Beginning Of Appendix

Begin Appendix A

United States Court of Appeals for the Fifth Circuit

No. 21-10469

United States Court of Appeals
Fifth Circuit
FILED
July 26, 2021
Lyle W. Cayce
Clerk

JOE W. BYRD,

Plaintiff—Appellant,

versus

BANK OF NEW YORK MELLON, *formerly known as* TRUSTEE FOR THE BENEFIT OF ALTERNATIVE LOAN TRUST 2007-J1 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-J1; PARAMOUNT MORTGAGE, INCORPORATED; TEXAS CAPITAL BANK; FLAGSTAR BANK, N.A.,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
No. 4:18-CV-70

Before KING, SMITH, and WILLETT, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the opposed motion of appellee Bank of New York Mellon to dismiss the appeal as frivolous is GRANTED.

IT IS FURTHER ORDERED that the opposed motion of appellee Bank of New York Mellon for sanctions and injunctive relief is DENIED. Any further filings by the appellant will be at the risk of severe sanctions.

IT IS FURTHER ORDERED that appellee Bank of New York Mellon's motion for judicial notice is GRANTED.

The mandate shall issue forthwith.

End
Appendix A

Begin Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JOE W. BYRD,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:18-cv-00070-P**
	§	
THE BANK OF NEW YORK MELLON, formerly known as Trustee for the benefit of Alternative Loan Trust 2007-J1 Mortgage Pass-Through Certificates, Series 2007-J1,	§	
	§	
Defendant.	§	

FINAL JUDGMENT

This Final Judgment is issued pursuant to Federal Rule of Civil Procedure 58. In accordance with the order granting the parties' joint motion to dismiss with prejudice:

It is **ORDERED, ADJUDGED, and DECREED** that this civil action is **DISMISSED with prejudice**.

It is further **ORDERED, ADJUDGED, and DECREED** that all costs and expenses are taxed against the party incurring the same.

The Clerk shall transmit a true copy of this Final Judgment to the parties.

SO ORDERED on this **7th day** of **January, 2020**.

Mark T. Pittman
UNITED STATES DISTRICT JUDGE

End
Appendix B

Begin Appendix C

Amendment V. Rights of Persons.

CONSTITUTION OF UNITED STATES

AMENDMENTS

Current through 2010

Amendment V. Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

End
Appendix C

Begin Appendix D

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection.

CONSTITUTION OF UNITED STATES

AMENDMENTS

Current through 2010

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be

held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

End
Appendix D

Begin Appendix E

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§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch. 646, 62 Stat. 928; Pub. L. 100–352, §2(a), (b), June 27, 1988, 102 Stat. 662.)

*****

End
Appendix E

Begin Appendix F

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§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

*****

End
Appendix F

Begin Appendix G

Rule 13. Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or crimi- nal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Ap- peals for the Armed Forces) is timely when it is iled with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discre- tionary review by the state court of last resort is timely when it is iled with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certio- rari that is jurisdictionally out of time. See, *e. g.,28* U. S. C. § 2101(c).

3. The time to ile a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely peti- tion for rehearing or *sua sponte* considers rehearing, the time to ile the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

4. A cross-petition for a writ of certiorari is timely when it is filed with the Clerk as provided in paragraphs 1, 3, and 5 of this Rule, or in Rule 12.5. However, a conditional cross- petition (which except for Rule 12.5 would be untimely) will not be granted unless another party's timely petition for a writ of certiorari is granted.

5. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out speciic reasons why an extension of time is justiied. The application must be filed with the Clerk at least 10 days before the date the peti- tion is due, except in extraordinary circumstances. The ap- plication must clearly identify each party for whom an ex- tension is being sought, as any extension that might be granted would apply solely to the party or parties named in the application. For the time and manner of presenting the application, see Rules 21, 22, 30, and 33.2. An application to extend the time to ile a petition for a writ of certiorari is not favored.

End
Appendix G

Begin Appendix H

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Federal Rules of Civil Procedure Rule 4 (m)

[NOTE: *Subsections Rule 4 (a) through Rule 4(l) Are Omitted Here*]

Rule 4. Summons

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court-on motion or on its own after notice to the plaintiff-must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

[NOTE: *Subsections Rule 4 (n) through the end of Rule 4 Are Omitted Here*]

*****

End
Appendix H

Begin Appendix I

Page 260

347 U.S. 260 (1954)

74 S.Ct. 499, 98 L.Ed. 681

Accardi

v.

Shaughnessy

No. 366

United States Supreme Court

March 15, 1954

Argued February 2, 1954

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Syllabus

By a habeas corpus proceeding in a federal district court, petitioner challenged the validity of the denial of his application for suspension of deportation under the provisions of § 19(c) of the Immigration Act of 1917. Admittedly deportable, petitioner alleged, *inter alia,* that the denial of his application by the Board of Immigration Appeals was prejudged through the issuance by the Attorney General in 1952, prior to the Board's decision, of a confidential list of "unsavory characters" including petitioner's name, which made it impossible for petitioner "to secure fair consideration of his case." Regulations promulgated by the Attorney General and having the force and effect of law delegated the Attorney General's discretionary power under § 19(c) in such cases to the Board and required the Board to exercise its own discretion when considering appeals.

Held: petitioner is entitled to an opportunity in the district court to prove the allegation, and, if he does prove it, he should receive a new hearing before the Board without the burden of previous proscription by the list. Pp. 261-268.

(a) As long as the Attorney General's administrative regulation conferring "discretion" on the Board remains operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner. Pp. 265-267.

(b) The allegations of the habeas corpus petition in this case were sufficient to charge the Attorney General with dictating the Board's decision. Pp. 267-268.

(c) This Court is not here reviewing and reversing the manner in which discretion was exercised by the Board, but rather regards as error the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations. P. 268.

(d) Petitioner's application for suspension of deportation having been made in 1948, this proceeding is governed by § 19(c) of the 1917 Act, rather than by the Immigration and Nationality Act of 1952. P. 261, n. 1.

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(e) The doctrine of *res judicata* is inapplicable to habeas corpus proceedings. P. 263, n. 4.

206 F.2d 897, reversed.

Petitioner's application for a writ of habeas corpus was denied by the District Court. The Court of Appeals affirmed. 206 F.2d 897. This Court granted certiorari. 346 U.S. 884. *Reversed,* p. 268.

CLARK, J., lead opinion

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a habeas corpus action in which the petitioner attacks the validity of the denial of his application for suspension of deportation under the provisions of § 19(c) of the Immigration Act of 1917.[1] Admittedly deportable,

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the petitioner alleged, among other things, that the denial of his application by the Board of Immigration Appeals was prejudged through the issuance by the Attorney General in 1952, prior to the Board's decision, of a confidential list of "unsavory characters" including petitioner's name, which made it impossible for him "to secure fair consideration of this case." The District Judge refused the offer of proof, denying the writ on the allegations of the petitioner without written opinion. A divided panel of the Court of Appeals for the Second Circuit affirmed. 206 F.2d 897. We granted certiorari. 346 U.S. 884.

