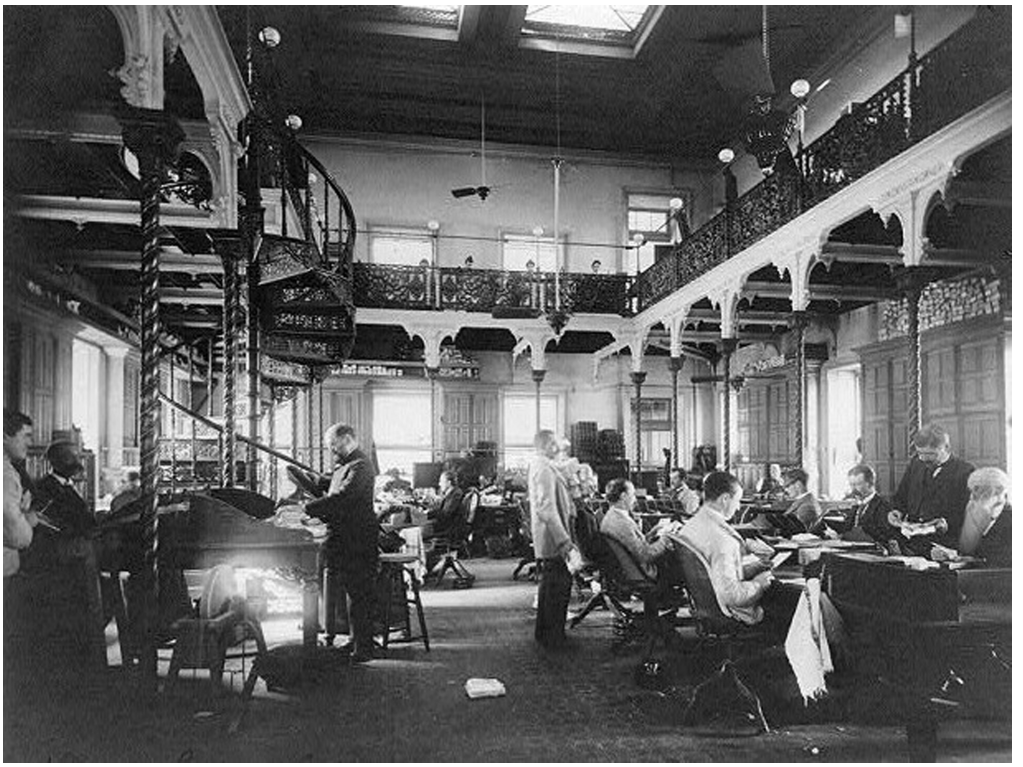
The Grapes of *McGrath*: The Supreme Court and the Attorney General's List of Subversive Organizations in *Joint Anti-Fascist Refugee Committee v. McGrath* (1951)

ROBERT JUSTIN GOLDSTEIN*

The so-called Attorney General's List of Subversive Organizations (AGLOSO) was one of the most central and widely publicized aspects of the post–World War II Red Scare, which has popularly—if inaccurately—become known as "McCarthyism." Like many other elements of the Red Scare, the AGLOSO in fact predated the emergence of Senator Joseph McCarthy on the national political red-hunting scene. It originated in President Harry Truman's Executive Order 9835 of March 21, 1947, which required all federal civil-service employees to be screened for "loyalty" and specified that one criterion to be used in determinations that "reasonable grounds exist for belief that the person involved is disloyal" would be a finding of "membership in, affiliation with or sympathetic association" with any organization determined by the Attorney General to be "totalitarian, Fascist, Communist, or subversive" or advocating or approving the forceful denial of constitutional rights to other persons or seeking "to alter the form of Government of the United States by unconstitutional means."[1] Beginning in late 1947, the federal government began publishing AGLOSO lists, which ultimately reached almost 300 organizations, without offering the targeted groups either hearings, specific charges, or advance notice. This led *Washington Post* editorial writer Alan Barth to term the Attorney General's AGLOSO mandate "perhaps the most arbitrary and far-reaching power ever exercised by a



In 1947, President Harry Truman mandated that federal civil-service employees be screened for loyalty, with one consideration their membership in, affiliation with or sympathetic association; with organizations determined by the Attorney General to be Communist, Fascist, totalitarian, or subversive. Pictured are government postal workers in the 1940s.

single public official" in American history, effectively allowing that official to "stigmatize" and "in effect, proscribe any organization of which he disapproves."[2] Although the only officially announced purpose of the AGLOSO was to provide guidance in federal civil-service loyalty determinations, it quickly became used by a wide variety of public and private organizations as the basis for discriminating against persons alleged to be affiliated with listed organizations and the groups themselves. Thus, it was utilized by state and local governments, the military, defense contractors, hotels, the Treasury Department (in making determinations regarding tax exemption) and the State Department (in making passport decisions), to cite only a few of many examples.[3] FBI Intelligence Division official A. H. Belmont wrote to Assistant FBI Director D. M. Ladd on March 18, 1952 that AGLOSO listings had been "found from experience to have substantially impeded the effectiveness of the [designated] organization."[4] Both scholars and the general press have clearly agreed with this assessment. Various scholars have written that the AGLOSO, which was massively publicized in the media, became what amounted to "an official black list"[5] and "usually a kiss of death"[6] to listed groups, which came to have in the public mind "authority as the definitive report on subversive organizations," understood as a "proscription of the treasonable activity of the listed organizations"[7] and the "litmus test for distinguishing between loyalty and disloyal organizations and individuals."[8] Thus, an April 28, 1949 *New York Times* story about the listing of additional AGLOSO organizations was headlined "Government Proscribes 36 More Groups as Subversive, 23 of Them 'Communist,'" while a number of files related to the AGLOSO held in the Eisenhower presidential library are marked "blacklisted organizations."[9] In an article entitled "What the Attorney General's List Means,"

the November, 1956 *Elks Magazine* began by accurately noting that "there are few Americans who have not heard of 'the Attorney General's subversive list'" and concluded by summarizing the AGLOSO's clear message: "There is no excuse for any American citizen becoming affiliated with a group on the Attorney General's list today."

In April 1951, in a decision featured in front-page headlines across the country, the U.S. Supreme Court struck the first major blow against the AGLOSO, in a complex and ambiguous decision, *Joint Anti-Fascist Refugee Committee v. [Atorney General Howard] McGrath*,[10] which overruled six lower court decisions and required that three designated organizations be allowed to contest their listings. The High Court ruling concerned the Joint Anti-Refugee Committee (JAFRC), the National Committee on American-Soviet Friendship (NCASF), and the International Workers Order (IWO), three clearly left-wing organizations, which were among the largest and most prominent AGLOSO-designated groups.

The JAFRC had been licensed in 1942 to provide medical aid for Spanish Civil War loyalist refugees in France by President Roosevelt's War Relief Control Board and, like the other organizations, had been granted tax-exempt status by the Treasury Department which had been withdrawn following its AGLOSO designation. The JAFRC included Communists in its leadership, but, like the other two organizations, was never accused of illegal activities. However, early on it attracted the attention of the House of Representatives Committee on Un-American Activities (HUAC), resulting in 1946 contempt-of-court sentences against its entire leadership for failing to supply HUAC with subpoenaed records. The NCASF was organized to promote Soviet-American friendship at a 1942 New York City mass meeting which received greetings from President Roosevelt and Vice President Henry Wallace, was sponsored by three Cabinet members, and was attended by 20,000 people, who heard speeches from New York Governor Herbert Lehman, New York City Mayor Fiorello Laguardia, and conservative American Federation of Labor President William Green. A 1944 NCASF dinner held to celebrate the twenty-sixth anniversary of the Soviet Army received congratulatory messages from five American generals, including Dwight Eisenhower and Douglas MacArthur; its membership included at least three Congressmen and Secretary of the Interior Harold Ickes. During the Cold War, the NCASF became widely viewed as an outlet for Soviet propaganda and its director was found in contempt of Congress in 1946 for failing to provide HUAC with subpoenaed records. The IWO, the largest organization ever AGLOSO-listed while still functioning, was a fraternal insurance benefit society chartered by the state of New York that, although clearly under very substantial Communist Party (CP) influence, enrolled over one million Americans (fewer than five percent of them CP members) between 1939 and 1950. It was praised during World War II by a variety of public officials, including Ickes and Senator Robert Wagner (D-NY), was awarded a Treasury Department certificate of merit for selling almost $300,000 in war bonds, and had repeatedly received high evaluations in regular reviews by New York state and private insurance raters.[11]

