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ARTICLE

The Administrative Law of McCarthyism

Nicholas Handler*

Abstract. This Article recovers the largely overlooked legal and administrative history of the federal loyalty program and argues that it played a formative role in the development of modern civil service protections and administrative law. During the McCarthy era, the United States Civil Service Commission (CSC), under pressure from Congress, implemented a sweeping loyalty program aimed at rooting out purportedly disloyal federal employees. Though often remembered as a moment of political overreach and civil liberties violations, the loyalty program simultaneously catalyzed a surprising expansion in procedural rights for government workers—both through internal reforms initiated by the CSC and through judicial decisions that extended emerging administrative law doctrines into the domain of federal employment.

Drawing on original archival research, this Article reconstructs how the Loyalty Review Board, housed within the CSC, developed formalized standards for loyalty adjudications, including evidentiary thresholds, rights to notice and counsel, and appellate review. These procedures, while initially limited to loyalty hearings, came to inform broader doctrines governing the removal and discipline of civil servants. In particular, courts began to apply principles such as the *Accardi* doctrine and the *Chenery* rule—originally developed for public-facing regulatory action—to disputes between the federal government and its own employees. The result was a nascent body of administrative law that treated personnel decisions not as matters of unfettered executive discretion, but as legal acts subject to procedural constraint.

* Associate Professor of Law, Texas A&M School of Law. For thoughtful feedback on earlier drafts, I am grateful to Nick Bagley, Rabia Belt, Emily Berman, Elena Chachko, Amy Chazkell, Katherine Mims Crocker, Sannoy Das, George Fisher, Emily Hammond, Hendrik Hartog, Bruce Handler, Chris Havasy, Stephen Lee, Brian Lipschutz, Alex Mechanick, Nina Mendelson, Gillian Metzger, Eric Muller, Alex Nunn, Nicholas Parrillo, Eloise Pasachoff, Seema Patel, Con Reynolds, Andrea Roth, Rachel Rothchild, Bill Sage, Neil Seigel, Jennifer Selin, Sidney Shapiro, Shirin Sinnar, Brian Slocum, Wendy Wagner, Chris Walker, and Daniel Walters. I am additionally thankful for the feedback I received from participants at the New Administrative Law Roundtable, the Arizona National Conference of Constitutional Law Scholars, the ABA Conference on Administrative Law, the American Society for Legal History's Early Career Legal History Workshop, the Texas A&M Public Law Workshop, the Grey Fellows Forum at Stanford Law School, and workshops at Baylor School of Law, the University of Tennessee School of Law, and Wake Forest School of Law. I am also deeply thankful to the staff of the *Stanford Law Review* for their outstanding editorial assistance. All errors are my own.

This Article makes two central claims. First, it argues that civil service law should be understood as a core component of administrative law—not merely a subspecialty of public employment law. Legal rules governing the hiring, discipline, and removal of civil servants serve the same functions as more familiar administrative law doctrines: They mediate interbranch conflict, preventing any one branch from dominating federal policymaking and thus serving deeper separation-of-powers and rule-of-law values. Second, this Article argues that the regulation of federal employment not only prevents the aggrandizement of the political branches but also protects individual rights. In the postwar era, federal jobs functioned as a major state-administered benefit, and the procedures surrounding those jobs shaped broader public expectations about fairness, merit, and due process. Those expectations were deeply challenged during the unrest of the McCarthy period but were ultimately vindicated by the creative adaption of administrative law principles.

These lessons are newly relevant today, as the second Trump Administration embarks upon one of the most ambitious attempts to remake the federal civil service in generations, often explicitly seeking to replace merit systems with tests of personal and political loyalty.

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Introduction

On June 17, 1957, the Supreme Court decided *Service v. Dulles*,[1] in which Foreign Service Officer John S. Service had appealed his dismissal from employment. He had been terminated in 1951 under Executive Order 9835, which required investigations of all federal employees and the removal of any civil servants found to be "disloyal to the Government of the United States."[2] The State Department had initially cleared Service.[3] The Loyalty Review Board (LRB), an arm of the United States Civil Service Commission (CSC) established to administer the President's loyalty program, had reversed that decision, finding under the applicable standard that "reasonable doubt" existed as to Service's loyalty.[4] In turn, the Supreme Court reversed that finding, holding that the State Department had violated its own hearing procedures for employees facing discipline and that the LRB had exceeded its own jurisdiction in reviewing the case.[5]

The context of the decision is infamous. Service was dismissed under the federal loyalty program, a sweeping McCarthy-era effort to purge the federal civil service of communist sympathizers and other purportedly disloyal employees.[6] The opinion itself, though, has largely been forgotten. Like many McCarthy-era cases, it avoided vexed constitutional questions about the First Amendment and the separation of powers by resolving challenges on "narrow nonconstitutional grounds"—primarily questions of administrative procedure.[7] Because of the Court's decision to "maintain a low profile for controversial decisions,"[8] the McCarthy-era loyalty program, while a watershed moment in U.S. political history, has not inspired a large body of comprehensive legal analysis.[9]

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1. 354 U.S. 363 (1957).
2. *Id.* at 365-66; Exec. Order No. 9835, 3 C.F.R. 129, 132 (Mar. 21, 1947).
3. *Service*, 354 U.S. at 365-66.
4. *Id.* at 366.
5. *Id.* at 366, 384-86.
6. *See* Landon R.Y. Storrs, *McCarthyism and the Second Red Scare*, OXFORD RSCH. ENCYC. AM. HIST. (July 2, 2015), https://perma.cc/75W8-BHXS. *See generally* William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375, 377 (discussing the ideological context of the Court's decisions in this era).
7. ROBERT M. LICHTMAN, THE SUPREME COURT AND MCCARTHY-ERA REPRESSION: ONE HUNDRED DECISIONS 11 (2012); *see infra* Part III (describing the range of administrative law doctrines deployed to resolve loyalty cases).
8. LICHTMAN, *supra* note 7, at 12.
9. *See* Wiecek, *supra* note 6, at 375-77. For the most comprehensive history of judicial opinions during the McCarthy era, see generally LICHTMAN, note 7 above.

But *Service* and other similar cases represent a critical, and largely unstudied, shift in the structure of the modern administrative state and its ideological underpinnings. The Court certainly evaded "controversial" rulings on constitutional law raised by the loyalty program.[10] But it did so by recognizing for the first time a broad range of employment protections for federal civil servants. These included the right to due process prior to removal, the right to be represented by counsel, rules of evidence to prove misconduct in disciplinary proceedings, and enforceable good-cause removal protections.[11] This Article excavates the creation of this new employment regime, drawing on original archival research, a wealth of contemporaneous secondary sources, and little-studied legal authority to reconstruct the new regime of civil-servant legal rights that emerged from the loyalty program.

Today, we take for granted that civil servants enjoy robust protections, so much so that the belief in an entrenched bureaucracy now frames many legal and political debates about the administrative state.[12] However, those rights were functionally non-existent until the 1930s and were not widespread until the 1950s. Beginning in the 1930s, the CSC, the independent agency responsible for administering federal employment, created or expanded many civil service protections.[13] Once a largely advisory body, by the 1930s and 1940s the CSC had come to wield enormous power over federal personnel. It leveraged its power to strengthen civil service protections, aiming to both professionalize government and, as central administrator of those protections, increase its own political influence within the executive branch.[14]

The loyalty program catalyzed this rapid expansion. It also marked the first time that the federal judiciary, which had historically viewed employment as a question of purely executive discretion, recognized and enforced those employment protections on a large scale.[15] To do so, the federal courts relied on emerging administrative law doctrines. These included the requirement, articulated in *Accardi v. Shaughnessy*, that agencies abide by their own procedural rules[16] and the prohibition, articulated in *SEC v. Chenery Corp.*,

10. LICHTMAN, *supra* note 7, at 12.

11. *See infra* Part II.

12. *See, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2207 (2020) (warning of the "expansion" of a "vast and varied federal bureaucracy" (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010))); United States v. Arthrex, Inc., 141 S. Ct. 1970, 1993-94 (2021) (Gorsuch, J., concurring in part and dissenting in part) (warning of the risks of an "unaccountable fourth branch" and a "permanent bureaucracy").

13. *See infra* Parts I.A, II.B.

14. *See infra* Part I.A.

15. *See infra* Part III.C.

16. *See* 347 U.S. 260, 266-67 (1954).

against agencies justifying their actions post hoc.[17] These and other doctrines, which had been devised primarily to regulate relations between the state and private parties, now came to also regulate relationships *between* government actors—between the federal government as employer on the one hand and the civil servant as claimant on the other. By the 1960s, federal courts had secured a substantially enlarged set of employment protections for federal civil servants.

This Article has two primary goals, the first of which is to illuminate a historical paradox. The federal loyalty program, designed as a vast purge of politically suspect federal workers, instead accelerated the development of a robust system of civil service protections. Rather than strengthening the President's ideological control of the executive branch, it formalized and hardened institutional resistance to presidential fiat.

The effort to purge government workers based on politics raised the specter of corruption and unfairness. Even at the height of McCarthyism, the CSC understood that loyalty proceedings required the appearance of fairness and legality.[18] Unrestrained firings of career public servants threatened to undermine government operations and damage public trust in the civil service. The CSC thus felt the need to innovate procedural protections for government workers at risk of being fired for their political commitments. Those rights were initially limited to loyalty proceedings, but once recognized, they expanded and spread to other areas of federal employment.[19]

Of course, the case should not be overstated. While firings were surprisingly rare, many New Deal-era civil servants resigned rather than face interrogation of their political beliefs.[20] Nonetheless, the architecture of civil service rights that emerged from the Red Scare crucible was extensive, and it persisted well beyond the 1950s, shaping the bureaucracy of the Great Society two decades later.[21]

A second goal is to highlight the ideological developments implicit in this story. This Article argues that federal personnel law, often treated as a niche of employment law, is better understood as a core site of administrative and constitutional governance. The analysis surfaces two key theoretical insights about the legal regulation of the federal civil service. First, civil service law is best understood not as a narrow subspecies of public employment law but rather as a core component of administrative law. The values that animate civil service law, including procedural regularity and reasoned decisionmaking, are the same ones that motivate administrative law doctrine

17. *See* 318 U.S. 80, 88-89 (1943).

18. *See infra* Parts II.A-.B.

19. *See infra* Part III.D.

20. Storrs, *supra* note 6, at 6-7 (detailing resignations and firings).

21. *See infra* Part III.D.

more broadly. In moments of interbranch conflict, these personnel rules serve the same function as other administrative constraints: They mediate rival claims of control over the machinery of federal governance.[22] The loyalty program of the early Cold War is a striking example. While justified in terms of national security, it functioned in practice as a sweeping attempt to reassert political oversight over the bureaucracy.[23] The loyalty program sought out not only spies and Soviet sympathizers, but also more generally, in the words of one Senator, "men of leftist thinking."[24] Millions of federal workers were subjected to scrutiny for ideological dissent, prior political associations, or connections to New Deal policymaking.[25]

What is often overlooked is that the loyalty program was largely a congressional phenomenon. Though it was implemented by the executive branch, its political impetus came from the legislature—specifically, from the newly Republican-controlled 80th Congress.[26] After more than a decade of Democratic dominance and a massive expansion of federal agencies under the New Deal and during the Second World War, congressional conservatives viewed the bureaucracy as politically hostile and ideologically suspect.[27] Committees launched investigations, leaked damaging information, and enacted new statutory frameworks to facilitate ideological vetting of federal employees.[28] These initiatives reflected what was, on the House's own account, its "anxiety over the pace with which the executive branch was being cleansed of subversives."[29] Disputes between the President and Congress "over primacy in personnel management" thus reflected a "larger century-long political battle" over control of public administration more generally.[30] The loyalty program represented a legislative counteroffensive against the accelerating trend of presidential aggrandizement.[31]

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22. *See infra* Part IV.A.

23. *See infra* Part IV.A.

24. JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 94 (2012) (quoting Letter from Alexander Wiley to Arthur S. Flemming (Apr. 5, 1947), *reprinted in The 350 Hearing Examiners: Chairman Wiley Asks Open Choices for Fitness*, 33 A.B.A. J. 421, 422 (1947) [hereinafter Wiley Letter]).

25. *See infra* Part I.B.

26. *See* Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387, 1388-90 (2005) (summarizing the congressional politics of the McCarthy era).

27. *Id.*

28. *See infra* Part I.B.

29. THE FEDERAL CIVILIAN LOYALTY PROGRAM, H.R. REP. NO. 92-1637, at 8 (1973).

30. MORDECAI LEE, A PRESIDENTIAL CIVIL SERVICE: FDR'S LIAISON OFFICE FOR PERSONNEL MANAGEMENT 8 (2016).

31. *See infra* Parts I.B, IV.A.

This history complicates prevailing accounts of bureaucratic independence, which tend to treat Congress as the institutional champion of civil service protections and locate the primary threat in the presidency.[32] Even if that framing captures important features of the present moment, it fails to account for the deeper logic of interbranch competition. As the story of the loyalty program demonstrates, both Congress and the President have sought to use their oversight powers to politicize the federal bureaucracy. These conflicts can be resolved through the application of broader administrative law principles requiring reasoned and unbiased personnel administration.[33]

Second, this Article argues that administrative law principles served not only to manage institutional conflict but also to safeguard individual rights within the civil service context. Federal employment was among the most important public benefits available to American workers in the postwar era. The federal government was one of the country's largest employers, and millions of Americans had entered civil service roles during the Great Depression, the wartime mobilization, and the early Cold War.[34] Civil servants represented a large slice of the country—over two million employees out of a population one-third its current size.[35] These jobs offered both economic stability and meaningful access to the middle class. In that sense, federal employment was a crucial part of the postwar welfare state, even if it was not always labeled as such. The processes by which civil servants were hired and fired thus had an "incalculable effect upon the attitude of the country as a whole."[36] These procedures helped define public expectations about fairness, opportunity, and merit in state-administered programs.

But civil servants were not merely recipients of public benefits. They were also agents of the federal government, entrusted with carrying out statutes, enforcing regulations, and implementing public policy. Their political independence and professional competence were central to the legitimacy of the administrative state. The ability to control hiring and firing thus had important implications for both public policy and the separation of powers. As Congress sought to increase its influence over the civil service during the loyalty program, it introduced overt ideological criteria into hiring and firing decisions.[37] Loyalty hearings often lacked clear evidentiary standards, relied

32. *See infra* Part IV.A.

33. *See infra* Part IV.B.

34. Thomas I. Emerson & David M. Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1, 7 (1948).

35. *Id.*

36. *Id.* at 7-8.

37. *See infra* Part I.B.

heavily on "gossip, rumor, and data on private affairs" and sometimes denied employees even the most basic procedural safeguards.[38] These practices stood in direct tension with the Administrative Procedure Act of 1946 (APA), which had recently codified a commitment to regularized administrative process.[39] The APA imposed procedural constraints on agency outputs—such as rules, adjudications, and enforcement actions—in order to protect citizens from arbitrary or politically motivated government action.[40] But it left largely untouched the internal personnel practices that shaped who made those decisions in the first place.

The result was a growing recognition that the fairness of administrative outputs could not be divorced from the fairness of administrative inputs.[41] If agencies were to act in a manner consistent with rule-of-law values, the individuals responsible for those actions needed to be selected, retained, and disciplined according to lawful and depoliticized procedures. The importation of administrative law norms into civil service governance—evidentiary thresholds, rights to notice and hearing, meaningful review—reflected this insight. In effect, the protection of civil servants' employment rights became a necessary precondition for the protection of broader constitutional and statutory rights. As the political scientist Norton Long explained in an influential 1952 article, "the bureaucracy" was "not just an instrument to carry out a will formed by the elected Congress and President" but was itself a democratic institution—a "medium for registering the diverse wills that make up the people's will and for transmuting them into . . . policy."[42]

Aside from its descriptive and theoretical contributions, this history holds useful lessons for the present political moment. In 2025, the Trump Administration embarked on arguably the most ambitious attempt since McCarthyism to remake federal policy through personnel management.[43] It

38. Emerson & Helfeld, *supra* note 34, at 72.

39. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

40. Paul Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 278-79 (1978) (observing that the APA "should have largely allayed" the perception of administrative process as "inherently arbitrary and oppressive").

41. *See infra* Part IV.B. For contemporary political science research on the connection between personnel policy and substantive agency outputs, see, for example, David E. Lewis, *Presidential Appointments and Personnel*, 14 ANN. REV. POL. SCI. 47, 58-60 (2011).

42. Norton E. Long, *Bureaucracy and Constitutionalism*, 46 AM. POL. SCI. REV. 808, 810 (1952).

43. As of this writing, many of the legal challenges to the Trump Administration's personnel policies are still pending. And the Administration continues to devise new means of removing federal employees, including by furloughs and layoffs. *See, e.g.*, Nick Bednar, *Reductions in Force During Shutdowns: Easier Said Than Done*, LAWFARE (Oct. 1, 2025, 1:10 PM), https://perma.cc/B8FJ-TV4K. Regardless of how these disputes are

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has sought to effectively eliminate longstanding federal programs and, in some cases, entire cabinet departments by laying off the civil servants who administer them en masse.[44] It has sought to influence remaining federal workers' decisionmaking by subjecting them to a combination of loyalty tests and workplace surveillance not seen since the Red Scare.[45]

These policies have been challenged in a tidal wave of litigation by unions, states, municipalities, and others. At the heart of much of this litigation lies the same question that animated litigation over the first loyalty program: To what degree should the resolution of personnel disputes turn on broader questions of administrative law or the separation of powers? In a number of cases, as in the McCarthy period, employment actions appear to fit within at least the letter, if not the spirit, of the executive branch's statutory authority to manage the federal workforce under the 1978 Civil Service Reform Act and other statutes.[46] However, the goals of many of these personnel actions—devastating an agency's workforce to prevent it from performing required functions or subjecting independent, professional decisionmaking to political litmus tests—resemble the stated intentions behind the loyalty purges of the 1940s and 1950s and pose many of the same difficult administrative law questions.[47]

The history of the loyalty program and the institutional response to it are thus informative. In that period, both the executive branch and courts were forced to reckon with the inevitable overlap between civil service law and administrative law and to adapt the former to accommodate the core value commitments of the latter. Today's political conflicts, of course, differ in many ways from those of the 1940s. But both in litigation and in national politics, the Trump Administration has been confronted with similar questions about the role of personnel management in a system of separated powers. Hoary McCarthy-era cases (including *Service*, as well as others discussed below) have been dusted off in litigation of headline disputes. Recovering the lessons of that earlier time is thus valuable in navigating the challenges of our own.[48]

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ultimately resolved, these tactics represent a historic shift in the explicit use of personnel law to influence policy and to punish perceived political enemies.

44. For overviews of the Trump Administration's attempts to limit traditional civil service independence, see Bednar, note 43 above; Roderick M. Hills, *What Just Happened: Purges at the DOJ and FBI—How Do and Don't the Civil Service Laws Apply*, JUST SEC. (Feb. 14, 2025), https://perma.cc/N958-XX46; Nick Bednar, *The Meaning of Article II and 'Executive Power' to Trump*, LAWFARE (Mar. 20, 2025, 1:00 PM), https://perma.cc/4FE6-ZWBU; and *Litigation Tracker: Legal Challenges to Trump Administration Actions*, JUST SEC. (Mar. 13, 2026), https://perma.cc/MYN4-68UC.

45. *See infra* Part IV.C.

46. *See infra* Part IV.C.

47. *See infra* Part IV.C.

48. *See infra* note 457 (discussing contemporary cases that have decided personnel management disputes by citing to McCarthy-era caselaw).

This Article proceeds in four parts. Part I sets out the relevant history, including the evolution of the CSC and the implementation of the loyalty program. Part II details the CSC's administration of the loyalty program, including the establishment of the LRB and the gradual creation of substantive and procedural rules governing loyalty hearings. Part III details the role of the federal courts in reviewing terminations under the loyalty program and in eventually expanding the procedural protections generated by the loyalty program to other areas of civil service law. Part IV discusses the key normative and theoretical insights that emerge from this history. The history of the loyalty program demonstrates the role civil service law plays both in mediating interbranch disputes over control of public policy and in modeling ideals of fairness and political equality for the broader public.

I. Historical Background

This Part traces the evolution of the CSC and the loyalty program, situating both within enduring interbranch struggles over control of the federal bureaucracy. That history set the stage for the CSC and, eventually, the courts to articulate stronger procedural protections for civil servants.

By the mid-twentieth century, the CSC had become one of the most powerful federal agencies, administering all aspects of personnel management. Its development reflected two intertwined commitments to administrative competence and to political neutrality. The first, rooted in Progressive Era ideals, sought professional governance insulated from partisan influence. The second, emerging from late-nineteenth-century reforms, demanded both partisan neutrality in hiring and institutional neutrality between Congress and the President. While reform curtailed patronage and empowered the executive, Congress retained leverage through appropriations and oversight, leaving the CSC to mediate the uneasy balance between the branches.

