

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)  
) DEFENSE MOTION:  
) FOR DISMISSAL OF  
) CHARGES FOR FAILURE TO  
) ACCORD THE ACCUSED A  
) STATUS REVIEW HEARING  
) BEFORE MILITARY COMMISSION  
)  
)  
)  
) August 24, 2004

1. Timeliness. This motion is filed in a timely manner as the material facts could not be known to the Defense prior to the date for commencement of proceedings in the Military Commission of Salim Ahmed Hamdan. Specifically the Defense could not ascertain prior to the date of commencement of proceedings whether the government had provided Mr. Hamdan a Combatant Status Review Tribunal.

2. Relief Sought. The Defense requests that the Military Commission dismiss the charges against Mr. Hamdan as untimely or in the alternative abate proceedings pending the outcome of Mr. Hamdan's Status Review Tribunal.

3. Overview. The United States government has stated in federal litigation that Mr. Hamdan is entitled to and will receive a Combatant Status Hearing regarding his detention in Guantanamo Bay prior to the commencement of a Military Commission in his case. The purpose of this Tribunal is to determine Mr. Hamdan's status, that is, whether he is a combatant at all, if a combatant, whether he is a POW and finally to determine whether his continued detention is justified.

4. Facts

a. On 7 July 2004, the Secretary of the Navy's Order Establishing Combatant Status Review Tribunal of July 7, 2004 (Press statement by Secretary of the Navy).

b. On or about 13 July 2004, Mr. Hamdan was served with a notice of his rights regarding the Combatant Status Review Hearing. (Mr. Hamdan statements to Defense Counsel and Defense Paralegal, copy of English version attached).

c. On 13 July 2004, a charge of conspiracy against Mr. Hamdan was approved and referred to this Military Commission by the Appointing Authority. (Charges previously furnished to Commission).

d. On 13 July 2004, Detailed Defense Counsel requested that charges be served on his office vice Mr. Hamdan and indicated that Detailed Defense Counsel would provide Mr. Hamdan with the Arabic copy of the charges during his next visit to Guantanamo Bay. (Memorandum from Defense Counsel).

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- e. On 13 July 2004, a copy of charges was provided to Detailed Defense Counsel's paralegal via email. (Prosecution email of 13 July).
- f. On 4 August 2004, Detailed Defense Counsel served on Mr. Hamdan the Arabic translation of charges provided by the Prosecution.
- g. On 5 August 2004, Detailed Defense Counsel spoke with the lead Prosecutor in the case via telephone in an effort to ensure that he had the correct copy of charges.
- h. On 6 August 2004, the United States government filed a notice of motion supported by memorandum, in *Swift v. Rumsfeld* and specifically promised to Mr. Hamdan that prior to trial by Military Commission he would be accorded a Combatant Status Review Hearing. (United States memorandum in support of its cross-motion to dismiss in *Swift v. Rumsfeld* in United States District Court, Western District of Washington at Seattle, at page 12).
- i. As of the date of this motion the government has not provided the Combatant Status Review Tribunal for Mr. Hamdan as promised. (Statements of Mr. Hamdan to Defense Counsel).

##### 5. Law Supporting the Request for the Relief Sought

The question before the Commission is whether the government, after instituting regulations for a Combatant Status Review Hearing and promising a Federal District Court that Mr. Hamdan would receive such a hearing prior to the commencement of trial before a Military Commission, may lawfully disregard their regulations and promises and proceed to trial before Military Commission in the absence of a Combatant Status Review Hearing.

The government's obligation to abide by its own regulations was clearly established by the United States Supreme Court in *Service v. Dulles* 354 U.S. 363 (1957) and *Vitarelli v. Seaton* 359 U.S. 535 (1959). Both of these cases involve questions of whether the Secretary of State was able to discharge an employee after he had commenced security hearings regarding the employee. In each case the court held that irrespective of whether the employee had a right to the hearing that the Secretary was bound to comply with the regulations for a hearing once those regulations had been implemented as Justice Harlan wrote in *Vitarelli*, "having chosen to proceed against petitioner on security grounds, the Secretary here, as in *Service*, was bound by the regulation which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily." *Id* at 539-40. In so finding the Court did not address whether Mr. Vitarelli had an independent constitutional right but rather based its findings on limits the agency had imposed on itself. The Courts holdings did not depend on finding of rights in the affected individual, but in imposing limits on the agency -- limits derived from the rules the agency itself had adopted.

The Supreme Courts earlier holding in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), makes clear that the government is similarly limited when dealing with aliens. In *Accardi*, the plaintiff was an alien who complained that he had been denied a fair hearing before the Board of Immigration Appeals by virtue of the Attorney General having placed him on a list

Review Exhibit 13

of "unsavory characters." The Court held that although the statute concerning suspension of deportation granted the Attorney General the absolute discretion to grant or deny suspensions, he could not prejudice the procedure he had established by creating the Board of Immigration Appeals by sending to it, a list of "unsavory characters" that he wanted to deport.

The government now seeks to do substantially the same in Mr. Hamdan's case. By commencing Military Commission proceedings against Mr. Hamdan, the government necessarily prejudices the Combatant Status Review Hearings. Inherent to prosecution of Mr. Hamdan before Military Commissions is the government contentions that not only is Mr. Hamdan a combatant, but that his actions rise to the level of war crimes prosecutable by Military Commission and punishable by up to life in prison. In order to maintain any chance of a fair hearing Mr. Hamdan must enter a plea of not guilty and undergo criminal jeopardy prior to being afforded the opportunity to have his status as a combatant reviewed. Such a contention at least rises to the same level as to include him on a list of unsavory characters. In order to afford Mr. Hamdan the same opportunity as other detainees brought before the Combatant Status Review Hearings, to dismiss the charges against Mr. Hamdan pending the outcome of this hearing.

Indeed a Combatant Status Review Hearing is necessary at the onset in order to determine at a minimum what category Mr. Hamdan fall into and as such what rights are accorded him under U.S. and international law. That is whether Mr. Hamdan should be classified a POW, a civilian, or an unauthorized belligerent. The Geneva Conventions, other international treaties and domestic statute, create separate and distinct obligations for the treatment and trial of persons in each of these categories. Until a determination of Mr. Hamdan's status is made, this Commission will be unable to determine the rights and procedure to be accorded Mr. Hamdan.

6. Documents Attached in Support of this Motion

Press statement by Secretary of the Navy

Memorandum from Defense Counsel

Prosecution email of 13 July

United States memorandum in support of its cross-motion to dismiss in *Swift v. Rumsfeld* in United States District Court, Western District of Washington at Seattle, at page 12

Notice of Combatant Status Hearing

7. Oral Argument. Is requested in order to reply to the government's response.

8. Legal Authority. The following legal authority has been cited in support of this motion:

*Service v. Dulles* 354 U.S. 363 (1957)

*Vitarelli v. Seaton* 359 U.S. 535 (1959)

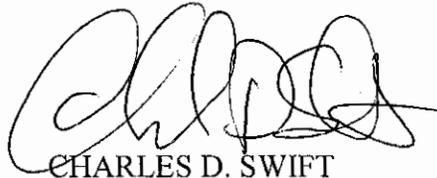
*United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)

9. Witnesses/Evidence. Witnesses, Mr. Hamdan is available to testify for the limited purpose of determining the date on which he was served notice of Combatant Status Review Hearing, charges before a Military Commission, and whether he has in fact received a Combatant Status Review Hearing.

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10. Additional Information. None.



CHARLES D. SWIFT  
Lieutenant Commander, JAGC, U.S. Navy  
Detailed Defense Counsel  
Office of Military Commissions

Attachments:  
As stated

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United States Department of Defense

# News Release

On the web: <http://www.defenselink.mil/releases/2004/nr20040707-0992.html>

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**IMMEDIATE RELEASE**

No. 651-04  
July 7, 2004

## COMBATANT STATUS REVIEW TRIBUNAL ORDER ISSUED

The Department of Defense announced today the formation of the Combatant Status Review Tribunal for detainees held at Guantanamo Bay, Cuba. This tribunal will serve as a forum for detainees to contest their status as enemy combatants.

Detainees held at Guantanamo Bay will be notified within 10 days of their opportunity to contest their enemy combatant status under this process. The tribunal process will start as soon as possible. Detainees will also be notified of their right to seek a writ of habeas corpus in the courts of the United States. Habeas corpus is a writ ordering a person in custody to be brought before a court.

An individual tribunal will be comprised of three neutral officers, none of whom were involved with the detainee. One of the tribunal members will be a judge advocate and the senior ranking officer will serve as the president of the tribunal.

Each detainee will be assigned a military officer as a personal representative. That officer will assist the detainee in preparing for a tribunal hearing. Detainees will have the right to testify before the tribunal, call witnesses and introduce any other evidence. Following the hearing of testimony and other evidence, the tribunal will determine in a closed-door session whether the detainee is properly held as an enemy combatant. Any detainee who is determined not to be an enemy combatant will be transferred to their country of citizenship or other disposition consistent with domestic and international obligations and U.S. foreign policy.

This tribunal does not replace the administrative review procedure announced earlier this year.

The order establishing the tribunals and a DoD Fact Sheet are available at:  
<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>  
<http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf>

RE 13

13 July 2004

From: Detailed Defense Counsel  
To: Appointing Authority, Office of the Military Commissions

Subj: SERVICE OF CHARGES ICO SALEM AHMED HAMDAN

1. Pursuant to the approval and referral of charges in US v. Salim Ahmed Hamdan, I request that charges not be served upon Mr. Hamdan until I am able to be present to explain the allegations of wrongs to my client in a timely fashion. I am presently in Yemen on Temporary Duty orders and will be out of the Continental United States until 29 July 2004. The earliest I am able to travel to Naval Station Guantanamo Bay, Cuba to be present for the service of charges Mr. Hamdan is 3 August 2004. In the alternative, I request that charges be served on my office vice Mr. Hamdan.

2. If you require any further information in support of this request, I maybe contacted in Yemen at 011-967-73234852. Alternatively, my paralegal may be contacted at 703-607-1521 ext. 196 and he can forward a message to me.

C. D. SWIFT  
LCDR, JAGC, USN  
Detailed Defense Counsel

CC:  
Chief Defense Counsel  
JTF GITMO SJA

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1 that “[i]n February of 1998, Usama Bin Laden, Ayman al Zawahiri and others under the  
2 banner of the ‘International Islamic Front for Jihad on the Jews and Crusaders,’ issued a fatwa  
3 (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether  
4 civilian or military – anywhere they can be found and to ‘plunder their money.’” Id. ¶ 9. It  
5 further alleges that “[s]ince 1989, members and associates of al Qaida \* \* \* have carried out  
6 numerous terrorist attacks, including, but not limited to: the attacks against the American  
7 Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in  
8 October 2000; and the attacks on the United States on September 11, 2001.” Id. ¶ 11.

9 As for Hamdan’s role in the conspiracy, the charge asserts that “[i]n 1996, Hamdan  
10 met with Usama bin Laden in Qandahar, Afghanistan, and ultimately became a bodyguard and  
11 personal driver for Usama bin Laden,” serving in that capacity “until his capture in November  
12 of 2001.” Id. ¶ 13(a). The charge further alleges that, in furtherance of al Qaida’s objectives,  
13 Hamdan from 1996 through 2001 “delivered weapons, ammunition or other supplies to al  
14 Qaida members and associates,” id. ¶ 13(a); “picked up weapons at Taliban warehouses for  
15 al Qaida use and delivered them directly to Saif al Adel, the head of al Qaida’s security  
16 committee, in Qandahar, Afghanistan,” id. ¶ 13(b)(1); “purchased or ensured that Toyota  
17 Hi Lux trucks were available for use by the Usama bin Laden bodyguard unit tasked with  
18 protecting and providing physical security” for bin Laden, id. ¶ 13(b)(2); “served as a driver  
19 in a convoy of three to nine vehicles in which Usama bin Laden and others were transported  
20 to various areas in Afghanistan” at the time of the 1998 embassy attacks and the September 11  
21 attacks, id. ¶ 13(b)(4); “drove or accompanied Usama bin Laden to various al Qaida-  
22 sponsored training camps, press conferences, or lectures,” id. ¶ 13(c); and “received training  
23 on rifles, handguns and machine guns at the al Qaida-sponsored al Farouq camp in  
24 Afghanistan,” id. ¶ 13(d).

