MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Designation of White Citizens Councils

Cole v. Young, 351 U.S. 536, 543, 544, held that the term "national security" in the act of August 26, 1950 (5 U.S.C. 22-1, et seq.), "is used in the Act in a definite and limited sense and relates only to those activities which are directly concerned with the Nation's safety, as distinguished from the general welfare," and that the "term was intended to comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare." The Cole case applied this standard to determining the types of positions in the executive branch of the Government the occupants of which would be subject to the summary suspension and termination procedures established by the act of August 26, 1950. The question is now raised whether this standard has any bearing upon the exercise of the Attorney General's authority to designate organizations under Part III, paragraph 3 of Executive Order 9835 of March 21, 1947 (3 CFR, 1947 Supp., p. 129), as continued and modified by section 12 of Executive Order 10450 of April 27, 1950 (3 CFR, 1953 Supp., p. 72). If it does have any bearing upon that authority, a further question is raised as to whether it would affect the designation of White Citizens Councils, assuming for the purpose of this memorandum that such organizations have been determined to have "adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States," and that this language of Part III, paragraph 3 of Executive Order 9835 sets forth a sufficiently definite standard to justify administrative action.

Cole v. Young has no express or direct effect upon the designation of organizations pursuant to the Employee Security

Program. Any impact that it might have on that function would have to be implied. We can perceive no such implied impact and therefore conclude that it has no bearing upon the exercise of the Attorney General's authority to designate organizations. It would follow that it would not affect the Attorney General's authority to designate White Citizens Councils. Whether such organizations may be designated would depend upon the facts and resolution of other legal problems involved in interpreting the language of Executive Order 9835 which are discussed below.

1. The impact of Cole v. Young. Cole, an employee of the Department of Health, Education, and Welfare, was discharged by the Secretary in the exercise of the powers conferred upon her as a result of the extension by Executive Order 10450 of the act of August 26, 1950, to all departments and agencies of the Government. Cole contended that the Civil Service Commission had invalidly refused to accept his appeal from the Secretary's action under the Veterans' Preference Act (5 U.S.C. 863). The Court noted (351 U.S. at 541) that the 1950 act "eliminates the right of appeal to the Civil Service Commission" and, that, therefore, "the sole question for decision is whether petitioner's discharge is authorized by the 1950 Act." Pointing to the language in the act which "authorizes dismissals only upon a determination by the department or agency head that the dismissal is 'necessary or advisable in the interest of national security,'" the Court adopted the view that the determination required involves not only (1) "the character of the employee and the likelihood of his misconducting himself," but also (2) "the nature of the position he occupies and its relationship to the 'national security'" (id. at 542).

The decision did not discuss the evidence relating to the character of Cole, other than to conclude that reasonable doubt as to his loyalty was the ground for his discharge, because it decided that the term "national security" was used in the act in the limited sense already set forth and that "no determination has been made that the petitioner's position was affected with the 'national security' as that term is used in the Act" (id. at 543). It reached this conclusion because the Secretary had made only the formal determination required by Executive Order 10450 that Cole's employment was not "clearly consistent with the interests of national security" and because the Court interpreted the order as requiring the discharge under the 1950 act of all

employees failing to meet minimum standards of loyalty without "any independent determination of the potential impact of the person's employment on the national security" (id. at 554; emphasis in opinion).

Thus an examination of the opinion makes it apparent that the discussion of the term "national security" was directed primarily, if not solely, to the question whether that phrase exercises a limiting effect upon the types of positions the occupants of which may be subject to the summary suspension and termination procedures authorized by the act. The Court emphasized that before, at the time of, and after the enactment of the 1950 legislation other authority existed to discharge employees because of loyalty doubts (id. at 543-544). It also rested its conclusion on the legislative history which indicated that employees with access to classified material were the only ones intended to be affected (id. at 550-551) and on the enumeration in the act of agencies which undoubtedly employ such personnel (id. 544-555). From this the Court reached the result that the phrase "in the interest of the national security of the United States" in the context of the 1950 act was intended to have a limiting effect upon the types of positions covered.