The Justice Department's immigration file on petitioner reveals the following relevant facts. He was born in Italy of Italian parents in 1909 and [74 S.Ct. 501] entered the United States by train from Canada in 1932 without immigration inspection and without an immigration visa. This entry clearly falls under § 14 of the Immigration Act of 1924,[2] and is the uncontested ground for deportation. The deportation proceedings

against him began in 1947. In 1948, he applied for suspension of deportation pursuant to § 19(c) of the Immigration Act of 1917. This section, as amended in 1948, provides in pertinent part that:

In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible

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for naturalization or, if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon July 1, 1948.

Hearings on the deportation charge and the application for suspension of deportation were held before officers of the Immigration and Naturalization Service at various times from 1948 to 1952. A hearing officer ultimately found petitioner deportable and recommended a denial of discretionary relief. On July 7, 1952, the Acting Commissioner of Immigration adopted the officer's findings and recommendation. Almost nine months later, on April 3, 1953, the Board of Immigration Appeals affirmed the decision of the hearing officer. A warrant of deportation was issued the same day, and arrangements were made for actual deportation to take place on April 24, 1953.

The scene of action then shifted to the United States District Court for the Southern District of New York. One day before his scheduled deportation, petitioner sued out a writ of habeas corpus. District Judge Noonan dismissed the writ on April 30, and his order, formally entered on May 5, was never appealed. Arrangements were then made for petitioner to depart on May 19.[3] However, on May 15, his wife commenced this action by filing a petition for a second writ of habeas corpus.[4] New

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grounds were alleged, on information and belief, for attacking the administrative refusal to suspend deportation.[5] The principal ground is that, on October 2, 1952 -- after the Acting Commissioner's decision in the case but before [74 S.Ct. 502] the decision of the Board of Immigration Appeals -- the Attorney General announced at a press conference that he planned to deport certain "unsavory characters"; on or about that date, the Attorney General prepared a confidential list of one hundred individuals, including petitioner, whose deportation he wished; the list was circulated by the Department of Justice among all employees in the Immigration Service and on the Board of Immigration Appeals; and that issuance of the list and related publicity amounted to public prejudgment by the Attorney General, so that fair consideration of petitioner's case by the Board of Immigration Appeals was made impossible. Although an opposing affidavit submitted by government counsel denied "that the decision was based on information outside of the record," and contended that the allegation of prejudgment was "frivolous," the same counsel repeated in a colloquy with the

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court a statement he had made at the first habeas corpus hearing -- "that this man was on the Attorney General's proscribed list of alien deportees."

District Judge Clancy did not order a hearing on the allegations, and summarily refused to issue a writ of habeas corpus. An appeal was taken to the Court of Appeals for the Second Circuit with the contention that the allegations required a hearing in the District Court, and that the writ should have been issued if the allegations were proved. A majority of the Court of Appeals' panel thought the administrative record amply supported a refusal to suspend deportation; found nothing in the record to indicate that the administrative officials considered anything but that record in arriving at a decision in the case, and ruled that the assertion of mere "suspicion and belief" that extraneous matters were considered does not require a hearing. Judge Frank dissented.

The same questions presented to the Court of Appeals were raised in the petition for certiorari, and are thus properly before us. The crucial question is whether the alleged conduct of the Attorney General deprived petitioner of any of the rights guaranteed him by the statute or by the regulations issued pursuant thereto.

Regulations[6] with the force and effect of law[7] supplement the bare bones of § 19(c). The regulations prescribe the procedure to be followed in processing an alien's application for suspension of deportation. Until

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the 1952 revision of the regulations, the procedure called for decisions at three separate administrative levels below the Attorney General -- hearing officer, Commissioner, and the Board of Immigration Appeals. The Board is appointed by the Attorney [74 S.Ct. 503] General, serves at his pleasure, and operates under regulations providing that:

in considering and determining . . . appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. The decision of the Board . . . shall be final except in

those cases reviewed by the Attorney General. . . .

8 CFR § 90.3(c) (1949). *See* 8 CFR § 6.1(d)(1) (Rev. 1952). And the Board was required to refer to the Attorney General for review all cases which:

(a) The Attorney General directs the Board to refer to him.

(b) The chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision.

(c) The Commissioner requests be referred to the Attorney General by the Board and it agrees.

8 CFR § 90.12 (1949). *See* 8 CFR § 6.1(h)(1) (Rev. 1952).

The regulations just quoted pinpoint the decisive fact in this case: the Board was required, as it still is, to exercise its own judgment when considering appeals. The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. In unequivocal terms, the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General's discretion became the yardstick of the Board's. And if the word "discretion"

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means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.

We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision. The petition alleges that the Attorney General included the name of petitioner in a confidential list of "unsavory characters" whom he wanted deported; public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General "planned to deport." And, it is alleged, this intention was made quite clear to the Board when the list was circulated among its members. In fact, the Assistant District Attorney characterized it as the "Attorney General's proscribed list of alien deportees." To be sure, the petition does not allege that the "Attorney General ordered the Board to deny discretionary relief to the listed aliens." It would be naive to expect such a heavy handed way of doing things. However, proof was offered and refused that the Commissioner of Immigration told previous counsel of petitioner, "We can't do a thing in your case because the Attorney General has his (petitioner's) name on that list of a hundred." We believe the allegations are quite sufficient where the body charged with the exercise of discretion is a nonstatutory board composed of subordinates within a department headed by the individual who formulated, announced, and circulated such views of the pending proceeding.

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It is important to emphasize that we are not here reviewing and reversing the manner in which discretion was exercised. If such were the case, we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged [74 S.Ct. 504] failure to exercise its own discretion, contrary to existing valid regulations.

If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof, and, in arriving at its decision, exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right.[8] Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings.

Reversed.

JACKSON, J., dissenting

MR. JUSTICE JACKSON, whom MR. JUSTICE REED, MR. JUSTICE BURTON, and MR. JUSTICE MINTON join, dissenting.

We feel constrained to dissent from the legal doctrine being announced. The doctrine seems proof of the adage that hard cases make bad law.

Peculiarities which distinguish this administrative decision from others we have held judicially reviewable must be borne in mind. The hearings questioned here as to their fairness were not hearings on which an order

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of deportation was based and which, under some limitations, may be tested by habeas corpus. *Nishimura Ekiu v. United States,* 142 U.S. 651. Neither is this a case involving questioned personal status, as whether one is eligible for citizenship, which we have held reviewable

under procedures for declaratory judgment and injunction. *McGrath v. Kristensen*, 340 U.S. 162. Petitioner admittedly is in this country illegally, and does not question his deportability or the validity of the order to deport him. The hearings in question relate only to whether carrying out an entirely legal deportation order is to be suspended.

Congress vested in the Attorney General, and in him alone, discretion as to whether to suspend deportation under certain circumstances. We think a refusal to exercise that discretion is not reviewable on habeas corpus, first, because the nature of the power and discretion vested in the Attorney General is analogous to the power of pardon or commutation of a sentence, which we trust no one thinks is subject to judicial control, and second, because no legal right exists in petitioner by virtue of constitution, statute or common law to have a lawful order of deportation suspended. Even if petitioner proves himself eligible for suspension, that gives him no right to it as a matter of law, but merely establishes a condition precedent to exercise of discretion by the Attorney General. Habeas corpus is to enforce legal rights, not to transfer to the courts control of executive discretion.

