The original documents are located in Box 27, folder "National Security Council - Requests for Access to Records (3)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

NSC

THE WHITE HOUSE

WASHINGTON

June 10, 1976

MEMORANDUM FOR: JEANNE DAVIS

FROM: PHIL BUCHEN

Much to my chagrin, I find that I neglected to submit to you previously the draft of letter which Dr. Rhoads would like me to send that deals with the release by the Archives of exchanges of correspondence between heads of state where the correspondence has been deposited in the Presidential Library.

My understanding is that you have had instances where correspondence of this type has not been classified and therefore it is not subject to the provisions of Section 11 of E. O. 11652.

The attached draft of letter proposes to apply a single rule to both classified and unclassified exchanges of correspondence and requires prior consultation with you in both instances unless the exchange of correspondence is more than ten years old or, if older, involves a head of state who still holds office. Please let me have your comments on the attached draft.

Attachment

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

National Archives and Records Service
Washington, DC 20408

Copy for Barry

MAY 18 1976

Honorable Philip W. Buchen
Counsel to the President
The White House
Washington, D. C. 20500

Dear Mr. Buchen:

Enclosed is the draft letter relating to heads of state/heads of government exchanges which we discussed on the telephone on May 7.

The ten year period noted in the letter strikes us as being realistic and reasonable, especially when coupled with agreement that older material will be referred to the NSC staff if the foreign official is still holding high office. A longer period could subject us to criticism that would best be avoided.

I look forward to an amicable resolution of this issue. I would, of course, be happy to discuss the matter further, if necessary.

Sincerely,

Brot RRoads

JAMES B. RHOADS
Archivist of the United States

Enclosure

DRAFT

Dear Dr. Rhoads:

As we have discussed, to avoid any possible damage to current foreign relations of the United States I suggest that classified and unclassified exchanges of correspondence between heads of state or heads of government located in Presidential Libraries be submitted to the National Security Council staff for its opinion prior to their release to the public. Since the sensitivity of this type of material diminishes with the passage of time, I believe we need only be concerned about such exchanges of correspondence which are ten years old or less, or older documents if the correspondence is from a head of state or government who still holds high office. This request for NSC review of such correspondence is, of course, directed only to that material which has not previously been made available to the public.

I recognize that the National Archives must respond in a timely fashion to public requests for access to this material. To assure that this arrangement is workable and responsive both to your needs and to the public's, I am asking that the National Security Council staff respond quickly to such material when you send it. I would think that a month would be a sufficient period for their review.

Sincerely,

Philip Buchen

NSC

Office of the Attorney General
Washington, D. C. 20530

July 6 1976

Honorable Philip W. Buchen
Counsel to the President
The White House
Washington, D. C. 20500

Dear Mr. Buchen:

This will confirm and approve the May 5, 1976 letter from Assistant Attorney General Richard L. Thornburgh requesting certain documents from the White House in connection with a Criminal Division investigation of possible violations of Federal law arising from testimony in 1973 and 1975 before the Senate Foreign Relations Committee and its Subcommittee on Multinational Corporations, as well as before the more recent Rockefeller Commission.

Inspection and photographic reproduction of the documentary material requested by Assistant Attorney General Thornburgh are needed for the lawful and current business of this Department, and your prompt attention to this request will be appreciated.

Sincerely,

Edward H. Levi
Attorney General

NSC (see Justice / Mr B. has the

THE WHITE HOUSE

WASHINGTON

July 19, 1976

MEMORANDUM FOR: BILL HYLAND

FROM: PHIL BUCHEN P.W.B.

Attached is a request of May 5, 1976, from Assistant Attorney General Thornburgh for copies of certain documents relating to CIA operations and activities in Chile in 1970. In discussing this matter with Justice, it is my understanding that the Department is interested in documents contained in the NSC institutional files as well as the Nixon Presidential files. Attached is a letter from the Attorney General approving this project. We are separately contacting counsel for former President Nixon concerning the search of the Presidential files.

In the meantime, I would appreciate if someone on the NSC staff could contact Mr. Robert Andary, 739-2346, of the Justice Department to make arrangements for review of the relevant NSC files and copying of material where appropriate. Due to the breadth of the request and the level of classification of these materials, it may be preferable if Justice is allowed to look through the relevant materials and designate what it needs in order to minimize the amount of materials to be duplicated.

If you have any questions in this regard, please contact either Barry Roth of my office or me.

Thank you.

ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Department of Justice
Washington 20530

MAY 5 1975

Honorable Philip W. Buchen
Counsel to the President
The White House
Washington, D.C.

Dear Mr. Buchen:

As you know, the Criminal Division has been investigating possible violations of Federal law arising from testimony in 1973 and 1975 before the Senate Foreign Relations Committee and its Subcommittee on Multinational Corporations, as well as before the more recent Rockefeller Commission. The testimony in question concerned Central Intelligence Agency activity and private corporate activity in Chile during the period 1970-1973.

In connection with this investigation, it is now necessary to request certain documents from the White House. Please assist us by furnishing any documents in White House files or archives which:

(1) were prepared by the White House, that is, by President Nixon, or by any advisor, assistant or member of the White House staff including but not limited to Dr. Henry Kissinger, General Alexander Haig, and Colonel Richard Kennedy, which concern any meeting, briefing, contact or communication with employees of the Central Intelligence Agency, including but not limited to Richard Helms, Thomas Karamessines, and William Broe, during the period September 1, 1970 through December 31, 1970 and relate to Central Intelligence Agency operations and activity in Chile; or

(2) were furnished by the Central Intelligence Agency and which concern Central Intelligence Agency operations and activity in Chile in 1970, or concern contacts or communications between the White House, as defined above, and any employee of the Central Intelligence Agency during the period September 1, 1970 through December 31, 1970 relating to Central Intelligence Agency operations and activity in Chile; or

(3) were furnished by any other Department or Agency, including but not limited to, the Departments of Defense, Justice, and State, the Defense Intelligence Agency and the National Security Agency, or the Heads thereof, including John Mitchell, during the period September 1, 1970 through December 31, 1970 which concern Chile; or

(4) were furnished by,or concern any meeting, briefing, contact, or communication with, any American or foreign business, firm or corporation, including but not limited to, ITT, Anaconda, Pepsi-Cola, and El Mercurio, or any owner, director, employee, or representative thereof, in the period September 1, 1970 through December 31, 1970, which concern Chile.

