LEGISLATION

Constitutional Law—

THE GWINN AMENDMENT: PRACTICAL AND CONSTITUTIONAL PROBLEMS IN ITS ENFORCEMENT

In passing the Independent Offices Appropriations Act of 1953, Congress attached a rider proposed by Congressman Gwinn, providing that: "No housing unit constructed under the Housing Act of 1937, as amended,[1] shall be occupied by a person who is a member of an organization designated as subversive by the Attorney General: Provided further, That the foregoing prohibition shall be enforced by the local housing authority. . . ."[2] To comply with this mandate, local housing authorities passed resolutions[3] requesting each tenant or applicant for future tenancy to sign a certificate denying present membership in every organization on the Attorney General's list of subversive organizations.[4] In a number of instances, tenants have refused to comply. As a result, the housing authorities have instituted eviction proceedings[5] or the tenants have sought relief through declaratory judgments[6] or through injunctions[7] to prevent enforcement of the act.[8]

1. Peters v. New York City Housing Authority, 307 N.Y. 519, 121 N.E.2d 529 (1954), required a new hearing on the scope of the amendment. On May 10, 1955, the official referee held that the amendment applied to all "low-rent" federal housing projects administered by the Public Housing Administrator. See Weixel v. New York City Housing Authority, 208 Misc. 246, 143 N.Y.S.2d 589 (Sup. Ct. 1955). There is strong evidence, however, that Congress intended to include coverage of all federally financed housing projects. See 98 CONG. REC. 8908-09 (1952).

2. 66 STAT. 403, 42 U.S.C. § 1411c (1952).

3. See, *e.g.*, resolution quoted in Peters v. New York City Housing Authority, 128 N.Y.S.2d 224, 230-31 (Sup. Ct. 1953).

4. The list was issued pursuant to Exec. Order No. 9835, 3 C.F.R. c. 2, at 129 (Supp. 1947), and Exec. Order No. 10450, 3 C.F.R. c. 2, at 72 (Supp. 1953), to implement the Federal Government's employee loyalty program.

5. Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955); Housing Authority v. Cordova, 130 Cal. App. 2d 883, 279 P.2d 215 (1955), *cert. denied*, 350 U.S. 969 (1956); Chicago Housing Authority v. Blackman, 4 Ill. 2d 319, 122 N.E.2d 522 (1954).

6. Lawson v. Housing Authority, 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955); Weixel v. New York City Housing Authority, 208 Misc. 246, 143 N.Y.S.2d 589 (Sup. Ct. 1955) (injunction and declaratory judgment).

7. Kutcher v. Housing Authority, 20 N.J. 181, 119 A.2d 1 (1955); Peters v. New York City Housing Authority, 307 N.Y. 519, 121 N.E.2d 529 (1954); Weixel v. New York City Housing Authority, *supra* note 6.

8. Applicants who have refused to sign presumably also have been excluded from occupancy, but apparently none have sought to contest their denial in the courts. Perhaps, counsel has advised applicants that the right to occupy government housing is a "privilege" and that an applicant for such a "privilege" need not be afforded due process. There is recent authority, however, which tends to show that the "privilege" concept is disappearing from the law. See, *e.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952); Parker v. Lester, 227 F.2d 708 (9th Cir. 1955), 104 U. PA. L. REV. 703 (1956).

The administrative and constitutional problems raised by the applicant will not be analyzed exhaustively in this Comment. See notes 18 and 29 *infra*.

Enforcement of the Gwinn Amendment in judicial proceedings raises numerous legal problems, both practical and constitutional, as a result of the courts' initial determination that public housing authorities, in contrast with private landlords, cannot arbitrarily evict tenants, in spite of sufficient notice of termination of the lease.[9]

One of the most troublesome problems created by the Gwinn Amendment is to find a practicable method of administration. Public housing authorities have been given a congressional mandate not to allow subversives to occupy housing under their control, but Congress has provided no guide to aid in implementation. One solution seems to have been adopted by all the authorities: the requirement that all tenants and applicants sign certificates affirming that they do not belong to the class ineligible to rent. This procedure has provided an administratively practical method of initially screening the large number of persons seeking government housing.