Each of the three organizations had originally filed separate suits against the Attorney General and other federal officials in federal district court in Washington, D.C. in 1948 and 1949, maintaining that their listing had unconstitutionally denied them free-speech and due-process rights by damaging their ability to conduct legitimate activities, by impairing their reputations and fostering a wide range of reprisals against them, and by depriving them of any opportunity to contest their designations. For example, with regard to First

The Joint Anti-Fascist Refugee Commission had its tax-exempt status withdrawn once it was placed on the Attorney General's List of Subversive Organizations (AGLOSO). It had been licensed in 1942 to provide medical aid for Spanish Civil War loyalist refugees in France by President Roosevelt's War Relief Control Board. Pictured here, a Spanish Red Cross poster asks for support for imprisoned antifascists and their families in 1936.

Amendment rights, the NCASF maintained that it and its affiliates had been "seriously frustrated and unduly burdened" in exercising its First Amendment rights, as it had "lost numerous members, officers and sponsors; lost public support; lost contributions; lost attendance at meetings; lost circulation of their publications; lost acceptance by colleges, schools and organizations of their exhibits and other material; have been denied meeting places; have been denied radio time;" lost their Federal tax exemption, costing "large sums of money which they would otherwise have received as contributions;" and lost the ability to "get members and support from federal employees," who feared that their "employment would be jeopardized." Beyond the alleged damage to their First Amendment rights, the three organizations maintained that their Fifth Amendment due-process rights had been violated because the government's AGLOSO designations were arbitrary, especially by not

granting them hearings or other procedures allowing contestation of their listings. Thus, the IWO maintained that its listing was "without warrant in law" and "without the slightest basis in truth or in fact and was made without notice or opportunity to be heard, without finding of fact or conclusions of law and without any prior or accompanying statement of explanation." Both the NCASF and the IWO explicitly denied that their activities provided any basis for their AGLOSO designations, while the JAFRC did so implicitly by describing its activities as solely dedicated to aiding Spanish refugees.[12]

The Justice Department filed two-sentence rejoinders to each of the three lawsuits, simply maintaining that the complaints failed to "state a claim" against the government "upon which relief can be granted." In three separate federal district court rulings in 1948 and 1949 judges upheld the government. The JAFRC suit was dismissed without explanation in June 1948. In a February 1949 ruling in the NCASF case, Judge Jennings Bailey declared that there could be no legal remedy for the "indirect effect" of AGLOSO designations upon organizations, which did not "constitute legal damage" or in any way subject them "to any civil or criminal liability" and which were related to a governmental program whose sole purpose was to legitimately facilitate the administration of federal loyalty screenings. In April 1949, Judge Matthew McGuire similarly ruled against the IWO, holding that it lacked standing to sue because it had shown no "unlawful invasion of some legally protected right," as the AGLOSO listing was not a "controlling" government action, but only the equivalent of "advice" to the President which, by implication, governmental agencies and others could utilize or not at their discretion.[13]

Things went little differently in the federal court of appeals for the District of Columbia, although here the Justice Department gave a slightly longer response, which included sweeping claims that the AGLOSO was based on executive powers not subject to judicial review and that, in any case, the AGLOSO inflicted no concrete damage on the complaining organizations that required a legal remedy. In the JAFRC appeal, for example, the Department maintained that the AGLOSO designation imposed "no restrictions whatever" upon the JAFRC, which remained free to conduct its business, raise money, voice its views and publish its beliefs, as the listing issued "no directive to other federal, state, or municipal officials" and did not "command the appellant to do or to refrain from doing anything." Moreover, the Department maintained, the Attorney General was constitutionally authorized to "designate appellant as a communist organization" as an agent of the President in carrying out his responsibilities to regulate admission to the civil service, and "certain executive powers" were "not subject" to court review, "clearly" including the "right to speak forth freely to the nation and inform it of groups deemed to be operating against the best interests of our constitutional government itself." The Department added that it was "untenable" to assert that the Attorney General could "under any circumstances be restrained" from informing the government and the nation about organizations that posed a "threat to our democratic processes," and that although such power "might be subject to abuse," the only remedy was "the elective process," or impeachment of the President. In each case, the appeals court endorsed the government's position. In the JAFRC case, for example, a three-judge appeals panel declared by a 2–1 vote on August 11, 1949 that the organization's complaint failed to "present a justiciable controversy" because the AGLOSO listing and Truman's Loyalty Order "command[ed] nothing of the Committee," denied it "no authority, privilege, immunity or license," subjected it to "no liability, civil or criminal," and "denied no one" any "property rights" or "freedom of speech and assembly." The decision added that, in promulgating the AGLOSO, the Attorney General had merely complied with

presidential directives in providing "information and advice" in pursuit of the government's legitimate interests in protecting the civil service from "disloyal and subversive elements," that the Attorney General had only undertaken "that which the President could have done for himself," in which case "his action would have been within the realm of his executive power, not subject to judicial review," and thus the AGLOSO's "essential character" was that of "acts of the President himself," which could not be "challenged legally." The Court further dismissed all challenges to procedural aspects of the AGLOSO's promulgation and publication, holding, for example, that lack of hearings implied no due-process lapses because the AGLOSO was a "necessary" step in implementing the loyalty program, thus affording "no ground for judicial review" if, as one of its "unavoidable consequences," it happened to "affect adversely" listed organizations "against whom it is not directed." In a vigorous dissent that was twice the length of the majority holding, Judge H. W. Edgerton maintained that the AGLOSO designation of the JAFRC was "contrary to fact, unauthorized and unconstitutional" for numerous reasons. Thus, he argued that "helping former Spanish Republicans is not evidence of disloyalty to the government," that the designation of the JAFRC lacked "basic standards of fairness" by failing to grant notice or hearing, and that the designation was "defamatory" and had unconstitutionally imposed a "substantial clog" on the group's First Amendment rights without any showing of "clear and present danger." The federal appeals court simply cited its JAFRC ruling in rejecting the NCASF appeal in October 1949, and it relied heavily on it in similarly rebuffing the IWO in March 1950.[14]

Following the appeals court rebuffs, the three organizations appealed to the Supreme Court, reiterating their previous arguments, adding that their cases were highly significant given the general context of increasing pressures on civil liberties arising in the Cold War atmosphere, and maintaining that the lower courts had erred in holding that the government bore no responsibility for injuries resulting from their AGLOSO designations. Thus, the NCASF urged the Court to intervene because the issues raised were of "great public importance," since its case presented "another application of the growing tendency of the making of administrative decisions," all "invariably justified by a claim of the needs of 'internal security,'" which "seriously impair individual liberties" without "procedural safeguards" and "on the basis of secret evidence locked in the bosom of the administrator and [therefore] never susceptible of rebuttal by those affected." It maintained that its injuries were caused by governmental officials "stimulating others to take action," and that the Constitution nullified "sophisticated as well as simple-minded encroachments on the freedoms of speech and assembly" and that therefore the contention that the Constitution distinguished between "indirect" and "direct" abridgement of guaranteed rights lacked any legal foundation. Moreover, it maintained, the Attorney General's "unfettered discretion" with regard to making AGLOSO designations meant that he could "list any organization which incurs his displeasure," all while claiming the right to "resist any inquiry into his illegal actions." The NCASF brief concluded by arguing that the Constitution gave "no power to any government official to list organizations as subversive or disloyal" and, citing the 1943 Supreme Court case of *West Virginia Board of Education v. Barnette* (holding that government had no right to demand orthodoxy of the citizenry's political beliefs, such as compelling school children to pledge allegiance to the flag), declared that the AGLOSO effectively allowed the Attorney General "to make himself a judge of political orthodox and loyalty" and to "inform the public that certain ideas are officially discouraged and prohibited," thus violating "the most revered traditions of our Constitution."[15]