Any documents you make available to us will be treated in accordance with their classification and will be promptly returned to the White House when any evidentiary use of the documents has been completed. Your assistance and cooperation will greatly assist us in our investigation.

Sincerely,

RICHARD L. THORNBURGH
Assistant Attorney General
Criminal Division

THE WHITE HOUSE

WASHINGTON

August 7, 1976

NSC
for
HOLD

MEMORANDUM FOR: KEN LAZARUS

FROM: PHIL BUCHEN P.

Attached is a memorandum from Jeanne Davis on which I would like you to prepare responsive comments. It occurs to me that Congresswoman Schroeder may feel that the studies in question could be edited sufficiently that they could be furnished to her. That seems to be here idea based on the fifth paragraph of her letter. In any event, I think we should be sure that Jeanne Davis' legal interpretation of the FOIA coincides with ours.

NSC

THE WHITE HOUSE

WASHINGTON

August 10, 1976

MEMORANDUM FOR

LEON ULMAN
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

Subject: Declassification of Memorandum to President Eisenhower

In response to your memorandum of July 22, 1976, I am returning the materials in question and can report to you that neither the NSC staff nor our office has any objection to the declassification of this document.

P.W.B.

Philip W. Buchen
Counsel to the President

THE WHITE HOUSE
WASHINGTON

8/9/76

Phil:

John Matheny handed the attached materials to me and indicated that NSC has no objection to declassification of the memo.

NATIONAL SECURITY COUNCIL

Steve —

per our conversation

[if you see problems
we should resolve
a memo]

John Marsh

NATIONAL SECURITY COUNCIL

August 3, 1976

TO: John Matheny

FROM: Steve Skancke

I can see no reason why this document may not be declassified. In my opinion, its release would not be expected to cause damage to our national security.

I don't think there is any need, however, for us to comment one way or the other.

Ken Lazarus Rec #106

See if we
have a folder
marked

NSC
Presidential
papers

THE WHITE HOUSE

WASHINGTON

~~Confidential~~ July 22, 1976

MEMORANDUM FOR: JOHN MATHENY

FROM: PHILIP W. BUCHEN P.W.B.

SUBJECT: Declassification of Memorandum to President Eisenhower

The Counsel's Office sees no reason why the attached memorandum could not be declassified.

Attachment

THE WHITE HOUSE

WASHINGTON

UNCLASSIFIED UPON REMOVAL OF CLASSIFIED ATTACHMENTS

~~Confidential~~

July 22, 1976

sent down 8/2/76

MEMORANDUM FOR: JOHN MATHENY

FROM: PHILIP W. BUCHEN P.W.B.

SUBJECT: Declassification of Memorandum to President Eisenhower

The Counsel's Office sees no reason why the attached memorandum could not be declassified.

Attachment

Form No. DJ-34
(Rev. 9-31-56)

DEPARTMENT OF JUSTICE

CLASSIFIED DOCUMENT RECEIPT

Control No. _____

FROM (Division or Office) Leon Ulman, Office of Legal Counsel, Justice Dept.

TO Phil Buchen, Counsel to the President, White House

DELIVERED BY _____ For _____ Room _____

RECEIVED BY Arthur Robertson For _____ Room _____

DATE July 22 1976 Time _____

IDENTITY OF DOCUMENT

ADDRESSEE Phil Buchen

FROM Leon Ulman

DATE 7/22/76 No. PAGES 28 COPY Xerox OF _____ COPIES

CLASSIFICATION Confidential FILE NO. _____

SUBJECT: Declassification of Memorandum to President Eisenhower (unclassified) with confidential letter to ODAG, attn Hauser, from Edwin A. Thompson and Memorandum to President Eisenhower from AG Brownell re amnesty proposal suggested by Arthur Hays Sulzberger in June 1953.

INSTRUCTIONS

Execute this receipt in duplicate and secure signature of person to whom the classified document is delivered. The original copy should be sent to the Divisional Top Secret Office. The duplicate should be retained by person releasing document.

Execution of a receipt is not required when a person who has signed for another person delivers the document to the addressee.

Transmittal of documents outside the Division or the Department must be cleared through the Divisional Top Secret Control Officer.

GPO 909-946

Form DJ-150
(Ed. 4-26-65)

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

Memorandum

~~CONFIDENTIAL~~ (Unclassified when classified enclosure is removed)

TO : Phil Buchen
Counsel to the President

DATE: JUL 22 1976

FROM: Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

SUBJECT: Declassification of Memorandum to President Eisenhower

The Attorney General has asked us to review the attached memorandum (classified "Confidential") as part of a mandatory declassification review requested by Mr. Duane Tananbaum. Because the document is a Memorandum to the President, we solicit your views. The memorandum (addressed to President Eisenhower by Attorney General Brownell in 1954) contains a legal analysis of a then-current "amnesty" proposal for former members of Communist-front organizations, closing with a recommended response to the proposal. Our present inclination is to recommend that the document be declassified, inasmuch as we find nothing in it the release of which could be reasonably expected to damage the national security.

Since we are already a bit behind our scheduled reply to this request, we would appreciate expedited attention.