The ground for judicial interference here seems to be that the Board of Immigration Appeals did find, or may have found, against suspension on instructions from the Attorney General. Even so, this Board is neither a judicial body nor an independent agency. It is created by the Attorney General as part of his office, he names its members, and they are responsible only to him. It operates under his supervision and direction, and its every

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decision is subject to his unlimited review and revision. The refusal to suspend deportation, no matter which subordinate officer actually makes it, is in law the Attorney General's decision. We do not think its validity [74 S.Ct. 505] can be impeached by showing that he overinfluenced members of his own staff whose opinion, in any event, would be only advisory.

The Court appears to be of the belief that habeas corpus will issue to review a decision by the Board. It is treating the Attorney General's regulations as if they vested in the Board final authority to exercise his discretion. But, in our view, the statute neither contemplates nor tolerates a redelegation of his discretion by the Attorney General so as to make the decision of the Board, even if left standing by him, final in the sense of being subject to judicial review as the Board's own decision. Even the Attorney General was not entrusted with this discretion free of all congressional control, for Congress specifically reserved to itself power to overrule his acts of grace. 54 Stat. 672, 8 U.S.C. (1946) § 155(c), as amended, 8 U.S.C. (Supp. V) § 155(c). It overtaxes our naivete about politics to believe Congress would entrust the power to a board which is not the creature of Congress and whose members are not subject to Senate confirmation.

Cases challenging deportation orders, such as *Bridges v. Wixon*, 326 U.S. 135, whatever their merits or demerits, have no application here. In cases where the question is the validity of a deportation order, habeas corpus will issue at least to review jurisdictional questions. In those cases, also, the petitioner has a legal right to assert, *viz.*, a private right not to be deported except upon grounds prescribed by Congress. Neither the validity of deportation nor a private right is involved here.

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Of course, it may be thought that it would be better government if even executive acts of grace were subject to judicial review. But the process of the Court seems adapted only to the determination of legal rights, and here the decision is thrusting upon the courts the task of reviewing a discretionary and purely executive function. Habeas corpus, like the currency, can be debased by over-issue quite as certainly as by too niggardly use. We would affirm and leave the responsibility for suspension or execution of this deportation squarely on the Attorney General, where Congress has put it.

Notes:

[1] 39 Stat. 889, as amended, 8 U.S.C. § 155(c) (1946 ed., Supp. V). Section 405 is the savings clause of the Immigration and Nationality Act of 1952., and its subsection (a) provides that:

Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any . . . proceeding which shall be valid at the time this Act shall take effect; or to affect any . . . proceedings . . . brought . . . at the time this Act shall take effect; but as to all such . . . proceedings, . . . the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . . An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, . . . which is pending on the date of enactment of this Act (June 27, 1952), shall be regarded as a proceeding within the meaning of this subsection.

66 Stat. 280, 8 U.S.C. p. 734 (1952).

Since Accardi's application for suspension of deportation was made in 1948, § 19(c) of the 1917 Act continues to govern this proceeding, rather than its more stringent equivalent in the 1952 Act, § 244, 66 Stat. 214, 8 U.S.C. § 1254 (1952).

[2]

Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States . . . shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917. . . .

43 Stat. 162, 8 U.S.C. § 214 (1946). This ground for deportation is perpetuated by § 241(a)(1) and (2) of the Immigration and Nationality Act of 1952. 66 Stat. 204, 8 U.S.C. § 1251(a)(1) and (2) (1952).

[3] Meanwhile, Accardi moved the Board of Immigration Appeals to reconsider his case. The motion was denied on May 8.

[4] *Res judicata* does not apply to proceedings for habeas corpus. *Salinger v. Loisel*, 265 U.S. 224 (1924); *Wong Doo v. United States*, 265 U.S. 239 (1924).

[5] The first ground was that,

in all similar cases, the Board of Immigration Appeals has exercised favorable discretion, and its refusal to do so herein constitutes an abuse of discretion.

This is a wholly frivolous contention, adequately disposed of by the Court of Appeals. 206 F.2d 897, 901. Another allegation charged "that the Department of Justice maintains a confidential file with respect to [Joseph Accardi]." But at no place does the petition elaborate on this charge, nor does the petition allege that discretionary relief was denied because of information contained in a confidential file. Although the petition does allege that, "because of consideration of matters outside the record of his immigration hearing, discretionary relief has been denied," this allegation seems to refer to the "confidential list" discussed in the body of the opinion. Hence, we assume that the charge of reliance on confidential information merely repeats the principal allegation that the Attorney General's prejudgment of Accardi's case by issuance of the "confidential list" caused the Board to deny discretionary relief.

[6] The applicable regulations in effect during most of this proceeding appear at 8 CFR, 1949, Pts. 150 and 90 and 8 CFR, 1951 Pocket Supp., Pts. 150, 151 and 90. The corresponding sections in the 1952 revision of the regulations, promulgated pursuant to the Immigration and Nationality Act of 1952, may be found at 8 CFR, Rev.1952, Pts. 242-244 and 6; 19 Fed.Reg. 930.

[7] *See Boske v. Comingore*, 177 U.S. 459 (1900); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923); *Bridges v. Wixon*, 326 U.S. 135, 150-156 (1945).

[8] *See* the *Bilokumsky* and *Bridges* cases cited in note 7, *supra.*

End
Appendix I

Begin Appendix J

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354 U.S. 363 (1957)

77 S.Ct. 1152, 1 L.Ed.2d 1403

Service

v.

Dulles

No. 407

United States Supreme Court

June 17, 1957

Argued April 2-3, 1957

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

This suit was brought by petitioner, a Foreign Service Officer, to test the validity of his discharge by the Secretary of State under these circumstances: the State Department's Loyalty Security Board had repeatedly cleared petitioner of charges of being disloyal and a security risk, and its findings had been approved by the Deputy Under Secretary, whose approval of findings favorable to an employee were final under the applicable Regulations. No finding unfavorable to petitioner ever had been made by the Department's Loyalty Security Board or the Deputy Under Secretary, and no recommendation unfavorable to petitioner ever had been made by the Deputy Under Secretary to the Secretary. Nevertheless, the Loyalty Review Board of the Civil Service Commission, on its own motion, conducted its own hearing, found that there was reasonable doubt as to petitioner's loyalty, and advised the Secretary that petitioner "should be forthwith removed from the rolls of the Department of State." Acting solely on the basis of the finding of that Board, and without making any independent determination of his own on the record in the case, the Secretary discharged petitioner on the same day. He based this action on Executive Orders No. 9835 and No. 10241 and § 103 of Public Law 188, 82d Congress, commonly known as the McCarran Rider, which authorized the Secretary, "in his absolute discretion," to

terminate the employment of any officer . . . of the Foreign Service . . . whenever he shall deem such termination necessary or advisable in the interests of the United States.

Held: petitioner's discharge was invalid because it violated Regulations of the Department of State which were binding on the Secretary, and the judgment is reversed. Pp. 365-389.

1. The Regulations of the State Department governing this subject were applicable to discharges under the McCarran Rider, as well as to those effected under the Loyalty-Security Program. Pp. 373-381.