In its seventy-eight-page petition for certiorari, the JAFRC maintained that it had

suffered concrete adverse impacts upon its property and constitutional rights. It also argued that because the "executive power is no more immune from judicial review" than any other form of governmental action, it had legal standing and its grievances did present a "justiciable controversy." The JAFRC termed it "immaterial" that the injury it had suffered was "occasioned by publicity and [that] respondents' conduct did not assume the more formal, orthodox, and traditional forms of governmental action," because the "prestige and the power" behind a "label attached and disseminated by an official agency of the government" was especially damaging. The JAFRC urged that "there must be some limits to the use of prestige and power of high public office to stigmatize individuals and organizations," and that a contrary holding could even allow the AGLOSO to list "religions or races as well as organizations" and to permit "the process of judicial review, which in this country is the cornerstone of constitutional government," to be "circumvented upon every occasion when officials conceive some ingenious or novel mode of wielding power." The brief also rejected claims that the AGLOSO only concerned civil-service employees and did not directly threaten First Amendment rights, on the ground that "the purpose of the publication of the list" was to "affect the freedom of thought, expression, and association of every organization labeled or capable of being labeled as 'subversive' by the Attorney General and to every person associated with such an organization."

The Justice Department responded to the briefs with short responses that urged denial of certiorari by reiterating its stance that no grounds existed to consider the lawsuit because "no justiciable controversy" was involved and the organizations had no legal standing because they had suffered no injury at the hands of the government. In its response to the JAFRC brief, for example, the Department maintained that the AGLOSO "in no way" changed the JAFRC's "existing or legal status," imposed "no regulation or directive limiting the operation or conduct of petitioner's affairs," included "no directive to other federal, state, or municipal officers which in any way subjects petitioner to the contingency of future administrative action," and subjected "neither petitioner nor its members to any criminal or civil penalties, either immediate or postponed." Moreover, the government maintained, any damage to the JAFRC's "advantageous relationship with others" alleged to stem from its AGLOSO designation "largely" arose "from the force of public opinion and not from the direct action of respondents." And in any case, it was legally "well settled that public officials are absolutely privileged to publish even false and defamatory matter in the exercise of official duties" and it was "plain that this alleged defamation was an official communication as to matters within the authority of respondents."[16]

The Supreme Court separately granted certiorari in each of the three cases during 1950, leading to another series of exchanges of legal briefs in which the three organizations and the Justice Department reiterated and elaborated upon their prior arguments, often in far sharper terms that reflected the growing Cold War tensions associated with the outbreak of the Korean War in June 1950 and Senator Joseph McCarthy's appearance on the anti-Communist scene in February 1950. Thus, in its September 1950 brief, the NCASF argued that the AGLOSO and the Appeals Court ruling that sustained it were "incompatible with a government of laws and freedom," as "without procedural safeguards, on the basis of secret evidence locked in the bosom of an administrative officer and never susceptible of rebuttal by those affected, and without fulfilling any legitimate governmental purpose" the government had "made an auto-da-fe for the ideas espoused" by the NCASF and the Appeals Court had only "heaped fuel on the flames." Responding to the lower court's ruling that it had no standing to sue because it had suffered no direct injury from the AGLOSO, the brief

characterized such reasoning as effectively holding that First Amendment freedoms required no judicial protection from the government so long as they were abridged by "sophisticated" and "subtle" indirect methods and by "insidious" pressures such as those "here employed," such as an official "blacklist" and "index," rather than "by an outright interdiction." Therefore, the NCASF argued, the appeals court, reflecting a "callous attitude towards the right of political dissent" and mixing "bad logic with misread precedents," had committed the "fundamental constitutional error" of failing to "discharge its primary obligation to give vitality to the Bill of Rights" and translate it into "living law." Thus, upholding its ruling would "imply that the courts have virtually withdrawn from the function of protecting civil liberties."

According to the NCASF brief, the impact of an AGLOSO listing upon an organization could be compared to that of a government "requirement that Jews wear arm-bands," effectively embodying in both cases an official determination that the targeted group or individual "is obnoxious to the government" and an intent to stimulate "the public to shun or harm it," thus presenting as "blatant an instance as ever there was in which governmental authority seeks to censor unpopular ideas by indirect and unhanded efforts." Especially given the real-world impact of the AGLOSO upon groups, the brief maintained that the AGLOSO effectively constituted an official government "regulation" and was thus fatally flawed by its "total disregard of due process" by giving the Attorney General "unfettered discretion," which allowed him to list "any organization which incurs his displeasure," regardless of its aims, activities, or loyalty, and by fostering the "irrational and dangerous" practice of threatening federal employees' jobs for their organizational affiliations rather than their individual performances. Clearly referring to Senator McCarthy, the brief termed the loyalty program's use of associations to judge employees the "stock-in-trade of irresponsible persons who are currently causing the demoralization of the federal service and the blasting of individual reputations and careers."[17]

In its October 1950 brief, the IWO maintained that "in light of the realities of today," it was "the sheerest sophistry for the Government" to maintain that the IWO lacked standing because, for example, AGLOSO designation did not compel anyone to resign from the IWO or to cancel his insurance, as the First Amendment included in its protection of American citizens against government actions those that limited their freedoms by "not only direct restraints but indirect ones as well." In its September 1950 brief, the JAFRC also rejected the claim that the AGLOSO had inflicted no "direct" injury upon it, maintaining that it put "civil service employees and applicants on notice that 'association' with the JAFRC will result in ineligibility," and that in the "political arena," the "intended and actual effect" of being listed was to weaken or destroy "any efficacy among the electorate that such organizations might possess." The brief concluded that even the "most elementary notions of fair play dictates that before a group of Americans may be officially stigmatized as 'disloyal' or 'subversive' they should be heard in their own defense."[18]

Previous government briefs defending the AGLOSO had generally been short and almost casual in tone. However, the Supreme Court's decision to hear the cases apparently came as a considerable shock to the Justice Department, which responded to the JAFRC brief with a fifty-one-page reply, which it incorporated in briefer responses to the NCASF and the IWO. The Department essentially declared that the AGLOSO was a "political" act promulgated by the President in pursuit of his constitutional powers to protect the nation and was therefore completely beyond judicial review and subject to correction only by elections or impeachment. The reply also considerably fleshed out the Department's position that the JAFRC lacked legal standing to challenge the AGLOSO and that "no justiciable controversy"

existed because the "list" allegedly failed to directly impose any concrete penalties on the organization, as it contained no "directive" to "federal, state, or municipal officials which in any way subjects petitioner to the contingency of future administrative action" or any "criminal or civil penalties either immediate or postponed," had no "legally operative effect on First Amendment rights," and did not even require federal employees to "disassociate themselves from petitioner's activities" or "bar other federal employees from becoming members," as it simply indicated that JAFRC affiliations "may or may not be helpful" in making federal loyalty determinations "based on all the evidence." In any case, according to the Department, "well settled" law established that "utterances" made by public officials "are absolutely privileged" against legal assaults "irrespective even of a claim of malicious motivation," and since here the Attorney General was acting "as the agent and alter ego of the President in the exercise of his primary executive power," his act was a "political" one that was "beyond the control of any other branch of the Government except in the mode prescribed by the Constitution through impeachment" or via "the elective process." This was especially so at present, the brief argued, since Cold War "tension and danger demands the utmost vigor and vigilance on the part of the President to take action which he deems required in the interest of national safety" and here he sought only to exercise his "constitutional and statutory authority" to regulate the "employment and discharge" of federal employees, which were "internal administrative matters concerning which the United States is free to act as it pleases without judicial compulsion or restraint at the insistence of an outsider such as petitioner." The Department maintained that it was a "complete distortion of the intent and purpose" of the AGLOSO to "conceive of it as a 'blacklist' calculated to injure petitioner by harassment and vilification," and that any "indirect consequences of public disclosure" were beyond "the purview of the First Amendment," which banned interference with free speech but did not state that "Congress or the Executive may not inform the public" or seek to "protect persons against unfavorable public opinion, even though such opinion may be stimulated by disclosures made by or to an investigating body." Essentially, the Department maintained, the JAFRC sought to restrain the Attorney General, who had "been directed by the President to determine and publish" the AGLOSO (in fact Truman's order made no reference to publication), from complying, as was his "clear duty under the Constitution," but "determinations made by the heads of department in the fulfillment of that duty are essentially political, not judicial, in nature" and were "decisions of a kind for which the judiciary neither has the responsibility nor the facilities to review."[19]