Attachment

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

National Archives and Records Service
Washington, DC 20408

In reply refer to:
NLE-76-43

MAR 19 1976

CONFIDENTIAL (Unclassified when classified enclosure is removed)

Office of the Deputy Attorney General
ATTN: Susan M. Hauser, Staff Assistant
Department of Justice
Washington, DC 20530

Dear Sir:

Under the provisions of Section 5(C), Executive Order 11652, Duane A. Tananbaum has requested mandatory classification review of the enclosed document from the papers of Dwight D. Eisenhower as President of the United States, 1953-61 (Administrative Series), in the Eisenhower Library's holdings.

Please review the document and, if it may be declassified, mark it appropriately. If the document must remain classified in the interest of national security, mark it with the applicable exemption category from Section 5(B) of the Executive order and with a date or event when automatic declassification may be accomplished. We would appreciate return of the document copy with your response.

Sincerely,

Edwin A. Thompson

EDWIN A. THOMPSON
Director
Records Declassification Division

Enclosures

RECEIVED
OFFICE OF THE
DEPUTY
ATTORNEY GENERAL
MAR 22 10 54 AM '76

UNCLASSIFIED UPON REMOVAL
OF CLASSIFIED ATTACHMENTS

GERALD R. FORD LIBRARY

CONFIDENTIAL

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

Keep Freedom in Your Future With U.S. Savings Bonds

Request for Mandatory Review of Classified Material in the Custody of the National Archives and Records Service

Date of request: _____
NLE 76-43

Name of depository: Dwight D. Eisenhower Library

Address: Abilene, Kansas 67410

I hereby request mandatory review of classified materials (as per attached list) in the Papers of Dwight D. Eisenhower as President of the U. S., 1953-61 (Administration Series) in accordance with the provisions of Executive Order 11652, Sec. 5 (c).

Signature of requestor: Diana Tananbaum

Address: 147 E 82nd St 7C
NY NY 10028

Telephone No.: _____ (Area Code: 212 535 1970)

DWIGHT D. EISENHOWER LIBRARY

List of Documents submitted by Duane A. Tananbaum for classification revi under the mandatory review provisions of E.O. 11652.

Collection Title: Eisenhower, Dwight D.: Papers as President of the United States (Administration Series) MR NLE 76-43

Box No.: 8 Folder Title: Brownell, Herbert, Jr., 1952-54 (3)

FOR LIBRARY USE ONLY					Please provide all information requested in the four columns low as provided on GSA Form 7122, Withdrawal Sheet, if availabl			
MR Doc. No.	Classification	Classified By	Also Sent To	No. of Pgs.	Entry No.	Form of Document	Correspondents or Title	Date o Docume
1	C	Justice	-	27	2	Memo	Attorney General to Eisenhower	3/22/

CONFIDENTIAL

Justice

JLR:LU:ecb:fek

MAR 2 7 1954

MEMORANDUM TO THE PRESIDENT

You and I both believed it desirable to give more careful consideration to the so-called "amnesty" proposal suggested by Mr. Arthur Hays Sulzberger in his address at the John Carroll University commencement exercises in June 1953. In this memorandum I have endeavored to analyze his proposal fully and explore its implications.

Mr. Sulzberger's address in essence suggests "the equivalent of a moratorium or a political amnesty" for persons who, having joined a Communist front organization prior to the beginning of the Berlin Airlift in 1948, clearly disassociated themselves from any such group before that date. The beginning of the Berlin Airlift is selected by Mr. Sulzberger as an appropriate date because "by then post-war communism had plainly declared itself" and "it had become entirely clear that Stalin had no intention of cooperating with us in the building of a peaceful world" (pp. 10-11). Mr. Sulzberger indicates the exclusion from any "amnesty" of those under consideration for "particularly sensitive positions" (p. 11). He also states that his proposal is not something susceptible of legal enactment, but is

CONFIDENTIAL

rather "a matter of spirit, of approach", and that this "philosophy" might be given formal expression by a committee to be appointed by the President (p. 12). If adopted, it might, he said, eliminate "destructive talk" occasioned by an individual's past affiliation and the "unedifying temptation to refuse testimony on the grounds of self-incrimination", and cut down "on our so-called loyalty trials" (pp. 11-12).

As an overall consideration it is important at the outset to place Mr. Sulzberger's proposal in its proper context. It will be noted that his suggestion is in terms of an "amnesty" for the persons intended to be benefited. The word "amnesty", however, is not appropriate. As defined by the Supreme Court, "amnesty" is "an act of the sovereign power granting oblivion, or a general pardon for a past offense * * *, and is usually exerted in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted". Brown v. Walker, 161 U.S. 591, 601-602. It is not suggested that the persons involved have, by participating in Communist front activities, been guilty of the commission of any criminal offense. Criminal conduct alone constitutes the occasion for the exercise of amnesty. Since that indispensable element is lacking, there is no basis for amnesty.

It is true, of course, as pointed out by Mr. Sulzberger and as is developed below in this memorandum, that individuals who at

one time or another have been active in Communist front organizations may be subjected to various forms of private and public opprobrium. They may, for example, be found to be security risks if they are in the employ of the Federal establishment, and hence be removable from the Federal service. But it is clear that this is not a judgment of guilt in the criminal sense or the equivalent of a conviction for treason. As stated by the Supreme Court in Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 720, with respect to municipal employees (and the same is true here), "Past conduct may well relate to present fitness, past loyalty may have a relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment." Or, as it was put in Adler v. Board of Education, 342 U.S. 485, 493: "In the employment of officials * * *, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate." In short, when an individual's past associations and conduct are considered to be such as to bar him from the Federal service, the individual has not been found guilty of a criminal offense; the Government has merely concluded that he is not a person who is fit to be entrusted with the public business.

With these observations in mind, I turn to the proposal itself. It is evident that it gives rise to a number of interesting and difficult questions concerning the following: (1) the persons to whom the proposal would apply; (2) the "evils" it seeks to alleviate; (3) the extent to which these "evils" are well-founded and can be remedied by the Executive; and (4) practical problems of implementation (for example, the factor of public opinion, the use of a cut-off date, the committee or commission method). Each of these will be discussed below in the belief that thereby consideration of various facets of the proposal and the possibilities of effective action will be facilitated.