25 The Appointing Authority approved and referred the charge to a Military Commission  
26 on July 13, 2004. See Exhibit B. The charge is noncapital, so Hamdan faces a maximum  
27 sentence of life imprisonment. Both the government and Hamdan have proposed that his  
28

1 Commission trial begin in December. Hamdan is scheduled to appear before the Commission  
2 on August 23, 2004, for preliminary matters.<sup>6</sup>

### 3 ARGUMENT

4 Since the founding of this nation, the military has used military commissions during  
5 wartime to try violations against the laws of war. Nearly ninety years ago, Congress  
6 recognized this historic practice and approved its continuing use. And nearly sixty years ago,  
7 the Supreme Court upheld the use of military commissions during World War II against a  
8 series of challenges, including cases involving a presumed American citizen, captured in the  
9 United States, Ex parte Quirin, 317 U.S. 1 (1942); the Japanese military governor of the  
10 Phillippines, Yamashita v. Styer, 327 U.S. 1 (1946); German nationals who alleged that they  
11 worked for civilian agencies of the German government in China, Johnson v. Eisentrager,  
12 339 U.S. 763 (1950); and the spouse of a serviceman posted in occupied Germany, Madsen v.  
13 Kinsella, 343 U.S. 341 (1952). Despite the fact that both Congress and the Judiciary have  
14 blessed the Executive's use of military commissions during wartime, despite the fact that the  
15 statutory framework today is identical in all material respects to that which existed during the  
16 prior legal challenges, and despite the fact that the President has inherent power as  
17 Commander in Chief to establish military commissions in the war against al Qaida and the  
18 Taliban, petitioner contends that Hamdan's detention pursuant to the Military Order violates  
19 federal statutes, the Constitution, and the Geneva Conventions. As discussed in more detail  
20 below, these claims cannot be heard at this time and lack merit in any event.<sup>7</sup>

21  
22 <sup>6</sup> Before his trial, Hamdan will have the opportunity to challenge his status as an enemy  
23 combatant before a Combatant Status Review Tribunal. See July 7, 2004 Order Establishing  
24 Combatant Status Review Tribunal, available at  
25 [www.defenselink.mil/news/Jul/2004/d20040707review.pdf](http://www.defenselink.mil/news/Jul/2004/d20040707review.pdf). That Tribunal will only confirm  
whether Hamdan is properly classified as an enemy combatant, not whether he committed the  
offense approved and referred for trial by the Military Commission.

26 <sup>7</sup> These claims cannot be heard for the additional reasons that petitioner lacks standing to  
27 serve as Hamdan's next-friend or as a third party, this Court lacks habeas jurisdiction, a  
28 mandamus petition is not appropriate given the nature of petitioner's claims, and this Court is  
not a proper venue even if mandamus were a proper vehicle. See Respondents' Motion to  
Dismiss or Transfer dated July 16, 2004.

### **Combatant Status Review Tribunal Notice to Detainees\***

You are being held as an enemy combatant by the United States Armed Forces. An enemy combatant is an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. The definition includes any person who has committed a belligerent act or has directly supported such hostilities.

The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held. The Tribunal will provide you with the following process:

1. You will be assigned a military officer to assist you with the presentation of your case to the Tribunal. This officer will be known as your Personal Representative. Your Personal Representative will review information that may be relevant to a determination of your status. Your Personal Representative will be able to discuss that information with you, except for classified information.
2. Before the Tribunal proceeding, you will be given a written statement of the unclassified factual basis for your classification as an enemy combatant.
3. You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence. Your Personal Representative will attend in either case.
4. You will be provided with an interpreter during the Tribunal hearing if necessary.
5. You will be able to present evidence to the Tribunal, including the testimony of witnesses. If those witnesses you propose are not reasonably available, their written testimony may be sought. You may also present written statements and other documents. You may testify before the Tribunal but will not be compelled to testify or answer questions.

As a matter separate from these Tribunals, United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention. You will be notified in the near future what procedures are available should you seek to challenge your detention in U.S. courts. Whether or not you decide to do so, the Combatant Status Review Tribunal will still review your status as an enemy combatant.

If you have any questions about this notice, your Personal Representative will be able to answer them.

[\*Text of Notice translated, and delivered to detainees 12-14 July 2004]

Enclosure (4)

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354 U.S. 363, \*; 77 S. Ct. 1152, \*\*;  
1 L. Ed. 2d 1403, \*\*\*; 1957 U.S. LEXIS 658

SERVICE v. DULLES ET AL.

No. 407

SUPREME COURT OF THE UNITED STATES

354 U.S. 363; 77 S. Ct. 1152; 1 L. Ed. 2d 1403; 1957 U.S. LEXIS 658

April 2-3, 1957, Argued  
June 17, 1957, Decided

**PRIOR HISTORY:**

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Petitioner sought review of a decision of the United States Court of Appeals for the District of Columbia Circuit, which affirmed petitioner's discharge from his employment as a Foreign Service Officer in the Foreign Service of the United States.

**OVERVIEW:** The Supreme Court reversed the appeals court's judgment affirming petitioner's discharge from his employment as a Foreign Service Officer in the Foreign Service of the United States, because the Secretary of State failed to comply with U.S. Dept. of State, Manual of Regulations and Procedures § 393.1 (1951). Petitioner argued that U.S. Dept. of State, Manual of Regulations and Procedures, § 390 et seq. (1949) remained applicable to his case, since he was not advised of the existence of the 1951 Regulations. The Supreme Court stated that it was unnecessary to make a choice between the two sets of regulations, finding that the manner in which petitioner was discharged was inconsistent with both. The necessary effect of that U.S. Dept. of State, Manual of Regulations and Procedures § 393.1 of the 1951 Regulations was to subject the exercise of the Secretary's McCarran Rider authority under 65 Stat. 581 to the substantive standards prescribed by that section and also to the procedural requirements that such cases were to be decided on all the evidence and after consideration of the complete file, arguments, briefs, and testimony presented.

**OUTCOME:** The Supreme Court reversed the judgment of the court below.

**CORE TERMS:** regulations, rider, loyalty, reasonable doubt, advisable, Public Law, security risk, terminate, favorable, disloyal, duty, post-audit, promulgated, unfavorable, discharged, removal, absolute discretion, recommendation, departmental, termination, terminated, effective, effected, handling, binding, invalid, national security, alien, notify, deem

**LexisNexis(R) Headnotes** ♦ [Hide Headnotes](#)

Governments > State & Territorial Governments > Employees & Officials 

**HN1** ↓ The following procedural scheme has been established by U.S. Dept. of State, Manual of Regulations and Procedures § 390 et seq. (1949) relating to loyalty and security cases: The filing of charges, upon notice to the employee involved, accompanied by adequate factual details as to their basis, and a statement as to the employee's work and pay status pending further action; and a hearing on such charges, if requested by the employee, before the Department's Loyalty Security Board, whose determination, together with the record of the hearings, were then to be

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forwarded to the Deputy Under Secretary for review. Upon such review, the Deputy Under Secretary was empowered (i) to return the case to the Board for further investigation or action; (ii) to decide in favor of the employee, and to so notify him in writing; or (iii) to decide against the employee, and to notify him of his right to appeal to the Secretary of State within 10 days thereafter. [More Like This Headnote](#)

[Governments > Federal Government > Employees & Officials](#) 

**HN2** In the event of an appeal of a loyalty and security case under U.S. Dept. of State, Manual of Regulations and Procedures § 390 et seq. (1949), the Secretary of State is empowered (i) to decide favorably to the employee, and to so notify him in writing; or (ii) to decide against the employee, and to notify him of such decision, and further, in a loyalty case, of his right to appeal to the Loyalty Review Board within 20 days thereafter. If, upon such an appeal, the Loyalty Review Board decides adversely to the employee and makes an "advisory" recommendation to the Secretary that the employee should be removed from employment under the applicable loyalty standards, the Department is to take prompt administrative action to that end. On the other hand if the Board decides favorably to the employee the Secretary is empowered (i) to restore the employee to duty and "close the case"; (ii) to permit the employee to resign; or (iii) to terminate his employment under the authority conferred by the McCarran Rider "or other appropriate authority." [More Like This Headnote](#)

[Governments > Federal Government > Employees & Officials](#) 

**HN3** Under U.S. Dept. of State, Manual of Regulations and Procedures § 390 et seq. (1949), following a decision of the Deputy Under Secretary upon a determination of Department Loyalty Security Board, there is an appeal to Secretary only if Deputy's action is adverse to employee. Under the Regulations the action of Deputy Under Secretary, if favorable to employee, is final, the Secretary reserving to himself power to act further only if his Deputy's action is unfavorable to employee. There is likewise an appeal to Loyalty Review Board from Secretary's decision only if his action is adverse to the employee. A decision of the Secretary favorable to the employee is final, and immune from further action by the Loyalty Review Board on post-audit. The Secretary reserves right to deal with such a case under his McCarran Rider authority (65 Stat. 581), outside Regulations, only in instances where, upon employee's appeal to the Loyalty Review Board from an unfavorable decision by the Secretary, the decision of that body is favorable to the employee. [More Like This Headnote](#)

[Governments > Federal Government > Employees & Officials](#) 

**HN4** See U.S. Dept. of State, Manual of Regulations and Procedures § 393.1 (1951).

[Governments > Federal Government > Employees & Officials](#) 

**HN5** Since U.S. Dept. of State, Manual of Regulations and Procedures § 391.1 (1951), which is incorporated by reference into U.S. Dept. of State, Manual of Regulations and Procedures § 393.1, specifically subjects the exercise of the Secretary's McCarran Rider authority (65 Stat. 481) to the operation of the 1951 Regulations, it seems clear that the necessary effect of U.S. Dept. of State, Manual of Regulations and Procedures § 393.1 is to subject the exercise of that authority to the substantive standards prescribed by that section, namely, those established by the Act of August 26, 1950, and also to the procedural requirements that such cases must be decided "on all the evidence" and after consideration of the complete file, arguments, briefs, and testimony presented. The essential meaning of the section, in other words, is that the Secretary's decision is required to be on the merits. While it is true that under the McCarran Rider the Secretary is not obligated to impose upon himself these more rigorous substantive and procedural standards, neither is he prohibited from doing so, and having done so he can not, so long as the Regulations remain unchanged, proceed without regard to them. [More Like This Headnote](#)

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**SYLLABUS:** This suit was brought by petitioner, a Foreign Service Officer, to test the validity of his discharge by the Secretary of State under these circumstances: The State Department's Loyalty Security Board had repeatedly cleared petitioner of charges of being disloyal and a security risk; and its findings had been

approved by the Deputy Under Secretary, whose approval of findings favorable to an employee were final under the applicable Regulations. No finding unfavorable to petitioner ever had been made by the Department's Loyalty Security Board or the Deputy Under Secretary, and no recommendation unfavorable to petitioner ever had been made by the Deputy Under Secretary to the Secretary. Nevertheless, the Loyalty Review Board of the Civil Service Commission, on its own motion, conducted its own hearing, found that there was reasonable doubt as to petitioner's loyalty, and advised the Secretary that petitioner "should be forthwith removed from the rolls of the Department of State." Acting solely on the basis of the finding of that Board, and without making any independent determination of his own on the record in the case, the Secretary discharged petitioner on the same day. He based this action on Executive Orders No. 9835 and No. 10241 and § 103 of Public Law 188, 82d Congress, commonly known as the McCarran Rider, which authorized the Secretary, "in his absolute discretion," to "terminate the employment of any officer . . . of the Foreign Service . . . whenever he shall deem such termination necessary or advisable in the interests of the United States." Held: Petitioner's discharge was invalid, because it violated Regulations of the Department of State which were binding on the Secretary; and the judgment is reversed. Pp. 365-389.

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

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

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

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

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

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

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

3. Since the Secretary did not comply with the applicable Regulations of his Department, which were binding on him, petitioner's dismissal cannot stand. *Accardi v. Shaughnessy*, 347 U.S. 260. Pp. 388-389.

**COUNSEL:** C. Edward Rhett argued the cause for petitioner. With him on the brief were Warner W. Gardner and Alfred L. Scanlan.

Donald B. MacGuineas argued the cause for respondents. With him on the brief were Solicitor General Rankin, Assistant Attorney General Doub and Paul A. Sweeney.

