LAWYERS AND LOYALTY-SECURITY LITIGATION

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As I told you yesterday, I can't figure this out. A criminal lawyer, who is famous for making big fees—maybe he'll make $15, $20, $30 or $40,000—will go in and represent a person on a multiple murder, arson, rape, and four or five other crimes, and the public has some kind of fondness for that. But if some guy will take, if a lawyer will take a case and he says, "I'm going to represent this communist because I think he has a right to express himself, and I'm going to do it just for the love of doing it," you get a little bit of an odd-ball stigma put on you. I think—I may be wrong on that. But . . . it's a strange thing that when you do it for money, the public seems to accept it; when you do it for more lofty reasons, I'm not sure that the public does accept it. What do you think?

THE WAVE OF CONCERN WITH SUBVERSIVE activities that emerged in this country after World War II produced a number of government loyalty-security programs.[1] The potential constitutional infirmities of these pro-

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1. Including programs for screening government employees; federal anti-subversive activities statutes (*e.g.*, the Smith and McCarran Acts); federal and state loyalty oaths;

grams were manifest, for the "subversive activities" the government sought to suppress often involved thought, speech, and association. In addition, many legislative investigations appeared aimed at the exposure of alleged subversives rather than at legislation. Thus, the loyalty-security programs raised important first amendment and due process issues. A great deal of litigation resulted from these programs and the Supreme Court frequently consented to hear the cases.[2]

This study focuses upon lawyers who argued loyalty-security cases decided with opinion by the Supreme Court of the United States, 1957-66.[3] The questions to be discussed include, who were these lawyers (in terms of demographic and attitudinal characteristics), how did they become involved in litigation, and what kinds of goals were they pursuing? The analysis of the data presented in this report has implications for understanding the process by which the legal profession was able to provide representation to a group of highly unpopular clients, and changes in the types of lawyer arguing the cases discussed here are perhaps reflective of changes in the social and political climate in this country.[4]

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and extensive investigative activities by legislative committees. For general background on government loyalty-security programs, see the following: THE FEDERAL LOYALTY-SECURITY PROGRAM. REPORT OF THE SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1956); REPORT OF THE COMMISSION ON GOVERNMENT SECURITY (1957); E. BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM (1953). The leading analysis by a political scientist is E. LATHAM, THE COMMUNIST CONTROVERSY IN WASHINGTON (1966). For a critical review of Latham's work, see F. J. Donner, *Leaving Out the Letter "E,"* 203 THE NATION 422 (1966). W. GOODMAN, THE COMMITTEE (1968) provides an entertaining history of the activities of the House Committee on Un-American Activities (HUAC).

2. Though sometimes there was a substantial time lag. Some important Court decisions came after the most virulent strains of McCarthyism had been severely weakened. *Compare*, for example, Dennis v. United States, 341 U.S. 494 (1951) *and* Yates v. United States, 354 U.S. 298 (1957).

3. The research reported here is excerpted from a study of lawyers who argued a variety of types of civil liberties and rights cases (loyalty-security, criminal justice, reapportionment, civil rights) during the 1957-66 period. *See* J. D. Casper, Lawyers in Defense of Liberty, 1968 (unpublished).

4. Because of limitations on the data available; the analysis presented here should be taken as somewhat provisional propositions, not as generalizations that have been empirically demonstrated. Forty-eight lawyers argued loyalty-security cases decided with opinion by the Supreme Court during the 1957-66 period. The data analyzed here are based upon a mail questionnaire (28 respondents) and a series of interviews (21 respondents); because of overlap between questionnaire and interview respondents, this amounts to a total of 30 respondents among the 48 lawyers.

INTRODUCTION

The Court agreed to hear cases during the 1957-66 period dealing with most aspects of government loyalty-security programs. Perhaps the largest body of litigation dealt with legislative investigations, particularly those of the House Committee on Un-American Activities (HUAC). The typical hostile witness raised broad attacks upon the power of legislative committees to compel testimony, raising claims of freedom of thought, speech, and association under the first amendment, disputing the propriety of delegation of power to legislative committees, and questioning the power of committees to expose simply for exposure's sake. The Court often reversed the contempt convictions of witnesses,[5] but a majority never accepted the broad attacks that went to the heart of the power of legislative committees. Court opinions were generally based upon relatively narrow grounds like the relevancy of questions to the subject under investigation,[6] the failure of committees to delegate power clearly to subcommittees,[7] defects in indictments,[8] failure of committees to act upon requests for executive sessions,[9] and the valid exercise of the fifth amendment privilege against self-incrimination.[10]

The Court gradually emasculated another part of the federal loyalty-security program, the Subversive Activities Control Act (the McCarran Act). In a series of cases, important provisions of the Act were declared unconstitutional.[11] The Court also dealt with various aspects of the federal employee loyalty-security screening program.[12] Finally, various state loyalty oaths[13] and antisubversive activities statutes[14] were struck down by the Court.

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5. With some notable exceptions. *See*, for example, Barenblatt v. United States, 360 U.S. 109 (1959); Wilkinson v. United States, 365 U.S. 399 (1961); and Braden v. United States, 365 U.S. 431 (1961).

6. *E.g.*, Watkins v. United States, 354 U.S. 178 (1957).

7. *E.g.*, Gojack v. United States, 384 U.S. 702 (1966).

8. *E.g.*, Russell v. United States, 369 U.S. 749 (1962).

9. *E.g.*, Yellin v. United States, 374 U.S. 109 (1963).

