

NOTES

THE FEDERAL EMPLOYEE LOYALTY-SECURITY PROGRAM: A CRITIQUE

INTRODUCTION

Federal loyalty programs are not of recent origin.¹ The earliest loyalty program adopted by the federal government was enacted by Congress in the form of the Alien and Sedition Act of 1798.² The more recent federal government employee loyalty and security programs find their origin in section 9-A of the Hatch Act which made it unlawful for federal employees to "have membership in any political party or organization which advocates the overthrow . . ." of the United States government.³ The latest programs have been concerned with the dismissal from government service of employees who may be detrimental to the security of, or disloyal to, the federal government.

Recently, the loyalty and security programs have been criticized by many who have felt that administration of the present program has resulted in unjust decisions and has imposed unnecessary hardships on some government employees.⁴ Apart from a few highly publicized cases there has been very little information available which could be used as a basis for an analysis of the program. Recently, however, there has been made public a preliminary collection of 50 fully reported cases, selected at random from a study of 230 cases,⁵ most of which have arisen under the present program.⁶ This project was

1. For a more complete historical background of loyalty programs, see Emerson & Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1, 3-20 (1948).

2. 1 STAT. 596 (1798).

3. 53 STAT. 1148 (1939) (later amended by 69 STAT. 624 (1955), 5 U.S.C. §§ 118p, 118r (Supp. III 1956)).

4. See BONTÉCOU, *THE FEDERAL LOYALTY-SECURITY PROGRAM* (1953); CURTIS, *THE OPPENHEIMER CASE* (1955); Emerson & Helfeld, *supra* note 1; Garrison, *Some Observations on the Loyalty-Security Program*, 23 U. CHI. L. REV. 1 (1955); Kaplan, *Loyalty Review of Federal Employees*, 23 N.Y.U.L.Q. REV. 437 (1948); Green, *Book Review*, 42 VA. L. REV. 123 (1956); Bush, *To Make Our Security System Secure*, N.Y. Times, March 20, 1955, § 6, p. 9.

However, it is questionable whether the majority of the American people are dissatisfied with the program. In a recent study sponsored by the Fund for the Republic it was found that less than 1% of the persons polled were concerned with the threat of Communists in the United States or infringement of civil liberties. STOFFER, *COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES* 59 (1955).

5. YARMOLINSKY, *CASE STUDIES IN PERSONNEL SECURITY* (1955) (hereinafter cited as YARMOLINSKY REPORT).

6. YARMOLINSKY REPORT. The security programs considered in these 50 cases involved government personnel, industrial security, military personnel, port security, and international agencies (American employees).

undertaken by Adam Yarmolinsky and was financed by the Fund for the Republic. It would appear that the data compiled in the Yarmolinsky Report may serve as a basis for a more accurate analysis of the program than has been heretofore possible. In the recent case of *Cole v. Young*,⁷ the Supreme Court has declared the Eisenhower program invalid as applied to "non-sensitive" employees. For this reason, the word "employee," as used in this note, is defined as an employee who holds a "sensitive" position. The scope of this note is confined to a discussion of the operation of the present security program, a presentation of criticisms of the program, and an evaluation of alleged "corrective" proposals. Therefore, the constitutionality of the program will not be discussed. A few of the proposals presented are so broad that if adopted they would change the fundamental nature of the program. Since these proposals put fundamental policy considerations into issue, they are beyond the scope of this note which is confined to proposals within the basic structure of the present security program.

OPERATION OF THE PRESENT PROGRAM

I

In 1947 the Federal Employee Loyalty Program was inaugurated under the provisions of Executive Order 9835.⁸ The primary purpose of the program was to remove from government employment persons who were believed to be disloyal. The standard used in determining

See Brown & Fassett, *Security Tests for Maritime Workers: Due Process Under the Port Security Program*, 62 YALE L.J. 1163 (1953). For a discussion concerning the operation of the Industrial Security Program and its effect on employer practices, see Note, 8 STAN. L. REV. 234 (1956).

7. *Cole v. Young*, 24 U.S.L. WEEK 4295 (1956). In this case it was held that a preference-eligible veteran, who held a civil service position as a food and drug inspector in the Department of Health, Education and Welfare, was entitled to review of his suspension before the Civil Service Commission. This holding was based upon the Court's construction of the effect of the 1950 Suspension Act, see note 14 *infra*, and its administrative implementation, Exec. Order No. 10450, note 15 *infra*, upon the Veteran's Preference Act, 1944, 58 STAT. 387, as amended, 5 U.S.C. § 581 (1952). Since not all positions in government are "affected with the national security" within the meaning of the 1950 act, and since no determination had been made that the employee's position was one in which he could affect the national security, the employee's discharge was not authorized by the 1950 act. But this conclusion was not based upon constitutional grounds. See 24 U.S.L. WEEK 4302 n.20. The result reached by the *Cole* case had been proposed prior to the decision of that case on June 11, 1956. See Emerson & Helfeld, *supra* note 1, at 136; Garrison, *supra* note 4; Green, *supra* note 4, at 131; Daniels, Letter to the Editors, N.Y. Times, Aug. 14, 1955, § 4, p. 8, col. 5. The program has been held to be constitutional. See *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951). See also Richardson, *Problems in the Removal of Federal Civil Servants*, 54 MICH. L. REV. 219, 230-48 (1955). It is questionable, however, whether the program will be held constitutional if the issue is again presented to the Supreme Court. See *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

8. 12 FED. REG. 1935 (1947). For a historical background of the period extending from the Hatch Act to President Truman's first loyalty order, see BONTECOU, *op. cit. supra* note 4, at 10-34.

whether an employee should be dismissed was whether there existed "reasonable grounds" for the belief that he was disloyal.⁹ In 1951 this standard was altered so that an employee might be dismissed if there was "reasonable doubt" that he was loyal.¹⁰ Under this program an employee charged with disloyalty had a right to a hearing before a departmental or agency board,¹¹ as well as the right to an appeal to the head of the department or agency if he received an adverse decision at the hearing. If the appeal to the departmental head resulted in a decision adverse to the employee, the latter had the right to an additional appeal to the Loyalty Review Board¹² which was not associated with any particular agency, but heard appeals from all the various departments and agencies; the decisions of this board were final.¹

In 1950 Congress enacted a statute¹¹ which provided for a security program under which any government employee was to be dismissed when "deemed necessary in the interest of national security." This security program did not supersede the Federal Loyalty Program, but ran concurrently with it. The congressional program was somewhat broader than the Loyalty Program in that the scope of the former was not confined merely to loyalty questions; for example, employees presumably could be dismissed for such causes as homosexuality or drug addiction.