The loyalty program destabilized both commitments. It threatened meritocratic principles by eroding employment protections and directing suspicion toward the bureaucracy's most skilled professionals. At the same time, it heralded a renewed congressional effort to penetrate the administrative hierarchy, unsettling the CSC's fragile equilibrium and placing the twin ideals of administrative competence and political neutrality under acute strain at a pivotal moment in the rise of the modern administrative state.

A. The Structure and Origins of the CSC

For the ninety-odd years between its creation under the 1883 Pendleton Act and its abolition in 1979, the CSC was the executive branch agency

primarily responsible for managing the federal civil service.[49] The main remit of the CSC was to administer basic personnel functions—such as hiring, firing, and classification—and to propose and implement broad policy reforms concerning the federal workforce.[50] Over the course of its history, the CSC pursued two related missions.

First, the CSC was committed to expertise and competence in administration. A product of the Progressive Era, the CSC was designed to promote the then-dominant administrative values of political neutrality and managerial competence within the federal government.[51] The CSC's mandate was shaped primarily by two statutes: the Pendleton Act and the Lloyd-La Follette Act. The Pendleton Act, which established the CSC, created a system of competitive examination for "classified" positions, replacing discretionary appointments by department heads that had formed the basis of the spoils system.[52] While the Pendleton Act only provided for a relatively small percentage of federal positions to be classified, it empowered the President to require additional classifications at his discretion.[53] The Pendleton Act prohibited any hiring, firing, or demotion based on political favoritism or in exchange for any financial benefit, directly repudiating the spoils system.[54] The Lloyd-La Follette Act, enacted in 1912, expanded protections by prohibiting firings or other adverse personnel actions except for "such cause as will promote the efficiency of [the] service" and by explicitly protecting civil servants against retaliation for providing evidence of agency misfeasance to Congress.[55]

Together, the two statutes established the framework for a merit-based federal civil service during the Progressive Era. At their core was a commitment to nonpartisanship and to the hiring and advancement of skilled professionals in federal service, regardless of their political affiliations.[56] Among other things, the statutes prohibited the federal government from

49. ROBERT G. VAUGHN, THE SPOILED SYSTEM: A CALL FOR CIVIL SERVICE REFORM 1-7 (1975) (detailing the growth of the CSC from the 1880s to 1978).

50. *Id.*

51. *See* Katherine Shaw, *Partisanship Creep*, 118 NW. U. L. REV. 1563, 1571 (2024) (describing the once widespread understanding that "limits on government officials' ability to advance purely partisan goals were firmly grounded in the Constitution").

52. Pendleton Civil Service Reform Act, ch. 27, § 6, 22 Stat. 403, 403-04 (1883) (codified as amended in scattered sections of 5 U.S.C.).

53. *Id.*

54. *Id.* §§ 13-14.

55. Lloyd-La Follette Act, Pub. L. No. 336, § 6, 37 Stat. 539, 555 (1912) (codified as amended in scattered sections of 5 U.S.C.).

56. Shaw, *supra* note 51, at 1573-74.

inquiring into the partisan affiliations or personal beliefs of civil servants.[57] As former CSC Commissioner Milton Esman stated, "[t]he civil service movement [was] a sustained campaign to eliminate partisan political consideration from public employment."[58] The primary goal of these laws was to ensure the hiring and retention of federal personnel based on professional competence.

These reforms were, in part, a response to the legacy of patronage appointments that had plagued the nineteenth-century federal service.[59] The perception of corruption, combined with the power of party bosses, allowed political machines to exert undue influence over government operations. As Leonard D. White, a leading scholar of public administration and member of the CSC, observed, "the patronage resources of nation, state, county, and city alike were exploited without hindrance by the party machines of both major political groups," producing a system which had sunk "at its lowest to such orgies of stealing as the Tweed Ring."[60] Civil service reform was intended to limit the influence of party machines in governance and, more generally, to advance the understanding that expertise and professionalism were distinct from partisan commitments in the federal civil service.[61] It was based on the belief that one could prioritize competence in administration while disregarding a civil servant's political values. Reformers felt that, in White's words, "[t]he expansion of professional and technical employment accelerates the reclamation of the public service from the arid lands of patronage."[62]

A second, and related, mission of the CSC was to mediate interbranch disputes between Congress and the President over political control of the federal workforce.[63] As the administrative state expanded, disputes between the political branches over control of the civil service came to reflect a "larger . . . political battle" for primacy in federal lawmaking.[64] On one hand, the CSC was instrumental to the creation of a professional civil service that

57. *See id.* at 1574 n.59 (citing PAUL P. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 99 (1958)).

58. Milton J. Esman, *The Hatch Act—A Reappraisal*, 60 YALE L.J. 986, 986 (1951).

59. *See* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 52-55 (1982); Shaw, *supra* note 51, at 1571-72.

60. Leonard D. White, *Politics and Civil Service*, 169 ANNALS AM. ACAD. POL. & SOC. SCI. 86, 86 (1933).

61. *See* SKOWRONEK, *supra* note 59, at 47 (noting that the "chief characteristics" of a civil service system in a "modern state" are "political neutrality, tenure in office, recruitment by criteria of special training or competitive examination, and uniform rules for the control of promotion, discipline, remuneration, and retirement").

62. Leonard D. White, *Administration as a Profession*, 189 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 85 (1937).

63. *See* SKOWRONEK, *supra* note 59, at 182.

64. LEE, *supra* note 30, at 8.

was answerable to the President, rather than Congress—a development that gave the executive enormous influence over federal policy.[65] In part, this was a function of the CSC's success in establishing more sophisticated management techniques and in recruiting more skilled labor to the executive branch.[66] The growth of bureaucratic capacity and the centralization of management allowed the President to influence policy more effectively than before.[67]

In part, the CSC contributed to the growth of presidential power by displacing congressional power over the hiring and firing of the federal workforce. The patronage system, which enabled new presidential administrations to hire and fire political allies at will, had stunted the growth of professional expertise in the civil service.[68] It had also allowed congressional power brokers to project their influence deep inside the executive branch.[69] While the President had the formal authority to hire and fire, he typically "exchange[d]" this power (which he lacked the administrative capacity to wield on his own) with influential congressmen for votes on key legislation.[70] Patronage thus contributed to the "domination" of executive offices by congressional leaders, depriving them of "autonomy and prestige."[71] Indeed, in response to that problem, the Pendleton Act specifically prohibited all senators and representatives from providing a "recommendation of any person" for a position in the federal service.[72] As patronage appointments receded in the late nineteenth and early twentieth centuries, Congress's power to control the burgeoning administrative state receded relative to the President's.

But while the CSC's mission contributed to a strong presidency, it also facilitated checks on the executive. The CSC was comprised of three commissioners, at least one of whom had to be appointed from each political

65. *See* SKOWRONEK, *supra* note 59, at 181; LEE, *supra* note 30, at 11-13 (describing the centrality of the CSC to civil service reform).

66. *See* GLADYS M. KAMMERER, IMPACT OF WAR ON FEDERAL PERSONNEL ADMINISTRATION, 1939-1945, at 7-11 (1951) (describing innovations in federal management during this period).

67. Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief:* Myers *and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2212-13 (2023) (observing that civil service professionalization had "transformed the bureaucracy into a streamlined apparatus ready to serve the presidential agenda" by the 1920s).

68. *See* SKOWRONEK, *supra* note 59, at 48 (describing the opposition of the "constituent party machine" to civil service reform).

69. *See id.* at 55-56.

70. RONALD N. JOHNSON & GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY 4 (1994).

71. SKOWRONEK, *supra* note 59, at 55.

72. Pendleton Civil Service Reform Act, ch. 27, § 10, 22 Stat. 403, 406 (1883) (codified as amended in scattered sections of 5 U.S.C.).

party.[73] While its institution-building often served presidential ends, it was nevertheless adept at resisting presidential control. Most notably, it successfully avoided being converted into an executive department with a single presidentially appointed head under President Franklin D. Roosevelt, even when other powerful agencies, such as the Bureau of Budget, did fall under direct presidential control.[74] Direct presidential control of the civil service was a core goal of the Roosevelt Administration's Committee on Administrative Management, which viewed the CSC's "autonomy" as a "significant obstacle to making personnel management more responsive to the president's management duties."[75] More prosaically, the CSC developed mechanisms for hiring, firing, and adjudicating disputes that operated largely outside of presidential supervision, building a management apparatus which allowed it to, with growing autonomy, determine the rights of federal employees with minimal executive input.[76]

The CSC owed its independence partly to its own expertise. Only the CSC had the capacity to manage the growing federal workforce, and as a result, it gained substantial freedom to shape personnel policy.[77] But in equal part, it owed its power to its relationship with Congress. While Congress had lost the ability to dole out jobs as spoils, it retained considerable influence over the civil service by way of powerful oversight committees (in particular, the House Committee on Civil Service) and appropriations committees.[78] Indeed, the relationship between the CSC and Congress was sufficiently strong that Congressman Robert Ramspeck, former Chairman of the Committee on Civil Service and former House majority whip, went on to serve as chairman of the CSC during the critical period of 1951-1952.[79]

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73. *Id.* § 1, 22 Stat. at 403.

74. LEE, *supra* note 30, at 54-58 (recounting the congressional defeat of President Roosevelt's attempt, modeled on the Bureau of the Budget, to consolidate the CSC under a single, presidentially appointed head).

75. *Id.* at 32-33.

76. *See* VAUGHN, *supra* note 49, at 1-7 (describing the evolution of the CSC's functions and its political independence).

77. *See generally* DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928, at 4-7 (2001) (describing how American bureaucracies have historically forged political autonomy through a combination of competent service delivery, policymaking entrepreneurship, and the development of diverse political networks).

78. *See* LEE, *supra* note 30, at 136-37 (describing congressional efforts to insulate the CSC from presidential control); *see also* KAMMERER, *supra* note 66, at 12-16 (describing the CSC's congressional alliances).

79. *Ramspeck, Robert C. Word*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, https://perma.cc/4P3Z-2W6P (archived Mar. 15, 2026).

These congressional alliances assisted the CSC in gaining independence from the White House. Particularly as the New Deal state expanded, Congress often saw an empowered CSC as a way to check presidential ambition. It was, for instance, the congressional Joint Committee on Governmental Reorganization that ultimately scuttled President Roosevelt's attempt to reorganize the CSC as an executive agency with a single director in 1937, refusing to make "the civil service a sort of appanage [sic] of the White House."[80] More generally, Congress regularly rebuffed presidential requests to exempt newly created "alphabet soup" agencies from classification requirements, fearing the creation of a new spoils system that would entrench President Roosevelt's political power.[81] Throughout the 1930s and 1940s, Congress drafted key legislation giving the CSC expanded authority to shape federal personnel policy, in part to keep that power out of the President's hands.[82] In 1932, for instance, the CSC obtained the power to make binding decisions on classification and promotion.[83] Twelve years later, it obtained appellate jurisdiction to review hiring and firing decisions concerning veterans, a power that subsequently expanded to all classified civil service workers.[84] In the years following the Second World War, it lobbied for the classification of an expanding number of workers as civil servants, significantly enlarging its jurisdiction,[85] and it successfully lobbied for a number of consequential reforms to the management structure of the federal bureaucracy.[86] It also developed an adjudicatory framework for addressing allegations of patronage against civil servants and, after 1939, for violations of the Hatch Act.[87]

In short, the CSC worked to develop professionalized standards for recruiting and administering an increasingly large, complex, and sophisticated federal workforce. These standards promoted more competent government

80. LEE, *supra* note 30, at 38.

81. *Id.* at 22.

82. *See* S. REP. NO. 95-969, at 5 (1978) (describing the CSC's transition during this period into "modern personnel administration"); KAMMERER, *supra* note 66, at 12-16 (describing the expansion of the CSC during the Second World War). *See generally* U.S. CIV. SERV. COMM'N, A BRIEF HISTORY OF THE U.S. CIVIL SERVICE COMMISSION: 1930-1950 at 1-9 (1952) [hereinafter BRIEF HISTORY] (summarizing the expanding role of the CSC during this period).

83. BRIEF HISTORY, *supra* note 82, at 2.

84. ELEANOR BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 54-55 (1953); *see also* KAMMERER, *supra* note 66, at 106-07 (describing the Veterans Preference Act in political context).

85. BRIEF HISTORY, *supra* note 82, at 4-5; KAMMERER, *supra* note 66, at 14.

86. *See* BRIEF HISTORY, *supra* note 82, at 6-9; KAMMERER, *supra* note 66, at 14.

87. *See* U.S. CIV. SERV. COMM'N, HATCH ACT DECISIONS (POLITICAL ACTIVITY CASES) OF THE UNITED STATES CIVIL SERVICE COMMISSION 8-9 (1949).

and service delivery, but they also served the deeper political purpose of mediating and defusing tensions between the President and Congress in the decades-long "conflict over primacy in the constitutional system."[88]

B. The Loyalty Program

The political context for the loyalty program—McCarthyism—is well known. The program formed part of the broader, infamous investigation of communist influence in American education and industry.[89] Putatively, loyalty investigations were intended to counter alleged communist infiltration of American government. Loyalty vetting of government employees had begun during the Second World War and included checks for communist as well as fascist affiliations.[90] Fears of Soviet infiltration were heightened after the war when a series of major espionage incidents involving federal workers came to light.[91] A 1946 minority report by the House Subcommittee on the Civil Service described growing public suspicion of the civil service: "The people of this country are deeply concerned and disturbed when they are informed that we have employees in many departments of the Federal Government, especially in responsible positions, whose loyalty is open to serious questioning."[92] Under pressure from conservative Republicans after their strong performance in 1946 midterm elections, President Harry Truman began to implement loyalty controls on the federal civil service. In 1948, he signed Executive Order 9835, which delegated to the CSC responsibility for conducting a "loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government."[93]

The loyalty program threatened both of the CSC's key roles as a guarantor of professional competence and as a mediator of interbranch disputes over control of the federal civil service.

First, the program imperiled the federal government's ability to recruit competent civil servants and to deliver the public services that were the foundation of its legitimacy. Both the President and the CSC worried that arbitrary or invasive investigations would trigger mass resignations, leading to

88. LEE, *supra* note 30, at 8-9.

89. *See generally* Wiecek, *supra* note 6, at 406-19 (describing the emergence of the second Red Scare).

90. Emerson & Helfeld, *supra* note 34, at 14-18.

91. *Id.* at 21-25.

92. SUBCOMM. ON THE CIV. SERV., 79TH CONG., SUPPLEMENTAL REPORT ON EMPLOYEE LOYALTY AND EMPLOYMENT PRACTICES 8 (Comm. Print 1946).

93. Exec. Order No. 9835, § 1, 3 C.F.R. 129 (Mar. 21, 1947).

a critical loss of skilled professionals.[94] Former Attorney General Frances Biddle described the impact that loyalty investigations could have on the morale of "human beings who have chosen or would like to choose government as a career."[95] The impact of "this vast, amateur, and childish, yet brutal and stupid, mechanism for our protection" on targeted employees and their departments could be "irreparabl[e]."[96] As former NLRB chair Lloyd Garrison explained, "once an employee has been through" the "ordeal[]" of a loyalty investigation, "even though he comes out with flying colors and is restored to his job, that man is deeply damaged for a long, long time to come, perhaps forever."[97] Even those who took seriously the risk of government subversion worried that an overly aggressive loyalty program could undermine the functioning of the federal government.[98] As one commission appointed to study civil service employment put it, "[t]he sabotage of inefficiency has proved almost as effective as the sabotage of disloyalty."[99]

Second, the program jeopardized the CSC's historical position as independent mediator of disputes between executive and legislative branches. In particular, the loyalty program sought to reimpose direct congressional supervision over the civil service to a degree not seen since the patronage era. The program thus threatened not only to upend the merit system, but also to disrupt the equilibrium that the CSC maintained between competing presidential and congressional efforts to control the civil service.

While the loyalty program involved cooperation from all three branches, it was primarily a legislative initiative. Congress applied much of the political pressure that ultimately led to the issuance of Executive Order 9835, motivated by its belief beginning in "the late thirties that many 'subversives' were occupying influential positions in the Government and elsewhere and that their influence must not remain unchallenged."[100] Many of the most prominent institutional drivers of the loyalty program, including the House Un-American Activities Committee (HUAC) and the Senate Internal Security

94. Francis Biddle, *Subversives in Government*, 300 ANNALS AM. ACAD. POL. & SOC. SCI. 51, 55 (1955); Harry S. Truman, Pres. of the U.S., Address of Harry S. Truman (Apr. 24, 1950), *in* 11 FED. BAR J. 123, 129 (1951) (expressing concern about the loyalty program becoming a "right-wing authoritarian" program).

95. Biddle, *supra* note 94, at 53.

96. *Id.* at 53-54.

97. Lloyd K. Garrison, *Some Observations on the Loyalty-Security Program*, 23 U. CHI. L. REV. 1, 4 (1955).

98. LUCIUS WILMERDING, JR., COMM'N OF INQUIRY ON PUB. SERV. PERS., GOVERNMENT BY MERIT 233 (1935).

99. *Id.*

100. United States v. Lovett, 328 U.S. 303, 308 (1946).

Committee, were creatures of Congress.[101] Many of the loyalty program's most prominent exponents, including Representative Martin Dies and future President Richard Nixon, were members of Congress,[102] not to mention Senator Joseph McCarthy himself. Its most prominent coverage in the press came from congressional hearings, leaks, and reports.[103] Indeed, in the early years of their anticommunist campaigns, congressional committees often sought to regulate the ideological commitments of the civil service directly. Committees sometimes held hearings structured like criminal trials, in which "charges" were proffered and accused civil servants were offered the opportunity to contest their "guilt[]" through the presentation of evidence and arguments.[104] In some instances, these committees sought to fire specific employees on the basis of their political histories by attaching riders to appropriations bills prohibiting the relevant departments from funding their salaries.[105] Ultimately, these efforts encountered both legal obstacles (the Supreme Court invalidated the riders as unlawful bills of attainder)[106] and practical difficulties, as the civil service proved too large and complex for congressional committees to investigate comprehensively.[107]

Eventually, Congress shifted tactics, increasingly pressuring the executive branch to investigate its own workforce more comprehensively. The first significant push for loyalty investigations occurred in 1938, when HUAC began probing alleged communist and fascist infiltration within the federal government.[108] In its search for "subversives," HUAC raised alarm over what it deemed the "Trojan horse" tactics of communists.[109]

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101. Felix Rackow, *The Federal Loyalty Program: Politics and Civil Liberty*, 12 CASE W. RES. L. REV. 701, 705-09 (1961); *see also* Watkins v. United States, 354 U.S. 178, 195 (1957) (detailing the emergence "[i]n the decade following World War II" of "a new kind of congressional inquiry" into the threat of subversion "unknown in prior periods of American history"). For a concise overview of the Senate Internal Security Committee's origins and remit, see Shelton v. United States, 280 F.2d 701, 702 (D.C. Cir. 1960), *rev'd*, Russell v. United States, 369 U.S. 749 (1962).

102. *See, e.g.*, Wiecek, *supra* note 6, at 398-404, 414-19 (describing the prominent role of Congress, including Representative Dies and then-Representative Nixon, in promoting campaigns against alleged communists and subversives).

103. *See* Stone, *supra* note 26, at 1388-90.

104. *Lovett*, 328 U.S. at 310 (quoting 89 CONG. REC. 479 (daily ed. Feb. 1, 1943) (statement of Rep. Martin H. Dies)).

105. *See, e.g.*, Wiecek, *supra* note 6, at 405.

106. *See Lovett*, 328 U.S. at 315.

107. *See* KAMMERER, *supra* note 66, at 11 (questioning the "effectiveness of congressional control over personnel administration" as the civil service expanded during and after the Second World War).

108. Wiecek, *supra* note 6, at 398.

109. Emerson & Helfeld, *supra* note 34, at 8-9.

In response to these concerns, in 1939 Congress enacted the Hatch Act, which sought to curb certain forms of political interference within the civil service.[110] Section 9A of the Hatch Act prohibited any federal employee from belonging to any political party or organization advocating the overthrow of the constitutional form of government in the United States, and further stipulated that any individual found in violation would be "immediately removed from the position or office held by him."[111] The CSC implemented the Act's standards in the following year.

Throughout the 1940s, Congress increased pressure on the executive branch to limit the influence of alleged subversives.[112] In 1946, the House Civil Service Committee conducted hearings and issued a report condemning the "inadequacies" of existing security programs.[113] The report stressed the "immediate necessity for certain action" regarding employee loyalty and served as "a blunt threat to the executive that, unless a stricter and more productive loyalty program was immediately instituted, Congress would undertake to do the job itself."[114] This report coincided with the Republicans' return to congressional power for the first time since 1931, with anticommunism emerging as a major theme in their platform alongside demands for more rigorous scrutiny of government employees.[115]

In 1947, under increasing political pressure, President Truman issued Executive Order 9835, which mandated a "loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government," or some two million civil servants.[116] The Order provided that federal employees should be dismissed when, "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States."[117] It delegated much of the responsibility for executing the loyalty program to the CSC, which was tasked with ensuring both "maximum protection . . . [to] the United States against infiltration of disloyal persons into the ranks of its employees"

110. Hatch Act of 1939, Pub. L. No. 76-252, § 9A(1), 53 Stat. 1147, 1148 (1939).

111. *Id.* § 9A(2), 53 Stat. at 1148.

