RES JUDICATA IN THE FEDERAL LOYALTY PROGRAM

The federal loyalty program was initiated on March 21, 1947, by the promulgation of Executive Order 9835.[1] This order prescribed dismissal of any federal employee upon a finding "that, on all the evidence,[2] reasonable grounds exist for belief that the person involved is disloyal[3] to the Government of the United States." On May 1, 1951, the standard of Executive Order 9835 was amended by Executive Order 10241,[4] providing for dismissal when, "on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

It seems clear, both semantically and logically,[5] that 10241 changed the original standard for dismissal set up by 9835. Under 9835, the concept of "reasonable belief" meant that the weight of evidence presented had to be great enough affirmatively to persuade the board that the individual was disloyal.[6] "Reasonable doubt," under 10241, on the other hand, means only that on the facts presented it may be intelligently questioned that the individual is actually

[1] 5 U.S.C.A. § 631 note (Supp., 1950), 1 Code Fed. Regs. 129 (Supp., 1947). The procedure calls for screening every employee and applicant. When derogatory information about an individual is found, a full field investigation is made. If the investigation indicates possible disloyalty, the employee is given a hearing before a departmental loyalty board. Should the board recommend dismissal, he may appeal to the department head and thence to the Loyalty Review Board set up by the Civil Service Commission. The Loyalty Review Board may also review any case on its own initiative. 14 Fed. Reg. 655 (1949).

[2] Bailey v. Richardson, 182 F. 2d 46 (App. D.C., 1950), aff'd by an equally-divided court, 341 U.S. 918 (1951), examined at length the question of what constituted "evidence" within the meaning of 9835. Although it was strongly contended that "evidence" meant only that which would be judicially acceptable, this view was rejected on the ground that it was inconsistent with other policies of 9835, i.e., safeguarding the identity of secret informers and notifying the employee of only that evidence the disclosure of which would be compatible with security. Evidence in 9835 is therefore taken to mean "any proof that may lead to a conclusion. It is not limited to such evidence as is admissible under the common-law rules of evidence." Transcript of Record at 107, Bailey v. Richardson, 341 U.S. 918 (1951).

[3] For the purposes of the federal loyalty program, "advocacy of whatever change in the form of government or the economic system of the United States, or both, however far-reaching such change may be, *is not disloyalty unless* that advocacy is coupled with the advocacy or approval . . . of the use of unconstitutional means to effect such change." 13 Fed. Reg. 254 (1948). (Emphasis added.) Brief for Respondents at 74, 95, Bailey v. Richardson, 341 U.S. 918 (1951).

[4] 5 U.S.C.A. § 631 note (Supp., 1952), 16 Fed. Reg. 3,690 (1951).

[5] Since no statement of purpose accompanied 10241, the reason for its issuance is open to conjecture. A plausible reason would be the increased realization of national peril caused by the entry of Communist China into the Korean War. The fact that less than one one-hundredth of one per cent of the employees and applicants screened in the loyalty program had been discharged or refused employment under the standard of 9835 (while another tenth of one per cent resigned during investigation) might have led the executive to fear that the standard of reasonable belief imposed upon the government a burden of proof which was excessive. Another possible reason would be political pressure from those who felt the program was not being prosecuted with sufficient vigor. See Emerson & Haber, Political and Civil Rights in the United States 563, 566–67 (1952).

[6] It is not enough to show that the individual is a member of proscribed groups; the reasonable belief must concern the personal disloyalty of the individual qua individual. Kutcher v. Gray, 199 F. 2d 783 (App. D.C., 1952).

loyal.[7] This does not mean that either the burden of coming forward or the burden of persuasion is shifted from the investigator to the investigated;[8] it means that the evidence need only induce reasonable doubt of loyalty rather than reasonable belief of disloyalty. As Seth W. Richardson, former chairman of the Loyalty Review Board, said at the time 10241 was issued, it "lessens the *degree* of proof. . . ."[9]

Finally, the agency most affected, the Loyalty Review Board, has been operating for over a year and a half on the assumption that there was indeed a change of standard, and no challenge to this assumption has yet been publicized.

