them.

Justice Frankfurter: Go ahead.

Mr. Burger: "The Board or an executive committee of the Board or a duly constituted panel of the Board shall have the right in its discretion to call up for review any determination or decision made by any department or agency, loyalty board or by any head of an employing department or agency, even though no appeal has been taken."

Justice Frankfurter: The appeal can only be taken by an adversely affected employee. The qualification would be meaningless otherwise.

Mr. Burger: I wouldn't agree with that at all, Your Honor.

Justice Frankfurter: Otherwise there is no point in saying "even though no appeal is taken." On the face of it, that can be given effect in a situation where an employee has been adversely found by the agency board, and he, for one reason or another, seeks not to fight it any more, the Review Board may bring it up.

Mr. Burger: Let me suggest this without conceding that point on which I would not read as the Court reads it.

From 1947, when the Order was promulgated by the President, this is the way this Loyalty Review Board interpreted and administered this order with the advice and approval of the Attorney General whenever his advice was sought.

Justice Frankfurter: They couldn't interpret it to mean the opposite of what the words read.

Mr. Burger: I would agree with that, Your Honor. But the President in this entire period has allowed the Board to interpret the Order which he, the President, has issued, in this manner.

Justice Frankfurter: Of course, I suppose the President has some other things to do than to follow what the Board is doing.

Mr. Burger: I would assume so.

Justice Frankfurter: When the time came to change the Order by President Eisenhower, that change was made.

Mr. Burger: That is correct. There were many changes made.

Justice Frankfurter: On that specific thing there was a change.

Mr. Burger: I was coming to that. There is, as far as I know, only one case which raises this issue, the case of Jayson v. Summerfield, 214 Fed. 2d 273, which is not cited in our brief. It is only raised now because this question was brought up. It was brought up here, I believe, during the present term of this Court on a writ of certiorari which was denied. I believe this precise issue was there raised.

Justice Harlan: What was the reference to that case?

Mr. Burger: 214 Fed. 2d 273. That is an appeal from the

Court of Appeals from the District of Columbia, certiorari denied at 348 U.S. 840.

I would quite agree with the Court that the President is not precisely looking over every act of his Loyalty Review Board, but as regulatory and advisory bodies go under the administrative practices, probably few of them have had closer attention than the Loyalty Review Board procedure under 9835, a directive by President Truman, from the time of its inception, because it was a new concept that attempted to codify what had previously been a hodgepodge and patchwork of loyalty review and loyalty check programs in various agencies.

Justice Burton: Mr. Burger, do you find any support for your procedural point in that Executive Order 10450 was extended 120 days to take up matters by the old Board?

Mr. Burger: I would assume that the primary purpose, at least, of the extension of 120 days was to allow the pipe line of cases to run out under the old Order.

Justice Burton: This was one of them, wasn't it?

Mr. Burger: Yes.

Justice Burton: Doesn't this give you authority?

Mr. Burger: As to that authority, that would be undoubted. There is no impact on this case of the expiration of 9835 and the supplanting --

Justice Burton: In that extension, it says:

"Whenever the Board is not in agreement with such

favorable determination, the cause shall be remanded to the department or agency concerned."

Does that limit it to a remand, or may it pass on it, as it did here?

Mr. Burger: I would assume it is the broad power.

Justice Frankfurter: Do you take the position that Executive Orders are to be construed more loosely and more broadly than an Act of Congress? If an Act of Congress says a case shall be remanded for further action by the lower court, we couldn't possibly construe it to mean that the Appellate Court could make a determination.

Mr. Burger: You are speaking to 10450?

Justice Frankfurter: I am speaking of what Justice Burton referred to.

If the Review Board couldn't itself dismiss, it must send it back to the agency for action.

Justice Reed: This was sent back to the agency for action, wasn't it?

Mr. Burger: This was automatically transmitted to the agency. Of course, it was an advisory recommendation only, much as it is an advisory recommendation, for example, in a conscientious objector case, or many of the others. The agency could reject it.

Justice Reed: Only the head of the agency has authority.

Mr. Burger: That is perfectly clear.

Justice Reed: This is purely an administrative matter.

Mr. Burger: This is advisory.

Justice Reed: This is not a judicial order of any kind.

Mr. Burger: This is not a case where they have directive powers at all until the agency has accepted it and adopted it.

Justice Reed: Then it is entirely optional with the agency head to discharge him.

Mr. Burger: Yes. The agency head could have rejected these findings and retained the petitioner.

Justice Douglas: They could not have appealed to the Review Board?

Mr. Burger: Who could not?

Justice Douglas: The agency.

Mr. Burger: I so read the order, that the agency could not have taken an appeal.

Justice Douglas: That may be in connection with the new Order, 10450, which you obliquely refer to, because I notice that was the Order that was passed after this Review Board kept jurisdiction of this case.

Mr. Burger: That is as I understand it, Your Honor.

Justice Douglas: And I notice in Section 11 of that Executive Order, 10450, a provision that the agency's favorable determination of the case of an employee pending before the Loyalty Review Board shall be acted upon by such Board, which would rather indicate that there was an assumption in this

Executive Order that there were ways of getting those favorable orders before this Board.

Mr. Burger: Favorable to the -- ?

Justice Douglas: -- to the employee.

Mr. Burger: Both those favorable to the employee and those favorable to the Government, as I read the new Order.

Justice Harlan: On the premise that we shouldn't reach Constitutional questions unless we have to, and assuming that this present question is decided so that the Board did have jurisdiction, this is a motion for judgment on the pleadings?

Mr. Burger: That is correct.

Justice Harlan: Which assumes that there are no issues of fact open.

Mr. Burger: That is correct.

Justice Harlan: The allegation is in the complaint, that the defendant did not receive enough information to enable him to prepare his defense, which is one of the requirements of the Loyalty Order.

Mr. Burger: I would not interpret that, however, as one of the facts admitted. I would say that is a legal conclusion.

Justice Harlan: That is denied?

Mr. Burger: That is denied.

Justice Harlan: Why doesn't that raise an issue of fact which would result in remanding this case to the trial court, which would result in a determination of that question?

Mr. Burger: I would answer that in two parts. I would question whether that raises a question of fact. I think that raises a legal conclusion. That is his legal conclusion, that it was not sufficient. His own pleading admission recites what it was that he was told, and on its face it is in conflict with the legal conclusion he draws, that it was not sufficient.

Justice Harlan: The Loyalty Order makes it a question of whether he should be given all information except such as in the discretion, which is a question of fact for the Board, should be withheld for the purposes of national security. Therefore I would think whether or not he had received enough information would involve a question of fact as to whether the Security Board abused its discretion in not giving him more.

Mr. Burger: I would answer, as I said, in two parts.

First, this is a legal conclusion that is in conflict with his own recital of what it is that they told him, and in conflict with what Judge Arnold said to this Court. There was no question about the sufficiency of the notice. If he had that point, I think he waived it. He certainly waived it in the District Court and he waived it expressly in the Court of Appeals, and standing here a few moments ago, he said it was sufficient.

Justice Frankfurter: Mr. Arnold cannot waive defects of record which show non-compliance with the Order. He may desire, as lawyers will, a broad Constitutional determination, but our function is the opposite.

Mr. Burger: I would agree with the Court, that neither his confession or admission of counsel alter the jurisdiction of this Court. I am trying to answer Judge Harlan's question about the posture of the case from a litigating point of view. That is not the posture of the case. I didn't intend to argue that the Court should go on with the side issues that the Court doesn't

feel it can or needs to reach.

Justice Frankfurter: Mr. Burger, to refer to your suggestion that this is merely an advisory opinion, what the Board does, that the agency is free, I call your attention to 2204, Directive 4, subdivision B: The President expects that loyalty policies, procedures and standards will be uniformly applied in the adjudication of loyalty cases by the several agencies and the responsibility for coordinating the program and insuring uniformity has been placed in the Loyalty Review Board.