112. Wiecek, *supra* note 6, at 398-99, 402-07, 414-18.

113. Emerson & Helfeld, *supra* note 34, at 18 (quoting COMM. ON CIV. SERV., 79TH CONG., REPORT OF INVESTIGATION WITH RESPECT TO EMPLOYEE LOYALTY AND EMPLOYMENT POLICIES AND PRACTICES IN THE GOVERNMENT OF THE UNITED STATES 1 (Comm. Print 1946)).

114. *Id.* at 18-19 (quoting COMM. ON CIV. SERV., *supra* note 113, at 1).

115. Wiecek, *supra* note 6, at 414-18.

116. Exec. Order No. 9835, pt. I, § 1, 3 C.F.R. 129 (Mar. 21, 1947).

117. *Id.* pt. V, § 1, 12 Fed. Reg. at 132.

and "equal protection from unfounded accusations of disloyalty" for civil servants.[118]

Congress had both partisan and institutional reasons for pursuing more aggressive oversight of the civil service. As an institutional matter, the growth of the civil service and the centralization of presidential control during the New Deal threatened to weaken congressional control of personnel policy. And this weakness came at precisely the same moment that the political stakes of personnel policy had risen dramatically.[119] Jobs had always been a source of political influence—in the patronage era, they were exchanged for votes.[120] But in an era of expanded federal administration, where the civil service was vastly larger and entrusted with implementing more complex welfare and regulatory schemes, control over the civil service also meant control over policy. The civil service that emerged from the New Deal and the war was more sophisticated and exercised considerably more discretion than the civil service of the 1920s.[121] Civil servants could make a wide range of decisions on their own, from licensing and adjudication to the advising on critical questions of policy.[122]

That discretion could, in turn, shape the impact of large federal programs.[123] As the Committee of Inquiry on Public Service Personnel, a working group convened by President Roosevelt to study problems in the civil service, wrote in 1935, "[a]s government increases in size and complexity," it risks "degenerat[ing] into a bureaucracy" insulated from the control of Congress and the President.[124] By the end of the Second World War, the combination of wartime security measures and emergency economic measures implemented to manage postwar demobilization had increased the discretionary powers of the federal bureaucracy even further.[125] As the political scientist Nathaniel Nathanson wrote in an influential 1951 article, "many of the burning issues of the thirties which aroused leaders of the

118. *Id.* pmbl., 12 Fed. Reg. at 129.

119. LEE, *supra* note 30, at 32-34 (describing the importance to President Roosevelt of asserting presidential control over the CSC).

120. *See supra* Part I.A.

121. *See* KAMMERER, *supra* note 66, at 12-16 (describing this evolution); BRIEF HISTORY, *supra* note 82, at 4.

122. *See* Charles Reich, *The New Property*, 73 YALE L.J. 733, 749-51 (1964) (describing the "magnification of governmental power by administrative discretion" between the 1930s and 1950s).

123. *Id.* (discussing the importance of this discretion in areas such as issuing licenses, enforcing punishments, and allocating public benefits).

124. WILMERDING, *supra* note 98, at 231.

125. *See* Nathaniel Nathanson, *Central Issues of Administrative Law*, 45 AM. POL. SCI. REV. 348, 371-72 (1951).

American Bar Association to storm the citadels of bureaucratic power have seemed to pale into relative insignificance beside the sweep of discretionary authority exercised in the name of national emergency."[126] Moreover, many of these powers fell outside the formal statutory requirements of the APA, which primarily imposed procedural restraints on agencies' use of formal rulemakings or adjudications, leaving a wide range of other discretionary decisions much less regulated.[127]

As a result, the selection of personnel took on new importance. Civil servants could, in ways that were difficult to detect, carry out discretionary duties in a manner designed to harm, rather than to further, the public welfare. As the chair of the loyalty and security committee for the Federation of American Scientists put it, "[a] Communist postman could fail to deliver his mail, and a Communist clerk typist could ruin the bookkeeping of a Government office . . . . [A]ny individual . . . can do some damage to our security if he is disloyal and if he really tries."[128]

Beyond concerns about active sabotage, many harbored broader anxieties about civil servants who might exercise their authority in ways that were legal but politically disfavored. Such fears stemmed from a longstanding critique of the permanent bureaucracy.[129] Indeed, as the New Deal state expanded in the 1930s, critics worried that federal employment would create a permanent constituency among civil servants in favor of an expansive regulatory state.[130] Experts in public administration predicted that a political "machine of this size" could prove "virtually impossible to defeat" and might entrench the power of the governing party.[131] This fear of the civil service transforming into a standing army of campaign volunteers for the Roosevelt agenda partially motivated the Hatch Act's prohibition on political activity by federal employees.[132] "The spectre of 'bureaucracy' as a political force," one

126. *Id.*

127. *See, e.g.*, 5 U.S.C. § 553(a)(2) (exempting "matter[s] with respect to agency management or personnel" from APA rulemaking procedures); *see also* Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 510 n.117 (2010) (noting areas, such as contracting, grant issuance, and personnel management, that fall outside the formal scope of the APA).

128. *Administration of the Federal Employees' Security Program: Hearings on S. Res. 20 Before the S. Comm. on Post Office & Civ. Serv.*, 84th Cong. 12 (1956) (statement of John Phelps, Sec'y, Scientists' Comm. on Loyalty & Sec., Fed'n Am. Scientists); *see also* S. Res. 154, 84th Cong. (1956) (enacted).

129. *See* WILMERDING, *supra* note 98, at 232.

130. *Id.* at 232-33.

131. *See, e.g.*, Esman, *supra* note 58, at 994.

132. *See, e.g.*, Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225, 231-32, 270-73 (2005) (describing the enactment of the Hatch Act to deprive President Roosevelt of patronage positions in the civil service).

commentator observed, "has disquieted many conservative citizens and convinced them that Federal employees must be neutralized politically lest they organize themselves into an aggressive power bloc."[133]

This concern became especially pronounced after the GOP takeover of Congress in 1946.[134] In the fifteen years since Republicans had last held a congressional majority, the administrative state had expanded dramatically, staffed largely by appointees of the Roosevelt and Truman Administrations.[135] As a result, Republicans feared that the civil servants responsible for formulating public policy might be unresponsive to the preferences of the newly empowered conservative majority.[136] Republican leaders therefore sought to evaluate civil servants not merely for disloyalty to the United States but also for divergence from the shifting policy priorities of the new Congress. Allegations of subversion were frequently coupled with broader claims that a particular official held leftist views on economic or foreign affairs. The Dies Committee, for instance, had often conflated subversion with inefficiency in painting the New Deal as a communist project.[137] As Senator Alexander Wiley, Chairman of the Judiciary Committee, warned, public administration was threatened not only by communists, but more generally by "men of leftist thinking, men who don't have complete loyalty to our constitutional system of checks and balances, men who are not devoted to our system of private enterprise."[138]

The CSC was tasked, as it had been historically, with mediating competing institutional claims to control federal personnel policy. Truman delegated it the administrative task of overseeing the mass investigation and adjudication of loyalty disputes. But implicitly, he also delegated to the commission the political work of balancing executive branch fears of attrition and diminished state capacity with (primarily) congressional concerns about the bureaucracy's ideological drift.

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133. Esman, *supra* note 58, at 994.

134. Stone, *supra* note 26, at 1388 (noting that as the 1946 midterm elections approached, President Truman came under "increasing attack from an anti-New Deal coalition of Republicans and Southern Democrats who excite[d] fears of Communist subversion").

135. *See generally* GRISINGER, *supra* note 24, at 1-3 (describing the expansion of the administrative state during the 1930s); JOSEPH POSTELL, BUREAUCRACY IN AMERICA 208-09 (2017) (similar).

136. *See* Wiecek, *supra* note 6, at 397 (noting the conservative hostility to "alphabet-soup bureaucracy and the collectivist mentality attributed to New Dealers" that had emerged during the Roosevelt presidency, as well as conservatives' desire to "smear the New Deal's regulatory, tax, and welfare innovations with the taint of un-Americanism and communism").

137. BONTECOU, *supra* note 84, at 8.

138. GRISINGER, *supra* note 24, at 94 (quoting Wiley Letter, *supra* note 24, at 422).

II. Due Process and Loyalty Adjudications

This Part examines the loyalty program's evolution from its 1948 inception through its 1953 discontinuation by executive order. The period reveals an unexpected narrative: As political forces sought greater control over the civil service, procedural protections for federal employees expanded in response. Such attempts to strengthen political control were broadly perceived as both politically perilous and potentially damaging to the state's administrative capacity. The first chapter of this story concerns the expansion of rights within the administrative state, notably through the establishment of substantive and procedural rules governing the adjudication of loyalty cases by the Loyalty Review Board (LRB). The second chapter, discussed in Part III, focuses on the enduring legacy of these rights outside the administrative state and beyond McCarthyism, with their enforcement increasingly placed in the hands of federal courts.

The central insight from this narrative is that while Executive Order 9835 established general guidelines for the loyalty program, it delegated significant authority to the newly created LRB, housed within the CSC, to implement those guidelines. In its early years, the CSC exercised this authority in ways that were notably rights-protective. The CSC's motivations for this approach were driven by both practical and ideological concerns. Practically, it sought to preserve the quality of government administration and protect its own political power. Ideologically, the CSC was informed by a belief in the impartial administration inherited from the Progressive and New Deal architects of its expansion.

As discussed in Part II.C and Part III, the CSC could in some critical instances restrict employee rights. It became more inclined to do so in the 1950s, following sustained criticism from Congress for its perceived leniency in investigating disloyalty. Nevertheless, the net result of the Board's development was the creation of a broader array of protections than civil servants had previously enjoyed or than the Executive Order had required. Furthermore, the Board's increased emphasis on procedural regularity laid the groundwork for more rigorous judicial review, which, as explored in Part III, provided an additional, longer-lasting layer of protection for federal employees.

The following Subparts set forth the origins and structure of the LRB. They then detail the legal and procedural innovations it introduced and assess the LRB's role in restraining the loyalty program.

A. The Creation of the LRB

In order to administer the new loyalty program, Executive Order 9835 directed the CSC to establish the LRB, comprised of at least three "impartial

persons," to oversee the investigation and adjudication of employee loyalty questions.[139]

The Order required a "loyalty investigation" of "every person" entering the federal service.[140] Information could be gleaned from any number of sources, but the Order required agencies to consider investigative files compiled by various government sources, including FBI files, CSC personnel files, military intelligence files, and records of local law enforcement, among other sources.[141] The Order further required that, if any "derogatory" information were discovered, a "full field investigation" by the responsible agency should be conducted.[142]

For existing employees, "[t]he head of each department and agency in the executive branch of the Government" was made "personally responsible for an effective program to assure that disloyal civilian officers or employees [were] not retained in employment in his department or agency."[143] Agency heads were, in turn, required to "prescrib[e] and supervis[e] the loyalty determination procedures" for their agencies "in accordance with" Executive Order 9835, which was to be "considered as providing [the] minimum requirements" for fair process.[144] Employees "charged with being disloyal" were guaranteed the right to written notice and hearing before the agency board, at which they might appear "personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit."[145]

The LRB centralized and formalized this process in two ways. First, it established a centralized system of appeals. Any employee was permitted to "appeal . . . prior to his removal, to the head of the employing department or agency," whose decision would be subject to further "appeal to the Civil Service Commission's Loyalty Review Board . . . for an advisory recommendation."[146]

Second, the LRB also promulgated substantive and procedural rules to govern the adjudication of cases at the agency level. The Board was empowered to "make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty."[147] It was also directed to "[a]dvise" agencies on "all

139. Exec. Order No. 9835, pt. III, 3 C.F.R. 129, 131 (Mar. 21, 1947).

140. *Id.* pt. I, at 129.

141. *Id.* pt. I, at 130.

142. *Id.*

143. *Id.* pt. II, at 130.

144. *Id.*

145. *Id.*

146. *Id.* pt. II, at 131.

147. *Id.* pt. III, at 131.

problems relating to employee loyalty," to "[d]isseminate" information on loyalty programs, and to "[c]oordinate" investigations across the executive branch.[148]

In short, the LRB was directed to render what might otherwise have been a decentralized process into one that was governed by uniform standards and procedures across the executive branch. Its administration of the loyalty program thus had much in common with the CSC's other personnel tasks it had been delegated over the previous two decades, including examination, promotion requirements, and administration of the Hatch Act.

And while the LRB's rulings on these questions were purely advisory in theory, it was in practice the only agency with the expertise and capacity to lend any coherence to the program. Secretary of Labor Frances Perkins, also a CSC Commissioner, predicted at the Board's first meeting that the Board's "influence" would "permeate into all the personnel offices and into the administrative agencies themselves with regard to the proper handling and quiet passing over so that they shouldn't make a scandal in the community."[149] As a result, other agencies tended to harmonize their procedures with those of the Board.[150]

As set forth below, the LRB often wielded its influence in rights-protective ways. In doing so, it was motivated by both practical and ideological concerns. Practically, in order to operate efficiently across the entire civil service, the LRB needed a set of procedural safeguards that were consistently applied. That level of procedural consistency would inevitably build friction into a system understood by its strongest proponents as a tool for quickly purging ideologically suspect employees.

On an institutional level, the LRB expressed concern about the effects of overly aggressive terminations, especially those imposed without sufficient procedural safeguards. One worry was about the potential degradation of government service through attrition and inability to attract new candidates. Secretary Perkins, for instance, emphasized that "there shouldn't be a witch hunt."[151] President Truman, in addressing the Board, likewise stressed that "[t]he Government, as the largest employer in the United States, must be the

148. *Id.*

149. First Meeting of the Loyalty Review Board, U.S. Civ. Serv. Comm'n 9 (Nov. 14-15, 1947) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 1) (statement of CSC Comm'r Frances Perkins).

150. BONTECOU, *supra* note 84, at 53.

151. First Meeting of the Loyalty Review Board, *supra* note 149, at 8 (statement of CSC Comm'r Perkins).

model of a fair employer. . . . [and] must guarantee that the civil rights of all employees of the Government shall be protected properly and adequately."[152]

In addition to degraded government operations, the LRB also worried about a loss of public trust in the government. LRB Chairman Seth Richardson, in closing the meeting, noted the challenge of "build[ing] . . . confidence in the public in the meritoriousness of the Board."[153] Indeed, the LRB appeared to expect from the outset that an exceedingly low number of civil servants would be terminated under the program. Based on its experience of wartime loyalty vetting, the LRB predicted at its first meeting that of the two million civilian employees in federal government, about 2%, or 36,000, might be investigated, and 11% of those, or about 3,900, might be subject to hearings and appeals.[154] All told, it estimated that about 1,800 of 716,000 new appointees, or less than 1%, would be rated ineligible for disloyalty and appeal.[155]

B. The Evolution of Loyalty Adjudication

While the LRB's formal authority was advisory, its practical influence stemmed from its unique position within the federal bureaucracy. As the only entity with both the expertise to standardize loyalty proceedings and the capacity to review them systematically, the Board faced the fundamental challenge of determining how to transform Executive Order 9835's broad directives into workable legal standards. This task required the Board to resolve two critical questions left open by the Order: What constituted disloyalty, and what procedures would govern its determination? The Board's response to these questions reflected both its institutional heritage as guardian of civil service neutrality and its practical need to maintain consistent standards across the federal workforce.

The Board's legal innovations fall broadly into two categories: substantive and procedural innovations. Both are detailed here and demonstrate how the early Board's focus on procedural fairness and regularity led to the development of novel protections for civil servants in loyalty hearings.

In resolving these legal questions, the LRB began to import a number of core components of due process—for example, the right to defined standards of evidence and proof, the right to a neutral decisionmaker, the right to appeal, and at least some protection against unfounded accusations—into a

152. *Id.* at 17 (statement of President Harry Truman).

153. *Id.* at 93 (statement of LRB Chairman Seth Richardson).

154. *See id.* at 12 (statement of CSC Comm'r Arthur Fleming); Emerson & Helfeld, *supra* note 34, at 7.

155. First Meeting of the Loyalty Review Board, *supra* note 149, at 13 (statement of CSC Comm'r Fleming).

decisionmaking process that had been largely standardless and discretionary until the 1940s.[156] While loyalty proceedings still provided less protections than many of the more familiar administrative adjudications conducted under the APA,[157] they were transformed in this period from purely discretionary choices into decisions bounded by substantive and procedural limits.

1. The LRB's substantive innovations

Providing a substantive definition of disloyalty presented the LRB with two conceptual difficulties: (1) how to define the offense of disloyalty and (2) what evidence would be admissible in proving disloyalty. The Board resolved both by narrowing the potential scope of disloyalty, thus subjecting termination decisions to higher standards of proof and more rigorous analytical requirements.

One critical question the LRB had to resolve was what it meant for a civil servant to be "disloyal." Executive Order 9835 had provided little guidance on that question. At its broadest, "disloyalty" might simply describe disaffection with aspects of American constitutional government. At its narrowest, the term might require the government to demonstrate a civil servant's specific intent to undermine American interests.

The need to define "disloyalty" presented a difficult legal problem. Under longstanding civil service rules, the LRB was prohibited from inquiring into or "discriminat[ing]" based on "an applicant's or an employee's religious opinions or affiliations, or because of his marital status or his race, or except as required by law because of his political opinions and affiliations."[158] Yet under the loyalty program, the Board was *required* to inquire into potentially disloyal political activity.[159] Under the broadest reading of that remit, the program could require investigation of many prohibited topics, from an employee's religious and political beliefs to their spouses and friends.

The Board often resolved this tension by construing the loyalty inquiry narrowly, shifting the focus "by implication and example" from broad

156. *See generally* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267 (1975) (discussing in depth the requirements of due process as applied across various adjudicative contexts).

157. *See* BONTECOU, *supra* note 84, at 207-14.

158. *Id.* at 66 (footnote omitted) (quoting Seth W. Richardson, Chairman, Loyalty Rev. Bd., Memorandum No. 33: Avoidance of Improper or Irrelevant Matters in Loyalty Proceedings, U.S. Civ. Serv. Comm'n (Dec. 17, 1948) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 10)).

159. *See* Exec. Order No. 9835, pt. I, 3 C.F.R. 129, 129 (Mar. 21, 1947) (requiring that there "shall" be a "loyalty investigation" of every federal employee).

ideological commitments to provable, specific, and prohibited acts.[160] The primary difficulty for loyalty boards was not, as Chairman Richardson emphasized, defining abstract concepts like "loyalty or disloyalty," but rather "identifying facts with respect to the activities of the individual employee."[161] The LRB accordingly preferred to elaborate on the definition case-by-case, much like a common-law court. In 1948, Secretary Perkins explained to the Board that "the line between disloyalty and just accidental association" with radicals would "be revealed in [its] case decisions one by one," which should, "where possible, be accompanied by a brief but instructive opinion which the lower boards, so to speak, [could] rely upon."[162]

In keeping with that goal, the Board never provided a comprehensive definition, but it did articulate more specific requirements for establishing disloyalty and thereby significantly limited the range of its possible meanings. First, the Board specified that the relevant question was a civil servant's *present* state of mind: An agency could dismiss an employee only if they were currently disloyal under the meaning of the Order; suspect loyalties in the past were not relevant.[163] This was a significant limitation, as many of the cases that came before the Board—and many of the accusations that inspired the most anxiety among civil servants—involved associations that had taken place years earlier, many during the United States' wartime alliance with the Soviet Union.[164]

In addition, the Board made clear that disloyalty required a showing of advocacy specifically for the overthrow of the U.S. government by unconstitutional means. The focus of the program, the Board emphasized, was on "[p]ersons holding beliefs calling for a change in our form of government through the use of force or other unconstitutional means, who indicate these beliefs by association or conduct."[165] Disloyalty could not, by contrast, be established by other political opinions, even those harshly critical of the United States. As the LRB clarified in a memorandum to agencies and regional

160. BONTECOU, *supra* note 84, at 69.

161. Seth W. Richardson, *The Federal Employee Loyalty Program*, 51 COLUM. L. REV. 546, 556 (1951). "Lower boards" may refer either to agency-level boards, which oversaw the loyalty proceedings of employees, or regional boards, which adjudicated loyalty claims regarding new applicants to the civil service. BONTECOU, *supra* note 84, at 35-37.

162. First Meeting of the Loyalty Review Board, *supra* note 149, at 8 (statement of CSC Comm'r Perkins).

163. BONTECOU, *supra* note 84, at 69.

164. *See* BONTECOU, *supra* note 84, at 109. *See generally* LANDON R.Y. STORRS, THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT 16-22 (2012) (describing the overlapping social and political circles of New Dealers and socialists in the 1930s).