I.

The proposal speaks in terms of persons who at one time or another were members of a Communist front organization. It is apparent that in this there lies a certain ambiguity. Thus, Mr. Hoover in his consideration of the proposal understood it to include former members of the Communist Party. He therefore characterized it as "extremely impractical" because former Communists cannot be trusted. You have stated your concurrence in this appraisal of the reliability of former Communists. Accordingly, there is now no room for any misunderstanding as to the outermost limits of the proposal.

The exclusion of former members of the Communist Party does not, however, fully answer the question as to what persons are intended to be covered by the term "members of Communist front organizations". It is possible, of course, to construe the term literally and unimaginatively. Through such a construction the proposal might be considered as intended to reach every person who at any time before the date selected was a member of a Communist front organization, regardless of his knowledge, the nature of his activities, the number of organizations he belonged to, or the duration of his activity. Communist front connections can mean many things. At one extreme may be the individual who never did more than join a single organization and had no knowledge of its Communist nature. At the other extreme may be the individual who not only was a member but knowingly participated in furthering the Communist objectives of the organization. And there are persons who occupy points midway between these extremes. The question is whether the proposal is intended to embrace all these people indiscriminately.

Moreover, in determining those to be included and those to be excluded, there are other factors in addition to the nature of the individual's participation. It certainly seems relevant to consider

the number of Communist front organizations with which a particular individual was associated and how long his association continued. Full confidence might be reposed in the person who belonged to one organization for a relatively brief period; great doubt might exist toward the person who belonged to numerous organizations over an extended period of time. I will discuss this further below in connection with the administration of the old loyalty program and the present security program.

II.

The basic evil which the proposal presumably seeks to eliminate is the suspicion attaching to many persons because of their past Communist associations. As a result, it is said, they may lead lives of doubt and fear. If they are in the Federal service, they may be concerned about their jobs because of the security program. Those who work for private firms may have a similar concern, particularly if the firm has defense contracts. Some, it is intimated, may fear criminal prosecution and therefore will claim the privilege against self-incrimination if called upon to testify before Congressional investigating committees.

III.

On the assumption that these reflect the primary fears of individuals who have been associated with Communist front organizations, the question arises as to what steps the Executive can appropriately take to dissipate or alleviate them. As an over-all consideration it would seem apparent that the Executive ought to limit any action he might be inclined to take to those areas in which action would be effective.

A. Criminal Prosecution. As has been pointed out above, amnesty relates exclusively to past criminal acts. Since in my opinion there can be, with regard to the persons here involved, no real basis for fearing criminal prosecution, at least insofar as the Federal Government is concerned, this presents no occasion for Executive action. In this area existing Federal criminal statutes reach only Communist Party members. The Smith Act (18 U.S.C. 2385) makes it a criminal offense for a person knowingly or willfully to advocate or teach the doctrine of overthrowing the Government by force or violence. The Act has been held applicable to the top leadership of the Communist Party (Dennis v. United States, 341 U. S. 494), and has been successfully utilized against the lower echelons of the Party's leadership. And in another context the Supreme Court has suggested that it might be used against rank-and-file members. Blau v. United States, 340 U. S. 159, holding that the Constitutional privilege against self-incrimination could be claimed by a witness interrogated in a grand jury proceeding

concerning his employment by the Communist Party for the reason that the Smith Act "made future prosecution of petitioner far more than a 'mere imaginary possibility * * *'" (p. 161). It is highly unlikely that an attempt to bring mere membership in or affiliation with Communist organizations within the scope of the Smith Act could succeed, particularly where the activity had long since been abandoned.

B. Investigations by Congressional Committees. Investigations by Congressional committees of various aspects of Communist activity are, of course, not subject to Executive control. Accordingly, to the extent that individuals are concerned in that regard, the Executive is without power to take direct action. Steps that might be taken in other connections could perhaps have an incidental effect of making witnesses less prone to resort to the privilege against self-incrimination. For example, an announcement by the President that certain activities had minimum significance in the administration of the Federal employees' security program might have that effect. Such an announcement might also make the claim of privilege less tenable. Although, as has been pointed out above, the fear of criminal prosecution is fanciful, it is nevertheless probable that a claim of privilege against self-incrimination based on former participation in Communist front activities would be upheld by the courts. While I am not aware of any decision dealing with this precise question, the Supreme Court has gone to great lengths to sustain the privilege. In a recent case the Court said that the constitutional guarantee against

self-incrimination "must be accorded liberal construction", and that it is to be upheld if it is "not 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate". Hoffman v. United States, 341 U. S. 479, 486, 488.

C. Employment. Probably the basic concern of those who have been associated with Communist front organizations is the fear of injury to their livelihoods. This concern may exist in the field of private and public employment. It is well-known that many private employers are actively interested in possible Communist associations of their employees. See Comment, Loyalty and Private Employment, 62 Yale L. J. 954 (1953). This is particularly true of those firms having government contracts. And, of course, it is a direct concern of employees in the Federal Service.1/ It would seem that it is in this area that the impact of Mr. Sulzberger's proposal and the possibilities of action would be the greatest. I shall therefore explore these aspects of the matter in some detail.

(1) The Old Loyalty Program. President Truman's loyalty program was initiated with the issuance of Executive Order 9835 of March 21, 1947 (12 F.R. 1935). The standard by which employees were to be judged was whether "on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of

1/ State and municipal employers also have loyalty programs. See The States and Subversion (Gellhorn ed. 1952); Garner v. Board of Public Works of Los Angeles, 341 U. S. 716.

the United States".[2] The order provided, so far as here pertinent, that activities and associations which could be considered, included -

> Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means. (Executive Order 9835, Part V, sec. 2 f)

After the issuance of the Executive order, the Attorney General on November 24, 1947, certified to the Loyalty Review Board, established pursuant to the order, a list of questionable organizations and thereafter from time to time added other organizations to the list. See 5 CFR, 1949 ed., pp. 199-205. The names of these organizations were subsequently published in the Federal Register. Although many of them had been designated by the Attorney General as subversive at an earlier date for the purposes of a former loyalty program,[3] those designations had been kept confidential.