**JUDGES:** Warren, Black, Frankfurter, Douglas, Burton, Harlan, Brennan, Whittaker; Clark took no part in the consideration or decision of this case.

**OPINIONBY:** HARLAN

**OPINION:** [\*365] [\*\*\*1406] [\*\*1153] MR. JUSTICE HARLAN delivered the opinion of the Court.

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

At the time of his discharge in 1951, Service had been a Foreign Service Officer for some sixteen years, during ten of which, 1935-1945, he had served in various capacities in China. In April 1945, shortly after his return to this country, Service became involved in the so-called Amerasia investigation through having furnished to one Jaffe, the editor of the Amerasia magazine, copies of certain of his Foreign Service reports. Two months later, Service, Jaffe and others were arrested and charged with violating the Espionage Act, n1 but the grand jury, in August 1945, refused to indict Service. He was thereupon restored to active duty in the Foreign Service, from which he had been on leave of absence since his arrest, and returned to duty in the Far East.

----- Footnotes -----

n1 Act of June 15, 1917, c. 30, 40 Stat. 217, as amended.

----- End Footnotes-----

From then on Service's loyalty and standing as a security risk were under recurrent investigation and review by a number of governmental agencies under the provisions of Executive Order No. 9835, n2 establishing the President's Loyalty Program, and otherwise. He was accorded successive "clearances" by the **【\*\*1154】** State Department **【\*366】** in each of the years 1945, 1946 and 1947, n3 and a fourth clearance in 1949 by that Department's Loyalty Security Board, which, however, was directed by the Loyalty Review Board of the Civil Service Commission, when the case was examined by it on "post-audit," n4 to prefer charges against Service and conduct a hearing thereon. This was done, and on October 6, 1950, after extensive hearings, the Department Board concluded that "reasonable grounds do not **【\*\*\*1407】** exist for belief that . . . Service is disloyal to the Government of the United States . . .," and that ". . . he does not constitute a security risk to the Department of State." These findings were approved by the Deputy Under Secretary of State, acting pursuant to authority delegated to him by the Secretary. n5 Again, however, the Loyalty Review Board, on post-audit, remanded the case to the Department Board for further consideration. n6 Such consideration was had, this time under the more stringent loyalty standard established by Executive Order No. 10241, n7 amending the earlier Executive Order No. 9835, and again the Department Board, on July 31, 1951, decided favorably to Service. This determination was likewise approved by the Deputy Under Secretary. However, on a further post-audit, the Loyalty Review Board decided to conduct a new hearing itself, which resulted this time in the Board's finding that there was a reasonable doubt as to Service's loyalty, and **【\*367】** in its advising the Secretary of State, on December 13, 1951, that in the Board's opinion Service "should be forthwith removed from the rolls of the Department of State" and that "the Secretary should approve and adopt the proceedings" had before the Board. n8 On the same **【\*368】** day the **【\*\*1155】** Department notified Service of his discharge, **【\*\*\*1408】** effective at the close of business on the following day.

----- Footnotes -----

n2 12 Fed. Reg. 1935.

n3 Hearings before the Subcommittee of the House Committee on Appropriations on the Department of State Appropriation Bill for 1950, 81st Cong., 1st Sess. 298.

n4 See Peters v. Hobby, 349 U.S. 331, 339-348, for a discussion of the then-existing "post-audit" procedure.

n5 See pp. 382-386 and note 16, *infra*.

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n6 This action was based on "supplementary information . . . received from the Federal Bureau of Investigation," the nature of which does not appear in the record.

n7 16 Fed. Reg. 3690.

n8 The essence of the Loyalty Review Board's action, and its relation to the prior departmental proceedings with respect to Service, are summarized in the State Department's press release of December 13, 1951, as follows:

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

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

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

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

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

"The Opinion of the Loyalty Review Board stressed the points made above by the Chairman -- that is, it stated that the Board was not required to find and did not find Mr. Service guilty of disloyalty, but it did find that his intentional and unauthorized disclosure of confidential documents raised reasonable doubt as to his loyalty. The State Department Board while censoring [*sic*] Mr. Service for indiscretions, believed that the experience Mr. Service had been through as a result of his indiscretions in 1945 had served to make him far more than normally security conscious. It found also that no reasonable doubt existed as to his loyalty to the Government of the United States. On this point the State Department Board was reversed.

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

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

----- End Footnotes-----

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

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"2. On December 13, 1951, I received a letter from the Chairman of the Loyalty Review Board of the Civil

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Service Commission submitting the Board's opinion, dated December 12, 1951, in the case of John S. Service, a Foreign Service officer of the Department of State and the plaintiff in this action.

"3. On that same day I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as [\*369] amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.

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

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

[\*370] Section 103 of Public Law 188, 82d Congress, upon which the Secretary thus relied, was the so-called McCarran Rider, first enacted as a rider to the Appropriation Act for 1947, which provided:

"Notwithstanding the provisions of . . . any other law, the Secretary of State may, in his absolute discretion, . . . terminate the employment of any officer or employee [\*\*\*1409] of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States . . . ." n10

Similar provisions were re-enacted in each subsequent appropriation act until 1953. n11

----- Footnotes -----

n9 65 Stat. 581.

n10 60 Stat. 458.

n11 See 61 Stat. 288, 62 Stat. 315, 63 Stat. 456, 64 Stat. 768, 65 Stat. 581, 66 Stat. 555. All of these provisions are referred to in this opinion as "the McCarran Rider."

----- End Footnotes -----

After an attempt to secure further administrative review of his discharge proved unsuccessful, petitioner brought this action, in which he sought a declaratory judgment that his discharge was invalid; an order directing the respondents to expunge from their records all written statements reflecting that his employment had been terminated because there was a reasonable doubt as to his loyalty; and an order directing the

Secretary to reinstate him to his employment and former grade in the Foreign Service, with full restoration of property rights and payment of accumulated salary.

While cross-motions for summary judgment were pending before the District Court, this Court rendered its decision in *Peters v. Hobby*, 349 U.S. 331, holding that under Executive Order No. 9835, the Loyalty Review Board had no authority to review, on post-audit, determinations favorable to employees made by department or agency [\*371] authorities, or to adjudicate individual cases on its own motion. On the authority of that decision, the District Court declared the finding and opinion of the Loyalty Review Board respecting Service to be a nullity, and directed the Civil Service Commission to expunge from its records the Board's finding that there was reasonable doubt as to his loyalty. But since petitioner's removal rested not only upon Executive Order No. 9835, as amended, but also upon the McCarran Rider, the District Court sustained petitioner's discharge as a valid exercise of the "absolute discretion" conferred upon the Secretary by the latter provision, and granted summary judgment in favor of respondents in all other respects. n12 The Court of Appeals affirmed, 98 U. S. App. D. C. 268, 235 F.2d 215, [\*372] and [\*\*1157] this Court granted certiorari, 352 U.S. 905, because [\*\*\*1410] of the importance of the questions involved to federal administrators and employees alike.

[\*\*\*HR1] [1]

[\*\*\*HR2] [2]

----- Footnotes -----

n12 The District Court's opinion is unreported. Actually, the Secretary could be considered to have power to discharge petitioner as he did only by virtue of the McCarran Rider. Petitioner was an officer in the Foreign Service of the United States, and as such was entitled to the protection of the Foreign Service Act of 1946, as amended. 22 U. S. C. § 801 *et seq.* That statute authorizes the Secretary of State to separate officers from the Foreign Service "for unsatisfactory performance of duty," *id.*, § 1007, or for "misconduct or malfeasance," *id.*, § 1008. However, under both sections, an officer may not be separated without a hearing before the Board of the Foreign Service established by § 211 of the Act, 22 U. S. C. § 826, and his unsatisfactory performance of duty or misconduct must be established at that hearing. No such hearing was ever afforded petitioner. Executive Order No. 9835 did not vest any additional authority in the heads of administrative agencies to discharge employees. It merely established new standards and procedures for effecting discharges under whatever independent legal authority existed for those discharges. Cf. *Cole v. Young*, 351 U.S. 536, 543-544. The only statutory provision which could be deemed to authorize the Secretary to dismiss petitioner without observance of the provisions of the Foreign Service Act was therefore the McCarran Rider. The latter provision thus was an indispensable supplement to the Department's authority if it was to proceed against petitioner under the Loyalty-Security Regulations as it did. See p. 376, *infra*.

----- End Footnotes -----

[\*\*\*HR3] [3]

Petitioner here attacks the validity of the termination of his employment on two separate grounds: *First*, he contends that the Secretary's exercise of discretion was invalid since the findings and opinion of the Loyalty Review Board, upon which alone the Secretary acted, were void, because they were rendered without jurisdiction n13 and were based upon procedures assertedly contrary to due process of law. Even conceding that the Secretary's powers under the McCarran Rider were such that he was not required to state the grounds for his decision, petitioner urges, his decision cannot stand because he did in fact rely upon grounds that are invalid. See *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80; *Perkins v. Elg*, 307 U.S. 325. *Second*, petitioner contends that the Secretary's action is subject to attack under the principles established by this Court's decision in *Accardi v. Shaughnessy*, 347 U.S. 260, namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature. Regulations relating to "loyalty and security of employees" which had been promulgated by the Secretary, petitioner asserts, were intended to govern discharges effected under the McCarran Rider as well as those effected under Executive Order No. 9835, as amended, and because those regulations were violated by the Secretary in this case, so petitioner claims, his dismissal by the Secretary cannot stand. Since, for reasons discussed hereafter, we

have concluded that petitioner's : and contention must be sustained, w o not reach the first.

----- Footnotes -----

n13 See *Peters v. Hobby, supra*, 349 U.S., at 342-343.

----- End Footnotes-----

**[\*373]** The questions to which we address ourselves therefore are as follows: (1) Were the departmental Regulations here involved applicable to discharges effected under the McCarran Rider? and (2) Were those Regulations violated in this instance? We do not understand the respondents to dispute that the principle of *Accardi v. Shaughnessy, supra*, is controlling, if we find that the Regulations were indeed applicable and were violated. We might also add that we are not here concerned in any wise with the merits of the Secretary's action in terminating the petitioner's employment.

I.

**\*\*\*HR4** [4]

We think it is not open to serious question that the departmental Regulations upon which petitioner relies were applicable to McCarran Rider discharges as well as to those effected pursuant to the Loyalty-Security program. The terms of the Regulations, the fact that the Department itself proceeded in this very case under those Regulations down to the point of petitioner's discharge, representations made by the State Department to Congress relating to its practices under the McCarran Rider, and the announced wish of the President to the effect that McCarran Rider authority should be exercised subject to procedural **\*\*\*1158** safeguards designed to protect "the personal liberties of employees," all combine to lead to that conclusion. We also **\*\*\*1411** think it clear that these Regulations were valid, so far as their validity is put in issue by the respondents in this case.

*A. The Regulations.*

When the Department's proceedings against the petitioner, which resulted in the "clearances" of October 6, 1950, and July 31, 1951, were begun, the Regulations in effect were those of March 11, 1949, entitled "Regulations and Procedures relating to Loyalty and Security of **[\*374]** Employees, U.S. Department of State." n14 Section 391 stated the "Authority and General Policy" of the Regulations in three subsections. Subsection 391.1 stated that it was "highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk." Subsection 391.2 stated that so far as the Regulations related to the handling of loyalty cases, they were promulgated in accordance with Executive Order No. 9835, which had recognized the "necessity for removing disloyal employees from the Federal service and for refusing employment therein to disloyal persons," and the "obligation to protect employees and applicants from unfounded accusations of disloyalty." Subsection 391.3 referred to the language of the McCarran Rider, noting that the Secretary of State had been granted by Congress the right, in his absolute discretion, "to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States." "In the exercise of this right," the subsection concluded, "the Department will, so far as possible, n15 afford its employees the same protection as those provided under the Loyalty Program." And, as we shall see hereafter, the Regulations made no provision for action by the **[\*375]** Secretary himself, under the McCarran Rider or otherwise, except following *unfavorable* action in the employee's case by the Department Loyalty Security Board, after full hearing before that Board on the charges against him, and approval of the Board's action by the Deputy Under Secretary. n16

----- Footnotes -----

n14 U.S. Department of State, Manual of Regulations and Procedures (1949), § 390 *et seq.*

**\*\*\*HR5** [5]

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n15 This qualification is without significance here in view of the fact that the petitioner's case before the Department was handled, down to the time of his discharge by the Secretary, under these Regulations. See p. 376, *infra*. Moreover, this phrase was deleted in the 1951 revision of the Regulations, as we note hereafter, p. 376, *infra*, and the respondents have insisted here that the 1951 revision is controlling, see p. 382, *infra*.

n16 We follow the parties in this case in using interchangeably the terms "Deputy Under Secretary" and "Assistant Secretary -- Administration." When the Department's 1949 Regulations were promulgated, the official charged with duties under them was the "Assistant Secretary -- Administration." At some time thereafter, however, that official's functions were apparently transferred to a Deputy Under Secretary. Cf. Act of May 26, 1949, §§ 3, 4, 63 Stat. 111. To avoid confusion, we have used exclusively the latter title in the text of this opinion, regardless of its technical correctness in the particular instance.