10. *E.g.*, Raley v. Ohio, 360 U.S. 423 (1959).

11. Including Aptheker v. Secretary of State, 378 U.S. 500 (1964); Albertson v. SACB, 382 U.S. 70 (1965).

12. *See*, for example, Greene v. McElroy, 360 U.S. 474 (1959), and Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

13. Some of the relevant loyalty oath cases include: Florida, Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); Washington, Baggett v. Bullitt, 377 U.S. 360 (1964); Arizona, Elfbrandt v. Russell, 384 U.S. 11 (1966).

14. *E.g.*, Pennsylvania v. Nelson, 350 U.S. 497 (1956).

Since many defendants in loyalty-security cases represented political viewpoints that the majority of the population found abhorrent,[15] the litigation was often acrimonious. Supreme Court decisions alleged to favor political radicals, or to restrict the power of government to deal with them, were highly controversial and led to attempts by Congress to restrict the power of the Court.[16]

Compared with other types of civil liberties and rights cases, there appears to have been a pronounced tendency in loyalty-security litigation for the lawyer to be tarred with the same brush used on his client. As the lawyer quoted at the outset noted somewhat plaintively, our society has at times apparently found it somehow more legitimate for a lawyer to defend a vicious criminal than an alleged Communist.

One evidence of this reaction to lawyers who have defended Communists can be found in the work of HUAC. A pamphlet issued by the committee[17] depicted the allegedly subversive connections of many lawyers who were prominent in loyalty-security litigation. As a result of this climate of hostility and fear, defendants in loyalty-security cases sometimes had difficulty obtaining counsel.[18]

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15. For a summary of survey data dealing with attitudes toward Communists and other dissenters during the mid-1950's, see S. STOUFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES (1955). The following data suggest the degree to which Communists were the subject of intense public hostility during the period in which a good deal of the loyalty-security litigation that reached the Supreme Court in the 1957-66 period began:

Should membership in the Communist Party be forbidden by law?

Percent of Respondents Saying "Yes"	Date of Survey	Survey
70.0%	3/49	AIPO #438
78.4	12/50	AIPO #469
74.0	9/53	MINN #120

Should members of the Communist Party be allowed to speak on the radio?

Percent of Respondents Saying "No"	Date of Survey	Survey
43.7%	3/46	NORC 49/141
57.3	4/48	NORC 75/157
73.2	1/54	NORC 136/351
75.5	1/56	NORC 150/382
75.1	4/57	NORC 156/404

16. *See* W. MURPHY, CONGRESS AND THE COURT (1962).

17. COMMUNIST LEGAL SUBVERSION: THE ROLE OF THE COMMUNIST LAWYER, H.R. Doc. No. 41, 86th Cong., 1st Sess. (1959).

18. *See* M. Alexander, *The Right to Counsel for the Politically Unpopular*, 22 L. IN TRANSITION 19 (1962) for a discussion of some of the reasons why some lawyers were reticent about handling loyalty-security litigation.

Loyalty-security cases before the Supreme Court during the 1957-66 period were argued by two fairly distinct groups of lawyers. One group—to be called the Radical Bar—included a number of attorneys who specialized in loyalty-security and civil liberties litigation. They were very active in the defense of political radicals, and this kind of litigation constituted a large part of their practices. Though many had not intended to specialize in loyalty-security litigation, once they had defended a few radicals, they began to defend many of them. The members of the Radical Bar were characterized by somewhat similar career patterns, a complex network of friendship ties among the lawyers and among lawyers and their clients, regular social and professional interaction, and common membership in a legal professional organization, the National Lawyers' Guild. They perceived their function in the litigation as defenders of the political left against governmental harassment.

The second major group of lawyers who argued loyalty-security cases became involved through their affiliation with the ACLU. They generally did not have extensive experience with loyalty-security cases, but rather became involved in only one or two. They perceived their function in the litigation as defenders of general democratic principles rather than of a particular political faction.

The earlier cases during the 1957-66 period were primarily argued by members of the Radical Bar. The more recent cases, which were somewhat different in content and arose after the height of the McCarthy period, have had more ACLU lawyers[19] involved.

RADICAL BAR AND ACLU LAWYERS: BACKGROUND AND CAREER

When lawyers who argued loyalty-security cases were compared with a group of lawyers who argued other kinds of civil liberties and civil rights cases during the same period, certain attitudinal and demographic variables appeared to differentiate the loyalty-security lawyers.[20]

19. The term "ACLU lawyer" is a euphemism used here to describe a typical lawyer who handles occasional cases for the ACLU but whose basic practice involves other types of matters. Many members of the Radical Bar were themselves members of the ACLU, but do not fall into the category "ACLU lawyer."

20. The following description of some of the variables that appear to differentiate loyalty-security lawyers from lawyers who argued other civil liberties and rights cases is based upon statistical analysis using multiple regression and analysis of variance techniques. Because the small N's involved make the relationships tentative (though statistically significant), the variables are presented here as suggestions of patterns in characteristics, not as relationships that have been empirically demonstrated.

They tended to be more politically liberal, to be somewhat older, to have relatively few affiliations with secondary groups that integrate individuals into society (*e.g.*, religious,[21] political and social organizations) and with legal professional organizations that integrate the lawyer into his profession. They maintained relatively high affiliation rates with their *own* legal professional organization—the National Lawyers' Guild—which performed the function of providing reinforcement to many lawyers outside the mainstream of their profession.