In November 1947, President Truman publicly announced that "any

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2/ This definition, added by Executive Order 10241 of April 28, 1951 (16 F.R. 3690), replaced the original definition, which provided that the standard should be whether "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States".

3/ These earlier designations had been made in connection with consideration of employee loyalty under Executive Order 9300 of February 5, 1943 (8 F.R. 1701), establishing an "Interdepartmental Committee to Consider Cases of Subversive Activity on the Part of Federal Employees". 5 C.F.R. 1949 ed., p. 200.

person who at any time happened to belong to one of these organizations would [not] automatically be dismissed from the employ of the Federal Government" and that "Membership in an organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case". N. Y. Times, November 15, 1947, p. 2. The Loyalty Review Board made a similar pronouncement, stating that, as had been pointed out by the Attorney General, it was "entirely possible that many persons belonging to such organizations may be loyal to the United States. * * * 'Guilt by association' has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual is disloyal. That must be the guide." 5 C.F.R. 1949 ed., p. 200.4/ The Board promulgated the following rule

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4/ As noted above, the "reasonable grounds" standard was changed in 1951 to a standard of "reasonable doubt".

In 1942, Attorney General Biddle, in connection with loyalty investigations conducted pursuant to Congressional direction (55 Stat. 292), stated that the membership of front organizations "included many persons who were completely innocent of subversive advocacy or belief. * * * While such membership or participation did not require dismissal from the Federal service, it was clearly relevant to a broad inquiry intended to determine fitness for public employment". House Doc. No. 833, 77th Cong., 2d sess., p. 2. He further stated that "the objective test of membership in a 'front' organization is thoroughly unsatisfactory * * *. * * * where the purposes of the organization are so stated as to make membership in most circumstances consistent with loyalty. Activity in the organization, rather than membership, would come closer to reality" (Id., p. 4). The Inter-departmental Committee reported to Mr. Biddle that in many cases the employee "had agreed to sponsor what appeared to him to be meritorious causes in no respect incompatible with his patriotic duties as a citizen, made nominal financial contributions, or attended occasional meetings, qx * * * had knowingly permitted his enthusiasm for what appeared to him to be worthy causes to override any concern he may have felt about being associated in such causes with known Communists" (Id., p. 27).

for evaluating the significance of association with subversive organizations (Statement of the Loyalty Review Board, 5 C.F.R., 1949 ed., sec. 200.1):

> The probative value of evidence of past or present membership in, affiliation with or sympathetic association with any one or more of the organizations * * * designated by the Attorney General can be fairly evaluated only after determining, so far as possible, the character of the organization, the period, nature and duration of the association, whether the employee or applicant was aware of the subversive character of the organization at the time of such association, and the nature of his activities in connection with such organization.

This rule, however, did not extend to present membership in the Communist Party. See 5 C.F.R., 1949 ed., Supp. 1952, sections 200.1, 210.11 (b), (4), (5), App. A, p. 127.

According to Mr. Seth W. Richardson, who was Chairman of the Loyalty Review Board during most of its existence, past membership in the Communist Party did not necessarily justify a finding of disloyalty. "The fact to be determined is * * * present disloyalty. Thus, in every case, questions concerning remote acts are pertinent only as indications of present attitude. * * * We live * * * under a theory of personal reformation which has in many cases made it necessary to perform the exceedingly difficult task of making a present evaluation of loyalty on the basis of questionable but remote acts and statements of the employee. If Budenz, an admitted Communist, may reform and be forgiven, why not an employee?" Richardson, The Federal Employee Loyalty Program, 51 Col. L. Rev. 546, 555 (1951). This policy is reflected in the proceedings of the regular meetings held by the Loyalty Review Board,

which proceedings were examined for the purpose of this memorandum. See proceedings December 3-4, 1947; September 30, 1948, p. 96; March 15-16, 1949, pp. 70-74; February 13-14, 1951, p. 54.5/ However, after the loyalty standard was changed in April 1951 from "reasonable grounds" for a belief as to disloyalty to "a reasonable doubt" as to loyalty, it appears that the cases of former Communists were scrutinized with greater care. Thus, the Board's new Chairman, Mr. Hiram Bingham, stated that the new standard would permit disqualification of persons who had unacceptable associations in the past but who had disassociated themselves from organizations deemed subversive. He pointed out that since the Communist Party had gone underground a few years ago, the difficulty of ferreting out disloyal persons had increased considerably. See N. Y. Times, April 15, 1951, p. 37. Referring to cases in which there might be a doubt concerning an employee's loyalty but not "a reasonable doubt", as, for example, cases involving former Party members or spouses of such members, Mr. Bingham expressed regret that the Loyalty Review Board's authority did not extend to adjudging such persons security risks. (Interview reported in U. S. News & World Report, November 23, 1951, p. 22.)

5/ For example, one member of the Loyalty Review Board put it this way: "A great many people get into the various organizations, including the Communist Party, without realizing what they are getting into, and that although we find that a person was a member of the Communist Party, if we found that he didn't know what he was doing at all and had never done any act himself of a subversive nature, then we'd be justified under the President's statement and under Mr. Richardson's statement in finding that that person was eligible, provided, of course, that we were shown that he had abandoned his membership." Statement of Harry W. Blair, Meeting, February 13-14, 1951, p. 54.