Therefore, if uniformity is to be attained, it is necessary that the head of an agency follow the recommendations of the Loyalty Board, Review Board in all cases.

So when this case goes back to an agency, it isn't free to act on it or not, since the directive is that it must obey.

Mr. Burger: I did not quite get the Court's citation on that. I have the code of regulations before me.

Justice Frankfurter: Federal Register 1948, Volume 13, page 9372, 2204, Directive 4, subdivision B.

Mr. Burger: That is a regulation of the Civil Service Commission Board, Your Honor?

Justice Frankfurter: Yes.

Mr. Burger: Is the authority conferred by the Executive Order itself --

Justice Frankfurter: It is a statement of the Loyalty Review Board.

Mr. Burger: If the authority conferred by the order itself gives the agency that option which I had understood was the case, I would want to ponder on that a bit before I would say that by that regulation it would take the power granted by the President to the agency away from the agency?

Justice Frankfurter: I suggest the same pondering is required to a plain statement in the President's order that a review could be had only on an adverse determination, which is the opposite of what it has been construed to mean by the regulations of the Board.

Mr. Burger: I do not construe it as limiting the administrative practice from 1947 to 1953, which is uniform to that effect, as I have suggested before.

Justice Frankfurter: May I also refer to Order 10450, to which Justice Harlan referred, which makes an exception in the case where the agencies favorable determination as to an officer or employee concerned is pending before the Loyalty Review Board.

This case was pending, was it not?

Mr. Burger: I believe it was.

Justice Frankfurter: On such a case, it states that it shall be acted upon by such a Board and whenever the Board is not in a position to make such statement or determination, the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order.

Unless there is more than meets the eye, that means the case shall be sent back to the agency for reconsideration in the light of the new Order, the standards in the new Order.

Mr. Burger: I am asking one of my colleagues to check the dates to see how they fit.

Justice Frankfurter: 18 Federal Register, 2492. The date of the Executive Order, the effective date, is May 27, 1953.

Justice Douglas: April 27th.

Justice Frankfurter: It became effective in May. It was issued in April and became effective in May.

Mr. Burger: It appears by a margin of five days in this case that it was one in the authority of the old Order and before the new Order had gone into effect.

Justice Frankfurter: Then it is subject to the old Order.

Mr. Burger: May 27th was the effective date of the new Order. May 22nd was the effective date here.

Justice Frankfurter: Then you have to stand on the old Order?

Mr. Burger: The Court raises a number of questions which, with your permission, I would like to address myself to. Perhaps in the light of the discussion about the Constitutional point, we might rather rapidly go over that area. It has been our view that unless a specific provision of the Constitution provides the act complained of, there is no bearing on the Constitution itself.

We have pointed out in the brief, I think at great length, the reasons why we believe that to be true. Judge Arnold has narrowed the thrust of his argument, as he has indicated in response to questions, to the case where there is some kind of a hearing which he says looks like a trial or a hearing, with respect to which there is a determination of disloyalty. We would take issue, although I don't want to dwell on it too long, on the differences in the original Order 9835 and 10241, under which this dismissal was had.

Whatever stigma or stain was involved, there is some difference. I wouldn't try to evaluate what difference there is between a finding that a man is disloyal to his country and a finding that there is reasonable doubt about his loyalty.

I don't know whether that goes to the heart of this suggestion about stigma and punishment. We have assumed, as we have indicated in the brief --

Justice Black: What was that you said?

Mr. Burger: That we suggest that there is a difference in the two standards of the two orders, that the first, 9835, required an affirmative finding that the man was disloyal. Under 10241, the modification, it is a finding that there is a reasonable doubt as to his loyalty.

Justice Black: What is the difference in effect on the man?

Mr. Burger: That is a subjective question, Your Honor, and with different people, there will be a different reaction.

I said I wouldn't undertake to dwell upon it, but just pointed out, that there is a difference in standards.

The President who issued apparently thought that there was a difference. As the Court is aware, that standard has again been altered in the Order which is now extant.

The Chief Justice: If you cannot understand the difference, how would you expect the Boards to understand the difference?

Mr. Burger: I did not suggest that, Your Honor. I did not suggest the difference on the part of the Board's not understanding it. I took the Court's question to be directed at the public impact, of which so much has been made by Judge Arnold.

I think that there is quite a difference to the Board, and we would have no difficulty in advising the Board on that score. If there is any doubt at all, it puts the Board in effect in the reverse position of a jury in a criminal case.

The Chief Justice: What would you advise them the difference was? I understood from your answer to Mr. Justice Black that you could not define the difference.

Mr. Burger: In terms of its impact on the public mind. I would say with reference to a board that it would require less evidence to make the finding that there was reasonable doubt about loyalty than to make a finding of disloyalty.

The Chief Justice: According to what standard?

Mr. Burger: That is the standard laid down in the Order itself, suggesting the organizations, the activities and the conduct which should be taken into account. And doubt would be cast on a man by less evidence than it would require to have them reach an affirmative decision of disloyalty.

Justice Frankfurter: That makes it, does it not, rather more important that the procedural details of the Order be satisfied?

Mr. Burger: I will say that if there is any difference in that respect, if the Court felt that the elastic concept of due process was being applied to it, that it might call for more, yes, because the standard has been so high with respect to procedural due process.

Justice Burton: Do you consider that the law in this case turns upon the difference between those two standards?

Mr. Burger: I would not think so. And certainly Judge Arnold has directed --

Justice Black: In other words, your idea is that if there has been sound reasonable doubt about his loyalty, you would consider it the same as though they had found he was disloyal?

Mr. Burger: In a Constitutional sense; in a Constitutional sense certainly.

And in a Constitutional sense, this question of punishment is important because, as one of the questions indicated, punishment in the sense used in the Constitution is not a consequential or incidental harm or hurt that results to a citizen. Punishment in the Constitutional sense is a punishment which results because the state intends that result.

Even under modern concepts of penology, when they set up

procedures for the punishment of a crime, that is an intended result, in part.

The Chief Justice: Mr. Burger, if a man, in addition to his dismissal, is disbarred from the public employment for a period of three years, or any term of years, is that not punishment?

Mr. Burger: I would say that that is not punishment in the Constitutional sense in this context, because the purpose of it here was protective. Now --

The Chief Justice: Suppose it had been for life. Would it be punishment?

Mr. Burger: I don't think in a Constitutional sense it would be, Your Honor. But I think that is perhaps moot, in a sense, in this case because that bar is no longer applied, and if the Court felt that that was a punishment which should be struck down, the Court could single that aspect of the case out and strike it down and let the remainder of the proceeding stand.

The Chief Justice: Provided it would be no longer applicable.

Mr. Burger: But the regulations have been changed under the new Order.

The Chief Justice: Does that change all the cases under the former Order?

Mr. Burger: No, I do not believe it does. I think it

leaves the bar as it does to those on whom it was imposed under the old Order. I am simply suggesting that if the Court struck it down --

The Chief Justice: I thought you just said in response to Justice Frankfurter's question that this was done five days under the old Order.

Mr. Burger: But under the new Order, Your Honor, the three-year bar is no longer imposed in dismissal cases under the Order. So while the bar still applies to the petitioner in this case, if this Court singled out and decided that was a punishment in the Constitutional sense and decided to strike it down, it could strike down that phase of this Order without striking down the entire Order or the entire procedure.

The Chief Justice: Why would you say that it was changed, if it was not for the purpose of relieving them from punishment? What was the purpose of doing it?

Mr. Burger: Well, I would have to speculate there, Your Honor, as to the reasons why the Civil Service Commission --

The Chief Justice: You have been speculating right along, it seems to me.