Taken as a whole, the loyalty-security lawyers appear to have been a somewhat alienated group, disaffiliated lawyers possessing many of the putative characteristics of the political radicals they often represented. But this image is somewhat deceptive, for it applies mainly to members of the Radical Bar, not to the ACLU lawyers who have recently become active in loyalty-security litigation. The ACLU lawyers, as compared with those in the Radical Bar, tended to be younger, less politically liberal, to have higher affiliation rates with social, political, religious, and legal professional organizations, and few were members of the Lawyers' Guild.

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21. One interesting finding appears when the religious affiliations of the loyalty-security lawyers are examined. The twenty-eight questionnaire respondents who argued loyalty-security cases reported the following religious affiliations:

Catholic	00.0%
Protestant	28.6
Jew	21.4
None	50.0
	100.0% (N = 28)

There is a common stereotype of the loyalty-security lawyer as an individual who is not only politically liberal, but also Jewish. Since one-half of the respondents reported no religious affiliation, the religion indicated for the respondents' fathers was checked, to see whether respondents who reported no affiliation were in fact lapsed Jews. For these fourteen respondents, the distribution of father's religious affiliation is as follows:

Catholic	7.2%
Protestant	42.9
Jew	28.6
None	21.4
	100.1% (N = 14)

Thus, the evidence, provisional though it is, does not suggest that loyalty-security lawyers have been predominantly Jewish. Though apparently very few are Catholics, they are well-distributed (both in terms of current affiliation and family background) among Protestants, Jews, and nonaffiliates.

The Radical Bar

These differences in background characteristics between the Radical Bar and the ACLU lawyers are reflected in the career patterns reported by members of the two groups. The typical member of the Radical Bar came from a family that was somewhat active in radical politics. The lawyer reported that he had no particular reason for choosing his profession: being a professional was desirable in a vague and diffuse way, and scholarships to law school were more easily obtainable than those to medical school. Thus, though he came from a liberal or radical political background, the typical member of the Radical Bar did not choose the legal profession for the purpose of working for social change. Many members graduated from law school during the depth of the Depression. The New Deal and the emergence of the CIO caught their interest, and most went into labor law, either working for industrial unions or the newly-formed NLRB. Most in the government left when Roosevelt died. The Depression was an extremely important influence upon their lives, for it deeply impressed upon them the social and political ills of American society. The New Deal swept them up in the search for new programs and policies to cure these ills. As a result of their work with the emerging industrial labor unions, they came into personal contact with many political radicals, including members of the American Communist Party and other left-wing factions. Whether or not the lawyer accepted their ideology, he came into contact with radicals, shared with them their concern about social conditions in America, and often became friends with them.

When the Cold War and the McCarthy period brought government action against the left wing, many of those in trouble turned to lawyers they knew and from whom they could expect a sympathetic response. Thus, the typical member of the Radical Bar became involved in a few loyalty-security cases in the middle and late 1940's. Since many lawyers would not handle these cases, those who did suddenly became inundated with clients. One respondent discusses how he became active in loyalty-security litigation:

> . . . [w]e left the government—I had been a trial examiner for the NLRB; my partner had been working for [another government agency]. We were interested in practicing law and generally interested in things. Let me say this—I don't think that if the McCarthyite period hadn't come and people hadn't come to us—I don't think we would have . . . I mean, it's not our personality—it's almost that these cases just came. And we didn't feel in good conscience that we could turn them down, cause they were important cases. I don't mean we struggled over it—we thought

> they were good cases and we were glad to do them. But the kind of thing happens—more so in those days than today—this business, if you take one or two of these cases you find you're not handling any others. I mean, it's not your choice—it seems to be other people's choice.

Some members of the Radical Bar also stressed the importance to their careers of their exposure to Marxism:

> I went to college to be a minister. I had a debate scholarship from "Hometown." The women there—we were the only Negro family there—they raised the money to send me to college. And they sent me to be a minister. It is a Methodist college and my folks were Methodists. But in my sophomore year I met a boy from Russia, and I was arguing with him on all these things. He was a Marxist and he really knew his stuff and he gradually drew me in during my sophomore year. I told my professor of Bible that I didn't think I could—I didn't believe in God in the sense that he believed in it, and I didn't think that I could be a minister. And he said, "I think you're right." So I switched over to political science and by that time I was so involved with my political beliefs on Marxism that I decided . . . [that] my best prospects would be in law.

The Radical Bar lawyer was ideologically receptive to the kinds of reforms advocated by the political radicals. His personal ties with radicals first led him into their cases. The social and political climate at the time insured that he would continue to represent them. In addition, there was probably some selection by the client, for the radical might well have wished to be represented by a lawyer of somewhat similar political persuasion.[22]

The ACLU Lawyers

The other group of lawyers included the typical ACLU cooperating attorney. His practice was quite general, usually with a small firm. The ACLU lawyers were moderately politically liberal and interested in

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22. For example, two black members of the Radical Bar suggested that they were sometimes called into cases in part because of their race. One reported:

> He [the lawyer for the defendants in a case involving members of the Communist Party] called from "Eastport" to tell me that they were looking for another lawyer and that he suggested me. It was a little more specific than that. It was just inconceivable that the defendants would go to trial with a battery of say three or four lawyers and not have a Negro among them. It would be a reflection on them and everything that they advocated.

On the other hand, some radicals might have preferred to be represented by more "respectable" lawyers but were unable to secure such representation and thus turned to those lawyers who were willing to handle their cases.

handling some civil liberties cases, though they by no means specialized in this kind of law.