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(a) The terms of the Regulations, the fact that the Department itself proceeded in this very case under those Regulations down to the point of petitioner's discharge, representations made by the State Department to Congress relating to its practices under the McCarran Rider, and the announced wish of the President to the effect that authority under the McCarran Rider should be exercised subject to procedural safeguards designed to protect "the personal liberties of employees" all combine to support this conclusion. Pp. 373-379.

(b) The Secretary was not powerless to bind himself by these Regulations as to discharges under the McCarran Rider. Pp. 379-380.

(c) A different result is not required by the fact that the Regulations refer explicitly to discharges based on loyalty and security grounds, and make no reference to discharges deemed "necessary or advisable in the interests of the United States," which is the sole standard of the McCarran Rider. Pp. 380-381.

2. The manner in which petitioner was discharged was inconsistent with, and violative of, Regulations of the State Department -- regardless of whether the 1949 Regulations or the 1951 Regulations be considered applicable. Pp. 382-388.

(a) Under the 1949 Regulations, the Secretary had no right to dismiss petitioner for loyalty or security reasons unless and until the Deputy Under Secretary, acting upon findings of the Department's Loyalty Security Board, had recommended dismissal. Pp. 383-387.

(b) Under § 393.1 of the 1951 Regulations, a decision in such a case could be reached only "after consideration of the complete file, arguments, briefs, and testimony presented," and the record shows that the Secretary made no attempt to comply with this requirement in this case. Pp. 387-388.

3. Since the Secretary did not comply with the applicable Regulations of his Department, which were binding on him, petitioner's dismissal cannot stand.

Accardi v. Shaughnessy, 347 U.S. 260. Pp. 388-389.

98 U.S.App.D.C. 268, 235 F.2d 215, reversed and remanded.

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HARLAN, J., lead opinion

MR. JUSTICE HARLAN delivered the opinion of the Court.

On December 14, 1951, petitioner, John S. Service, was discharged by the then Secretary of State, Dean Acheson, from his employment as a Foreign Service Officer in the Foreign Service of the United States. This case brings before us the validity of that discharge.

At the time of his discharge in 1951, Service had been a Foreign Service Officer for some sixteen years, during ten of which, 1935-1945, he had served in various capacities in China. In April, 1945, shortly after his return to this country, Service became involved in the so-called Amerasia investigation through having furnished to one Jaffe, the editor of the Amerasia magazine, copies of certain of his Foreign Service reports. Two months later, Service, Jaffe, and others were arrested and charged with violating the Espionage Act,[1] but the grand jury, in August, 1945, refused to indict Service. He was thereupon restored to active duty in the Foreign Service, from which he had been on leave of absence since his arrest, and returned to duty in the Far East.

From then on, Service's loyalty and standing as a security risk were under recurrent investigation and review by a number of governmental agencies under the provisions of Executive Order No. 9835,[2] establishing the President's Loyalty Program, and otherwise. He was accorded successive "clearances" by the [77 S.Ct. 1154] State Department

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in each of the years 1945, 1946, and 1947,[3] and a fourth clearance in 1949 by that Department's Loyalty Security Board, which, however, was directed by the Loyalty Review Board of the Civil Service Commission, when the case was examined by it on "post-audit,"[4] to prefer charges against Service and conduct a hearing thereon. This was done, and, on October 6, 1950, after extensive hearings, the Department Board concluded that "reasonable grounds do not exist for belief that . . . Service is disloyal to the Government of the United States . . . ," and that " . . . he does not constitute a security risk to the Department of State." These findings were approved by the Deputy Under Secretary of State, acting pursuant to authority delegated to him by the Secretary.[5] Again, however, the Loyalty Review Board, on post-audit, remanded the case to the Department Board for further consideration.[6] Such consideration was had, this time under the more stringent loyalty standard established by Executive Order No. 10241,[7] amending the earlier Executive Order No. 9835, and again the Department Board, on July 31, 1951, decided favorably to Service. This determination was likewise approved by the Deputy Under Secretary. However, on a further post-audit, the Loyalty Review Board decided to conduct a new hearing itself, which resulted this time in the Board's finding that there was a reasonable doubt as to Service's loyalty, and

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in its advising the Secretary of State, on December 13, 1951, that, in the Board's opinion, Service "should be forthwith removed from the rolls of the Department of State," and that "the Secretary should approve and adopt the proceedings" had before the Board.[8] On the same

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day, the [77 S.Ct. 1155] Department notified Service of his discharge, effective at the close of business on the following day.

The authority and basis upon which the Secretary acted in discharging petitioner are set forth in an affidavit later filed by Mr. Acheson in the present litigation, in which he states:

2. On December 13, 1951, I received a letter from the Chairman of the Loyalty Review Board of the Civil Service Commission submitting to me that Board's opinion, dated December 12, 1951, in the case of John S. Service, a Foreign Service officer of the Department of State and the plaintiff in this action.

3. On that same day, I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as

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amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.

4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.

5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this

determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether, on the evidence submitted before those boards, there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me, and that I was legally free to exercise my [77 S.Ct. 1156] own judgment as to whether Mr. Service's employment should be terminated, and I did so exercise that judgment.

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Section 103 of Public Law 188, 82d Congress,[9] upon which the Secretary thus relied, was the so-called McCarran Rider, first enacted as a rider to the Appropriation Act for 1947, which provided:

Notwithstanding the provisions of . . . any other law, the Secretary of State may, in his absolute discretion, . . . terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States. . . .[10]

Similar provisions were reenacted in each subsequent appropriation act until 1953.[11]

After an attempt to secure further administrative review of his discharge proved unsuccessful, petitioner brought this action, in which he sought a declaratory judgment that his discharge was invalid; an order directing the respondents to expunge from their records all written statements reflecting that his employment had been terminated because there was a reasonable doubt as to his loyalty; and an order directing the Secretary to reinstate him to his employment and former grade in the Foreign Service, with full restoration of property rights and payment of accumulated salary.

While cross-motions for summary judgment were pending before the District Court, this Court rendered its decision in *Peters v. Hobby*, 349 U.S. 331, holding that, under Executive Order No. 9835, the Loyalty Review Board had no authority to review, on post-audit, determinations favorable to employees made by department or agency

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authorities, or to adjudicate individual cases on its own motion. On the authority of that decision, the District Court declared the finding and opinion of the Loyalty Review Board respecting Service to be a nullity, and directed the Civil Service Commission to expunge from its records the Board's finding that there was reasonable doubt as to his loyalty. But since petitioner's removal rested not only upon Executive Order No. 9835, as amended, but also upon the McCarran Rider, the District Court sustained petitioner's discharge as a valid exercise of the "absolute discretion" conferred upon the Secretary by the latter provision, and granted summary judgment in favor of respondents in all other respects.[12] The Court of Appeals affirmed, 98 U.S.App.D.C. 268, 235 F.2d

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215, and [77 S.Ct. 1157] this Court granted certiorari, 352 U.S. 905, because of the importance of the questions involved to federal administrators and employees alike.