In effect, 9835 had made a certain *group*—those about whom there was a reasonable belief of disloyalty—liable to discharge. 10241 created *another group*—those whose loyalty was in reasonable doubt—and made *them also* liable to discharge. Though the second group logically encompasses all the members of the first, it also includes some who were *not* members of the first.

In the course of enforcing Executive Order 10241, the Loyalty Review Board, on May 23, 1951, issued Memorandum No. 66, directing departmental loyalty boards to readjudicate under the new standard all cases in which an employee found dischargeable by any board under the standard of 9835 had been cleared on appeal.[10] The case of *Jason v. Alger*[11] was concerned with an attempt to enjoin such a readjudication. Plaintiff, a clerk in the Post Office Department, was suspended by his departmental loyalty board on September 6, 1949, pursuant to a finding of reasonable belief of disloyalty. The Postmaster General affirmed the order. On appeal to the Loyalty Review Board, however, the finding was reversed and plaintiff reinstated.

Following the instructions of Memorandum No. 66, the departmental board, on January 10, 1952, notified plaintiff that another hearing would be held to determine his fitness for employment under the new standard imposed by Executive Order 10241. Plaintiff, on receiving this notice, attempted to enjoin the contemplated readjudication on the ground that the prior adjudication was res judicata. The government conceded that it would offer no additional evidence of disloyalty. While plaintiff's injunctive action was dismissed without prejudice because of a failure to exhaust available administrative remedies, the court raised the question of whether res judicata would apply to such a readjudication.[12]

[7] In criminal cases, "reasonable doubt" serves to *free* the accused.

[8] 10241 does not change the provisions of 9835 which require that the employing agency charge disloyalty, and that discharge must be made "on all the evidence," rules which require that a positive case be made against the employee. Query whether the burden of coming forward is placed on applicants for employment by the necessity of filling out loyalty questionnaires?

[9] Richardson, The Federal Employee Loyalty Program, 51 Col. L. Rev. 546, 555 (1951).

[10] By its very nature, Memorandum No. 66 could affect only a small number of employees. See Emerson & Haber, op. cit. supra note 5, at 563.

[11] 104 F. Supp. 653 (D.C. D.C., 1952).

[12] To the degree that plaintiff desired to escape the rigors of another administrative hearing, the requirement that he exhaust his administrative remedies was a substantial decision against him.

The basic rules of res judicata are simple, and the major reasons for the existence of these rules are both logical and historical. The first reason is the protection of the parties to a law suit from relitigation of the same subject matter, with the consequent danger of losing the rights gained by the first adjudication.[13] If "decided" issues could be reopened at any time, no one would be safe in relying on a judicial determination of rights. The second reason is the protection of the public interest in freedom from needlessly repetitious litigation.[14] Res judicata, having developed in the courts, naturally tends most strongly to apply to the types of vested rights with which the courts deal. In fact, one *effect* of res judicata is to vest rights as between the parties before the court and their privies.

The principal rules of res judicata are commonly referred to as "bar and merger" and "collateral estoppel."[15] "Bar and merger" is the rule that a final judgment rendered on the merits of a cause of action by a court having jurisdiction over the action and the parties thereto, binds the parties to the action and their privies on the same claim or cause of action as to those issues of law and fact *actually* raised and those issues which *could have been* raised.[16] "Collateral estoppel" is the rule that in a second suit between the parties to the original action based upon a different claim or cause of action, the prior judgment operates as an estoppel to prevent the relitigation of all factual issues litigated and decided in the prior suit.[17]

The rule of collateral estoppel, however, generally does not apply to questions of law litigated in the original action.[18] An explanation for this is that the doctrine of stare decisis normally governs the effect of previously decided rules of law on any given suit.[19] The greater flexibility of stare decisis seems advantageous where principles of law are concerned, since if collateral estoppel were applied to questions of law, a change in the law on the subject would produce the anomalous situation of leaving the original parties forever bound by a rule of law different from that applied to other people in the same circumstances.[20]

The rules of res judicata are seldom applied as strictly in administrative pro-

[13] E.g., Baker v. Cummings, 181 U.S. 117 (1901).