As suggested above, involvement of members of the Radical Bar in loyalty-security cases was related to a coherent pattern of policy preferences, socioeconomic background, group memberships, and career experience. Some similar explanation of the participation of ACLU lawyers in loyalty-security litigation is in order, but is much more difficult to specify. On the basis of the data gathered in this study, it appears that the different career pattern followed by the two groups is largely a result of the difference in age between Radical Bar and ACLU lawyers.

The ACLU lawyer, a decade younger, began his practice in the middle to late 1940's (the war causing a lag of more than ten years). The social and political climate faced by the ACLU lawyer starting out in practice was distinctly different from that which had faced the Radical Bar lawyer. The struggle over unionization had waned and the fervor of the New Deal had to a large extent worn off. The pressures of the Cold War were building and tolerance for social activism and dissent was reduced. The activist liberal bar association formed in the late 1930's—the National Lawyers' Guild—had been wracked by charges of Communist domination and torn by mass resignations.

In this climate many ACLU lawyers began their careers. It was not a time in which it appeared profitable or even safe to practice much civil liberties law. Not having as liberal political views as the Radical Bar, and facing a social and political climate in which the opportunities for the practice of law for social reform appeared bleak, the typical ACLU lawyer chose a more socially and politically acceptable general practice.[23] But both his policy preferences and his attitudes toward the function of the law and the legal profession in society made complete noninvolvement in civil liberties cases unattractive. Therefore, the ACLU lawyer joined the ACLU. Through his involvement he could satisfy his desire to participate in civil liberties litigation, while at the same time not make his career dependent upon such a practice.

The ACLU lawyers have recently become much more active in loyalty-security cases. During the height of the McCarthy period, the ACLU and its cooperating attorneys were apparently somewhat less

23. Or, some specialized in another field of social reform, civil rights.

eager to support the defense of political offenders.[24] The issues in the loyalty-security cases argued by ACLU lawyers were somewhat different. For example, ACLU lawyers have been involved in a number of recent attacks upon state loyalty oaths. These cases are somewhat "cleaner," for the plaintiffs have typically not been political radicals but rather nonideological citizens who simply do not like oaths. In addition, the political climate seems to have changed substantially so that it has become more permissible to defend radicals. For example, the *Stammler* case, a recent attempt to enjoin a HUAC hearing, involves individuals who have been active in radical politics, but the case is being handled by a large and conservative Chicago firm.[25]

INVOLVEMENT IN LITIGATION

The Radical Bar

One of the most striking aspects of involvement by the Radical Bar in litigation was the importance of friendship ties between lawyer and client. Ten of the 21 interview respondents who argued loyalty-security cases reported some friendship tie or social contact with their client previous to involvement in his litigation. All ten were members of the Radical Bar. Some Radical Bar lawyers also became involved in litigation when members of unions they represented had loyalty-security difficulties. Finally, Radical Bar lawyers became involved as a result of their reputations. A lawyer quickly developed a reputation for willingness to become involved in loyalty-security cases; this led to the snowball effect alluded to above—one case led to another and then more. In this way, a Radical Bar—a group of lawyers specializing in loyalty-security litigation—developed.

The ACLU Lawyers

The other major group of lawyers became involved through their affiliation with the ACLU. They were not likely to have been previously

24. This statement was suggested by a number of cooperating and staff attorneys of the ACLU. A similar view of the role of the ACLU and of the importance of a small group of lawyers in the loyalty-security cases arising during the McCarthy period is suggested in N. Hakman, *The Supreme Court's Political Environment: The Processing of Noncommercial Litigation*, in J. Grossman and J. Tanenhaus, FRONTIERS OF JUDICIAL RESEARCH (1969), pp. 199-253, at 226-227.

25. For a discussion of the Stammler hearing and some of the early stages of the litigation, see *The New York Times*, May 25, 1965, at 18; May 27, 1965, at 20; November 13, 1966, at 27. *See also*, GOODMAN, *supra* note 1, at 456-64.

acquainted with their clients nor to have had much experience in loyalty-security litigation. They took the case, though sometimes with some trepidation:

> I was the only lawyer in town who was connected with the ACLU for about four or five years. I was on vacation when [the incident that led to litigation took place] and he gave a statement to the press that he wanted the ACLU to represent him, and he asked specifically for me by name.
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> Why did he ask for the ACLU?
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> I think probably by general reputation. He's a cultured, educated man, and he told me that he was afraid that no other lawyer, private lawyer . . . they might fear, they might be afraid to represent him. And so he came to me—on that basis. And I was scared to represent him, but I'd been talking about free speech and the Constitution for 25 years and I either had to take his case or leave town—one of the two. So I took it. I wasn't really happy about it—I was excited about it . . . but hell, I had to take it.

Or, the lawyer himself may have taken some initiative:

> I became convinced that our school teachers in this state are such a bunch of little ninnies anyway, and so afraid of opening their mouths, that any further legislation that would in any way restrict them would have catastrophic results on academic freedom. So I personally made up my mind that I was going to fight it, and I was going to find a client someplace.

Thus, the ACLU lawyers usually came to litigation without previous ties to their clients. More important, they came to litigation without commitment to the kinds of ideological positions that the client sometimes espoused. Their commitment was rather to some general principles about civil liberties. It must be stressed that this is not meant to imply that members of the Radical Bar were themselves unsympathetic to these democratic principles (for example, that members of the Radical Bar were close-minded authoritarians of the Left) but simply that for members of the Radical Bar there was a closer nexus between the ideology of the lawyer and the client.