Mr. Burger: As to what was necessary. But this is a practical answer to it, that that, as a practical matter, is not necessary. They can determine the question of reemployment on a case-by-case basis with respect to each individual dismissed if he ever applied for employment again. I assume as a practical

administrative matter, that is the answer to the question.

Justice Reed: There is no occasion to take action on the constitutionality of it, is there? They can keep him out, anyway.

Mr. Burger: There are certainly practical ways of effecting the same result and then removing what may be a borderline, twilight zone case, in the minds of some people.

Now, I think that as a practical matter, since the decision of this Court in the Wieman case, it probably is academic to a degree to speculate on whether there are no bars to Executive action in the personnel field or whether there are some. I say "academic" because certainly under the decision in the Wieman case, if any Executive should issue at any time an Executive Order in which he placed as a standard for retention in employment or for applications, that as part of any application he would take a pigmentation test, certainly in the light of the decisions which this Court has been dealing with in the segregation field, that is a denial of at least equal protection, and it is probably fruitless to suggest that there is an absolute bar to any consideration of Executive action in the personnel field.

I think the Court in the Wieman case put its finger on it by the emphasis on the word "patently," and the use of the word "indiscriminate." The reason it struck down the Oklahoma statute, I believe, was that the indiscriminate classification

of innocent and knowing activity was a patently arbitrary thing, with respect to which few people would disagree, although some in Oklahoma did.

Now, I think it probably is fruitless to pursue that argument, and I would rather turn to what is perhaps the more important one in the light of the questions of the Court, to whether, assuming that due process is required in loyalty dismissals for the purposes of this argument --

Justice Black: Do you deny that it is?

Mr. Burger: We have argued that it does not reach, subject to this point which I have just made, that in the light of Wieman, it certainly is obviously not an absolute.

Justice Frankfurter: That was not a pigmentation case, by the way, was it?

Mr. Burger: No, it was not.

Justice Frankfurter: It was much nearer to the area we are in now.

Mr. Burger: Much nearer.

But I suggest that the Wieman case is put in better perspective, Your Honor -- at least, it did for me -- by reviewing the same type of arbitrary classification and indiscriminate classification which the State of Oklahoma used with respect to state employees, to persons wanting to do business with the State of Oklahoma, persons wanting to practice any of the learned professions over which the state had control, or licenses

over which the state had control.

With respect to any of those, I think that that kind of indiscriminate classification would be invalid under the Wieman case.

Justice Frankfurter: May I suggest that in that case, due process in its substantive sense would give them application, and due process in its historical, procedural aspect I should think would come into play much more readily or much more easily than the extension that had to be made in giving due process --

Mr. Burger: I agree with that.

Justice Frankfurter: In other words, discrimination is a basis for eliminating it. In that case, state power is the relationship. I should say that with the basic consideration of procedural safeguard, you would have an easier time if you dismissed it.

Mr. Burger: I would agree with the Court that that is true with respect to procedural due process. And turning to that, I would suggest what this Court has been defining so many times, and as Your Honor has defined it in some of the recent cases, that this is a concept which is fitted to the needs of the occasion.

The inquiry of the Court is as to what interests of the state, the government, are sought to be protected, and what is the interest of the individual which is invaded in that process,

and does the process as set up bear a reasonable relationship to the achievement of that end.

I think by those standards that we have due process in this case, and I suggest -- I would like to give a couple of illustrations -- that if we do not, then there are a great many other areas where due process is, in the confrontation sense, not being applied.

I would rather accept Judge Arnold's basis and say that the real issue here is whether process must include confrontation in order to be due process under the Fifth Amendment.

As I read the decisions of this Court, the Court has said that there are two minimum requirements. One is notice of charges with reasonable specificity so that the person receiving the notice may know what it is he must meet; and second, an opportunity to be heard to answer and to refute.

Now, some members of the Court have gone beyond that and said the opportunity to refute must include confrontation of all sources of information adverse if the agency, if the deciding power, is relying on the information.

I do not read the decisions of the Court as having said that that confrontation is required in every case. And I suggest that when the Executive Order was issued by President Truman, his advisers and his own staffs that were dealing with this problem were well aware of the fact that the consequences of doubtful loyalty or affirmative disloyalty in the security

problem of the Government were a much more severe problem in the present state of the world than the presence of, perhaps, an embezzler or a bribe-taker, as to which, in 2,000,000 employees, there are bound to be some.

And I think it is pertinent to look at the process by which the Government deals with those charges and by which historically they have dealt with them.

Under the Lloyd-LaFollette Act, which was passed in 1912, and has been referred to, the notice requirement is substantially the same as here. That is, the man must receive a notice that informs him what he must meet. He has an opportunity to come in to the administrative head and explain it away, bringing witnesses, bringing statements, bringing affidavits. In the discretion of the administrator, he may have a hearing, and often does.

Now, under the Lloyd-LaFollette Act, a man may be charged, a man or a woman may receive charges which cover a wide range of activity, but for these purposes, the important ones are covered in two or three of the paragraphs listed in the regulations of the Civil Service Commission.

One of them is criminal, infamous, dishonest, immoral, or notorious and disgraceful conduct.

Under that, a man or a woman employee may be charged with receiving bribes or may be charged with theft or may be charged with any one of a number of infamous crimes, or narcotics

addiction or some other serious defect of character that may in itself not be a crime, but would certainly impose a stigma.

Justice Black: Isn't there a direct Constitutional provision that says something about how a man shall be tried if accused of an infamous crime?

Mr. Burger: Yes, the Constitution has that provision.

Now, this is a charge on disqualification for being a person who fits into any one of these categories.

Justice Black: But you are providing a trial for him to determine whether he fits into it?

Mr. Burger: Not a trial, Your Honor. Under the Lloyd-LaFollette Act --

Justice Black: But you must have some kind of system of determining whether he is innocent or guilty, or partially thought to be innocent of an infamous crime.

Mr. Burger: The test --

Justice Black: Is that what you have to do to determine whether or not he is to be discharged?

Mr. Burger: I would have to go beyond it a little, Your Honor, by saying that the notice was given and the executive head of the agency then undertakes to determine whether in the light of the evidence which comes before him, that man should be retained or discharged in the interests of the efficiency of the agency.

Justice Black: By a reasonable finding that he is guilty

of an infamous crime, or that he may be guilty?

Mr. Burger: That is possible under this Lloyd-LaFollette Act; yes, sir.

Justice Black: Now, what does the Constitution say about the Government's finding a man guilty of an infamous crime?

Mr. Burger: If the Court equates the grounds for dismissal to the finding of guilty of an infamous crime, then the Constitution would apply. But this determination --

Justice Black: It would have to be by a Court, would it not?

Mr. Burger: But this determination is not a determination of guilt. This is a determination which must be made in the mind of the administrator, who, on all the evidence --

Justice Black: There is reasonable grounds to believe he is guilty of the infamous crime?

Mr. Burger: No, that is not the standard.

Justice Black: There is a doubt about whether he is guilty or innocent?

Mr. Burger: No, that is not true; but rather whether in the interest of the efficiency of the service, he wants to retain the man as to whom those charges have been made, and many employees have been discharged under the statute.

Justice Black: Does that depend on whether or not there is a finding one way or the other about the infamous crime?

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Mr. Burger: You are asking now an administrative question of whether they made a finding, and I cannot answer that. But the notice of charges --

Justice Black: Are they allowed to discharge him with reference to an infamous crime without reaching a conclusion of some kind on some kind of evidence about his guilt or innocence of the infamous crime?

Mr. Burger: I assume that the employing authority reached the decision in his own mind, Your Honor.

Justice Black: About being guilty of an infamous crime?

Mr. Burger: That is right. He does.

Now, what findings he may make, I cannot answer. But that would include many criminal acts, many acts of immorality, many --

Justice Black: Does the Constitution say that before the Government finds a man guilty or innocent of an infamous crime, he should be tried by a jury of his peers?