The Supreme Court heard consolidated oral argument in the three challenges to the AGLOSO's constitutionality on October 11, 1950, with both the *New York Times* and the *Washington Post*, quite unusually, reporting the developments in lengthy news stories the following day. Only eight Justices appeared at the Bench to hear the cases, as Tom Clark, the former Attorney General who had overseen the AGLOSO, abstained due to conflict-of-interest concerns. Former assistant attorney general O. John Rogge, representing the JAFRC, denounced the "list" as a "star chamber" technique that made the Attorney General's "whims final and correct," while NCASF attorney David Rein termed the AGLOSO a "kind of censorship," currently "in its heyday as a technique for suppressing political dissent," which proclaimed that "certain persons, organizations, literature, or doctrine[s] are heretical, disloyal, subversive, or otherwise officially obnoxious." After IWO attorney Allen H. Rosenberg declared that his organization was the "only fraternal benefit" society in the country that banned segregation and welcomed "the Negro people into membership," Justice Robert H. Jackson inquired who might be excluded from

the organization; when Rosenberg responded, "perhaps professional strikebreakers," Jackson dryly retorted, "They might not be very good insurance risks anyway."

Solicitor General Philip Perlman maintained for the government that careful investigation had preceded the AGLOSO's promulgation, and he denied that any "wholesale blacklisting" of organizations had followed it or that the plaintiff organizations had suffered injury real enough to provide them legal standing to challenge it. Perlman rejected Rogge's contention that AGLOSO's real purpose was to "regiment the American people," instead maintaining that its sole purpose was to "protect and safeguard our form of government" and that it served only as a "guide" and but "one element" in making federal loyalty determinations. When Justice Hugo Black asked Perlman if even the Catholic church could be listed, the Solicitor General said it could. Moreover, under questioning Perlman conceded that since listed organizations had no right to a hearing or appeal, their only remedy was "none" other than to have "the people elect another President who will appoint another Attorney General who will take it off." Justice Felix Frankfurter said the "crux" of the cases was that listed groups were denied a hearing, to which Perlman responded that hearings would "ruin the whole loyalty program," since it would take "years and years" to settle the status of even a single group.

The AGLOSO cases were clearly viewed by the Supreme Court judges and their clerks as simultaneously extremely divisive, important, and politically explosive from the very beginning, according to both the public record of the Court and the files of Supreme Court Justices that became available after their retirement and/or deaths. Two Justices, Frankfurter and Jackson, became so frustrated by the Court's handling of the cases that, as discussed below, they lashed out at their colleagues in extraordinarily harsh terms. Memos to the Justices from their clerks advising them concerning whether to grant "cert," and on the merits of the cases once the Court had decided to consider them, reflect significant division among the clerks and between the clerks and their Justices and, above all, an acute sensitivity to the political ramifications and importance of the issues involved.[20]

In two instances, Justices rejected advice from their clerks that the Court use the recent passage of the 1950 McCarran Act, which provided for hearings before the newly created Subversive Activities Control Board (SACB) and the right to seek subsequent judicial review before the government listed organizations (outside of specific consideration with regard to government employment) as communistic, as an excuse for either indefinitely delaying any ruling on the cases or for backing the government (despite the clerks' conclusions that the AGLOSO organizations had valid cases). Thus, in an undated eight-page memo focused on the NCASF case apparently written immediately before the Court heard oral argument on October 11, 1950, one of Justice Harold Burton's clerks (initials MS) concluded that there was "no doubt" the organization had raised a "justifiable" issue, since its AGLOSO listing was "just about to wreck" its mission, the Attorney General's procedure "did not meet the procedural requirements" of Truman's order calling for "appropriate investigation and determination," and there was "no reason" why "relief cannot or should not be given." However, he recommended that the Court should seek to avoid the "unpleasant chore" of rebuking the executive by seeking governmental assurance at oral argument that, due to the McCarran Act, it would either "rescind the old [AGLOSO] list" and thus moot the existing cases or else "promise" to utilize the Act against the plaintiffs, in which case "these proceedings should be stayed pending" the completion of SACB hearings and the possible judicial review guaranteed under it. The clerk concluded that if the SACB found the JAFRC "subversive and if that finding is upheld by the courts, the merger of the damage from the two lists would make this case moot,"

while if the JAFRC was found "to be lily white, and if the Attorney General persists in leaving the old list stand," then the JAFRC "would still have a cause of action."

A fundamentally similar thirty-three-page October 9, 1950 memo from one of Frankfurter's clerks also evoked the McCarran Act to urge the Court to avoid rejecting the government's arguments (advice that Frankfurter ultimately rejected, just as Burton rejected the above-discussed recommendation of his clerk). Frankfurter's clerk declared that the complaining organizations had "fulfilled the requirements for a justiciable controversy" and had suffered "very real" harm, which had "substantially if indeterminately" reduced the "volume of constitutionally-protected controversial ideas 'competing in the market-place'" and thus raised a "public as well as private interest in allowing the suit." However, he concluded that the Court should "withhold relief on the ground that insufficient justification has been shown for interference with this executive function at this particular time and in these particular instances," above all because "when considerations arising" from the McCarran Act "are placed in the scales, it seems to me tolerably clear that the Court should not now intervene."

Justice Reed also ignored the advice of one of his clerks (initials BAM), although in the reverse direction. While the Court was considering whether to grant "cert" in the JAFRC case, Reed's clerk wrote a memo arguing that the JAFRC had clearly "lost property" interests due to its AGLOSO listing and that the loyalty order had given the Attorney General an "awful power," whose procedures were "squarely at odds with the most rudimentary notions of due process and fair play." Although, he argued, the JAFRC was a "genuinely Communist and 'subversive' outfit" and "there would be no doubt but that after [an administrative or judicial] hearing, its designation would remain as 'subversive,'" the "arbitrary power" granted the Attorney General "to brand with this mark of the pariah is so dangerous" that it was in the "direct tradition of the medieval heresy court—and inconsonant utterly with whole philosophy of Anglo-American law." He concluded that before allowing an official to publish "his black list of heretical organizations, I should require that they at least be given an opportunity to hear the charges and meet them before their reputation is ruined, their property made valueless, and their existence jeopardized." Reed voted not to grant certiorari and, later, against the organizations' claims.

In other instances, the Justices accepted impassioned recommendations from their clerks. Justice William Douglas was advised by a clerk (initials WMC), when the Court was considering hearing the JAFRC's appeal in early 1950, that "it is not necessary to labor the point that this is one of the most important certs of the year," especially because "these days, there are few more serious charges that an organization or person is Communist" and that it appeared that the Attorney General had abused his authority by publishing the AGLOSO and ignoring "rudimentary fairness" by denying the JAFRC "an opportunity to be heard before listing it as subversive or communist." One of Justice Robert Jackson clerk's (initials AYC) similarly advised him to grant cert in the JAFRC case, terming the questions raised therein "of great public importance and significance." According to the clerk, the existing AGLOSO procedure amounted to a "method of prescribing orthodoxy in thought," and what made the Attorney General's powers "so frightening" was the "complete lack of any of the usual trappings of due process." Clearly referring to Jackson's service as a prosecutor of Nazi war criminals at Nuremberg, during which hearings were held before organizations were labeled "Nazi," the clerk added, "I would find it embarrassing, to say the least, to try to explain why the German organizations were given a complete trial" while "American organizations are not entitled to one here."