----- End Footnotes-----

In May and September 1951, prior to the time of petitioner's discharge, the Regulations were revised, and the amended § 391 provided even more explicitly than the original that the procedures and standards established were intended to govern exercise of the authority granted by the McCarran Rider. After stating in the first subsection n17 that the [\*\*\*1412] Regulations [\*\*1159] were adopted to implement the Department's policy that "no person be employed in the Department n18 who is disloyal or who constitutes a security risk," the section continues in the next two subsections n19 to state in effect that the Regulations relating to the handling of *loyalty* cases were promulgated in accordance with Executive Order No. 9835, and that those relating to *security* cases were promulgated under [\*376] the authority of the Act of August 26, 1950 n20 and the McCarran Rider. n21 The phrase "so far as possible," in reference to McCarran Rider authority, was deleted. The Regulations thus drew upon all the sources of authority available to the Secretary with reference to such cases, and purported to set forth definitively the procedures and standards to be followed in their handling.

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n17 "391.1 *Policy*." For the Department's 1951 Regulations see U.S. Department of State, Manual of Regulations and Procedures (1951), Vol. I, § 390 *et seq*.

n18 "Department" is defined as including "the Foreign Service of the United States." § 391.3.

n19 "391.2 *Loyalty Authority*," and "391.3 *Security Authority*."

n20 This statute is referred to in the subsection as "Public Law 733, 81st Congress," being the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. §§ 22-1, 22-3, which gave to the State Department, among other departments and agencies of the Government, suspension and dismissal powers over their civilian employees when deemed necessary "in the interest of the national security of the United States." Cf. *Cole v. Young*, 351 U.S. 536.

n21 Referred to in the subsection as "General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress."

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The administrative proceedings held in petitioner's case were unquestionably conducted on the premise that the Regulations were applicable in this instance. The charges were based on the Regulations, and a copy of the Regulations was sent to Service along with the letter of charges. The hearing was scheduled under § 395 of the 1949 Regulations. In its opinion exonerating Service, the Department Board noted, following the Regulations, that "the issues here are (1) loyalty, and (2) security risk." The Board's favorable recommendations came twice before the Deputy Under Secretary for review under §§ 395.6 and 396.7 of these Regulations, and were approved by him. Later, before the Civil Service Commission's Loyalty Review Board, an additional charge was added to the Department's original charges by stipulation of the parties, and the stipulation expressly referred to §§ 392.2 and 393.1a of the Regulations. Indeed, at no time during any of the administrative proceedings [\*377] in this case was there any suggestion that the Regulations were not applicable to the entire proceedings and binding upon all parties to the case.

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

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

". . . The policy of the Department prior to the passage of the McCarran rider was that if there was reasonable doubt as to an employee's loyalty, his employment was required to be terminated. The McCarran rider freed the hands of the Department in making this policy [\*\*\*1413] effective. Basically any reasonable doubt of an employee's loyalty if based on substantial evidence was to be resolved in favor of the Government. After enactment of the McCarran rider the Department did not contemplate that the legislation required or that the people of this [\*\*1160] country would countenance the use of 'Gestapo' methods or harassment or persecution of loyal employees who were American citizens on flimsy evidence or hearsay and innuendo. The Department proceeded to develop appropriate procedures designed to implement fully and properly the authority granted the Department under the McCarran rider.

"The McCarran rider . . . was the first of a series of provisions included in each subsequent appropriation act which authorized the Secretary of State in his absolute discretion to 'terminate the employment [\*378] of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.' Accordingly, effective during the 1947 fiscal year, and each fiscal year thereafter, the Department considered the McCarran rider as an additional standard for dealing with security problems in the Department. . . . *In [its] considered view the McCarran rider was subject to procedural limitations.* The McCarran rider was not interpreted as permitting reckless discharge or the exercise of arbitrary whims.

....

"The President's loyalty order of March 21, 1947, prescribed a comprehensive set of standards governing the executive branch as a whole. It was deemed applicable to the Department of State, as well as to other agencies. *The unique powers conferred on the Department as a result of continuous reenactment of the McCarran rider led the Department to promulgate regulations which would encompass its duties and powers both under the Executive order and under the McCarran rider.*" n22

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n22 S. Rep. No. 2108, 81st Cong., 2d Sess. 15-16 (emphasis supplied).

----- End Footnotes-----

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D. *The President's Letter.*

That the policy of the Secretary to subject his plenary powers under the McCarran Rider to procedural limitations was deliberately adopted, and rested on decisions taken at the highest level, is evidenced by a letter dated September 6, 1950, from President Truman to the Secretary of State, which was made a part of the record below. In that letter, the President advised the Secretary that he had just approved H. R. 7786, the General Appropriation Act, 1951, 64 Stat. 595, 768, § 1213 of **[\*379]** which re-enacted the McCarran Rider for the current fiscal year. The President continued:

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

"In order that officers and employees of the Department of State may be afforded the same protection as that afforded by Public Law 733, it is my desire that you follow the procedures set forth in that law in carrying out the provisions of section **[\*\*\*1414]** 1213 of the General Appropriations Act."

In view of the terms of the Regulations, the course of procedure followed by the Department, and the background materials we have noted, we think that **[\*\*1161]** there is no room for doubt that the departmental Regulations for the handling of loyalty and security cases were both intended and considered by the Department to apply in this instance. We cannot accept either of the respondents' present arguments to the contrary. The first argument, as put by the District Court, whose language was adopted by the Court of Appeals, n23 is:

". . . It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 188. This power of summary dismissal would not have been granted the **[\*380]** Secretary of State by the Congress if the Congress was satisfied that the interests of this country were adequately protected by Executive Order 9835."

**[\*\*\*HR6]** [6]

**[\*\*\*HR7]** [7]

We gather from this that the lower courts thought that the Secretary was powerless to bind himself by these Regulations as to McCarran Rider discharges based on loyalty or security grounds. We do not think this is so. Although Congress was advised in unmistakable terms that the Secretary had seen fit to limit by regulations the discretion conferred upon him, see pp. 377-378, *supra*, it continued to re-enact the McCarran Rider without change for several succeeding years. n24 Cf. *Labor Board v. Gullett Gin Co.*, 340 U.S. 361, 366; *Fleming v. Mohawk Co.*, 331 U.S. 111, 116. Nor do we see any inconsistency between this statute and the effect of the Regulations upon the Secretary under *Accardi v. Shaughnessy*, 347 U.S. 260, already discussed, pp. 372-373, *supra*. *Accardi*, indeed, involved statutory authority as broad as that involved here. n25

----- Footnotes -----

n23 98 U. S. App. D. C., at 271, 235 F.2d, at 218.

n24 See note 11, *supra*.

n25 *I. e.*, § 19 (c) of the Immigration Act of 1917, as amended: "In the case of any alien (other than one to

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whom subsection (d) is applicable who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act." 62 Stat. 1206, 8 U. S. C. (1946 ed., Supp. V) § 155 (c).

----- End Footnotes-----

The respondents' second argument is that the Regulations refer explicitly to discharges based on loyalty and security grounds, but make no reference to discharges [\*381] deemed "necessary or advisable in the interests of the United States" -- the sole McCarran Rider standard -- and hence were not applicable to such discharges. But, as has already been demonstrated, both the Regulations and their historical context show that the Regulations were applicable to McCarran Rider discharges, at least to the extent that they were based on loyalty or security grounds, and we do not see how it could seriously be considered, as the respondents now seem to urge, that Service was not discharged on such grounds. The Secretary's affidavit, n26 and also the Department's formal notice to Service of his discharge, n27 [\*\*\*1415] both of which, among other things, refer to Executive Order [\*\*1162] No. 9835 as well as to the McCarran Rider as authority for the Secretary's action, unmistakably show that the discharge was based on such grounds.

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n26 See pp. 368-369, *supra*.

n27 This notice read:

"My dear Mr. Service:

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

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

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

----- End Footnotes-----

[\*382] We now turn to the question whether the manner of petitioner's discharge was consistent with the Department's Regulations.

II.

Preliminarily, it must be noted that the parties are in dispute as to which of the two sets of Regulations -- those of 1949 or those of 1951 -- is applicable to petitioner's case, assuming, as we have held, that one or the other must govern. The departmental proceedings against petitioner were begun and were conducted under the 1949 Regulations. However, prior to petitioner's discharge in December 1951, the revised

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Regulations of May and September 1951 had become effective, and it is under those Regulations, the respondents say, that Service's discharge must be judged. n28 On the other hand, the petitioner contends that the 1949 Regulations remained applicable to his case, since he was not advised of the existence of the 1951 Regulations until after his discharge had been accomplished and the present court proceedings had been commenced. n29 However, it is unnecessary for us to make a choice between the two sets of Regulations, for we find the manner in which petitioner was discharged to have been inconsistent with both.

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n28 The respondents argue that the proper rule to be applied is that of *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, holding that a change in the applicable law after a case has been decided by a *nisi prius* court, but before decision on appeal, requires the appellate court to apply the changed law. And see *Ziffrin, Inc. v. United States*, 318 U.S. 73.

n29 Petitioner argues that the decisions cited in note 28, *supra*, are not in point here because, *inter alia*, the changed regulations were invalid as to him under the Federal Register Act, 49 Stat. 502, 44 U. S. C. § 307, and the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. § 1002, because not published in the Federal Register.

----- End Footnotes-----

**[\*383]** A. *The 1949 Regulations.*

**[\*\*\*HR8]** [8]

In terms of the 1949 Regulations, the vice we find in petitioner's discharge is that the Secretary had no right to dismiss the petitioner for loyalty or security reasons unless and until the Deputy Under Secretary, acting upon the findings of the Department's Loyalty Security Board, had recommended such dismissal. In other words, the Deputy Under Secretary in this instance having approved the findings of the Loyalty Security Board favorable to petitioner, the Secretary, consistently **[\*\*\*1416]** with these Regulations, could not, without more, dismiss the petitioner.

The basis for this conclusion will appear from a consideration of <sup>HN1</sup>the procedural scheme established by the 1949 Regulations relating to loyalty and security cases. In outline that scheme involved the following procedural steps:

(1) The filing of charges, upon notice to the employee involved, accompanied by adequate factual details as to their basis, and a statement as to the employee's **[\*\*1163]** work and pay status pending further action. n30

(2) A hearing on such charges, if requested by the employee, before the Department's Loyalty Security Board, whose determination, together with the record of the hearings, were then to be forwarded to the Deputy Under Secretary for review. n31

(3) Upon such review the Deputy Under Secretary was empowered (i) to return the case to the Board for further investigation or action; (ii) to decide in favor of the employee, and to so notify him **[\*384]** in writing; or (iii) to decide against the employee, and to notify him of his right to appeal to the Secretary within 10 days thereafter. n32

<sup>HN2</sup>(4) In the event of such an appeal, the Secretary was empowered (i) to decide favorably to the employee, and to so notify him in writing; or (ii) to decide against the employee, and to notify him of such decision, and further, in a loyalty case, of his right to appeal to the Loyalty Review Board within 20 days thereafter. n33

(5) If, upon such an appeal, the Loyalty Review Board decided adversely the employee and made an "advisory" recommendation to the Secretary that the employee should be removed from employment under the applicable loyalty standards, the Department was to take prompt administrative action to that end. On the other hand if the Board decided favorably to the employee the Secretary was empowered (i) to restore the employee to duty and "close the case"; (ii) to permit the employee to resign; or (iii) to terminate his employment under the authority conferred by the McCarran Rider "or other appropriate authority." n34

----- Footnotes -----

n30 §§ 394.13, 394.15, 395.1.

n31 §§ 395.1, 395.53.

n32 §§ 395.6, 396.11.

n33 §§ 396.2, 396.3.

n34 §§ 396.4, 396.5.