165. Statement, Regulations, and Directives of the Loyalty Review Board, U.S. Civ. Serv. Comm'n 2 (Dec. 17, 1948) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 9).

boards: "Advocacy of whatever change in the form of government or the economic system of the United States . . . is not disloyalty, unless that advocacy is coupled with the advocacy or approval . . . of the use of unconstitutional means to effect such change."[166]

How, then, might an agency establish disloyalty? In formulating guidelines, the Board was also required to answer a number of questions about the evidentiary standards to be used in hearings.

One of the most consequential of these questions was the standard of proof for disloyalty. Executive Order 9835 ambiguously required "reasonable grounds for belief that the person involved [was] disloyal to the Government of the United States."[167] But did any evidence of disloyalty—or "derogatory information," as the Board typically called it[168]—justify dismissal, even if other substantial evidence weighed in the employee's favor? Or was the government required to prove disloyalty by something like the preponderance of the evidence?

The question prompted extensive debate in closed Board meetings. Chairman Richardson initially read the language as requiring "just the opposite" of a criminal trial: "Unless the employee can convince the Board beyond a reasonable doubt that he is loyal, the assumption is that he is disloyal."[169] CSC Commissioner Mitchell, however, pointed out that the temporary commission which had drafted the language "after thrashing [the] thing over a great deal" had done so specifically to raise the burden of proof from what had been required in wartime.[170]

Chairman Richardson, in turn, agreed that a higher burden of proof was "much more in accord with what we ought to do."[171] While a disloyalty finding was not "a criminal matter, and [wasn't] a question of constitutional rights," it could nonetheless be "devastating" because of its reputational and employment implications.[172] The Board thus considered the stricter reading, which required only "one piece of evidence" to prove disloyalty, to be unduly harsh, because it could destroy a civil servant's career "although he may be possessed of a whole preponderance of evidence to show that he isn't disloyal."[173]

166. *Id.* at 1.

167. Exec. Order No. 9835, pt. V, 3 C.F.R. 129, 132 (Mar. 21, 1947).

168. BONTECOU, *supra* note 84, at 27.

169. First Meeting of the Loyalty Review Board, *supra* note 149, at 77 (statement of LRB Chairman Richardson).

170. *Id.* at 78 (statement of CSC Comm'r Mitchell).

171. *Id.* (statement of LRB Chairman Richardson).

172. *Id.* at 78-79.

173. *Id.* at 80.

The Board ultimately adopted the more demanding preponderance standard. Several months later, in guidance to regional boards,[174] the Board clarified that each panel was required to "reach its decision on consideration of the complete file, arguments, brief and testimony presented to it."[175]

Perhaps the most contested questions were evidentiary: What evidence could be used to establish disloyalty, and what weight was to be given to different categories of evidence? At the outset, the Board made clear that "[s]trict legal rules of evidence" were inappropriate for hearings under its purview; instead, "reasonable bounds [were to] be maintained as to competency, relevancy and materiality."[176]

Nonetheless, the Board articulated several meaningful limitations on the use of evidence to establish disloyalty in its early years. One was a general requirement that charges of disloyalty be supported by well-founded factual evidence.[177] The Board admonished agencies to ensure they had sufficient evidence of subversive associations.[178] Agencies should not, the Board advised, file "charges" or serve interrogatories without first "tak[ing] care that the surrounding factual data relating to assertions with respect to employee relations and actions should be sufficiently developed in the record."[179]

In line with the President's desire to avoid "witch hunts" unmoored from tangible threats to government operations, the Board prescribed the types of evidence that could be considered and the weight each piece of evidence could be afforded.[180] The Executive Order identified a set of criteria for agencies to consider when assessing loyalty. These included "[s]abotage [or] espionage"; "[t]reason or sedition or advocacy thereof"; "[a]dvocacy of revolution or force or violence to alter the constitutional form of government of the United States"; "[i]ntentional, unauthorized disclosure" of "documents or information of a confidential or non-public character"; "[p]erforming or attempting to

174. For the definitions of regional boards and agency boards, see note 161 above.

175. Seth W. Richardson, Chairman, Loyalty Rev. Bd., Memorandum No. 42: Amendments to the Statement, Regulations and Directives of the Loyalty Review Board, U.S. Civ. Serv. Comm'n 8 (Apr. 26, 1949) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 10).

176. Statement, Regulations, and Directives of the Loyalty Review Board, *supra* note 165, at 10.

177. Seth W. Richardson, Chairman, Loyalty Rev. Bd., Memorandum No. 30 Revised: Instructions to Supplement Directive II of the Directives to the Departments and Agencies, U.S. Civ. Serv. Comm'n 1 (Jan. 24, 1948) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 10).

178. *Id.*

179. *Id.* at 1-2.

180. First Meeting of the Loyalty Review Board, *supra* note 149, at 8 (statement of CSC Comm'r Perkins).

perform" duties "so as to serve the interests of another government"; and membership in a proscribed group.[181] But it did not specify how those factors were to be weighed or whether agencies could consider other evidence.

One of the most important limiting roles the LRB played was in narrowly construing permissible sources of proof. First, the Board cautioned that agencies should only consider the offenses set forth in the Order, not political commitments or beliefs more broadly, as proof of disloyalty.[182] This was a meaningful limitation, as many of the criteria—including unauthorized disclosure and espionage—were already criminal offenses and applied to a vanishingly small percentage of workers.[183]

The broadest and most contested ground for dismissal was membership in a group proscribed by the Attorney General. Here, too, the LRB meaningfully limited potential grounds for dismissal. The Board made clear, with the concurrence of the President, that membership in most organizations designated subversive by the Attorney General constituted only one piece of evidence and could not by itself establish disloyalty.[184] "Guilt by association," the Board explained, "has never been one of the principles of our American jurisprudence."[185] Instead, in its first memorandum to agencies, the LRB

181. Exec. Order No. 9835, pt. V, 3 C.F.R. 129, 132 (Mar. 21, 1947); *see also* Statement, Regulations, and Directives of the Loyalty Review Board, *supra* note 165, at 8-9.

182. Statement, Regulations, and Directives of the Loyalty Review Board, *supra* note 165, at 8-9; *see id.* at 1 (noting that "[a]dvocacy of whatever change in the form of government or the economic system of the United States" is not disloyalty "unless that advocacy is coupled with the advocacy or approval . . . of the use of unconstitutional means to effect such change"); Seth W. Richardson, Chairman, Loyalty Rev. Bd., Memorandum No. 23: Revision of the Directives to the Departments and Agencies, U.S. Civ. Serv. Comm'n 2 (Oct. 18, 1948) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, Box 10) (identifying the offenses listed in the Executive Order as the factors which "may be considered" when adjudicating disloyalty). *But see* BONTECOU, *supra* note 84, at 71 (suggesting that, in certain high profile cases, the Board inferred from past affiliations a "presumption" of disloyalty that was "almost impossible to overcome").

183. Statement, Regulations, and Directives of the Loyalty Review Board, *supra* note 165, at 8 (listing criteria).

184. Under Section 9A of the Hatch Act, civil servants could not belong to organizations that advocate the overthrow of the U.S. government. The Justice Department designated relatively few organizations under Section 9A, including the (then-defunct) German-American Bund, the Communist Party, and alleged Communist Party affiliates, including the Socialist Party. U.S. CIV. SERV. COMM'N, 66TH ANNUAL REPORT 33 (1947). It promulgated a much longer list of organizations that were deemed "subversive," but membership in these groups did not necessarily result in termination. *See* Statement, Regulations, and Directives of the Loyalty Review Board, *supra* note 181, at 47-51; BONTECOU, *supra* note 84, at 357-58.

185. Statement, Regulations, and Directives of the Loyalty Review Board, *supra* note 165, at 46.

emphasized that "membership in any particular organization is not, and must not be considered, as per se establishing disloyalty."[186]

As with other aspects of the disloyalty inquiry, each decision had to be grounded in a factual record. Thus, "[t]he probative value of evidence of past or present membership in" a listed organization could "be fairly evaluated only after determining . . . the character of the organization . . . and the nature of [the employee's] activities in connection with such organization."[187]

2. The LRB's procedural innovations

In addition to leaving key substantive questions unanswered, the Executive Order also provided little guidance on what procedural protections civil servants would receive during loyalty inquiries. The Order provided a vague assurance that employees were entitled to "protection from unfounded accusations of disloyalty."[188] It also promised employees that they were entitled to "notice" of the "nature of the charges against [them] in sufficient detail" to allow a defense; "a right to an administrative hearing before a loyalty board in the employing department or agency"; the right to appear "personally, accompanied by counsel[,] or [by a] representative of his own choosing"; and the right to "present evidence on his own behalf, through witnesses or by affidavit."[189] The Order likewise provided a right to appeal unfavorable decisions by the agency board, first to the agency head and then to the LRB.[190]

But it had left many critical questions unanswered. For instance, what procedural protections would apply during loyalty hearings? What was the precise scope of the LRB's authority to review agency-level cases? What was the standard of review on appeal from agencies to the Board? The Order delegated to the LRB the task of filling in these procedural gaps to create a coherent adjudicatory framework.

The LRB read a number of procedural requirements into the loyalty hearing process. Taken together, they imposed significant constraints on agencies' ability to dismiss employees without competent evidence and without at least a minimally impartial process. Key representative examples

186. Seth W. Richardson, Chairman, Loyalty Rev. Bd., Memorandum No. 1: Effect of Proof of Membership or the Equivalent Thereof in Any Organization on So-Called Attorney General's List, U.S. Civ. Serv. Comm'n 1 (Mar. 9, 1948) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 10).

187. Statement, Regulations, and Directives of the Loyalty Review Board, *supra* note 165, at 3.

188. Exec. Order No. 9835 pmbl., 3 C.F.R. 129, 129 (Mar. 21, 1947).

189. *Id.* pt. II, at 130.

190. *Id.* pt. II, at 131.

are detailed here, some of which were publicized at the time, others of which are recorded in the LRB's archives.

The inability of accused employees to confront adverse witnesses, many of whom provided information that was repeated anonymously in the FBI reports that formed the basis for loyalty charges, was one of the most consistently criticized aspects of the loyalty program.[191] The FBI did not disclose the identity of their informants, and many refused to testify.[192] But other anonymous witnesses contributed to loyalty reports and were not protected by the FBI.[193] The LRB thus had to decide whether to consider their testimony and to what degree it should allow confrontation by accused employees. As CSC Commissioner Arthur S. Flemming recalled at the Board's first meeting, the issue of confrontation had been raised repeatedly "before the Senate, before the House, and by very sincere members of the Congress of the United States," who took "violent exception to the fact that there is no confrontation of witnesses."[194]

In response to these concerns, the LRB adopted rules to limit the use and impact of anonymous witness testimony. It did so in a few ways.

First, it emphasized that agency boards were required to make all reasonable efforts to require non-confidential witnesses to appear. The LRB lacked subpoena power, but it authorized any agency board, "in its discretion, to invite any person not a confidential informant to appear before the board and testify," as well as to "cross-examine such [a] witness in connection with his testimony."[195] In the absence of personal testimony, the Board also directed agencies to seek sworn statements from informants.[196]

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191. *See* BONTECOU, *supra* note 84, at 60; First Meeting of the Loyalty Review Board, *supra* note 149, at 54-55 (detailing the doubts of Secretary Perkins and others as to the "reliability" of confidential informants and noting that members of Congress and the public took "violent exception" to employees' inability to confront accusers); Emerson & Helfeld, *supra* note 34, at 101-03 (describing the use of anonymous FBI reports as "an insane grotesque of the trial process" and citing critiques by others).

192. BONTECOU, *supra* note 84, at 60-61; *see* Emerson & Helfeld, *supra* note 34, at 107 (quoting Seth Richardson, *Aims and Procedures of Loyalty Review Board*, N.Y. TIMES, Dec. 28, 1947, at 28) (detailing the widespread use of confidential FBI informants in loyalty hearings).

193. Emerson & Helfeld, *supra* note 34, at 107 (quoting Richardson, *supra* note 192).

194. First Meeting of the Loyalty Review Board, *supra* note 149, at 54-55 (statement of CSC Comm'r Fleming).

195. Seth W. Richardson, Chairman, Loyalty Rev. Bd., Memorandum No. 27: Instructions to Supplement the Directives to the Departments and Agencies, U.S. Civ. Serv. Comm'n 1 (Nov. 2, 1948) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 10).

196. Conference on Regional Loyalty Board Matters, U.S. Civ. Serv. Comm'n 5-6 (June 25-26, 1951) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 11).

Second, the LRB directed agencies to make efforts to corroborate the reliability of testimony against employees. Here, the Board had to address both ordinary witnesses who had provided evidence to the agency during the investigation and witnesses whom the FBI deemed "confidential" (and thus entitled to anonymity) because they had assisted in investigations. In correspondence to regional boards, the LRB clarified that non-confidential witnesses could be cross-examined.[197] As part of this effort, it radically altered the sharp rule of secrecy that had allowed informants who had not been designated confidential by the FBI to conceal their identities.[198] In a series of rulings, the Board determined that employees were entitled to the names of the individuals with whom they were charged to have associated.[199]

Despite not permitting confrontation of confidential witnesses, the LRB did create similar mechanisms for limiting abuses. By rule, it allowed loyalty boards to question FBI agents about their informants' reliability and to consider the results when weighing evidence.[200] It also authorized agency boards to "seek further corroboration or amplification with respect to confidential evidence" submitted by the FBI.[201] In addition, it forbade local and agency boards from relying on vague or incomplete testimony, instructing them to follow up with the FBI to investigate and corroborate "categorical statements" in reports of subversive activity.[202]

Finally, and perhaps most importantly, the LRB also made clear that boards were required to discount the evidentiary value of testimony from witnesses who failed to appear or whose credibility could not be confirmed. An agency board could consider a signed statement by a non-confidential informant "for what it was worth."[203] But where, as often happened, those witnesses agreed to testify and then failed to appear, the non-appearance was "made a matter of record," and each board was instructed to, "in considering the

197. Letter from L.V. Maloy, Exec. Sec'y, Loyalty Rev. Bd., to Charles Staff, Exec. Sec'y, Reg'l Loyalty Bd., 2d U.S. Civ. Serv. Region (Feb. 11, 1949) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 11); *see* Letter from Charles Staff, Exec. Sec'y, Reg'l Loyalty Bd., 2d U.S. Civ. Serv. Region, to L.V. Maloy, Exec. Sec'y, Loyalty Rev. Bd. (Feb. 2, 1949) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 11).

198. BONTECOU, *supra* note 84, at 60.

199. *Id.*

200. *Id.* at 61.

201. Richardson, *supra* note 195, at 2.

202. Note of Executive Meeting Held on December 17, 1948, U.S. Civ. Serv. Comm'n 1 (Dec. 17, 1948) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 3).

203. Richardson, *supra* note 186, at 2.

testimony of such witness, give such weight to his reasons, if any, for his failure to appear as to the Board shall deem just and proper."[204]

In addition to ensuring the reliability of witness testimony, the LRB consistently cautioned agencies against considering factors not explicitly outlined in President Truman's Executive Order. Civil service rules prohibited inquiries into matters such as religion, political affiliations, and other personal characteristics.[205] In its guidance, the Board reiterated these limitations, stressing that agencies must avoid questioning individuals on topics unrelated to the determination of their loyalty.[206]

In December 1948, the LRB reiterated this directive, emphasizing that "all possible care must be used not to inject into . . . a loyalty proceeding[] matters . . . which are improper, irrelevant, incompetent, or which are not relevant to the determination of an individual's loyalty."[207] These included employees' religious beliefs, marital status, race, "or, except as may be required by law, [their] political opinions or affiliations."[208]

The LRB reiterated these restrictions in guidance to agencies and regional boards.[209] It also instructed agencies to reconsider cases in which improper evidence had been introduced.[210]

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204. Richardson, *supra* note 195, at 2.

205. *See* BONTECOU, *supra* note 84, at 66 (noting that, consistent with civil service rules, the LRB instructed lower boards that they could not discriminate based on an employee's "religious opinions or affiliations, or because of his marital status or his race" (quoting Seth W. Richardson, Chairman, Loyalty Rev. Bd., Memorandum No. 33: Avoidance of Improper or Irrelevant Matters in Loyalty Proceedings, U.S. Civ. Serv. Comm'n (Dec. 17, 1948) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 10))). The Pendleton Act, the Lloyd-La Follette Act, and the Hatch Act likewise prohibited discrimination on the basis of political affiliation or activity. *See supra* Part I.A.

206. Seth W. Richardson, Chairman, Loyalty Rev. Bd., Memorandum No. 33—Avoidance of Improper or Irrelevant Matters in Loyalty Proceedings, U.S. Civ. Serv. Comm'n (Dec. 17, 1948) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 10) (cautioning agencies against consideration of "irrelevant" factors). *But see* BONTECOU, *supra* note 84, at 136 (noting that certain agencies often still deviated from CSC guidance by considering evidence of employees' personal opinions).

207. Richardson, *supra* note 206.

208. *Id.*

209. *See, e.g.*, Letter from L.V. Maloy, Exec. Sec'y, Loyalty Rev. Bd., to George M. Morris, Exec. Sec'y, Regional Rev. Bd., Fourth U.S. Civ. Serv. Region 2 (Dec. 3, 1948) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 11, Folder F4).

210. *See, e.g., id.*

The LRB also guarded its hearings against ex parte interference by the Attorney General and others.[211] The question of civil servant loyalty had generated enormous political attention and, with it, pressure to obtain dismissals in high-profile cases.[212] That pressure, in turn, raised the risk that political actors would seek to influence loyalty proceedings outside the normal course of adjudication.

The Board repeatedly took steps to limit that interference. In 1949, for instance, the Veterans Affairs board informed the LRB that the Attorney General had sent it FBI investigative files regarding certain employees who had previously been cleared of disloyalty charges, in an attempt to persuade the Board to reopen their cases.[213] Chairman Richardson recalled in March of that year that he "immediately wrote to the Attorney General" in response and warned him "in words of one syllable" not to "inject[] himself in the Loyalty Program by communicating with the head of a department" regarding individual cases.[214] After a meeting, the Attorney General agreed to refrain from further ex parte communications with agency boards and to route concerns directly to the LRB instead.[215]

The Board also established rules to limit interference from Congress, particularly congressional Republicans, who sought to use hearing records to pressure the Board into taking a harder line.[216] In response, the Board prohibited agencies from sharing case files (beyond an index and procedural history) with outside parties, including Congress. That prohibition applied even after loyalty investigations had been completed.[217]

One of the most important procedural innovations of the Board was its formalization of appellate review over agency decisions. It did this in two ways.

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211. *See, e.g.*, Transcript of Proceedings: Eighth Meeting of the Loyalty Review Board, U.S. Civ. Serv. Comm'n 19-20 (Mar. 15-16, 1949) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 2) [hereinafter Eighth Meeting] (reflecting a rule that the FBI and Attorney General could communicate only with the LRB directly, not with agency boards, concerning pending cases).

212. *See supra* Part I.B.

213. Eighth Meeting, *supra* note 211, at 19.

214. *Id.*

215. *Id.* at 20.

216. *See, e.g.*, BONTECOU, *supra* note 84, at 136 (describing Senator McCarthy's use of leaked records to attack the LRB).

217. Seth W. Richardson, Chairman, Loyalty Rev. Bd., Memorandum No. 45: Information Which May Be Furnished by Government Agencies with Regard to Loyalty Matters Under Executive Order 9835, U.S. Civ. Serv. Comm'n 1 (Jul. 26, 1949) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 10).

As an initial matter, the Board required agencies to allow appeals of unfavorable decisions to agency heads. "In formulating the existing loyalty program," the Board explained that it had "specifically provided for the right of appeal as of right from an Agency Board to the head of th[at] Agency."[218]

Second, and perhaps more consequentially, the Board also made aggressive use of its appellate authority over agency heads. The exact scope of the LRB's ability to oversee agency adjudications was unclear under Executive Order 9835, but the Board read into it a very extensive appellate authority, determining that the employees could appeal unfavorable agency decisions "as of right."[219] And the Board established the standard on appeal as "more or less de novo," giving it wide latitude to overturn agency rulings.[220]

Most importantly, through a combination of legal interpretation and political maneuver, the LRB established its rulings on loyalty matters as binding on agencies. In 1944, the CSC had lobbied for and obtained appellate review over personnel decisions concerning veterans under the Veterans Preference Act (VPA), and its rulings on those disputes were binding.[221] Executive Order 9835, however, had specified that the LRB's rulings on questions of loyalty would be only "advisory."[222] Because the Order conflicted with the requirements of the VPA, the LRB quickly asserted its right to issue mandatory opinions in loyalty cases involving veterans.[223]

And because veterans made up an exceptionally large portion of the civil service in the post-war period, that made the LRB's opinions binding in many of the appeals that it heard. Given that its findings were already mandatory for many of the employees who appeared before it, the Board quickly instilled an expectation that its rulings would be followed even in nonveteran cases to afford consistent rights to civil servants. In 1948, the LRB communicated to agency boards that, because "[t]he recommendations of the Civil Service Commission in cases of employees covered by Section 14 of the [VPA were]

218. Seth W. Richardson, Chairman, Loyalty Rev. Bd., Memorandum No. 29: Instructions to Supplement the Directives to the Departments and Agencies, U.S. Civ. Serv. Comm'n 1 (Nov. 4, 1948) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 10).