Petitioner here attacks the validity of the termination of his employment on two separate grounds: first, he contends that the Secretary's exercise of discretion was invalid since the findings and opinion of the Loyalty Review Board, upon which alone the Secretary acted, were void because they were rendered without jurisdiction[13] and were based upon procedures assertedly contrary to due process of law. Even conceding that the Secretary's powers under the McCarran Rider were such that he was not required to state the grounds for his decision, petitioner urges, his decision cannot stand, because he did, in fact, rely upon grounds that are invalid. *See Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80; *Perkins v. Elg*, 307 U.S. 325. Second, petitioner contends that the Secretary's action is subject to attack under the principles established by this Court's decision in *Accardi v. Shaughnessy*, 347 U.S. 260, namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature. Regulations relating to "loyalty and security of employees" which had been promulgated by the Secretary, petitioner asserts, were intended to govern discharges effected under the McCarran Rider as well as those effected under Executive Order No. 9835, as amended, and because those regulations were violated by the Secretary in this case, so petitioner claims, his dismissal by the Secretary cannot stand. Since, for reasons discussed hereafter, we have concluded that petitioner's second contention must be sustained, we do not reach the first.

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The questions to which we address ourselves therefore are as follows: (1) were the departmental

Regulations here involved applicable to discharges effected under the McCarran Rider? and (2) were those Regulations violated in this instance? We do not understand the respondents to dispute that the principle of *Accardi v. Shaughnessy, supra,* is controlling if we find that the Regulations were indeed applicable and were violated. We might also add that we are not here concerned in any wise with the merits of the Secretary's action in terminating the petitioner's employment.

I

We think it is not open to serious question that the departmental Regulations upon which petitioner relies were applicable to McCarran Rider discharges as well as to those effected pursuant to the Loyalty-Security program. The terms of the Regulations, the fact that the Department itself proceeded in this very case under those Regulations down to the point of petitioner's discharge, representations made by the State Department to Congress relating to its practices under the McCarran Rider, and the announced wish of the President to the effect that McCarran Rider authority should be exercised subject to procedural [77 S.Ct. 1158] safeguards designed to protect "the personal liberties of employees," all combine to lead to that conclusion. We also think it clear that these Regulations were valid so far as their validity is put in issue by the respondents in this case.

A. *The Regulations.*

When the Department's proceedings against the petitioner, which resulted in the "clearances" of October 6, 1950, and July 31, 1951, were begun, the Regulations in effect were those of March 11, 1949, entitled "Regulations and Procedures relating to Loyalty and Security of

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Employees, U.S. Department of State."[14] Section 391 stated the "Authority and General Policy" of the Regulations in three subsections. Subsection 391.1 stated that it was

highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk.

Subsection 391.2 stated that, so far as the Regulations related to the handling of loyalty cases, they were promulgated in accordance with Executive Order No. 9835, which had recognized the "necessity for removing disloyal employees from the Federal service and for refusing employment therein to disloyal persons," and the "obligation to protect employees and applicants from unfounded accusations of disloyalty." Subsection 391.3 referred to the language of the McCarran Rider, noting that the Secretary of State had been granted by Congress the right, in his absolute discretion,

to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

"In the exercise of this right," the subsection concluded, "the Department will, so far as possible,[15] afford its employees the same protection as those provided under the Loyalty Program." And, as we shall see hereafter, the Regulations made no provision for action by the

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Secretary himself, under the McCarran Rider or otherwise, except following unfavorable action in the employee's case by the Department Loyalty Security Board, after full hearing before that Board on the charges against him, and approval of the Board's action by the Deputy Under Secretary.[16]

In May and September, 1951, prior to the time of petitioner's discharge, the Regulations were revised, and the amended § 391 provided even more explicitly than the original that the procedures and standards established were intended to govern exercise of the authority granted by the McCarran Rider. After stating in the first subsection[17] that the Regulations were adopted to implement the Department's policy that [77 S.Ct. 1159] "no person be employed in the Department[18] who is disloyal or who constitutes a security risk," the section continues in the next two subsections[19] to state in effect that the Regulations relating to the handling of *loyalty* cases were promulgated in accordance with Executive Order No. 9835, and that those relating to *security* cases were promulgated under

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the authority of the Act of August 26, 1950[20] and the McCarran Rider.[21] The phrase "so far as possible," in reference to McCarran Rider authority, was deleted. The Regulations thus drew upon all the sources of authority available to the Secretary with reference to such cases, and purported to set forth definitively the procedures and standards to be followed in their handling.

B. *The Administrative Proceedings in this Case.*

The administrative proceedings held in petitioner's case were unquestionably conducted on the premise that the Regulations were applicable in this instance. The charges were based on the Regulations, and a copy of the Regulations was sent to Service along with the letter of charges. The hearing was scheduled under § 395 of the 1949 Regulations. In its opinion exonerating Service, the Department Board noted, following the Regulations, that "the issues here are (1) loyalty, and (2) security risk." The Board's favorable recommendations came twice before the Deputy Under Secretary for review under §§ 395.6

and 396.7 of these Regulations, and were approved by him. Later, before the Civil Service Commission's Loyalty Review Board, an additional charge was added to the Department's original charges by stipulation of the parties, and the stipulation expressly referred to §§ 392.2 and 393.1a of the Regulations. Indeed at no time during any of the administrative proceedings

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in this case was there any suggestion that the Regulations were not applicable to the entire proceedings and binding upon all parties to the case.

C. *The Department's Representations to Congress.*

In the spring of 1950, the Department of State submitted to an investigating subcommittee of the Senate Foreign Relations Committee a comprehensive report on the procedures and standards used by the Department in dealing with employee loyalty and security problems. After describing the procedures utilized by the Department in the early post-war period, the report continued as follows:

. . . The policy of the Department prior to the passage of the McCarran rider was that, if there was reasonable doubt as to an employee's loyalty, his employment was required to be terminated. The McCarran rider freed the hands of the Department in making this policy effective. Basically, any reasonable doubt of an employee's loyalty, if based on substantial evidence, was to be resolved in favor of the Government. After enactment of the McCarran rider, the Department did not contemplate that the legislation required, or that the people of this [77 S.Ct. 1160] country would countenance, the use of "Gestapo" methods or harassment or persecution of loyal employees who were American citizens on flimsy evidence or hearsay and innuendo. The Department proceeded to develop appropriate procedures designed to implement fully and properly the authority granted the Department under the McCarran rider.

The McCarran rider . . . was the first of a series of provisions included in each subsequent appropriation act which authorized the Secretary of State, in his absolute discretion, to

terminate the employment

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of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

Accordingly, effective during the 1947 fiscal year and each fiscal year thereafter, the Department considered the McCarran rider as an additional standard for dealing with security problems in the Department. . . . *In [its] considered view, the McCarran rider was subject to procedural limitations.* The McCarran rider was not interpreted as permitting reckless discharge or the exercise of arbitrary whims.