----- End Footnotes----- **\*\*\*HR9** [9]

From this survey, three things appear as to the handling of loyalty and security cases under the 1949 Regulations which are of significance in this case. *First*, <sup>HN3</sup> following the decision of the Deputy Under Secretary upon a determination of the Department Loyalty Security Board, there was to be an appeal to the Secretary *only* if the Deputy's action had been adverse to the employee. In other words, under these Regulations the action of the **\*385** Deputy Under Secretary, if *favorable* to the employee, was to be final, the Secretary reserving to himself power to act further only if his Deputy's action was *unfavorable* to the employee. n35 *Second*, there was likewise **\*\*\*1417** an appeal to the Loyalty Review Board from the Secretary's decision *only* if his action was *adverse* to the employee. Again, in other words, a decision of the Secretary favorable to the employee was to be final, and immune **\*\*1164** from further action by the Loyalty Review Board on post-audit, a rule since confirmed by our decision in *Peters v. Hobby, supra*. *Third*, the Secretary reserved the right to deal with such a case under his McCarran Rider authority, outside the Regulations, only in instances where, upon an employee's appeal to the Loyalty Review Board from an unfavorable decision by the Secretary, the decision of that body was favorable to the employee.

----- Footnotes -----

n35 That this was understood to be the effect of the Regulations is indicated by Department of State Press Release No. 247, March 13, 1950, which is reprinted in S. Rep. No. 2108, 81st Cong., 2d Sess. 254. Deputy Under Secretary of State John E. Peurifoy is there quoted as stating, in reply to charges made on the floor of the Senate:

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

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

"My decisions on matters of loyalty and security within the Department are *final*, subject, however, under the law, *in certain instances* to appeal to the Secretary and the President's Loyalty Review Board. Since the loyalty and security program was launched in the Department, however, there has not been a single instance

in which a decision made by me has been reversed or overruled in any way by Secretary Acheson." (Emphasis supplied.)

----- End Footnotes-----

Granted, as the respondents argue, that these Regulations gave the petitioner (a) no right of appeal to the Secretary from the Deputy Under Secretary's favorable [\*386] decision, and (b) no right of appeal at all from the action of the Loyalty Review Board, it does not follow, as the respondents then argue, that the Secretary was free to dismiss the petitioner. For, as has already been observed, the Regulations left the Secretary *functus officio* with respect to such cases once the Deputy Under Secretary had made a determination favorable to the employee. So here when the Deputy Under Secretary approved the Loyalty Security Board's action of July 31, 1951, clearing the petitioner, under these Regulations the case against Service was closed. n36 Hence Service's subsequent discharge by the Secretary must be deemed to have been in contravention of these 1949 Regulations. n37 The situation under the 1949 Regulations was thus closely analogous to that which obtained in *Accardi v. Shaughnessy, supra*. There, the Attorney General bound himself not to exercise his discretion until he had received an impartial recommendation from a subordinate board. Here, the [\*387] Secretary bound himself not to act at all in cases such as this, except upon appeal by employees from determinations unfavorable to them. We see no relevant ground for distinction.

----- Footnotes-----

n36 Section 396.7 of the Regulations provided:

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

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

n37 In view of this conclusion, it becomes unnecessary to consider the other respects in which petitioner claims that his discharge contravened the 1949 Regulations.

----- End Footnotes----- -B. The 1951 Regulations.

\*\*\*HR10 [10]

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

\*\*\*1418 HN47 "The standard for removal from employment in the Department of State under the authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented." (Emphasis added.)

The "authority referred to in sect 391.3," as we have already noted, included the McCarran Rider. n38 In light of the former Secretary's affidavit n39 there is no room for dispute that no attempt [\*\*1165] was made to comply with this section of the Regulations, n40 as indeed the respondents' brief virtually concedes.

----- Footnotes -----

n38 See pp. 375-376, *supra*.

n39 See pp. 368-369, *supra*.

[\*\*HR11] [11]

n40 We do not, of course, imply that the Regulations precluded the Secretary from discharging any individual without *personally* reading the "complete file" and considering "all the evidence." No doubt the Secretary could delegate that duty. But nothing of the kind appears to have been done here.

----- End Footnotes----- [\*\*HR12] [12]

The respondents argue that this provision was not violated in petitioner's case because "the only decision to which Section 393.1 relates is that the removal of the [\*\*388] officer or employee involved is 'necessary or advisable in the interest of national security,' " the standard laid down in the Act of August 26, 1950, n41 and that "nothing in this section purports to prescribe the procedure to be followed in determining that removal is 'necessary or advisable in the interests of the United States,'" the standard contained in the McCarran Rider. But <sup>HNS</sup> since § 391.3, which is incorporated by reference into § 393.1, specifically subjected the exercise of the Secretary's McCarran Rider authority, in such cases as this, to the operation of the 1951 Regulations, it seems clear that the necessary effect of § 393.1 was to subject the exercise of that authority to the substantive standards prescribed by that section, namely, those established by the Act of August 26, 1950, n42 and also to the procedural requirements that such cases must be decided "on all the evidence" and "after consideration of the complete file, arguments, briefs, and testimony presented." The essential meaning of the section, in other words, was that the Secretary's decision was required to be on the merits. While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.

----- Footnotes -----

n41 See note 20, *supra*.

n42 Sections 393.2 and 393.3 further refined the standard by defining five classes of persons constituting security risks, and listing five factors which were to be taken into account, together with possible mitigating circumstances.

----- End Footnotes-----

It being clear that § 393.1 was not complied with by the Secretary in this instance, it follows that under the *Accardi* doctrine petitioner's dismissal cannot stand, [\*\*389] regardless of whether the 1951, rather than the 1949, Regulations are deemed applicable in his case. n43

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n43 Because of this conclusion it is unnecessary to deal with the other respects in which petitioner claims his discharge violated the 1951 Regulations.

----- End Footnotes-----

For the foregoing reasons the judgment of the Court of Appeals must be reversed, and the case remanded to the District Court for [\*\*\*1419] further proceedings consistent with this opinion.

*It is so ordered.*

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

**REFERENCES:** ♦ [Return To Full Text Opinion](#)

Annotation References:

1. Supreme Court decisions involving loyalty investigations, 95 L ed 875, 877 and 100 L ed 661, 663.
2. Administrative decision by officer not present when evidence was taken, [18 ALR 2d 606](#).

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359 U.S. 535, \*; 79 S. Ct. 968, \*\*;  
3 L. Ed. 2d 1012, \*\*\*; 1959 U.S. LEXIS 899

VITARELLI v. SEATON, SECRETARY OF THE INTERIOR, ET AL.

No. 101

SUPREME COURT OF THE UNITED STATES

359 U.S. 535; 79 S. Ct. 968; 3 L. Ed. 2d 1012; 1959 U.S. LEXIS 899

April 1-2, 1959, Argued  
June 1, 1959, Decided

**PRIOR HISTORY:**

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**DISPOSITION:** 102 U. S. App. D. C. 316, 253 F.2d 338, reversed.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Petitioner employee challenged an order of the United States Court of Appeals for the District of Columbia Circuit, affirming an order of the district court granting summary judgment for respondent Secretary of the Interior. After the Secretary had terminated the employee on security grounds, he attempted to do so based on the employee's at will status.

**OVERVIEW:** Petitioner employee was appointed in 1952 by respondent Secretary of the Interior as a schedule A employee. Respondent's predecessor notified petitioner of his suspension, citing petitioner's association with the Communist Party, among other things. A notice of dismissal was sent to petitioner, citing the original charges. A Notification of Personnel Action followed. A hearing resulted in dismissal, and petitioner filed suit in a district court. Later, a second Notification, omitting any reason for dismissal, was filed with the district court and delivered to petitioner. The district court granted summary judgment to respondent, which the court of appeals affirmed. On appeal, the court found numerous instances of violations of petitioner's rights. The court rejected the argument that petitioner was only entitled to expungement of his records because respondent could have fired him at any time for no reason, because respondent gratuitously decided to give the reason of national security, and he was obligated to conform to Order No. 2738. Because petitioner's proceedings fell substantially short of the regulations, the court held that the dismissal was illegal and of no effect.

**OUTCOME:** The court found that respondent Secretary of the Interior had violated petitioner employee's rights after his termination for suspected affiliation with the Communist Party. The court held the termination to be illegal and ineffective because respondent gratuitously gave the reason of national security, and then failed to conform to applicable departmental regulations under those circumstances.

**CORE TERMS:** notice, regulation, national security, departmental, security officer, notification, informant, delivery, expunging, effective, summarily, reinstatement, cross-examine, confidential, discharged, designated, quota, government employees, fired, entitled to reinstatement, retroactively, sympathetic, suspension, questioned, severance, personnel, reciting, revision, resident, doctor

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**HN1** Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953), the Act of August 26, 1950, 64 Stat. 476, 5

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U.S.C.S. § 22-1 et seq., and Department of the Interior Order No. 2738, all relate to discharges of government employees on security or loyalty grounds. The statute does not apply to government employees in positions not designated as "sensitive." [More Like This Headnote](#)

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**HN2**  The Act of August 26, 1950, 64 Stat. 476, 5 U.S.C.S. § 22-1 et seq., did not permit the discharge of nonsensitive employees pursuant to procedures authorized by that Act if those procedures were more summary than those to which the employee would have been entitled by virtue of any pre-existing statute or regulation. [More Like This Headnote](#)

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**HN3**  First, § 15 (a) of Department of the Interior Order No. 2738 requires that the statement of charges served upon an employee at the time of his suspension on security grounds shall be as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit and shall be subject to amendment within 30 days of issuance. [More Like This Headnote](#)

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**HN4**  Sections 21 (a) and (e) of Department of the Interior Order No. 2738 require that hearings before security hearing boards shall be "orderly" and that reasonable restrictions shall be imposed as to relevancy, competency, and materiality of matters considered. [More Like This Headnote](#)

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**HN5**  Section § 21 (c)(4) gives the employee the right to cross-examine any witness offered in support of the charges. It is apparent from an over-all reading of the regulations that it was not contemplated that this provision should require the Department to call witnesses to testify in support of any or all of the charges, because it was expected that charges might rest on information gathered from or by "confidential informants." [More Like This Headnote](#)

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**HN6**  Section 21 (e) of the Order, which provides in part that if the employee is or may be handicapped by the nondisclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board shall take that fact into consideration, thus implying that the employee is to have the right to cross-examine nonconfidential informants who provide material taken into consideration by the board. [More Like This Headnote](#)

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**SYLLABUS:** Petitioner was an employee of the Department of the Interior in a position not designated as "sensitive." He was not a veteran, had no protected Civil Service status, and could have been discharged summarily without cause. Purporting to proceed under the Act of August 26, 1950, Executive Order No. 10450 and departmental regulations prescribing the procedure to be followed in "security risk" cases, the Secretary suspended him and served him with written charges that his "sympathetic association" with Communists or Communist sympathizers, and other similar alleged activities, tended to show that his continued employment might be "contrary to the best interests of national security." At a subsequent hearing before a security hearing board, no evidence was adduced in support of these charges and no witness testified against petitioner; but he and four witnesses who testified for him were subjected to an extensive cross-examination which went far beyond the activities specified in the charges. Subsequently, he was sent a notice of dismissal, effective September 10, 1954, "in the interest of national security" and for the reasons set forth in the charges. In 1956, he sued for a declaratory judgment that his discharge was illegal and an injunction directing his reinstatement. While the case was pending, a copy of a "notification of personnel action," dated September 21, 1954, and reciting that it was "a revision of and replaces the original bearing the same date," was filed in the court and a copy was delivered to petitioner. This notification was identical with one issued September 21, 1954, except that it omitted any reference to the reason for petitioner's discharge and to the authority under which it was carried out. *Held:* Petitioner's dismissal was illegal and he is entitled to reinstatement. Pp. 536-546.

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(a) Having chosen to proceed against petitioner on security grounds, the Secretary was bound by the regulations which he had promulgated for dealing with such cases, even though petitioner could have been discharged summarily and without cause independently of those regulations. Pp. 539-540.