It is important to this discussion that nowhere in the opinion is there cast any doubt on the proposition that loyalty is relevant to Government employment, whether included within the concept of security as it is in Executive Order 10450, or subsumed under the Lloyd-LaFollette (5 U.S.C. 652) and Veterans' Preference Acts' (5 U.S.C. 863) formula of promoting "the efficiency of the service," or used as an independent standard as it was in Executive Order 9835. On the contrary, in connection with its emphasis on the availability of those acts to deal with disloyal employees generally and on the fact that Congress enacted the 1950 legislation in the background of the existence of Executive Order 9835, the Court stated:

> "Thus there was no want of substantive authority to dismiss employees on loyalty grounds, and the question for decision here is not whether an employee can be dismissed on such grounds but only the extent to which the summary procedures authorized by the 1950 act are available in such a case" (351 U.S. at 544; emphasis in opinion).

Even in its detailed analysis of Executive Order 10450, which was critical in tone, the opinion did not question the general relevance of a loyalty standard.

Nor did the Court consider what would be appropriate loyalty standards or procedures. In view of the narrow questions it conceived to be before it--whether the 1950 act covers the occupants of all positions or merely the occupants of sensitive positions and whether the order purported unduly to extend its coverage in loyalty cases--and its assumption that other procedures are available to deal with disloyal employees generally, there was no occasion for it to do so. It is true that it confined the types of positions subject to the act to those directly concerned with protection against "internal subversion or foreign aggression." However, nothing in the opinion indicates that even by dictum was it implying what a standard for loyalty generally should be or that this formula was intended to establish one.

It is clear that the device of designating or listing organizations in connection with the Federal personnel system is used in connection with determining loyalty. The history of listing goes considerably further back than Executive Order 9835. Bontecou, "The Federal Loyalty-Security Program" (1953), pp. 159-167. However, that order, which established a standard of loyalty to be met by all employees and a procedure to adjudicate it, serves as an appropriate starting place for a discussion of the present function. Part V, paragraph 1 of the order, as amended, provided that:

"1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

Part V, paragraph 2 included among the "activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty":

"f. Membership in, affiliation with or sympathetic association with any foreign or domestic

organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

Part III, paragraph 3 of the order required that the Loyalty Review Board, established by the order, be furnished by the Department of Justice the name of each organization "which the Attorney General, after appropriate investigation and determination, designates as" coming within one of the categories set forth in Part V, paragraph 2.f. The Loyalty Review Board was in turn required to furnish "such information to all departments and agencies."

Executive Order 10450, which repealed Executive Order 9835, introduced "security" as a broader and more all-encompassing test than "loyalty." However, the standard of loyalty was by no means dropped. Rather it was included within the broader concept. Thus, in its preamble the order recited that all Government employees must be "of complete and unswerving loyalty to the United States." Section 8 of the order directed that investigations be related to disclosing, together with matters not mentioned in Executive Order 9835, all the associations and activities set forth as relevant to loyalty standards under Part V of the earlier order. This included relationships with organizations identically described as in Executive Order 9835. Accordingly, the Supreme Court concluded in the Cole case that an employee was not intended by Executive Order 10450 to be retained unless "there is no doubt as to his loyalty." 351 U.S. at 552.

In turn, the function of designating or listing organizations was clearly continued for its use in determining loyalty, now one of the criteria to be used in reaching a judgment on security. Section 12 of Executive Order 10450 revoked Executive Order 9835 and continued the existence of the Loyalty Review

Board for only a limited period of time. However, it expressly provided that

> "the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of Executive Order No. 9835, but directly to the head of each department and agency."

As indicated above, the types of organizations referred to in paragraph 3 of Part III are identical with those enumerated in paragraph 2.f. of Part V, dealing with the standards to be used in determining loyalty. Therefore, Executive Order 10450 not only continued loyalty as a test for employment but also required the Attorney General to continue to designate organizations in precisely the same terms and for precisely the same purposes as Executive Order 9835. The only change resulted from the fact that the Loyalty Review Board ceased to exist. The names of the organizations are now to be furnished by the Attorney General directly to the department and agency heads rather than through that body. Thus, providing evidence or information to be used in connection with a determination of the loyalty of Government employees remains the purpose of the designation of organizations by the Attorney General.

