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# A LAWYER IN CRISIS TIMES: JOSEPH L. RAUH, JR., THE LOYALTY-SECURITY PROGRAM, AND THE DEFENSE OF CIVIL LIBERTIES IN THE EARLY COLD WAR

MICHAEL E. PARRISH\*

*This Article tells the story of Joseph L. Rauh, Jr., a lawyer who fought for American civil liberties during a time when they were in great peril. Rauh challenged the federal government's loyalty-security program during the height of McCarthyism and the Red Scare through his representation of government employees and contractors that were faced with termination and humiliation due to allegations of disloyalty. This Article recounts Rauh's efforts by examining his representation of James Kutcher, William Remington, and Charles Allen Taylor, three men who were accused of disloyalty to the United States under the federal government's loyalty-security program. Rauh fought for their right to confront their accusers during hearings conducted to examine their loyalty and, through Taylor's case, helped put due process limits on the federal government's loyalty-security program.*

INTRODUCTION .....	1800
I. JOE RAUH AND CIVIL LIBERTIES .....	1802
II. KUTCHER, REMINGTON, TAYLOR, AND THE COLD WAR IN AMERICA .....	1803
III. TRUMAN'S EXECUTIVE ORDER 9835 .....	1807
IV. VICTIMS .....	1810
V. THE ORDEAL OF JAMES KUTCHER .....	1813
VI. THE MANY TRIALS OF WILLIAM REMINGTON .....	1817
VII. TURNING THE TIDE: PETERS, TAYLOR, AND GREENE .....	1835
CONCLUSION .....	1838

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## INTRODUCTION

In the winter of 1799, as revolution raged in France and the Administration of John Adams prosecuted Americans under the Sedition Act,<sup>1</sup> James Madison observed that the government had invoked a foreign menace to divert public attention from the real danger to liberty. "The fetters imposed on liberty at home," wrote this founding father, "have ever been forged out of the weapons provided for defense against real, pretended or imaginary dangers from abroad."<sup>2</sup>

How grounded in history and how prescient Madison's remarks proved to be. From the days of the French Revolution and the Sedition Act in the eighteenth century to the War Against Terrorism and the USA PATRIOT Act of 2001,<sup>3</sup> what Madison called "real, pretended or imaginary dangers from abroad" have presented serious threats to the liberties of the American people.

In every generation, but especially in times of war, American lawyers have been called upon to guard the ramparts of civil liberties when the federal government has invoked a foreign threat to justify repressive legislation. William Wirt, a future Attorney General of the United States, defended James Callender of Virginia, who was charged with violating the Sedition Act in 1798.<sup>4</sup> Alexander Dallas, a future Secretary of the Treasury, represented John Fries, who was charged with treason against the United States for his resistance to a federal excise tax.<sup>5</sup> In the twentieth century, Harvard law professor Felix Frankfurter took up the cause of alien radicals, many of whom were jailed without charges and threatened with deportation during the Palmer Raids following World War I.<sup>6</sup> Hayden Covington argued over thirty cases before the Supreme Court on behalf of Jehovah's Witnesses who faced persecution during the patriotic frenzy of World War II.<sup>7</sup> Currently, American lawyers such as Donna R. Newman,<sup>8</sup>

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1. An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (expired 1801).

2. James Madison, *Political Reflections*, in 17 THE PAPERS OF JAMES MADISON 237, 242 (David B. Mattern et al. eds., 1991).

3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.).

4. *United States v. Callender*, 25 F. Cas. 239, 241 (D.Va. 1800) (No. 14,709).

5. *Case of Fries*, 9 F. Cas. 826, 841 (D.Pa. 1799) (No. 5126).

6. *Colyer v. Skeffington*, 265 F. 17, 21-22 (D. Mass. 1920).

7. *See, e.g., W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629-30 (1943) (requesting that Jehovah's Witnesses be exempted from a school board regulation requiring the saluting of the American flag); *Murdock v. Pennsylvania*, 319 U.S. 105, 106-

Jenny S. Martinez,<sup>9</sup> Stephen Yagman,<sup>10</sup> and John J. Gibbons, a former appellate judge,<sup>11</sup> are representing American citizens and foreign nationals who have challenged the authority of the Bush Administration to hold them in this country and in Cuba as enemy combatants without trial or access to legal counsel. These lawyers today are defending civil liberties in the long tradition forged by Wirt, Dallas, Frankfurter, Covington, and one of Frankfurter's own students, Joseph L. Rauh, Jr.

This Article analyzes Rauh's challenge to the federal government's Cold War loyalty-security program when he represented federal government employees and contractors faced with termination and humiliation because "reasonable grounds" existed to doubt their fidelity to the United States.<sup>12</sup> That program, launched by President Harry Truman and expanded during the Dwight Eisenhower Administration, raised fundamental constitutional issues, none more vital than the right of persons to confront those who accused them of disloyalty.

In his representation of James Kutcher, William Remington, Charles Allen Taylor, and many others, Rauh waged a determined battle in the federal courts to win for his clients the right to confront their accusers before federal loyalty review boards. This Article examines Rauh's litigation strategy in these major cases that helped pave the way for Supreme Court decisions in the late 1950s. These decisions ultimately limited the government's authority to shield informants from cross-examination during loyalty hearings.<sup>13</sup> In Part I of this Article, I sketch Joe Rauh's career as a lawyer who practiced

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08 (1943) (arguing an ordinance requiring payment of a house-to-house solicitation tax violated the First Amendment rights of Jehovah's Witnesses); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591-92 (1940) (defending Jehovah's Witness children expelled for refusing to participate in the Pledge of Allegiance).

8. See Benjamin Weiser, *Judge Affirms Terror Suspect Must Meet with Lawyers*, N.Y. TIMES, Mar. 12, 2003, at A17.

9. See William Glaberson, *Judges Question Detention of American*, N.Y. TIMES, Nov. 18, 2003, at A19.

10. See Neil A. Lewis & William Glaberson, *U.S. Courts Reject Detention Policy in 2 Terror Cases*, N.Y. TIMES, Dec. 19, 2003, at A1.

11. See Chris Hedges, *Ex-Judge Vs. the Government's Law-Free Zone*, N.Y. TIMES, Feb. 6, 2004, at B2.

12. See Exec. Order No. 9835, 3 C.F.R. 627, 630 (1943-1948).

13. See generally *Taylor v. McElroy*, 360 U.S. 709 (1959) (holding moot a dispute over an industrial worker's security clearance because the Secretary of Defense reinstated the employee's clearance after the Court granted certiorari); *Green v. McElroy*, 360 U.S. 474 (1954) (holding that the secretaries of the Armed Forces were not authorized to deprive an engineer of his job without the procedural safeguards of confrontation and cross-examination).

civil liberties, civil rights, and labor law in Washington, D.C., from the days of the New Deal until his death in 1992. Part II introduces three of his most important clients during the controversy over the federal government's loyalty-security program of the Truman-Eisenhower years. Part III focuses on how the accelerating foreign crises of the early Cold War promoted domestic fear of communism and espionage and led to Truman's executive order requiring loyalty investigations of federal employees. Parts IV, V, and VI examine a number of Rauh's loyalty cases, with special attention to those of James Kutcher and William Remington. Part VII analyzes how one case, that of Charles Allen Taylor, helped to put some due process limits upon the loyalty program by the end of the 1950s.

### I. JOE RAUH AND CIVIL LIBERTIES

Joe Rauh's vigorous defense of civil liberties did not begin or end with the loyalty-security issues of the early Cold War. Rauh, who died in 1992, joined Franklin Roosevelt's New Deal as a young lawyer in 1935 after graduating from Harvard Law School. During the Roosevelt Administration he worked with Ben Cohen and Tommy Corcoran on public utility regulation in the Wage and Hours Division of the Labor Department and in the Lend Lease Administration before becoming a civil affairs officer for General Douglas MacArthur during World War II.<sup>14</sup> After the war, Rauh opened an office in Washington, D.C., where he practiced labor, civil rights, and civil liberties law for the next half a century. Where Americans suffered economic inequality, government repression, or racism, Rauh and his firm stood ready to fight for them. He imbibed his commitment to civil liberties at Harvard Law School in the 1930s as a student of Professor Frankfurter. Frankfurter was a law school professor who defended, among others, labor radical Tom Mooney<sup>15</sup> and condemned Italian anarchists Nicola Sacco and Bartolomeo Vanzetti.<sup>16</sup> Rauh's clients included Walter Reuther and the United Automobile Workers Union, A. Philip Randolph and the Brotherhood of Sleeping Car Porters, the Mississippi Freedom Democratic Party, and Joseph A. Yablonski, a reform candidate inside the United Mine Workers.<sup>17</sup>

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14. See Wolfgang Saxon, *Joseph Rauh Jr., Groundbreaking Civil Liberties Lawyer, Dies at 81*, N.Y. TIMES, Sept. 5, 1992, at L10.

15. See MICHAEL E. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 97-101* (1982).

16. *Id.* at 176-96.

17. See Saxon, *supra* note 14.

In the era of the Cold War he represented numerous persons called to testify before the House Committee on Un-American Activities ("HUAC"), notably Lillian Hellman,<sup>18</sup> Arthur Miller,<sup>19</sup> and James Watkins. *Watkins v. United States*,<sup>20</sup> for example, became a landmark case on civil liberties when the Warren Court overturned the defendant's conviction for contempt of Congress and narrowed the investigative authority of committees such as HUAC.<sup>21</sup>

In these same years, Rauh appeared before federal agencies and in court on behalf of clients such as James Kutcher, William Remington, and Charles Allen Taylor to challenge the central features of the loyalty-security program. Truman's program, covering all employees of the executive branch, allowed the government to fire individuals where loyalty boards concluded after a hearing that "reasonable grounds" existed for doubting the employee's loyalty to the United States.<sup>22</sup> In addition to evidence of a criminal nature, employees could be terminated for having a "sympathetic association" with persons or organizations listed by the Attorney General as totalitarian, fascist, communist, or subversive.<sup>23</sup> One scholar of the Truman presidency notes that the program "failed to provide elementary procedural safeguards for those accused of disloyalty and practically included a presumption of guilt."<sup>24</sup> Kutcher, Remington, and Taylor, although only three of the many Americans caught in the dragnet of the loyalty-security program after 1947, experienced the full range of its absurdity and repression.

## II. KUTCHER, REMINGTON, TAYLOR, AND THE COLD WAR IN AMERICA

James Kutcher lost both of his legs at San Pietro, Italy fighting for the United States during World War II.<sup>25</sup> After the war, he earned forty-two dollars a week as a clerk in the Newark office of the United States Veterans Administration in addition to three hundred

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18. See LILLIAN HELLMAN, SCOUNDREL TIME 60–61 (1976).

19. ARTHUR MILLER, TIME BENDS: A LIFE 403–12 (1987); see *Miller v. United States*, 259 F.2d 187, 188 (D.C. Cir. 1958).

20. 354 U.S. 178 (1956).

21. *Id.* at 197 (stating that "abuses of investigative processes may imperceptibly lead to abridgment of protective freedoms").

22. Exec. Order No. 9835, 3 C.F.R. 627, 630 (1943–1948).

23. *Id.*

24. ALONZO L. HAMBY, BEYOND THE NEW DEAL: HARRY S. TRUMAN AND AMERICAN LIBERALISM 171 (1973).

25. See *Legless Veteran Dismissed as VA Clerk After Branch Board Terms Him 'Disloyal'*, N.Y. TIMES, Oct. 14, 1948, at 32 [hereinafter *Legless Veteran Dismissed*].

twenty-nine dollars a month from a disability pension.<sup>26</sup> Kutcher also belonged to the Socialist Workers Party.<sup>27</sup> Some United States government officials, however, did not like his extra-curricular, non-governmental political activities.<sup>28</sup>

Bill Remington's past alarmed the federal government, too. A former employee of the War Production Board, he had socialized with known communists while working for the Tennessee Valley Authority and met during the war with Helen Johnson, a woman he believed to be a journalist.<sup>29</sup> Helen turned out to be a spy for the Soviet Union.

Charles Taylor, a member of the United Automobile Workers Union, joined many left-wing organizations in the 1930s, some of whom had members who were also in the American Communist Party.<sup>30</sup> When Taylor's past became known to the Department of Defense, he was denied access to classified defense information and fired from his job at Bell Aircraft.<sup>31</sup> James Kutcher, Bill Remington and Charles Taylor lived worlds apart and never met, but they and other Americans became part of Rauh's life when the Cold War between the United States and the Soviet Union heightened national security concerns and inspired the federal government's loyalty and security program.