In 1953 President Eisenhower issued Executive Order 10450¹⁵ which combined the Truman Loyalty Program and the 1950 congressional security program; in effect, the former was absorbed by the latter. The procedure to be followed under the Eisenhower presidential order is that which was employed in the administration of the 1950 congressional security program. This procedure places the final responsibility on the head of each agency or department for the successful operation of the program within his unit. It is within the discretion of this departmental head to determine whether a particular employee

9. Exec. Order No. 9835, 12 FED. REG. 1935, pt. V, § 1 (1947).

10. Exec. Order No. 10241, 3 C.F.R. 431 (Supp. 1951).

11. Members of the hearing board underwent a training program established by the Civil Service Commission designed to inform them of the nature of the issues to be presented to the board and of the nature and meaning of evidence which might be introduced. BONTECOU, *op. cit. supra* note 4, at 47-48. Bontecou believes that for the most part the board members were men of good character and fine intelligence, but that too often they failed to understand the activities and motivations of the employee appearing before the board. *Id.* at 47.

12. The Loyalty Review Board was established by the Civil Service Commission. Bontecou comments that the Review Board originally made an earnest effort to effectuate a high standard of justice, but later became more limited in its scope. *Id.* at 56-57.

13. The decisions of the Loyalty Review Board were to be, under the terms of the executive order, advisory recommendations to the agency, but in actual practice they were considered binding. *Id.* at 54.

14. 64 STAT. 476 (1950), 5 U.S.C. § 22-1 (1952).

15. 3 C.F.R. 72 (Supp. 1953).

shall be dismissed or retained. If suspended, the employee is to be furnished within thirty days after suspension a statement of charges, to which he is entitled to submit answers, and is to be accorded a hearing before "a duly constituted agency authority." If the employee receives an adverse ruling at this hearing he may have the decision reviewed by the agency head whose decision is conclusive.¹⁶ Under neither the 1950 congressional program nor the Eisenhower program is there anything comparable to the Loyalty Review Board.

The Eisenhower program has also altered the standard to be used in determining whether an employee should be dismissed: he is not to be retained unless his retention is "clearly consistent with the interests of national security."¹⁷ Under this new standard the trier is explicitly given the power to discharge an employee not only for possible disloyalty, but also if it is thought the employee may be a sexual pervert, drunkard, drug addict, mental incompetent, or is unable to withstand pressure and coercion.¹⁸

II

Each of the 2.3 million federal employees has been screened since the inauguration of the new program in 1953.¹⁹ Of the many employees who left government service after this program became effective, 4,315 had derogatory information in their files which might have warranted their dismissal.²⁰ From May 1953 to June 1955, approximately 3,600 employees had been dismissed²¹ as a result of the new program. Since most of these dismissals were made through ordinary channels,²² it is possible that many employees were unaware they were being dismissed as security risks.²³ Three hundred and forty-two of this number, or .00015 per cent of all federal employees, went through the hearing procedure.²⁴ As a result of the program approximately 8,000 federal employees left federal service, either by dismissal or resignation under a cloud of some sort. Thus, only .035 per cent of all federal employees were directly affected by the program.²⁵

16. See note 4 *supra*.

17. See Exec. Order No. 10450, § 2, 3 C.F.R. at 72, 73 (Supp. 1953). In actual operation the head of the agency has been prone to "play it safe" and dismiss the employee if there is any doubt as to the desirability of retaining the individual. N.Y. Times, Jan. 16, 1955, § 4, p. 2, col. 1.

18. See Exec. Order No. 10450, § 8, 3 C.F.R. at 74-75 (Supp. 1953).

19. N.Y. Times, July 29, 1955, p. 18, col. 7.

20. 71 U.S. CIVIL SERVICE COMM'N ANN. REP. app. F (1954).

21. N.Y. Times, Sept. 28, 1955, p. 1, col. 5. The exact number varies from day to day.

22. N.Y. Times, Dec. 2, 1955, p. 12, col. 4. The administration did not state with certainty that all of these employees had derogatory information in their files. N.Y. Times, Dec. 3, 1955, p. 8, col. 5.

23. N.Y. Times, Nov. 29, 1955, p. 1, col. 7.

24. N.Y. Times, Dec. 2, 1955, p. 12, col. 4.

25. It is not here intended to minimize the effect of the program for it did present very real problems to the persons involved. In addition, there were many

The Yarmolinsky Report, which serves as a basis for the following analysis, contains fifty fully reported cases²⁶ involving employees who went through some phase of the security program. Twenty-nine of these cases involved suspended employees who later succeeded in being reinstated, while twenty involved employees who were permanently dismissed, and two involved employees who resigned before a final determination was reached. Thus, the initial suspension was thought to be erroneous in twenty-nine of the cases reported.²⁷ Even though the twenty-nine persons were ultimately reinstated, they suffered adverse consequences as a result of the initial suspension. For example, from the time of the suspension to the time of final determination the employee usually is not paid. While this period has varied from two months to three years, the average length of time was eight and one-half months. Thus, twenty-nine loyal employees erroneously suspended were without pay for an average of approximately eight and one-half months. It should be noted, however, that an employee who has been falsely charged does receive back-pay for the period he was suspended.

Moreover, counsel devote a considerable amount of time in representing the suspended employees. Lawyers have spent as little as four hours and as much as four hundred hours on a single case. The cost to the employee has varied from \$50 to \$1,750—an average of \$367 per case.²⁸ The government does not reimburse the employee for the necessary attorney's fees incurred in challenging his suspension.

There is no assurance given the employee—once he has undergone the suspension period, the hearing, the appeal, and incurred the at-

more persons who were subjected to the program, and who suffered a great deal, both mentally and financially, even though subsequently cleared.