There exists a substantial line of authority which establishes that any public employment may be made subject to meeting reasonable loyalty requirements. In Garner v. Board of Public Works, 341 U.S. 716, 720-721, the Supreme Court held constitutional a loyalty oath requirement for all Los Angeles employees as "a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States." Assuming that appropriate procedures are used to establish the list and appropriate distinctions are made between knowing and innocent relationships, such "a reasonable regulation" may involve consideration of affiliation with or membership in an organization designated by an appropriate authority. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123; Adler v. Board of Education, 342 U.S. 485, 493; Weiman v. Updegraff, 344 U.S. 183; National Lawyers Guild v. Brownell, 225 F (2d) 552, 556 (C.A.D.C., 1955), certiorari denied 351 U.S. 927. Nothing in Cole v. Young indicates an intention to repudiate this line of authority. Rather, without attempting to define the concept, the Court impliedly reaffirmed the general relevance of loyalty to Government em-

ployment when it expressed the view "that there was no want of substantive authority to dismiss employees on loyalty grounds."

It may be seen from the foregoing that the only questions dealt with in Cole v. Young were the types of positions to which the act of August 26, 1950, is applicable and whether Executive Order 10450 purported to extend the application of the act beyond positions of the type determined to be covered. However, the case did not involve and the opinion did not discuss what would constitute appropriate standards of loyalty or what procedures or evidence may be used in determining loyalty. Since this is so, it does not bear upon the Attorney General's authority to designate organizations, including his authority to designate any specific organizations such as White Citizens Councils. Whether they may be designated depends on the facts and certain additional problems raised by the language of Executive Order 9835.

2. The applicability of the Executive Order. Of course, the foregoing provides no guidance as to whether any White Citizens Council may or may not be listed. In the event further consideration is to be given to that question, some serious additional problems are raised by Executive Order 9835, which appears to be governing here. First, as indicated above, membership or sympathetic association with an organization designated "as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States" is to be considered under Part V, paragraph 2 of the order only "in connection with the determination of disloyalty." The order read as a whole seems clearly to intend that the disloyalty of an organization be a prerequisite to designation. Even assuming that a White Citizens Council adopts "a policy of advocating or approving the commission of acts of force or violence to deny" Negroes "their rights under the Constitution" there is a real question as to whether it may be considered disloyal.

White Citizens Councils and similar organizations seem to be markedly different from other types of organizations which have been listed in the past. Most of the organizations presently listed are either truly subversive in nature in the sense that they are or have been instruments of unfriendly foreign

powers or fronts for such instruments. A few are crackpot organizations of the type of the Ku Klux Klan. However, you may recall that at a recent meeting Mr. Olney pointed out that even that organization was listed only because at the time it appeared to be embarking upon a program which was closely related to, if not inseparable from, the activities of hostile Nazi organizations in America.

The organization of White Citizens Councils resulted from recent court decisions which have a special and radical impact upon the social structure of one section of the country. As we understand the facts, the membership and direction of the organizations are wholly domestic and they are made up of individuals whose loyalty to the United States, in the terms in which loyalty is ordinarily understood, is not questioned. They differ from other loyal citizens in their deep and aggressive hostility to acceptance of the consequences of the Fourteenth and Fifteenth Amendments in relation to Negro rights. This hostility when placed against the growing unwillingness of the Negroes to accept an illegally imposed subordinate position in society and their increasing insistence on the assertion and enjoyment of their constitutional rights may be leading, or has already led, to an explosive and tragic situation.

We know of no legal answer to these legitimate claims of the Negroes. We are in accord in believing that they are fully entitled to the protection of the law in the assertion of those rights. On the other hand, labeling as subversive, and classing with Communists and Fascists, so large and otherwise loyal a group of individuals as compose the membership of the Citizens Councils would seem to be of questionable utility as a device for reducing opposition to the recognition of Negro rights.