With their vibrant economy, intact political institutions, and a monopoly on the atomic bomb,<sup>32</sup> Americans had every reason to believe in 1945 that the shattered post-war world could be repaired in accordance with their values and desires. Indeed, they had reason to believe that democracy, free trade, and international harmony might now flourish under the inspiration and leadership of the United States. Henry Luce, the titan of popular journalism at *Time* magazine, proclaimed in 1941 what now seemed possible—"the American Century."<sup>33</sup> Such optimism, however, did not last long into

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26. *Id.*

27. *Id.*

28. See *VA Ousts Amputee over His Politics*, N.Y. TIMES, Aug. 26, 1948, at 18 (noting that Kutcher was charged with being a member of the Socialist Workers party) [hereinafter *VA Ousts Amputee*].

29. See GARY MAY, UN-AMERICAN ACTIVITIES: THE TRIALS OF WILLIAM REMINGTON 26-35, 69-70 (1994).

30. Interview with Joseph Rauh, Jr., in Washington, D.C. (Aug. 18, 1985) [hereinafter August 18th Rauh Interview].

31. *Id.*

32. See GREGG HERKEN, THE WINNING WEAPON: THE ATOMIC BOMB IN THE COLD WAR 1945-1950, at 97-136 (1980) (discussing American efforts to retain a monopoly on the atomic bomb).

33. THE IDEAS OF HENRY LUCE 105 (John K. Jessup ed., 1967).

the post-war era.

In five short years, events at home and abroad took unexpected and sobering turns. Neither economic pressure nor the atomic bomb bent the Soviet Union to America's will in Europe.<sup>34</sup> Reneging on promises made to Roosevelt at the Yalta Conference, Stalin refused to hold free elections in Poland.<sup>35</sup> Behind the Red Army, communist parties from Poland to Rumania tightened their grip on state power and displayed less and less toleration for opposition parties.<sup>36</sup> This was especially true in Czechoslovakia, where the Stalinists overturned a coalition government and murdered its foreign minister, Jan Masaryk.<sup>37</sup>

Other events soon intensified the anxieties of American leaders. Lowering an iron curtain across Eastern Europe and matching the formation of the American-led NATO military alliance against them, the Soviet Union also entered the atomic age in September 1949.<sup>38</sup> Three months later, retreating before Mao Tse-tung's forces that had earlier proclaimed the creation of the People's Democratic Republic of China, General Chiang Kai-shek fled with his cache of gold and 300,000 loyal troops to the island of Formosa.<sup>39</sup> The red flag of communism now flew over nearly all of China. A year later, North Korea launched an attack on the American-supported regime in South Korea, opening a conflict that would last four years and cost the United States thousands of casualties.<sup>40</sup>

Faced with these unexpected events, Americans soon began to search for scapegoats. Why had American goals and expectations for the post-war world proved so incapable of speedy realization? Why had the Soviets gained the upper hand in Eastern Europe and half of Germany? The Soviet Union, thought to be a backward and devastated country, had broken America's atomic monopoly.<sup>41</sup> The far left remained politically potent in Italy, France, and Greece.<sup>42</sup> Americans were now being asked to pick up the bill for the Marshall

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34. STEPHEN E. AMBROSE, *RISE TO GLOBALISM: AMERICAN FOREIGN POLICY SINCE 1938*, at 64 (5th ed. 1988).

35. *Id.* at 55-56.

36. See Melvin Leffler, *The American Conception of National Security and the Beginnings of the Cold War, 1945-48*, 89 AM. HIST. REV. 346, 373 (1984).

37. AMBROSE, *supra* note 34, at 93-94.

38. HERKEN, *supra* note 32, at 281-305.

39. ROBERT J. DONOVAN, *TUMULTUOUS YEARS: THE PRESIDENCY OF HARRY S. TRUMAN, 1949-1953*, at 74-88 (1982).

40. AMBROSE, *supra* note 34, at 118.

41. HERKEN, *supra* note 32, at 97-136.

42. See generally AMBROSE, *supra* note 34 (discussing the strength of the Communist Party and the Left in these respective countries).



Plan, a gigantic relief program in Western Europe.<sup>43</sup> The communists had triumphed in China, and America's allies had come under attack in India, the Philippines, and Indochina. Communist North Korea had attacked South Korea.<sup>44</sup> Was that conflict the beginning of another world war, barely five years after the last one?

Inside the federal government and outside, those impatient with complex answers to these questions tended to ignore the devastating impact of the Second World War.<sup>45</sup> They discounted historic Soviet paranoia about security, the heroic stature assumed by communist partisans in the struggles against fascism, and the accumulated grievances of Third World elites against European colonialism.<sup>46</sup> Fewer still questioned the reasonableness of America's vision for the post-war world.<sup>47</sup> Unwilling to doubt the nobility of America's goals or motives, many placed the blame for all these reversals elsewhere. America, many came to believe, had been the victim of both an international communist conspiracy and domestic traitors who furthered the goals of that conspiracy.<sup>48</sup>

The behavior of the Soviet Union, combined with old and new evidence of communist influence within the United States soon turned rational vigilance into irrational panic and generated a full-blown Red Scare that dwarfed in both virulence and duration its World War I predecessor. The publication of classified government documents in left-wing magazines<sup>49</sup> and the arrest of Canadian and British citizens, including physicists Alan Nunn May and Klaus Fuchs, who confessed to atomic espionage,<sup>50</sup> stoked more fears of a vast Soviet spy apparatus operating throughout American society. The arrest of Americans Harry Gold, David Greenglass, and Julius and Ethel Rosenberg on similar charges of atomic espionage offered

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43. JOHN PATRICK DIGGINS, *THE PROUD DECADES: AMERICA IN WAR AND PEACE, 1941-1960*, at 75-81 (1988).

44. *Id.* at 86-94; DONOVAN, *supra* note 39, at 139-47.

45. See JOYCE KOLKO & GABRIEL KOLKO, *THE LIMITS OF POWER: THE WORLD AND UNITED STATES FOREIGN POLICY, 1945-1954*, at 29 (1972).

46. *Id.* at 31.

47. MICHAEL H. HUNT, *IDEOLOGY AND U.S. FOREIGN POLICY* 151 (1987).

48. See DIGGINS, *supra* note 43, at 110-17 (describing the red scare); M.J. HEALE, *MCCARTHY'S AMERICANS: RED SCARE POLITICS IN STATE AND NATION, 1935-1965*, *passim* (1998) (describing suspicions of communist conspiracies); LISLE A. ROSE, *THE COLD WAR COMES TO MAIN STREET: AMERICA IN 1950*, at 20-25 (1999) (discussing Americans' changing views on communists).

49. See generally HARVEY KLEHR & RONALD RADOSH, *THE AMERASIA CASE: PRELUDE TO MCCARTHYISM* (1996) (describing the investigation, arrests, and legal developments of the alleged communist spies associated with the journal *Amerasia*).

50. See ALLEN WEINSTEIN & ALEXANDER VASSILIEV, *THE HAUNTED WOOD: SOVIET ESPIONAGE IN AMERICA—THE STALIN ERA 172-222, 311-37* (1999).

further proof of domestic betrayal.<sup>51</sup>

Never one to be out-flanked by his political adversaries, Truman declined to cede to the Republicans a monopoly on anti-communism. Unable to intimidate the Soviets abroad, he could harass their past and present followers at home,<sup>52</sup> paint Henry Wallace and his Progressive Party in the reddest possible hues,<sup>53</sup> and secure the indictment of the Progressive Party's top leaders on the eve of the presidential election for violating the Smith Act.<sup>54</sup> The Smith Act made it a crime to advocate the overthrow of the government of the United States by force or violence or to organize any group whose purpose was to advocate such ideas.<sup>55</sup> Truman did not manufacture the new Red Scare alone, but he gave it a significant push forward,<sup>56</sup> and soon lost control of its direction to more ruthless practitioners—Congressman Richard Nixon, Roy Cohn, and Senators Pat McCarren, and Joseph McCarthy.<sup>57</sup>

### III. TRUMAN'S EXECUTIVE ORDER 9835

Initiated by Truman on March 21, 1947 following the publication of classified State Department documents in the journal *Amerasia*, the President's Executive Order 9835 subjected all present and prospective federal employees in each department and agency of the executive branch to potential investigation by the FBI to determine whether evidence existed such that "reasonable grounds exist for belief that the person . . . is disloyal to the Government of the United States."<sup>58</sup>

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51. See RONALD RADOSH & JOYCE MILTON, *THE ROSENBERG FILE: A SEARCH FOR THE TRUTH* 198–223 (1982).

52. HAMBY, *supra* note 24, at 379–402. See generally ATHAN THEOHARIS, *SEEDS OF REPRESSION: HARRY S. TRUMAN AND THE ORIGINS OF MCCARTHYISM* (1971) (discussing President Truman's use of anti-communist rhetoric for political gain).

53. "I do not want and I will not accept the political support of Henry Wallace and his Communists," Truman declared during the 1948 presidential campaign. HAMBY, *supra* note 24, at 223. Wallace, he later added, "ought to go to the country he loves so well [the Soviet Union] and help them against his own country if that's the way he feels." *Id.*

54. See MICHAEL BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY AND AMERICAN CIVIL LIBERTIES* 46–53 (1977).

55. 18 U.S.C. § 2385 (2003).

56. THEOHARIS, *supra* note 52, at 147–71.

57. See ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 203–65 (1998); cf. RICHARD GID POWERS, *NOT WITHOUT HONOR: THE HISTORY OF AMERICAN ANTICOMMUNISM* 191–272 (1995) (discussing the rise of the Red Scare and the political leaders behind it).

58. Exec. Order No. 9835, 3 C.F.R. 627, 630 (1943–1948). The text of Truman's executive order can also be found at *Text of Truman's Order to Shield Employees*, N.Y. TIMES, Mar. 23, 1947, at 49.

Truman's edict, covering 2,200,000 jobs, set out six possible grounds for a finding of disloyalty, including evidence of sabotage, espionage, treason, or the unauthorized disclosure "to any person" of "documents or information of a confidential or non-public character."<sup>59</sup> But, in addition to these patent examples of illegal and criminal conduct, an employee could be found disloyal and fired for "membership in, affiliation with or sympathetic association with" any organization, movement, or group of persons "designated by the Attorney General as totalitarian, fascist, communist, or subversive."<sup>60</sup> Attorney General Tom Clark and the Department of Justice drew up lists of banned organizations largely on the basis of information provided by the FBI, but without initially affording the groups a hearing.<sup>61</sup> The original list, for instance, included the National Council for Soviet-American Friendship, whose 1945 rally at Madison Square Garden included future Secretary of State Dean Acheson.<sup>62</sup>

The Truman program afforded employees suspected of disloyalty a right to have a formal hearing before their agency's loyalty board and a right to appeal an adverse decision to a loyalty review board.<sup>63</sup> The government was not, however, required to disclose the identity of those who made accusations and employees had no right to examine the FBI's investigative records.<sup>64</sup> In short, an employee had no right to confront his or her accusers or to cross-examine them.<sup>65</sup> Seth Richardson, a prominent Republican lawyer-politician chosen by Truman to head the Loyalty Review Board, thought this procedure unfair, but he finally accepted it when FBI Director J. Edgar Hoover refused to compromise for fear of exposing FBI informants and

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59. Exec. Order No. 9835, 3 C.F.R. 627, 630 (1943-1948).

60. *Id.*

61. See *Bailey v. Richardson*, 182 F.2d 46, 63-73 (D.C. Cir. 1951) (concerning the dismissal of an employee based on the reports of unidentified FBI informants), *aff'd*, 341 U.S. 918 (1951); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 125-28 (1951) (concerning an administrative order labeling specified groups as disloyal to the United States).

62. DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 45, 581 (1978). The list was frozen in 1955 with 300 organizations on it, separated in six categories: (a) Communist or Communist front; (b) Totalitarian; (c) Fascist; (d) Subversive; (e) Advocating the use of force and violence to deny others their rights; and (f) Aiming to alter the forms of government by unconstitutional means. *Id.* at 581. Some organizations were listed under multiple categories. *Id.* When General William Saxbe abolished the list in 1974, only thirty of the 300 organizations that were listed in 1955 still functioned. *Id.*

63. Exec. Order No. 9835, 3 C.F.R. 627, 630 (1943-1948).

64. See ALAN BARTH, *THE LOYALTY OF FREE MEN* 109-39 (1951).

65. See *id.* The Supreme Court, evenly divided, upheld the non-confrontation rule in *Bailey v. Richardson*, 341 U.S. 918, 918 (1951) (per curiam).

activities, including the use of illegal wiretaps.<sup>66</sup>

Rauh regarded non-confrontation as a deadly threat to civil liberties and once had the opportunity to confront Truman directly on the issue.<sup>67</sup> In 1951, after the program had been operating for four years, he faced Truman at a White House meeting where the President asked for the endorsement of Americans for Democratic Action (ADA), a liberal, anti-communist organization that Rauh helped to organize in 1948.<sup>68</sup> When his time came to speak, Rauh launched into a vigorous attack on the loyalty-security program.<sup>69</sup> He recited case after case where employees had been accused of disloyalty by FBI informants whose identity remained secret.<sup>70</sup> Truman seemed surprised and shocked by this recital.<sup>71</sup> He turned to his two aides in the room, David Lloyd and Charles Murphy.<sup>72</sup> Lloyd had once been the victim of political attacks for his past political associations.<sup>73</sup>

"Is Joe right, is this kind of stuff going on?" the President asked.<sup>74</sup> Both confirmed Rauh's account.<sup>75</sup>

"Damn it," Truman said, "we're going to do something about that."<sup>76</sup>

Rauh left the meeting with the impression that the President and his senior staff would soon address major defects in the program.<sup>77</sup> But to his disbelief, a new directive from the chairman of the Loyalty Review Board three weeks later made it easier for the government to dismiss federal employees.<sup>78</sup> Instead of a clear finding that the employee "is disloyal," the new standard required only "that on all the evidence, there [be] a reasonable doubt as to the loyalty of the

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66. See Joseph L. Rauh, Jr., *Nonconfrontation in Security Cases: The Greene Decision*, 45 VA. L. REV. 1175, 1175-76 (1959); Seth W. Richardson, *Aims and Procedure Are Outlined by Loyalty Board*, N.Y. TIMES, Dec. 28, 1947, at 29.

67. Interview with Joseph Rauh Jr., in Washington, D.C. (Aug. 15, 1985) [hereinafter August 15th Rauh Interview].

68. See Saxon, *supra* note 14.

69. See August 15th Rauh Interview, *supra* note 67.

70. See *id.*

71. See *id.*

72. See *id.*

73. DONOVAN, *supra* note 39, at 166.

74. Interview by Niel M. Johnson, Truman Presidential Museum and Library, with Joseph L. Rauh, Jr. 54-55 (June 21, 1989) (transcript available at <http://www.trumanlibrary.org/oralhist/rauh.htm>) [hereinafter Johnson Interview].

75. See *id.*

76. See *id.*

77. DONOVAN, *supra* note 39, at 166.

78. See Loyalty Review Board, 16 Fed. Reg. 12214, 12219 (Dec. 4, 1951).

person involved.”<sup>79</sup> Furious over this change, Rauh called Lloyd, who confessed ignorance of the new language, but blamed fervent anti-communists on the Loyalty Review Board for the shift.<sup>80</sup> Nothing about the program would change, and Rauh knew it would continue to produce other victims like those he already knew.

#### IV. VICTIMS

As the FBI’s investigative machinery ground on, ultimately processing four million files by 1952, thousands of federal employees found themselves charged with disloyalty and threatened with the loss of their jobs and reputations. Many of these victims found their way to Rauh’s offices on the second floor of a little green house in Washington, D.C., on K Street, where their tales confirmed his worst fears.

Rauh’s firm now included another former Supreme Court clerk, Irv Levy, a brilliant brief writer who had become general counsel to Walter Reuther’s auto workers. Rauh and Levy recruited a soft-spoken, passionate young civil libertarian from North Carolina, Daniel Pollitt, a recent graduate of the Cornell Law School. Since Washington, D.C. did not have a chapter of the American Civil Liberties Union in the late 1940s, Rauh, Levy, and Pollitt became its surrogate. “I wasn’t supposed to ask them [clients] for any money,” Pollitt recalled, “if it would embarrass them.”<sup>81</sup> Other Washington lawyers, however, fattened themselves on the loyalty crusade by squeezing every nickel out of poor, frightened government workers. Overburdened with such cases at one point, Pollitt referred a client to another lawyer after an initial response failed to persuade the agency to drop the investigation. A few days later, Rauh received a \$500 forwarding fee from that lawyer, who intended to charge the client \$1500 for representing him before the loyalty board.<sup>82</sup>

Impoverished clients touched Rauh’s sympathy, but they had to be candid with him about their past, no matter how checkered or embarrassing. He quickly realized that in the pervasive climate of fear generated by the loyalty probe and assorted congressional hearings, shame and fear had become a major obstacle to learning about a person’s former activities and beliefs. He insisted on the

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79. *See id.*

80. Johnson Interview, *supra* note 75, at 54–55.

81. Interview with Daniel Pollitt, in Washington, D.C (Aug. 13, 1985) [hereinafter Interview with Daniel Pollitt].

82. *Id.*

fullest possible version of the truth and bluntly told clients that he would walk out of any loyalty hearing if information turned up which they had concealed.<sup>83</sup> The threat worked and he never had occasion to use it.<sup>84</sup>

Even before he represented Kutcher, Remington, or Taylor, Rauh learned from other clients the horrors of the government's loyalty crusade. During the first six years of the program under Truman, 12,568 employees endured charges of disloyalty and hearings that resulted in 519 dismissals, but not a single termination was based on allegations of treason, espionage, sedition, or the unauthorized disclosure of confidential information.<sup>85</sup> The government ousted these victims solely on the grounds of their "sympathetic association" with other persons or organizations and usually on the basis of information provided by confidential informants.<sup>86</sup>

Rauh's first client, for example, faced dismissal because he had been a member of the Washington Book Shop, an organization listed as a communist front by the Attorney General.<sup>87</sup> Like hundreds of others, he had faithfully patronized that establishment not out of sympathy for Marx, Lenin or Stalin, but because the bookstore sold books cheaper than other outlets in the District of Columbia.<sup>88</sup> He received a clean bill of patriotic health from the Loyalty Review Board, but only after Rauh demonstrated that none of the books purchased had been subversive and produced witnesses who testified to his client's vigorous anti-communist opinions.<sup>89</sup>

Loyalty investigators believed they uncovered a palpable threat to American security when they interrogated another of Rauh's

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83. See August 15th Rauh Interview, *supra* note 67.

84. Rauh did, however, decline to represent those who refused to be entirely candid about their past political allegiances or who insisted on dictating his legal tactics. Approached by Mrs. Morton Sobell, whose husband had been charged with conspiracy to commit espionage as part of the Rosenberg spy ring, he turned her down when she declined to discuss why her husband had fled to Mexico to avoid arrest and prosecution. Likewise, Rauh might have played a role in the defense of the eleven Communist Party leaders charged under the Smith Act, but they insisted that the overall defense strategy would remain in the hands of other attorneys representing the party. Rauh never declined to represent clients who had been party members or so close to the party that it made little difference, notably Lillian Hellman, William Remington, and James Watkins. See Joseph Rauh, Jr., Oral History, Truman Library, 75; August 15th Rauh Interview, *supra* note 67; Interview with Daniel Pollitt, *supra* note 81.

85. CAUTE, *supra* note 62, at 268-79.

86. *Id.*

87. August 15th Rauh Interview, *supra* note 67.

88. See *id.*

89. See Interview with Joseph Rauh, Jr., in Washington, D.C. (Aug. 17, 1985) [hereinafter August 17th Rauh Interview].

clients, an employee in the Library of Congress, who had at one time held an important post in the Russian government.<sup>90</sup> Rauh asked his client whether he was a member of the Kerensky government.<sup>91</sup> After his client answered in the affirmative,<sup>92</sup> Rauh was forced to explain to the loyalty board examiners that Kerensky's liberal, anti-communist regime had been overthrown by Lenin, Trotsky, and the Bolsheviks.<sup>93</sup>

Another client faced accusations of disloyalty for purchasing a car from an employee of the Czechoslovakian embassy,<sup>94</sup> another for donating English translations of the Moscow purge trials to the Library of Congress;<sup>95</sup> a third for providing milk to the children of sit-down strikers of the Workers Alliance;<sup>96</sup> and a fourth for giving five dollars to the Joint Anti-Fascist Refugee Committee years before it appeared on the Attorney General's list.<sup>97</sup> Ex-landlords accused former tenants of receiving regular shipments of "communist literature," which could mean any publication that mentioned Karl Marx, Lenin, or Stalin.<sup>98</sup> One employee who attempted to switch agencies against the wishes of his supervisor found himself accused of disloyalty by this same supervisor and hauled before a hearing board. Finally exonerated, he could not find another department willing to employ him for fear that his presence would inspire investigations by Congress.<sup>99</sup>

The case of one client, a researcher in the Department of Defense, demonstrated how far the government could stretch the elastic concept of "sympathetic association." She had been a candidate for local public office on the Communist Party ticket in the mid-1930s. The Truman Administration not only discharged her for disloyalty based on this far-removed political choice, but it also fired

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90. *See id.*

91. *See id.*

92. *See id.*

93. *Id.* When this line of questioning proved fruitless, the board subjected Rauh's client to another battery of questions, including whether or not he believed in God. *Id.* David Caute provides a sample of other questions posed by various loyalty boards to Federal employees, including: "How many times did you vote for Henry Wallace?," "Do you believe in government ownership of public utilities as a general proposition?," and "What do you think of female chastity?" CAUTE, *supra* note 62, at 281-82.

94. August 17th Rauh Interview, *supra* note 89.

95. *Id.*

96. *Id.*

97. Joseph L. Rauh, Jr., Revised Loyalty Article 6 (undated) (on file with the North Carolina Law Review).

98. August 17th Rauh Interview, *supra* note 89.

99. *Id.*

her husband who worked in the Internal Revenue Service, and her daughter, an employee of the Federal Housing Agency. Finally, the vigilant officials in nearby Montgomery County, Maryland dismissed the daughter's spouse, who drove an ambulance operated by the county.<sup>100</sup>

Only by accident did those charged with disloyalty ever learn the identity of their hidden accusers. Faced with anonymous allegations that he held "weekly communist meetings" at his apartment, one government employee asked an elderly janitor in his building to testify before the loyalty board. During the course of the interrogation it became clear that the janitor had been the source of the FBI's erroneous information concerning communist meetings, gatherings that had never taken place.<sup>101</sup>

#### V. THE ORDEAL OF JAMES KUTCHER

The case of the legless James Kutcher epitomized the loyalty program at its most ludicrous. The short, rotund forty-three-year-old veteran, gravely wounded during the Italian campaign, eked out a living as a clerk in the Newark office of the Veterans Administration ("VA"). When not at the VA, however, he served as a leading spokesman for the Socialist Workers Party, one of several Trotskyite organizations listed as subversive by the Attorney General of the United States. In his speeches Kutcher sounded like the most rabid anti-Soviet member of Congress.<sup>102</sup> He regularly denounced Josef Stalin as a "Fascist dictator" and denied that his organization advocated the use of force or violence, except in self-defense against capitalists who would resist the peaceful transition to socialism.<sup>103</sup> Such distinctions eluded officials in the VA who fired him in September 1948 after a hearing board in Philadelphia found him to be disloyal. Richardson's Loyalty Review Board sustained that decision seven months later. "Two years ago, when I learned to use my artificial limbs the Government gave me a job," Kutcher told reporters.<sup>104</sup> "Now it has taken my job away—not because of any fault in my work, but because of my political views."<sup>105</sup> The government's vendetta against this anti-Stalinist communist had just begun.

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100. Interview with Dan Pollitt, in Washington, D.C. (Aug. 18, 1985).

101. Rauh, *supra* note 66, at 1176–77.

102. August 17th Rauh Interview, *supra* note 89.

103. See *VA Ousts Amputee*, *supra* note 28; *Legless Veteran Dismissed*, *supra* note 25.

104. *VA Ousts Amputee*, *supra* note 28.