The Court's records indicate extraordinary, intense, and prolonged divisions once the Justices began to ponder the cases following

the October 11, 1950 oral argument. While sometimes contradictory, these records suggest that, although the Justices discussed the cases on October 14, quite unusually they did not vote until a later meeting on either October 16 or October 21, and that, after first deadlocking 4–4 (effectively upholding the lower court rulings by failing to overturn them), ultimately voted 5–3 against the government when Justice Jackson changed his position. Notes taken by Douglas and Justice Stanley Reed at the October 14 conference indicate that the three dissenting judges—Reed, Chief Justice Fred Vinson, and Justice Sherman Minton—agreed that the three complaining AGLOSO organizations either had "no standing" to sue (Vinson's view) or, if they did, had "nothing to sue for" (in Minton's words) because (in Reed's words) "none" of their constitutional rights had been "violated" and thus there was no "actual controversy."

The opposite position was articulated by Douglas, Burton (who maintained that the Attorney General "cannot without some hearing call them subversive") and Black (who declared that "these organizations have been destroyed" and that no governmental officials could exercise the powers involved in the case "without hearings, evidence, and the right to be heard," since such a proceeding "runs counter to due process and our notion of fairness"). Jackson's comments were highly ambiguous, suggesting that an AGLOSO listing amounted to little more than "abuse piled on to the organization" and "one of the risks" that organizations had to face. His primary concern was that individuals who faced loyalty dismissal proceedings due to AGLOSO ties have the right to "challenge the rating of the organization" and show it was not, in fact, "subversive," and therefore he intended to "wait on these three [organizational] cases until the Court votes on [the case of Dorothy] Bailey," a loyalty dismissal proceeding about which the Court also heard oral argument on October 11, 1950. The tally sheets maintained by several of the Justices strongly suggest that Jackson at first voted against granting relief to the three organizations: Both Vinson's and Reed's records show the vote at 4–4 (with, in Reed's records, a vote for granting relief by Jackson erased and replaced by an opposite vote), while Burton's tally shows a vote by Jackson against relief erased and replaced by a positive vote, with the final vote seemingly dated October 16, 1950 (although Frankfurter's records place the vote on October 21).

On October 23, Burton was assigned to write an opinion for the Court, which rejected the government's position on an extremely narrow basis by giving the complaining organizations the right to further legal proceedings to challenge their AGLOSO listings, while not accepting any general attack on the fundamental constitutionality of the concept of the AGLOSO or the loyalty program. Burton submitted a draft opinion on November 20, which Douglas joined on February 6. Douglas also wrote a separate concurrence, which he circulated on April 11. Separate concurring opinions were circulated by Frankfurter on December 21, Jackson on January 30, and Black on February 9. Between Black's opinion, which created a definitive majority for overturning the lower court rulings and rebuffing the government, and Reed's dissenting opinion of April 6, which was joined by Vinson and Minton, Frankfurter and Jackson both exploded in rage over the Court's proceedings.

Frankfurter's anger centered on what he viewed as the dissenters' unconscionable delay in circulating their views for many weeks after the five majority Justices had submitted their opinions (perhaps fearing that Jackson might switch again or that some other development would affect the vote), which he suggested violated the norms both of the Court and of "decency." In a private letter to Reed on March 19, 1951, Frankfurter fumed that "five months have elapsed since a majority of the Court voted to reverse these cases and nearly six weeks have elapsed since [Black's] last concurring opinion for the judgment of reversal has been circulated," while the dissenters "could

not have been in doubt about your position since October 21st" (possibly the date of the final 5–3 vote in the case). Frankfurter stated that the dissenters' action in "holding up the judgment in the loyalty cases long after a majority has been ready for their disposition" had "no equal since I have been on the court" and "with considerable knowledge of the past doings of the Court, I venture to believe nothing like it has happened for at least 50 years." Noting that Reed had stated "in your engaging way" that he was working on another case, which from the "the point of view of any honest workmanship, could not be possibly be ready for a considerable stretch," Frankfurter thundered that "one of the most unquestioned unwritten laws of the Court is that a man should put aside all to work on a dissent in a case that is ready to go down," a general "obligation," which here carried "special force" because the case involved "interests of great importance, both to the government and citizens." This was especially so, Frankfurter argued, because the majority was calling for "readjustments by the government" that "ought not to be delayed a needless moment" and the "consequences to which the procedure found unauthorized is day to day giving rise are more widely radiating than I think is fully realized," so that "in all decency" the Court's ruling should not "be held up any longer." Although Reed submitted a draft dissent on April 6, he circulated revised versions on April 12, 13 and 21, leading Frankfurter to explode again in an April 27 memorandum to all of the Justices, in which he urged that "these cases come down without further ado," as "the lines have been drawn for more than six months, and the demands of public administration call for adjudication."

While Frankfurter was fuming at his dissenting colleagues, Jackson appears to have remained deeply ambivalent and at times intensely angry about the Court's handling of the AGLOSO cases. His ambivalence apparently largely derived from the collision of his intense detestation of Communism and deep disdain for Douglas, which may have inclined him to originally side with the dissenters, with his strong commitment to due process, which inclined him in the other direction. What outraged him was that he viewed the Court's impending AGLOSO decision, which mandated additional due-process protections for the complaining organizations, as totally contradicting its pending decision to effectively uphold Bailey's federal loyalty firing without providing the right to learn of or cross-examine her accusers. While Jackson focused on the latter issue in his ultimately published, deeply angry concurring opinion, his anger also surfaced in his first draft concurrence, which was circulated in late January 1951, and, above all, in an amazingly bitter, uncirculated draft concurrence that he placed in his files in mid-April.

Jackson's January draft bore only passing resemblance to his final published concurrence; in it he essentially attacked the Court for lacking clarity in its holding and, especially, for allegedly providing AGLOSO organizations more protections than are granted to individuals such as Bailey. Thus, Jackson argued in his draft that "due process requires standards for administrative action," but that the loyalty program provided only "undefined and indefinable generalities" in its use of terms such as "subversiveness, totalitarianism, fascism, or communism" and, indeed, of "loyalty" itself. He termed the AGLOSO listings "administrative finding of a fact" made "without notice to anybody, opportunity for hearing, and standards," which could be "made without anything that a court would recognize as evidence, and so far as the record available to this court shows, it was so made." The draft noted in a footnote that at Nuremberg "every accused organization had opportunity to offer evidence in its defense" and "was confronted with and had a chance to cross-examine all prosecution witnesses," and declared that "lack of notice and lack of right to be heard I think preclude acceptance of the Attorney General's designation as final."

Jackson's anger completely boiled over in the bitter, never-circulated April 12 draft

"addendum" to his concurrence, by then substantially revised from his January draft, which he explained as an attempt "expressly to dissociate myself" from Justice Douglas's April 11 draft concurrence. Jackson's "addendum" essentially accused the Court of having been "soft on communism" in its recent rulings, thereby blocking measures "which if taken in time might well have prevented much of the difficulty [in the loyalty area] that has ensued." Jackson thundered that attempts by the Roosevelt administration to take "some of the 'strong measures' against Communism to which the [Douglas] opinion pays lips service" had been "consistently defeated by this Court" with Douglas's endorsement, with the result that "virtual assurance" had been given to "government employees and others that Communist organizations were quite proper for them to join or affiliate with." Instead of attributing the government's AGLOSO errors to a "good faith mistake in an unsettled and debatable field," Jackson declared that the Court majority was joining the "Communist campaign to smear our own government by accusing [AGLOSO] of being 'totalitarian' in trend, of borrowing 'totalitarian' techniques, of starting down a 'totalitarian path' and of taking a 'leaf from totalitarian jurisprudence.'" In his peroration, Jackson lamented that the government was now finding itself "denounced as 'totalitarians'—by one [i.e. Douglas] who never has been able to see totalitarianism in any Communist case before this Court . . . [T]he gratuitous assault upon our own Government from our highest Court ought to be repudiated in the same source if we let truth instead of amiable cowardice be our guide."