[14] See, e.g., Miles v. Caldwell, 2 Wall. (U.S.) 35, 39 (1864).

[15] The rule of "bar and merger" developed from Roman jurisprudence, while that of "collateral estoppel" was derived from the medieval Germanic law. Millar, The Historical Relation of Estoppel by Record to Res Judicata, 35 Ill. L. Rev. 41 (1940).

[16] See, e.g., Cromwell v. County of Sac, 94 U.S. 351 (1876).

[17] Ibid.

[18] "Where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; and in any event it is not conclusive if injustice would result." Rest., Judgments § 70 (1942).

[19] Ibid., Comment a. See also von Moschzisker, Res Judicata, 38 Yale L.J. 299, 300 (1929).

[20] United States v. Stone & Downer Co., 274 U.S. 225 (1927) (customs determination held not res judicata lest later determinations in other cases create dissimilarity of treatment).

ceedings as in the courts.[21] One basic distinction in the administrative field was made by the case of *Prentis v. Atlantic Coast Line Company*.[22] The distinction was between the "legislative" and "judicial" functions of the agencies, res judicata applying only to the latter.[23] This application seems proper because of the substantial similarity between the judicial determinations of agencies and those of courts.[24] Since the purpose of the "legislative" function, however, is to affect future conduct, it would be defeated by a rule perpetuating past decisions.[25]

A third distinguishable function of administrative agencies is the "executive." This function encompasses the execution of policies "legislatively" determined and the general "housekeeping" duties of the agencies.[26] Executive duties are of such a nature as to make res judicata inapplicable, for the constantly changing details of execution and internal management are not susceptible to inflexible rules of repose. The courts are in accord with this view and do not allow rights to vest solely on the strength of an executive determination.[27]

In the judicial sphere of administrative law where res judicata is applicable, the distinction between fact and law remains. "The desire for repose on which res judicata rests relates primarily to findings of fact; repose on lively problems

[21] Davis, Administrative Law § 172 (1951). The following reasons might be suggested: (1) Since the primary responsibility of an administrative agency is to the public, the interest of the public in the results of the determination should take precedence over the interest of the parties in putting a definite end to litigation. (2) Flexibility of policy is vital to the public interest. (3) There is danger in binding administrative agencies to the perpetuation of decisions based merely on informal proceedings.

[22] 211 U.S. 210 (1908).

[23] Professor Davis feels this distinction is inadequate because of the practical inability to determine when the functions of an administrative body are "legislative," and when "judicial." He contends that a better approach would be that of "relaxation," whereby, in each type of case, the rules of res judicata are applied only to the extent appropriate to the case. "This escape from the all-or-none fallacy is fully supported in the practices of the agencies and in the holdings of courts. . . ." He admits that "the proposition that res judicata may be a matter of degree is not articulated as such . . . ," but feels that "the law of the subject seems to suffer from a lack of that articulation." Davis, Administrative Law 566 (1951).

[24] "Orders by government officials acting in a quasi-judicial capacity, and based on similar proceedings, have been regarded as final and binding on the government. . . ." Spencer v. United States, 100 F. Supp. 444, 447 (Ct. Cl., 1951). Accord: United States v. Burchard, 125 U.S. 176 (1888).

[25] See Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co., 284 U.S. 370, 388–89 (1932).

[26] Davis, Administrative Law 594 (1951).

[27] In District of Columbia v. Cluss, 103 U.S. 705 (1880), it was held that the determination of an architect's fee by a board of audit ("it exercised little more than the function of an accountant") was not binding upon the parties. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206 (1930), held that an executive determination by the Secretary of the Interior on the pension rights of an Indian did not preclude later reconsideration of the subject. However, in Lane v. Watts, 234 U.S. 525 (1914), it was held that once *title* to land had passed to an individual, the Secretary of the Interior could not reopen, even though the original grant had been made in the exercise of his executive functions. A transitional case is Greenameyer v. Coate, 212 U.S. 434 (1909), holding that a rehearing in a land grant case would be allowed only until legal title in the land was vested in an individual.

of law may even be affirmatively objectionable."[28] Thus, in *West v. Standard Oil Company*,[29] res judicata was not applied to an administrative determination of law, though the Court assumed that findings of fact would have been binding.