105. See *id.*; *Veteran's Appeal on U.S. Job Denied*, N.Y. TIMES, May 2, 1949, at 7.



Following the loyalty board decision, the Newark Housing Authority attempted to evict Kutcher and his father from their low-income apartment when the elder Kutcher refused to sign an affidavit that no one in the unit belonged to an organization on the Attorney General's list.<sup>106</sup> The VA also sought to strip Kutcher of his \$329-a-month disability pension by claiming that his affiliation with the Socialist Workers Party and his various speeches gave "aid and comfort to the enemy" during the Korean War.<sup>107</sup> For the next seven years, despite the doubts of several friends who said he should be defending more appealing clients, Rauh and his firm battled to save Kutcher's job and pension by attacking the loyalty program in several rounds of administrative hearings and judicial proceedings.<sup>108</sup>

Three years after his dismissal had been upheld by federal district Judge Edward Curran, the Federal Circuit Court for the District of Columbia ordered a new loyalty hearing for Kutcher.<sup>109</sup> The court ruled that the VA administrator who fired him had not complied with Truman's executive order because he failed to weigh the totality of evidence and because he based his decision solely on the Attorney General's listing of the Socialist Workers Party.<sup>110</sup> When a second round of hearings again went against Kutcher and Judge Curran again upheld his firing, Rauh filed a second appeal with the circuit court.<sup>111</sup>

Although split two to one, the appeals court now ruled that Kutcher had been improperly dismissed under general civil service regulations because the charges of disloyalty (i.e., membership in the Socialist Workers Party) bore only the vaguest relationship to the actual findings of the hearing board.<sup>112</sup> Kutcher, the majority

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106. August 17th Rauh Interview, *supra* note 89.

107. *Kutcher Denies Being Disloyal*, N.Y. TIMES, Dec. 31, 1955, at 4 [hereinafter *Kutcher Denies Being Disloyal*].

108. Pollitt described the poorly-educated Kutcher as "a slob" who had been shamelessly exploited by the Trotskyites for propaganda purposes. Interview with Daniel Pollitt, *supra* note 81. Rauh held his nose through the showing of a documentary film about the Kutcher case produced by the Socialist Workers Party and later when Kutcher publicly praised the North Koreans and Chinese. *Id.*

109. *Kutcher v. Gray*, 199 F.2d 783, 787 (D.C. Cir. 1952) (remanding to district court for determination by the Administrator of the VA whether there were reasonable grounds for believing that Kutcher was disloyal to the government).

110. *Id.* at 787. The court refused, however, to pass on Rauh's constitutional challenge to the entire program and specifically affirmed the legality of the Attorney General's listing of organizations even without affording the organizations a hearing. *Id.* at 788. Moreover, the court did not overturn Kutcher's original suspension. *Id.* at 789.

111. August 18th Rauh Interview, *supra* note 30.

112. *Kutcher v. Higley*, 235 F.2d 505, 509 (D.C. Cir. 1956) (comparing the charges against Kutcher and the reasons given for his discharge).

reasoned, had not received notice nor been given “a fair chance to defend himself upon the very grounds on which he may be discharged.”<sup>113</sup> Even in the face of this second ruling by the appeals court, Judge Curran expressed reluctance to sign an order of reinstatement.<sup>114</sup>

“I don’t mind being reversed by the court of appeals,” the judge told Rauh, his voice dripping with ridicule.<sup>115</sup>

“Not even twice in one case?” Rauh replied, a retort that risked contempt.<sup>116</sup>

In the summer of 1956, the VA finally announced Kutcher’s reinstatement in the Newark office “with full seniority,” but not with back pay.<sup>117</sup>

Overturning the VA’s decision to terminate Kutcher’s disability benefits proved somewhat easier, thanks to the ineptness of the agency’s bureaucrats and the assistance of Herbert L. Block (“Herblock”), the celebrated cartoonist at the *Washington Post*. Rauh and his new partner, John Silard, insisted on a public hearing before the Committee on Waivers and Forfeitures of the VA.<sup>118</sup> Kutcher and the Trotskyites notified the press, which turned out in full force with cameras and microphones.<sup>119</sup> Rauh and Silard made certain Kutcher hobbled into the hearing room using two canes, festooned with all his battle ribbons and a Purple Heart.<sup>120</sup>

The chairman of the committee, Peyton H. Moss, opened the proceedings by announcing that Kutcher was not on trial for a crime. But, he added, the VA had been given the authority by Congress to deny benefits to anyone “shown by evidence satisfactory to the Administrator of Veterans Affairs to be guilty of mutiny, treason, sabotage, or rendering assistance to any enemy of the United States.”<sup>121</sup> Kutcher had been charged specifically, Moss continued, with giving aid to the nation’s enemies by making statements such as that he “liked the Red system of government,” that the government of the United States was composed of “cheaters and crooks who oppress the working people,” and that members of his party should

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113. *See id.* at 507.

114. August 17th Rauh Interview, *supra* note 89.

115. *Id.*

116. *Id.*

117. *Legless Veteran Gets Back V.A. Job*, N.Y. TIMES, June 21, 1956, at 16; August 18th Rauh Interview, *supra* note 30 [hereinafter *Legless Veteran Gets Back V.A. Job*].

118. *Legless Veteran Gets Back V.A. Job*, *supra* note 117.

119. *Kutcher Denies Being Disloyal*, *supra* note 107.

120. *Id.*

121. *Id.*

"cause strikes and get in key positions to take over the government of the United States."<sup>122</sup> Moss said that by "espousing and defending" the Socialist Workers Party, Kutcher had "rendered aid and assistance to an enemy of the United States."<sup>123</sup> When the chairman concluded, Rauh opened the hearing by asking Moss for a copy of the rules "under which the committee will be proceeding today."<sup>124</sup> That caught Moss and the committee completely off guard because they had never conducted a similar hearing.

"I'll make the rules as we go along," Moss replied.<sup>125</sup>

At that procedural gaffe, the hearing room erupted in laughter from the assembled journalists and Moss immediately called for a recess.<sup>126</sup> The rattled chairman never regained the advantage. When the hearing finally resumed, the chairman asked Kutcher's lawyer to present his case.<sup>127</sup> Rauh demanded to know who made the charges against his client and when they might appear at the hearing.<sup>128</sup> Moss explained that the accusers would not be at the hearing and that their identities could not be disclosed in accordance with a policy adopted by the President of the United States.<sup>129</sup>

Rauh next asked Moss to dismiss the charges against Kutcher on the grounds that they amounted to a charge of treason, accusations that had never been tested in a court of law.<sup>130</sup> Further, he argued, the VA had no authority to make such a finding.<sup>131</sup> The charges also constituted an infringement of the First Amendment, Rauh added, because the government sought to censor a pensioner's right to speak.<sup>132</sup> Nothing his client had said during the Korean War, he concluded, "could have possibly done as much to undermine the war effort as some of the 1952 campaign statements of General Eisenhower."<sup>133</sup> In defending Kutcher before the Committee on Waivers and Forfeitures, Rauh deployed three effective strategies. By insisting upon an open hearing with reporters present, he guaranteed wide coverage in the newspapers, with the knowledge that

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122. *Id.*

123. *Id.*

124. August 18th Rauh Interview, *supra* note 30.

125. *VA Conduct of Kutcher Hearing Hit*, WASH. POST & TIMES HERALD, Dec. 31, 1955, at 1.

126. August 18th Rauh Interview, *supra* note 30.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Kutcher Denies Being Disloyal*, *supra* note 107.

131. *Id.*

132. *Id.*

133. *Id.*

some of them had been editorially sympathetic to his client in the past.<sup>134</sup> He launched into a procedural attack upon the committee's jurisdiction and its apparent absence of rules; and finally, he put the interrogators on the defensive by suggesting their charges against Kutcher raised fundamental constitutional issues of treason and freedom far beyond their competence.

Rauh's procedural gamble and Moss's ineptitude doomed the VA's case against Kutcher. The morning edition of the *Post* carried Herblock's devastating cartoon comparing Moss's conduct to the Mad Hatter's Tea Party in *Alice in Wonderland*.<sup>135</sup> It bore the caption: "How the Government Intends to Handle the Kutcher Case: We Make Up the Rules As We Go Along."<sup>136</sup> On January 8, 1956, Moss's committee announced that Kutcher would keep his benefits because the government lacked sufficient evidence "beyond a reasonable doubt" that he had "knowingly and intentionally" given aid to America's enemies.<sup>137</sup> Thanks to Rauh's aggressive defense tactics, Kutcher kept his job and his disability pension. Bill Remington was not so lucky.

## VI. THE MANY TRIALS OF WILLIAM REMINGTON

William Walter Remington was blessed with brains, good looks, and a resume that included government service on the War Production Board, the Office of War Mobilization and Reconversion, and the President's Council of Economic Advisers. He, however, presented Rauh with a far more challenging set of circumstances once Remington was named as a major figure in an extensive Soviet espionage organization by Elizabeth Bentley.

In November 1945, Bentley, soon to be known to the American press as "the blonde spy queen," entered unnoticed into a field office of the FBI to confess that she had for many years spied on behalf of the Soviet Union.<sup>138</sup> Now a defector and fearing for her life, the

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134. See, e.g., Editorial, *The Kutcher Case*, N.Y. TIMES, Oct. 18, 1952, at 18; Editorial, *The Kutcher Case*, N.Y. TIMES, Dec. 29, 1955, at 22.

135. See Herbert L. Block, "God, I Wish I'd Said That," WASH. POST, Jan. 6, 1956, at 24; August 18th Rauh Interview, *supra* note 30.

136. Block, *supra* note 135. Block sent Rauh the original of his cartoon, and Rauh later prominently displayed it in his law office.

137. August 15th Rauh Interview, *supra* note 67; *Kutcher Denies Being Disloyal*, *supra* note 107; Alvin Shuster, *Accused Veteran Will Keep Benefits*, N.Y. TIMES, Jan. 9, 1956, at 1.

138. KATHERINE S. OLMSTEAD, *RED SPY QUEEN: A BIOGRAPHY OF ELIZABETH BENTLEY* 89-111 (2002). Bentley first tested the waters with the FBI in August 1945 at one of the agency's small field offices in New Haven, Connecticut. *Id.* at 89. She told the

graduate of Vassar College told agents she had spied for seven years, collecting U.S. government information from dozens of highly placed agents in various federal agencies.<sup>139</sup> She named Remington among the many people she claimed had been party members or had engaged in espionage for the Soviet Union during the war years.<sup>140</sup> Remington, she claimed, had done both. According to her account, Remington gave her information from the War Production Board on aircraft production and plans to produce synthetic rubber.<sup>141</sup> He paid his dues to the party, too, but their contacts ended when Remington entered the Navy in 1944.<sup>142</sup>

In the wake of Bentley's charges, the FBI placed Remington under intense scrutiny, including the use of wiretaps, for over a year.<sup>143</sup> The Bureau alerted the White House and others in the executive branch to the accusations, and finally interrogated Remington in the spring of 1947, all with the hope of securing a prosecution for espionage.<sup>144</sup> The Bureau and the Department of Justice abandoned that effort, however, when it became clear their case would likely rest on the testimony of a single witness—Bentley—a woman prone to severe bouts of alcoholism and depression.<sup>145</sup> In addition, they had been unable to unearth proof of any information provided by Remington that had reached the Soviet Union with the intent of injuring the United States.<sup>146</sup>

A federal grand jury in New York, after grilling Remington in the spring of 1948, reached the same conclusion.<sup>147</sup> By then, however,

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agent in charge that she worked for a shipping firm in New York with economic ties to the Soviet Union and that she had been approached by someone she believed to be impersonating a government agent. *Id.* at 90. A month later she dangled more information about "espionage" before FBI agents in New York, one of whom thought she might be psychotic. *Id.* at 95–96. In November, she returned to that office to make her first full confession about spying for the Russians. *Id.* at 99.

139. *Id.* at 3, 36–52, 57–59.

140. *Id.* at 53–54.

141. *Id.* Olmstead called Remington:

[A]n insignificant source for Elizabeth, but he would become her most important opponent in her later, ex-Communist career . . . [Bentley] contemptuously dismissed him as 'a small boy trying to avoid mowing the lawn or cleaning out the furnace when he would much rather go fishing.' . . . Elizabeth wanted to dump Remington as a source, especially since his information was rather marginal.

*Id.*

142. GARY MAY, UN-AMERICAN ACTIVITIES: THE TRIALS OF WILLIAM REMINGTON 82–87 (1994).

143. *Id.* at 77, 87.

144. *Id.* at 89–91.

145. *Id.* at 77–78, 84–85, 88, 95.

146. *Id.* at 89.

147. *Id.* at 92–94.

Remington himself had become a willing informant for the FBI.<sup>148</sup> He told agents, “[I am as] eager as you [the Bureau] are to help rid this country of communists and their sympathizers.”<sup>149</sup> Now anxious to assist Hoover’s agents in their anti-subversive campaign, he insisted that he had never been a member of the Communist Party or given Bentley anything other than public information from the War Production Board to which anyone claiming to be a reporter would have been entitled.<sup>150</sup> When Bentley publicized her charges more widely, however, Remington’s troubles deepened considerably.