Competition for Cases

A good deal has been said above about the effects of the political and social climate during the 1950's upon the availability of counsel in loyalty-security cases. A number of members of the Radical Bar commented upon recent changes in the availability of counsel. They sug-

gested that while during the 1940's and 1950's there were almost always more cases than there were lawyers willing to handle them, today the situation is to some extent even reversed. Today, some suggested, there are often more lawyers desiring to handle civil liberties cases than there are cases available. Many mentioned competition among lawyers for the "juicy" cases, the ones which raise the "big issue." For example:

> Whether [the competing lawyers] paid [the defendant] for the case or whether it was that they said, "We'll take care of all the expenses," which is more likely—and "expenses" is an elastic term—that's the way they got it, see. In other words, the law is not always completely aboveboard and honorable . . .
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> I was there with him [the defendant] when nobody else would take it. It was only after the others recognized the significance of it that these other lawyers came in. But at that first level . . . [n]obody was anxious for it then. But when we got it set up and clarified the issues, that's when the other lawyers said, "We'd like that case." And they conspired to get it and it was a terrible thing. [One of the other lawyers] called and was threatening us. And we had gotten some grants in some cases from foundations. And [the competing lawyers] were big shots in these foundations, and they got to those foundation people, who also called.

How much of this competition there is could not be determined, but many lawyers are very aware of it.

Several explanations for the emergence of competition may be advanced and most revolve around a change in the political climate. Some respondents suggested that today it is "respectable" to become involved in many kinds of civil liberties cases, when before it was not. As a result of this change, there are more lawyers interested in this litigation, both lawyers practicing in the earlier period who were then unwilling to handle such cases, and also young lawyers recently out of law school. In addition, as suggested above, the ACLU has more and more emerged as an active force in civil liberties litigation. A combination of these factors partially explains the change in the availability of counsel for the politically unpopular.

The final and perhaps most important factor has been the emergence and success of the civil rights movement. The success of this protest movement, and most particularly the cooptation of its goals and perhaps of the movement itself by the federal government, seems to have had important effects upon the American political process. Direct action (as well as litigation) by a group of political and social outsiders was successful and the imprimatur of the government was placed upon their protest activities. The civil rights movement seems to have engendered a climate in which many feel it legitimate to dissent and to protest

directly perceived social ills. The effects of the Vietnam war, current student unrest, black militancy, and the white backlash make the future hard to predict, but it seems fair to suggest that the civil rights movement did usher in a new form of political action and a new tolerance of and legitimacy for dissent. Civil liberties as a concept has itself been broadened. During the 1950's the big legal issues were loyalty-security programs and civil rights; the 1960's brought a rash of new issues, including criminal justice, reapportionment, and new attacks in the name of freedom of religion and speech. The currently developing legal battle over protests of the Vietnam war and draft resistance appears to be opening a new area. The widening of concern for civil liberties, and the importance of litigation as a tool, are both related to the success of the civil rights movement and its effects upon our tolerance for dissent.

Whatever its causes, this shift in the availability of representation and in attitudes of the legal profession toward the provision of counsel to social and political dissenters must be noted. Litigation that was once shunned is now apparently viewed by many lawyers as prestigeful. A new breed of lawyers has entered loyalty-security litigation and other areas of civil liberties. The competition that has developed has involved not only the Radical Bar versus lawyers newly interested in the litigation, but also competition among members of the Radical Bar. This competition may have somewhat reduced the friendship ties that characterized the Radical Bar during earlier years. For members of the Radical Bar, the development of competition has been not only distasteful, but also highly ironic.

CLIENTELE

In analyzing what the lawyers were trying to achieve in their cases before the Supreme Court, the concept used was "clientele." Clientele refers to the individual or group whom the lawyer perceives has a stake in and will be affected by the outcome of his litigation.[26] A law-

26. The concept of clientele is closely related to the concepts of reference groups and reference individuals. For an introduction to the reference group literature, see 13 H. Hyman, *Reference Groups*, INT'L ENCYC. SOC. SCI. 353-61 (1968); and R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE ch. 8 (1957). Any lawyer in litigation probably has a number of reference groups and individuals, including his client, the judge, and other members of the bar. Clientele attempts to focus upon the reference group or individual most salient to the lawyer.

The concept of clientele is also related to the so-called group process approach to the legal process. *See*, for example, J. PELTASON, FEDERAL COURTS IN THE POLITICAL

yer's clientele may be the same as his client (the individual or group that formally retains his services), but the two need not be identical. In analyzing responses to a series of open ended questions relating to what the lawyer was trying to achieve in his litigation,[27] lawyers with three different clienteles were identified: the Advocate, the Group Advocate, and the Civil Libertarian.

The Advocate

A lawyer behaving as an Advocate is close to the paradigm often associated with the legal profession. The Advocate uses his training and skill in litigation simply on behalf of his client. He is concerned almost exclusively with winning the case and will use any legal and ethical means, raise any issue, seek any satisfactory result (*e.g.*, agree to a plea bargain at the trial level, be satisfied with winning an appeal on a technicality or with a remand to a lower court for further proceedings). The Advocate is indifferent about whom he represents; the characteristics of his client are of little interest to him. The Advocate's own policy preferences are irrelevant to his activity as an attorney and the ramifications of his case for others in society are also of little concern, unless they affect directly his chances for winning. Thus, the Advocate's goals are very limited.