Furthermore, the morale of the whole government service has been lowered by the program. Jahoda, *Morale in the Federal Civil Service*, 300 ANNALS 110 (1955). The effect of the program, however, on the government employee depends upon his individual perception of the entire situation which includes a broader basis than merely the loyalty and security programs. Jahoda & Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 YALE L.J. 295, 329 (1952).

26. Although only 50 cases are published in the YARMOLINSKY REPORT, government employee case No. 112 involves two separate persons. For the purposes of statistical analysis, it shall count as 2 cases, thus making the total number of cases reported 51.

The YARMOLINSKY REPORT attempts to describe factually the events that occurred. Analysis and criticism are wholly absent. The report is intended to give neither a complete nor a random or stratified sampling of the cases in which charges were filed against the employees. It may have a bias in favor of the employee since government files were not available. The statistics, therefore, should be considered with reservation. In collecting the cases, however, Yarmolinsky tried to eliminate bias through the use of skilled interviewers, reliance mainly on documentary material, and identification of information set forth in the Report which was based on statements of the employee or his counsel.

27. The ratio of clearances to denials appears to be even higher in the total number of cases studied under the Yarmolinsky project. Green, *supra* note 4, at 128.

28. There was no fee charged in four cases.

torney's fees—that he will not again be subjected to a security challenge or that he can feel secure in his job. Nineteen of the employees in the reported cases had undergone investigation under prior programs. Four had been investigated under one prior program, eleven under two, and four under three. Of these nineteen, ten were retained and nine were permanently discharged. Thirty-two employees had not undergone a previous security investigation. Of these, nineteen were retained after a hearing, eleven were given unfavorable decisions, and two resigned before a decision was reached.

The fact that the initial hearing board and the agency head often disagree as to whether an employee is a security risk is another aspect of the program which tends to cast doubt upon its accuracy. Of forty-nine cases in which a final decision was reached, seventeen employees received favorable decisions at the initial hearing. Only five of these decisions were approved by the final authority, three were overruled, and no action was taken in nine cases. Twenty-two employees were given unfavorable reports by the initial board. Eight of these decisions were subsequently affirmed, ten were reversed, and no action was taken in four cases. In ten cases the initial decision was not reported.

Most of the charges made against the employees in the cases reported by Yarmolinsky were directed to communist affiliations, associations, or sympathies. Among the various charges in twenty-nine cases were accusations that the employee had communist affiliations; seventeen cases involved charges that a relative was a communist sympathizer; allegations of associations with communists or communist sympathizers other than relatives were found in twenty-one cases; twenty-nine of the cases involved charges accusing the employee of having communist sympathies. Most of these allegations were based upon events in the distant past rather than upon relatively recent events. Twelve of the cases contained miscellaneous charges including failure to pay debts, difficulty in getting along with others, immorality, irresponsibility, drunkenness, cheating in college, homosexuality, dishonesty, and sympathies with fascism.

A reading of the Yarmolinsky Report would not appear to provide a basis for reposing trust in the reliability of the opinions of the administrators. Nor is confidence in the program engendered by the fact that there are no restrictions on the evidence to be considered by the adjudicator. Because there is no access to government files, there is no way of knowing what factors may have influenced a decision in any given case. It seems the administrator may consider evidence pre-

sented after the hearing, or may reach a decision prior to receipt of the record from the initial hearing board.²⁹

PROPOSALS FOR CHANGES—THEIR EVALUATION

The basic criticisms of the program are that unjust and erroneous decisions are reached and that many employees have been subjected to undue hardship in the course of the administration of the program; thus reputation is stigmatized and capacity to earn a living impaired. Accordingly, in order to solve these problems, many proposals have been made for improving the security program. Though there can be no precise classification of the various proposals, generally they seem to come within one of four general categories: (1) Procedural safeguards; (2) Changes in standards and criteria; (3) Changes in organizational structure; and (4) Miscellaneous changes.

1. *Procedural Safeguards*

Some individuals interested in the program have felt that judicial standards should be incorporated into administrative hearings so that possible injustices may be avoided.³⁰ Consequently, there are proposals calling for procedures essentially analogous to those used in criminal trials.³¹ Such proposals might initially seem to be desirable because of our traditional regard for fair play, rather than as a result of a thoughtful analysis of the problem. Although an objective of a criminal trial is to convict those guilty of crime, the procedures followed are also designed to insure that no innocent person be convicted of crime. An almost certain consequence of this system is that some guilty persons will be acquitted.³² In the security system the objective is to assure, as far as possible, the discharge of security risks, with minimum injury to employees who, in fact, are not security risks. In light of this objective, the procedures cannot be designed primarily to protect the accused, *i.e.*, to insure that one who is not in fact a security risk will not be dismissed at the expense of the national security. While the interest of the community is such that some criminals will be allowed to go free rather than chance a conviction of one who is innocent, national security demands that there should be a minimum possibility of retaining security risks. Thus, comprehensive introduction of judicial procedure into the security program would seem to be undesirable.

29. There is no requirement in the statutes or executive orders that the head of the agency or his delegated subordinate is bound to consider all the evidence introduced before the hearing board, or that they cannot consider new evidence. See, *e.g.*, the Clubb case, as reported in *N.Y. Times*, March 9, 1952, § 4, p. 2, col. 5.

30. See, *e.g.*, O'BRIAN, *NATIONAL SECURITY AND INDIVIDUAL FREEDOM* (1955).

31. Chasanow, as reported in *N.Y. Times*, Sept. 1, 1955, p. 10, cols. 6-7.

32. Waite, *Judges and the Crime Burden*, 54 *MICH. L. REV.* 169 (1955).

While criminal procedure should not be collectively carried over to security hearings, the proposed incorporation of certain judicial procedures³³ such as the rights to cross-examination,³⁴ confrontation,³⁵ adequate notification,³⁶ and compulsory process³⁷ would, to a degree, appear to be desirable and unobjectionable. These devices would help the employee to prepare and present a more convincing case to prove that his retention would not be detrimental to the national security. It must be recognized, however, that if such procedures are incorporated into the present program, there must be certain limitations on their use. In order that there be rights to cross-examination, confrontation, and compulsory process, the witness must obviously be present and revealed. Disclosure of the nature of the charges to the extent required by criminal procedure to constitute adequate notification may also result in revealing witnesses. Therefore, consideration must be given to the necessity of keeping secret the identity of confidential government informants.³⁸ When the interests of national security dictate that the informant must not be revealed, the employee should be denied these various procedural safeguards.