The fact-law distinction is sharpened when there has been a change in the applicable law between the two adjudications. *Blair v. Commissioner*[30] squarely held that a change in the law prevented the prior decision from collaterally estopping the question of law involved.[31] In *Commissioner v. Sunnen*,[32] the Court said:

> A subsequent . . . change or development in the controlling legal principles may make [the earlier] determination obsolete or erroneous, at least for future purposes. . . . Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve . . . the same bundle of legal principles that contributed to the rendering of the first judgment.

It seems clear, then, that in administrative law, a change in the law destroys the res judicata effect of legal determinations based on the prior state of the law.[33]

Assuming arguendo that loyalty readjudication is a judicial function to which the general doctrines of res judicata are applicable, it appears nevertheless that departmental boards are not collaterally estopped from readjudicating the loyalty of any federal employee. Such a proceeding involves questions of both

[28] Davis, Administrative Law 568 (1951).

[29] 278 U.S. 200 (1929). The federal government had surrendered title to certain lands, excepting those portions known to be mineral. A ruling by the Secretary of the Interior that certain property was not known to be mineral was later vacated by a successor on the ground that the first ruling had not attempted to determine the contested issues of fact but had been based on a supposed rule of law. The Court assumed that had it been a ruling of fact, it would have been inviolate.

[30] 300 U.S. 5 (1937). A beneficiary had been found taxable on trust income which he had assigned, on the ground that the trust was "spendthrift" according to the local law. Later, a court of the state whose law applied held the trust not spendthrift. In view of this, the first decision was held not to be binding with regard to the incidence of the tax in later years.

[31] This holding followed the dictum of Tait v. Western Md. Ry. Co., 289 U.S. 620 (1933), which held that a tax law determination for one year would be res judicata for the same issue in other years, absent an intervening change in the law, but implied that such a change would reopen the question.

[32] 333 U.S. 591, 599, 601–2 (1948). A taxpayer had given his wife the income from some license contracts. A determination that the man was not taxable on the royalties paid his wife during one tax period did not bar reopening the question for another period's royalties, since there had been an intervening change in the federal law. Note the similarity between the continuous nature of income tax liability, employment, and the absence of a certain state of mind.

[33] Comm'r v. Western Union Tel. Co., 141 F. 2d 774 (C.A. 2d, 1944), had attempted to limit the holding of Blair v. Comm'r, 300 U.S. 5 (1937) to situations in which the decision in a federal case depended on relationships established by state law, which relationships had been altered by a change in the state law. It interpreted the Blair holding as treating such state law determinations as questions of *fact* in so far as the federal courts were concerned, and held that the Blair rule did not apply where the law was changed by intervening federal decisions. But Comm'r v. Sunnen, 333 U.S. 591 (1948), impliedly overruled the Western Union case.

fact and law.[34] In the prior hearing, it was determined as a fact that the employee had a given state of mind, i.e., certain opinions and attitudes concerning communism and his personal duty to his own government. It was also determined as a matter of law that certain legal consequences then attached to that state of mind, i.e., the employee was not within the dischargeable group. Later, when another dischargeable group was created, the previous determination that the employee's state of mind did not place him within the first group does not preclude the question of whether it places him within the second.