The Group Advocate

The Group Advocate perceives himself as the representative of some particular group, and uses his skills in litigation to further the aims of that group. This is not to imply that the Group Advocate is simply an Advocate with a group as his client. Rather, the Group Advocate perceives himself as having long-term commitments to the group involved, and, importantly, *the group itself may not even be a formal party to the*

PROCESS (1955) and C. E. Vose, *Litigation as a Form of Pressure Group Activity*, 319 ANNALS 20 (1958). Though clientele itself does not focus upon the activity of interest groups, it does deal with the perception of the attorney of the nature and breadth of the "interest" he is representing in his litigation.

27. The questions in the interview schedule most relevant to clientele were as follows:

(1) Did you consider the case primarily important for your client or for broader social considerations?

(2) Were you interested in winning the case on any possible ground, or in establishing a particular point of law?

(3) Were you satisfied with the results of this litigation?

litigation. The Group Advocate is serving *his* group in litigation (though he may not formally be a member of the group—*e.g.*, the white civil rights lawyer defending black clients).[28] The interest of the Group Advocate in the grounds for decision in his case (assuming he wins) varies a great deal.[29] The Group Advocate perceives himself as a member of a specific group, and his activity in litigation as that of representative of the group interest. His goals are those of his group.

The Civil Libertarian

The Civil Libertarian is an activist in the community who initiates and intervenes in litigation in an attempt to further principles he considers basic to a democratic society. The principles are of somewhat general order, *e.g.*, "freedom of speech" or "freedom of religion." The lawyer is a gadfly, using his expertise to promote democratic principles, and he perceives his clientele as all of society. The ACLU is an organization—largely staffed by lawyers—dedicated to using litigation to promote principles of this order.

The Civil Libertarian's goal is perhaps more amorphous than the Advocate's or Group Advocate's. His goal is not so much to vindicate the interests of individuals or groups in litigation but rather to vindicate principles. He is therefore very much concerned with the grounds for decision in his case. Although the Civil Libertarian wants to win for his client, his interest in principles leads to a concern that the decision vindicate his principle as broadly as possible.[30]

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28. Though, if Truman's definition of group membership—interaction and shared attitudes—is adopted, the white civil rights lawyer and his black clientele are members of the same group. *See* D. TRUMAN, THE GOVERNMENTAL PROCESS ch. 2 (1951).

29. For example, a Group Advocate for a political faction in a reapportionment case who was trying to "break the back of the rural machine" was often indifferent to the grounds for decision. Whether a judge ordered reapportionment because the equal protection clause required population apportionment in both houses, or because he examined the specific apportionment scheme and found that it "discriminated invidiously," or was "arbitrary," the outcome—reapportionment—still occurred.

Alternatively, in some of the later sit-in cases, Group Advocates were almost exclusively interested in the grounds for decision. They knew they could almost invariably succeed in having their clients' convictions overturned by demonstrating some overt state action in favor of discrimination, but were interested in using their suits to induce the courts to declare that discrimination in public accommodations—in the absence of overt state action—was itself unconstitutional.

30. The distinction between Group Advocates and Civil Libertarians is illuminated by contrasting the Legal Defense Fund (LDF) of the NAACP with the ACLU. Lawyers of both organizations become involved in litigation presenting somewhat similar issues. For the Legal Defense Fund, the operative factor in its involvement has typically been

CLIENTELES IN LOYALTY-SECURITY LITIGATION

The Radical Bar

Involvement in any particular loyalty-security case was by no means a discrete event for the member of the Radical Bar. During the 1950's (when much of the litigation argued before the Supreme Court during the 1957-66 period began), he was likely to be representing a number of individuals who had been caught in the loyalty-security net. A good part of his practice involved counseling clients, representing them before loyalty-security review boards and legislative committees, and finally in court proceedings. The atmosphere of such proceedings was often one of fear and hostility. Since the lawyer was often personally acquainted with his client and held political beliefs sympathetic to the social and political goals of the radicals, it was natural for the lawyer to empathize with his client.

The Radical Bar lawyers usually perceived their litigation in a "we-they" perspective. They identified with their clients both because of some similarity in views and because others lumped them together. Each case was to some extent viewed as a contest between the government (and society generally) and the group of radicals who were coming under attack.

The performance of many Radical Bar lawyers at legislative hearings tends to confirm the notion that they perceived the proceedings as personalized contests. The hearings were often highly acrimonious and the lawyers for the witnesses often displayed scorn for the committees' members and purposes (and vice versa).[31] Relatedly, in his study of the provision of counsel to political radicals, Alexander[32] cites as one of the major reasons for the difficulty the radicals found in obtaining

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the presence of an issue involving black people (*i.e.*, an issue affecting this particular group of people); for the ACLU, the operative factor has been the presence of some democratic principle. The services of the LDF have in a sense not been available to all, for the organization was set up and functioned primarily as an advocate for a particular minority, black people (though this appears to be changing; the LDF is more and more becoming involved in litigation dealing with issues that affect many minority groups, not just blacks). The ACLU, on the other hand, tends to be indifferent to the characteristics of its clients—ACLU lawyers have represented fascists and Communists, racists and blacks. In the case of one organization, a particular group of people brings it into action; in the other, a kind of principle. The difference between the activities of the two organizations corresponds closely to the distinction between the Group Advocate and the Civil Libertarian.