219. *Id.*

220. Conference on Regional Loyalty Board Matters, Civ. Serv. Comm'n 3 (June 25-26, 1951) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 11, Folder 3).

221. *See* BRIEF HISTORY, *supra* note 82, at 7-8; BONTECOU, *supra* note 84, at 54.

222. Exec. Order No. 9835, pt. II, 3 C.F.R. 129, 131 (Mar. 21, 1947).

223. U.S. CIV. SERV. COMM'N, 65TH ANNUAL REPORT 14-15 (1948).

mandatory," the "loyalty of persons not covered by section 14 [was to] be judged by the same standards."[224]

The combination of powers the Board assigned itself and the substantive and evidentiary requirements it placed on hearings led it to reverse a significant number of decisions, often incurring public criticism.[225] Indeed, as another Board member noted in 1951, the LRB often reversed dismissals in ambiguous cases.[226]

C. The Impact of LRB Rules

The LRB's legal innovations ultimately restrained the federal loyalty purge. Partly as a result of its protections, only about 2,700 federal employees were dismissed and between 2,000 and 12,000 resigned out of five million investigations conducted across a federal workforce that at any given time exceeded two million employees.[227] Moreover, most of those dismissed were relatively low-level employees.[228] Loyalty "clearance," as Chairman Richardson wrote in 1951, "occur[red] in the over-whelming majority of cases."[229]

Eleanor Bontecou, a lawyer who represented civil servants before the LRB and wrote a critical history of it in 1953, likewise recounted that in its early years the Board adhered to a "high standard of justice" and reversed "many adverse judgments" on appeal.[230]

A more detailed examination of the LRB's records confirms this estimation. The CSC provided comprehensive annual reports to Congress of its personnel activity, including its adjudication of loyalty cases. As can be seen in Table 1, the vast majority of employees who were investigated were cleared

224. Statement, Regulations, and Directives of the Loyalty Review Board, U.S. Civ. Serv. Comm'n 26 (Dec. 31, 1948) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 9).

225. *See infra* Table 1; text accompanying notes 264-69.

226. Fourteenth Meeting of the Loyalty Review Board, U.S. Civ. Serv. Comm'n 18 (Feb. 13-14, 1951) [hereinafter Fourteenth Meeting] (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 2).

227. As set forth in Table 1 below, the CSC's own data estimated that approximately 2,000 employees resigned while loyalty investigations were pending. Other studies place the figure slightly higher, at 12,000. *See, e.g.*, *Truman's Loyalty Program*, NAT'L ARCHIVES & RECS. ADMIN., https://perma.cc/CS8L-NNCQ (archived Mar. 15, 2026). The higher number may include resignations that were linked to, but occurred before or after, security investigations.

228. Storrs, *supra* note 6, at 10.

229. Richardson, *supra* note 161, at 548.

230. BONTECOU, *supra* note 84, at 56-57.

without hearing. Out of an estimated five million civil servants who passed through government service between 1948 and 1954, only approximately 13,000 had their cases adjudicated by agency boards. Of those, around 80% were ultimately cleared by either the agency or the LRB, with approximately 17% (around 2,000 employees) resigning mid-investigation and about 2% (between 200 and 300 employees) found disloyal.

Table 1

Loyalty Case Dispositions at Agency Board, Agency Head, and LRB Review Stages[231]

Year	**1948**	**1949**	**1950**	**1951**	**1952**	**1953**	**Total**	**Total (%)[232]**
Cases Processed by Agency Boards (Total)	308	2,748	2,285	2,115	5,207	3,037	13,086	-
Employee Resigned Prior to Decision	0	295	229	217	952	469	2,162	16.5%
Agency Made Decisions Favorable to Employee[233]	0	1,757	1,788	1,023	3,462	2,086	10,116	77.3%

231. For the raw data used in this table, see CIV. SERV. COMM'N, 1953 ANNUAL REPORT 30-31 (1953) [hereinafter 1953 CSC REPORT], which provides the most updated statistics on the LRB. For earlier, unrevised numbers for each year, see CIV. SERV. COMM'N, 1949 ANNUAL REPORT 35, 38 (1949); CIV. SERV. COMM'N, 1950 ANNUAL REPORT 32, 34 (1950) [hereinafter 1950 CSC REPORT]; CIV. SERV. COMM'N, 68TH ANNUAL REPORT 35-36 (1951) [hereinafter 1951 CSC REPORT]; and CIV. SERV. COMM'N, 69TH ANNUAL REPORT 54-55 (1952). When the LRB had not processed a case by the time an annual report was printed, its disposition was noted in the following year's report. The CSC stopped reporting case numbers in 1954, when the loyalty program was discontinued. *See* 1953 CSC REPORT, *supra*, at 23.

232. In 1951, the period coinciding with Chairman Bingham's takeover of the Board, the reporting format changed, and the CSC no longer distinguished between cases decided at the agency board and agency head level. *Compare* 1951 CSC REPORT, *supra* note 231, at 35-36, *with* 1950 CSC REPORT, *supra* note 231, at 32. The most updated statistics thus do not distinguish between favorable decisions made by agency boards and those made by agency heads on appeal from unfavorable board rulings.

233. Not all cases had been disposed of by the time numbers were reported in the CSC's annual reports, so totals add up to slightly less than 100%. 1953 CSC REPORT, *supra* note 231, at 30.

Agency Made Decision Unfavorable to Employee	0	16	49	29	47	69	210	1.6%
Appeals to LRB (Total)[234]	14	109	192	86	80	75	415	-
Appellant Found Eligible	0	39	72	25	31	14	181	43.6%
Appellant Found Ineligible	3	27	55	59	28	62	234	56.4%

For all of the very real fear it instilled in civil servants, the loyalty program terminated relatively few federal employees in practice.

The LRB's tempering role was also evident in political reactions. Congress repeatedly accused the CSC of clearing too many employees.[235] As explained in the next Part, the Truman and Eisenhower Administrations responded to congressional calls for more dismissals by reportedly lowering the standard for disloyalty, eventually disbanding the Board altogether in 1953.[236] Even so, the number of dismissals remained consistently low. In 1954, the Eisenhower Administration went so far as to publicly exaggerate the number of loyalty dismissals, possibly to cover up the LRB's perceived laxity.[237]

Of course, fear and intimidation were part of the McCarthyite strategy for controlling the bureaucracy, and we should be careful not to understate the impacts of the loyalty program. Over 2,000 terminations and about as many resignations for disloyalty were still significant, even if that number constituted only a miniscule share of the entire federal workforce. And historians have made a compelling case that many civil servants who were not

234. The number of appeals is slightly higher than the number of unfavorable decisions at the agency level. This is because the Board affirmatively reviewed on post audit a small number of cases decided favorably at the agency level. *Id.* at 29, 31. As discussed below, the Supreme Court later prohibited that practice in *Peters v. Hobby*, 349 U.S. 331, 342 (1955). *See infra* Part III.C.

235. *See infra* Part III.C.

236. *See* 1953 CSC REPORT, *supra* note 231, at 1.

237. *See* Rackow, *supra* note 101, at 718, 721-22.

fired, or even investigated, may have curtailed their advocacy for certain policies out of fear.[238] During the same period, moreover, the CSC oversaw vetting for security risks that could serve as a stalking horse for discrimination against civil servants from marginalized groups—most notoriously gay and lesbian workers during the so-called "Lavender Scare."[239]

Nor did the LRB behave in a uniformly rights-protective manner. The Board declined to extend protections to civil servants in some important instances, even when it arguably had the legal leeway to do so. It often did so for self-protective reasons, limiting individual agencies' ability to deviate from Department of Justice and CSC guidance and preventing agencies from becoming overly protective of controversial employees. For instance, the LRB prohibited agency boards from reexamining organizations designated as subversive by the Attorney General and from concluding that non-listed organizations were subversive.[240] The Board was likewise criticized for its practice of post-auditing (essentially, a post hoc review of specific cases) favorable decisions from agency boards, effectively pressuring agencies to discharge employees it had previously found loyal.[241]

Nonetheless, the LRB's procedural innovations still had a meaningful impact in insulating the civil service from employment purges. In its early years, the Board established a centralized system of adjudication with strong, enforceable rights. Moreover, as set forth below, the procedural protections first established by the LRB ultimately came to be enforced by courts and increasingly migrated into unrelated areas of civil service law. This is a remarkable development for a system that, a decade earlier, had provided few procedural protections or avenues for review of adverse employment decisions.

238. *See, e.g.*, STORRS, *supra* note 164, at 177-205 (describing the "trauma" civil servants experienced from undergoing loyalty investigations, even those that did not result in dismissal).

239. *See generally* DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT (2006) (detailing efforts to remove gay and lesbian workers from the federal service, often based on purported concerns about loyalty and national security).

240. BONTECOU, *supra* note 84, at 173.

241. *See* Seth W. Richardson, Chairman, Loyalty Rev. Bd., Memorandum No. 52: Processing Supplemental Reports of Investigation Received After Final Favorable Decision in Loyalty Cases of Employees, U.S. Civ. Serv. Comm'n (Oct. 14, 1949) (on file with Nat'l Archives, Records of the U.S. Civil Service Commission, Records Relating to Loyalty Review Boards, 1947-1952, Box 10).

III. Judicial Review and Evolution

Prior to the 1950s, the expansion of civil service rights occurred largely within the administrative state, through procedural and substantive rules issued by the CSC and LRB. This Part traces how those protections survived and expanded beyond McCarthyism. When the Eisenhower Administration pressed for stricter loyalty standards, the LRB responded in kind, narrowing its own protections. In the years that followed, federal courts intervened to cabin the loyalty purge, inserting themselves into contests that raised fundamental questions of civil liberties and the separation of powers.[242]

In adjudicating these disputes, courts did not rely primarily on the First Amendment or separation-of-powers doctrine. Instead, they drew on emerging principles of administrative law to enforce the executive's own procedural constraints. Although personnel actions were nominally exempt from the APA, judges adapted doctrines originally designed to protect private parties and redeployed them to mediate relationships among government actors themselves.[243] The procedural norms that governed agencies' treatment of citizens thus came to structure their authority over civil servants.

These rights endured and deepened after McCarthyism, laying the foundation for the powerful and independent federal bureaucracy of the 1960s. What began as a piecemeal effort to prevent political capture of the civil service evolved into a system of procedural constraint that produced a more autonomous administrative state than the architects of the Pendleton Act or the reformers of the Progressive Era could have imagined.[244]

A. The Existing Case Law of Civil Service Protections

Until the 1940s, federal courts were extremely deferential to executive branch employment decisions, recognizing essentially no enforceable right to due process for federal civil servants. The Pendleton Act and the Lloyd-La Follette Act created statutory frameworks for the merit-based hiring and firing, respectively, of federal civil servants.[245] Some evidence does suggest that their limitations were often followed in practice and yielded substantial improvements in government service.[246]

242. *See infra* Part III.C.

243. *See infra* Part III.C.

244. *See infra* Parts III.C-.D.

245. Pendleton Civil Service Reform Act, ch. 27, §§ 1-3, 22 Stat. 403, 406 (1883) (codified as amended in scattered sections of 5 U.S.C.) (governing hiring); Lloyd-La Follette Act, Pub. L. No. 336, § 6, 37 Stat. 539, 555 (1912) (codified as amended in scattered sections of 5 U.S.C.) (governing termination).

246. *See, e.g.*, Abhay Aneja & Guo Xu, *Strengthening State Capacity: Civil Service Reform and Public Sector Performance During the Gilded Age*, 114 AM. ECON. REV. 2352 (2024)
footnote continued on next page

But these rules lacked meaningful enforcement mechanisms. The CSC's opinions interpreting these rules were advisory and nonbinding for the first fifty years of its existence.[247] Neither could civil servants bring suit in federal court to enforce their rights. While federal employees could only be terminated for "such cause as will promote the efficiency of said service and for reasons given in writing,"[248] courts consistently deferred to the judgment of the executive branch on what could satisfy such a standard and did not second-guess employment decisions.[249]

Through the 1940s, federal courts continued that trend, holding that civil service statutes gave agency heads near-plenary discretion in hiring and firing. For instance, in *Carter v. Forrestal*, the D.C. Circuit upheld the dismissal of an Army Department employee for repeated failure to pay personal debts, refusing to consider whether such conduct actually impeded the "efficiency" of federal service as required by the Lloyd-La Follette Act.[250] The D.C. Circuit declined to entertain that argument, observing that "[i]n the many cases arising under that statute, the courts have uniformly held that the administrative determination by the employing agency of what constitutes cause for discharge will not be judicially reviewed."[251]

In *Bailey v. Richardson*, the D.C. Circuit directly confronted the legality of the loyalty program. The court held that the program was permissible under the Constitution's Appointments Clause and the relevant civil service statutes.[252] It also held that the appellant had no due process right to notice or hearing prior to her loss of employment, as, "[o]bviously, an applicant for office has no constitutional right to a hearing or a specification of the reasons why he is not appointed."[253]

But as investigations of loyalty gained strength, courts began to develop doctrines for interrogating executive branch employment decisions. In particular, they began to draw on theories of structural constitutional law to limit congressional incursions into federal personnel management. In its 1946 decision *United States v. Lovett*, the Supreme Court considered the

(demonstrating that the adoption of the Pendleton Act led to increased accuracy and efficiency of postal deliveries).

247. *See supra* Part I.A.

248. § 6, 37 Stat. at 555.

249. *See, e.g.*, Gadsden v. United States, 78 F. Supp. 126, 127 (Ct. Cl. 1948) ("The determination of whether or not a person's discharge would promote the efficiency of the Government service is vested in the administrative officer and no court has power to review his action if that action was taken in good faith.").

250. 175 F.2d 364, 364-66 (D.C. Cir. 1949); *see* § 6, 37 Stat. at 555.

251. 175 F.2d at 365 (collecting cases).

252. Bailey v. Richardson, 182 F.2d 46, 55, 57-58 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

253. *Id.* at 55.

constitutionality of an appropriations rider denying payment to specific civil servants deemed to have "subversive" views.[254] The rider was enacted at HUAC's urging in 1943, and it prohibited employing agencies from using their funds to pay the salaries of thirty-nine employees identified by the Committee.[255] In defiance of the statute, the agencies retained the employees beyond the expiration of their funds, and the employees sued in the U.S. Court of Claims to recover back payment. They argued that the rider violated (1) the Fifth Amendment, by depriving them of property without due process of law; (2) Article II, Sections 1-4 of the Constitution, by intruding upon the executive branch's allegedly exclusive right to fire its employees; and (3) Article I, Section 9, by acting as a bill of attainder.[256]

As in later cases, the Supreme Court sidestepped both civil servants' individual interests in a government job and the proper division between congressional and presidential authority over executive branch employees. Instead, it focused on a process violation, holding that the appropriation bill constituted a bill of attainder—that is, a "legislative act which inflicts punishment without a judicial trial."[257] Relying on colorful language from HUAC hearings in which the Committee purported to conduct an "inquest" into "charges" of subversion, the Court held that Congress had in fact adjudicated the employees "guilty" of subversion in an attempt to "purge" the civil service.[258] The "punishment" imposed—"prohibiting [the employees from] ever holding a government job"—was of the type contemplated by the Framers in forbidding bills of attainder, so it could not be imposed legislatively.[259]

Lovett foreshadowed later cases in demonstrating the Court's increasing willingness to insert itself into executive branch personnel disputes, and it showed that employment decisions were not exclusively the province of the political branches. More importantly, by invoking the Bill of Attainder Clause, the Court demonstrated an awareness that loyalty investigations did not just threaten the individual rights of federal employees; they also threatened to upset separation-of-powers principles by aggrandizing Congress in ways the Framers had sought to prevent.[260] In its extensive quotation of the

254. 328 U.S. 303, 304-05, 308 (1946).

255. *Id.* at 305, 308-09.

256. *Id.* at 306.

257. *Id.* at 315 (quoting Cummings v. Missouri, 71 U.S. 277, 323 (1867)).

258. *Id.* at 309-11, 314 (quoting H. REP. NO. 78-448, at 5-7, 9 (1943)).

259. *Id.* at 313.

260. *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1013 (2006) (noting that the Bill of Attainder Clause was intended broadly as an "implementation of the separation of powers" to check legislative aggrandizement (quoting United States v. Brown, 381 U.S. 437, 442 (1965))).

congressional record, the Court demonstrated awareness and skepticism of Congress's attempt to politicize the civil service by "purg[ing]" it.[261]

B. The Evolution of the Loyalty Program in the 1950s

The CSC had always run somewhat against the current of congressional demands for stricter investigations of alleged subversives. But particularly in the 1950s, the CSC came under sustained political pressure to remove more federal employees under the loyalty program.

This was partly a product of conservative pressure in Congress as the Korean War reshaped the political arena.[262] This pressure was heightened by cases involving high-level employees who had been cleared by the LRB and subsequently charged with espionage-related offenses. These included the cases of William Remington, an economist in the President's Council of Economic Advisors, who was cleared by the LRB but later alleged to be a Soviet spy, and John S. Service, a State Department officer accused of leaking documents on East Asia policy.[263]

The pressure was partly a result of the LRB's perceived laxity in administering the program. By 1950, it had become clear that the loyalty program would likely only impact a small percentage of federal workers. This perceived problem was particularly acute in certain politically sensitive departments. The Departments of Commerce and State, for instance, both investigated few employees.[264] Commerce reached a finding of disloyalty in just 7% of the cases it adjudicated, and State found no employees disloyal at all.[265] The low rate of dismissals drew intense criticism from Congress and in the press.[266]

On February 7, 1950, Republican members of the House and Senate released a joint statement to denounce the Truman Administration's "soft" stance on disloyal federal employees.[267] They demanded a "complete overhaul

261. *Lovett*, 328 U.S. at 314.

262. Rackow, *supra* note 101, at 711.

263. *Id.* at 712; BONTECOU, *supra* note 84, at 64 n.78, 70-71, 102 (discussing Service and Remington); Service v. Dulles, 354 U.S. 363, 364-67 (1957).

264. 97 CONG. REC. 9704, 9705 (1951) (statement of Sen. Joseph McCarthy); Rackow, *supra* note 101, at 711 n.89; Fourteenth Meeting, *supra* note 226, at 5 (Feb. 13-14, 1951) (statement by Chairman Bingham) (describing the Board as "under fire" from Congress and the press for allegedly lax investigations).

265. 97 CONG. REC. 9704, 9705 (statement of Sen. Joseph McCarthy).

266. *See id.* at 9705-06 (statement of Sen. Joseph McCarthy).

267. Rackow, *supra* note 101, at 715 (quoting *Text of Republican Party's Statement of Principles and Objectives*, N.Y. TIMES, Feb. 7, 1950, at 20).

of the so-called loyalty and security checks of Federal personnel."[268] Chairman Richardson received particularly harsh criticism. One congressman summarized the sentiments of the Republican caucus: "For nearly 4 years Seth W. Richardson operated the Loyalty Review Board and administered a so-called loyalty program with never a determined effort to have those unreasonable and restricted standards amended."[269]

By the early 1950s, Congress had launched multiple investigations into what it considered the lax standards of the loyalty program.[270] In 1950, Congress enacted Public Law 733, which exempted eleven national security-related agencies from any procedural requirements under the loyalty programs and empowered the heads of those agencies to issue summary dismissals of employees they determined to be "endanger[ing] 'national security.'"[271] That law was soon accompanied by a wave of additional anticommunist legislation, including the McCarran Internal Security Act of 1950.[272]

By 1950, the CSC and the President had begun to yield to political pressure. Richardson was replaced as chairman that year by former Senator Hiram Bingham.[273] In his first months in the position, Bingham acknowledged the intense political pressure the Board was facing and resolved to repair its reputation by taking a harder line on loyalty cases. After convening his first meeting, Bingham explained to the Board, "As you all know, and especially those of you who live in this vicinity, we have been under fire now pretty seriously for some time, and particularly recently."[274] He noted that the House Appropriations Committee, in advance of appropriating funds to executive departments, was "making a special point of asking members of the different departments how many persons in their office have been investigated, [and] what the results of those investigations were."[275]

Seeking to alleviate political pressure, Bingham moved to reform the Board to make it less amenable to employee appeals. Most importantly, he successfully lobbied President Truman to change the loyalty standard. Upon reviewing past cases from the State Department and other agencies, Bingham

268. *Id.*

269. 97 CONG. REC. 4757 (1951) (statement of Rep. Fred E. Busbey).