The advocates of reform have recognized such a limitation on the employee's right to these safeguards. Consequently, there has been a proposal that when the informant's identity cannot be revealed, he should be interrogated by a special board.³⁹ The findings of this board

33. Garrison, *supra* note 4. Interdepartmental Committee of the National Security Council, as reported in N.Y. Times, Aug. 9, 1952, p. 1, col. 6. Chasanow believes that this proposal is second only to the proposal for a judicial trial. N.Y. Times, Sept. 1, 1955, p. 10, cols. 6-7. Former Secretary of the Air Force Finletter suggests, because such procedures are so basic to the American tradition of justice, that if the government employee is to be deprived of these procedures, the Constitution should be amended so that due process would be observed. Finletter, *The Great Tradition*, 81 LIBRARY J. 311 (1956).

34. Emerson & Helfeld, *supra* note 1, at 114-15.

35. N.A.A.C.P., as reported in N.Y. Times, June 26, 1955, p. 4, col. 1.

36. Emerson & Helfeld, *supra* note 1, at 101, 114-15; Green, *supra* note 4 at 133. General Donovan, War-time Director of Office of Strategic Services, suggests that if the identity of the informants cannot be revealed, the government should at least advise the employee of the information being used against him. Donovan & Jones, *Program for a Democratic Counter Attack to Communist Penetration of Government Service*, 58 YALE L.J. 1211, 1235 (1949).

37. N.Y. Times, Aug. 15, 1955, p. 1, col. 3, p. 5, col. 3. See also Emerson & Helfeld, *supra* note 1, at 114-15.

The latest Atomic Energy Commission regulations have authorized the hearing board to exercise a limited subpoena power. St. Louis Post-Dispatch, May 10, 1956, p. 12, col. 2.

38. But there is really very little sense in hiding those who merely want to avoid a difficult situation, such as being confronted by the employee. Parker v. Lester, 227 F.2d 708, 721 (9th Cir. 1955) (dictum); BONTÉCOU, *op. cit. supra* note 4, at 246. See also Donovan & Jones, *supra* note 36, at 1235.

A possible objection to the use of these procedural devices is that informants might be deterred from giving any information to government investigators if they knew they might be submitted to inconveniences such as appearing before the hearing board and being subjected to cross-examination. This does not seem to be a crucial objection.

39. Green, *supra* note 4, at 133-34. Senator Hennings, in an address to the Lawyers Association of St. Louis, on Nov. 3, 1955, proposed that a board of

are then to be submitted to the agency hearing board. Just how this special board is to function is not clear. If the board were merely to perform a ministerial function, such as asking the informant questions submitted by the employee or hearing board, there seems to be no valid objection to adoption of this proposal. Nor would a procedure allowing the hearing board to subject secret informants to a "thorough questioning" with the aid of impartial counsel be objectionable.⁴⁰

If the function of such a board, however, would be to evaluate the testimony of the secret witness and submit a report of its findings to the hearing board, a function of the administrator would be arrogated. If the administrator is not to evaluate all the evidence presented, he can hardly be held accountable for the final decision. Thus, rather than placing the responsibility for the successful operation of the program in a particular agency upon the head of that agency as intended by the Eisenhower executive order,⁴¹ divided responsibility would be created. It is believed that successful administration can only be accomplished by creating individual responsibility. One must be able to assign a task and give to the appointee sufficient discretion in the performance of that task so that there is created both the power and duty to act. A superior should be able to point to a particular individual and hold him accountable. Certainly it cannot be argued that an individual will be concerned with the success of a job when he does not have the final responsibility to see that it is done properly. To usurp the agency head's function and to relieve him from final responsibility by the creation of such a special board is not in keeping with the more desirable theory of administration. The establishment of a special board which could make findings evaluating testimony of secret witnesses would create a possibility of laxity in administration of the security program by providing its administrators with an opportunity to "pass the buck."

It would seem clear that certain other features of the criminal trial will never be introduced into the security program. For example, it would appear that there will never be a requirement that the government must prove beyond a reasonable doubt that the employee is a security risk. As pointed out previously, the interest of the nation is so great that the possibility of error must be kept to an absolute

lawyers cleared for "top secret" be selected to interrogate undisclosed informants at the request of the employee. *Id.* at 133.

40. The latest Atomic Energy Commission regulations have empowered the hearing boards to call and "thoroughly question" confidential witnesses who cannot be revealed to the employee. *St. Louis Post-Dispatch*, May 10, 1956, p. 12, col. 2.

41. *N.Y. Times*, March 6, 1955, p. 28, col. 1.

The trend today is toward centralizing authority—providing for fewer agencies, not more. *Cf. NASH & LYNDE, A HOOK IN LEVIATHAN* 22, 218 (1950).

minimum, *i.e.*, as far as is possible there should be no retention of a possible security risk.

Some proposals have called for incorporation of judicial rules of evidence into hearings to a greater extent than is now the practice.⁴² The validity of this proposal depends largely upon just what rules of evidence are thought to be necessary. Considering the interest of the national security it would certainly seem absurd to exclude evidence which would prove that the employee is disloyal, or is a security risk, merely because the evidence could be classified as hearsay or may have been illegally obtained (such as evidence obtained by wiretapping). Similarly, if evidence offered by the employee is trustworthy, it should be admissible. For example, statements by the employee should not be excluded merely because they may be labeled as self-serving. The legal rules of evidence cannot be incorporated into the program en masse. Each rule of evidence should be considered separately before it is rejected or adopted. Consideration should be given to the nature of the hearing and to the respective interests of the government and the employee.