31. *See* GOODMAN, *supra* note 1, for a description of several HUAC hearings.

32. *See* Alexander, *supra* note 18, at 42.

counsel the fact that many lawyers feel that they must believe in the cause of their client if they are to provide effective representation. Since many lawyers did not hold such sympathies for political radicals, the politically unpopular often had difficulty in obtaining representation.

Thirteen of the 21 lawyers interviewed who argued loyalty-security cases were members of what is called here the Radical Bar. Of the 13, 11 were Group Advocates, 1 was an Advocate, and 1 a Civil Libertarian.

In calling them Group Advocates, it is not suggested that they were unsympathetic to the broad principles involved in their cases nor to the application of these principles to individuals with whom the lawyer would disagree. Rather, the Radical Bar lawyers simply became so involved in the affairs and claims of the political radicals that they tended to view the litigation as primarily a contest between the government and the kinds of people the lawyers were representing. In the same way, a civil rights lawyer may become immersed in the claims of black people, and perceive his litigation as primarily concerning their affairs, without in any way being unsympathetic to similar claims by other minority groups.

The Radical Bar lawyers were somewhat ambivalent about the specific grounds for decision in their cases. They were concerned with broad and principled decisions because such decisions would be the most effective way of curtailing their adversaries. Since the lawyers often felt that the activities of their clients were important in fighting for social reform, a narrow victory was useful because it kept the client in circulation. Any victory was felt to be as important, both because it was a rebuff to a hostile government and placed one more obstacle in the path of continued government harassment. The lawyer's goals were sometimes affected by the interest of the client, for many clients in loyalty-security cases were themselves concerned with the broad civil liberties issues involved in their cases. On occasion a client would urge his lawyer not to raise technical issues because he did not want to win the case on a narrow point, but preferred going to jail to getting off on a technicality:

> I've known some clients who felt that way [wanted to stress only the broader issues]. And particularly in this area where Committee witnesses . . . I've tried to tell people that that's a very unreal question because while they may have the feeling that they only want to have the broad issues, I try to tell them that it doesn't really make much difference what their feeling is. The Court's going to pick out something which even if you don't present it, they think is *de minimus*. And it's not really your choice. For example, [another member of the Radical

> Bar] once told me about one of his cases—a [client] absolutely forbid him to raise any other questions. I think he succeeded in dissuading him, but the Court didn't take the case. It's not that I disagree with the client's point of view. I can understand these people who say, "Why should I go through all this trouble just to get off and not raise the principle."

The Radical Bar acted in litigation as Group Advocates for the political left. Their interest in the grounds for decision varied. The case often came to the lawyer in the context of an acquaintance in trouble and the lawyer often felt a close personal identification with his client.

The ACLU Lawyers

These lawyers became involved through their association with groups like the ACLU and had little previous experience in the field of loyalty-security litigation. Six of the 8 ACLU lawyers interviewed were Civil Libertarians, 1 was an Advocate, and 1 a Group Advocate. Thus, the bulk of the ACLU lawyers perceived their clienteles broadly, and felt that they were vindicating principles important to all of society rather than defending a specific group of victims of governmental harassment. This is not to say that they lacked sympathy for their clients, but simply that their general perspective toward the litigation was different from that of the typical Radical Bar lawyer. For example, one ACLU lawyer described his loyalty-oath case:

> If I'm proud of anything in the whole case, it was that I was able to keep us from winning it. [*i.e.*, The lawyer was careful not to win the case on a narrow ground in a lower court because he wanted to get the case to the Supreme Court and have the broader issue resolved. The case was ultimately won.]
>
> We didn't go up for some sect. We didn't fight the case for school teachers alone. It was not a matter of dramatic hyperbole to say that we were there because of the garbage collector. Because this legislation was binding on every type of employee of [the state] or of any city. . . . And our real client was the illiterate apolitical garbage collector in the city. Someone would come and say to him, "Hey, Joe, sign this." And he would say, "What is it?" and they would say, "Ah, don't worry about it, sign it." We felt that would be the most egregious character of this whole law, from a moral point of view. And we designed the case for the garbage collector. And he was our client. And we tried to maintain the case for him, all the way through.
>
> And the funny part of it was, there is a garbage collector. It wasn't quite a garbage collector, but he's a municipal employee in [town] who none of us knew anything about, who didn't sign, and who lost his job.

> He read [the oath] and he'd been with the city 14 years, and had a fairly good-sized family. And he refused to sign it because he said, "I'm a free man and I couldn't understand what they wanted me to sign. I read it and it didn't make any sense to me." And it seems to me, when one worries about democracy, and worries about human beings, that here is a testimony to the basic dogma of democracy, the basic belief in individual man. Some five, six years later, that man who said, "I don't know what it is and therefore I won't sign it"—that the Supreme Court of the United States basically said, in very simple words, took the same position: "When you read it you really don't know what you're reading, and therefore it's no good." So that's why we fought it and this is why we attempted to keep from winning it.

The striking aspect of this respondent's remarks is the impersonality of his view of the litigation: the case did not involve real people but rather some hypothetical construct. The clientele was all society, not a single person or particular group. For the Civil Libertarian, cases are vehicles for general principles, not disputes involving individuals or groups.