270. Fourteenth Meeting, *supra* note 226, at 5-6 (referencing three separate congressional investigations of the LRB).

271. Rackow, *supra* note 101, at 711 (quoting Act of Aug. 26, 1950, Pub. L. No. 733, 64 Stat. 476 (1950)).

272. Wiecek, *supra* note 6, at 424-25 (citing McCarran Internal Security Act, Pub. L. No. 81-831, 64 Stat. 987 (1950)).

273. BONTECOU, *supra* note 84, at 45.

274. Fourteenth Meeting, *supra* note 226, at 5.

275. *Id.* at 6.

concluded that the standard established in Executive Order 9835—reasonable grounds to believe that the employee was disloyal—was too lenient, meaning that there were "in the Government a small number of very dangerous persons whom, under the present rule, [the Board could not] reach."[276] He therefore recommended, with the approval of the Board, that the President amend the standard to require only "reasonable doubt" as to the employee's "loyalty"—a standard that President Truman ultimately adopted in 1951 via Executive Order 10,241.[277] In a number of areas, including the burden of proof borne by employees and the standard for disloyalty, the Bingham Board sought to amend its procedures to favor removal.[278] By 1952, the Board had "definitely tipped against" employees.[279]

The next administration imposed further restrictions. On April 27, 1953, President Dwight D. Eisenhower issued Executive Order 10,450, which superseded Executive Order 10,241. The Order effectively extended the requirements of Public Law 733 from sensitive agencies to the entire executive branch.[280] It changed the standard for dismissal of federal employees from "reasonable doubt as to the loyalty of the person involved" to a requirement that their employment be "clearly consistent with the [requirements] of . . . national security," effectively abolishing the distinction between loyalty and security that the LRB had assiduously maintained.[281] Having eliminated loyalty as a standalone consideration, it also abolished the LRB in its entirety, leaving final dismissal authority with agency heads.[282]

C. Judicial Review and the Loyalty Program

As the executive branch harshened its own loyalty-security standards, courts intervened in an increasingly aggressive way to limit civil service purges. In the 1950s, the federal courts, like the CSC, were often criticized for their perceived sympathy to subversives.[283] While they sought to limit infringements on constitutional rights, they also sought to limit political backlash.[284] In doing so, they did not rely on core constitutional law doctrines

276. *Id.* at 10-11.

277. *Id.*; Exec. Order 10241, 16 Fed. Reg. 3690, 3690 (May 1, 1951).

278. BONTECOU, supra note 84, at 69-72.

279. *Id.* at 72.

280. Exec. Order No. 10450 § 1, 18 Fed. Reg. 2489, 2489 (Apr. 29, 1953).

281. *Id.* § 2.

282. Rackow, *supra* note 101, at 717; *see also* LICHTMAN, *supra* note 7, at 105-07 (describing backlash against the federal judiciary for rights-protective rulings during the McCarthy era).

283. *See* LICHTMAN, *supra* note 7, at 11.

284. *See id.* at 11-12.

hinging on civil liberties or separation of powers. To the contrary, courts scrupulously avoided those questions, "declin[ing] . . . [f]rom a very early date" to "anticipate a question of constitutional law" relating to the loyalty program.[285] But in a number of cases, the Supreme Court did rein in the loyalty program as the LRB, and later agency heads, were pushed to act more aggressively.[286]

These rulings drew on emerging doctrines of administrative law, including, among other doctrines, the APA's prohibition on arbitrary and capricious agency action;[287] the requirement under *United States ex rel. Accardi v. Shaughnessy* that agencies follow their own procedures;[288] and *SEC v. Chenery Corp.*, which precluded agencies from justifying an action by relying in litigation on a rationale not relied upon in the record below.[289]

In other words, courts began to apply the same principles meant to limit agencies' power over private parties to limit their ability to discipline and dismiss their own employees. First, they imposed increasingly strict requirements on agencies of procedural regularity and reasoned decisionmaking when taking personnel actions. And second, they circumscribed the CSC's and the LRB's jurisdiction over personnel actions, particularly employee-friendly decisions on the agency level.

These rulings reflected the LRB's own innovations in the 1940s, limiting agencies' removal powers by tying them to specific hearing procedures, limiting the jurisdiction of the loyalty boards, and imposing certain substantive limits on removal.

1. Legal requirements in loyalty adjudications

Federal courts became increasingly strict in enforcing limits on executive discretion over firing. These limits included the text of the President's Executive Orders, general principles of procedural regularity, and the CSC's own procedures in loyalty cases. These rulings began to create a legal regime

285. Coleman v. Brucker, 257 F.2d 661, 662 (D.C. Cir. 1958) (quoting Peters v. Hobby, 349 U.S. 331, 338 (1955)); *see also* Greene v. McElroy, 360 U.S. 474, 509 (1959) (Harlan, J., concurring) (declining to reach the plaintiff's Fifth Amendment claims in view of the "Court's traditional and wise rule of not reaching constitutional issues unnecessarily or prematurely").

286. *See infra* Part III.C.

287. *See* Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?,* 124 U. PA. L. REV. 942, 972-73 (1976) (describing the emergence of case law in this period that limited the government's ability to make arbitrary personnel decisions).

288. 347 U.S. 260, 266 (1954), *superseded by statute,* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546, *as recognized in* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1980, 1990 (2020).

289. 318 U.S. 80, 92-94 (1943).

for federal employment law that more closely resembled other areas of administrative law, where requirements for procedural regularity and reasoned decisionmaking were enforced aggressively and meaningfully limited the President's discretion to act arbitrarily.

The first of these rulings was *Joint Anti-Fascist Refugee Committee v. McGrath*, which read into the loyalty program a requirement that agency action not be "arbitrary" or "capricious."[290] In that case, organizations identified as "subversive" on the Attorney General's list compiled under Executive Order 9835 sued the Attorney General and the LRB. They claimed they were deprived of their First Amendment right to free speech and free assembly and their Fifth Amendment right to due process because their presence on the list chilled expressive activity and cost them members, revenue, and reputation.[291]

The Court declined to reach those constitutional claims, instead resolving the case on administrative law grounds.[292] Executive Order 9835 had not provided the Attorney General with any criteria or other limitations to consider when compiling the list. And the Loyalty Board, for reasons both practical and political, had declined to create any process for challenging the Attorney General's designations.[293] As a result, under the rules of the program, designation was made entirely within the Attorney General's discretion.[294]

Nonetheless, the Court read into the Order a requirement that the Attorney General and the LRB act only based on evidence and reasoned decisionmaking.[295] At the outset of its opinion, the Court acknowledged that it was relying upon a close reading of the Executive Order and administrative law principles to sustain the plaintiffs' complaint.[296] If it were true that the Order had authorized the designation of these organizations as subversive, based only upon their associations and expressive activity, then "the case would have bristled with constitutional issues" and would have raised difficult questions of justiciability.[297]

But the Court found no need to reach the constitutional issues raised by the case. Instead, it relied on the Executive Order. While the Order had not placed any limitations on the Attorney General's power to designate organizations, the Court noted that it also did not contain any "express or

290. 341 U.S. 123, 136 (1951).

291. *Id.* at 124-25, 131-36.

292. *Id.* at 136.

293. *See id.* at 125.

294. *See id.* at 136.

295. *Id.*

296. *Id.* at 124-26, 137-38.

297. *Id.* at 135.

implied attempt to confer power on anyone to act arbitrarily or capriciously."[298] Rather, the Order required the LRB to safeguard "not only the protection of the United States against disloyal employees but the 'equal protection' of loyal employees against unfounded accusations of disloyalty."[299]

And because the Order required decisions to be based on both evidence and appropriate process, no action—even one arguably committed to the Attorney General's discretion—could be valid thereunder if it were "patently arbitrary and contrary to the uncontroverted material facts."[300] Here, based on the facts as pleaded in the complaints, the plaintiff organizations engaged in ordinary charitable work, and designating them as subversive amounted to an "arbitrary fiat contrary to the known facts."[301]

Contrary to the arguably best reading of the Order, the Court declined to grant the Attorney General unfettered discretion to designate organizations and refused to defer to his contrary interpretation of the Executive Order.[302] In so holding, the Court invoked general principles of administrative law forbidding arbitrary action: "The doctrine of administrative construction never has been carried so far as to permit administrative discretion to run riot."[303] Holding otherwise "would rest upon the premise that the Attorney General has attempted to delegate to himself the power to act arbitrarily."[304] The Court refused to "impute such an attempt to the Nation's highest law enforcement officer any more than we can to its President."[305]

The next year, in *Kutcher v. Gray*, the D.C. Circuit elaborated on the prohibition against arbitrary and capricious personnel action, requiring (as in other areas of administrative law) reasoned explanation for adverse action under the loyalty program.[306] In that case, the plaintiff, Kutcher, was dismissed from his position at the Veterans Administration due to his past membership in the Socialist Workers Party.[307] Because the Attorney General had designated that party an organization that sought to "alter the form of Government of the United States by unconstitutional means," the agency board concluded, based on guidance issued by the LRB, that his dismissal was mandatory under

298. *Id.* at 136.

299. *Id.* (quoting Exec. Order No. 9835, pmbl., 3 C.F.R. 129, 129 (Mar. 21, 1947)).

300. *Id.*

301. *Id.*

302. *Id.* at 138.

303. *Id.*

304. *Id.*

305. *Id.*

306. *See* 199 F.2d 783, 787, 789 (D.C. Cir. 1952).

307. *Id.* at 785.

Section 9A of the Hatch Act.[308] Kutcher appealed the decision to the agency head, who accepted the recommendation of the board without making an independent analysis of the record.[309]

On appeal, the D.C. Circuit invalidated Kutcher's termination.[310] There were two key components to the court's holding. First, it invalidated the Administrator's decision because he had accepted the recommendation of the agency board without making an independent finding that Kutcher was disloyal.[311] The agency's loyalty board was required under the Executive Order to issue a "recommendation" as to whether "on all the evidence" there was reasonable doubt as to an employee's loyalty.[312] But the Administrator had not taken the board's finding as a "recommendation"; he had accepted it wholesale.[313] This, the court ruled, violated the Order's procedural guarantees, which were designed to implement the loyalty program in a "fair and practicable way."[314] The Administrator was required to render a decision on his own judgment: "Upon him fell the duty to impartially determine on all the evidence whether there were reasonable grounds for belief that Kutcher was disloyal to the Government of the United States."[315]

Second, the court invalidated the LRB's longstanding interpretation of Section 9A of the Hatch Act as requiring the dismissal of employees who were members of proscribed groups.[316] Nothing in either the Hatch Act or the Executive Order, the court held, "proscribe[d] membership in the Socialist Workers Party by an employee, and neither Congress nor the President ha[d] seen fit to make membership in any organization designated by the Attorney General cause for removal from Government employment."[317] Rather, the procedural framework established by the Order "ma[de] disloyalty the test" and required a determination on all of the evidence, not merely an employee's membership in a single organization.[318]

Through these holdings, the court imposed on the agency head what amounted to a reasoning requirement: In order to discharge an employee, an

308. *Id.*

309. *Id.* at 785-86.

310. *Id.* at 789.

311. *Id.* at 787.

312. *Id.*

313. *Id.* at 786-87.

314. *Id.* at 788.

315. *Id.* at 787.

316. As noted above, not all so-called subversive groups fell under Section 9A of the Hatch Act. Membership in most did not trigger automatic termination. *See supra* Part II.B.

317. *Kutcher*, 199 F.2d at 787-88.

318. *Id.* at 788.

agency head was required to make an independent finding of fact that the employee was disloyal.[319] He could not delegate that responsibility to a board of subordinates.[320] And in making that finding, he could not rely exclusively on the employee's membership in a proscribed group; instead, he had to rely on a deliberate analysis of the whole record.[321]

Finally, in *Service v. Dulles*, the case on which this Article opened, the Supreme Court held that agencies had to follow loyalty board procedures, even in instances where Congress had authorized them to exercise near-plenary discretion in loyalty cases.[322] John S. Service, a member of the Foreign Service, had been accused of violating the Espionage Act by passing confidential State Department documents to the editor of *Amerasia* magazine in 1945.[323] The case had provoked intense national scrutiny of the State Department.[324] A grand jury had refused to indict Service in 1945, but "[f]rom then on Service's loyalty and standing as a security risk were under recurrent investigation."[325] Service was repeatedly cleared by the State Department's own loyalty board, which had been notoriously unwilling to implement the loyalty program, to the frustration of the CSC and the anger of Congress.[326] Finally, the LRB conducted a post-audit of the case, now under the less demanding standard of Executive Order 10,241, and found reasonable doubt as to Service's loyalty.[327]

Service appealed his termination, and the Supreme Court reversed.[328] Much as in *Kutcher*, the agency argued that it had wide discretion to dismiss employees for disloyalty.[329] Indeed, its argument was arguably stronger than that of the Department of Veterans Affairs in *Kutcher*. Under a statutory provision first enacted in 1947, the government argued that the Secretary of State could, "in his absolute discretion" and "[n]otwithstanding the provisions of . . . any other law[,] . . . terminate the employment of any officer or employee . . . whenever he shall deem such termination necessary or

319. *Id.* at 787.

320. *Id.*

321. *Id.* at 788.

322. 354 U.S. 363, 386-88 (1957).

323. *Id.* at 365.

324. HARVEY KLEHR & RONALD RADOSH, THE AMERASIA CASE: PRELUDE TO MCCARTHYISM 6-9 (1996).

325. *Service*, 354 U.S. at 365.

326. *Id.* at 365-67; *see also* KLEHR & RADOSH, *supra* note 324, at 206-12 (discussing the congressional hearings following Service's initial clearance by the loyalty board, leading to his ultimate dismissal).

327. *Service*, 354 U.S. at 366.

328. *Id.* at 370, 389.

329. *Id.* at 386-88.

advisable in the interests of the United States."[330] But the Court held that Service's termination was improper because the agency had violated its own hearing procedures, which required it to "afford its employees the same protection as those provided under the Loyalty Program."[331] Those regulations only permitted the Secretary to hear a case if the employee was appealing an unfavorable decision from an agency board;[332] they made no provision for reviewing a case remanded on post-audit by the LRB.

The Court's opinion leaned heavily on its own recent ruling in *Accardi*, in which it had held that agencies were required to obey their own formal procedures, even when those procedures were not mandated by statute.[333] It reasoned that the Secretary of State had "bound himself not to act at all in cases such as this, except upon appeal by employees from determinations unfavorable to them."[334] Because the Secretary had instead overturned a favorable agency board ruling, the relevant regulations were "not complied with," so, under the *Accardi* doctrine, Service's "dismissal [could not] stand."[335]

In all of these cases, the federal courts ratified and expanded upon a core tenet of the early loyalty program: that federal personnel decisions must be based on evidence, justified by reasoned explanation, and governed by consistent procedural rules. Hiring and firing decisions, which had once been governed by nearly unreviewable executive discretion, were disciplined by the reasoning requirements of administrative law. Grants of authority to investigate and discipline employees for their political commitments were interpreted narrowly, not construed as broad new grants of personnel power. And agencies were forced to abide by the procedural commitments laid down in their formal rules, meaning that they could not deviate from procedure to fire employees whenever political convenience dictated. In these ways, civil service law came to embody the emerging values of administrative law more broadly.

330. *Id.* at 370 (alterations in original) (quoting Department of State Appropriation Act, 1947, ch. 541, § 1, 64 Stat. 446, 458 (1946)).

331. *Id.* at 374 (quoting U.S. DEP'T. OF STATE, MANUAL OF REGULATIONS AND PROCEDURES § 391.3 (1949)).

332. *Id.* at 387.

333. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546, *as recognized in* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1980, 1990 (2020).

334. *Service*, 354 U.S. at 387.

335. *Id.* at 388.

2. The jurisdiction and scope of the loyalty program

In addition to imposing substantive and procedural requirements on the loyalty program, courts also prevented the President and the CSC from circumventing procedural safeguards by interpreting them as excluding certain classes of civil servants. In several prominent cases, courts precluded the CSC from asserting power not granted it by the President and prevented the President from asserting power not granted by Congress.[336] Among other doctrines, they drew on emerging administrative law precedents defining the scope of agency jurisdiction.[337]

The first of these was *Peters v. Hobby*.[338] John Peters was a professor of medicine at Yale University and had been appointed to a position at the Department of Health and Human Services.[339] He was adjudicated by the agency's loyalty board twice, and both times, the board found that there was "no reasonable doubt" as to his loyalty.[340] But, as in Service's case, the LRB then conducted a post-audit, found Peters disloyal, and directed the agency to dismiss him.[341]

Peters sued, alleging violations of the Executive Order, of the Constitution's prohibitions on bills of attainder and ex post facto laws, and of his rights to free speech and due process.[342] As in other cases, the Court declined to address the constitutional claims, writing that "[t]hese issues, if reached by the Court, would obviously present serious and far-reaching problems in reconciling fundamental constitutional guarantees with the procedures used to determine the loyalty of government personnel."[343] Instead, it resolved the case on jurisdictional grounds, holding that the plain text of Executive Order 10,241 only provided the LRB with review jurisdiction for employees recommended for dismissal.[344] That limitation precluded post-audits of favorable determinations like that of Peters. The LRB's post-audits of

336. *See, e.g.*, cases cited *infra* notes 338, 347.

337. *See, e.g.*, Addison v. Holly Hill Fruit Prods., 322 U.S. 607, 614 (1944) (holding that an agency could not define the scope of its own jurisdiction); FCC v. Am. Broad. Co., 347 U.S. 284, 294 (1954) (holding that an agency could not regulate activities outside their statutory jurisdiction without express congressional authorization). For more recent case law addressing the authority of agencies to define their own jurisdiction, see, for example, City of Arlington v. FCC, 569 U.S. 290, 293 (2013).

338. 349 U.S. 331 (1955).

339. *Id.* at 333.

340. *Id.* at 335-36.

341. *Id.* at 336-37.

342. *Id.* at 337-38.

343. *Id.* at 338.

344. *Id.* at 334, 338-39.

favorable agency decisions—a staple of its crackdown on disloyalty under congressional pressure—thus violated the Order establishing the loyalty program. "The Board," the Court ruled, could not "do by regulation precisely what it was not permitted to do under the Order."[345]

Here, again, the Court rooted this ruling in broader principles of administrative law, holding that "[a]gencies . . . must of course be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limitations on that authority."[346] In short, the ruling placed a significant limit on the CSC's ability to increase firings but no limit on their ability to reverse them.

In *Cole v. Young*, the Court went further by restricting the scope of President Eisenhower's Executive Order 10,450.[347] Kendrick Cole, a former FDA food inspector, had been terminated for Communist ties under Executive Order 10,450 and a related 1950 statute.[348] He was entitled to certain procedural protections under the VPA, but the CSC contended that those protections did not apply in cases where employees were dismissed on loyalty grounds in the agency head's discretion.[349] He challenged his removal unsuccessfully in federal court.[350]

On appeal to the Supreme Court, Cole argued that his dismissal had been inconsistent with the CSC's procedural requirements.[351] In addition, he contended that those requirements had not been altered by either the 1950 Act or Executive Order 10,450.[352] The 1950 Act had provided that agency heads may, in their "absolute discretion," terminate any employee "whenever [they] shall determine such termination necessary or advisable in the interest of the national security of the United States" and that "such determination by the agency head concerned [would] be conclusive and final."[353] The Act applied to eleven specified national security-related agencies, but it also authorized the President to extend its terms to any others.[354] Under Executive Order 10,450, President Eisenhower extended the summary termination provisions to apply

345. *Id.* at 342.

346. *Id.* at 345.

347. 351 U.S. 536, 551, 557 (1956).

348. *Id.* at 539-40, 542 n.2.

349. *Id.* at 540-41; *see* Veterans' Preference Act, ch. 287, § 14, 58 Stat. 387, 390 (1944) (codified as amended in 5 U.S.C. § 863).

350. *Cole*, 351 U.S. at 540-41.

351. *Id.*

352. *See id.* at 543.

353. *Id.* at 541 (quoting Act of Aug. 26, 1950, ch. 803, § 1, 64 Stat. 476, 476 (1950) (codified as amended in scattered sections of 5 U.S.C.)).

354. § 3, 64 Stat. at 477.

to the entire federal government.[355] Effectively, this would have replaced the CSC's procedural protections with an unreviewable right by agency heads to terminate civil servants on "national security" grounds.

The Court reversed.[356] Unlike in prior cases, it did not just limit the scope of the loyalty program based on the text of an executive order. It limited the scope of Executive Order 10,450 itself, dramatically curtailing President Eisenhower's attempt to expand the loyalty purge.[357] The Court based its opinion on the 1950 Act, holding that an agency head's right of summary termination only extended to positions actually related to "national security."[358] Ordinary "non-sensitive" positions remained covered by the CSC's procedural protections.[359] "The 1950 Act itself," the Court explained, "reflect[ed] Congress' concern for the procedural rights of employees and its desire to limit the unreviewable dismissal power to the minimum scope necessary to the purpose of protecting activities affected with the 'national security.'"[360]

The *Cole* opinion was one of the Court's most significant rebukes to the loyalty program. It restricted not only the power of the CSC but also the power of the President himself to expand the scope of loyalty purges. The ruling, as one longtime staff member of the Senate Internal Security Committee later reflected, had "a highly chilling effect on the . . . implementation of 10450."[361] The intervention is particularly remarkable considering that, less than a decade earlier, the executive branch's power to determine questions of employment was considered to be largely outside the scope of judicial review.