It has also been proposed that once a decision has been reached the ruling should be "*res adjudicata*" so that an employee will not be subjected to the rigors of the security program with each change of administration.⁴³ This recommendation does not take into account the changes in the standard of retention. For example, it may have been found that "reasonable grounds" did not exist to question the employee's loyalty under the Truman standard. Under the same factual situation it could be found that the employee's retention was not "clearly consistent with the interests of national security" under the Eisenhower standard. It would seem that when the executive or legislature makes a basic policy determination as to what the standards will be in determining whether employees shall be retained, all employees are necessarily subject to another security check. However, as long as the standard does remain the same it would appear that an employee's case should be "*res adjudicata*," at least until new evidence is presented.⁴⁴

There have been other procedural proposals worthy of mention. Some observers believe the employee should be furnished with a record of the hearing.⁴⁵ This proposal does not appear to be objectionable and might well be adopted. It would certainly aid the employee's attorney in preparing his brief, which may be considered by the administrator on appeal. Often lawyers do not feel capable of preparing

42. Bush, *supra* note 4.

43. *Id.* at 44.

44. BONTECOU, *op cit. supra* note 4, at 249.

45. Emerson & Helfeld, *supra* note 1, at 114-15; Green, *supra* note 4, at 134.

adequate briefs because they are unable to recollect details of the hearing. Further, some would like to see the hearing board make determinations of fact in addition to rendering a decision.⁴⁶ This, too, would seem desirable, for not only would the appellate trier be informed as to what facts the lower board relied upon in reaching its decision, but also, the public would know just what facts are relied on in dismissing an employee.

While some of the procedural safeguards, such as cross-examination and confrontation, would be beneficial to the employees in some instances, in many cases the effectiveness of the adoption of these procedures on the final determination is doubtful. The issue is not confined solely to whether a specific event did or did not occur, but includes a determination of the character of a specific employee.⁴⁷ Certainly past events and existing facts are important, but of even greater importance is the administrator's prediction of the effect of these facts and events on a specific individual's future conduct. For example, in government civilian employee case No. 75 of the Yarmolinsky Report the charge against the employee was her association with her brother who was alleged to be an active participant in communist activities. There was no dispute of these facts. Procedural safeguards would have been of little or no value to the employee. The administrator had to consider how the employee would react if at some future time she was requested by her brother to obtain government information: Was she an individual who would place loyalty to relatives over loyalty to country? Would it make a difference whether her brother would be put in a position of peril if she did not obtain the requested information for him? These are only a few of the many value judgments which must be made by the administrator in a given case. To further complicate the situation there may be other factors—such as the sensitivity of the job or the difficulty in securing an adequate replacement—either favorable or unfavorable to the employee. From all this the administrator must decide whether retention of this specific employee is clearly consistent with the interest of national security. It cannot be overemphasized that the trier is not concerned with what generally would be the future reaction of persons in like circumstances, but what will be the reaction of *this* individual. The Yarmolinsky Report indicates that very often the real dispute was related to the trier's conclusion drawn from the facts. Therefore, the question is presented whether the problem in the pres-

46. Donovan & Jones, *supra* note 36.

47. Arnold, *Due Process in Trials*, 300 ANNALS 123, 125-28 (1955). Thurman Arnold compares the current attempt to impart fair procedures into the program to a similar attempt in the trial of Joan of Arc "for the purpose of giving dignity and sanctity to the disposal." *Id.* at 126-27.

ent security program is merely one of procedural safeguards or whether it is also a question of having administrators who are competent to make the necessary value judgments.

2. *Standards and Criteria*

Many of the proposals concern the standards to be used in determining whether an employee should be retained in government employment. Other proposals are directed to the criteria or factors to be considered in applying the standards.

(a) *Standards*

The Eisenhower standard is to retain an employee only when his retention is "clearly consistent with the interests of national security."⁴⁸ This standard has the effect of raising a presumption⁴⁹ that the employee is a security risk. Proposals call for the removal of this presumption.⁵⁰ Again, it must be noted that the interest of the nation is such that in the administration of a security program the government cannot adopt standards which tend to result in the retention of possible security risks. Removal of the present presumption would appear to shift to the government the burden of proving that the employee is a security risk. Obviously this increases the possibility that security risks will be retained.

It has been proposed that there should be substantial evidence to support a decision dismissing an employee.⁵¹ This, in effect, is suggesting a return to the original Truman standard that "reasonable grounds" exist for the belief that an employee is disloyal. The Truman administration rejected such a standard in 1951.⁵² Neither Congress in its security program nor President Eisenhower in the present program believed a return to such a standard was desirable. This standard seeks to afford protection to the employee to the possible detriment of the nation; the likelihood of retaining possible security risks is increased by limiting the administrator's discretion.

Some observers have felt that since the employee has the burden of disproving the charges made against him and rebutting the presumption, a method should be adopted for challenging the sufficiency of the charges prior to disproving them.⁵³ This proposal is related to the

48. See Exec. Order No. 10450, § 8(a), 3 C.F.R. at 74 (Supp. 1953).

49. Unlike the so-called presumption of innocence extended to an accused in a criminal trial, see McCORMICK, EVIDENCE § 309 (1954), the presumption here might be said to be a true presumption, both in the lay sense as an inference from probability, and in the legal sense as a permissible inference from the basic fact that the employee has been initially suspended as a security risk.

50. Green, *supra*, note 4, at 132.

51. Proposed by R. Daniels, assistant professor of Slavic studies at Indiana University, Letter to the Editors, N.Y. Times, Aug. 14, 1955, § 4, p. 8, col. 5.

52. See text supported by note 10 *supra*.

53. N.Y. Times, Aug. 15, 1955, p. 1, col. 3. There should be some justification for the charges made. Chasanow, as reported in N.Y. Times, Sept. 1, 1955, p. 10, cols. 6-7.

recommendation considered earlier that there should be a fuller notification of the charges; if the allegations are so indefinite or incomplete that they cannot really be said to constitute a "charge," the employee should be able to attack the charges for insufficiency. Once again the problem is presented as to the extent the government can safely reveal secret informants or confidential information in its possession. While under ordinary circumstances this proposal might seem to be desirable, nevertheless, if making charges more definite or providing additional facts will be detrimental to the interests of national security, it would seem that the employee cannot be afforded an opportunity to attack the charges for insufficiency.