In July 1948 before a Senate Committee chaired by Homer Ferguson of Michigan, the “the blonde spy queen” repeated her charges against Remington: she alleged that from 1941 to 1943 she had passed his reports and others on to her lover, Soviet spy master Jacob Golos, who had died of a heart attack in 1943.<sup>151</sup> Remington had no choice but to go public with his own version of events.

Responding to Bentley’s public charges, he appeared before Ferguson’s committee and denied to the press ever having been a member of the Communist Party or giving Bentley “one single scrap of confidential information.”<sup>152</sup> He admitted knowing and meeting with Bentley during the war when she called herself Helen Johnson, and represented to him that she was a journalist.<sup>153</sup> He paid her for newspapers, he said, not party dues.<sup>154</sup> But he also admitted having been introduced initially to Bentley/Johnson and Golos by his mother-in-law, Elizabeth Moos, an active Communist Party member, and Moos’s long-time boyfriend, Joe North, founder and editor of the communist weekly, *New Masses*.<sup>155</sup>

Remington did admit giving Bentley/Johnson routine reports from the War Production Board similar to those he provided to other journalists.<sup>156</sup> He denied that he ever gave Bentley/Johnson “one single scrap of confidential information.”<sup>157</sup> He stated emphatically that he did not know Bentley/Johnson or Golos were spies or even party members.<sup>158</sup> Remington concluded his rebuttal by pointing to

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148. *Id.* at 93–94.

149. *Id.* at 93.

150. *Id.* at 90.

151. OLMSTEAD, *supra* note 138, at 127–34.

152. MAY, *supra* note 142, at 95–96, 97–100, 101–04.

153. *Id.* at 90.

154. *Id.*

155. *Id.* at 89–90, 98.

156. *Id.* at 90.

157. *Id.* at 98.

158. *Id.* at 99–100.

his strong anti-Soviet views, including recent support for the Truman Doctrine and the Marshall Plan.<sup>159</sup> He praised Bentley for coming forward to expose subversion in the government and Ferguson's committee for furthering these efforts.<sup>160</sup>

Bentley's Senate appearance triggered a hearing before the Fourth Region Loyalty Board in Washington to determine Remington's loyalty and fitness to continue serving in the Commerce Department.<sup>161</sup> In addition to the Ferguson hearings, that board also had access to an extensive FBI file on Remington based on the Bureau's investigation into his past associations and activities at the time of his appointment as director of the Commerce Department's export program.<sup>162</sup> Remington's FBI file provided grist for both his enemies and his defenders.

On the one hand, it documented Remington's extraordinary network of friendships and associations with people and organizations who were either openly communist or sympathetic to communism, some reaching back to his college days at Dartmouth.<sup>163</sup> But classmates and administrators also offered a confusing portrait of Remington's ideological orientation. They recalled, for example, that he had denounced as "hysterical and irresponsible" the leaders of the communist-dominated American Student Union at Hanover, but that he regularly attended their meetings as well as those of the Young Communist League where he "defended his views of Communism with zeal and deep conviction."<sup>164</sup> Remington's activities after Dartmouth painted a portrait of a man on the left, but someone who also wanted to be all things to all people.

Taking a leave from Dartmouth at the start of his junior year in 1936, he worked as a messenger at the Tennessee Valley Authority ("TVA") in Knoxville.<sup>165</sup> There he joined the Workers Education Committee, a group active in promoting union organization among the valley's workers. Remington also encouraged TVA employees to re-affiliate with the CIO, and socialized with a number of men and

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159. *Id.* at 108.

160. *See id.* at 98 (stating that he had a high regard for Bentley and believed she was sincere).

161. *Id.* at 101.

162. *See id.* at 76-77, 94-95 (stating that the FBI investigated him for thirty days in 1948).

163. *See id.* at 104, 106-10 (detailing Remington's associations with communist groups since college).

164. *Id.* at 39-40.

165. *See id.* at 25 (explaining that he did so to "work and struggle and get knocked around a bit").

women such as Howard Bridgman, Muriel Speare, and Kit Buckles, all of who were active in the local Communist Party organization.<sup>166</sup> They considered him a member, and a few of them recalled Remington's own recruitment efforts on behalf of the party.<sup>167</sup>

In 1938, Remington married Ann Moos, a graduate of Bennington, whom he first met at a conference of the United Student Peace Committee.<sup>168</sup> Introduced to party leaders by her mother whose Croton-on-Hudson estate had become a gathering place for Communist Party activists and assorted radicals, Ann Moos later claimed that Remington had vowed to remain faithful to the party as a condition of their marriage.<sup>169</sup> While her husband completed his doctoral studies in economics at Columbia, Ann worked as a secretary in the New York office of the American Youth Congress.<sup>170</sup> They contributed money to the financially ailing *New Masses* and spent most weekends at Croton, where they met North and other party leaders, who in turn introduced them to Bentley when the Remingtons moved to Washington in 1940.<sup>171</sup>

Several FBI informants recalled that Remington had defended the Soviet invasion of Finland in 1939–40 and denounced American aid to England prior to the German invasion of the Soviet Union, two positions consistent with the official Communist Party line.<sup>172</sup> But in the wake of Germany's defeat, Remington's foreign policy views took on a decidedly anti-Soviet cast.<sup>173</sup> He opposed the so-called Morgenthau Plan that would have stripped Germany of much of its industrial potential, and supported both the Truman Doctrine and the Marshall Plan, as well as efforts to restrict American exports to the Russians.<sup>174</sup> And according to Thomas Blaisdell, his boss in the Commerce Department, Remington's virulent anti-Soviet views had provoked criticism from State Department officials.<sup>175</sup>

Truman's Executive Order instructed hearing boards to

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166. *Id.* at 27–29, 55, 105–12.

167. *See id.* at 27–35 (describing Remington's activities with the Communist Party in Tennessee).

168. *Id.* at 44–52.

169. *Id.* at 211–13, 248.

170. *See id.* at 57, 64–65 (explaining Bill and Ann's connection to the American Youth Conference).

171. *Id.* at 69, 90, 99, 105.

172. *See id.* at 57–58 (describing the meeting of the American Youth Congress's Citizen Institute in 1940).

173. *Id.* at 73.

174. *See id.* (explaining that Germany would need to be rebuilt to successfully oppose communism).

175. *Id.* at 113.



determine the *present* loyalty of federal employees, but Remington's inquisitors dismissed the testimony of people like Blaisdell and based their conclusions upon his past activities, especially the relationship to Bentley during the war that they interpreted as "imparting non-public information to a person closely identified with communists."<sup>176</sup> The board gave Remington an official notification that he had been found disloyal; termination of his employment at the Commerce Department followed swiftly, but he was given twenty days to appeal to the Civil Service Commission Loyalty Review Board.<sup>177</sup>

More than thirty years after he agreed to represent Remington in his appeal, Rauh wrote that "the big story is not what Remington did (that will always be shrouded in the gray area of uncertainty) but what a hysterical society did to Remington for, at the worst, stupid and show-off activities."<sup>178</sup> Rauh might have added that Remington had been a victim of his own desire to please virtually everyone who came into his life—professors, classmates, a wife, a mother-in-law, communists, even FBI agents. Throughout his adult life, it appears, Remington had been a psychological chameleon who easily altered his political coloration depending upon the circumstances.

In 1948 and later, Rauh doubted he would ever know the whole truth about Remington's life. Had his client joined the party? Paid dues? Had he given Bentley non-public information? Did he know she was a communist spy working for the Soviets? Remington admitted to the FBI at one point that Bentley's allegations "were basically correct and that he was convinced that she had talked to the persons named by her."<sup>179</sup> But he also insisted she gave "incorrect . . . certain details . . . concerning himself, that he never had any overt Communist Party discussion with her and that he did not give her any confidential information."<sup>180</sup>

Only as the case unfolded did Rauh learn more of the details of Remington's youthful activities at Dartmouth and in Knoxville, details which his client had not volunteered and which Rauh himself had not initially probed, given what he assumed would be the government's emphasis upon his client's present loyalty to the United

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176. *Id.* at 120.

177. *Id.* at 119.

178. Letter from Joseph L. Rauh to Gary May, Historian, University of Delaware (Apr. 10, 1981) (on file with the North Carolina Law Review).

179. See Memorandum from J. Edgar Hoover, Director of the FBI, to Thomas C. Clark, Attorney General (Oct. 1, 1948) (on file with the North Carolina Law Review), Joseph L. Rauh, Jr. File, Records of the Federal Bureau of Investigation, Washington, D.C. [hereinafter Rauh FBI File].

180. *Id.*

States. Remington had not been forthcoming, Rauh later believed, because, "the hysteria made it impossible for anybody to tell the truth in those days.... They were all scared green by the public reaction... whipped up by the slightest admission of communist leanings or associates."<sup>181</sup> Rauh decided to become Remington's lawyer in 1948 because he believed him to be "a decent boy," someone entitled "to make a mistake, even a bad mistake, without being crucified as disloyal."<sup>182</sup>

Rauh sensed that Remington's appeal would be his most challenging and controversial loyalty case. He therefore sought the aid of other attorneys outside his firm, especially ones with impeccable conservative credentials.<sup>183</sup> He approached John Lord O'Brian, next to Henry Stimson, the dean of progressive Republicanism, but O'Brian declined to serve even when Rauh offered to do all the legal drudgery.<sup>184</sup> Rauh received a positive response, however, from Bethuel M. Webster, an esteemed member of the New York bar who served in the Department of Justice under Presidents Coolidge and Hoover, but had also written sonnets about the injustice done to the condemned anarchists Sacco and Vanzetti.<sup>185</sup>

The procedures of the loyalty boards, especially their reliance upon secret informants and accusers in undisclosed FBI reports, made Remington's lawyers' job extremely difficult. It was essentially like entering a pitch-black room without the aid of a flashlight. Even with a transcript of the original hearing, Rauh and Webster did not know for certain how the regional board had assessed each charge against Remington, but they decided to challenge directly the credibility of Bentley, his chief accuser. They asked the Loyalty Review Board to invite Bentley to testify.<sup>186</sup> Encouraged by Rauh and attorney Richard G. Green, Remington also filed a libel suit against the spy queen in New York after she repeated her accusations against him on the NBC radio program, *Meet the Press*.<sup>187</sup> Their strategy almost succeeded and garnered support from a surprising source inside the loyalty bureaucracy.

The attempt to draw Bentley into an arena where she might be

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181. See August 17th Rauh Interview, *supra* note 89.

182. See *id.*

183. August 15th Rauh Interview, *supra* note 67.

184. *Id.*

185. See MAY, *supra* note 142, at 121–22 (explaining that if Rauh convinced Webster that Remington was innocent, Webster would take the case).

186. *Id.* at 121.

187. *Id.* at 118, 136–37.

subjected to tough cross-examination received encouragement from Richardson, the chairman of the Loyalty Review Board, who had initially opposed the use of confidential informants. Richardson's own youthful attachment to Robert La Follette's brand of Republican progressivism in Wisconsin had once been used to brand him as a subversive. Despite Richardson's intensive efforts, however, Bentley, who had recently converted to Catholicism and taken shelter under the wing of the Right Reverend Fulton J. Sheen, a militant anti-communist, refused to appear before the board.<sup>188</sup>

Bentley's unwillingness to testify, combined with a bundle of affidavits from prominent government figures who all vouched for Remington's loyalty and staunch anti-Soviet views, proved decisive. Richardson and his two colleagues on the board, one of whom served as a former national commander of the American Legion, focused largely on Remington's record since the war and gave little credence to old events at Dartmouth or at the Tennessee Valley Authority during the 1930s.<sup>189</sup> They even discounted Bentley's tale of espionage by noting that Russia had been America's ally during the war, that American official efforts had been made to keep her in the struggle against Hitler, and that "giving the Russians information with respect to the progress of our war effort wouldn't necessarily spell disloyalty."<sup>190</sup> Rauh, Webster, and Remington could sense victory when the hearings ended, a forecast that proved correct.

In early February 1949, finding no reasonable grounds to believe

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188. *Id.* at 125-26.