Mr. Burger: Yes, Your Honor, when that is coupled with punishment. That is correct.

In a Constitutional sense, we think this is not punishment, and we think this is not a determination of guilt, because no consequence flows from this determination except to terminate his employment.

Justice Reed: Can he still be tried for a crime after his separation?

Mr. Burger: He might.

Obviously, if the agency had enough information about the crime to believe that he was guilty, they would be obliged to turn it over to the proper prosecution authorities.

Justice Reed: Could he be tried again after they had tried him and found him guilty?

Mr. Burger: I am sure that he could be tried for the crime after he was dismissed on these grounds.

And, as a matter of fact, one situation, purely hypothetical, occurs where a person was discharged on the ground of embezzlement, for shortage of a large amount of money. The dismissal was sustained. Criminal trial could not sustain the criminal standard of proof, and there was an acquittal. And subsequently that was followed by a collection on the bond of the employee by the state involved.

Now, I would like to make the further comparison of these two --

The Chief Justice: Mr. Burger, you made the comparison between the Lloyd-LaFollette Act and this. Did it have the same standard of proof that we have here? Did it require the same standard?

Mr. Burger: I think all that is involved, Mr. Chief Justice, in the Lloyd-LaFollette removal is the determination by the administrator of an agency that the man should or should not be retained in the interests of the efficiency of the

service.

The Chief Justice: But did it say in that Act, as it does here, that the standard for the refusal of employment or the removal from employment in an Executive department or agency on grounds relating to loyalty shall be that on all the evidence there is a reasonable doubt as to the loyalty of the person involved, "on all the evidence?" Does it say that?

Mr. Burger: Well, I will perhaps answer that by reading this section of the Civil Service Regulation, which is under the Lloyd-LaFollette Act, and I do not have the Act before me:

> "The employing agency shall remove, demote, or reassign to another position any employee in the competitive service whose conduct or capacity is such that his removal, demotion or reassignment will promote the efficiency of the service. The grounds for disqualification of an applicant for examination stayed through Section 8 of this Chapter shall be included among those constituting sufficient cause for removal,"

and that includes the items which I listed.

The Chief Justice: Then you would say that that Act does not require them to take into consideration all the evidence; they can do it on any basis they want?

Mr. Burger: I think that would be right. It does not have the standard which is recited here.

The Chief Justice: That is analogous, is it not?

Mr. Burger: I would say it is analogous in terms of its impact, because here is a finding, a determination by an agency head on charges which have been directed to conduct, which, independently, is equivalent to an illegal act or immoral act. And if a man is dismissed, our point is that that man is substantially in the same posture as the individual who goes through a loyalty proceeding.

The Chief Justice: Yes.

But there in that Act, all they have the power to do is to reduce him in rank, transfer him, or dismiss him from the service.

Mr. Burger: Or dismiss him.

The Chief Justice: But here you admit that these boards could disbar a man for life from the Government service. Don't you see there is some difference between the two?

Mr. Burger: I suggested that they could. They have not undertaken to do so and now do not --

The Chief Justice: Well, it is a question of degree. They did it for three years, did they not?

Mr. Burger: That is correct.

The Chief Justice: Do you not think there is some difference between dismissing a man from his position in one case and in another, adding to that a sentence that he should be disbarred for three years from any Government service any place?

Mr. Burger: I think there is a difference, but --

The Chief Justice: An immaterial difference?

Mr. Burger: I can hardly think of any agency where they accomplished dismissal on one of these derogatory grounds and reemployed the man within three years, or any of the other agencies of the Government employing him, depending, of course, on what the derogatory grounds amounted to.

The Chief Justice: We have had instances recently where one department released a man because he was a security risk and another department of the Government hired him the next day.

Mr. Burger: Not under this kind of proceeding at all, Your Honor.

The Chief Justice: What kind of proceeding? You said that you cannot conceive of their ever re-employing him.

Mr. Burger: Because there has been no determination in the case that you are referring to. There was a termination within an arbitrary authority to dismiss. There was no hearing; no process had been gone through at all.

Justice Frankfurter: Mr. Burger, the Chief Justice asked you some questions about the evidence on which action was taken. I would like to get a little more on that in relation to this

case. Would you be good enough to sketch the category or the types of evidence on which, first, the agency board acted? What did they have before them? We do not have the record, but --

Mr. Burger: I can speculate -- I can suggest categories. I could not undertake to state what was the content, because the President's Order forbids that.

Justice Frankfurter: No, I quite understand that.

Mr. Burger: I would say the answer to that question is broadly contained in the Order itself, indicating what factors should be taken into account.

Justice Frankfurter: The facts or factors are standards which relate to evidence.

Mr. Burger: Yes.

Justice Frankfurter: Now, what would be the evidence? Where did they get the evidence?

Mr. Burger: The Board had the authority -- and when I am speaking now of the Board, I am speaking of all the boards in the aggregate --

Justice Frankfurter: May I get one thing clear in my own mind? The Review Board had nothing before it except the dossier that was before the agency board except the secret testimony; is that right?

Mr. Burger: And the five additional witnesses.

Justice Frankfurter: So far as the Government case, if I

may so denominate it, it was merely the record made before the agency?

Mr. Burger: That is right.

Justice Frankfurter: Now, what was before the agency board?

Mr. Burger: Before the agency board was the combination, the cumulation of files of reports, which had been secured by the FBI and other investigative agencies through the Government under this Order. And those reports in sum were before the board.

That is the same type of information which would be before the administrative head of an agency under a Lloyd-LaFollette dismissal.

Justice Frankfurter: Did the agency board have the names of the witnesses on which the FBI based its report?

Mr. Burger: As to some of them; and as to others, not.

Justice Frankfurter: They were not?

Mr. Burger: That is correct.

Justice Frankfurter: Was it given the grounds why it could not give the names of the witnesses on the basis of which the FBI made the reports?

Mr. Burger: I can answer that, Your Honor, as to information by saying that the Order provides that the Board shall receive sufficient information to satisfy the Board.

Justice Frankfurter: To satisfy the Board of what?

Mr. Burger: To satisfy the Board -- I shall read it:

"Provided it" -- the investigative agency -- "furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished and of the sources."

Justice Frankfurter: In other words, X is an informant of the FBI -- that is the investigative agency; is that right?

Mr. Burger: That is correct.

Justice Frankfurter: X is an informant of the FBI. The FBI does not transmit X's name, but gives something that comes from X without disclosing who X is. And as I heard what you read, there is some duty on the part of the FBI to tell the agency why it cannot, some basis on which an evaluation of reliability must be based; is that right?

Mr. Burger: That is right. And I will go beyond that, that every report contains that, and in this case did contain the evaluation of sources as to which the name was not revealed.

Justice Frankfurter: By "evaluation" you mean the FBI thinks they are reliable, or the basis of reliability?

Mr. Burger: No. There are two things furnished by the FBI: First, facts recited in the report relating to the reliability of the person that would indicate the presence or absence of reliability, the presence or absence or possibly existance of bias or motivation for giving an adverse report, if one was adverse.

Justice Frankfurter: I take it that would only apply to casual informants, neighbors?

Mr. Burger: That is right.

Justice Frankfurter: It would not apply to those whom the FBI accredited as permanent informants, would it?

Mr. Burger: Even as to the permanent informants, they make that same evaluation and furnish that data.

Justice Frankfurter: But I assumed that the Department of Justice would not have on its staff permanent informants, unless they are generally accredited, credible and trustworthy.

Mr. Burger: That was furnished. Of course, that may be a conclusion that was made administratively. The Board may not be aware of those facts. That information is furnished to the Board in each case.

Justice Frankfurter: But in all events --

Mr. Burger: The Board directs that in any case they may go back and ask for information, and they often do it.