On April 30, 1951, the Court made headlines across the country when it finally announced its ruling in *Joint Anti-Fascist Refugee Committee v. McGrath*. In what a United Press dispatch termed a "bombshell" decision, the Court clearly, as the Associated Press lead summarized, "lashed out at the government for branding organizations as Communist without a hearing," yet simultaneously failed to give the plaintiffs anything even approaching a complete victory. Of the eight participating Justices, six of them wrote separate, often-heated, opinions that totaled 40,000 words, or seventy pages in print. As they announced the ruling by reading long excerpts from their written opinions, Jackson commented acidly that hearing them was "likely to make one delirious," while Clark, who had not participated in the case, sat by quietly.[21]

Five Justices—Burton, in a controlling opinion joined only by Douglas, with separate concurring opinions by Douglas, Jackson, Frankfurter, and Black—agreed only that, based on the uncontested factual record before them, since the government had not contested any of the plaintiffs' factual assertions concerning their nature and post-AGLOSO damage to their ability to function, the complaining organizations had standing to sue, that the dispute was justiciable, and that the challenged AGLOSO determinations, in the absence of any process allowing contestation of disputed listings, were so "arbitrary" that their cases should be returned to a federal district court for "determination" as to whether the organizations "are in fact Communistic or whether the Attorney General possesses information from which he could reasonably find them to be so." The Court specifically ordered the cases remanded to district court "with instructions to deny the respondents' [government's] motion that the complaint can be dismissed for failure to state a claim upon which relief can be granted."

In his controlling opinion, Burton held that, in "listing" the three organizations the government had done nothing that "purports to adjudicate the truth of [their] allegations that they are not in fact Communistic." Because the Justice Department had failed to contest their denials and had only moved to dismiss their suits as lacking standing and justiciability, Burton held that, under legal precedent, the government had "therefore admitted" the "facts alleged in the complaint," which must be "taken as true," and the Court therefore

Harold H. Burton (right) was appointed to the Court in 1945 by President Truman (left), the instigator of the AGLOSO. Justice Burton wrote the controlling opinion for the Court in 1951, calling the Attorney General's actions "arbitrary and unauthorized" because Truman's loyalty order had not required that organizations be properly investigated before being placed on the list.

was compelled to find their AGLOSO listings "patently arbitrary," because Truman's order did not authorize the Attorney General to list them "contrary to the alleged and uncontroversial facts constituting the entire record before us." Burton said the situation would be "comparable" if "the Attorney General, under like circumstances, were to designate the American National Red Cross as a communist organization" in the absence of "any contrary claim asserted against" its general reputation as a charitable and loyal organization. Burton's opinion flatly rejected the government's position on standing and justiciability, holding that "the touchstone to justiciability is injury to a legally protected right[,] and the right of a bona fide charitable organization to carry on its work, free from defamatory statements of the kind discussed, is such a right." Brushing aside the government's position that the AGLOSO caused no direct harm to listed organizations, Burton declared that the impact of the AGLOSO listing was to "cripple the functioning and damage the reputation of these organizations." The Attorney General's actions were labeled both "arbitrary and unauthorized," amounting to administrative discretion "run riot," because, according to Burton, Truman's loyalty order had required that listings be preceded by "appropriate investigation and determination," yet the Attorney General's actions had lacked "reliance upon either disclosed or undisclosed facts supplying a reasonable basis for the determination." In the present case, Burton said, Truman's order failed to "authorize, much less direct, the exercise of any such absolute power as would permit the inclusion in the Attorney General's

list of a designation that is patently arbitrary or contrary to fact," but the challenged AGLOSO listings were "unauthorized publications of admittedly unfounded designations of the complaining organizations as 'Communist.'"

Burton added that it would "obviously" be contrary to the intent of the Truman order to "confer power on anyone to act arbitrarily or capriciously—even assuming a constitutional power to do so" or to include AGLOSO designations that were "patently arbitrary and contrary to the uncontroversial material facts," and that an "appropriate" governmental "determination" had to be "the result of a process of reasoning" and not "an arbitrary fiat contrary to the known facts." Burton concluded, "Whether the complaining organizations are in fact Communistic or whether the Attorney General possesses information from which he could reasonably find them to be so must await determination by the [federal] district court" that had first dismissed the lawsuits. While the only clear mandate of the ruling was to refer the cases back to federal district court, in a footnote Burton seemed to suggest that if the government provided an "administrative hearing" at which organizations proposed for listing were allowed to "present evidence on their own behalf" and to be informed on the "evidence on which the designations rest," that might suffice to make the AGLOSO process constitutional henceforth.

In their concurrences, Black and Douglas both suggested that the entire loyalty program was unconstitutional, and Black characterized the entire concept of an official list of subversive organizations (with or without hearings) as such. However, Burton's controlling opinion was drawn extremely narrowly to focus only on the "outer limit of the authority of the Attorney General" to list organizations without any kind of legal process. Thus, in a footnote, Burton noted that the Court specifically declined to rule on the validity of the government's "acts in furnishing and disseminating a comparable list in any instance where such acts are within the authority purportedly granted by the executive order." The ruling even failed to indicate whether the entire existing "list"—as opposed to the listing of the three challenging organizations—was invalid pending further proceedings, if the three complaining groups were to be "delisted" pending the federal court determination, if all future AGLOSO designations had to be preceded by some kind of "administrative hearing" (as seemed to be suggested in the footnote referenced above), or if the sole future recourse of listed organizations was to challenge their designations in federal court, presumably after considerable damage to their reputations had already occurred. Thus, the immediate result of the ruling was primarily, as the Associated Press reported, to throw a "legal cloud" over the AGLOSO but to clearly establish little beyond that.

Jackson's concurrence, which sometimes read like a dissent, complained about the "extravagance" and "intemperance" of some of the opinions, lamenting that it was "unfortunate that this court should flounder in wordy disagreement over the validity and effect of procedures which have already been pursued for several years," and declaring that the rulings "may create the impression that the decision of the case does not rise above the political controversy that engendered it." Jackson also blasted the Court for its separate ruling issued the same day, upholding by a 4–4 vote (by failing to reverse the lower courts) Dorothy Bailey's loyalty dismissal. Jackson lamented, "This is the first time this court has held rights of individuals subordinate and inferior to those organized groups," terming it an "inverted view of the law" and "justice turned bottom-side up." He added that it was "beyond my understanding how a court whose collective opinion is that the [AGLOSO] designations are subject to judicial inquiry can at the same time say that a discharge based at least in part on them is not." With regard to the AGLOSO itself, Jackson said that "if the only effect of the loyalty order was that suffered by the organizations," he would "think their right to relief very dubious,"

because the designation deprived them of "no legal right or immunity," and they suffered only due to the "sanctions applied by public disapproval, not by law." However, Jackson continued, because of the AGLOSO's impact upon federal employees accused of association with listed groups and their inability to challenge the designations in loyalty proceedings, he would reverse the lower court rulings upholding the AGLOSO "for lack of due process in denying a hearing at any stage," because "unless a hearing is provided in which the organization can present evidence as to its character, a presumption of disloyalty is entered against its every member employee, and because of it, he may be branded disloyal, discharged, and rendered ineligible for government service."

Frankfurter's concurrence, at twenty-five pages by far the longest of the six opinions, declared that the "heart of the matter" was that democratic principles implied "respect for the elementary rights of men, however suspect or unworthy," particularly the practice of "fairness," which could "rarely be obtained by secret, one-sided determination of facts decisive of rights," which served to "maim and decapitate" listed organizations "on the mere say-so of the Attorney General." Even if the designation directly "imposes no legal sanctions on these organizations" and "does not directly deprive anyone of liberty or property," Frankfurter wrote, "it would be blindness" to fail to "recognize that in the conditions of our time such designation," issued by the "highest law officer of the government," in practice "drastically restricts the organizations, if it does not proscribe them." He added that "due process" requirements were "perhaps the most majestic concept in our whole constitutional system," and were not "a fair-weather or timid assurance," but required respect "in periods of calm and in times of trouble" and should be "particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe." Perhaps suggesting that his dissenting colleagues were bending in the political wind, Frankfurter pointedly declared that the nation's Founding Fathers had "put their trust in a judiciary truly independent" by making them "not subject to the fears or allurements of a limited tenure and by the very nature of their function detached from passing and partisan influences."