Of more relevance in this context, the concept of "loyalty" when used in Government security and loyalty programs is used for the purpose of protecting the Government against infiltration. Indeed, it was the fear of infiltration by individuals who could use their positions either for the purpose of espionage on behalf of foreign powers or to influence policy on behalf of foreign powers which was the principal reason for the adoption of the loyalty program. Bontecou, supra, pp. 21-30, 300-306. The types of organizations that were enumerated were not, however, limited to organizations with foreign connections. It could include, for example, purely domestic revolutionary

organizations. And if such organizations exist there would be little difficulty in considering their members disloyal and the Government entitled to protect itself against infiltration by them to the same extent that it is entitled to protect itself against the members of organizations which are in effect the agents of foreign powers.

However, there seems to be some doubt as to the meaningfulness of the concept of infiltration as applied to organizations which advocate the denial of others their constitutional rights. The danger of espionage in this field seems to be negligible. It seems unlikely that Government positions will be used either to deny others their rights by force or violence or as a forum to advocate such a policy. Accordingly, the type of infiltration the Government would be protecting itself against by designating such organizations is not clear. If the probability of the use of Government positions for those purposes should be found actually to exist it would be easier to argue that infiltration has a real meaning in the context. However, whether or not this would amount to disloyalty would still remain a question. In any event, it may be seen that if the order is interpreted against its overall purpose rather than by a mechanical judgment as to whether a particular organization falls within a prescribed formula, substantial problems are involved.

Second, even assuming that designation of White Citizens Councils is consistent with the general intent of the order, the language "having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States" should be reexamined to determine the meaning which should be attributed to it and whether that meaning meets appropriate standards of specificity. There has been, for example, a difference of opinion within the Department as to whether the word "force" in the phrase "force or violence" comprehends mere acts of economic coercion alone without resort to violence. In a memorandum to this Office dated December 6, 1955, the Internal Security Division concluded that it could be so interpreted. However, in a memorandum in reply dated January 24, 1956, this Office expressed the view that the history of the use of the phrase "force or violence" and its judicial interpretation in analogous situations precludes that view.

More difficult is the content to be ascribed to the phrase "to deny others their rights under the Constitution of the United States." The language is reminiscent of that used in the civil rights statutes and raises all the problems of vagueness which have plagued the interpretation of those statutes. See, e.g., Screws v. United States, 325 U.S. 91; Collins v. Hardyman, 341 U.S. 651, 661. In the latter case the Court pointedly noted that it was

> "Passing the argument, fully developed in the Civil Rights Cases, that an individual or group of individuals not in office cannot deprive anybody of constitutional rights, though they may invade or violate those rights, * ***." (Emphasis in opinion)

That case involved the breaking up by the American Legion of what was apparently a pro-communist meeting. The Court did not find it necessary to pass on the question because it held that the statute does not apply "unless there is some manipulation of the law or its agencies," a factor not found to be present in the case. Should some similar standard be applied to the Executive order language only organizations which advocate or approve official action would be covered.

Further, the Executive order language is remarkably similar to 18 U.S.C. 241 which imposes criminal penalties on conspiracies "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." However, the last time the Court dealt with the issue it split four to four on the question whether the statute covers anything more than rights arising from the relationship of the victim and the Federal Government. United States v. Williams, 341 U.S. 70. If so limited, it would exclude action protected under the Fourteenth Amendment, such as the right to attend unsegregated schools. A similar limitation read into the Executive order would therefore make it inapplicable to organizations which advocate only the denial by force of the right to attend integrated schools, as opposed to those which also advocate denial by force of the right to vote for Federal officers.

It is doubted whether any really reliable answer can be given to the questions here raised without a judicial determination or a series of such determinations. This memorandum does not, however, by any means exhaust the consideration which may

be given to those questions. However, in view of the conclusion here reached that Cole v. Young does not bear upon the question whether designation of the organizations involved is authorized, it has been considered appropriate at this point merely to raise some of the questions which do appear relevant and to indicate the difficulties involved in their solution.

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