Turning to the actual determinations of the Loyalty Review Board in individual cases, a number of which were studied in connection with this memorandum, it has been found that throughout the history of the Board remote membership in the Communist Party did not result in an adverse loyalty finding if the Board was satisfied that the individual himself had never been guilty of disloyal acts and had clearly established his disassociation from the Communist Party. For example, in one case the Board ruled[6/] on May 15, 1952, that "it is difficult for this panel to understand how past membership [in the Communist Party] ending in 1943, could result in a finding that there is a present reasonable doubt as to appellant's loyalty". In another decision, promulgated August 28, 1951, the Board ruled for the employee because it believed his testimony that "he definitely abandoned his Communist Party membership and association in 1946 and has not since and does not now sympathize with or believe in Communist ideology". On the other hand, the Board ruled against employees with long histories of Communist Party membership and those whose claims of having left the Party were subject to doubt. So, in a case involving membership in the Communist Party from 1933 to 1947 and in the International Workers Order (designated by the Attorney General as a Communist organization) from 1934 to the date of the hearing, the Board held against the employee. Case of B_____, Decision dated October 29, 1951. The Board stated in part:

6/ Cases were heard and determined by panels consisting of three Board members.

> This long and continuous membership in
> Party and in the I.W.O. we think shows an in
> and must have brought to him a knowledge and
> of, Communism and its ideology. His profes
> of the sinister objectives of these organiza
> believe, is pure pretense. By 1946 or 1947
> generally was aware of the fact that Communi
> to our way of life. From other cases we kno
> in Government service were advised or requir
> ground and give no outward or visible signs
> to the Party. B did not deny that hi
> of activities in these organizations may have
> occasioned by his employment by the Governmen
> for dropping out of the party was not becaus
> awakening to, or realization of, the evils o
> Even today, he is wavering, uncertain and eva
> answering questions as to his present views
> as to whether the U.S.S.R. or the United Sta
> in the present controversies between those co
> is lacking in either sincerity or in convict
> it is a lack of sincerity and that his long a
> with and membership in Communist organizatio
> indelible impression on his mind and heart an
> is a reasonable doubt as to his loyalty to th
> of the United States.

And, where the employee had falsely denied having be
Communist Party from June 1940 to June 1941, the Boar
adverse ruling, stating that while it "would be incl
the effect of such Communist Party membership in the
past if there had been any showing of a change of hea
in effect to rehabilitation * * *, we find no basis i
show that employee has changed his former views and
Case of P , April 10, 1953.

Since past membership in the Communist Party
a ground for disqualification under the loyalty progr
that past participation in Communist front organizati

of lesser significance. Even existing participation in such organizations did not necessarily require a finding of disloyalty. Board Meetings, May 4, 1948, pp. 69, 91, 102; March 15-16, 1949, p. 180; June 15, 1949, p. 4. According to Chairman Richardson, membership in a Communist front organization "might be explained and, if necessary, overlooked by the Board in determining whether or not there was evidence of disloyalty". Meeting, June 15, 1949, p. 4. The determinations of the Board show that only extremely aggravated circumstances of Communist front activity were considered a sufficient basis for an unfavorable loyalty determination. Examples of favorable findings are as follows: (1) an employee who had joined the I.W.O. in 1941 for insurance purposes and had established his long opposition to Communism (Case of K_____, April 13, 1953); (2) an employee who had been active in the affairs of the Workers Alliance in 1936; the Board stated that "such membership of almost sixteen years ago is so remote in point of time as not to raise at this time a reasonable doubt as to his loyalty" (Case of H_____, May 28, 1952); (3) an employee who had joined American Youth for Democracy in 1946 at the insistent solicitation of a friend but had not participated in its activities or meetings (Case of W_____, January 8, 1953); (4) an employee who had been a member of the Washington Bookshop from 1940-1941 and had during that period attended public meetings and lectures sponsored by the American Peace Mobilization (Case of L_____, July 16, 1952). In one case the Board ruled in favor of a doctor who was a special consultant for

the Public Health Service and admittedly a member of several Communist front organizations for a number of years. It reached this conclusion because it was convinced of the individual's loyalty, stating that while he may have been unwise and naive in failing to appreciate the value to Communists of the use of his name, he did not act for disloyal or subversive purposes but was "a loyal American who is deeply concerned with the preservation of civil liberties in the United States no matter whose liberty may be in jeopardy" (Case of B_____, August 5, 1952).

There were, however, instances in which Communist front activities did result in adverse findings. Thus, in one case the employee who had been a member of the I.W.O. made one statement that he had dropped out because it had been put on the Attorney General's list of subversive organizations, and then gave a contradictory reason for dropping out. There was in addition a disputed charge of Communist Party membership. The Board stated that "ordinarily, membership in the International Workers Order, standing alone, is not a significant factor in determination of loyalty, although the organization has been designated as subversive by the Attorney General, * * * yet looking at the entire panorama, as shown by the record, one conclusion only can be reached and that is that there is a reasonable doubt as to * * * loyalty" (Case of A_____, May 25, 1953). In another case the Board found a reasonable doubt as to loyalty where the individual admitted both membership in some 20 Communist front organizations and active sponsorship of their objectives. The Board stated that while "no one

these [memberships] standing alone would be significant ... the composite, not the parts that is significant. ... as late as 1948 through 1951 clearly demonstrate ... he espoused * * * are so grounded within him that hi ... be altered". The Board ruled further that it was ... the respondent had joined the organizations before t... as subversive because he was a man "of acute intell... satisfied that he always made an investigation before he ... any organization" (Case of P_____, May 18, 1953).