As a result of this initial screening, housing authorities have been faced with a certain number of tenants who have refused to sign. The authority must then determine whether to seek to evict the non-complying tenants immediately, or to attempt to secure other evidence which would tend to prove or disprove the tenant's alleged membership. The authority's course of action ultimately will be determined by whether or not the courts will accept evidence of refusal to sign as sufficient to satisfy the authority's burden of persuasion.[10] Since refusal to sign does not rationally prove membership, if the courts held this sufficient proof to establish membership they will have afforded this evidence the status of a presumption.[11] The effect would be to shift the burden of going forward with the evidence to the defendant.

Whether or not a presumption is justified in this situation depends upon an analysis of three factors: the probability of the inference to be drawn, the procedural convenience involved and the relative ease or difficulty of proving or disproving the crucial fact of membership as between the authority and the tenant.[12] Certainly, membership is at least one reasonable inference which can be drawn from refusal to sign, but this infer-

9. *E.g.*, Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955); Housing Authority v. Cordova, 130 Cal. App. 2d 883, 279 P.2d 215 (1955), *cert. denied*, 350 U.S. 969 (1956); see 55 COLUM. L. REV. 1222 (1955). *But cf.* Columbus Metropolitan Housing Authority v. Simpson, 85 Ohio App. 73, 85 N.E.2d 560 (1949).

10. Two courts have held that a showing of refusal to sign would be in itself insufficient to prove membership in any listed organization. Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955); Kutcher v. Newark Housing Authority, 20 N.J. 181, 119 A.2d 1 (1955).

11. From the proven fact of refusal to sign an oath denying membership is assumed the fact of membership. For a discussion of the difference between a presumption and an inference see Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. PA. L. REV. 1, 11 (1954); Morgan, *Presumptions: Their Nature, Purpose and Reason* in 2 BRANDEIS LAWYERS' SOCIETY, ADDRESSES 3-4 (1949); UNIFORM RULES OF EVIDENCE Rule 13.

12. See MCCORMICK, EVIDENCE § 309 (1954). McCormick does not state that all three of these factors must be present before the presumption is justified. It would seem that all that should be required to justify a presumption is that the factors which support it outweigh those factors which weigh against its creation.

ence is probably not so compelling that, standing alone, it justifies the presumption. As has been pointed out in the controversy over the privilege against self incrimination, there are other reasonable inferences which can follow.[13]

As a matter of procedural convenience, as has already been pointed out, the use of the affidavit is a rapid and inexpensive method of initially processing a vast number of tenants and applicants. However, this initial convenience alone does not justify the authority in not seeking other competent evidence to support its case. Since the number of non-signers will not be great,[14] the requirement that an individual investigation be made, at least superficially, appears to be a reasonable burden. The authority may be able to hire private investigators or to make use of the files or agents of appropriate state and federal agencies to attempt to secure additional evidence. However, there is a possibility that the authority may not be able to secure funds to hire private investigators,[15] or, even if funds for this purpose can be raised through increased rentals,[16] the authority may feel that to so act would subvert the avowed purpose of the federal program —to provide low-cost federal housing for low-income families. Moreover, governmental investigative agencies may be reluctant to cooperate with the authorities, either because they feel that their manpower can be put to better use in a more crucial area or because they feel that there is a danger, in allowing the authorities to use their files, that important confidential informants may be revealed in relatively unimportant proceedings.[17]

But even assuming that the authority has no adequate means for securing an investigation, if the innocent tenant normally will be unable to rebut the presumption of membership, then under no circumstances can the presumption be justified. This would seem to be the case if the tenant must adduce evidence going solely to the issue of non-membership in order to shift the burden of going forward once again to the administrator, for such

13. See Note, *Mandatory Dismissal of Public Personnel and the Privilege Against Self-Incrimination*, 101 U. PA. L. REV. 1190, 1199 (1953). Other possible inferences are self-righteous indignation, religious or libertarian protest, or uncertainty of association activity creating a fear of perjury. *Cf.* Noonan, *Inferences from the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311, 321 (1955); Note, *Mandatory Dismissal of Public Personnel and the Privilege Against Self-Incrimination*, 101 U. PA. L. REV. 1190, 1199-1200 (1953).

14. Although not an accurate reflection of the number of non-signers, it has been reported that only 60 out of 1,300,000 tenants have contested eviction based on refusal to sign the specified affidavit. N.Y. Times, Aug. 10, 1955, p. 24, col. 2.