189. *See id.* at 129-30. Led by Richardson, the Loyalty Review Board's decision rebuked the regional board for ignoring the letter of Truman's executive order, which required investigators to base their decision on a judgment about an employee's *present* loyalty to the United States, not *past* conduct, associations, or beliefs. *Id.* at 130. Richardson's board therefore discounted Remington's years at Dartmouth and the Tennessee Valley Authority, for example, episodes that would later be used against him by the House Committee on Un-American Activities and federal prosecutors. *See id.* at 129. "It would be unfair for our board to bind a man forever by what he did as a youth," Richardson observed. *Id.* Richardson knew from first-hand experience how the past could stigmatize a person. While studying law at the University of Wisconsin in 1902, he supported Progressive governor Robert La Follette. *See id.* Years later, Richardson's nomination to become Assistant United States Attorney General was held up because Attorney General William D. Mitchell equated La Follette and Richardson with communism. *See id.* Other loyalty hearings, however, frequently departed from the standard used by Richardson and his colleagues in the Remington case by focusing on an employee's past. *See CAUTE, supra* note 62, at 180-83.

190. MAY, *supra* note 142, at 129. Richardson did not believe Remington had dealt with Bentley "as part of his official permissive duty." *Id.* at 130. Their relationship struck him as "off-color," but, like Rauh, he concluded Remington "was very young and immature, the times were different, and his work since has been above criticism." *Id.*

Remington was disloyal, the Richardson board ordered him reinstated to his post in the Commerce Department with back pay amounting to \$5,813.72.<sup>191</sup> Not long after that decision, Remington's ordeal and vindication received sympathetic treatment from Daniel Lang in a long *New Yorker* essay that also cast further doubt on Bentley's credibility.<sup>192</sup> Six months later, after federal judge Edward Conger ruled that Remington's libel suit against Bentley, NBC, and General Foods should proceed to trial, lawyers representing the network and sponsors of *Meet the Press* settled the litigation for \$9,000.<sup>193</sup> Remington's only setback came when his superiors at the Department of Commerce demoted him in the hope he might resign, but he refused to quit, fortified by these victories over Bentley. That decision, however, became his death warrant.

The blond spy queen had a desperate need to rebuild her reputation by 1950, when she was dismissed from a teaching position in Chicago for alleged "moral laxity" and she failed to find a publisher eager to buy her memoirs of life in the Soviet underground.<sup>194</sup> Other persons and organizations also had staked their reputations in the anti-communist crusade upon her version of Soviet espionage and American betrayal, especially committees of Congress, the Department of Justice, the FBI, and John Gilland Brunini, director of the Catholic Poetry Society and Bentley's literary collaborator.<sup>195</sup> And, by coincidence, Brunini served as the foreman of the federal grand jury in New York charged with investigating Soviet espionage in the United States.<sup>196</sup> William Remington, exonerated by the government's own loyalty machinery, now threatened the credibility of powerful government agencies, their supporters and patrons. One of those institutions was HUAC, which to this point had been marginalized in the Remington affair.

But at the end of April 1950, Congressman John S. Wood, chairman of HUAC, announced that Remington would be called before his body to respond to testimony from former residents of Knoxville who knew him to be a member of the Communist Party in 1936 to 1937.<sup>197</sup> Despite the ruling of the Richardson board and the

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191. *Id.* at 132.

192. Daniel Lang, *The Days of Suspicion*, NEW YORKER, May 21, 1949, at 37.

193. See MAY, *supra* note 142, at 142-43.

194. See OLMSTEAD, *supra* note 138, at 153-58.

195. *Id.*

196. See *id.* at 156.

197. See MAY, *supra* note 142, at 147-54 (discussing the three witnesses who testified about Remington's activities in Knoxville).

guidelines in Truman's executive order, Wood also urged the Loyalty Review Board to reopen its inquiry in light of these old allegations from Remington's youthful past. The Brunini-dominated grand jury was not far behind HUAC. Two months later, after calling Bentley, Remington, and Remington's ex-wife Ann to testify, Brunini's grand jury returned an indictment charging Remington with perjury—specifically, charging that he had lied about his past membership in the Communist Party.<sup>198</sup> Rauh now faced legal challenges on several new fronts.

Remington's chief attorney had little difficulty punching large holes in the testimony of HUAC's "new witnesses" from Remington's days at TVA. They admitted their own past activities in the Knoxville cell of the Communist Party, but could only verify that Remington had joined them in efforts such as the Workers Education Committee and in organizing activities for the Textile Workers Union.<sup>199</sup> Those were not efforts exclusively led or directed by the party. Remington, they said, had socialized with them and traded motorcycles, but they also placed him at gatherings that Remington alleged took place either before he reached Knoxville or after his return to Dartmouth in June 1937.<sup>200</sup>

But defending Remington against the perjury charge proved to be another matter. The government had unlimited resources for lawyers and investigators, while Rauh's client and his parents had finally exhausted their bank accounts after posting \$5,000 bail.<sup>201</sup> Webster, pleading obligations to his law firm, also declined to continue. A close friend of the Remington family temporarily rescued the defense until Rauh could raise \$20,000 from the James Marshall Civil Liberties Trust.<sup>202</sup> He pleaded successfully that Remington's ability to receive a fair trial had been compromised by anti-communist hysteria and that his conviction would intensify the purge of liberals and non-conformists from the federal government. To replace Webster, Rauh recruited another establishment attorney, William C. Chanler, a partner in Henry Stimson's old law firm and a former corporation counsel for New York City during the LaGuardia

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198. *Id.* at 157.

199. *See id.* at 148–54 (discussing the testimony of the new witnesses).

200. Memorandum from Guy Hottel, FBI Agent, to J. Edgar Hoover, Director of the FBI (May 5, 1950) (on file with the North Carolina Law Review); Letter from Joseph Rauh, Jr., to Seth W. Richardson, Chairman, Loyalty Review Board (May 6, 1950) (on file with the North Carolina Law Review).

201. *See MAY*, *supra* note 142, at 183.

202. *See id.* at 184.

Administration.<sup>203</sup>

On the new perjury charge, Remington now faced a more formidable accuser than Bentley—his ex-wife, Ann Moos, angry and vengeful because he blamed her and her mother for all his legal difficulties. Ann now testified for the prosecution that Remington had been a member of the Communist Party.<sup>204</sup> Her incriminating statements before the grand jury came, however, only after hours of relentless interrogation by Brunini and federal prosecutor Thomas Donegan,<sup>205</sup> an ordeal that Judge Learned Hand on the Second Circuit Court of Appeals later described as bordering upon duress and torture.<sup>206</sup>

According to those grand jury transcripts, Donegan declared that he believed Remington was a communist when he met Bentley and gave her information from the War Production Board. Initially, Ann resisted that conclusion and fought back: “Well, I am sure he wasn’t.”<sup>207</sup> She added firmly, “I am convinced that he is not [a communist] and has not been . . . but he is a devious sort.”<sup>208</sup> Later in her testimony, after being denied food, told that she could not invoke either the Fifth Amendment or her marital privilege, and threatened with a perjury indictment, Ann finally altered her story to the grand jury. Her husband, she said, had given money to the Communist Party.

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203. The FBI commenced an investigation of the Robert Marshall Foundation in 1944, after the organization made grants to the Southern Conference for Human Welfare, the Workers Defense League, and Tom Mooney, the chairman of the Citizens’ Committee to Free Earl Browder, the former head of the American Communist Party. All of these groups, the Bureau noted, had been cited by either HUAC or the Attorney General as communist fronts or communist-dominated. When Rauh and Chanler denied that Remington’s defense expenses had been paid by the communists, the FBI suggested otherwise based on the Marshall Foundation’s gifts. *See generally* Letter from D. M. Ladd to J. Edgar Hoover, Director of the FBI (Jan. 17, 1951) (on file with the North Carolina Law Review).

204. MAY, *supra* note 142, at 164.

205. *Id.* at 165–66.

206. Judge Hand was especially troubled by the fact that the examination of Ann Remington had been ex parte and without the presence and control of a judge or other official. He considered the proceedings secret and coercive, and stated that, “[s]ave for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination.” GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 617 (1994). More recently, attorneys representing accused terrorist Jose Padilla and others held in Cuba have also questioned the authority of the United States government to detain and interrogate persons ex parte without the presence of legal counsel. *See* William Glaberson, *Judges Question Detention of American*, N.Y. TIMES, Nov. 18, 2003, at A19.

207. MAY, *supra* note 142, at 161.

208. *Id.* (quoting Ann Remington’s grand jury testimony).

At Remington's trial, Ann became even more confident and incriminating. Remington was a communist at Dartmouth, she said. Furthermore, he contributed financially to the party, recruited for the party, and gave secrets to Bentley.<sup>209</sup> But under careful cross-examination by Chanler, Ann also maintained "we were not orthodox Communists . . . . We were Communists as much as we wanted to be."<sup>210</sup> When combined with testimony by Bentley, former classmates at Dartmouth, and TVA employees who placed Remington at party meetings, Ann Moos's statements helped convict Remington of perjury on February 7, 1951.<sup>211</sup>

Throughout the trial, Rauh and Chanler tangled often with Judge Gregory Noonan, who rejected their motions and imposed the maximum sentence on Remington of five years in prison and a two thousand dollar fine.<sup>212</sup> Noonan even denied an extension of bail pending an appeal because he believed his conduct had been flawless. Rauh and Chanler thought otherwise.<sup>213</sup> Noonan, they believed, had given improper instructions on the issue of "membership" in the Communist Party, an error that allowed the jury to roam unchecked and to equate harmless social engagements with active participation in the party.<sup>214</sup> They also challenged Noonan's decision to brush aside their claims of coercion inside the grand jury room by foreman Brunini, who had been aided by prosecutors Donegan and Irving Saypol.<sup>215</sup>

Rauh had good reasons to question what took place before the grand jury. On the eve of the trial, Remington's lawyers were approached by two employees of the publishing firm Devin-Adair who offered them the astonishing information that Brunini had signed a contract in 1950 which gave him a share of profits from Bentley's planned book about her life in the communist underground.<sup>216</sup> In short, the jury foreman had a pecuniary stake in securing Remington's conviction that would assist in vindicating

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209. *See id.* at 212.

210. *Id.* at 215.

211. *Id.* at 264.

212. *Id.* at 265.

213. *Id.* at 266.

214. When Rauh and Chanler asked Noonan at one point in the trial to define "membership" in the Communist Party, the judge snapped back: "Ask him [Remington], he knows." A three-judge panel of the circuit court, Thomas Swam, Gus Hand, and Learned Hand, promptly reversed Noonan on the bail issue. In a crowded elevator as they left the court that day, Learned Hand said to his cousin, "That's the most outrageous thing I have ever heard." August 15th Rauh Interview, *supra* note 67.

215. *Id.*

216. MAY, *supra* note 142, at 235.

Bentley's story regarding her espionage activities.<sup>217</sup> Finally, Rauh and Webster hoped that an appeals court might be persuaded that Ann Remington's grand jury testimony had been secured through duress.

Chief prosecutor Saypol branded the defense witnesses who testified about Brunini's book contract as liars. He also assured Judge Noonan that no irregularities had taken place in the grand jury room. Noonan quickly rejected the defense's motion to throw out the indictment and refused to give Rauh and Chanler access to the grand jury transcripts. Whatever the truth about Brunini and Bentley, Noonan declared, twelve men voted to indict Remington, not one. Undeterred, Rauh wanted to make grand jury misconduct the centerpiece of their appeal in the hope of quashing the original indictment.<sup>218</sup> Chanler, however, opposed that strategy and placed their emphasis instead upon Noonan's inept instructions about membership in the Communist Party.<sup>219</sup>

A distinguished three-judge panel of the Second Circuit Court of Appeals, composed of Judges Tom Swan, Learned Hand, and Augustus Hand, stunned the prosecution when it agreed unanimously with Chanler's core argument that Noonan's instructions on membership had been "too vague and indefinite to constitute any definition at all of what facts the jury must find in order to convict the defendant."<sup>220</sup> They also criticized Saypol for constantly invoking the Attorney General's list as authority for subversion, ordered a new trial for Remington, and further ruled that his lawyers should be granted access to the grand jury proceedings to determine if misconduct had taken place in securing the indictment.<sup>221</sup>

Like the prior Loyalty Review Board ruling, the decision by the court of appeals severely damaged the government's case against Remington. Rauh, however, wanted to save his client further agony with an extraordinary legal maneuver. Despite their partial victory in

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217. *Id.* at 236.

218. *Id.* at 269.

219. Saypol had learned of the Brunini-Bentley connection before the Devin-Adair employees came forward to testify. He had urged the Attorney General to seek a fresh indictment, fearing that this secret would be exposed and ruin the prosecution's case. He was overruled. At the time, even Saypol did not know that the grand jury proceedings had been further compromised by the fact that Donegan and another prosecution witness, Joseph Egan, also had prior legal relationships with Bentley. See Brief for Appellant at 36-37, *United States v. Remington*, 191 F.2d 246 (2d Cir. 1951) (No. 51-22045); MAY, *supra* note 142, at 204.