(b) The record shows that the proceedings leading to petitioner's dismissal from Government service on grounds of national security violated petitioner's procedural rights under the applicable departmental regulations. Therefore, his dismissal was illegal and of no effect. Pp. 540-545.

(c) Delivery to petitioner in 1956 of the revised "notification of personnel action" dated September 21, 1954, which was plainly intended only as a grant of relief to petitioner by expunging the grounds of the 1954 discharge, cannot be treated as an exercise of the Secretary's summary dismissal power as of the date of its delivery to petitioner. Pp. 545-546.

(d) Petitioner is entitled to reinstatement, subject to any lawful exercise of the Secretary's authority hereafter to dismiss him from employment. P. 546.

**COUNSEL:** Clifford J. Hynning argued the cause for petitioner. With him on the brief was Harry E. Sprogell.

John G. Laughlin, Jr. argued the cause for respondents. With him on the brief were Solicitor General Rankin, Assistant Attorney General Doub and Samuel D. Slade.

**JUDGES:** Warren, Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, Stewart

**OPINIONBY:** HARLAN

**OPINION:** [\*536] [\*\*\*1015] [\*\*971] MR. JUSTICE HARLAN delivered the opinion of the Court.

This case concerns the legality of petitioner's discharge as an employee of the Department of the Interior. Vitarelli, an educator holding a doctor's degree from Columbia University, was appointed in 1952 by the Department of the Interior as an Education and Training Specialist in the Education Department of the Trust Territory of the Pacific Islands, at Koror in the Palau District, a mandated area for which this country has responsibility.

By a letter dated March 30, 1954, respondent Secretary's predecessor in office notified petitioner of his suspension from duty without pay, effective April 2, 1954, assigning as ground therefor various charges. Essentially, the charges were that petitioner from 1941 to 1945 [\*537] had been in "sympathetic association" with three named persons alleged to have been members of or in sympathetic association with the Communist Party, and had concealed from the Government the true extent of these associations at the time of a previous inquiry into them; that he had registered as a supporter of the American Labor Party in New York City in 1945, had subscribed to the USSR Information Bulletin, and had purchased copies of the Daily Worker and New Masses; and that because such associations and activities tended to show that petitioner was "not reliable or trustworthy" his continued employment might be "contrary to the best interests of national security."

Petitioner filed a written answer to the statement of charges, and appeared before a security hearing board on June 22 and July 1, 1954. At this hearing no evidence was adduced by the Department in support of the charges, nor did any witness testify against petitioner. Petitioner testified at length, and presented four witnesses, and he and the witnesses were extensively cross-examined by the security officer and the members of the hearing board. On September 2, 1954, a notice of dismissal effective September 10, 1954, was sent petitioner over the signature of the Secretary, reciting that the dismissal was "in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954." This was followed on September 21, 1954, with the filing of a "Notification of Personnel Action" setting forth the Secretary's action. The record does not show that a copy of this document was ever sent to petitioner.

After having failed to obtain reinstatement [\*\*\*1016] by a demand upon the Secretary, petitioner filed suit in the United States District Court for the District of Columbia seeking a declaration that his dismissal had been illegal and ineffective and an injunction requiring his reinstatement. On October 10, 1956, while the case was pending in the [\*538] District Court, a copy of a new "Notification of Personnel Action," dated September 21, 1954, and reciting that it was "a revision of and replaces the original bearing the same date,"

was filed in the District Court, and another copy of this **\*\*\*972** document was delivered to petitioner shortly thereafter. This notification was identical with the one already mentioned, except that it omitted any reference to the reason for petitioner's discharge and to the authority under which it was carried out. n1 Thereafter the District Court granted summary judgment for the respondent. That judgment was affirmed by the Court of Appeals, one judge dissenting. 102 U. S. App. D. C. 316, 253 F.2d 338. We granted certiorari to consider the validity of petitioner's discharge. 358 U.S. 871.

----- Footnotes -----

n1 An affidavit of the custodian of records of the Civil Service Commission, filed in the District Court together with this revised notification, states "That all records of the said Commission have been expunged of all adverse findings made with respect to Mr. William Vincent Vitarelli under Executive Order 10450."

----- End Footnotes-----

The Secretary's letter of March 30, 1954, and notice of dismissal of September 2, 1954, both relied upon <sup>HN1</sup> Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953), the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. § 22-1 *et seq.*, and Department of the Interior Order No. 2738, all relating to discharges of government employees on security or loyalty grounds, as the authority for petitioner's dismissal. In *Cole v. Young*, 351 U.S. 536, this Court held that the statute referred to did not apply to government employees in positions not designated as "sensitive." Respondent takes the position that since petitioner's position in government service has at no time been designated as sensitive the effect of *Cole*, which was decided after the 1954 dismissal of petitioner, was to render also inapplicable to petitioner Department of the Interior Order No. 2738, under which the proceedings relating to petitioner's dismissal were had. It is urged **\*\*\*539** that in this state of affairs petitioner, who concededly was at no time within the protection of the Civil Service Act, Veterans' Preference Act, or any other statute relating to employment rights of government employees, and who, as a "Schedule A" employee, could have been summarily discharged by the Secretary at any time without the giving of a reason, under no circumstances could be entitled to more than that which he has already received -- namely, an "expunging" from the record of his 1954 discharge of any reference to the authority or reasons therefor.

**\*\*\*HR1** [1]

**\*\*\*HR2** [2]

Respondent misconceives the effect of our decision in *Cole*. It is true that the Act of August 26, 1950, and the Executive Order did not alter the power of the Secretary to discharge summarily an employee in petitioner's status, without the giving of any reason. Nor did the Department's own regulations preclude such a course. Since, however, the Secretary gratuitously decided to give a reason, and that reason was national security, he was obligated to conform to the procedural standards he had formulated **\*\*\*1017** in Order No. 2738 for the dismissal of employees on security grounds. *Service v. Dulles*, 354 U.S. 363. That Order on its face applies to *all* security discharges in the Department of the Interior, including such discharges of Schedule A employees. *Cole v. Young* established that <sup>HN2</sup> the Act of August 26, 1950, did not permit the discharge of nonsensitive employees pursuant to procedures authorized by that Act if those procedures were more summary than those to which the employee would have been entitled by virtue of any pre-existing statute or regulation. That decision cannot, however, justify noncompliance by the Secretary with regulations promulgated by him in the departmental Order, which as to petitioner afford greater procedural protections in the case of dismissal stated to be for security reasons than in the case of dismissal without any statement **\*\*\*973** of reasons. Having chosen to proceed against petitioner on security **\*\*\*540** grounds, the Secretary here, as in *Service*, was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily.

**\*\*\*HR3** [3]

Petitioner makes various contentions as to the constitutional invalidity of the procedures provided by Order No. 2738. He further urges that even assuming the validity of the governing procedures, his dismissal cannot stand because the notice of suspension and hearing given him did not comply with the Order. We find it unnecessary to reach the constitutional issues, for we think that petitioner's second position is well taken and must be sustained.

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**\*\*\*HR4** [4]

Preliminarily, it should be said that departures from departmental regulations in matters of this kind involve more than mere consideration of procedural irregularities. For in proceedings of this nature, in which the ordinary rules of evidence do not apply, in which matters involving the disclosure of confidential information are withheld, and where it must be recognized that counsel is under practical constraints in the making of objections and in the tactical handling of his case which would not obtain in a cause being tried in a court of law before trained judges, scrupulous observance of departmental procedural safeguards is clearly of particular importance. n2 In this instance an examination of the record, and of the transcript of the hearing before the departmental security board, discloses that petitioner's procedural rights under the applicable regulations were violated in at least three material respects in the proceedings which terminated in the final notice of his dismissal.

----- Footnotes -----

n2 As already noted, we do not reach the question of the constitutional permissibility of an administrative adjudication based on "confidential information" not disclosed to the employee.

----- End Footnotes-----

**\*\*\*HR5** [5]

<sup>HN3</sup>First, § 15 (a) of Order No. 2738 requires that the statement of charges served upon an employee at the time **[\*541]** of his suspension on security grounds "shall be as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit . . . and shall be subject to amendment within 30 days of issuance." Although the statement of charges furnished petitioner appears on its face to be reasonably specific, n3 the transcript **\*\*\*1018** of hearing establishes that the statement, which was never amended, cannot conceivably be said in fact to be as specific and detailed as "security considerations . . . permit." For petitioner was questioned by the security officer and by the hearing board in great detail concerning his association with and knowledge of various persons and organizations nowhere mentioned in the statement of charges, n4 and at length concerning his activities in Bucks County, **[\*974]** Pennsylvania, and elsewhere after 1945, activities as to which the charges are also completely silent. These questions were presumably asked because they were deemed relevant to the inquiry before the board, and the very fact that they were asked and thus spread on the record is conclusive **[\*542]** indication that "security considerations" could not have justified the omission of any statement concerning them in the charges furnished petitioner.

----- Footnotes -----

n3 The substance of the charges has been stated on pp. 536-537, *supra*.

n4 The statement of charges referred to petitioner's alleged associations with only three named persons, "F , W , and W ." During the course of the hearing the security officer, however, asked "How well did you know L B ? . . . Did you ever meet H B C ? . . . Did you ever remember meeting a J L ?" Further, petitioner was questioned as to his knowledge of and relationships with a wide variety of organizations not mentioned in the statement of charges. Thus he was asked: "Do you know what Black Mountain Transcendentalism is? . . . Do you recall an organization by the name of National Council for Soviet-American Friendship? . . . How about the Southern Conference for Human Welfare? . . . What is the organization called the Joint Antifascist Refugee Committee? . . . Have you ever had any contact with the Negro Youth Congress? . . . How about Abraham Lincoln Brigade? . . . Have you ever heard of a magazine called 'Cooperative Union'? . . . I was wondering whether you had ever heard of Consumers Union?"

----- End Footnotes-----

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**\*\*\*HR6** [6]

<sup>HN4</sup>Second, §§ 21 (a) and (e) require that hearings before security hearing boards shall be "orderly" and

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that "reasonable restrictions shall be imposed as to relevancy, competency, and materiality of matters considered." The material set forth in the margin, taken from the transcript, and illustrative rather than exhaustive, shows that these indispensable indicia of a meaningful hearing were not observed. n5 It is [\*\*\*1019] not an overcharacterization to say [\*543] that as the hearing [\*\*975] proceeded it developed into a wide-ranging inquisition into this man's educational, social, and political beliefs, encompassing even a question as to whether he was "a religious man."

----- Footnotes -----

n5 "Mr. ARMSTRONG [the departmental security officer, inquiring about petitioner's activities as a teacher in a Georgia college]: Were these activities designed to be put into effect by both the white and the colored races? . . . What were your feelings at that time concerning race equality? . . . How about civil rights? Did that enter into a discussion in your seminar groups?"

"Mr. ARMSTRONG: Do I interpret your statement correctly that maybe Negroes and Jews are denied some of their constitutional rights at present?"

"Mr. VITARELLI: Yes.

"Mr. ARMSTRONG: In what way?"

"Mr. VITARELLI: I saw it in the South where certain jobs were open to white people and not open to Negroes because they were Negroes. . . . In our own university, there was a quota at Columbia College for the medical students. Because they were Jewish, they would permit only so many. I thought that was wrong.

"Chairman TOWSON: Doctor, isn't it also true that Columbia College had quotas by states and other classifications as well?"

"Mr. VITARELLI: I don't remember that. It may be true.

"Mr. ARMSTRONG: In other words, wasn't there a quota on Gentiles as well as Jews?"

"Mr. VITARELLI: . . . I had remembered that some Jews seemed to feel, and I felt, too, at the time, that they were being persecuted somewhat.

"Chairman TOWSON: Did you ever take the trouble to investigate whether or not they were or did you just accept their word?"

"Mr. VITARELLI: No, I didn't investigate it.

"Chairman TOWSON: You accepted their word for it.

"Mr. VITARELLI: I accepted the general opinion of the group of professors with whom I associated and was taught. . . .

"Chairman TOWSON: I am simply asking you to verify the vague impression I have that Columbia College puts a severe quota on residents of New York City, whatever their race, creed or color may be.

"Mr. VITARELLI: I think that is true. . . .

"Chairman TOWSON: Otherwise there would be no students at Columbia College except residents of New York City.

"Mr. VITARELLI: There may be a few others, but mostly New York City.