15. Although many municipal housing authorities have been granted the power to conduct investigations on any "material" matter, see, *e.g.*, CAL. HEALTH & SAFETY CODE ANN. § 34318 (West 1954); N.Y. PUB. HOUSING LAW § 37(1)(x); PA. STAT. ANN. tit. 35, § 1550(y) (Purdon 1949), the financing of probes into suspected subversive activities of non-signers may be prevented by adverse municipal governments which, in some states, control the authority's purse strings. See, *e.g.*, N.Y. PUB. HOUSING LAW § 96 which limits the housing authority to securing administrative expenses from the appropriate municipality.

16. See, *e.g.*, PA. STAT. ANN. tit. 35, § 1562 (Purdon Supp. 1954); WIS. STAT. § 66.401(2) (1953).

17. Parker v. Lester, 227 F.2d 708 (9th Cir. 1955), suggests that the Government may henceforth be unable to keep the source of relevant information from applicants on the ground that national security requires such conduct. See 104 U. PA. L. REV. 703 (1956).

proof would be almost impossible to obtain. If, on the other hand, a more reasonable approach is taken, *i.e.*, that the tenant can rebut the presumption by giving an acceptable explanation, other than membership, for his failure to sign, the presumption seems reasonable. If a tenant has refused to sign the affidavit because his previously avowed libertarian views or religious creed prevents him from signing such oaths, proof of his reasons should not be too difficult to obtain and, if believed, obviously would be sufficient to rebut the presumption. Perhaps, a few innocent tenants will be unable to adduce sufficient credible evidence to meet this presumption, but this, no doubt, would be the rare case. While it is difficult to approve a procedure which may ensnare the innocent, no matter how few, it would not seem that it is asking too much of our citizenry that they submit to what they consider an unwise law and seek its repeal in the legislature or attack its constitutionality in the courts.[18]

The problem of proof of membership is essentially one of complying with the statute. A related problem, also requiring statutory construction, has arisen more frequently in the early cases interpreting the amendment. It is the resolution of what is meant by the ambiguous phrase "subversive" appearing in the statute. It never was seriously challenged that the word should be construed according to the Attorney General's list of subversive organizations prepared for the Government's loyalty program, but a question was presented by the fact that before 1953 the list had six categories, one of which was expressly labeled subversive.[19] However, limiting the amendment to that group[20] would have had the anomalous result of not including communists,[21] probably the one group that Congress could be

18. In cases involving applicants for housing rather than tenants, a completely different problem is presented. Here the housing authority is not required to go into court as a plaintiff in an ejectment suit in order to give effect to its decision. Rather, the applicant must sue for relief and, therefore, must carry the plaintiff's burden of proof. Consequently there does not appear to be any need to afford the authority the benefit of the presumption of the applicant's membership in one of the listed organizations. One situation in which it may be properly invoked, however, would arise where the only charge is that the authority's action was arbitrary and unreasonable for lack of a sufficient basis of fact to justify the denial.

19. "The Loyalty Review Board shall currently be furnished . . . the name of each . . . organization . . . which the Attorney General . . . designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." Exec. Order No. 9835, 3 C.F.R. c. 2, at 131 (Supp. 1947). The early lists of the Attorney General classified each organization within one of the six types here indicated. 5 C.F.R. § 210.15 (1949). Since April, 1953, all organizations have been listed alphabetically without further classification. 18 FED. REG. 2741 (1953).

20. Two courts have held that "designated as subversive" referred only to the separate category labeled "subversive" by the Attorney General. Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955); Kutcher v. Newark Housing Authority, 20 N.J. 181, 119 A.2d 1 (1955).

21. The Attorney General interpreted Exec. Order No. 9835, 3 C.F.R. c. 2, at 129 (Supp. 1947), to require classification into independent and mutually exclusive categories, and although recognizing that one organization may have characteristics corresponding to more than one category, grouped them by the characteristic deemed predominant. In the 1948 list, however, three of the six organizations termed "subversive" were also listed in the third and sixth groupings. 5 C.F.R. § 210.15 (1949).

said to have had clearly in mind.[22] At the same time, it is not clear that Congress intended to bar members of all the organizations on the list.[23] The interpretation of the meaning of "subversive" in *Lawson v. Housing Authority*[24] appears to be the one closest to achieving Congress' intent. That court defined "subversive" organizations as those which advocate or seek to overthrow the Government through force or other unconstitutional means. Housing authorities, therefore, should utilize a list which contains only those organizations which fall within the *Lawson* definition, and not the Attorney General's entire list. However, the authorities may have considerable difficulty following such a standard since the Attorney General no longer categorizes the listed organizations on that criterion.[25] Perhaps, the Attorney General, if requested, might be able to bring up to date an old list which did place organizations within the *Lawson* category supplemented with organizations which fall within its purview.[26]

