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Comments on the Report of the Commission on Government Security

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On June 21, 1957 the Commission on Government Security, established by joint resolution of the Senate and House of Representatives,[1] filed its report[2] with the President and the Congress.

Legislation to implement the recommendations contained in the report was introduced both in the House of Representatives and the Senate sometime after the report was filed, but because other important controversial matters were then pending and because adjournment was imminent, no action was taken thereon during the first session of the 85th Congress.

However, since legislation based upon the report will probably be introduced at the second session of the 85th Congress, which began in January of 1958, some comment on the conclusions reached by the Commission may prove to be of interest to the Bar at this time.

DECLARATION OF CONGRESSIONAL POLICY

Since the Commission was established "for the purpose of carrying out the policy set forth" in the joint resolution, a consideration of the declared congressional purpose is essential if one is to evaluate the work of the Commission.

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1. See 69 Stat. 595 (1955), 50 U.S.C. § 781 (Supp. IV, 1957).
2. Report of the Commission on Government Security (1957) (hereafter cited Report).

The declaration of policy in public law 304 is set forth in section 1 of the joint resolution and reads as follows:

> Section 1. It is vital to the welfare and safety of the United States that there be adequate protection of the national security, including the safeguarding of all national defense secrets and public and private defense installations, against loss or compromise arising from espionage, sabotage, disloyalty, subversive activities, or unauthorized disclosures.
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> It is, therefore, the policy of the Congress that there shall exist a sound Government program—
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> (a) establishing procedures for security investigation, evaluation, and, where necessary, adjudication of Government employees, and also appropriate security requirements with respect to persons privately employed or occupied on work requiring access to national defense secrets or work affording significant opportunity for injury to the national security;
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> (b) for vigorous enforcement of effective and realistic security laws and regulations; and
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> (c) for a careful, consistent, and efficient administration of this policy in a manner which will protect the national security and preserve basic American rights.[3]

COMPOSITION OF COMMISSION

The Commission was composed of twelve members, four of whom were appointed by the President, four by the President of the Senate and four by the Speaker of the House of Representatives. Under the terms of the joint resolution, two of the appointments to be made by the President were to be from the executive branch of the government and two from private life; two of the appointments to be made by the President of the Senate were to be from the Senate and two from private life; two of the appointments to be made by the Speaker were to come from the House of Representatives and two from private life. Not more than two of the four appointees designated by the President, President of the Senate, and Speaker of the House, respectively, were to be from the same political party.

President Eisenhower appointed from the executive branch Carter Burgess, Assistant Secretary of the Department of Defense, and Louis S. Rothshild, Under Secretary of Commerce, and from private life Dr. Franklin D. Murphy, Chancellor, University of Kansas, and James P. McGranery, former United States District Judge and former Attorney General of the United States. Upon the resignation of Mr. Burgess as Assistant Secretary of Defense the President appointed in his stead F. Moran McConihe, Commissioner, Public Building Service, General Services Administration.

Vice-President Nixon, as President of the Senate, appointed from

3. See note 1 supra.

the Senate Norris Cotton of New Hampshire and John Stennis of Mississippi, and from private life Dr. Susan B. Riley, Professor of English, George Peabody College for Teachers, and Lloyd Wright, former President of the American Bar Association.

Speaker Rayburn appointed from the House of Representatives William M. McCulloch of Ohio and Francis E. Walter of Pennsylvania, and from private life James L. Noel, Jr., attorney at law, and Edwin L. Mechem, Governor of New Mexico.

The Commission selected Mr. Wright as Chairman and Senator Stennis as Vice-Chairman.

DUTIES OF THE COMMISSION

The Commission was directed to study and investigate the entire government security program. This included the various statutes, presidential orders, administrative regulations and directives under which the government seeks to protect the national security, together with the actual manner in which such statutes, orders, regulations and directives had been and were being administered and implemented. The view in mind was determining whether existing requirements, practices, and procedures were in accordance with the policy set forth in the joint resolution and recommending such changes as the Commission might determine were necessary or desirable. The Commission was also directed to submit reports and recommendations on the adequacy or deficiency of existing programs and their administration, from the standpoint of internal consistency of the overall security program and effective protection and maintenance of the national security.

SCOPE OF THE RECOMMENDATIONS

Some idea of the nature and extent of the studies and investigations made by the Commission may be gleaned from the fact that in its report the Commission has made recommendations in the following areas: (1) Federal Civilian Employees' Loyalty Program,[4] (2) Military Personnel Program,[5] (3) Document Classification Program,[6] (4) Atomic Energy Program,[7] (5) Industrial Security Program,[8] (6) Port Security Program,[9] (7) International Organizations Programs,[10] (8) Passport Security Program,[11] (9) Civil Air Transport Security Pro-

4. Report at 3-107.
5. Id. at 111-48.
6. Id. at 151-74.
7. Id. at 187-232.
8. Id. at 235-319.
9. Id. at 323-65.
10. Id. at 369-442.
11. Id. at 445-95.

gram,[12] (10) Immigration and Nationality Program,[13] and (11) Criminal Statutes.[14]