* * * *

The President's loyalty order of March 21, 1947, prescribed a comprehensive set of standards governing the executive branch as a whole. It was deemed applicable to the Department of State, as well as to other agencies. *The unique powers conferred on the Department as a result of continuous reenactment of the McCarran rider led the Department to promulgate regulations which would encompass its duties and powers both under the Executive order and under the McCarran rider.*[22]

D. *The President's Letter.*

That the policy of the Secretary to subject his plenary powers under the McCarran Rider to procedural limitations was deliberately adopted, and rested on decisions taken at the highest level, is evidenced by a letter dated September 6, 1950, from President Truman to the Secretary of State, which was made a part of the record below. In that letter, the President advised the Secretary that he had just approved H.R. 7786, the General Appropriation Act, 1951, 69 Stat. 595, 768, § 1213 of

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which reenacted the McCarran Rider for the current fiscal year. The President continued:

I am sure you will agree that, in exercising the discretion conferred upon you by Section 1213, every effort should be made to protect the national security without unduly jeopardizing the personal liberties of the employees within your jurisdiction. Procedures designed to accomplish these two objectives are set forth in Public Law 733, 81st Congress, which authorizes the summary suspension of civilian officers and employees of various departments and agencies of the Government, including the Department of State.

In order that officers and employees of the Department of State may be afforded the same protection as that afforded by Public Law 733, it is my desire that you follow the procedures set forth in that law in carrying out the provisions of section 1213 of the General Appropriations Act.

In view of the terms of the Regulations, the course of procedure followed by the Department, and the background materials we have noted, we think that [77 S.Ct. 1161] there is no room for doubt that the departmental Regulations for the handling of loyalty and security cases were both intended and considered by the Department to apply in this instance. We cannot accept

either of the respondents' present arguments to the contrary. The first argument, as put by the District Court, whose language was adopted by the Court of Appeals,[23] is:

. . . It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 188. This power of summary dismissal would not have been granted the

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Secretary of State by the Congress if the Congress was satisfied that the interests of this country were adequately protected by Executive Order 9835.

We gather from this that the lower courts though that the Secretary was powerless to bind himself by these Regulations as to McCarran Rider discharges based on loyalty or security grounds. We do not think this is so. Although Congress was advised in unmistakable terms that the Secretary had seen fit to limit by regulations the discretion conferred upon him, *see* pp. 377-378, *supra,* it continued to reenact the McCarran Rider without change for several succeeding years.[24] *Cf. Labor Board v. Gullett Gin Co.*, 340 U.S. 361, 366; *Fleming v. Mohawk Wrecking Co.*, 331 U.S. 111, 116. Nor do we see any inconsistency between this statute and the effect of the Regulations upon the Secretary under *Accardi v. Shaughnessy*, 347 U.S. 260, already discussed, pp. 372-373, *supra.Accardi,* indeed, involved statutory authority as broad as that involved here.[25]

The respondents' second argument is that the Regulations refer explicitly to discharges based on loyalty and security grounds, but make no reference to discharges

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deemed "necessary or advisable in the interests of the United States" -- the sole McCarran Rider standard -- and hence were not applicable to such discharges. But, as has already been demonstrated, both the Regulations and their historical context show that the Regulations were applicable to McCarran Rider discharges at least to the extent that they were based on loyalty or security grounds, and we do not see how it could seriously be considered, as the respondents now seem to urge, that Service was not discharged on such grounds. The Secretary's affidavit,[26] and also the Department's formal notice to Service of his discharge,[27] both of which, among other things, refer to Executive Order No. 9835 [77 S.Ct. 1162] as well as to the McCarran Rider as authority for the Secretary's action, unmistakably show that the discharge was based on such grounds.

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We now turn to the question whether the manner of petitioner's discharge was consistent with the Department's Regulations.

II

Preliminarily, it must be noted that the parties are in dispute as to which of the two sets of Regulations -- those of 1949 or those of 1951 -- is applicable to petitioner's case, assuming, as we have held, that one or the other must govern. The departmental proceedings against petitioner were begun and were conducted under the 1949 Regulations. However, prior to petitioner's discharge in December, 1951, the revised Regulations of May and September, 1951, had become effective, and it is under those Regulations, the respondents say, that Service's discharge must be judged.[28] On the other hand, the petitioner contends that the 1949 Regulations remained applicable to his case, since he was not advised of the existence of the 1951 Regulations until after his discharge had been accomplished and the present court proceedings had been commenced.[29] However, it is unnecessary for us to make a choice between the two sets of Regulations, for we find the manner in which petitioner was discharged to have been inconsistent with both.

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A. *The 1949 Regulations.*

In terms of the 1949 Regulations, the vice we find in petitioner's discharge is that the Secretary had no right to dismiss the petitioner for loyalty or security reasons unless and until the Deputy Under Secretary, acting upon the findings of the Department's Loyalty Security Board, had recommended such dismissal. In other words, the Deputy Under Secretary in this instance having approved the findings of the Loyalty Security Board favorable to petitioner, the Secretary, consistently with these Regulations, could not, without more, dismiss the petitioner.

The basis for this conclusion will appear from a consideration of the procedural scheme established by the 1949 Regulations relating to loyalty and security cases. In outline, that scheme involved the following procedural steps:

(1) The filing of charges, upon notice to the employee involved, accompanied by adequate factual details as to their basis, and a statement as to the employee's [77 S.Ct. 1163] work and pay status pending further action.[30]

(2) A hearing on such charges, if requested by the employee, before the Department's Loyalty Security Board, whose determination, together with the record of the hearings, were then to be forwarded to the Deputy Under Secretary for review.[31]

(3) Upon such review, the Deputy Under Secretary was empowered (i) to return the case to the Board for further investigation or action; (ii) to decide in favor of the

employee, and to so notify him

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in writing; or (iii) to decide against the employee, and to notify him of his right to appeal to the Secretary within 10 days thereafter.[32]

(4) In the event of such an appeal, the Secretary was empowered (i) to decide favorably to the employee, and to so notify him in writing; or (ii) to decided against the employee, and to notify him of such decision, and further, in a loyalty case, of his right to appeal to the Loyalty Review Board within 20 days thereafter.[33]

(5) If, upon such an appeal, the Loyalty Review Board decided adversely to the employee and made an "advisory" recommendation to the Secretary that the employee should be removed from employment under the applicable loyalty standards, the Department was to take prompt administrative action to that end. On the other hand, if the Board decided favorably to the employee, the Secretary was empowered (i) to restore the employee to duty and "close the case"; (ii) to permit the employee to resign; or (iii) to terminate his employment under the authority conferred by the McCarran Rider "or other appropriate authority."[34]

From this survey, three things appear as to the handling of loyalty and security cases under the 1949 Regulations which are of significance in this case. *First,* following the decision of the Deputy Under Secretary upon a determination of the Department Loyalty Security Board, there was to be an appeal to the Secretary *only* if the Deputy's action had been adverse to the employee. In other words, under these Regulations, the action of the

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Deputy Under Secretary, if *favorable* to the employee, was to be final, the Secretary reserving to himself power to act further only if his Deputy's action was unfavorable to the employee.[35] *Second,* there was likewise an appeal to the Loyalty Review Board from the Secretary's decision *only* if his action was *adverse* to the employee. Again, in other words, a decision of the Secretary favorable to the employee was to be final, and immune [77 S.Ct. 1164] from further action by the Loyalty Review Board on post-audit, a rule since confirmed by our decision in *Peters v. Hobby, supra.Third,* the Secretary reserved the right to deal with such a case under his McCarran Rider authority, outside the Regulations, only in instances where, upon an employee's appeal to the Loyalty Review Board from an unfavorable decision by the Secretary, the decision of that body was favorable to the employee.