Finally, in *Vitarelli v. Seaton*,[362] the Court extended procedural rights in loyalty proceedings to entire classes of civil servants who had not previously enjoyed protection.[363] Petitioner William Vitarelli was employed by the Department of the Interior and had been dismissed under Executive Order 10,450 and the 1950 Act based on his alleged communist ties.[364] Vitarelli was a "Schedule A" employee who was not covered by the Civil Service Act or

355. Exec. Order No. 10450, 18 Fed. Reg. 2489, 2489; *see Cole*, 351 U.S. at 551-52.

356. *Cole*, 351 U.S. at 557-58.

357. *Id.*

358. *Id.*

359. *See id.* at 551.

360. *Id.* at 547.

361. *Government Files: Retention or Destruction?: Hearing Before the Subcomm. on Sec. and Terrorism of the Comm. on the Judiciary*, 97th Cong. 71 (1981) [hereinafter Martin Testimony] (testimony of David Martin).

362. 359 U.S. 535 (1959).

363. *Id.* at 539-40.

364. *Id.* at 536-37.

the VPA.[365] As such, Secretary of the Interior Fred Seaton had the authority to remove him at will.[366] But the Court nonetheless held that the discharge was improper because, instead of summarily dismissing Vitarelli, Secretary Seaton had explicitly relied on his authority under the Executive Order and the statute.[367] Having "gratuitously decided to give a reason, and that reason [being] national security," the Court held that Secretary Seaton was required to abide by the procedures that applied to loyalty and security proceedings, even if he could otherwise have summarily fired Vitarelli.[368] Relying on its earlier opinion in *Service*, the Court explained that "[h]aving chosen to proceed against petitioner on security grounds, the Secretary here, as in *Service*, was bound by the regulations which he himself had promulgated for dealing with such cases."[369]

Writing separately, Justice Felix Frankfurter articulated the point even more forcefully, relying on *Service* and *Chenery*. "An executive agency," he explained, "must be rigorously held to the standards by which it professes its action to be judged."[370] Thus, if "dismissal from employment is based on a defined procedure . . . that procedure must be scrupulously observed."[371]

Like *Cole*, *Vitarelli* was an extraordinary intervention into the loyalty program. Having once defined procedures that apply to loyalty proceedings, the executive branch now could not dismiss any employee—even one who did not enjoy statutory civil service protections—without observing those procedures. Together, *Cole* and *Vitarelli* extended the procedural protections elaborated by the early LRB and expanded by the federal courts for a much wider swathe of the civil service. And the Court did so in both by relying on bedrock principles of administrative law.

D. The Legacy of the Loyalty Cases

In the 1950s and beyond, the principles articulated in the loyalty cases formed the basis for increasingly comprehensive due process rights for civil servants. While later scholarship on federal employment is limited, those analyses that have been published suggest that doctrinal changes to civil

365. *Id.* at 539.

366. *Id.*

367. *Id.* at 545-46.

368. *Id.* at 539.

369. *Id.* at 539-40.

370. *Id.* at 546 (Frankfurter, J., concurring in part, dissenting in part) (citing SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943)).

371. *Id.* at 547 (citing Service v. Dulles, 354 U.S. 363, 372 (1957)).

service law in the 1940s and 1950s had only a limited impact.[372] But when these cases are placed in historical context and situated within the broader evolution of administrative law, their impact appears far more substantial.

The procedural rights promulgated by the early LRB were both enforced and expanded by the federal courts in the 1950s, creating unprecedented protections greater than those envisioned by either President Truman or the CSC.[373] And those rights quickly migrated beyond the boundaries of civil service loyalty cases. In 1959, the Supreme Court afforded similar rights to government contractors charged with disloyalty, reining in "an elaborate clearance program which embodies procedures traditionally believed to be inadequate to protect affected persons."[374]

The administrative law principles in the Court's loyalty cases were also extended to many federal employment cases unrelated to McCarthyism, especially in the Court of Claims.[375] The arbitrary-and-capricious standard also migrated from loyalty cases and other areas of administrative law into public employment cases, paring back the executive branch's traditional discretion as an employer.[376]

The result of these developments is clear. In the 1940s and 1950s, McCarthyite officials tried to purge the civil service. On a limited scale, they succeeded, and the immediate, harmful impact on the civil service should not be understated. But in the longer run, the loyalty program initiated legal changes with precisely the opposite effect. The loyalty program expanded procedural rights for civil servants, generated unprecedented recognition and enforceability of those rights in the courts, and mobilized a coalition to defend the bureaucracy from political interference.

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372. *See, e.g.*, Frug, *supra* note 287, at 973 (asserting the "limited nature" of judicially created protections for civil servants in the 1950s).

373. *See supra* Part III.C; *see also* Bell v. United States, 366 U.S. 393, 412-14 (1961) (requiring the Army to remit back pay to Korean War deserters, rejecting the Army's allegations of disloyal conduct based on insufficient factfinding); Coleman v. Brucker, 257 F.2d 661, 662-63 (D.C. Cir. 1958) (citing Peters v. Hobby, 349 U.S. 331, 338 (1955); *Service*, 354 U.S. at 372; and United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954)) (requiring a more extensive procedure prior to an employee's termination for disloyalty and remanding the case to the originating agency).

374. *See, e.g.*, Greene v. McElroy, 360 U.S. 474, 475, 504 (1959) (requiring the government to provide procedural protections to a contractor before revoking his security clearance).

375. *See, e.g.*, Watson v. United States, 162 F. Supp. 755, 759 (Ct. Cl. 1958) (invoking *Service* in requiring a statement of reasons prior to dismissal); Daub v. United States, 292 F.2d 895, 897-98 (Ct. Cl. 1961) (invoking *Service* in invalidating a dismissal for improper disregard of regulations and awarding the employee back pay); Newman v. United States, 143 Ct. Cl. 784, 793, 799 (1958) (awarding back pay and invoking *Service*); Piccone v. United States, 407 F.2d 866, 871 (Ct. Cl. 1969) (same).

376. *See, e.g.*, Beckham v. United States, 375 F.2d 782, 785 (Ct. Cl. 1967) (collecting cases); Morelli v. United States, 177 Ct. Cl. 848, 856 (1966) (per curiam).

Paul Van Riper, a leading scholar of public administration and a skeptic of strong civil service protections, described to Congress in 1959 the "de facto development of what amount[ed] to an administrative court system."[377] He decried what he considered the "judicializing of administrative and personnel procedures since World War II," before which "the courts [had] considered personnel actions as the administrative matters of discretion which they normally ought to be."[378] By the late 1950s, he claimed, the growth of procedural protections had "Europeanize[d] our civil service system and tie[d] it up in a web of procedure and semijudicial appeals."[379]

Indeed, the trend of both courts and the CSC broadly construing civil servants' procedural rights continued and intensified for decades. In loyalty and security cases, the growth of procedural protections had led to the near-disappearance of loyalty vetting by the mid-1970s.[380] David Martin, a twenty-year staff member of the Senate Internal Security Committee, summarized the trend before Congress in 1978: "While the previous two decades have witnessed a significant weakening of the Federal Employee Security Program, over the past seven years a rapid succession of retreats has resulted in its near-total demolition."[381]

In short, the reaction to the loyalty program actually strengthened the federal bureaucracy, increasing its prominence and legitimacy in American law.

IV. The Loyalty Program's Lessons for Administrative Law

This Part examines the doctrinal and theoretical developments revealed by the history of the loyalty program and the legal responses to it. The loyalty program was widely described in authoritarian terms: President Truman himself took pains to assure that the LRB would not become an American "Gestapo."[382] One member of the Federal Communications Commission argued that the program conferred "dictatorial power over government employment policies."[383] Yet civil service regulation was hardly new. Statutes like the Hatch

377. *A Bill to Provide for an Effective System of Personnel Administration: Hearing on S. 1638 Before the Subcomm. on Civ. Serv. of the S. Comm. on Post Off. and Civ. Serv.*, 94 Cong. 88, 94 (1959) (statement of Paul Van Riper).

378. *Id.*

379. *Id.*

380. Martin Testimony, *supra* note 361, at 75.

381. *Id.*

382. Truman, *supra* note 94, at 129.

383. Clifford J. Durr, *The Loyalty Order's Challenge to the Constitution*, 16 U. CHI. L. REV. 298, 301 (1949).

Act and even the Pendleton Act had long governed the political and ideological composition of the federal workforce.[384] Nor had agency heads lost their broad discretion to discipline employees. Why, then, was this initiative condemned as a uniquely authoritarian departure?

The answer lies in the program's challenge to rule-of-law values in the modern administrative state. As the political significance of the bureaucracy grew, the loyalty program threatened to unsettle the established allocation of authority over personnel matters. For decades, the CSC had cultivated a model of politically independent management that constrained both Congress and the President.[385] The loyalty program marked a return to direct political intervention unseen since the spoils system. It also provoked concern that public administration would be governed not by neutral, legally constrained principles but by partisan loyalty and suspicion.[386] To midcentury reformers, this was a fundamental affront to the procedural and structural norms of legitimate administration.[387]

The increasingly assertive application of administrative law doctrines, first by the CSC and later by the courts, sought to restore those norms.[388] These developments revealed a deeper connection between federal employment law and broader constitutional and administrative principles than modern observers often acknowledge. By the 1950s, it was evident that an orderly and rule-bound administrative state required an equally orderly and rule-bound civil service.[389] That lesson bears renewed significance as civil service independence again comes under political strain.

A. The Loyalty Program and the Separation of Powers

The loyalty program, like McCarthyism more generally, was primarily a legislative phenomenon. Powerful congressional committees and enterprising legislators were its main drivers. Committee hearings, leaks to the press, and highly targeted legislation were its main tools. All told, Congress's demand that the White House conduct wide-ranging ideological investigations into federal civil servants risked upending the fifty-year interbranch balance of power in civil service governance. The loyalty program threatened to sideline both the

384. *See supra* Part I.A.

385. *See supra* Part I.A.

386. *See supra* Part I.B.

387. *See supra* Part I.B; *see also* Emerson & Helfeld, *supra* note 34, at 2-3 (criticizing the loyalty program as a "threat to democratic institutions" and an attempt by a "temporarily dominant group[]" to "demand political orthodoxy").

388. *See supra* Parts II-III.

389. *Cf. infra* Part IV.C (demonstrating how a functioning civil service is necessary to sustain a functioning system of administrative procedure).

CSC and the merit principles it had refined through decades of agency policy.[390]

This aspect of the loyalty program challenges contemporary assumptions about the separation of powers. Modern commentators typically emphasize Congress as a source of democratic legitimacy.[391] In contests over control of the bureaucracy, it is typically the presidency rather than the legislature that is seen as posing a threat to democratic values and the rule of law, risking a "cult of personality" that accelerates "democratic breakdown."[392] That was an important motive of many New Deal-era executive branch reforms, when the specter of a "personalist" President inspired frightening comparisons to fascist autocracies in Europe.[393] That fear is also surely the most pressing one today, as Presidents for several decades have accrued more personal control over the executive branch.[394]

But the loyalty program presented a different problem. There, it was Congress that sought to undermine the merit system by subjecting it to intensive political interference and wielding it as a tool of broader social control.[395] Congress's pursuit of alleged subversives resembled less the tactics of twentieth century dictators than they did, in the Supreme Court's words, the legislative abuses of "the French Chamber of Deputies, during the Reign of Terror."[396] The loyalty program raised the specter of authoritarianism not by

390. *See supra* Part I.B.

391. *See, e.g.*, Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2108 (2022) (rejecting structural constitutional visions that embrace the primacy of the President and the courts, instead emphasizing that Congress's historic role was to "decide what government is established . . . [and] whether it is republican or not" (alterations in original) (quoting Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849))); JOSH CHAFETZ, CONGRESS'S CONSTITUTION 303-12 (2017) (describing Congress's role in promoting "representation," "deliberation," and "tyranny prevention" in the constitutional system).

392. *E.g.*, Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 657 (2000).

393. *See* Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 4-5 (2022) (describing fears that the executive branch could become "nothing but an extension of the personality of the chief executive").

394. *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316-18 (2006) (describing the demise of many checks and balances within the executive branch).

395. *See, e.g.*, United States v. Rumely, 345 U.S. 41, 44 (1953) (observing that the Supreme Court would have been "blind" to "not see what '[a]ll others can see and understand' . . . that there is wide concern both in and out of Congress over some aspects of the exercise of the congressional power of investigation" (quoting Child Labor Tax Case, 259 U.S. 20, 37 (1921))).

396. United States v. Lovett, 328 U.S. 303, 309 (1946) (quoting 89 CONG. REC. 654 (1943) (statement of Rep. Clarence Cannon)); *see also* Watkins v. United States, 354 U.S. 178, 197 (1957) (warning of "[a]buses of the investigative process" stemming from congressional investigations into subversion).

the executive's hand, but by that of the legislature. That fear can be traced back to the Founders, for many of whom the greatest threat to liberty was a "popular assembly not governed by fundamental laws," which, acting "under bias of anger, malice, or a thirst for revenge," might "commit more excess than an arbitrary monarch."[397]

Personnel policy—both the legal and practical ability to hire, fire, and influence civil servants inside the merit system—confers substantial political power. Control of that policy, like control of administrative agencies and administrative procedure more broadly, thus raises important separation-of-powers concerns. If one branch has outsized influence over the employment policies of the civil service, that branch has the means to aggrandize itself no differently than if it had outsized control over questions of budget, enforcement, or administrative procedure.[398] Personnel law must attend to separation-of-powers questions in the same way as administrative procedure.[399]

While legal observers have been most attuned to the risk of presidential aggrandizement through domination of the bureaucracy,[400] that risk is not unique to the executive branch. All three branches compete for influence over personnel policy, as the history of the loyalty program demonstrates.[401] Any one of them might develop a distortionary influence over employment law, whether out of institutional self-interest or simply in response to inaction by the other branches. As a result, reform proposals cannot simply shift influence over personnel from one branch to another. Today, many calls for bureaucratic reform lean heavily on a reinvigorated Congress or a more aggressive form of judicial review to slow presidential incursions into the merit system.[402] Those may be appropriate responses to the threat of an overly powerful President, but they overlook the incentives that multiple

397. GORDON WOOD, CREATING THE AMERICAN REPUBLIC 405 (1969) (quoting AEDANUS BURKE, AN ADDRESS TO THE FREEMEN OF SOUTH CAROLINA 23 (Philadelphia, Robert Bell 1783)).

398. *See supra* Part I.A.

399. *See* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 436 (2009).

400. *See generally* Katyal, *supra* note 394 (detailing the role that internal executive branch procedure plays in checking arbitrary or abusive presidential decisionmaking); Rosenblum, *supra* note 393 (detailing attempts to bolster administrative procedure in order to prevent fascistic power from accruing to the presidency).

401. *See supra* Part I.A.

402. *See, e.g.*, Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 376 (2022) (arguing for administrative law doctrine that more forcefully defends the "competing democratic authority of Congress to structure the Executive Branch"); Shaw, *supra* note 51, at 1609-10 (similar).

institutions, including Congress, have for interfering in the operation of the merit system. In order to mediate competing claims for control of the bureaucracy, the merit system provided a stable set of legal rules that accommodates the interests of each branch without allowing any one branch to dominate personnel policy. That was the equilibrium the CSC had reached by the 1930s, and it was that settlement that was placed in jeopardy by Congress's push to purge the civil service in the 1940s.

The application of administrative law principles to civil service disputes was critical to resolving these tensions. The doctrinal innovations in civil service law of the 1940s and 1950s by the CSC and the courts resolved interbranch disputes over control of personnel in much the same way as the APA and judicial review of agency action mediated interbranch disputes over administrative process. The APA responded quite explicitly to fears of an overly powerful President and what he might do with a bureaucracy that had become a mere extension of himself. The statute that was enacted in 1946 represented an uneasy compromise between Congress and President Roosevelt over how far the latter would implement the New Deal.[403] It resolved what Justice Robert Jackson called "a long period of study and strife" during which conservative legislators sought to constrain a rapidly growing welfare and regulatory state headed by a charismatic and powerful chief executive.[404] The lattice of procedural rules and judicial preview provisions that emerged "enact[ed] a formula upon which opposing social and political forces [came] to rest," allowing administrative law to survive and evolve within negotiated legal confines.[405]

The doctrinal developments of the McCarthy era, though less noted by administrative law scholars, provided a similar settlement with respect to personnel law. The CSC had developed management practices that did away with raw political competition between Congress and the President and between the political parties. In their place, it substituted employment rules rooted in academic theories of public administration and a system of adjudication modeled on the administrative tribunals governed by the APA.[406] Transactional patronage practices gave way to a system of "internal administrative law" governed by theories of public welfare.[407] The goal of this system was to mediate between competing institutional claims to control

403. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1680 (1996).

404. *Id.* at 1678 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950)).

405. *Id.* at 1679 (quoting *McGrath*, 339 U.S. at 40).

406. *See supra* Part I.A.

407. *See* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1241-44 (2017).

federal hiring. Under the pressure of McCarthy-era loyalty investigations, courts for the first time translated this internal administrative law into an external administrative law, enforced through largely the same doctrines that enforced limits on political interference with administrative procedure.

B. Civil Service Law and Administrative Law

Much as administrative law was well positioned to address separation-of-powers concerns, it was also poised to address concerns about individual rights. The loyalty program was widely accused of unfairly depriving civil servants of their positions and of subjecting them to invasive questions about their political beliefs.[408] But it was not immediately apparent, given the history and doctrine of personnel law until the 1950s, what exactly about the loyalty program was improper. Congress had modified the requirements for civil service employment repeatedly since the 1880s, imposing conditions related to both professional competence and political neutrality.[409] The Hatch Act sought to protect the integrity of the civil service, in part by actively prohibiting federal employees from serving in a political capacity while employed by the government.[410] Indeed, it was a provision of the Hatch Act, Section 9A, that provided the initial statutory authorization for the loyalty program. And the executive branch, for its part, had historically exercised wide discretion in employment, with its judgments as to employee fitness left largely unreviewable by courts.[411] From one perspective, the loyalty program merely continued this tradition, translating a broad statutory mandate of loyalty into a discretionary series of employment decisions guided by congressional inquiries.

Why, then, was this process so widely seen as a deviation from past practice, a lurch toward authoritarianism? The answer turns in part on the perceived arbitrariness of the McCarthy era. Congressional hearings on alleged subversion inside the federal government were notorious for relying on rumors, innuendo, and unproven accusations to generate fear and suspicion of targeted departments.[412] As President Truman publicly lamented, the loyalty program was often "wickedly used by demagogues and sensational newspapers

408. *See supra* Part I.B; *see also* Truman, *supra* note 94, at 129 (responding to allegations of "Gestapo" tactics by the loyalty program); Durr, *supra* note 383, at 301 (accusing the LRB of exercising "dictatorial" power).

409. *See supra* Part I.A.

410. *See generally* Bloch, *supra* note 132, at 237-50 (detailing the Hatch Act's various restrictions).

411. *See supra* Part III.A.

412. *See supra* Part I.B.

in an attempt to frighten and mislead the American people."[413] FBI files were likewise often unreliable, mixing potentially damaging evidence with rumor and hearsay.[414] McCarthy-era inquiries violated many fundamental rule-of-law norms—denying the accused their rights to access counsel, to confront accusers, and to receive a reasoned determination of their supposed "guilt" in associating with communists.[415]

Another part of the answer turns on the interests impaired by this arbitrary process. The distribution of jobs was a critical exercise of state power. Particularly as the civil service had grown, the question of whether and how that distribution could be subject to predictable rules had become more pressing.

Employment projected state power in two distinct ways, both of which implicated important questions of administrative law and thus invited administrative law responses.

On one hand, public employment functioned as a tangible benefit conferred by the state, akin to other public goods. The central question was thus whether the government could allocate that benefit in a biased or partisan manner. Under prevailing constitutional doctrine, there was no affirmative right to public employment; the government retained broad discretion as an employer to set qualifications and standards.[416] But over time, a practical consensus emerged that the government ought not use its employment power to punish individuals for their political affiliations or beliefs, particularly when those beliefs bore no relation to job performance or institutional integrity. Dismissing an employee solely because they supported the wrong candidate or held unpopular views came to be seen as a form of viewpoint discrimination incompatible with democratic ideals. As the scholar Leonard White wrote in 1951, the LRB's duty to protect citizens in the civil service "against frivolous, prejudiced, or unfounded allegations" was "essential to the safety and the wholesomeness of American democracy."[417] This concern reflected a broader legal and political struggle over the distribution of public goods: If the state was both a regulator and a provider, then its power to grant

413. Rackow, *supra* note 101, at 710 (quoting HARRY S. TRUMAN, MEMOIRS, YEARS OF TRIAL AND HOPE, 279 (1956)).

414. *See* Emerson & Helfeld, *supra* note 34, at 72 (noting that "[e]rrors and abuses are particularly difficult to weed out of secret investigations").