Before concluding the discussion of the old loyal... should be pointed out that the Loyalty Review Board at ... March 15-16, 1949, considered but did not accept a pro... similar to Mr. Sulzberger's; but of broader application. ... related to individuals who had been members of the Commun... during the war years and had clearly disassociated themse... Communist activity thereafter. John Kirkland Clark of Ne... Board member, suggested "the possibility of a uniform rul... * * * three years * * * had expired since the membership, ... those conditions would not be considered sufficient ... finding of ineligibility". He said that he had "fixed ... around the termination of the period when Russia and t... were jointly concerned in the fight against German... activities on behalf of Russia, or activities on beh... with us in the war, are not necessarily any evide...

disloyalty to this country * * *." Another member objected to the adoption of any arbitrary rule because, in his opinion, it was unnecessary, and, from the public relations standpoint, unwise. He said that although remote Communist affiliation had been ignored he sensed "a very delicate and dangerous factor in public relations in any such announcement or rule * * * because there are many in our populace who are so rabid on this subject that they would want to lynch us if we were to hold that a man who ever held a Communist ticket at any time should get by". Mr. Alger, another Board member, commented that "if a man comes forward and tells us how he happened to join the Communist Party and how he got out, that's all right, but when you begin to draw a definite line, a lot of them will start hedging. * * * A lot of them would come forward who are really Communists and would say that they never belonged to the Communist Party at all, but you know that they did, and therefore you consider that they continue to belong". The Chairman of the Board, Mr. Richardson, agreed that it would be unwise to adopt an inflexible rule. Finally, Mr. Clark withdrew his suggestion. See Proceedings of March 15-16, 1949, pp. 70-74.

(2) The Present Security Program. The present employees security program was initiated with the issuance of Executive Order 10450 of April 27, 1953 (18 F.R. 2489). Its purpose is to insure that all Federal employees shall be "reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States". Under its terms the head of each department and agency is

responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency "is clearly consistent with the interests of the national security". (Sec. 2) It provides, moreover, that the head of each agency shall designate as sensitive any position in the agency in which the occupant, because of the nature of the position, could bring about "a material adverse effect on the national security" (Sec. 3(b)). Among the matters to be considered in determining whether an employee is a security risk is

> Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government by the United States by unconstitutional means. (Sec. 8(a)(5)) 7/

The evaluation standard for membership, affiliation, or association with a subversive organization as set out in the Civil Service Handbook, "Guides for Members of Security Hearing Boards under Executive Order 10450" is that "the security hearing board will give consideration to the employee's statement of his reason for joining and his knowledge of the purposes of the organization" (Civil Service

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7/ This provision is substantially identical with Part V, § 2f, of Executive Order 9835. The organizational designations made under that order have been redesignated under the new order (18 F.R. 2740), and additional ones have been made. See 18 F.R. 4240.

Handbook IM-203, p. 13). On its face this is a narrower standard than that which prevailed under the old loyalty program. The latter standard included such additional factors as the nature and duration of the association, and the nature of the individual's activities. (5 C.F.R., 1949 ed., § 200.1, supra.)

But there is no inflexible rule that even past membership in the Communist Party or in a Communist front organization necessarily disqualifies an individual for retention in the Department's employ under the present security program. Since the security concept is broader than the concept of loyalty, the standard of evaluation under the old program, the ultimate significance attached to an employee's questionable activities may be greater than under the earlier program. Thus, under the present program it is possible to conclude, which could not be done under the earlier program, that because of past membership in the Communist Party or in Communist front organizations, even though admitted, an employee might in the future be subjected to coercion, influence or pressure causing him to act contrary to the best interests of the national security. He may therefore be a security risk although he would not have been found disloyal under the old program.

IV.

A. The preceding discussion suggests, at first, that with regard to its possible direct impact on the employee security program the use of a uniform cut-off date would not change the result in very many cases. But the psychological effect on hearing boards would, in all probability, result in a less stringent standard of the meaning of security risk, and almost surely the public would assume that the program was being "liberalized" or "softened".

Opinions will differ, too, as to the proper cut-off date. It may be that in some cases the use of a uniform cut-off date, as for example, the beginning of the Berlin Airlift in 1948, might automatically absolve membership in a front organization continued after the date the organization had been publicly designated as Communist or subversive for purposes of the loyalty program. Under that program the first public announcement of organizational designations appeared in the Federal Register of March 20, 1948 (13 F.R. 1471). Those designations included a number of Communist front organizations. Additional designations appeared in the Federal Registers of June 9, 1948 (13 F.R. 3067), and October 21, 1948 (13 F.R. 6135). If we assume as a reasonably approximate date for the beginning of the Berlin Airlift

July 9, 1948, 8/ there would be a three and one-half month gap from the time when Communist front organizations first received public designation as such under the loyalty program, namely, March 20, 1948. There is little reason to suppose that any considerable number of persons who continued membership in Communist front organizations after their public designation on March 20, 1948, dropped out between that date and July 9, 1948. Accordingly, it is probable that only a small number of cases would be affected by ignoring membership in Communist front organizations between March 20, 1948 and July 9, 1948.

Moreover, if a cut-off date is to be utilized, the beginning of the Berlin Airlift may well be an appropriate date. There can certainly be no quarrel with Mr. Sulzberger's statement that "by then post-war communism had plainly declared itself" and that it "had become entirely clear that Stalin had no intention of cooperating with us in the building of a peaceful world". (See his Address, p. 10.) It may be that prior to

8/ The Soviet blockade of Berlin began on March 30, 1948. The United States commenced airlift operations on April 2, 1948. By June 19, 1948, the blockade had become complete, and airlift operations on a large scale were initiated on June 26. On June 30 Secretary of State Marshall announced that the United States intended to stay in Berlin and that it would make maximum use of air transport to supply the civilian population. On July 6 the United States, the United Kingdom and France delivered notes to the Soviet Government denouncing the blockade "as clear violation of existing agreements concerning the administration of Berlin by the four occupying powers". These notes were made public on July 9, 1948. See N.Y. Times, April 1, 2, June 20, 27, July 1, 10 and September 27, 1948.

the unmistakable evidence furnished by the Berlin blockade many well-intentioned people held to a belief that there was still a possibility of rapprochement between the Western powers and the Soviet Union, and accordingly that participation in a Communist front organization did not connote working against the interests of the United States.