Granted, as the respondents argue, that these Regulations gave the petitioner (a) no right of appeal to the Secretary from the Deputy Under Secretary's

favorable

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decision, and (b) no right of appeal at all from the action of the Loyalty Review Board, it does not follow, as the respondents then argue, that the Secretary was free to dismiss the petitioner. For, as has already been observed, the Regulations left the Secretary *functus officio* with respect to such cases once the Deputy Under Secretary had made a determination favorable to the employee. So here, when the Deputy Under Secretary approved the Loyalty Security Board's action of July 31, 1951, clearing the petitioner, under these Regulations, the case against Service was closed.[36] Hence, Service's subsequent discharge by the Secretary must be deemed to have been in contravention of these 1949 Regulations.[37] The situation under the 1949 Regulations was thus closely analogous to that which obtained in *Accardi v. Shaughnessy, supra.* There, the Attorney General bound himself not to exercise his discretion until he had received an impartial recommendation from a subordinate board. Here, the

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Secretary bound himself not to act at all in cases such as this, except upon appeal by employees from determinations unfavorable to them. We see no relevant ground for distinction.

B. *The 1951 Regulations.*

A similar conclusion must be reached if the 1951 Regulations are deemed applicable to petitioner's case. Section 393.1 of those Regulations provides:

The standard for removal from employment in the Department of State under the authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. *The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.*

(Emphasis added.) The "authority referred to in section 391.3," as we have already noted, included the McCarran Rider.[38] In light of the former Secretary's affidavit,[39] there is no room for dispute that no attempt [77 S.Ct. 1165] was made to comply with this section of the Regulations,[40] as indeed the respondents' brief virtually concedes.

The respondents argue that this provision was not violated in petitioner's case, because

the only decision to which Section 393.1 relates is that the removal of the

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officer or employee involved is "necessary or advisable in the interest of national security,"

the standard laid down in the Act of August 26, 1950,[41] and that

[n]othing in this section purports to prescribe the procedure to be followed in determining that removal is "necessary or advisable in the interests of the United States,"

the standard contained in the McCarran Rider. But since § 391.3, which is incorporated by reference into § 393.1, specifically subjected the exercise of the Secretary's McCarran Rider authority, in such cases as this, to the operation of the 1951 Regulations, it seems clear that the necessary effect of §393.1 was to subject the exercise of that authority to the substantive standards prescribed by that section, namely, those established by the Act of August 26, 1950,[42] and also to the procedural requirements that such cases must be decided "on all the evidence" and "after consideration of the complete file, arguments, briefs, and testimony presented." The essential meaning of the section, in other words, was that the Secretary's decision was required to be on the merits. While it is, of course, true that, under the McCarran Rider, the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and, having done so, he could not, so long as the Regulations remained unchanged, proceed without regard to them.

It being clear that § 393.1 was not complied with by the Secretary in this instance, it follows that, under the *Accardi* doctrine, petitioner's dismissal cannot stand,

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regardless of whether the 1951, rather than the 1949, Regulations are deemed applicable in his case.[43]

For the foregoing reasons, the judgment of the Court of Appeals must be reversed, and the case remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

Notes:

[1] Act of June 15, 1917, c. 30, 40 Stat. 217, as amended.

[2] 12 Fed.Reg. 1935.

[3] Hearings before the Subcommittee of the House Committee on Appropriations on the Department of State Appropriation Bill for 1950, 81st Cong., 1st Sess. 298.

[4] *See Peters v. Hobby*, 349 U.S. 331, 339-348, for a discussion of the then-existing "post-audit" procedure.

[5] *See* pp. 382-386 and note 16, *infra.*

[6] This action was based on "supplementary information . . . received from the Federal Bureau of Investigation," the nature of which does not appear in the record.

[7] 16 Fed.Reg. 3690.

[8] The essence of the Loyalty Review Board's action, and its relation to the prior departmental proceedings with respect to Service, are summarized in the State Department's press release of December 13, 1951, as follows:

The Department of State announced today that the Loyalty Review Board of the Civil Service Commission has advised the Department that this Board has found a reasonable doubt as to the loyalty of John Stewart Service, Foreign Service Officer.

Today's decision of the Loyalty Review Board is based on the evidence which was considered by the Department's Board and found to be insufficient on which to base a finding of "reasonable doubt" as to Mr. Service's loyalty or security. Copies of the Opinions of both Boards are attached.

The Department of State's Loyalty Security Board, on July 31, 1951, had reaffirmed its earlier findings that Service was neither disloyal nor a security risk, and the case had been referred to the Loyalty Review Board for post-audit on September 4, 1951. The Loyalty Review Board assumed jurisdiction of Mr. Service's case on October 9, 1951.

The Chairman of the Loyalty Review Board in today's letter to the Secretary (full text attached) noted:

The Loyalty Review Board found no evidence of membership in the Communist Party or in any organization on the Attorney General's list on the part of John Stewart Service. The Loyalty Review Board did find that there is a reasonable doubt as to the loyalty of the employee, John Stewart Service, to the Government of the United States, based on the intentional and unauthorized disclosure of documents and information of a confidential and nonpublic character within the meaning of subparagraph d of paragraph 2 of Part V, "Standards," of Executive Order No. 9835, as amended.

The Opinion of the Loyalty Review Board stressed the points made above by the Chairman -- that is, it stated that the Board was not required to find, and did not find, Mr. Service guilty of disloyalty, but it did find that his

intentional and unauthorized disclosure of confidential documents raised reasonable doubt as to his loyalty. The State Department Board while censoring [*sic*] Mr. Service for indiscretions, believed that the experience Mr. Service had been through as a result of his indiscretions in 1945 had served to make him far more than normally security conscious. It found also that no reasonable doubt existed as to his loyalty to the Government of the United States. On this point, the State Department Board was reversed.

The Chairman of the Loyalty Review Board has requested the Secretary of State to advise the Board of the effective date of the separation of Mr. Service. This request stems from the provisions of Executive Orders 9835 and 10241 -- which established the President's Loyalty Program -- and the Regulations promulgated thereon. These Regulations are binding on the Department of State.

The Department has advised the Chairman of the Loyalty Review Board that Mr. Service's employment has been terminated.

[9] 65 Stat. 581.

[10] 60 Stat. 458.

[11] *See* 61 Stat. 288, 62 Stat. 315, 63 Stat. 456, 64 Stat. 768. 65 Stat. 581, 66 Stat. 555. All of these provisions are referred to in this opinion as "the McCarran Rider."

[12] The District Court's opinion is unreported. Actually, the Secretary could be considered to have power to discharge petitioner as he did only by virtue of the McCarran Rider. Petitioner was an officer in the Foreign Service of the United States, and, as such, was entitled to the protection of the Foreign Service Act of 1946, as amended. 22 U.S.C. § 801 *et seq.* That statute authorizes the Secretary of State to separate officers from the Foreign Service "for unsatisfactory performance of duty," *id.*, § 1007, or for "misconduct or malfeasance," *id.*, § 1008. However, under both sections, an officer may not be separated without a hearing before the Board of the Foreign Service established by § 211 of the Act, 22 U.S.C. § 826, and his unsatisfactory performance of duty or misconduct must be established at that hearing. No such hearing was ever afforded petitioner. Executive Order No. 9835 did not vest any additional authority in the heads of administrative agencies to discharge employees. It merely established new standards and procedures for effecting discharges under whatever independent legal authority existed for those discharges. *Cf. Cole v. Young*, 351 U.S. 536, 543-544. The only statutory provision which could be deemed to authorize the Secretary to dismiss petitioner without observance of the provisions of the Foreign Service Act was therefore the McCarran Rider. The latter provision thus was an indispensable supplement to the Department's authority if it was to proceed against petitioner under the Loyalty-Security Regulations as it did. *See* p. 376, *infra.*

[13] *See Peters v. Hobby, supra,* at 342-343.