"Chairman TOWSON: Isn't it true that the quota system is designed by the college in order to make it available to persons other than live in New York City?"

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"Mr. VITARELLI: I believe that is the reason.

"Chairman TOWSON: And any exclusion of a resident of New York City would be for that reason, rather than the race, creed or color?

"Mr. VITARELLI: I think that is the way the policy is stated.

"Chairman TOWSON: Is it not a fact?

"Mr. VITARELLI: I don't think so. . . .

"Chairman TOWSON: Excuse me, Mr. Armstrong.

"Mr. ARMSTRONG: I went to Columbia Law School for two years and certainly there was not any quota system there at that time, and that is a long time ago. All right, we are getting afield."

Petitioner was also asked the following questions by the security officer during the course of the hearing:

"Mr. ARMSTRONG: I think you indicated in an answer or a reply to an interrogatory that you at times voted for and sponsored the principles of Franklin Delano Roosevelt, Norman A. Thomas, and Henry Wallace? . . . How many times did you vote for . . . [Thomas] if you care to say? . . . How about Henry Wallace? . . . How about Norman Thomas? Did his platform coincide more nearly with your ideas of democracy? . . . At one time, or two, you were a strong advocate of the United Nations. Are you still? . . . The file indicates, too, that you were quite hepped up over the one world idea at one time; is that right?"

Witnesses presented by petitioner were asked by the security officer and board members such questions as:

"The Doctor indicated that he was acquainted with and talked to Norman Thomas on occasions. Did you know about that? . . . How about Dr. Vitarelli? Is he scholarly? . . . A good administrator? . . . Was he careless with his language around the students or careful? . . . Did you consider Dr. Vitarelli as a religious man? . . . Was he an extremist on equality of races? . . . In connection with the activities that Dr. Vitarelli worked on that you know about, either in the form of projects or in connection with the educational activities that you have mentioned, did they extend to the Negro population of the country? In other words, were they contacts with Negro groups, with Negro instructors, with Negro students, and so on?"

It is not apparent how any of the above matters could be material to a consideration of the question whether petitioner's retention in government service would be consistent with national security.

----- End Footnotes-----

**[\*544]**

**\*\*\*HR7** [7]

*HNS* Third, § 21 (c)(4) gives the employee the right "to cross-examine any witness offered in support of the charges." It is apparent from an over-all reading of the regulations that it was not contemplated that this provision should require the Department to call witnesses to testify in support of any or all of the charges, because it was expected that charges might rest on information gathered from or by "confidential informants." We think, however, that § 21 (c)(4) did contemplate the calling by the Department of any informant not properly classifiable as "confidential," if information furnished by that informant was to be used by the board in assessing an employee's status. n6 The transcript shows that this **[\*545]** provision was violated on at **\*\*\*1020** least one occasion at petitioner's hearing, for the security officer identified by name a person who had given information apparently considered detrimental to petitioner, thus negating any possible inference that that person was considered a "confidential informant" whose identity it was necessary to keep secret, and questioned petitioner at some length concerning the information supplied from this source without calling the informant and affording petitioner the right to cross-examine. n7

----- Footnotes-----

25 12

n6 This reading of the provision is supported by <sup>HN6</sup>§ 21 (e) of the Order, which provides in part that "if the employee is or may be handicapped by the nondisclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board shall take that fact into consideration," thus implying that the employee is to have the right to cross-examine nonconfidential informants who provide material taken into consideration by the board.

n7 The information was to the effect that petitioner had criticized as "bourgeois" the purchase of a house by a woman associate in Georgia. Petitioner flatly denied that he had made the remark attributed to him, and said that he could never have made such a statement except in a spirit of levity.

----- End Footnotes----- **\*\*\*HR8** [8]

Because the proceedings attendant upon petitioner's dismissal from government service on grounds of national security fell substantially short of the requirements of the applicable departmental regulations, we hold that such dismissal was illegal and of no effect.

**\*\*\*HR9** [9]

Respondent urges that even if the dismissal of September 10, 1954, was invalid, petitioner is not entitled to reinstatement by reason of the fact that **\*\*976** he was at all events validly dismissed in October 1956, when a copy of the second "Notification of Personnel Action," omitting all reference to any statute, order, or regulation relating to security discharges, was delivered to him. Granting that the Secretary could at any time after September 10, 1954, have validly dismissed petitioner without any statement of reasons, and independently of the proceedings taken against him under Order No. 2738, we cannot view the delivery of the new notification to petitioner as an exercise of that summary dismissal power. Rather, the fact that it was dated "9-21-54," contained a termination of employment date of "9-10-54," was designated as "a revision" of the 1954 notification, and was evidently filed in **\*546** the District Court before its delivery to petitioner indicates that its sole purpose was an attempt to moot petitioner's suit in the District Court by an "expunging" of the grounds for the dismissal which brought Order No. 2738 into play. n8 In these circumstances, we would not be justified in now treating the 1956 action, plainly intended by the Secretary as a grant of relief to petitioner in connection with the form of the 1954 discharge, as an exercise of the Secretary's summary removal power as of the date of its delivery to petitioner. n9

----- Footnotes -----

n8 The Secretary successfully took the position in the courts below that the only possible defect in the 1954 discharge was the articulation of the "national security" grounds therefor, and that since that defect did not void the dismissal as such, an "expunging" of these grounds gave petitioner the maximum relief to which he could possibly be entitled.

n9 Respondent's brief in this Court refers to the 1956 notice as part of "corrective administrative action which has been taken," and as "relief voluntarily accorded [petitioner]." The premise upon which the dissenting opinion essentially rests -- that the 1956 action was an attempt "to discharge Vitarelli retroactively" -- thus is contrary to the Secretary's own position as to the reason for that action.

----- End Footnotes-----

**\*\*\*HR10** [10]

It follows from what we have said that petitioner is entitled to **\*\*1021** the reinstatement which he seeks, subject, of course to any lawful exercise of the Secretary's authority hereafter to dismiss him from employment in the Department of the Interior.

*Reversed.*

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**CONCURBY:** FRANKFURTER (In Part)

**DISSENTBY:** FRANKFURTER (In Part)

**DISSENT:** MR. JUSTICE FRANKFURTER, whom MR. JUSTICE CLARK, MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART join, concurring in part and dissenting in part.

**[\*\*\*HR11]** [11]

An executive agency must be rigorously held to the standards by which it professes its action to be judged. See *Securities & Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87-88. Accordingly, if dismissal from **[\*547]** employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. See *Service v. Dulles*, 354 U.S. 363. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword. Therefore, I unreservedly join in the Court's main conclusion, that the attempted dismissal of Vitarelli in September 1954 was abortive and of no validity because the procedure under Department of the Interior Order No. 2738 was invoked but not observed.

But when an executive agency draws on the freedom that the law vests in it, the judiciary cannot deny or curtail such freedom. The Secretary of the Interior concededly had untrammelled right to dismiss Vitarelli out of hand, since he had no protected employment rights. He could do so as freely as a private employer who is not bound by procedural restrictions of a collective bargaining contract. The Secretary was under no

**[\*\*977]** law-imposed or self-imposed restriction in discharging an employee in Vitarelli's position without statement of reasons and without a hearing. And so the question is, did the Secretary take action, after the abortive discharge in 1954, dismissing Vitarelli?

In October 1956 there was served upon Vitarelli a copy of a new notice of dismissal which had been inserted in the Department's personnel records in place of the first notice. Another copy was filed with the District Court in this proceeding. This second notice contained no mention of grounds of discharge. If, instead of sending this second notice to Vitarelli, the Secretary had telephoned Vitarelli to convey the contents of the second notice, he would have said: "I note that you are contesting the validity of the dismissal. I want to make this very clear to you. If I did not succeed in dismissing you before, **[\*548]** I now dismiss you, and I dismiss you retroactively, effective September 1954."

The Court disallows this significance to the second notice of discharge because it finds controlling meaning in the suggestion of the Government that the expunging from the record of any adverse comment, and the second notice of discharge, signified a reassertion of the effectiveness of the first attempt at dismissal. And so, the Court concludes, no intention of severance from service in 1956 could legally be found since the Secretary expressed no doubt that the first dismissal had been effective. But this **[\*\*\*1022]** document of 1956 was not a mere piece of paper in a dialectic. The paper was a record of a process, a manifestation of purpose and action. The intendment of the second notice, to be sure, was to discharge Vitarelli retroactively, resting this attempted dismissal on valid authority -- the summary power to dismiss without reason. Though the second notice could not pre-date the summary discharge because the Secretary rested his 1954 discharge on an unsustainable ground, and Vitarelli could not be deprived of rights accrued during two years of unlawful discharge, the prior wrongful action did not deprive the Secretary of the power in him to fire Vitarelli prospectively. And if the intent of the Secretary be manifested in fact by what he did, however that intent be expressed -- here, the intent to be rid of Vitarelli -- the Court should not frustrate the Secretary's rightful exercise of this power as of October 1956. The fact that he wished to accomplish more does not mean he accomplished nothing.

To construe the second notice to mean administratively nothing is to attribute to the Secretary the purpose of a mere diarist, the corrector of entries in the Department's archives. This wholly disregards the actualities in the conduct of a Department concerned with terminating the services of an undesired employee as completely and by **[\*549]** whatever means that may legally be accomplished. If an employer summons before him an employee over whom he has unfettered power of dismissal and says to him: "You are no longer employed here because I fired you last week," can one reasonably escape the conclusion that though the employer was in error and had not effectively carried out his purpose to fire the employee last week, the employer's statement clearly manifests a present belief that the employee is dismissed and an intention that he be foreverafter dismissed? Certainly the employee would have no doubt his employment was now at an

end. Of course if some special formal document were required to bring about a severance of a relationship, cf. *Felter v. Southern Pacific Co.*, 359 U.S. 326, because of non-compliance with the formality the severance would not come into being. But no such formality was requisite to Vitarelli's dismissal.

This is the common sense of it: In 1956 the Secretary said to Vitarelli: "This document tells you without any ifs, ands, or buts, you have been fired right along and of course that means you are not presently employed by this Department. [\*\*978] " Since he had not been fired successfully in 1954, the Court concludes he must still be employed. I cannot join in an unreal interpretation which attributes to governmental action the empty meaning of confetti throwing.

**REFERENCES:** ♦ [Return To Full Text Opinion](#)

#### Annotation References:

Supreme Court decisions involving loyalty investigations, 95 L ed 877 and 100 L ed 663.

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*347 U.S. 260, \*; 74 S. Ct. 499, \*\*;  
98 L. Ed. 681, \*\*\*; 1954 U.S. LEXIS 2334*

UNITED STATES EX REL. ACCARDI v. SHAUGHNESSY, DISTRICT DIRECTOR OF THE  
IMMIGRATION AND NATURALIZATION SERVICE

No. 366

SUPREME COURT OF THE UNITED STATES

347 U.S. 260; 74 S. Ct. 499; 98 L. Ed. 681; 1954 U.S. LEXIS 2334

February 2, 1954, Argued  
March 15, 1954, Decided

**PRIOR HISTORY:**

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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

**DISPOSITION:** 206 F.2d 897, reversed.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Certiorari was granted to the United States Court of Appeals for the Second Circuit, which denied petitioner's application for a writ of habeas corpus that petitioner sought in order to attack the validity of the denial of his application for suspension of deportation under section 19(c) of the Immigration Act, 8 U.S.C.S. § 155 (c).

**OVERVIEW:** Petitioner was to be deported. Petitioner claimed that right before the Board of Immigration Appeals' (Board) decision, the Attorney General issued a list of unsavory characters with petitioner's name on the list that the Attorney General wished to have deported. Petitioner claimed the list was circulated among all the employees in the Immigration Service and on the Board and that circulation of the list made fair consideration of petitioner's case impossible. The U.S. Supreme Court reversed. If true, the allegations showed that the Board's discretion in determining petitioner's case was compromised by the Attorney General, as it was clear in the allegations that the Attorney General wanted the people on his list deported. Petitioner was thus entitled to a hearing before the district court in order to try and prove his allegation that the Attorney General prevented the Board from exercising its discretion. If successful, petitioner would be entitled to a hearing before the Board on the matter of suspension of deportation. If the Board were to hear petitioner's application for suspension, it would have to rule out consideration of the Attorney General's list.