415. BONTECOU, *supra* note 84, at 207-14 (describing the tension between loyalty hearings and traditional Anglo-American conceptions of due process).

416. *See* Bailey v. Richardson, 182 F.2d 46, 57 (D.C. Cir. 1950) (noting the President's historic power to, "absent congressional limitation," dismiss federal employees without process).

417. Leonard D. White, *The Loyalty Program of the United States Government*, BULL. ATOMIC SCIENTISTS 363, 382 (Dec. 1, 1951).

or withhold public benefits like jobs had to be constrained by principles of fairness, neutrality, and due process.[418]

The civil service was among the most important public benefits the federal government distributed. This was in part a function of its sheer size. In 1946, it employed over two million workers—nearly as many as in 2025, out of a population one-third as large—and substantially more people had cycled through government service during the Great Depression and the Second World War.[419] Civil servants and their families made up a large segment of the population,[420] and the public conceived of the rights of government employees and the rights of citizens in similar terms. As one former federal official observed, "[a] strikingly large number of Americans enter[ed] the public service for shorter or longer periods and then return[ed] to private occupations, perhaps to re-enter public service at a future date."[421] Part of the federal government's legitimacy and its public support derived from its tangible and visible presence in ordinary Americans' lives. This "frequent interchange" of Americans between private and public employment, as one scholar wrote, "contributed to democratization of the nation through wider citizen understanding of and participation in governmental problems."[422] There were thus few "social, professional, or traditional barriers between the civil service and private citizens; many have seen it from the inside."[423]

As a result, as Thomas Emerson and David Helfeld have explained, "the standard set by the Government in this area ha[d] an incalculable effect upon the attitude of the country as a whole."[424] While "[c]alm and intelligent action by government set[] a healthy example," "[w]itchhunts" would "breed imitations throughout the nation."[425] This led to a belief that, as an institution with which so many Americans directly interacted, the government should

418. *See* Reich, *New Property*, *supra* note 122, at 778-79, 783 (suggesting the creation of property interests in welfare and other public goods, so as to harmonize the "law of government largess" with the Bill of Rights). *See generally* Karen Tani, Flemming v. Nestor: *Anticommunism, the Welfare State, and the Making of "New Property"*, 26 L. & HIST. REV. 379, 401-13 (2008) (describing the evolution of new property rights in welfare in response to McCarthy-era attempts to strip claimants of Social Security and other benefits).

419. Emerson & Helfeld, *supra* note 34, at 7.

420. *Id.*

421. Herman Miles Somers, *The Dilemma of the American Executive Branch*, CONFLUENCE, Sept. 1952, at 63, 67.

422. *Id.* at 68.

423. *Id.*

424. Emerson & Helfeld, *supra* note 34, at 7.

425. *Id.* at 7-8.

reflect their society's democratic values—that it should be, in President Truman's words, the "model of a fair employer."[426]

On the other hand, employment was also a means of policy implementation. Control of the civil service was valuable in part because it gave political actors a lever with which to influence administrative action. In particular, as the federal civil service both expanded and professionalized over the early twentieth century, its capacity to make and implement substantive policy expanded dramatically.[427] As a result, the ability to control the civil service translated into an increasing ability to control policy more broadly.[428] By the 1920s, the President and Congress had reached a stalemate in an increasingly tense battle for control of the key aspects of personnel administration.[429] Indeed, the more familiar, longstanding debate over removal protections for principal officers (which began in the same era) has turned on the assumption that the ability to hire and fire public servants translates into an ability to influence their decisionmaking.[430] Political science research largely confirms that power over employment translates into considerable, if imperfect, control over behavior.[431] That was one reason why control of the civil service had grown ever more contested.

But for precisely that reason, Congress's McCarthy-era efforts to exert greater control over civil service employment posed a threat to the integrity of the administrative state more broadly. The power wielded by civil servants affected the rights of private citizens across every sector of the economy. If a civil servant who was responsible for adjudicating important rights—say, licensure—was at risk of losing their job for failure to conform to a specific political agenda, then license applicants subject to their discretion were exposed to the same political whims.[432]

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426. First Meeting of the Loyalty Review Board, *supra* note 149, at 6 (statement of President Truman).

427. *See generally* Katz & Rosenblum, *supra* note 67, at 2210-26 (describing the evolution of public administration during this period).

428. *See id.* at 2212-13.

429. SKOWRONEK, *supra* note 59, at 204.

430. *See, e.g.*, Seila Law LLC v. CFPB, 591 U.S. 197, 213-14 (2020) (defending an expansive power of presidential removal for officers on the ground that "it is 'only the authority that can remove' such officials that they 'must fear and, in the performance of [their] functions, obey'" the President (quoting Bowsher v. Synar, 478 U.S. 714, 726 (1986))); *see also* Katz & Rosenblum, *supra* note 67, at 2163.

431. *See, e.g.*, Lewis, *supra* note 41, at 58-60 (summarizing political science literature on how appointments of personnel affects policy outputs).

432. The "magnification of government power by administrative discretion" over these programs and the corollary risk of abuse, along with McCarthyism itself, inspired Charles Reich to write his canonical law review article on administrative due process a decade later. Reich, *supra* note 122, at 749-52.

Culminating in the enactment of the APA in 1946, lawyers, lawmakers, and courts had struggled to implement basic rule-of-law constraints on agencies throughout the 1930s. Under the APA, administrative policymaking, whether in the form of rulemaking or adjudication, was subject to a comprehensive set of procedural requirements, public reasoning obligations, and judicial review in federal court. But while administrative decisionmaking had been subjected to legal constraints, the rules governing the selection of decisionmakers remained underdeveloped.[433] Outside the limited protections of the Pendleton Act and the Lloyd-La Follette Act, Congress had provided few procedural safeguards for civil servants facing dismissal. Courts had invested agencies with vast discretion to determine whether "for cause" termination was appropriate.[434]

But the pressures of the loyalty program—the direct political intervention into the merit system by elected officials, the sidelining of adjudicatory processes developed by the CSC over decades, the often arbitrary and baseless nature of accusations against civil servants, and the risk that dysfunction in the civil service would bleed into regulatory law more generally—meant that an unregulated system of personnel law was no longer tenable. The development of more robust procedural protections for civil servants, first by the CSC and later by the courts, thus imported many of the key protections of administrative law (procedural requirements, evidentiary standards, and meaningful judicial review) into the personnel system.

C. Implications for Contemporary Law

Beyond its theoretical and descriptive contributions, this history holds lessons for the legal and political conflicts of today. Since taking office in 2025, the Trump Administration has embarked on an unprecedented campaign to remake federal policy, often by leveraging personnel and budget management.[435] These moves have dramatic implications for the American political and constitutional order. Some legal scholars have suggested that President Donald Trump's aggressive interpretations of executive power have created a "constitutional crisis" that threatens to destabilize longstanding separation-of-powers principles.[436]

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433. Administrative law judges were a limited exception. *See* 5 U.S.C. § 3105 (governing the appointment and assignment of administrative law judges); 5 U.S.C. § 7521 (stipulating that those judges may be removed only for good cause).

434. *See supra* Parts I.A, III.A.

435. *See* Sam Berger & Jacob Leibenluft, *Trump Administration's Mass Layoffs of Federal Workers Are Illegal*, CTR. ON BUDGET & POL'Y PRIORITIES (May 2, 2025), https://perma.cc/4ET3-69MA.

436. *See, e.g.*, Adam Liptak, *Trump's Actions Have Created a Constitutional Crisis, Scholars Say*, N.Y. TIMES (Feb. 12, 2025), https://perma.cc/KA9W-GK9Q.

The Trump Administration has been explicit that it views personnel management as a means for achieving substantive policy goals. Shortly after taking office, President Trump stated publicly that civil servants who "refuse to advance the policy interests of the President" should "no longer have a job."[437] Indeed, a central theme of the Heritage Foundation's Project 2025—a policy blueprint that has often overlapped with the Trump Administration's personnel and positions—is that many conservative policy objectives can be achieved by overhauling the civil service.[438] Early in the nine-hundred-page report, the authors emphasize that the President must make "personnel management his highest priority" because "whoever holds a government position sets its policy."[439]

In some cases, the second Trump Administration has sought to achieve its political objectives by crippling offices whose missions it opposes through mass layoffs. To take just a few prominent examples, the President and his advisors have sought to dismantle the Department of Education by ordering mass firings (called "reductions in force" (RIFs)) to the agency's staff, effectively preventing it from carrying out a number of core functions.[440] The Administration has sought to "feed[]" the U.S. Agency for International Development "into the woodchipper" by firing nearly its entire staff.[441] And it has pursued similar goals at a number of other agencies, including many under the Departments of State and Health and Human Services.[442]

In other instances, the Trump Administration has sought not to dismantle programs but instead to influence the exercise of official discretion by subjecting civil servants to loyalty tests and unprecedented surveillance. For instance, a cornerstone of the President's personnel initiative has been a push

437. Donald Trump (@realDonaldTrump), TRUTH SOCIAL (Apr. 18, 2025, 1:32 PM), https://perma.cc/5ZUW-XE5M.

438. *See* Andy Kroll, *What You Should Know About Russ Vought, Trump's Shadow President*, PROPUBLICA (Oct. 20, 2025), https://perma.cc/GU3L-JLHV (discussing the role of Russell Vought, the current director of the Office of Management and Budget, in both shaping Project 2025 and implementing the second Trump Administration's policy agenda); Steve Contorno, *Trump Claims Not to Know Who Is Behind Project 2025. A CNN Review Found at Least 140 People Who Worked for Him Are Involved*, CNN (Jul. 11, 2024), https://perma.cc/Y39G-2UHM (noting an extensive overlap between former Trump officials and Project 2025 staffers).

439. Donald Devine, Dennis Dean Kirk & Paul Dans, *Central Personnel Agencies: Managing the Bureaucracy, in* MANDATE FOR LEADERSHIP: PROJECT 2025 69, 69 (2024).

440. *See* Berger & Leibenluft, *supra* note 435.

441. Jim Kunder, *USAID Went into the Woodchipper, and We're All Paying a Price*, THE HILL (Apr. 23, 2025, 1:00 PM ET) (quoting Elon Musk (@elonmusk), X (Feb. 2, 2025, 10:54 PM), https://perma.cc/J4GC-ZJQJ), https://perma.cc/NG3Y-W36B.

442. *See* Exec. Order No. 14210, 90 Fed. Reg. 9669 (Feb. 14, 2025) (ordering mass layoffs across multiple agencies); Berger & Leibenluft, *supra* note 435.

to reclassify many civil servants out of the competitive service and into a new employment schedule—known as "Schedule Policy/Career"—that would render them fireable at will.[443] At some agencies, like the FBI, the Administration has gone so far as to use polygraph tests to assess individual employees' loyalty to the President.[444] These attempts to police civil servants' personal loyalties strongly evoke the loyalty program. And often, the Administration's attempts to justify them harken back to the fears of bureaucratic sabotage and "resistance" that motivated the Red Scare purges of the 1940s and 1950s.[445] In the Administration's notice of proposed rulemaking on Schedule Policy/Career, it warned of "politicized competence" within the civil service: a tendency by federal workers to develop "competency in agency operations, but us[e] that competency to advance their personal political preferences" instead of "implementing the elected President's agenda."[446]

States, municipalities, unions, and others have challenged these strategies in a wave of lawsuits.[447] In adjudicating these cases, courts have confronted the same tension that arose during the first Red Scare. On one hand, while civil service law provides more procedural protections to federal workers than it did in the McCarthy era,[448] many fundamental questions about personnel management are still left largely to executive discretion. The President can decide, for instance, when RIFs are appropriate and when cause exists for termination.

On the other hand, as the Trump Administration's campaign against the civil service has made clear, personnel actions implicate more fundamental questions of administrative and constitutional law. Yes, the President has broad discretion to decide when to conduct RIFs in the name of making agencies

443. Donald F. Kettl, *Trump's Push for Executive Order Loyalty Risks Undermining the Federal Workforce and the Constitution*, GOV'T EXEC. (June 10, 2025), https://perma.cc/F6T5-HTV4.

444. Adam Goldman, *The F.B.I. Is Using Polygraphs to Test Officials' Loyalty*, N.Y. TIMES (July 10, 2025), https://perma.cc/X7BL-Y6EG.

445. *See* Improving Performance, Accountability and Responsiveness in the Civil Service, 90 Fed. Reg. 17182 (proposed Apr. 23, 2025) (to be codified at 5 C.F.R. pts. 210, 212, 213, 302, 432, 451, 752).

446. *Id.*

447. *See, e.g.*, Second Amended Complaint at 103-12, Am. Fed'n Gov't Emps. v. Trump, 784 F. Supp. 3d 1316 (N.D. Cal. 2025) (No. 25-cv-03698), 2025 WL 3901046, ECF No. 270 (seeking the injunction of mass RIFs across multiple agencies), *vacated*, 155 F.4th 1082 (9th Cir. 2025); First Amended Complaint at 39-43, New York v. McMahon, 784 F. Supp. 3d 311 (D. Mass. 2025) (Nos. 25-cv-10601 & 25-cv-10677), 2025 WL 3542413, ECF No. 187 (challenging large-scale RIFs at the Department of Education as violating separation-of-powers principles and the APA).

448. Civil service law was substantially overhauled by the Civil Service Reform Act of 1978. *See* Nicholas Handler, *Separation of Powers by Contract: How Collective Bargaining Reshapes Presidential Power*, 99 N.Y.U. L. REV. 45, 54-58 (2024).

more efficient.[449] But when does the elimination of a large number of civil service positions so limit an agency's capacity that it becomes unable to carry out its statutory mission? In other words, when does a personnel action (where the executive branch operates with considerable deference) so impact agency operations that it implicates broader questions under the APA, the Impoundment Control Act, or Supreme Court separation-of-powers precedent?[450] When does personnel management exit the world of "internal administrative law"—lawlike and important, but not subject to the same standards of judicial review[451]—and enter the world of administrative law proper?

Likewise, hiring and firing civil servants based on political loyalty is prohibited under the Civil Service Reform Act and the Hatch Act.[452] But such claims are difficult to prove, and both the Merit Systems Protection Board and the Office of Special Counsel pose additional hurdles.[453] Yet when the President conditions civil service employment on personal or political loyalty, those decisions threaten not only merit principles but also administrative law values (such as reasoned and unbiased decisionmaking) more broadly.[454] Can the President staff an agency in such a biased manner that the personnel policy becomes inextricable from questions of statutory implementation? Now, as

449. *See* Nick Bednar, *A Primer on Reductions in Force*, LAWFARE (Feb. 20, 2025, 9:58 AM) (noting that "the MSPB [Merit Systems Protection Board] and courts are quite deferential to [an] agency's determination" that personnel reductions are appropriate), https://perma.cc/T8R5-UNAJ.

450. *See, e.g.*, First Amended Complaint at 39-43, *supra* note 447 (challenging RIFs as ultra vires and as violating the APA, Article I of the U.S. Constitution, and the Take Care Clause); Second Amended Complaint at 103-12, *supra* note 447 (challenging RIFs as violating the APA and separation-of-powers principles).

451. *See* Metzger, *supra* note 399, at 455 (recommending that courts "reinforc[e] internal constraints through separation of powers analysis").

452. *See* Hills, *supra* note 44 (cataloging these protections).

453. *See* Nick Bednar, *Trump's Dismantling of the Government Hurts Due Process*, LAWFARE (Mar. 4, 2025, 2:00 PM) (describing how vacancies at the MSPB and the Federal Labor Relations Authority have made it difficult for civil servants to exercise their hearing rights), https://perma.cc/44GH-A5DD.

454. *See, e.g.*, Complaint at 20-23, Nat'l Treasury Emps. Union v. Trump, 780 F. Supp. 3d 237 (D.D.C. 2025) (No. 25-cv-00170), ECF No. 1 (challenging the new Schedule Policy/Career as ultra vires, violative of Article I of the U.S. Constitution, and violative of the APA), *stay granted*, No. 25-5157, 2025 WL 1441563 (D.C. Cir. May 6, 2025); Complaint at 37-38, Pub. Emps. for Env't Resp. v. Trump, No. 25-cv-00260 (D. Md. Jan. 28, 2025), ECF No. 1 (challenging the new schedule as violating the APA and civil servants' due process rights); Complaint at 28-35, Gov't Accountability Project v. Off. Pers. Mgmt., No. 1:25-cv-00347 (D.D.C. Feb. 6, 2025), ECF No. 1 (challenging the new schedule as violating the APA, the Civil Service Reform Act, and civil servants' due process rights).

then, it becomes difficult to cleanly separate the world of personnel administration from the world of administrative law.

Increasingly, in the cases challenging the Administration's personnel initiatives, courts have begun to analyze the President's orders for their legality not only under the Civil Service Reform Act but also under the APA, the Constitution, and more.[455] This doctrinal move has a number of implications. If personnel actions are reviewable under the APA or the Constitution, they will not only be subject to closer to judicial scrutiny, but may also have a quicker pathway into court, as they will not need to take the lengthy and sometimes dysfunctional route through the Merit Systems Protection Board, Federal Labor Relations Administration, or the Office of Special Counsel.[456]

The historical experience of the loyalty program is informative here: courts have recognized that personnel disputes are inextricable from broader questions of public law. Indeed, in many of the cases currently making their way through federal courts, judges and litigants have begun to cite and analyze once obscure precedents from the McCarthy era—*Service v. Dulles*, *Cole v. Young*, and *Vitarelli v. Seaton* among them.[457] Understanding the historical and political context of those cases, and the stakes for public law that judges and litigants perceived, can and should inform today's debates over the civil service.

Conclusion

The federal loyalty program of the early Cold War was designed as a sweeping mechanism of political control—an effort by Congress to reassert influence over an expanding, increasingly professionalized civil service.

As originally envisioned, the program posed deep challenges to both established separation-of-powers norms and newer individual employment rights. It challenged the detente that Congress and the President had reached a generation earlier over control of the federal civil service.[458] Battles over patronage and direct political influence over the everyday operation of the

455. *See supra* notes 450, 454.

456. *See* Bednar, *supra* note 453.

457. *See, e.g.*, Harris v. Bessent, 775 F. Supp. 3d 164, 164 (D.D.C. 2025) (stating that "federal courts are generally empowered to review the claims of discharged federal employees" (citing Sampson v. Murray, 415 U.S. 61, 71-72 (1974) (citing Service v. Dulles, 354 U.S. 363 (1957)))), *rev'd*, 160 F.4th 1235 (D.C. Cir. 2025); Maryland v. U.S. Dep't of Agric., 777 F. Supp. 3d 432, 489 (D. Md. 2025) (noting that, and collecting cases in which, courts have "reinstated federal employees to their positions or prevented their removals from taking effect" (citing Vitarelli v. Seaton, 359 U.S. 535, 546 (1959))), *rev'd*, 151 F.4th 197 (4th Cir. 2025).

458. *See supra* Part I.B.

bureaucracy had been defused by delegating personnel management to the CSC, which in turn developed an increasingly robust set of procedural rights and managerial principles to replace the raw influence peddling of the patronage era.[459] The depoliticization of personnel administration, in turn, promised a more professional and less openly partisan administration of federal law. As the New Deal state expanded into nearly every sector of American society, the rule-of-law norms embodied by civil service reform took on new legal and political relevance.

The loyalty program threatened to upend these democratic arrangements, once again rendering the civil service a target of direct political influence and ideological surveillance. Federal law responded to this challenge by adopting a range of new procedural protections that federal workers had never before enjoyed: hearings, counsel, evidentiary standards, and substantive guidelines for what constituted "cause" to dismiss merit-protected employees.[460] Eventually, federal courts began enforcing these protections against agencies, repurposing administrative law doctrines to constrain agencies' discretion as employers.[461]

These doctrinal developments increasingly blurred the line between ordinary administrative law, tightly governing the executive's interactions with the public, and "internal" administrative law, which oversaw personnel management.[462] As the legal and political battles of McCarthyism laid bare, the boundary between internal and external administrative law was inevitably porous. Under conditions of intense political conflict, the distinction tended to collapse altogether.

Ultimately, in order to preserve the rule-of-law values embodied in the APA and administrative law doctrine, courts were forced to apply the same prohibitions on arbitrary and biased action to personnel management as they had to other areas of regulation. This history is valuable in navigating our current era of political and legal turmoil, as control of the civil service—and the legal and democratic values implicated by that control—is again contested.

459. *See supra* Part I.A.

460. *See supra* Part II.

461. *See supra* Part III.

462. *See supra* Part IV.B; *see also* Metzger, *supra* note 399 (discussing the ways in which internal executive branch management influences traditional separation-of-powers arrangements).