Some proposals have called for a body similar in function to a grand jury.⁵⁴ This body would determine whether there is sufficient derogatory information concerning an employee to justify his initial suspension. The suggestion of a grand jury and "indictment" immediately appeals to one's sense of fair play, but it is doubtful whether an agency "grand jury" can perform this task with more efficiency than the administrator. The extent to which such a body would improve the administration of the present program is questionable inasmuch as such a procedure would merely be substituting one set of value judgments for another. Moreover, if the administrator is to be held accountable for the successful operation of the program in his department, it would seem that he should have authority to make the initial suspension. It is submitted that competent personnel are needed to make the determination. Whether the personnel be called administrators or grand jury is of no importance.

(b) Criteria

Most of the criteria or factors to be used in determining whether the employee's retention is "clearly consistent with the interests of national security"⁵⁵ are generally accepted without criticism. However, use of such criteria as sympathetic associations with subversive persons, and membership in, or sympathetic association with, subversive groups, has been severely criticized. It has been proposed that membership in a subversive organization should be insufficient to

54. Garrison, *supra* note 4, at 6; Bush, *supra* note 4, at 44.

55. The criteria to be used in determining whether the employee's retention is "clearly consistent with the interests of the national security" include: (1) unsuitability (unreliable, defective judgment, untrustworthiness, and pressure risk), (2) sabotage, treason, espionage, and sedition, (3) sympathetic association with subversive persons, (4) advocacy of forceful overthrow of the government by unconstitutional means, (5) membership or sympathetic association with subversive groups, (6) intentional violation or wilful disregard of security regulations, (7) acts or attempted acts serving interests of another government in preference to those of the United States (actual disloyalty), and (8) refusing to testify before a congressional committee on grounds of self-incrimination. Exec. Order No. 10450, § 8, 3 C.F.R. at 74-75 (Supp. 1953), as amended, Exec. Order No. 10491, 3 C.F.R. 109 (Supp. 1953).

provide a basis for dismissing an individual without a finding that the employee either knew of its subversive nature or intended to serve the interests of another government by joining the organization.⁵⁶ In effect this proposal seeks to put the burden on the government to establish that the employee is in fact a security risk. The interest of the nation is such that it should, as a matter of policy, be incumbent upon the employee to convince the trier of the desirability of his retention. The proposal fails to recognize this factor.

Some proposals have suggested the termination of the use of "guilt by association."⁵⁷ Certainly, factors such as membership in subversive organizations and sympathetic association with subversives over a long period of time are relevant to a determination of one's sympathies⁵⁸ and hence are indicia of one's loyalty. On the other hand, one or two isolated events of a "disloyal" association possibly might be ignored by the trier. It does not seem reasonable, however, to preclude the consideration of all such associations. It would appear that the administrator should have discretion to analyze the significance of and weight to be given to continued associations, infrequent associations, and associations falling between these extremes in a given case. The solution to the problem may best be solved by seeking to improve the personnel evaluating the evidence.

The desirability of retaining an employee may be questioned if a relative has had associations with subversive groups or individuals. Proposals have been submitted which suggest restriction of the "guilt by association" concept to the employee's own associations.⁵⁹ Such a recommendation does not seem to be justified. The associations of persons closely related to the employee, such as a spouse, would appear to be relevant to a determination of whether the employee is a security risk, since these persons possibly exert a great amount of influence on the employee. Thus, it would seem that the administrator should have discretion to determine whether the associations of relatives are relevant. Rigid rules at either extreme are not desirable, *i.e.*, the associations of relatives should not be per se determinative against the employee, nor should they be ignored. Once again, the proper solution necessarily seems to be a proper value judgment by a competent administrator.

It has been suggested that rather than basing a decision upon mere beliefs, friendships, or associations of the employee, the criteria

56. Donovan & Jones, *supra* note 36, at 1231-32.

57. Americans for Traditional Liberties, as reported in N.Y. Times, Sept. 25, 1955, p. 51, col. 2.

58. The British recently have announced that in their newly revised employee loyalty program "guilt by association" is a factor to be considered by the head of each department. Lyne, *British Spy Curb Draws Applause*, Christian Science Monitor, March 10, 1956, p. 1, col. 4.

59. Green, *supra* note 4, at 133.

should be restricted to affirmative acts.⁶⁰ To limit the criteria to such acts of the employee, however, might seriously handicap the administrator who may have good reason to believe that an employee should be discharged since the latter might in the future cause serious harm although he had as yet committed no overt act. Obviously, it is desirable to remove such an employee from government before he does an act which may be harmful to the nation.⁶¹

1. *Changes in the Organizational Structure*

Many proposals have been directed to the organizational structure of the security system. They have varied from recommendations urging a central review board,⁶² judicial review,⁶³ and independent agencies to administer the program,⁶⁴ to the abolishment of present boards entirely.⁶⁵ The proposals calling for the establishment of new review procedures contemplate a board or court having as its function the review of all agency determinations and the assumption of final responsibility for making the decision.⁶⁶ The proposal calling for independent agencies to administer the program seeks to remove from the department or agency the power to dismiss employees as security risks.

In effect, proposals regarding the establishment of additional appellate procedures are directed toward giving the employee an additional appeal such as existed under the Truman program where the employee had the right to appeal to the Loyalty Review Board. It is to be recalled that neither the 1950 congressional act creating a security program nor the Eisenhower executive order provided for the use of

60. Donovan & Jones, *supra* note 36, at 1231-32; Emerson & Helfeld, *supra* note 1, at 137. *But see* Garrison, *supra* note 4.

61. At present, one is discharged, if he is thought to be a security risk, without any consideration of the loss to the government of his services. It has been proposed that the loss to the government of the employee's services should be weighed against the risk to the nation of his retention before he is discharged. Daniels, Letter to the Editors, N.Y. Times, Aug. 14, 1955, § 4, p. 8, col. 5. This proposal would be particularly applicable in cases involving men similar to J. Robert Oppenheimer. Since this proposal goes to the fundamental policies of the program it is beyond the scope of this note.

62. Arden Panel, as reported in N.Y. Times, Oct. 11, 1954, p. 22, col. 3; Proposal by Interdepartmental Committee of the National Security Council, as reported in N.Y. Times, Aug. 9, 1952, p. 1, col. 6.