Some Determinants of Clientele

Examination of data gathered from a sample of lawyers who argued various kinds of civil liberties and civil rights cases reveals a number of variables apparently related to a lawyer's clientele: his attitudes toward the function of the law and the legal profession in society (called his legal ideology); the amount of experience a lawyer has had in the field of litigation; his socioeconomic background and education; his public policy preferences; the context surrounding his involvement in the case; cues provided by the Supreme Court; and the type of case he argued.[33]

The factors that appear most important for lawyers who argued loyalty-security cases are the lawyer's previous experience with this type of litigation and the circumstances surrounding his involvement.[34]

The Radical Bar had friendship and ideological ties with their clients and were likely to identify with them. The lawyers' experience in the field of litigation tended to reinforce the notion that a case involved not a dispute between the government and an individual but govern-

33. *See* Casper, *supra* note 3, for a more detailed discussion of the factors affecting lawyers' clienteles.

34. Legal ideology appears to be the most important variable affecting clientele. Other factors operate at the margin, as in the case of Radical Bar and ACLU lawyers, both of whom had similar legal ideologies.

ment versus a group of people. Their identification with the group led the member of the Radical Bar to be interested not only in the principles at stake, but with the welfare of members of *his* group.

The ACLU lawyers were neither highly experienced in loyalty-security cases nor intimately tied with their clients. Most important, they became involved in the case within a particular context. The case came to them as a "civil liberties" case, not one in which people with whom the lawyer was already acquainted were involved. Hence their lack of ties with the client, combined with the context surrounding their involvement, led to their impersonalization of the litigation and stress upon broad principles.[35]

CONCLUSIONS

Two distinct groups of lawyers were involved in loyalty-security litigation before the Supreme Court during the 1957-66 period. One group—the Radical Bar—had background characteristics, political policy preferences, attitudes toward the law and the legal profession, and a career pattern that all combined to bring them into contact with individuals who became involved in loyalty-security litigation. Their willingness to defend these people at a time when many other lawyers were unwilling to do so led them into a great deal of litigation. The other group—the ACLU lawyers—has become more active recently. They have not had personal ties with the clients and usually have had law practices that did not depend to any important degree upon civil liberties and civil rights litigation.

The Radical Bar performed an important function in the legal process. At a time when it was difficult to obtain representation, they were willing to defend those whose loyalty was suspect. The Radical Bar formed a distinct subgroup within the legal profession, maintaining friendship ties and interaction within their own legal professional organization. Given their alienation from many of the institutions of society and of the legal profession, their ties with each other were probably vital to their remaining members of the legal profession. The ability of the profession to encompass this group of lawyers was crucial

35. As suggested above, age is perhaps the crucial difference between Radical Bar and ACLU lawyers. The different career patterns, friendship ties, and legal experience discussed here are related to this age difference.

to its ability to provide representation to a group of somewhat unpopular clients.

Recently, other lawyers have become more active in loyalty-security litigation. The nature of the litigation has changed to some extent. During the 1940's and 1950's, the legal process served in the field of loyalty-security programs as a defensive battlefield in which a small and unpopular minority sought to protect its rights. Recently, litigation has gone on the offensive and attempted to seize the initiative (*e.g.*, some success in injunctive action against HUAC, the loyalty oath cases). The litigants have not waited for government to act, but have initiated their own suits and used them as instruments for mobilizing interests in opposition to government programs. Relatedly, litigating interest groups —particularly the ACLU—have moved into the forefront of loyalty-security litigation.

The institutionalization of the defense of civil liberties and rights is reflected in other areas of litigation as well. In civil rights litigation, interest groups like the Legal Defense Fund (LDF) of the NAACP have over the years provided counsel and mapped strategy in the struggle for racial equality.[36] In the reapportionment cases, political interest groups and factions initiated and supported the litigation. In the area of criminal justice, litigating interest groups (*e.g.*, the ACLU and LDF) are becoming more active. Perhaps more importantly, special litigating interest groups devoting themselves to the defense of persons accused of crime are currently developing. Primarily as a result of recent Supreme Court decisions relating to the provision of counsel to indigent defendants, Public Defender and legal services offices under the Poverty Program have grown up. These groups and others will probably become more and more important as active legal lobbyists for the rights of persons accused of crime.

As in the political process, organization and mobilization of resources are essential to effective participation in the legal process. Gradually, the benefits of such organization are being extended to minority groups, both in the broader political process and in the legal process itself.

The extension of the institutionalization of defense of civil liberties and rights is probably reflective of changes in American society as a whole. Tolerance for dissent and concern for those excluded from normal political channels are expanding. As such societal tolerance and concern expands, defense in the legal process of rights and liberties also

36. *See*, for example, L. HUGHES, FIGHT FOR FREEDOM: STORY OF THE NAACP (1962); and C. VOSE, CAUCASIANS ONLY (1959).

expands. Increased organizational activity in defense of minority rights is not only reflective of an increase in societal tolerance, but also is essential to the maintenance of an open and free political system. If attempts are made to infringe minority rights, institutions committed to their defense can mobilize their resources in opposition. In addition, widespread membership in such organization is important to the maintenance and propagation of democratic norms.

In the area of loyalty-security programs, lawyers and litigating interest groups previously reticent or unwilling to defend the politically unpopular are today eager to do so. If the political climate changes, and minority groups (*e.g.*, political radicals, black people, persons accused of crime) come under increasing attack, perhaps groups and individuals committed to their defense will remain as an important bulwark against the denial of their rights. Instead of depending upon a courageous yet somewhat small and isolated Radical Bar, the politically unpopular may, in the future, enjoy defense by organized and powerful litigating interest groups drawing members from a broader spectrum of the bar.