Turning from the practical to the constitutional problems which the Gwinn Amendment has evoked, the first is whether the tenant must be afforded a trial-type hearing before he can be evicted. The Court of Appeals for the District of Columbia, in *Rudder v. United States*,[27] found that the procedure followed by the housing authority was invalid, among other reasons, for failing to give the Rudders a hearing before attempting to evict them. The validity of this requirement is doubtful. Due process requirements normally are satisfied if an administrative or judicial hearing is allowed before the governmental action becomes final.[28] Since the housing authority must institute eviction proceedings in court to enforce its determination of a tenant's ineligibility, an administrative hearing would seem unnecessary. The tenant's rights would be adequately safeguarded, first, because the courts provide a hearing on the merits in which the administrator would have the risk of non-persuasion, and, second, because the tenant would remain in occupancy pending a final court determination. By independently evaluating the sufficiency of the administrator's complaint on

22. When advocating the amendment on the floor of Congress, Congressman Gwinn referred to infiltrating communists and *socialists*. 98 CONG. REC. 2639-40 (1952). At a later date Senator Maybank referred to communists and "other subversives." *Id.* at 8908-09.

23. This view, however, was apparently taken by the official referee in the *Peters* hearing, when he held that use of the entire list was "within the mandate of the Gwinn amendment." This view is quoted and followed with approval in Weixel v. New York City Housing Authority, 208 Misc. 246, 143 N.Y.S.2d 589 (Sup. Ct. 1955). This position receives some support from the fact that the list is often referred to loosely as the "Attorney General's list of subversive organizations."

24. 70 N.W.2d 605, 612 (Wis.), *cert. denied*, 350 U.S. 882 (1955).

25. See note 19 *supra*.

26. This would be necessary to prevent the anomalous result referred to in the text at note 21 *supra*.

27. 226 F.2d 51, 53 (D.C. Cir. 1955). *But see* Peters v. New York City Housing Authority, 283 App. Div. 801, 802, 128 N.Y.S.2d 712, 714 (2d Dep't 1954).

28. Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950); Lichter v. United States, 334 U.S. 742 (1948); Hagar v. Reclamation District, 111 U.S. 701 (1884); DAVIS, ADMINISTRATIVE LAW § 75 (1951).

demurrer, the *Rudder* court itself destroyed any basis for requiring that the tenant be given an administrative hearing.[29]

Other constitutional arguments are available which have a good deal more merit. It can be argued seriously that the amendment is neither reasonably related to the purposes of the Housing Act to which it is added as an amendment[30] or to the purpose of protecting the national security in the United States.[31] In the absence of such relationship to a legitimate legislative purpose, the statute would be violative of due process.[32] Furthermore, the language of the legislation contains no requirement of *scienter*. It penalizes any member, not only those members who belong knowing of the organization's nefarious purposes. Construed to affect equally "innocent" as well as "knowing" members, the statute is again probably contrary to the requisites of due process.[33] Most courts have met this problem, however, by the oft used maxim of statutory construction that when reasonable alternatives are available, the constitutional interpretation will be chosen.[34] They have implied a requirement of scienter.[35] Lastly, the amendment makes no provision for permitting organizations which fall within its purview to attack their listing as arbitrary. One court,[36] relying

29. The requirement of an administrative hearing prior to action by the authority is more plausible when the action concerns an applicant rather than a tenant. The authority is not required to bring an action for ejectment when it denies an application for housing so that the necessity for a judicial hearing before the order becomes effective, which obviated the need for an administrative hearing on ejectment of a tenant, is not found here. The only review open to the applicant is a suit by him against the authority. Moreover, he would not be enjoying the advantages of public housing in the possibly protracted interim between the denial of his application and final action by the court. Indeed, he may even be denied standing to secure judicial review at all on the ground that public housing is a "privilege." See note 8 *supra;* 104 U. PA. L. REV. 703 (1956). As a result, there is a real need for the authority to hold a hearing before it denies an application solely on the basis of the refusal to sign the requested certificate.