Inasmuch as the evidence used by the government in loyalty program cases often consists of past acts or states of mind, it seems arguable that the cases fall within the rule of *United States v. Moser*.[35] This case held that in a judicial determination by the Court of Claims,

> a *fact, question, or right* distinctly adjudged in the original action cannot thereafter be disputed . . . even though the determination was reached upon an erroneous view or by an erroneous application of the law.[36]

The *Moser* case involved the question of whether plaintiff had "served" in the Civil War by attending Annapolis during the war. In plaintiff's first suit for a veteran's pension, the applicable statutory law was incorrectly interpreted to say that he was a member of a group that had served. Even when the interpretation of the law changed, the first suit was held res judicata on the fact of his membership in this group and consequent right to continue receiving the pension. In effect, then, this suit had vested plaintiff's right to the pension. If, in loyalty readjudication cases, the hearings under Executive Order 9835 had adjudged the fact that the employee in question belonged to a "loyal" group, he might have the right not to be later dismissed on a charge of disloyalty based on the same evidence as was presented in the first hearing. The prior hearing, however, did not find as a fact that the employee was loyal; it merely found that he was not a member of the group whose discharge was required by the standard then in force. When the promulgation of Executive Order 10241 created *another* dischargeable group, the *Moser* rule would not forbid a determination of whether or not the employee was a member of the *latter* group.

It appears, therefore, that even if it were properly assumed that this is a field in which the general principles of res judicata apply, there would be no actual application to employee loyalty cases because the change in the standard of dis-

[34] That the change in law in loyalty cases is made by executive order rather than by statute seems unimportant. In Continental Oil Co. v. Jones, 176 F. 2d 519 (C.A. 10th, 1949), a mere change in administrative regulations was held to make res judicata inapplicable. Certain gathering movements of crude oil had previously been held not subject to a transportation tax under the Treasury Department regulations then in force. The regulations were later changed to make these movements taxable, and the prior determination did not collaterally estop the question of liability under such tax.

[35] 266 U.S. 236 (1924).

[36] Ibid., at 242.

charge made by 10241 was a change in the pertinent law creating a new group of employees required to be discharged.[37]

Moreover, the assumption that this is a field in which the general principles of res judicata apply is probably incorrect. The determination of employee qualification clearly seems to be an executive function.[38] Therefore, the general rule that no rights vest in an executive decision[39] should apply. The traditional line of decisions on the rights of government employees has been fully in accord with this rule. These decisions held that, absent statutory protection, a government employee had no vested right in his job and could be dismissed at the will of his employer.[40]

The recent case of *Wieman v. Updegraff*[41] amended this traditional line, however, and held that sufficient right in a government job vests in its holder to protect him from wholly arbitrary discharge. If the right vested in an employee by the *Wieman* case were a *property* right, he could not be deprived of that right without due process of law. It might conceivably be argued that where property relationships are involved, the concept of due process would include the protection of res judicata.

However, the *Wieman* case does not seem to have created a *property* right in a job.

> It is sufficient to say that constitutional protection [of due process] does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory.[42]

Thus the government's right to discharge its employees "for such cause as will promote the efficiency of [the civil service]"[43] is tacitly recognized.

In conclusion, it appears that, since the employee loyalty cases are decided by an agency of government acting in an executive capacity, the power of decision is not limited by any application of the rules of res judicata. However, this does not preclude the larger question of whether the loyalty program itself is in keeping with our Constitution and our traditions.

[37] The obvious considerations bearing upon the "justice" of this result are the interest of employees in job security and the public interest in the employee good morale and efficiency which this would promote, balanced against the public interest in an effective loyalty program with the perhaps necessary concomitant of executive power to change the standards of discharge.

[38] "Even in normal times and as a matter of ordinary internal operation, the ability, integrity and loyalty of purely executive employees is exclusively for the executive branch of Government to determine, except in so far as the Congress has a constitutional voice in the matter." Bailey v. Richardson, 182 F. 2d 46, 51 (App. D.C., 1950). Statutory limitation upon this function requires only that discharge be made with notice and for valid cause. 37 Stat. 555 (1912), as amended, 5 U.S.C.A. § 652(a) (Supp., 1950).

[39] See note 27 supra.

[40] Myers v. United States, 272 U.S. 52 (1926). This case was limited by Humphrey's Executor v. United States, 295 U.S. 602 (1935), only insofar as Congress imposed special limitations upon the discharge of a specified class of officials.

[41] 344 U.S. 183 (1952). [42] Ibid., at 192.

[43] 37 Stat. 555 (1912), as amended, 5 U.S.C.A. § 652(a) (Supp., 1950).