In his concurrence, Douglas said that the "paramount issue of the age" was the need to reconcile the need to provide both "security" and "freedom." But he warned that when the country took "shortcuts by borrowing from the totalitarian techniques of our opponents," it opened the way to "a subversive influence of our own that destroys us from within," a trend illustrated by the AGLOSO and Bailey cases. Douglas declared that organizations branded "subversive" by the Attorney General suffered the "real, immediate, and incalculable" injury of being "maimed and crippled," and that, as currently administered, the AGLOSO had "no place in our system of law," but only planted "within the body politic the virus of the totalitarian ideology which we oppose." Given that the "subversive" label "may well destroy the group against whom" it was directed, Douglas wrote, "when the government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests," and to let the government adopt "such lesser ones as suits the convenience of its officers is to start down the totalitarian path." Douglas argued that the "rudiments of justice, as we know it, call for notice and hearing," since the government "cannot by edict condemn or place beyond the pale" and "no more critical governmental ruling can be made against an organization these days" than by branding them "subversive," which, under existing practice, "destroys without opportunity to be heard."

Alone among the Justices, Black's concurrence specifically declared that the government had no authority "with or without a hearing" to "determine, list, and publicize individuals and groups as traitors and public

enemies," a practice he said was "tyrannical" and "smacks of a most evil type of censorship" and one that"effectively punished many organizations and their members merely because of their political beliefs and utterances." Black added that AGLOSO proceedings possessed "almost every quality of bills of attainder," which were specifically forbidden by the Constitution, because they amounted to "executive investigations, condemnations, and blacklists as a substitute for imposition of legal types of penalties by courts following trial and conviction in accordance with procedural safeguards of the bill of rights." But, he lamented, "[i]n this day when prejudice, hate, and fear are constantly invoked to justify irresponsible smears and persecutions of persons even faintly suspected of entertaining unpopular views, it may be futile to suggest that the cause of internal security would be fostered, not hurt, by faithful adherence to our constitutional guarantees of individual liberty." Branding the AGLOSO a "much publicized" blacklist, Black said the designations of the three complaining organizations found them "guilty of harboring treasonable opinions and designs" and "officially branded them as communists," labels that "in the present climate of public opinion" and "regardless of their truth or falsity, are the practical equivalents of confiscation and death sentences for any blacklisted organization not possessing extraordinary financial, political, or religious prestige and influence."

The single dissenting opinion, written by Reed and joined by Vinson and Minton, endorsed all of the government's key arguments, holding that listed organizations suffered no concrete damage from the AGLOSO, that the AGLOSO's purpose of aiding government personnel loyalty investigations was valid, that listed organizations had no "basis for any court action," and that "in investigations to determine the purposes of suspected organizations, the Government should be free to proceed without notice or hearing" because such loyalty-program-related designations did "not require 'proof' in the sense of a court proceeding" and "to allow petitioners entry into the investigation would amount to interference with the executive's discretion." According to the dissenters, although AGLOSO listings presumably could be "hurtful" to the "prestige, reputation, and earning power" of designated groups, those groups lost no First Amendment or property rights, because they were "not ordered to do anything and are not punished for doing anything" and were not deprived "of liberty of speech or other freedom." According to Reed, AGLOSO listings did not even constitute "guilt by association," because they only amounted to a "warning" to federal officials to "investigate the conduct of the employee and his opportunity for harm." Reed's opinion added that the Attorney General's list sought only to aid loyalty investigations, and was unquestionably "preferable" to investigations of organizations "by each of the more than a hundred" government agencies, while "to require a determination as to each organization for the administrative hearing of each employee investigated for disloyalty would be impossible." The dissenters declared the designations were presumably made after "appropriate investigation and determination" and that, in aid of making loyalty determinations regarding federal personnel, "in investigations to determine the purposes of suspected organizations, the Government should be free to proceed without notice or hearing."

The *McGrath* ruling proved largely a Pyrrhic victory for the organizations that officially "won" their case, but it marked the beginning of a very slow and agonizing end for the AGLOSO, which ultimately took twenty-three years to die. The Justice Department stalled and puzzled over *McGrath* for two years before finally issuing, under the new Eisenhower administration in April 1953, a set of AGLOSO hearing regulations that were grossly biased in favor of the government. Organizations that sought to challenge their designations were given thirty days to act and then required to respond to numerous

The Red Scare blacklisting predated the rise to power of Joseph McCarthy, pictured here in 1954 sharing a laugh with his counsel Roy Cohn at a Senate subcommittee session.

detailed inquiries, which effectively forced them to become police informers on themselves. Moreover, the same Attorney General who originally sought to designate them made the final decision on that designation after obtaining recommendations from hearing officers. The new Attorney General, Herbert Brownell, "relisted" all of the previously designated 192 AGLOSO groups in April 1953, while also proposing sixty-two additions and announcing the new hearing rules. However, the effect of being listed was so devastating, the requirements to obtain a hearing so onerous, and the government so determined to avoid granting hearings that only one such hearing was ever held, involving the miniscule Independent Socialist League (ISL) and two affiliated organizations. In all other cases, the listed groups were already defunct, failed to request hearings, or asked but were denied them on the grounds that their responses to the government's detailed inquiries were inadequate.[22]

The ISL hearing was held in 1955 and 1956. The government delayed issuing a finding thereafter for two years and the new Attorney General, William Rogers, then abandoned the case on June 18, 1958. In the meantime, the Red Scare had markedly diminished, especially with the Korean War armistice of 1953, Democratic victories in the November 1954 congressional elections, the Senate censure of Senator McCarthy the following month, a growing storm of congressional and other criticism of the AGLOSO and other Red Scare excesses after 1954, and an increasing inclination of the Supreme Court to strike down government "anti-subversive" measures after 1956. The government never designated any more AGLOSO organizations after 1954, and in two 1957 cases agreed to "delist" two Lithuanian organizations that challenged their listings in court, for fear that that the Supreme Court would declare the AGLOSO unconstitutional in toto if the cases reached them. Similar concerns led the Justice Department to drop efforts

to list the National Lawyers Guild in 1958, after five years of litigation.[23]

As the AGLOSO gradually diminished in public consciousness and became increasingly moribund in general, Supreme Court rulings in the 1960s effectively dismantled the 1950 McCarran Act, designed to force "Communist" and "Communist front" groups to "register" with the government following hearings before the SACB. After the SACB then increasingly came under attack in the late 1960s as having nothing to do and serving as a political sinecure, President Richard Nixon attempted to revive both the AGLOSO and the SACB by issuing Executive Order 11605 on July 2, 1971, which transferred to the SACB the power to designate AGLOSO organizations following referrals from the Attorney General and hearings, a response both to *McGrath* and to criticism that, under the 1953 Justice Department AGLOSO regulations, the Attorney General acted as both prosecutor and judge. However, as opposition to the Vietnam War and to growing revelations of government spying rose in the 1960s, Nixon was bitterly attacked in Congress for seeking to both foster repression and usurp congressional authority by his executive order, with the legislative opposition lead by Senator Sam Ervin (D-NC) in what amounted to a preview of the Watergate hearings Ervin would lead soon thereafter. In 1972, Congress killed the SACB by defunding it, and in 1974, by then deeply enmeshed in the Watergate scandal, Nixon abolished the AGLOSO via Executive Order 11785, signed on June 4, 1974, two months before his resignation.[24]

The three *McGrath* organizations took their case back to federal district court in late 1951 to determine if the government was justified in its AGLOSO designations—which the government never removed—as provided for by *McGrath*. Before the years of litigation that followed were completed, the IWO was liquidated as an insurance corporation in 1953 as a result of judicial proceedings in New York (the Supreme Court refused to hear the IWO's appeal in this case) and the JAFRC disbanded in early 1955, citing government "harassments, persecutions, and prosecutions" that made it "impossible to carry on" its "good and necessary work." Ten years after it first sued the government over its AGLOSO designation, the NCASF threw in the legal towel in March 1957, following a federal appeals court ruling that, by not seeking an administrative hearing under the 1953 Justice Department regulations, the organization had failed to exhaust its available administrative remedies and therefore was not entitled to relief in the courts. The organization won a small triumph in May 1963, when a federal appeals court held that the SACB's 1956 finding that it was a "communist front" was based on "negligible" evidence and could not be sustained. None of the nation's major newspapers reported the ruling.[25]

ENDNOTES

*This article is drawn from Professor Goldstein's book, scheduled for late 2008 publication by the University Press of Kansas, **American Blacklist: The Attorney General's List of Subversive Organizations**.