Justice Frankfurter: In any event, there was before this Board a body of evidence emanating from undisclosed informants; is that right?

Mr. Burger: That is correct; some of it was disclosed.

Justice Frankfurter: Some of it was disclosed?

Mr. Burger: That is right.

Justice Frankfurter (continuing): -- the names of whom, the names or qualifications, the agency would not know anything

about; is that right?

Mr. Burger: That is right.

Justice Frankfurter: Now, would you please tell me this? If I accept the general principle tendered on the question you are discussing, there must be a balancing of interests. What consideration of public security justifies the Government in withholding the names of witnesses on whom it relies, from its own instrument for determining the justice or injustice of a solution, or an examination?

Mr. Burger: In a given case, to answer your question, Your Honor, the informant himself has placed a condition that he will give the information only if his name is not revealed; then the agency has no discretion, the investigative agency, but to take that information and transmit it and indicate in the report, as they do, what reasons may have been given, if any, and what may exist for insisting upon that confidence.

Justice Frankfurter: I suggest it has a choice. It has a choice not to give such confidential information to another branch of the Government. I suggest that one whom the Department of Justice trusts who is unwilling to give the Secretary of Defense -- that may be a bad selection -- Secretary Hobby -- someone who is unwilling, or in the case of whom the Department is unwilling to say, "We want this man to appear before you" -- I suggest that there is a choice of not using such an informant, if you cannot trust the very tribunal which is to sit in

justice on the security of fellow citizens and the availability of people for service to the United States.

Mr. Burger: The consequence of that choice would be to receive and hold information within the hands of one Governmental agency which might be very important in evaluating the trustworthiness of an employee, and not giving it to the people who are going to make the decision.

Justice Frankfurter: It is very difficult for me to understand why a member of the Cabinet cannot be trusted with information in the possession of the FBI. It is very difficult for me.

Mr. Burger: Your Honor, this goes way beyond the Cabinet. This goes to some 150 Boards of three men each operating at a given time, something over five hundred people in all, at any given time, operating under --

Justice Frankfurter: I suggest that that should prevail even to informants --

Mr. Burger: I suspect that is true, and I suspect it is true of many informants, informants who give information in the Conscientious Objector cases that this Court has been passing on.

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There is, I think, a completely parallel process with reference to this confrontation matter. Someone makes the claim for exemption from military service in the time of war or at the present time on the grounds of religion or on the grounds of conscience, and he has a decision made in the first instance by a local board. Then he may appeal to the Hearing Officer. The Hearing Officer gives him a summary of the adverse information, which is exactly what is done under this proceeding.

The man is not permitted to see the sources of information, to know the sources, and he is not permitted to look at the reports. This Court has passed on that and given the reasons why. And there the consequence of rejection of that appeal, the only grounds for rejecting it, would be to find that the man has made a false and baseless claim on grounds of conscience and religion to escape military service, and there can be no greater stigma than that imposed upon a man.

Yet, this Court says that it has already been imposed by that process, and that no formal proceeding was contemplated.

Justice Frankfurter: We just said recently how closely we scrutinized it.

Mr. Burger: That is true. And I think this stands that scrutiny.

Justice Frankfurter: And also, over the protest of what might be called a sizeable majority.

Mr. Burger: This Court has passed on that in two cases with

respect to the process of probation which I would like to refer to. But I see my time is running short.

Justice Frankfurter: I want to ask some more questions, because to me this is a very crucial aspect of the case. It is more than confrontation, that the very judges of the government are not allowed to know who the witnesses are on whose judgment they make an estimate which may have such an adverse effect not only on the individual, but on the service, because in many cases this information is not even available to the Review Board; am I right?

Mr. Burger: Some of it is not; some of it is

Justice Frankfurter: But in this case, the Review Board may be foreclosed from finding out who the witnesses are on the basis of whose testimony they are to make a finding. That is a true statement, is it not?

Mr. Burger: As to part of the witnesses, your Honor, as to some of them.

Justice Frankfurter: Well, there may be crucial ones, and we know the power and we know the significance of cross examination, the Anglo-American procedures.

Mr. Burger: I submit that the same thing precisely is true with reference to the conscientious objector cases, and the same thing was true when this Court was hearing one of the probation cases, one of two that I would like to mention, not cited in our brief.

The Chief Justice: Mr. Burger, before you get to that, did the investigative agency in this case advise the Department in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed?

Mr. Burger: I would like to answer that in this way. I have only seen part of this report. As to part of it, that is correct, that they did so advise.

The Chief Justice: What part?

Mr. Burger: That, I do not know, your Honor. I did not personally make an analysis of the record in this case. The record is not before you.

Justice Black: Are you allowed to see it?

Mr. Burger: I am allowed to see it, yes.

The Chief Justice: If they did not do that, how could they have complied with Order 9835, which says --

Mr. Burger: Excuse me, your Honor. I think you misunderstood me. I said they did do it.

The Chief Justice: You said, in part.

Mr. Burger: As to all the parts of it that I saw, that was done; that is correct. But that is not in issue in the case, because it was not so pleaded. They have not complained here that we did not so disclose.

Justice Frankfurter: But the Order in the case --

The Chief Justice: The Order provides that you must do it.

And if you did not do it, and this man has suffered the injury by reason of it, then --

Mr. Burger: I cannot answer that, your Honor, because the record is not before the Court. Now, if there was a complaint --

The Chief Justice: You say that you have seen the record.

Mr. Burger: In the absence of complaint, this Court must assume that that was done.

Justice Frankfurter: You said you have seen the report?

Mr. Burger: Just a part of it, yes, sir.

Justice Frankfurter: This is not obtrusive and certainly not inquisitive. But by what authority?

Mr. Burger: As an Assistant to the Attorney General, I am permitted to see it.

Justice Frankfurter: You are permitted to see it, but this Court is not?

Mr. Burger: What court are you speaking of now?

Justice Frankfurter: This Court.

Mr. Burger: That is a choice of the plaintiff. By his decision, he can release it to this Court. The government can have no objection.

Justice Black: He can release the names of the informants and let us see who they are?

Mr. Burger: He can release the official record of the Board.

Justice Frankfurter: I do not understand how the lawyer can

see it and the Court cannot.

Mr. Burger: But that is a decision made by the counsel, to come up on the pleadings and not on the record. That is not a question of the government's part.

Justice Frankfurter: But I do not understand why whatever relieves you from whatever restriction on that you have, does not also relieve it for this Court. I do not understand that.

Mr. Burger: That is a question --

Justice Frankfurter: You are not revealing confidential communications of a client, are you?

Mr. Burger: No. That is a choice made by the litigant here, your Honor. The government is not responsible. We did not bring the case to the Court.

Justice Frankfurter: That is not the question. The question is the basis on which this Court is to make its determination. As I understand it, you have in your possession knowledge not obtained by you because of relations between attorney and client, but because of some other reasons, you are placing your restriction on a document not open to the Court, but open to you.

Mr. Burger: What the Court is really suggesting is that that is a reason why this case should not be decided on the pleadings. That is all.

Justice Frankfurter: I am not suggesting anything. I am only outlining the situation.

Mr. Burger: But that is a situation which the government did

not come here on its own choosing on.

Justice Reed: Are you speaking of the record before the Review Board?

Mr. Burger: I understood Mr. Frankfurter's question was directed --

Justice Reed: You said that you had seen the records before the Review Board; is that correct?

Mr. Burger: That is correct.

Justice Douglas: I thought we were talking about --

Mr. Burger: We have been talking about different records at different times, your Honor.

Justice Douglas: -- the names of the informants.

Justice Frankfurter: You understood my question. I was talking about the record before the Review Board.

Mr. Burger: The Review Board.

Justice Harlan: Mr. Burger, if the plaintiffs had chosen to come up on their merits instead of on the pleadings, would there have been any interference or objection on the part of the government, or to their having available and this Court's having available, the record?