[14] U.S. Department of State, Manual of Regulations and Procedures (1949), § 390 *et seq.*

[15] This qualification is without significance here in view of the fact that the petitioner's case before the Department was handled, down to the time of his discharge by the Secretary, under these Regulations. *See* p. 376, *infra.* Moreover, this phrase was deleted in the 1951 revision of the Regulations, as we note hereafter, p. 376, *infra,* and the respondents have insisted here that the 1951 revision is controlling, *see* p. 382, *infra.*

[16] We follow the parties in this case in using interchangeably the terms "Deputy Under Secretary" and "Assistant Secretary-Administration." When the Department's 1949 Regulations were promulgated, the official charged with duties under them was the "Assistant Secretary-Administration." At some time thereafter, however, that official's functions were apparently transferred to a Deputy Under Secretary. *Cf.* Act of May 26, 1949, §§ 3, 4, 63 Stat. 111. To avoid confusion, we have used exclusively the latter title in the text of this opinion regardless of its technical correctness in the particular instance.

[17] "391.1 *Policy.*" For the Department's 1951 Regulations, *see* U.S. Department of State, Manual of Regulations and Procedures (1951), Vol. I, § 390 *et seq.*

[18] "Department" is defined as including "the Foreign Service of the United States." § 391.3.

[19] "391.2 *Loyalty Authority,*" and "391.3 *Security Authority.*"

[20] This statute is referred to in the subsection as "Public Law 733, 81st Congress," being the Act of August 26, 1950, 64 Stat. 476, 5 U.S.C. §§ 22-1, 22-3, which gave to the State Department, among other departments and agencies of the Government, suspension and dismissal powers over their civilian employees when deemed necessary "in the interest of the national security of the United States." *Cf. Cole v. Young*, 351 U.S. 536.

[21] Referred to in the subsection as "General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress."

[22] S.Rep.No.2108, 81st Cong., 2d Sess., 15-16 (emphasis supplied).

[23] 98 U.S.App.D.C. 271, 235 F.2d at 218.

[24] *See* note 11, *supra.*

[25] *I.e.,* § 19(c) of the Immigration Act of 1917, as amended:

In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien, or (b) that such alien had resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act.

62 Stat. 1206, 8 U.S.C. (1946 ed., Supp. V) § 155(c).

[26] *See* pp. 368-369, *supra.*

[27] This notice read:

My Dear Mr. Service:

The Secretary of State was advised today by the Chairman of the Loyalty Review Board of the U.S. Civil Service Commission that the Loyalty Review Board has found that there is a reasonable doubt as to your loyalty to the Government of the United States. This finding was based on the intentional and unauthorized disclosure of documents and information of a confidential and nonpublic character within the meaning of subparagraph d of Paragraph 2 of Part V of Executive Order 9835, as amended. The Loyalty Review Board further advised that it found no evidence of membership on your part in the Communist Party or in any organizations on the Attorney General's list.

Pursuant to the foregoing, the Secretary of State, under the authority of Executive Order 9835, as amended, and Section 103 of Public Law 188, 82nd Congress, has directed me to terminate your employment in the Foreign Service of the United States as of the close of business December 14, 1951.

In view thereof, you are advised that your employment in the Foreign Service of the United States is hereby terminated effective [at the] close of business December 14, 1951.

[28] The respondents argue that the proper rule to be applied is that of *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, holding that a change in the applicable law after a case has been decided by a *nisi prius* court, but before decision on appeal, requires the appellate court to apply the changed law. *And see* Ziffrin, Inc. v. United States, 318 U.S. 73.

[29] Petitioner argues that the decisions cited in note 28, *supra,* are not in point here because, *inter alia,* the changed regulations were invalid as to him under the Federal Register Act, 49 Stat. 502, 44 U.S.C. § 307, and the Administrative Procedure Act, 60 Stat. 238, 5 U.S.C. § 1002, because not published in the Federal Register.

[30] §§ 394.13, 394.15, 395.1.

[31] §§ 395.1, 395.53.

[32] §§ 395.6, 396.11.

[33] §§ 396.2, 396.3.

[34] §§ 396.4, 396.5.

[35] That this was understood to be the effect of the Regulations is indicated by Department of State Press Release No. 247, March 13, 1950, which is reprinted in S.Rep. No. 2108, 81st Cong., 2d Sess. 254. Deputy Under Secretary of State John E. Peurifoy is there quoted as stating, in reply to charges made on the floor of the Senate:

. . . I am in full charge of loyalty matters, and . . . am fully prepared to deal with these charges.

Gen. George C. Marshall, as Secretary of State, vested in me full responsibility and authority for carrying out the loyalty and security program of the Department of State, and I have continued to exercise the same responsibility and authority under Secretary Dean Acheson.

My decisions on matters of loyalty and security within the Department are *final,* subject, however, under the law, *in certain instances* to appeal to the Secretary and the President's Loyalty Review Board. Since the loyalty and security program was launched in the Department, however, there has not been a single instance in which a decision made by me has been reversed or overruled in any way by Secretary Acheson.

(Emphasis supplied.)

[36] Section 396.7 of the Regulations provided:

If the Assistant Secretary-Administration or the Secretary of State shall, during his consideration of any case, decide affirmatively that an officer or employee is not disloyal and does not constitute a security risk and that his case should be closed, such officer or employee shall be restored to duty, if suspended, and the record shall show such decision.

In holding as we do, we by no means imply that, under these Regulations, the action of the Deputy Under Secretary had the effect of "closing" petitioner's case irrevocably and beyond hope of recall. No doubt proper steps could have been taken to reopen it in the Department. But, consistent with his Regulations, we think that the Secretary could in no event have discharged the petitioner, as he did here, without the required action first having been taken by the Department's Loyalty Security Board and the Deputy Under Secretary.

[37] In view of this conclusion, it becomes unnecessary

to consider the other respects in which petitioner claims that his discharge contravened the 1949 Regulations.

[38] *See* pp. 375-376, *supra.*

[39] *See* pp. 368-369, *supra.*

[40] We do not, of course, imply that the Regulations precluded the Secretary from discharging any individual without personally reading the "complete file" and considering "all the evidence." No doubt the Secretary could delegate that duty. But nothing of the kind appears to have been done here.

[41] *See* note 20, *supra.*

[42] Sections 393.2 and 393.3 further refined the standard by defining five classes of persons constituting security risks, and listing five factors which were to be taken into account, together with possible mitigating circumstances.

[43] Because of this conclusion, it is unnecessary to deal with the other respects in which petitioner claims his discharge violated the 1951 Regulations.

End
Appendix J

End Of Appendix