At least implied support for using the beginning of the Berlin Airlift is to be found in the fact that in the Emergency Detention Act of 1950 Congress selected January 1, 1949, as the significant date for membership in the Communist Party as a basis for detention. See 50 U.S.C. § 819 (h) (3).9/ Moreover, there is not too much of a time-lag between the beginning of the Berlin Airlift (July 9, 1948) and the initial public announcement of organizational designations under the

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9/ "In deciding the question of the existence of reasonable ground to believe a person probably will engage in or conspire with others to engage in espionage or sabotage, the Attorney General, any preliminary hearing officer, and the Board of Detention Review are authorized to consider evidence of the following:

* * *

"(3) * * * the holding at any time after January 1, 1949, of membership in, the Communist Party of the United States * * *."

loyalty program (March 20, 1948).

B. Assuming that adoption of the proposal is desirable in principle, there remains for consideration the question of practical methods for translating the proposal into action, without at the same time seriously weakening the security program. In his address, Mr. Sulzberger suggested the appointment of a Presidential "committee to give formal expression to this philosophy" (p. 12). Presumably Mr. Sulzberger had in mind a commission composed of citizens eminent in private life. In my opinion the commission method has several disadvantages which militate against its use. From what has been said in the preceding portions of this memorandum it seems apparent that the most the Executive can or should do in this area is with respect to the federal employees security program. However, action in this limited area is likely to serve as a guidepost in other areas. But with regard to the security program I fail to see what useful function a commission could perform. You will recall that when the security program was publicly announced you transmitted to the heads of all departments and agencies a letter concerning the establishment of agency hearing boards and the promulgation of uniform agency regulations. It seems to me that a wholly adequate method for effectuating the proposal with respect to the security program would be to transmit a supplemental letter to each department and agency head advising them as to how past membership in or affiliation with Communist front organizations should be considered in determining whether or not an individual is a security risk. The matter of publicity could be

readily taken care of by simultaneous issuance of an appropriate press release.

It is also likely that a Presidential commission would have the disadvantage of being politically undesirable. An attempt to handle the subject through such a device might well run into major Congressional opposition. You may remember the fate of President Truman's 1951 Commission on Internal Security and Individual Rights, the so-called Nimits Commission. That Commission, set up by Executive order (Executive Order 10207 of January 23, 1951, 16 F.R. 709), was to make a thorough study of the problem of providing for the internal security of the country and at the same time protecting the rights and freedoms of individuals. President Truman instructed the Commission to consider how these problems should be met by Government and by private action, and in connection with the Government's loyalty and security programs to "consider the need for protecting individuals from unwarranted attacks and from unwarranted infringement of their rights and liberties in the name of security" (E. O. 10207, supra). The Commission was headed by Admiral Nimitz, and it included such persons as Harvey S. Firestone, Russell C. Leffingwell, and Judge Danaher. It never functioned because Congress refused to exempt its members from the "conflicts of interests" statutes prohibiting Government officials from engaging in business dealings with the Government.

Even if the Commission members were unpaid and were denominated "Presidential consultants" the conflict of interest statutes would apply.

Senator McCarran attacked the Nimitz Commission as an attempt to belittle his Internal Security Subcommittee; Senator Ferguson described it as "a politically partisan device" intended to by-pass Congress. The matter was finally terminated in October 1951 when President Truman accepted the resignations of the Commission's members. See N.Y. Times, January 24, 26, April 15, May 13, 29, and October 28, 1951. The Congress is not apt to be particularly enthusiastic about any new endeavor patterned along the lines of the Nimitz Commission.

C. I should like finally to comment on the public opinion aspects of the proposal. I would judge that as of the present date the general body of the public is reasonably confident, despite some suggestions to the contrary, that the Administration has taken effective measures through the security program for dealing with the problem of Communists and Communist sympathizers in the Federal service. As I pointed out above, the old Loyalty Review Board turned down a proposal for a rule establishing a uniform cut-off date for membership in the Communist Party. The rejection was apparently motivated primarily because of the Board's fear that the public would look upon its adoption of such a rule as indicating the Board's general indifference towards rooting out Communists in the Federal establishment. The arguments contra are: In the first place, former Communists are not to be included. Secondly, possible risk to the national security is to be minimized by excluding applicants for and occupants of positions which have been designated as sensitive. (But would this exception make

the whole proposal somewhat ridiculous since the employee security program is aimed importantly at sensitive positions). Thirdly, the proposal ought to be formulated in terms that make it abundantly plain that it would not serve ipso facto to clear every person who dropped out of Communist front organizations prior to the cut-off date, regardless of the duration, nature, and intensity of his organizational activity. Yet such a limitation would becloud the proposal in the public mind, and eliminate the "certainty" which was one of the attractive aspects of the Salzberger proposal.

I am returning your file on the matter.

Attorney General

Attachment

MEMORANDUM 1574

NATIONAL SECURITY COUNCIL

~~TOP SECRET~~ ATTACHMENTS

URGENT ACTION
March 13, 1975

MEMORANDUM FOR: PHILIP W. BUCHEN

FROM: JEANNE W. DAVIS

SUBJECT: Executive Privilege and the Freedom of Information Act

In February 1968 General Wheeler, the Chairman of the Joint Chiefs of Staff, was sent by President Johnson to Vietnam to conduct a post-Tet review of the situation. The attached document is the report prepared by General Wheeler after returning from his Presidential mission.

The Department of Defense has had a Freedom of Information Act request for the declassification of this study and has asked the NSC/White House to review it for possible release. The NSC staff is now examining the substance of the study to determine whether or not it may be declassified. We question, however, whether a report prepared for the President and at the request of the President is subject to review under the FOIA in that it would appear to be covered by executive privilege or by Section (b)(5) of the FOIA. We would therefore appreciate guidance from your office as to whether this document is so covered and guidance as to how we should handle this request.

Defense must reply to this FOIA request on Monday, March 17, so we would appreciate a response from your office by the close of business tomorrow, Friday, March 14.

Attachment

~~TOP SECRET~~ ATTACHMENT