[1]Pertinent parts of Truman's loyalty order are reprinted in Ellen Schrecker, **The Age of McCarthyism: A Brief History with Documents** (Boston: Bedford, 2002), p. 175.

[2]Alan Barth, **The Loyalty of Free Men** (New York: Pocket Books, 1952), p. 110.

[3]See "Collateral Consequences of the Attorney General's List," Digest of the Public Record of Communism in the United States (New York: Fund for the Republic, 1955), pp. 77–78. Surprisingly little has been published (aside from some rather technical law review articles) specifically about the Attorney General's List of Subversive Organizations (AGLOSO), but see Eleanor Bontecou, **The Federal Loyalty-Security Program** (Ithaca, N.Y.: Cornell University Press, 1953), pp. 157–204; and Robert Justin Goldstein, "Prelude to McCarthyism: The Making of a Blacklist," *Prologue* (2006), 38, # 3, pp. 22–33. On the Red Scare in general, see Richard Fried, **Nightmare in Red: The McCarthy Era in Perspective** (New York: Oxford University Press, 1990); Ellen Schrecker, **Many Are the Crimes: McCarthyism in America** (Boston: Little, Brown, 1998); and David Caute, **The Great Fear: The Anti-Communist Purge under Truman and Eisenhower** (New York: Simon & Schuster, 1978).

[4]FBI document obtained under the Freedom of Information Act.

[5]Barth, **Loyalty of Free Men**, p. 111.

[6]Schrecker, **The Age of McCarthyism**, p. 40.

[7]Athan Theoharis, **Seeds of Repression: Harry S. Truman and the Origins of McCarthyism** (Chicago: Quadrangle, 1971), pp. 106–7.

[8]Athan Theoharis, "The Escalation of the Loyalty Program," in **Politics and Policies of the Truman Administration**, ed. Barton J. Bernstein (Chicago: Quadrangle, 1970), p. 264.

[9]*See* Eisenhower Presidential Library, Central Files, Office File, 133–E-10, Box 662 for examples of government documents that refer to AGLOSO-listed groups as "blacklisted."

[10]341 U.S. 123 (1951).

[11]For the JAFRC I have relied upon newspaper articles and court rulings. For the NCASF I have used, in addition to such sources, the organization's archival materials in the Tamiment Library at New York University and also Louis Nemzer, "The Soviet Friendship Societies," *Public Opinion Quarterly*, 13 (Summer, 1949), pp. 265–84. The IWO is thoroughly covered in two books: Thomas Walker, **Pluralistic Fraternity: The History of the International Workers Order** (New York: Garland, 1991) and Arthur Sabin, **Red Scare in Court: *New York v. the International Workers Order*** (Philadelphia: University of Pennsylvania Press, 1993).

[12]The district court briefs are included in the organizations' petitions for *certiorari* before the Supreme Court: *NCASF v. McGrath*, petition filed January 23, 1950; *IWO v. McGrath*, filed May 11, 1950; *JAFRC v. McGrath*, filed January 25, 1950. Unless otherwise indicated, all legal materials pertaining to this case were examined in the Supreme Court library.

[13]The district court rulings are included in the briefs referred to *supra* note 12.

[14]*JAFRC v. Clark*, 177 F. 2d 79 (1949), *IWO v. McGrath*, 182 F. 2d 368 (1950). Judge Edgerton dissented again in the latter case. The NCASF case was decided without opinion on October 25, 1949, citing the *JAFRC* ruling (U.S. Court of Appeals for the District of Columbia, No. 10,165). The briefs are included in the petitions to the Supreme Court for *certiorati*, referenced *supra* note 12.

[15]*West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). Otherwise, see sources cited *supra* note 12 for this and the following paragraph.

[16]Brief for Respondents in opposition, *JAFRC v. McGrath*, March 1950.

[17]Brief for Petitioner, *NCASF v. McGrath*, filed September 20, 1050.

[18]Brief for Petitioner, *IWO v. McGrath*, October 13, 1950; Brief for Petitioner, *JAFRC v. McGrath*, filed September 29, 1950.

[19]Brief for respondents, *JAFRC v. McGrath*, October, 1950.

[20]The following paragraphs are based on the papers of Justices Tom Clark (Tarlton Law Library, the University of Texas at Austin), Stanley Reed (University of Kentucky Library), Harold Burton (Library of Congress), Harold Vinson (University of Kentucky), Robert Jackson (Library of Congress), Hugo Black (Library of Congress), Felix Frankfurter (Library of Congress), and William Douglas (Library of Congress).

[21]*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

[22]*Washington Post* [hereinafter *WP*], *New York Times* [hereinafter *NYT*], *Los Angeles Times* [hereinafter *LAT*], April 30, 1953; *WP*, May 4, 1953. The new regulations and complete listing were published in the May 12, 1953 *Federal Register*.

[23]On the ISL case, see Olive Golden, "Administration of the Attorney-General's List of Subversive Organizations: The Case of the Workers Party—Independent Socialist League," University of Chicago M.A., August, 1962. The dropping of AGLOSO proceedings against the Association of Lithuanian Workers and the American Lithuanian Workers Literary Association received virtually no press coverage, but it is documented in the National Archives, Department of Justice, Record Group 60, file 146-200-2-012; *see especially* the October 4, 1957 file memorandum by Executive Assistant to the Attorney General Harold Healy, Jr. On the National Lawyers Guild's ordeal, see Percival Bailey, "Progressive Lawyers: A History of the National Lawyers Guild, 1936–1958," Ph.D., Rutgers University, 1979. For press coverage, see *WP*, *NYT*, *Chicago Tribune* [hereinafter *CT*], September 13, 1958. On mounting attacks on AGLOSO, see Robert Justin Goldstein, "'Raising Cain': Senator Harry Cain and His Attack on the Attorney General's List of Subversive Organizations," *Pacific Northwest Quarterly*, 98 (2007), pp. 64–77.

[24]On the SACB and its fate, see Ellen Schrecker, "Introduction" to microfilm records of the SACB, 1950–1972 (Frederick, MD: University Publications of America, 1989). Nixon's executive orders were published in the *Federal Register*, July 7, 1971 and June 6, 1974. For samples of the extensive press coverage, see *Washington Star*, July 8, 1971; *NYT*, *CT*, July 16, 1971; *Philadelphia Inquirer*, July 9, 1971; *NYT*, *LAT*, *WP*, June 6, 1974. For the Ervin hearings, see "President Nixon's Executive Order 11605," Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, 92nd Cong., 1st Sess., October 5, 7, 1971.

[25]The IWO's fate is thoroughly covered in Sabin, **Red Scare**. The dissolution of the JAFRC is reported in *NYT*, February 16, 1955. For developments concerning the NCASF, see the NCASF archives, held at the Tamiment Library, New York University, Collection Number 134. The court ruling setting aside the SACB's finding is *NCASF v. SACB*, 322 F. 2d 375 (D.C.C.A. 1963).