63. Donovan & Jones, *supra* note 36, at 1226-27; Emerson & Helfeld, *supra* note 1, at 101.

A determination that one is disloyal or a security risk is damaging to the discharged employee seeking employment elsewhere. A judicial determination that he was not disloyal would serve to clear his name. *Cf.* Gardner, *The Great Charter and the Case of Angilly v. United States*, 67 HARV. L. REV. 1, 25-27 (1953).

64. Americans for Democratic Action and American Jewish Congress, as reported in N.Y. Times, Aug. 31, 1955, p. 1, col. 1, p. 12, col. 6. *Cf.* Chasanow, as reported in N.Y. Times, Sept. 1, 1955, p. 10, cols. 6-7.

65. Krash, Book Review, 65 YALE L.J. 567, 571 (1956).

66. Senators Jackson and Monroney, as reported in N.Y. Times, March 6, 1955, p. 28, col. 2.

such a board. Thus, there have been executive and legislative policy determinations considering it wiser to place final responsibility on the head of the agency rather than to adopt the use of outside appeal boards, courts, or independent administrative agencies. Since each agency has its peculiar problems, and since the factors which may make one a security risk in one department may not be sufficient to reach such a result in another, this would appear to be the better procedure. For example, the Atomic Energy Commission and the Central Intelligence Agency obviously must be more vigilant in eliminating possible security risks than the Department of Agriculture. In view of this fact, it would seem that each particular agency can best decide its own security problems. In addition, there is no indication that a judge, independent review board, or independent agency would be better qualified to administer the program than those now making the final decisions. Once more, we find a proposal which merely seeks to substitute one value judgment for another—a proposal which seeks to establish one more bureaucratic agency.

Furthermore, it should be noted that in regard to proposals for judicial review, it cannot be denied that courts have reached harsh decisions or that innocent persons have been found guilty.⁶⁷ In the area of federal security, there is no assurance that courts would be more accurate than the present administrators. Nor is there any basis for supposing that a court's value judgments would be more accurate than those of the present trier. Thus, the end to be achieved by establishing judicial review is no more likely to be realized than under the present system.

It has been suggested that all method of review should be abolished and that the decision of the hearing board should be final.⁶⁸ Because this board personally observes the employee and his reactions, some believe it to be in a better position to evaluate the desirability of retaining the employee than any other group which may deal with the case. In addition, the head of the agency merely examines the record and counsel's brief; no witnesses appear before him, nor does he have benefit of counsel's oral arguments. This proposal, however, fails to recognize that the agency head bears ultimate responsibility for decisions made in his agency. Moreover, final decisions by the administrator, at least as indicated by the Yarmolinsky Report, have been more beneficial than detrimental to employees. Of seventeen initial decisions in favor of employees only three were reversed by the ad-

67. BORCHARD, *CONVICING THE INNOCENT* (1932). Consequently, there are certain devices available to review such convictions, such as the executive power of pardon, habeas corpus proceedings, and post-conviction laws. See, *e.g.*, ILL. REV. STAT. c. 38, §§ 826-32 (1955). See also Uniform Code of Military Justice, 64 STAT. 132 (1950), 50 U.S.C. §§ 660, 663 (1952).

68. *E.g.*, Green, *supra* note 4, at 132.

ministrator. Of twenty-two decisions adverse to the employee, ten were reversed. Therefore, it is not apparent just how this proposal will tend to avoid decisions unjust to the employee, since the administrator appears to be more sympathetic to the employee than to the decision of the hearing board.

A few proposals concern selection of the personnel of the initial hearing board. It has been suggested that the board members be selected with greater care⁶⁹ and that they undergo a training program to orient them as to the objectives of the program, the application of the criteria, political philosophies,⁷⁰ and subversive techniques.⁷¹ Obviously, this is a meritorious proposal. The more training the board members receive in understanding these matters, the more qualified they will be to evaluate each case.

It has been suggested that the initial hearing boards be abolished outright⁷² unless they are changed radically from those that exist at the present time. Such a proposal would necessitate the adoption of a summary dismissal procedure. The initial suspension by the head of the agency would be the final decision. The Yarmolinsky Report indicates that as a result of the present procedure, suspended employees are more likely to be reinstated than dismissed permanently. If this proposal had been adopted previously, these reinstated employees would have been permanently dismissed. Therefore, it seems this proposal would tend to create a greater likelihood of unjust decisions than presently exists.

4. *Miscellaneous Proposals*

A few proposals have been directed to the alleviation of some of the hardships imposed upon the employee by the operation of the program, rather than having been advanced as methods to achieve more accurate decisions. The practice has been to suspend the employee without pay prior to, or upon receipt of, the charges against him. It has been suggested that the suspension be postponed until a final decision has been reached unless retention might seriously endanger the national security.⁷³ There appears to be no valid objection to such a practice. In fact, the government has followed this very procedure in some cases.⁷⁴ It has also been proposed that the employee should not

69. Emerson & Helfeld, *supra* note 1, at 114-15.

70. BONTECOU, *op. cit. supra* note 4, at 47-48.

71. Donovan & Jones, *supra* note 36, at 1229.

72. See Krash, *supra* note 65.

73. Emerson & Helfeld, *supra* note 1, at 115; Green, *supra* note 4, at 132; N.Y. Times, Aug. 15, 1955, p. 1, col. 3, p. 5, col. 3. The Arden Panel's proposal provides that even if the employee is suspended he should be continued on the payroll until a final decision has been reached. N.Y. Times, Oct. 11, 1954, p. 22, col. 3.