30. Two cases, Chicago Housing Authority v. Blackman, 4 Ill. 2d 319, 122 N.E.2d 522 (1954), and Housing Authority v. Cordova, 130 Cal. App. 2d 883, 279 P.2d 215 (1955), *cert. denied,* 350 U.S. 969 (1956), held that the exclusion or expulsion of subversives from public housing had such little relationship to slum-clearing purposes as to make enforcement of the Gwinn Amendment by local housing authorities an ultra vires act. For an apparently valid criticism of these rulings, see Note, 69 HARV. L. REV. 551, 552 (1956).

31. See discussion in text at pp. 701-02 *infra.*

32. *Cf.* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952).

33. Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955); Chicago Housing Authority v. Blackman, 4 Ill. 2d 319, 122 N.E.2d 522 (1954) (state loyalty oath requirement for tenants); Kutcher v. Newark Housing Authority, 20 N.J. 181, 119 A.2d 1 (1955); *cf.* Wieman v. Updegraff, 344 U.S. 183 (1952).

34. American Communications Ass'n, CIO v. Douds, 339 U.S. 382, 407 (1950); United States v. CIO, 335 U.S. 106, 120-21 (1948); United States v. Delaware & Hudson Co., 213 U.S. 366, 407-08 (1909).

35. Lawson v. Housing Authority, 70 N.W.2d 605, 612 (Wis.), *cert. denied,* 350 U.S. 882 (1955); *cf.* Garner v. Board of Public Works, 341 U.S. 716, 723 (1951); Peters v. New York City Housing Authority, 283 App. Div. 801, 802, 128 N.Y.S.2d 712, 714 (2d Dep't 1954). The courts, in *Lawson* and *Peters,* held *scienter* satisfied when, prior to signing, the tenant was provided with a list of the designated organizations. Since the Gwinn Amendment focuses solely on present membership, the tenant or applicant is thus given opportunity to sever his ties with the named organizations prior to signing the affidavit.

36. Peters v. New York Housing Authority, 128 N.Y.S.2d 224 (Sup. Ct. 1953), 53 COLUM. L. REV. 1166.

on *Joint Anti-Fascist Refugee Committee v. McGrath*,[37] held that this failure to provide the organizations with some means of contesting their designation violated due process. In response to this decision, the Attorney General has provided for giving notice and the right to contest their designation to all listed organizations,[38] apparently satisfying the due process requirement.[39]

The Gwinn Amendment may also be attacked as an unconstitutional restriction of freedom of speech and assembly. It might be argued, as some courts have done,[40] that, since the Government could completely withhold such "bounties" as low-cost public housing from its citizens, it should be able to refuse to grant them to members of organizations which advocate the destruction of the source of these "bounties." One difficulty with this argument is that it ignores the fact that by compelling the individual to choose between membership in an organization and low-cost public housing, it indirectly limits his freedom of speech and assembly.

The Supreme Court has determined the constitutional validity of similar mandatory choices indirectly restricting first amendment guarantees and, in each case, has sustained the pertinent statute. For example, in 1947, in *United Public Workers, CIO v. Mitchell*,[41] the Court recognized that in preventing classified public workers from engaging in political activity freedom of expression was restricted, but upheld the constitutionality of this limitation on the basis that the efficiency of the civil service was in Congress' sphere. In 1950, with *American Communications Ass'n, CIO v. Douds*,[42] the Court indicated a sensitivity to the coercive effect on party membership of a statute which required that union officers sign non-communist affidavits before a union could avail itself of LMRA enforcement mechanisms. Although Chief Justice Vinson purportedly balanced the importance of preventing an interruption of interstate commerce against the degree of restriction on free speech,[43] in holding the act constitutional, he largely deferred to the congressional determination that this restriction was reasonably necessary to prevent the interruption of interstate commerce. In *Gerende v. Board of Supervisors*,[44] denial of knowing membership in an organization engaged in an attempt to overthrow the Government by force or violence was held to be a valid requirement for those seeking a place on the ballot in a municipal election. In *Garner v. Board of Public*

37. 341 U.S. 123 (1951).

38. 28 C.F.R. c. 1, pt. 41 (Supp. 1954).

39. Peters v. New York City Housing Authority, 283 App. Div. 801, 128 N.Y.S.2d 712 (2d Dep't 1954); see Note, 69 HARV. L. REV. 551, 557-59 (1956).