220. *United States v. Remington*, 191 F.2d 246, 250-51 (2d Cir. 1951); *Remington Verdict Is Upset on Appeal; New Trial Studied*, N.Y. TIMES, Aug. 23, 1951, at 1.

221. *Remington*, 191 F.2d at 250-51.



the court of appeals, he believed they should ask the Supreme Court to review the circuit court, where they would place the emphasis upon grand jury coercion and corruption and have the original indictment thrown out.<sup>222</sup> Content with a new trial, Chanler thought Rauh's gambit would fail, but he reluctantly went along with petitioning the Supreme Court for a writ of certiorari.<sup>223</sup> As it turned out, Rauh was not the only one who could think creatively about the Remington case in light of what the circuit court had ruled and the petition for certiorari.

Rauh's bold move provoked an equally unprecedented response from the prosecutors, who quickly secured a fresh grand jury indictment against Remington.<sup>224</sup> They now charged him with five counts of perjury for statements made while testifying at his trial.<sup>225</sup> They also petitioned the United States Supreme Court to throw out the original indictment.<sup>226</sup> This strategy came from the fertile brain of Saypol's chief assistant, Roy Cohn, the pudgy son of a former New York jurist, whom Chanler referred to as the prosecution's "ever-active genie."<sup>227</sup>

In 1951, Roy Cohn played a major role along with Saypol in the trial of Julius and Ethel Rosenberg for atomic espionage and soon joined Senator McCarthy's staff as chief counsel.<sup>228</sup> Cohn thought it hopeless for the government to win on the membership issue in the Supreme Court, and he feared further judicial inquiry into the unsavory tactics used against Ann Moos during the grand jury proceedings.<sup>229</sup>

Rauh led a chorus of criticism against the government's new indictment and Cohn's attempt to void the first one. The latter he denounced as a tactic designed to avoid the rule against double-jeopardy and to cover up the prosecution's own dubious conduct before the grand jury. The Supreme Court rejected a part of Cohn's strategy when it refused to quash the first indictment,<sup>230</sup> but on March

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222. August 15th Rauh Interview, *supra* note 67.

223. *Id.*

224. MAY, *supra* note 142, at 273.

225. *Id.* at 273-74.

226. *Id.*

227. *Id.* at 273.

228. NICHOLAS VON HOFFMAN, *CITIZEN COHN: THE LIFE AND TIMES OF ROY COHN* 94-104, 138-44 (1988) (describing Cohn in the Rosenberg trial and his acceptance of the job with Senator McCarthy).

229. *Id.*; SIDNEY ZION, *THE AUTOBIOGRAPHY OF ROY COHN* 46-52 (1988).

230. See *Remington v. United States*, 342 U.S. 895, 895 (1951) (dismissing motion for leave to apply to the district court to dismiss indictment).

24, 1952, the justices also declined to hear Rauh's appeal of misconduct by the grand jury.<sup>231</sup> Remington faced a second trial, but he would do so without Joe Rauh.<sup>232</sup>

Rauh declined to represent Remington at this point because he was worn down by the first battle and he found himself at odds over trial strategy with Chanler and with Chanler's replacement, John Minton, a seasoned criminal lawyer. The government now claimed that Remington had lied while on the witness stand at his trial concerning attendance at Communist Party meetings, giving information to Bentley, paying party dues, and regarding his knowledge of the Young Communist League at Dartmouth.<sup>233</sup> Rauh argued that they would never persuade a new jury to acquit Remington on all of these charges against the background of the war raging in Korea, combined with the testimony of Ann Moos and Bentley. The only hope for Remington, he told them, rested at the court of appeals and the Supreme Court with a frontal attack on the legality of the original grand jury indictment.<sup>234</sup>

Minton, whose nephew had been killed recently in Korea and who harbored strong anti-communist views, rejected Rauh's strategy. So did Chanler and Remington. The latter had become persuaded that the government would never rest until he had been acquitted or convicted by a jury. Discouraged about this strategy, Rauh withdrew from the second trial, but not without telling Chanler that he believed their "path of least resistance . . . is the road to defeat."<sup>235</sup> In his heart, he hoped they would prove him wrong.<sup>236</sup>

The Minton-Chanler strategy failed. After a trial that lasted only ten days in January 1953, the jury found Remington guilty on two of the five counts of perjury—giving Bentley information to which she was not entitled and knowledge of the YCL at Dartmouth.<sup>237</sup> The judge sentenced him to three years in prison.<sup>238</sup> Minton argued that

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231. See *Remington v. United States*, 343 U.S. 907, 907–08 (1952). Three justices, Felix Frankfurter, Hugo Black, and William O. Douglas voted to hear the case, but only Black and Douglas publicly expressed their dismay with the court's refusal to grant certiorari. *Id.* Black believed that the Bentley-Brunini connection and the prosecution's failure to disclose it constituted conduct "abhorrent to a fair administration of justice" and probably denied Remington due process of law. *Id.*

232. Interview with Joseph Rauh, Jr., in Washington, D.C. (Aug. 16, 1985) [hereinafter August 16th Rauh Interview].

233. See MAY, *supra* note 142, at 273.

234. *Id.*

235. *Id.* at 279.

236. *Id.*; August 16th Rauh Interview, *supra* note 232.

237. MAY, *supra* note 142, at 288.

238. *Id.* at 292.

on appeal they should focus narrowly on the sufficiency and admissibility of certain evidence.<sup>239</sup> Rauh, still smarting from the rejection of his grand jury strategy, but convinced the case raised a profound constitutional question, urged Remington to appeal on his theory. After an emotional dinner reunion in New York where he further probed Remington's innocence, Rauh agreed to write a brief with the assistance of Richard Green and Pollitt and to argue the appeal himself before the circuit court.<sup>240</sup>

With Remington already in prison at Lewisburg Penitentiary, Rauh made a simple and eloquent argument before Judges Swan and the two Hands on October 15, 1953.<sup>241</sup> The United States, having originally procured Remington's indictment and first trial by coerced and corrupt means, could not indict him for what he said while on the witness stand. Moreover, Rauh argued, the original grand jury proceedings proved clearly that Brunini and Donegan, one a literary collaborator with Bentley and the other her former attorney, coerced testimony from Ann Remington and deceived her concerning her legal rights. Rauh also contended that prosecutors hid these wrongs from the defense.<sup>242</sup>

Rauh realized that in a recent decision, *United States v. Williams*,<sup>243</sup> the Supreme Court ruled that a legally defective indictment did not nullify a conviction for perjury committed while on trial under that indictment.<sup>244</sup> But, in *Williams*, the indictment had been technically flawed (the defendant was charged with the wrong offense), and was not the result of serious misconduct by a grand jury foreman and prosecutors.<sup>245</sup> Remington's case, Rauh argued, more closely resembled those arising under illegal searches and seizures or wiretapping, where the Supreme Court ruled that the government could not profit from its own wrongdoing or use tainted evidence, the so-called "fruit of the poisonous tree" defense.<sup>246</sup> These decisions,

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239. *Id.*

240. Remington reaffirmed to Rauh his innocence on both perjury counts: he had never knowingly engaged in espionage with Bentley or belonged to the Communist Party. An undated memorandum in Rauh's papers, "Spy Rings and Riddles" notes that since the FBI had Bentley and Jacob Golos under surveillance from 1940 until the latter's death in 1943, the Bureau either believed any information they received was of little value or the Bureau bungled its responsibilities to protect the nation's secrets. Joseph L. Rauh, Jr., *Spy Rings and Riddles 1-5* (undated) (on file with the North Carolina Law Review).

241. See MAY, *supra* note 142, at 301.

242. *Id.*

243. 341 U.S. 58 (1945).

244. *Id.* at 82.

245. *Id.*

246. August 16th Rauh Interview, *supra* note 232.

moreover, were authored by Justices Holmes and Frankfurter, two justices likely to impress the circuit court.<sup>247</sup>

Rauh asked the circuit court judges to make a modest intellectual leap from cases like *Silverthorne Lumber Co. v. United States*<sup>248</sup> and *Nardone v. United States*<sup>249</sup> to the facts present in Remington's. But only Learned Hand, whose dissent blistered the prosecution's conduct before the grand jury, accepted the argument.<sup>250</sup> Swan, although not unmoved by Rauh's arguments, thought the Supreme Court should make the leap, not the court of appeals.<sup>251</sup> Augustus Hand, despite his cousin's fervent pleas, remained unmoved.<sup>252</sup> He viewed the grand jury misconduct and Remington's subsequent perjury as two distinct events.<sup>253</sup> Reversing the conviction, he claimed, would only encourage other defendants to lie on the witness stand.<sup>254</sup> In a two to one decision, the Court of Appeals affirmed Remington's conviction for perjury.<sup>255</sup>

Three months later, after receiving Rauh's petition for certiorari, the Supreme Court of the United States again declined to hear Remington's appeal,<sup>256</sup> a decision that led Hand privately to express his profound sadness about the outcome to Frankfurter. At the Supreme Court, Rauh's brief and Hand's impassioned dissent had encouraged at least three justices—Frankfurter, Black, and Douglas—to support review, but they could not secure the vote of Justice Jackson.<sup>257</sup> Rauh learned later that personal bitterness and ideological conflict between Black and Jackson played a major role in the Court's refusal to hear the case.<sup>258</sup> Black expressed the view that

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247. Brief for Appellant, *United States v. Remington*, 191 F.2d 246 (2d Cir. 1951) (No. 51-22045); see, e.g., *Nardone v. United States*, 302 U.S. 379, 383 (1937) (holding that methods used by officers of the state that are "inconsistent with ethical standards" are "destructive of personal liberty"); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (stating that "knowledge gained by the Government's own wrong cannot be used by it").

248. 251 U.S. 385 (1920).

249. 302 U.S. 379 (1937).

250. See *United States v. Remington*, 208 F.2d 567, 571–75 (2d Cir. 1953) (critiquing the coercive extraction of privileged information in an ex parte examination).

251. MAY, *supra* note 142, at 302–03.

252. *Id.* at 303.

253. *Id.*

254. *Id.*

255. *Remington*, 208 F.2d at 571. See generally GUNTHER, *supra* note 206, at 614–20 (providing context for the case and the decision, particularly Judge Hand's lone dissent).

256. *Remington v. United States*, 347 U.S. 913 (1954) (denial of certiorari).

257. August 16th Rauh Interview, *supra* note 232.

258. *Id.*

the case could be used to overrule *Williams*.<sup>259</sup> Frankfurter, who had also dissented in *Williams*, believed the two cases distinguishable and blamed Black's willfulness for alienating Jackson and dooming Remington's appeal.<sup>260</sup>

Even had they secured Jackson's vote for certiorari, Rauh knew that the possibility of overturning Remington's conviction remained much in doubt. With Justice Tom Clark, the former Attorney General, likely to recuse himself,<sup>261</sup> the probable vote (assuming Justice Jackson joined Justices Black, Douglas, and Frankfurter) would have been four to four,<sup>262</sup> a result that would have affirmed the circuit court decision and kept Remington in prison.

No macabre twist in Remington's case, however, prepared Rauh for the final tragedy. In November 1954, eight months before Remington's scheduled release from Lewisburg, three fellow inmates attacked him in his cell and beat him to death.<sup>263</sup> The prosecutors and prison officials insisted that Remington's murder resulted from an attempted robbery gone awry.<sup>264</sup> Roy Cohn claimed until his own death from AIDS in 1986 that Remington had been a victim of "a turgid sexually motivated murder."<sup>265</sup> But the three men convicted of his murder—George McCoy, Lewis Cagle, Jr., and Robert Parker—nursed intense anti-communist sentiments and each claimed their attack had been politically motivated.<sup>266</sup> The Bureau of Prisons hid those facts for three decades, perpetrating the last cover up in the Remington case.<sup>267</sup>

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259. *Id.*

260. GUNTHER, *supra* note 207, at 623–24; see Joseph L. Rauh, Jr., *Felix Frankfurter: Civil Libertarian*, 11 HARV. C.R.-C.L. L. REV. 496, 510–13 (1976); August 18th Rauh Interview, *supra* note 30. Rauh believed that Justice Frankfurter's intense dislike of Justice Black in 1954 blinded him to Justice Jackson's own complicity in the Remington tragedy. A year earlier during the final appeals in the *Rosenberg* case, Justice Jackson had behaved in a similar manner by refusing to hear the Rosenbergs' appeal when Justice Douglas's behavior offended him. See Michael E. Parrish, *Cold War Justice: The Supreme Court and the Rosenbergs*, 82 AM. HIST. REV. 805, 816–20 (1977).