Mr. Burger: Not the slightest.

Justice Harlan: And that is the whole point?

Mr. Burger: That is the whole point, the election which we did not make.

Justice Black: Would the whole record have included the names

of the informants?

Mr. Burger: The whole record would have included everything that the Board had.

Justice Black: And would it include the names of the informants?

Mr. Burger: I had not finished, your Honor.

Justice Black: Go ahead.

Mr. Burger: It would include some of the names, the ones that the Board saw, and would not include others. As to those where they were not included, there would be the evaluation of the FBI as to the reason of national security, why they did not include the name.

Justice Douglas: So once we have the record, we still haven't much. Don't we still have a question of law?

Mr. Burger: That is correct. The basic question would still be here.

Justice Frankfurter: But the question of what the informant told the FBI, why they could not give the name, would be before us, would it not? That would be in the record, would it not?

Mr. Burger: I do not believe so. I am not sure I got your question, your Honor.

Justice Frankfurter: If the FBI does not foward the name of the informant, the regulation requires explicitly that it should give a full account of the reason for not forwarding it?

Mr. Burger: Well, when you use the words "full account," I think it says, "sufficient to satisfy the Board."

Justice Frankfurter: All right. Anyhow, the record would disclose that, would it not?

Mr. Burger: That is right.

Your Honor, I see that my time is up.

The Chief Justice: You said that you had two cases you would like to cite.

Mr. Burger: I would like to go into them.

The Chief Justice: You may.

Mr. Burger: The first case is Escoe v. Zerbst, which we have not cited in our brief, but we will give the Clerk a memorandum of the citation, and supply it to the counsel. That is a case that came up to this Court in 1934, where a young man down in the Eighth Circuit had been convicted of a crime and sent to five years in prison. He was put on probation by the judge on the basis of his record.

Some time after he was out on probation, the Court got information that he was violating the terms of the probation, which were that he violate no state or federal penal statute and that he live a good, clean, temperate life. The Court sent the Marshal out to take him right to Leavenworth Prison without more of a review.

This Court sent the case back, but in doing so, Judge Cardozo said, "We do not want this to be taken to mean that he is

entitled to any kind of full trial, or entitled to be confronted by the witnesses who reported to the Court that he was violating his parole, that that is a decision for the Court."

The Chief Justice: Of course, there is no requirement in probation matters that they do have any such kind of hearing, is there?

Isn't that a matter within the plain discretion of the Court?

Mr. Burger: That is right.

The Chief Justice: And the whole probation system is for the benefit of the accused?

Mr. Burger: That is right, sir. And I was addressing myself to the constitutional aspect of it, as to whether or not confrontation was required.

The Chief Justice: But he has already been convicted of the crime, and the Court is merely granting him this leniency so long as, in the opinion of the Court --

Mr. Burger: (interposing) That is right. But in terms of the rights being invaded -- one day he is in Cedar Rapids, Iowa, and the next day he is over in Leavenworth, Kansas, or two days later, but not knowing by what informants he had gotten there.

Now, next the Williams Case. Williams V. New York is even more important, and I will close on that --

Justice Burton: What is the citation to the Zerbst case?

Mr. Burger: The Zerbst case is 259 U.S. 490, and the Williams v. New York is 377 U.S. 241.

Williams, in New York, was convicted after trial of murder in the first degree.

Justice Black: He had a trial before a jury, did he?

Mr. Burger: That is correct.

Justice Black: A regular court of this country?

Mr. Burger: That is right. A jury of 12 people found him guilty.

Justice Black: Was there a regular judge?

Mr. Burger: That is right.

Justice Black: Was he permitted to see and hear his witnesses, and cross examination?

Mr. Burger: That is right.

Justice Reed: And he was sentenced --

Mr. Burger: I was just getting to that. The Judge had gotten to the sentencing point. The jury recommended a life sentence for this man. Under the New York Statute, the Court had the power to accept that -- that was advisory only -- accept it, or he could reject it and send him to the electric chair. The judge had a probation report before him, and conducted, he indicated from the Bench, an investigation of his own, about the background, the life, the habits, the family and the general background of the whole man, trying to evaluate this man as a security risk for society as a whole.

On the basis of that information and from the Bench the Judge announced that he was going to send him to the electric

chair, on the basis of this secret information from confidential informants, some of which may have been known to the Court and some of which may not have been known. The case does not disclose that.

I think this Court has said for us in better form than we have said it in our brief or than I can say in this argument, the reason for it. And if I may abridge the usual rule of not reading the Court's language to it, I would like to do so. The Court said:

"Tribunals passing on the guilt of defendants have always been hedged in by strict evidentiary procedural limitation. Rules of Evidence have been fashioned for criminal trials which narrowly confine the trial process to evidence which is strictly relevant to the particular offense charged."

The Court went on to say that in the post-verdict process, reports, investigative reports, have been given a high place by the judges who want to sentence persons upon the best information available rather than on guesswork.

Justice Minton: Mr. Burger, let me see if I understand what the Government's position is with reference to this kind of hearing he is entitled to. The President may or may not give a hearing; is that not true?

Mr. Burger: That is certainly conceded by counsel in this case.

Justice Minton: Now, if the President gives the hearing and

the employee is found unfit for employment because of the question as to his loyalty, in such a hearing the employee is entitled to such a hearing as the President has provided, not due process; is that your position?

Mr. Burger: That is our position in the first instance, and then we can go beyond that --

Justice Minton: Then they have complied with the provisions here.

Mr. Burger: I can go beyond that and say that even if the due process clause applied, this process is due process under the circumstances, fitting the needs of the government to the rights invaded, and having in mind what this Court has done in other comparable situations.

One last word as to the reason which the Court assigned in this Williams case for the confidential nature of the informants.

Justice Harlan: Do you draw in that respect any distinction between a nonsensitive employee and a sensitive employee?

Mr. Burger: As to questions of loyalty, Mr. Justice, no. There are not any. The charwoman and the janitor might be as serious a loyalty breach as the Cabinet officer, and the investigative record on that score bears that out fully. All the literature on the subject bears that out.

Justice Reed: Mr. Attorney General, is there a copy of the record of the charges that have been made against this gentleman?

Mr. Burger: There is not. And that is protected by the privilege which the Presidential Order confers upon Dr. Peters. If he waived the privilege, that would be in the pleadings, and could have been. But in this case, he indicated that it would not be. But that is no desire on the part of the Government. If Dr. Peters waives it, we will.

Justice Black: Do you find comfort in the Williams case, in treating a defendant -- with the power of the judge -- a man who has been convicted after a fair trial, with a fair court, being confronted with witnesses, in contrast with the wholesale trial of the Government employees, citizens of this country, who have had nothing and who have never had a chance to be tried before a jury, face a witness -- do you find comfort in comparing those Government employees and the right to determine whether they are to be found guilty of infamous crimes,

and the power of a judge in determining what sentence will be imposed, in exercising judicial authority to seek information from whatever source he can to see that he is doing justice?

Mr. Burger: I would like to answer that in this way, if I may:

If the Court in this case, the trial court, could make the choice between letting Williams live and sending him to the electric chair, which clearly he did, by the secret informant process, withheld from him, and no confrontation or cross-examination, I do submit that Dr. Peters may be dismissed from Federal employment under this program on the same kind of process.

Justice Black: But Dr. Peters had no trial.

Mr. Burger: For reasons which are far more important than the reasons of protecting confidential sources in probation cases. And one sentence on the decision indicated that, where this Court said that we must recognize that most of the information now relied upon by judges to guide them in the intelligent disposition of sentences would be unavailable -- would be unavailable -- if information were restricted to that given in open court.