74. N.Y. Times, July 4, 1955, p. 24, col. 6.

be discharged, but rather, should be transferred to a non-sensitive job, if there is any doubt as to his loyalty.⁷⁵ As the program existed prior to *Cole v. Young*,⁷⁶ it would have been inconsistent to dismiss permanently non-sensitive employees and at the same time place sensitive employees who are security risks in non-sensitive positions. While the *Cole* case has removed the inconsistency from this proposal, it is doubtful whether many would be willing to accept employment in a non-sensitive position, which would most probably be at a lower level. Because in many cases the decision following the hearing is delayed for several months, it has been urged that this decision-making process be accelerated.⁷⁷ Procedure should be adopted to eliminate delay if at all possible. Many proposals are directed to the problem of the cost of legal services to the employee. Generally, the proposals have called for the establishment of legal aid⁷⁸ similar to public defender programs,⁷⁹ or for reimbursement of an employee for legal expenses⁸⁰ when it has been found he has been falsely accused.⁸¹ It would appear that in good conscience the government should bear the expense of an innocent employee's attorneys' fees.

CONCLUSION

As previously indicated, the problem presented in an administrative security determination involves primarily an evaluation of an employee's character and a prediction of his future conduct, rather than a determination of the facts.⁸² Thus, it is doubtful what effect the various proposed procedural safeguards would have on the accuracy of the ultimate decision.⁸³ Unless the employee can show that all the adverse "information" is clearly unfounded the problem of evaluation will continue to exist, regardless of the number of procedural devices afforded the employee.⁸⁴ Thus, it would seem that the

75. Bush, *supra* note 4, at 42.

76. 24 U.S.L. WEEK 4295 (1956). See discussion of this case at note 7 *supra*.

77. Green, *supra* note 4, at 132.

78. Emerson & Helfeld, *supra* note 1, at 114-15; Green, *supra* note 4, at 132; Bush, *supra* note 4, at 44; Chasanow, as reported in N.Y. Times, Sept. 1, 1955, p. 10, cols. 6-7.

79. Arden Panel, as reported in N.Y. Times, Oct. 11, 1954, p. 22, col. 3.

80. *Ibid.*

81. Senator Kefauver, as reported in N.Y. Times, June 3, 1954, p. 9, col. 5.

82. See text supported by note 47 *supra*.

83. In the final analysis, it is not the use of procedures that determines whether the employee shall be retained or not, but rather the confidence in him of his superior. Judge Prettyman in *Bailey v. Richardson*, 182 F.2d 46, 58 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951); Kaplan, *Loyalty Review of Federal Employees*, 23 N.Y.U.L.Q. REV. 437, 441 (1948); Krash, *supra* note 65, at 571.

84. J. Robert Oppenheimer was given about the fairest hearing—in the sense of procedural safeguards—ever given under the program. He was afforded the right of cross-examination and confrontation, practically all documents were made available to him, and the decision was nevertheless adverse. AEC, TRANSCRIPT OF HEARING BEFORE PERSONNEL SECURITY BOARD, IN THE MATTER OF J.

requisite for the avoidance of shocking decisions is *intelligent administration*.⁷⁷ Selection of good administrators with a keen sense of human understanding and ability to make proper value judgments is more likely to lead to proper decisions than any of the other proposals considered. Furthermore, insofar as procedural reforms are needed, they should be designed to effectuate administrative goals rather than to satisfy the objectives of the criminal trial. It is therefore submitted that methods may be discovered whereby the efficiency of the administrative agencies will be increased. This objective could be approached by the discovery of methods which would: (1) increase the effectiveness of administrative investigatory processes; (2) verify the credibility of informants whose identity the government is unwilling to reveal; (3) develop other procedures helpful in the determination of character. In addition, periodic discussion of common problems among officials of the various administrative agencies would seem helpful.

Most of the proposals discussed throughout this note seem to be concerned with establishing checks against possible injustice to the employee, rather than with reaching correct decisions. Would it not be better to adopt an affirmative approach designed to reach correct results in all cases and to establish good administrative decision-making guides, rather than to employ the negative method of attack?

It has been contended that the administrative structure, by its very nature, may be a system which must be closely supervised and controlled even at the cost of preventing the accomplishment of its assigned task. This attitude is based on the belief that there exists in the administrative system an inertia and unwillingness to make decisions; a tendency to play it safe and find "guilty" rather than "acquit" and submit oneself to the possibility of censure; and a tendency to refuse to admit that erroneous decisions have been made.⁸⁶ It is submitted, however, that satisfactory administration can be achieved through the selection of administrators who possess the virtues of good conscience and sense of duty and who have a sincere de-

ROBERT OPPENHEIMER (1954); AEC, TEXTS OF PRINCIPAL DOCUMENTS & LETTERS OF PERSONNEL SECURITY BOARD, IN THE MATTER OF J. ROBERT OPPENHEIMER (1954). Many people, however, were nevertheless dissatisfied with the result.

77. See Kaplan, *supra* note 83, at 446. For an example of poor administration, see CURTIS, *op. cit. supra* note 4, at 213-20, concerning the conduct of the AEC's counsel. Apparently the government counsel was more interested in getting a "conviction" than reaching the proper result.

It might be noted that, in the area of business, corporations have not created systems of adversary proceeding in their determination of whether an employee is to be retained or discharged when he has been reported for violations of secrecy, disloyalty, immorality, etc. They have recognized that the problem is one of exercise of judgment by the individual supervisor or other official rather than a trial procedure. Interview with faculty members of the School of Business and Public Administration, Washington University, March 1956.

86. The Dreyfus case is a striking example of how far administrators will go to avoid admitting they have made a mistake. Grossman, *The Dreyfus Affair Fifty Years Later*, 21 COMMENTARY 25 (1956).

sire to accomplish assigned tasks. Those who attack the supposed inherently undesirable characteristics of the administrative organism assert, however, that even though an administrator may act in good faith, he will nevertheless be so subjectively motivated by these considerations that he will be unable to avoid their influence in the decision-making process. This objection, of course, essentially attacks the underlying foundation of the whole administrative framework upon which much of our federal government now depends for the practicable execution of its policies. That such an argument will have little effect in the foreseeable future seems obvious in light of the ever-increasing administrative tasks in government.

The significance of the security program at this time appears to be mainly historical. Certainly the program is the subject of far less discussion now than it was in the recent past. Its imperfections are important because they may serve as a basis for the ascertainment of: (1) the mistakes which have been made; (2) which of these could have been avoided; and (3) how mistakes are to be avoided with respect to future administrative problems. Not only is the improvement of administration important in the security program, but it should also serve as the primary point of departure for reform in any administrative area.

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