**OUTCOME:** The Supreme Court reversed the appellate court's decision, finding petitioner was entitled to a hearing to try and prove his allegations about the Attorney General's list because the Board of Immigration of Appeals was supposed to use its own discretion in hearing petitioner's case, and if the allegations were true, it was likely that the Board's

discretion was compromised by the Attorney General's list.

**CORE TERMS:** deportation, regulation, suspension, alien, habeas corpus, immigration, confidential, discretionary, Immigration Act, suspend, deportable, Nationality Act, unsavory, issuance, reviewable, deported, fair consideration, force and effect, hearing officer, own discretion, prejudgment, circulated, announced, revision, deport, subject to judicial review, specifically provided, ineligible, questioned, suspended

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[Immigration Law](#) > [Deportation & Removal](#) > [Relief](#) > [Relief Generally](#) 

**HN1**  See 66 Stat. 280.

[Immigration Law](#) > [Deportation & Removal](#) > [Relief](#) > [Relief Generally](#) 

**HN2**  See 8 U.S.C.S. § 155(c).

[Immigration Law](#) > [Deportation & Removal](#) > [Grounds](#) > [Inadmissibility at Entry](#) 

**HN3**  See 8 U.S.C.S. § 214.

[Immigration Law](#) > [Deportation & Removal](#) > [Grounds](#) > [Inadmissibility at Entry](#) 

**HN4**  The ground for deportation found in 8 U.S.C.S. § 214 is perpetuated by § 241 (a) (1) and (2) of the Immigration and Nationality Act of 1952, 8 U.S.C.S. § 1251 (a) (1) and (2). [More Like This Headnote](#)

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[Immigration Law](#) > [Judicial Review](#) > [Habeas Corpus](#) 

**HN5**  Res judicata does not apply to proceedings for habeas corpus. [More Like This Headnote](#)

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**HN6**  Regulations with the force and effect of law supplement the bare bones of 8 U.S.C.S. § 155(c). The regulations prescribe the procedure to be followed in processing an alien's application for suspension of deportation. Until the 1952 revision of the regulations, the procedure called for decisions at three separate administrative levels below the Attorney General, hearing officer, Commissioner, and the Board of Immigration Appeals. [More Like This Headnote](#)

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**HN7**  The Board of Immigration Appeals is appointed by the Attorney General, serves at his pleasure, and operates under regulations providing that: In considering and determining appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. The decision of the Board shall be final except in those cases reviewed by the Attorney General. And the Board is required to refer to the Attorney General for review all cases which: (a) the Attorney General directs the Board to refer to him; (b) the chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision; (c) the Commissioner requests be referred to the Attorney General by the Board and it agrees. [More Like This Headnote](#)

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**HN8**  If the word "discretion" means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board of

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Immigration Appeals and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner. [More Like This Headnote](#)

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**SYLLABUS:** By a habeas corpus proceeding in a federal district court, petitioner challenged the validity of the denial of his application for suspension of deportation under the provisions of § 19 (c) of the Immigration Act of 1917. Admittedly deportable, petitioner alleged, *inter alia*, that the denial of his application by the Board of Immigration Appeals was prejudged through the issuance by the Attorney General in 1952, prior to the Board's decision, of a confidential list of "unsavory characters" including petitioner's name, which made it impossible for petitioner "to secure fair consideration of his case." Regulations promulgated by the Attorney General and having the force and effect of law delegated the Attorney General's discretionary power under § 19 (c) in such cases to the Board and required the Board to exercise its own discretion when considering appeals. *Held:* Petitioner is entitled to an opportunity in the district court to prove the allegation; and, if he does prove it, he should receive a new hearing before the Board without the burden of previous proscription by the list. Pp. 261-268.

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

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

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

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

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

**COUNSEL:** Jack Wasserman argued the cause and filed a brief for petitioner.

Marvin E. Frankel argued the cause for respondent. With him on the brief were Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg and Robert G. Maysack.

**JUDGES:** Warren, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton

**OPINIONBY:** CLARK

**OPINION:** [\*261] [\*\*500] [\*\*\*683] MR. JUSTICE CLARK delivered the opinion of the Court.

This is a habeas corpus action in which the petitioner attacks the validity of the denial of his application for suspension of deportation under the provisions of § 19 (c) of the Immigration Act of 1917. n1 Admittedly [\*\*\*684] deportable, [\*262] the petitioner alleged, among other things, that the denial of his application by the Board of Immigration Appeals was prejudged through the issuance by the Attorney General in 1952, prior to the Board's

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decision, of a confidential list of "unsavory characters" including petitioner's name, which made it impossible for him "to secure fair consideration of his case." The District Judge refused the offer of proof, denying the writ on the allegations of the petitioner without written opinion. A divided panel of the Court of Appeals for the Second Circuit affirmed. 206 F.2d 897. We granted certiorari. 346 U.S. 884.

[1]

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n1 39 Stat. 889, as amended, 8 U. S. C. (1946 ed., Supp. V) § 155 (c). Section 405 is the savings clause of the Immigration and Nationality Act of 1952 and its subsection (a) provides that:

**HN1** "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any . . . proceeding which shall be valid at the time this Act shall take effect; or to affect any . . . proceedings . . . brought . . . at the time this Act shall take effect; but as to all such . . . proceedings, . . . the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . . An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, . . . which is pending on the date of enactment of this Act [June 27, 1952], shall be regarded as a proceeding within the meaning of this subsection." 66 Stat. 280, 8 U. S. C. (1952 ed.), p. 734.

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

----- End Footnotes -----

The Justice Department's immigration file on petitioner reveals the following relevant facts. He was born in Italy of Italian parents in 1909 and **[\*\*501]** entered the United States by train from Canada in 1932 without immigration inspection and without an immigration visa. This entry clearly falls under § 14 of the Immigration Act of 1924 n2 and is the uncontested ground for deportation. The deportation proceedings against him began in 1947. In 1948 he applied for suspension of deportation pursuant to § 19 (c) of the Immigration Act of 1917. This section as amended in 1948 provides, in pertinent part, that:

**HN2** "In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible **[\*263]** for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon July 1, 1948." 8 U. S. C. (1946 ed., Supp. V) § 155 (c).

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----- Footnotes -----

n2 <sup>HN3</sup> "Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States . . . shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917 . . ." 43 Stat. 162, 8 U. S. C. (1946 ed.) § 214. <sup>HN4</sup> This ground for deportation is perpetuated by § 241 (a)(1) and (2) of the Immigration and Nationality Act of 1952. 66 Stat. 204, 8 U. S. C. (1952 ed.) § 1251 (a)(1) and (2).

----- End Footnotes-----

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

The scene of action then shifted to the United States District Court for the Southern District of New York. One day before his scheduled deportation petitioner sued out a writ of habeas corpus. District Judge Noonan dismissed the writ on April 30 and his order, formally entered **[\*\*685]** on May 5, was never appealed. Arrangements were then made for petitioner to depart on May 19. n3 However, on May 15, his wife commenced this action by filing a petition for a second writ of habeas corpus. n4 New **[\*264]** grounds were alleged, on information and belief, for attacking the administrative refusal to suspend deportation. n5 The principal ground is that on October 2, 1952 -- after the Acting Commissioner's decision in the case but before **[\*\*502]** the decision of the Board of Immigration Appeals -- the Attorney General announced at a press conference that he planned to deport certain "unsavory characters"; on or about that date the Attorney General prepared a confidential list of one hundred individuals, including petitioner, whose deportation he wished; the list was circulated by the Department of Justice among all employees in the Immigration Service and on the Board of Immigration Appeals; and that issuance of the list and related publicity amounted to public prejudgment by the Attorney General so that fair consideration of petitioner's case by the Board of Immigration Appeals was made impossible. Although an opposing affidavit submitted by government counsel denied "that the decision was based on information outside of the record" and contended that the allegation of prejudgment was "frivolous," the same counsel repeated in a colloquy with the **[\*265]** court a statement he had made at the first habeas corpus hearing -- "that this man was on the Attorney General's proscribed list of alien deportees."

----- Footnotes -----

n3 Meanwhile, Accardi moved the Board of Immigration Appeals to reconsider his case. The motion was denied on May 8.

[2]

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n4 <sup>HN5</sup>Res judicata does not apply to proceedings for habeas corpus. *Salinger v. Loisel*, 265 U.S. 224 (1924); *Wong Doo v. United States*, 265 U.S. 239 (1924).

n5 The first ground was that "in all similar cases the Board of Immigration Appeals has exercised favorable discretion and its refusal to do so herein constitutes an abuse of discretion." This is a wholly frivolous contention, adequately disposed of by the Court of Appeals. 206 F.2d 897, 901. Another allegation charged "that the Department of Justice maintains a confidential file with respect to [Joseph Accardi]." But at no place does the petition elaborate on this charge, nor does the petition allege that discretionary relief was denied because of information contained in a confidential file. Although the petition does allege that "because of consideration of matters outside the record of his immigration hearing, discretionary relief has been denied," this allegation seems to refer to the "confidential list" discussed in the body of the opinion. Hence we assume that the charge of reliance on confidential information merely repeats the principal allegation that the Attorney General's prejudgment of Accardi's case by issuance of the "confidential list" caused the Board to deny discretionary relief.

----- End Footnotes-----

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

**\*\*\*HR3** [3]

The same questions presented to the Court of Appeals were raised in the petition for certiorari and are thus properly before us. The crucial question is whether the alleged conduct of the Attorney General deprived petitioner of any of the rights guaranteed him by the statute **\*\*\*686** or by the regulations issued pursuant thereto.

**\*\*\*HR4** [4]

<sup>HN6</sup>Regulations n6 with the force and effect of law n7 supplement the bare bones of § 19 (c). The regulations prescribe the procedure to be followed in processing an alien's application for suspension of deportation. Until **\*266** the 1952 revision of the regulations, the procedure called for decisions at three separate administrative levels below the Attorney General -- hearing officer, Commissioner, and the Board of Immigration Appeals. <sup>HN7</sup>The Board is appointed by the Attorney **\*\*\*503** General, serves at his pleasure, and operates under regulations providing that: "In considering and determining . . . appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. The decision of the Board . . . shall be final except in those cases reviewed by the Attorney General . . ." 8 CFR, 1949, § 90.3 (c). See 8 CFR, Rev. 1952, § 6.1 (d)(1). And the Board was required to refer to the Attorney General for review all cases which:

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

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

"(c) The Commissioner requests be referred to the Attorney General by the Board and it agrees." 8 CFR, 1949, § 90.12. See 8 CFR, Rev. 1952, § 6.1 (h)(1).

----- Footnotes -----

n6 The applicable regulations in effect during most of this proceeding appear at 8 CFR, 1949, Pts. 150 and 90 and 8 CFR, 1951 Pocket Supp., Pts. 150, 151 and 90. The corresponding sections in the 1952 revision of the regulations, promulgated pursuant to the Immigration and Nationality Act of 1952, may be found at 8 CFR, Rev. 1952, Pts. 242-244 and 6; 8 CFR, 1954 Pocket Supp., Pts. 242-244 and 6; 19 Fed. Reg. 930.

n7 See Boske v. Comingore, 177 U.S. 459 (1900); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923); Bridges v. Wixon, 326 U.S. 135, 150-156 (1945).

----- End Footnotes-----

**\*\*\*HR5** [5]

**\*\*\*HR6** [6]

The regulations just quoted pinpoint the decisive fact in this case: the Board was required, as it still is, to exercise its own judgment when considering appeals. The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General's discretion became the yardstick of the Board's. And <sup>HNB</sup> if the word "discretion" **[\*267]** means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.

**\*\*\*HR7** [7]

We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision. The petition alleges that the Attorney General included the name of petitioner in a confidential list of "unsavory characters" whom he wanted deported; public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General "planned to deport." And, **\*\*\*687** it is alleged, this intention was made quite clear to the Board when the list was circulated among its members. In fact, the Assistant District Attorney characterized it as the "Attorney General's proscribed list of alien deportees." To be sure, the petition does not allege that the "Attorney General ordered the Board to deny discretionary relief to the listed aliens." It would be naive to expect such a heavy-handed way of doing things. However, proof was offered and refused that the Commissioner of Immigration told previous counsel of petitioner, "We can't do a thing in your case because the Attorney General has his [petitioner's] name on that list of a hundred." We believe the allegations are

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