Now, the same thing is true with reference to any loyalty proceeding. The same thing is true with reference to this conscietious objector case. We submit that the needs of the Government with respect to the security program vastly outweigh the need of the Court and the Government in the probation process

and in the conscientious objector process, and that weighing those two needs against the right, and reconciling them that should be resolved in favor of the Government, and that the Government's decisions to do it in this way, the best way they know how, should be sustained.

Justice Frankfurter: Security even as against highly placed officials who have the ultimate determination of whether or not a man should be discharged from the service?

Mr. Burger: If you include in there --

Justice Frankfurter: -- whether a man where the head of the Board is now cannot be trusted, against the say-so of someone, that his name should be withheld?

Mr. Burger: There is not one. There are at least 400 or 500.

Justice Frankfurter: I am talking about review boards. That is not 150. That is just a handful of people.

Mr. Burger: That is relatively small.

Justice Frankfurter: And they are denied to officials, but are placed in the hands of subordinates in the Department of Justice.

Mr. Burger: There are numerous people involved in that process, Your Honor, and if the security aspect is evaluated by the Department which has that responsibility in that way, I submit that that is an administrative determination.

Justice Frankfurter: When you say "department," that means

a few human beings, fallible, who, in the interests of zeal, which sometimes outweighs discretion, a few individuals in a subordinate place in the Department of Justice determine the basis on which a highly placed, handful of people should act. That is the security on which we rest.

Mr. Burger: And I suggest that the administrative history of that process shows a pretty good record of discrimination.

Justice Frankfurter: How do you test it? How do you test the success of it?

Mr. Burger: There are not subjective tests, but there are objective tests in the total record, that out of 4,500,000 or 4,750,000 checks, it resolves itself down to 17,000 hearings that resulted in 560 dismissals, and as to more than half of those 560 dismissals, they were people who were applicants trying to come in.

Justice Frankfurter: So those are quantitative tests which do not take account of pervasive, spiritual consequences which are not subject to these crude tests.

Mr. Burger: I said that this was objective purely, Your Honor, and this process of weighing is to look at how an administrative process has worked, and I submit that on the record --

Justice Frankfurter: No. But if the standards are inadequate, then the results of those standards are inadequate.

Mr. Burger: That, of course, is to be determined by this

Court.

The Chief Justice: Mr. Burger, in view of the fact that the procedural question was not briefed, would you brief for us the question of whether the Board can review an agency's dismissal of the proceeding against an accused employee?

Mr. Burger: Of course, Your Honor. I shall be very happy to do so.

The Chief Justice: Can you brief that point also?

Mr. Arnold: We will.

The Chief Justice: Can we have that by Thursday night?

Mr. Burger: You shall have it before that.

Justice Frankfurter: Of course, as one member of the Court, I have other difficulties with the fulfilment of the Order. And I suggest that when you go through the Order which is controlling upon this Court, you may want to direct your attention to see whether the requirements of the Order of the President, which is the basis of the validity of any Order by the Board, have been satisfied in every particular, whether Mr. Arnold has raised the questions or not.

Mr. Burger: We shall undertake to see if there are any which he has not raised. He has raised only one. So we shall look for others.

Thank you.

The Chief Justice: Mr. Porter.

REPLY ARGUMENT ON BEHALF OF PETITIONER

By Mr. Porter

Mr. Porter: Mr. Chief Justice and Your Honors, I would like at the outset, if I might, to try to clarify the situation with respect to the circumstances as to why the transcript of record at the hearings below was not made a part of this record.

As appears in our transcript of record at page 21, paragraph 25 of the defendant's answer states explicitly that they allege that at the hearing before the panel of the Loyalty Review Board, no evidence was adduced except that adduced by counsel for the plaintiff but alleged that the entire record on which the panel of the Loyalty Review Board considered plaintiff's case contained evidence contrary to that adduced by counsel for the plaintiff.

Now, if Your Honors please, that is to say that if we had certified that transcript in this proceeding, all that would have been before this Court, the District Court and the Court of Appeals, was the evidence from Dr. Peters and his friends favorable to him. There would not have been before this Court any of the data to which Mr. Burger referred, namely, as to what the Review Board considered. It was not available to us or to his counsel below, and so we felt that it was unnecessary to burden this record with only the favorable testimony and the interrogatories and Dr. Peters' responses thereto.

Justice Frankfurter: Wouldn't the certification or

whatever the proper word is -- wouldn't the transmission of the evidence from the FBI contain the reasons they were not making the disclosure?

Mr. Porter: That would not, sir.

Justice Frankfurter: Then how can we possibly tell whether they satisfy the Order, on the assumption that we must assume that everything that everybody does is regular, which is certainly an assumption contrary to the fact and the experiences of this Court?

Mr. Porter: The correspondence, if any, between the FBI and the Loyalty Review Board and the panel below was again in the category of confidential information, not made available to accused or counsel. So therefore we felt --

Justice Reed: It was in the record before the Board, was it not?

Mr. Porter: Yes, but that record, Mr. Justice Reed, would not be available even to this Court by the Government. It has not been made available to Dr. Peters or to his counsel. So all that the transcript of record would have shown, as it did in the Bailey case, was the evidence favorable to the accused.

And I think that the Court will recall that it was conceded that there was no evidence that was in that record that was adverse to the accused. So we felt a similar kind of situation would have developed in this case, and it would have

been of no help to the Court.

Justice Reed: Counsel for the Government said that he was perfectly willing for you to bring the entire record in.

Mr. Porter: Yes. But I think there was confusion of definitions, Mr. Reed. By that he meant the transcript of evidence contained at the hearing. It does not mean the information, the dossiers, that were before the Review Board in considering Dr. Peters' case.

Justice Frankfurter: Or the explanation of why there was not any dossier?

Mr. Porter: Or the explanation as to why the names of the informers were not revealed, or the correspondence between the investigative agency and the Review Board. So all that the Court would have had here would have been testimony favorable to Dr. Peters.

Justice Frankfurter: Would the record, if I am allowed to ask this question without transgressing -- would the record disclose demands by Dr. Peters' counsel for this data or the other thing? Would the record show that you made requests and that you had made calls?

Mr. Porter: Yes.

Justice Frankfurter: Would the record show that those calls and requests were denied?

Mr. Porter: In the --

Justice Frankfurter: Would the record show that?

Mr. Porter: Yes, the record would show that, and we have so alleged in the initial complaint, and it is not denied.

Now, we would be perfectly happy, if the Court please, to make the record available of the hearings below.

Justice Frankfurter: You should not feel under any pressure so far as the Court is concerned. I think it is very desirable, as I thought it was desirable in the Bailey case, that we should be able to see the record.

Mr. Porter: In this case, Your Honor, we offer it, if the Court so desires. But as I say, I do not believe that it will reach these issues which the Court has been addressing itself to during Mr. Burger's argument.

Justice Reed: Did you ask the Government to release the entire record when it was before the Board?

Mr. Porter: We will produce the record as it was available to us and file it with the Clerk, if the Court so desires. The rest is not available to us.

Justice Reed: You are not going to ask for it; is that right?

Mr. Porter: I do not think at this posture of the case that we could, sir. We will furnish what we have, which as I see it, consists of testimony of Dr. Peters and the allegations --

Justice Frankfurter: Unless I misconceive the whole thing, you are not in a position to ask Mr. Burger, because he is free to decline; is that right?

Mr. Porter: Precisely.

Justice Frankfurter: That is the whole point of this case, that he need make no such disclosure.

Mr. Porter: That is correct. I do not think that perhaps he would be permitted to make it.

Justice Frankfurter: That is right.

Mr. Porter: Under the applicable Executive Orders.

Justice Frankfurter: So I understand.

Mr. Porter: If the Department felt that this was information in the confidential category, it would not be available even on request.

Now, as I say, the only thing -- we do not know what was in the minds of the Board or what information they had, what information they considered. All we know is that there was nothing which in our judgment was derogatory to Dr. Peters.