261. August 16th Rauh Interview, *supra* note 232.

262. *Id.*

263. MAY, *supra* note 142, at 307–10.

264. See *id.* at 312–15.

265. See ZION, *supra* note 229, at 57.

266. See MAY, *supra* note 142, at 307–15.

267. *Id.* at 3–9. Morton Sobell, the convicted atom spy, believed that persons connected with the Bureau of Prisons engineered Remington's murder. Historian Lee Jones first secured the Bureau of Prisons files through a Freedom of Information Act lawsuit and disproved this theory. See Lee W. Jones, *After 33 Years, The Real Story*, NATION, Jan. 9, 1988, at 8.

## VII. TURNING THE TIDE: PETERS, TAYLOR, AND GREENE

All of Rauh's legal skills could not save Bill Remington from the anti-communist hysteria that spread its venom even inside a maximum security federal prison, but his tragic death heightened Rauh's resolve to destroy the basic evil at the heart of the loyalty-security program—non-confrontation. Before President Truman, hearing boards, congressional committees, and in courtrooms he attacked the unfairness of that procedure at every opportunity since 1947. Slowly, due in large measure to the efforts of Rauh and other attorneys, the courts came around to this point of view, but only after the Red Scare cooled in the late 1950s following the end of the Korean War, the disgrace of Senator McCarthy, and the death of Stalin.

The loyalty program's long-standing policy that denied to government employees the right to confront their accusers and subject them to cross-examination became even more crucial for Rauh and his clients after 1953 when the Eisenhower Administration tightened the regulations to provide that federal employees could retain their jobs only if the hearing boards believed their retention was "clearly consistent with the interests of the national security."<sup>268</sup> Those new regulations also expanded the list of grounds for dismissal to include:

Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy. Any . . . infamous, dishonest, immoral, or notoriously disgraceful conduct. . . [or] any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.<sup>269</sup>

Filled with Truman appointees, the Supreme Court majority displayed little sympathy for the victims of non-confrontation until Earl Warren succeeded Fred Vinson as Chief Justice in 1953. In the first test case, with three of Truman's justices voting as a block, the court by a four to four decision would not endorse the principle that the government's failure to allow a dismissed employee to confront his or her accusers violated the Constitution.<sup>270</sup> Despite a biting dissent on the circuit court and others offered by Justices Black,

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268. Exec. Order No. 10,450, 3 C.F.R. 936 (1949–1953).

269. *Id.*

270. *Bailey v. Richardson*, 341 U.S. 918, 918 (1951) (plurality decision) (affirming the trial court's decision).

Douglas, Frankfurter, and Jackson, the Truman majority ruled that the guarantee of the Sixth Amendment applied only to criminal prosecutions, not to administrative proceedings such as those involved in the loyalty program.<sup>271</sup> Rauh and other civil liberties lawyers did not abandon the fight.

In 1955, Rauh filed an amicus brief on behalf of John Peters, a distinguished member of the Yale Medical School who had been dismissed as a special consultant to the Surgeon General. The Loyalty Review Board, overruling a lower tribunal, found reasonable doubt as to his loyalty.<sup>272</sup> Rauh and others hoped the justices would address the constitutional question and perhaps overturn *Bailey v. Richardson*.<sup>273</sup> In addition to Rauh and Arthur Goldberg, whose brief spoke for the CIO, Peters's appeal enlisted an extraordinary group of attorneys, including Thurman Arnold, Paul Porter, Abe Fortas, and the ACLU's Herbert Monte Levy and Morris Ernst.<sup>274</sup>

To the great embarrassment of the Eisenhower Administration, the distinguished Solicitor General Simon Sobeloff argued that the government's own appeal was unjust and contrary to the public interest, and refused to sign the government's brief or to appear before the Supreme Court.<sup>275</sup> But to the dismay of Rauh and the attorneys, a majority of the justices, led by Justice Frankfurter, elected to avoid the constitutional question. They reversed the Loyalty Review Board in *Peters v. Hobby*,<sup>276</sup> but only on the grounds that the board lacked the authority to overrule a lower board's decision to acquit such an employee.<sup>277</sup>

By 1957, Rauh believed he had a case that would at last trump

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271. *Bailey v. Richardson*, 182 F.2d 46, 65 (D.C. Cir. 1950). Justice Clark, the fourth Truman appointee and former Attorney General when Miss Bailey had been dismissed, did not participate in the case.

272. August 18th Rauh Interview, *supra* note 30.

273. 341 U.S. 918 (1951).

274. See *Peters v. Hobby*, 349 U.S. 331, 332 (1955).

275. See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 11-12 (1987). With Sobeloff and his staff in rebellion against the Administration's legal position, Attorney General Herbert Brownell prevailed upon another Justice Department official to argue the case. *Id.* at 11. For this effort, Warren Burger was elevated a year later to the Court of Appeals for the District of Columbia. *Id.* at 12. Sobeloff later became a federal court of appeals judge. *Id.*

276. 349 U.S. 331 (1955).

277. Rauh's old mentor, Justice Frankfurter, advanced this narrow approach to the resolution of the *Peters* case during oral argument and persuaded Warren to adopt it for the majority. Neither the government nor Peters's attorneys had raised the issue, prompting Arnold to protest the Frankfurter gambit. Justices Black and Douglas believed the Court should have decided the constitutional problem. August 18th Rauh Interview, *supra* note 30; see *Peters*, 349 U.S. at 338.

the government on non-confrontation in security cases. He represented Charles Allen Taylor, a member of the United Automobile Workers, who had been fired from his job at Bell Aircraft after the Pentagon's loyalty board twice ruled that his access to classified defense information was "not clearly consistent with the interests of national security."<sup>278</sup> At both hearings, the Defense Department board refused to divulge the identity of those who had made statements against Taylor, a ruling upheld by the district court, but which Rauh appealed on the grounds that it had denied Taylor due process.<sup>279</sup>

Rauh had found the perfect case, but not the one furthest down the litigation track. The Supreme Court had already agreed to hear the appeal of William L. Greene, a businessman who, like Taylor, had been banned from further access to defense "secrets," some of which he had developed for the Navy at his own electronics company.<sup>280</sup> Green, like Taylor, was not able to confront his accusers. The justices agreed finally to hear Taylor's case without intermediate review by the court of appeals so that it might be argued along with Greene's case.<sup>281</sup>

Lawyers for the Justice and Defense Departments also sensed Rauh had a winning case. Four months prior to oral argument the Pentagon capitulated in an attempt to avoid a Supreme Court decision. The department announced that "the granting of clearance to Mr. Charles Allen Taylor for access to Secret defense information is in the national interest."<sup>282</sup> Two weeks later, as Rauh expected, the government's lawyers asked the Supreme Court to dismiss Taylor's suit on grounds of mootness.<sup>283</sup> The Supreme Court, however, refused to rule on that point until after full argument on the merits.<sup>284</sup>

On March 31 and April Fool's Day, 1959, Rauh, representing Taylor, and Carl W. Beruefly, representing Greene, asked the justices to rule that their clients had been denied fundamental rights to confront their accusers and cross-examine them under the Constitution of the United States.<sup>285</sup> With only Clark in dissent, the Supreme Court agreed that Greene had been illegally denied security

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278. *Taylor v. McElroy*, 360 U.S. 709, 710 (1959).

279. August 18th Rauh Interview, *supra* note 30.

280. See Rauh, *supra* note 66, at 1175-76.

281. *Taylor*, 360 U.S. at 709 (stating that this case is a companion case to *Greene v. McElroy*, 360 U.S. 474 (1959)).

282. *Id.* at 710.

283. *Id.*

284. *Id.*

285. August 18th Rauh Interview, *supra* note 30.



clearances, but not on constitutional grounds.<sup>286</sup> Again avoiding that issue, the majority ruled simply that neither executive orders nor congressional legislation authorized the Defense Department to operate its Industrial Security Program without the guarantees of confrontation and cross-examination.<sup>287</sup> Led by Chief Justice Warren, however, five members of the majority made it clear that any loyalty procedures without such guarantees would also violate constitutional due process.<sup>288</sup>

Rauh, the leading opponent of non-confrontation from the beginning of the loyalty program, technically lost the constitutional race to Beruefly. The justices ruled Taylor's suit moot on the same day they held for Greene, and ordered that the loyalty proceeding conform to due process.<sup>289</sup> Although his case did not stand for a shining legal principle, Taylor reaped more immediate benefits. The government gave an ironclad guarantee to Rauh that it would restore Taylor's clearance, that no evidence in his file would be used in the future, and that the findings against him would be expunged.<sup>290</sup> These concessions, Rauh observed, "made Taylor's clearance probably the most rock-ribbed and unassailable in the history of the security programs."<sup>291</sup>

#### CONCLUSION

The victories of Rauh and Beruefly in *Taylor* and *Greene* climaxed an aggressive campaign by civil liberties lawyers in the 1950s to turn back the momentum of the repressive anti-communist crusade of the Truman years. In addition to Rauh's success in the *Watkins* case,<sup>292</sup> these crusaders persuaded the Warren Court to strike down a provision in the New York City charter that provided for summary dismissal of employees who invoked the privilege against self-incrimination,<sup>293</sup> to invalidate Pennsylvania's state sedition act,<sup>294</sup> and

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286. *Greene v. McElroy*, 360 U.S. 474, 474-75 (1959).

287. *Id.* at 474.

288. *Id.* at 506-08.

289. *Taylor*, 360 U.S. at 711.

290. *Id.*

291. Rauh, *supra* note 66, at 1182.

292. *Watkins v. United States*, 354 U.S. 178 (1956).

293. *See Slochower v. Bd. of Educ.*, 350 U.S. 551, 558-59 (1956) (holding that the summary dismissal in this case violated the Due Process Clause of the Fourteenth Amendment).

294. *See Yates v. United States*, 354 U.S. 298, 337-38 (1957) (reversing the Smith Act convictions of fourteen leaders of the Communist Party in California); *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956) (ruling that the federal Smith Act preempted the Pennsylvania Sedition Act).

to curb the State Department's denial of passports to American citizens.<sup>295</sup> In the same term as *Taylor and Greene*, however, the Justices began to backtrack in the face of mounting criticism in Congress and elsewhere, including a committee of the American Bar Association that declared that the Supreme Court decisions encouraged communist activities in the United States.<sup>296</sup> The Court cut back on *Watkins* in *Barenblatt v. United States*,<sup>297</sup> and two years later sustained the Subversive Activities Control Act of 1950.<sup>298</sup> This brief retreat lasted until the retirements of Justices Frankfurter and Whittaker in 1962. Nevertheless, the addition of Justices Arthur Goldberg and Byron White to the bench opened a new liberal chapter in the history of the Warren Court. Rauh and other civil liberties lawyers helped to write its prologue in their campaign against the excesses of the loyalty-security program.

On an individual level, Joe Rauh's decade-long war against the abuses of the loyalty-security program displayed all of his considerable virtues as a lawyer and a human being—extraordinary stamina, bold litigation strategy, and a willingness to make substantial personal and financial sacrifices on behalf of important principles of fairness and justice. His fight against the Cold War's loyalty-security program also demonstrated the continued vitality of a long and proud tradition of the American bar: that whenever the United States government invoked foreign threats to justify policies imposing "fetters . . . on liberty at home,"<sup>299</sup> there would be courageous lawyers ready to come forward to defend individual rights. He would be heartened today, however, by the example of other lawyers who have come forward in the days and months since September 11th to challenge the actions of the United States government that in the recent words of appellate judge Barrington D. Parker, Jr., threaten "a sea change in the constitutional life of this country."<sup>300</sup>

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295. See *Kent v. Dulles*, 357 U.S. 116, 130 (1958) (holding that the Secretary of State was not authorized to deny passports on grounds of immigrants' communist beliefs).

296. ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 352–53 (1997) (chronicling the life of the Chief Justice).

297. 360 U.S. 109 (1959).

298. See *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 56, 86 (1961) (holding that the registration requirements of the Subversive Activities Control Act were neither unconstitutional as a bill of attainder nor unconstitutional as a violation of the First Amendment).

299. See Madison, *supra* note 1, at 241–42.

300. Glaberson, *supra* note 206; see also Eric Lichtblau, *Citing Free Speech, Judge Voids Part of Antiterror Act*, N.Y. TIMES, Jan. 27, 2004, at A21 (reporting that a federal judge struck down part of the USA Patriot Act).