40. Rudder v. United States, 105 A.2d 741, 745 (Mun. App. D.C. 1953), *rev'd on other grounds*, 226 F.2d 51 (D.C. Cir. 1955); Housing Authority v. Mollie Turner, No. 342,281, Municipal Court, San Francisco, Cal., cited in Brief for Appellees, p. 29, Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955); *cf.* Dworken v. Collopy, 91 N.E.2d 564, 571 (Ohio C.P. 1950) (workmen's compensation).

41. 330 U.S. 75 (1947).

42. 339 U.S. 382 (1950).

43. *Id.* at 400.

44. 341 U.S. 56 (1951) (per curiam).

Works,[45] the Court bowed to a state legislature in upholding as "reasonable" a statute requiring state employees to sign affidavits denying membership in communist organizations and advocacy of forcible overthrow of the government. Finally, in *Adler v. Board of Education*,[46] the Court held that only choice, not speech or assembly, was restricted by the requirement that public school teachers sign an affidavit denying membership in subversive organizations.

If the language employed in *Adler* were to be followed, then the Gwinn Amendment clearly would not violate the first amendment, for the choice between membership and public housing is probably less oppressive than that between membership and public school teaching. However, a better interpretation of *Adler*, in view of the previous cases, is that a restriction is present, but is justified by the need for loyal teachers, particularly where pupils are in a formative and impressionable stage, and by the legislative determination that the means adopted is reasonably calculated to effectuate this policy. In considering the Gwinn Amendment, the prevention of violent overthrow of the Government or the success of the low-cost housing programs are concededly legitimate legislative objectives of great significance, and denial of public housing represents a relatively minor restriction on members of subversive organizations. If a court then must defer to a congressional determination of the reasonable necessity of this restriction to secure one of the above-named objectives, there apparently is no basis for finding the Gwinn Amendment repugnant to the first amendment.

However, deferral to the congressional determination is sensible, if at all,[47] only when Congress has attempted rationally to exercise its prerogative. Here no such effort is evident. Indeed, the fact that the Gwinn Amendment passed as a rider to an appropriations act and the fact that there was no congressional hearing and little debate on its advisability strongly suggest that Congress did not really consider the reasonableness of the act as a means of preventing the occurrence of a substantive evil. Rather, it would seem that the act was designed to withdraw a government bounty from a highly disfavored group.

Therefore, a court may justifiably, and consistently with past cases, independently balance the relative efficacy of the Gwinn Amendment to achieve any legitimate legislative objective with the degree to which such legislation cuts into the first amendment guarantee of free speech. The court in *Peters v. New York City Housing Authority*,[48] in upholding the constitutionality of the Gwinn Amendment, stated without further elaboration that it had found evidence of a substantial evil in the formation of "cell" groups within the housing developments. If the removal of this "evil" is

45. 341 U.S. 716, 720-21 (1951).

46. 342 U.S. 485, 493 (1952).

47. There is at present strong judicial opposition to any such deferral where the legislation in question in any way restricts free speech. See Dennis v. United States, 341 U.S. 494, 579-80 (1951) (Black, J., dissenting).

48. 283 App. Div. 801, 128 N.Y.S.2d 712 (2d Dep't), *rev'd on other grounds*, 307 N.Y. 519, 121 N.E.2d 529 (1954).

in itself a legitimate governmental objective, there can be little question that the Gwinn Amendment would be an effective means for procuring that result. But subversives, even when concentrated in large numbers, do not necessarily constitute a substantial evil. Since there is no indication that subversives are hampering the success of the housing program,[49] there is apparently no justification for the *Peters* finding unless such concentration threatens the nation's security. The court in *Lawson v. Housing Authority*[50] recognized the danger to national security as an evil to be guarded against, and although willing to give weight to a congressional determination of need, found that the evidence of subversives in federally financed housing projects showed no threat to national security, and hence held the Gwinn Amendment unconstitutional in violation of the first amendment. The *Lawson* view seems correct in all respects, but particularly in refusing to defer to an irresponsible and unexpressed congressional determination of need.

49. See note 30 *supra.*

50. 270 Wis. 269, 70 N.W.2d 605, *cert. denied,* 350 U.S. 882 (1955); *cf.* Danskin v. San Diego Unified School District, 28 Cal. 2d 536, 171 P.2d 885 (1946) (applicants for use of public building or property).