Justice Harlan: Does that mean literally that there would be no way in which the Court could find out whether the Review Board, in saying that it had other information, was telling the truth?

Mr. Porter: I would have presumed that there would be nothing in the record, Mr. Justice Harlan, that would disclose what was in the Review Board's possession, what they had before them, and what they considered, and that there is no way under these procedures for any court to reach that on this secret evidence and on matters which have been restricted by the Depart-

ment of Justice.

Justice Douglas: Unless the Court went beyond the record.

Mr. Porter: That is right; unless the Court went beyond the record.

Certainly, it is not available to the parties, except the Review Board.

Justice Reed: You use the word "record" to mean what you know about it?

Mr. Porter: That is precisely it, sir. And that record is, as I say, the conventional kind of testimony in these proceedings and Dr. Peters' own statements.

Now --

The Chief Justice: Mr. Porter, we will continue. We will conclude the case this afternoon.

Mr. Porter: Very well, sir.

I would like next, if I may, to address myself to the question of punishment, which I think was raised by Mr. Justice Reed.

In one of the standard works, "The Federal Loyalty-Security Program," to which the Government and counsel for the petitioner refer in their briefs, at page 65 of "The Federal Loyalty-Security Program," by Miss Bontecou, you find this comment, in talking about the Review Board:

"The Board went beyond this, however, to make

certain that an adverse judgment will follow the employee into private life. It directed that, in the event of an inquiry, a prospective employer should be told when Government employment had been terminated after proceedings under Executive Order 9835. In the case of anyone who left his job before his case was completed, even though only the postaudit was involved, the prospective employer was to be informed that the check on loyalty was never completed. The Chairman of the Loyalty Review Board has left no doubt that these rules were issued with full understanding of their potential impact. He stated that they 'mean a man is ruined everywhere and forever. No reputable employer would be likely to take a chance in giving him a job.'"

Now, that, if you please, is what we mean in using the term "punishment" in addition to what this Court has referred to in the Wieman-Updegraff case as a badge of infamy and deep stain.

I submit, Your Honors, that the Government has not maintained the two standards in the test laid down by Mr. Justice Frankfurter as to due process. First, the mere assertion that the Government has an interest, and an interest in security, I do not think is sufficient. We have heard no description or details or documentation as to what the nature of that interest is. We think, as a matter of fact, that the interest can be

established to the contrary.

When I heard today the Government assert that the rights and interests of Federal employees and the security and protection of their jobs, the procedure involved in that is analogous to a convicted felon or a paroled convict, it was not surprising to me to note, as we have in our reply brief, the report of the Hoover Commission on Reorganization as to the depressing effects and lower morale of Government employees.

Now, the Government in its main brief on page 104 makes a very interesting observation which I think has some impact in this proceeding. There they discuss that no one contends that perfection exists, but for the need of this program, they refer to the Black Tom case in World War I and the fact that there was a total absence of known sabotage in World War II.

Well, I submit, if the Court please, that the Orders that are here under discussion are postwar Orders and that during World War II it was the use of effective, expert police and detective work that prevented sabotage and espionage. It was not this panoply of inquiries and demands, thoughts, opinions, beliefs, their past associations and actions, that had any responsibility when the nation's security was threatened by a shooting war that espionage and sabotage were prevented.

And I say I hope that one of the effects of this case will be that these investigators can return to the duties and functions of direct protection.

Now, we think that we have established that the national interest lies in adherence to these Constitutional procedures. I have made reference to the Hoover Report about the morale of the Federal employees, which should be of concern, obviously, to the Government.

We also have cited in our brief the comment of the Orthopsychiatric Institute, in which they discuss the effects on mental health of these proceedings, and we have handed up to the Court the moving story of Beatrice Murphy Campbell, who was a psychological casualty of these kinds of procedures, even though acquitted.

I would like, if I may, in closing to point out to the Court that in the Bulletin of Atomic Scientists which was released only recently and which was published this morning, in discussing the question of security, there were 65 pages and 15 articles developing every aspect of this, and Professor Shils of Chicago said that:

> "Somewhere in the neighborhood of 1,000 qualified scientists" are estimated to have "encountered security difficulties."
>
> He reports:
>
> "A small number of senior scientists and some outstanding younger scientists have apparently refused to work in fields dominated by the security procedures."

He reaches what is to me an amazing conclusion, but I think

it is a valid conclusion, that if postwar security provisions had obtained during the war, it would not have been possible to have accomplished anything approximating the great successes of wartime scientific research.

Now, we have quoted in our main brief the comments of Dr. Vannevar Bush. This recent report certainly corroborates his earlier conclusions.

So we contend, if Your Honors please, that the Executive has no longer the power to try and condemn a person as disloyal to his country. We say that due process would also be violated if the employee were discharged without a hearing, but a finding was made and spread on the official record that he was disloyal. We say that due process was violated here because there was no confrontation.

In other words, Mr. Justice Harlan, we say that the petitioner could never be adequately informed of the nature of the charge against him without knowing the identify of these informants.

Now, the Government can, of course, as Judge Arnold has said, discharge employees in the usual case without a hearing in the interests of the efficiency of the service, but the Government cannot discharge, we maintain, a person in other circumstances regardless of the procedure.

For example, a regulation barring all Catholics or Jews or any other test of that kind would, of course, violate due process.

We say that here, where the Government has established a hearing and where they have invoked a hearing process, and where it conveys the impression of a decision by an impartial tribunal on the evidence, it must give a due process hearing. And there is no doubt that the question of punishment is clear and unequivocal.

Mr. Chief Justice, we propose to file a copy of the transcript we have with the Clerk, with the Court's permission. I say I have reservations as to the extent to which --

The Chief Justice: Perhaps I can ask a question of Mr. Burger that will clear that up.

Mr. Burger, did I understand you to say that if the petitioner had come to this Court on the merits, all the information available to the Board would be a part of the record?

Mr. Burger: Oh, no.

The Chief Justice: Well, I understood you to say that it would have been available to the Court.

Mr. Burger: The record in the case would have been before the Court; the record in the case.

The Chief Justice: That would have been nothing but the testimony of the petitioner and his witness?

Mr. Burger: And the charges.

The Chief Justice: But I understood you to say that we could have had the dossier and everything that went before the Board.

Mr. Burger: I certainly did not intend to give the Court that impression. It would take a Presidential Order to permit that to be released under any circumstances. The Presidential Order forbids --

The Chief Justice: In that case, we would gain nothing by putting counsel to the expense of printing the testimony of his witnesses, would we?

Mr. Burger: That is a question I am afraid I would have to let the Court answer.

The Chief Justice: I misunderstood you, because I thought you said that you have no objection at all to the Court's seeing the report upon which the Board acted.

Mr. Burger: At that time I understood the questions to be directed to the notice of charges and the report of the proceeding, but not --

The Chief Justice: Of course, there is nothing there except the testimony of the petitioner and his witnesses.

Mr. Burger: That is correct.

The Chief Justice: And, of course, as far as I am concerned, I would not want to put them to the expense of preparing a record for that purpose.

Mr. Burger: It would be just what the testimony before the Court --

Justice Frankfurter: Mr. Burger, was there not a regulation or a rule or something issued in 1952 by the Civil Service

Commission explaining that the President's Order is not a restriction upon the availability of the personnel record of any person in the service -- I do not know whether this would fall in that -- at the request of any agency or the Judicial Branch of the Government? Is there not such a law?

Mr. Burger: I do not know. We will check on that.

Justice Frankfurter: Would you advise me on that?

Mr. Burger: We will advise the Court on that if you ask us to advise you on that. We will undertake to do it.

The Chief Justice: Thank you.

(Whereupon, at 4:40 o'clock p.m., the arguments were concluded.)

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