In addition the report contains special studies relating to the proposed Central Security Office,[15] the attorney general's list,[16] confrontation,[17] subpoena power,[18] and the privilege against self-incrimination.[19]

To minimize or eliminate so far as possible any misunderstanding of the recommendations contained in its report and to put such recommendations in concrete form, the Commission drafted and included in its report proposed legislation and executive orders which it felt were necessary to carry out its recommendations.[20]

It would obviously be impossible to discuss all the facets of the many problems covered by the Report in an article of this nature. Therefore, the comments which follow will be limited principally to a consideration of (a) recommendations designed to extend greater protection to individuals involved in loyalty or security proceedings, (b) recommendations designed to avoid the dangers of overclassification of defense information and materials, (c) recommendations designed to promote a greater degree of uniformity, consistency, and efficiency in the administration of the various programs, (d) recommendations designed to promote vigorous enforcement of effective and realistic security laws, and (e) constitutional issues arising out of the operation of loyalty and security programs.

Recommendations Designed to Extend Greater Protection to Individuals

As heretofore pointed out, Congress in the joint resolution establishing the Commission called for a sound program that could be carefully, consistently, and efficiently administered in a manner which would not only protect the national security but "preserve basic American rights."

The lawyer, whether he be judge, teacher, or practitioner, is particularly aware of the conflicts that arise between competing interests of the individual on the one hand and society on the other. Perhaps the most challenging aspect of a lawyer's work is resolving such conflicts. With respect to the operation of loyalty-security programs, the

12. Id. at 499-516.
13. Id. at 519-612.
14. Id. at 615-30.
15. Id. at 633-43.
16. Id. at 645-55.
17. Id. at 657-71.
18. Id. at 673-74.
19. Id. at 675-81.
20. Id. at 691-756.

interests both of society and of the individual are of the highest order. In the case of society it is the interest of the nation in self-preservation; in the case of the individual it is adequate protection against an arbitrary adverse determination resulting in grave damage to reputation and serious economic consequences.

Because lawyers possess special training and competence for resolving conflicts of this nature, the legal profession could render a valuable public service if, after a study of the report of the Commission, its views were made known to the Congress and the public. The Commission's recommendations, if adopted, would substantially improve the position of the individual in the respects hereinafter enumerated.

(1) Change of Standard and Criteria in Civilian Employee and Military Personnel Programs

The present standard for employment and retention in employment of civilian employees[21] and for appointment, enlistment and retention in the armed forces[22] requires that employment, appointment, enlistment or retention be "clearly consistent with the interests of national security."

This standard has been severely criticized as (1) placing an undue burden to establish fitness upon the individual and (2) conferring too wide a range of discretion upon the responsible authority.

A substantial number of the criteria[23] established for applying the standard relate to conduct or personality defects affecting suitability, such as behavior, activities or associations tending to show the individual is not reliable or trustworthy, falsification of material facts, criminal conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion, and physical and mental illness.

The consequences resulting from the denial of employment, or denial of admission to the armed forces, or discharge from either civilian employment or military service for *security reasons* are infinitely more grave than when the grounds stem from lack of suitability.

The studies of the Commission disclosed that the overwhelming majority of "security-risk" discharges of civilian employees under Executive Order 10450 were based upon the lack of suitability under civil service requirements and were in fact effectuated through the use of civil service procedures. It is, of course, true that the lack of suitability may, and in certain situations does, operate to make the individual a security risk. But when the cause for dismissal is essentially lack of appropriate suitability, no useful purpose is served by adding the security risk label.

21. See Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953).
22. Department of Defense Directive as reissued June 19, 1956.
23. Section 8(a) 1-8, Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953).

The Commission was of the view that where, as in the case of civilian employees or members of the armed forces, absence of suitability constitutes grounds for disqualification, the standard and criteria should relate solely to suitability. Accordingly, the only security-risk standard it recommends in respect to civilian and military personnel is that, on all the available information, a reasonable doubt exists about the loyalty of the individual. The criteria it recommends, then, for ascertaining whether or not the standard is met, relate solely to loyalty.

(2) Application of Loyalty Standard and Criteria

When applying the standard and criteria to specific cases, the Commission points out that an adverse determination must be based upon information that is reliable and trustworthy, "for obviously a doubt not based upon such information would be arbitrary or fanciful as distinguished from reasonable."[24]

The Commission's report emphasizes that in the screening, hearing, and adjudicative processes, "greatest care must be taken to avoid misinterpretation of affiliation. The affiliation should be viewed in the light of the member's knowledge of the purposes of the organization, or the extent to which such organizational purpose has been publicized at the time the individual joined the organization or retained membership therein. The character and history of an organization must be closely examined with the realization that loyal persons may have been persuaded to join for innocent reasons."[25]

Normal associations with members of one's family, even though they are close, continuing, and sympathetic, are not sufficient to create a reasonable doubt about loyalty unless they indicate a sympathetic association with an organization which Congress or a duly authorized agency or officer of the United States has found seeks to alter the form of government of the United States by force, violence, or other unconstitutional means, or seeks to accomplish a related objective as set forth in the proposed criteria.

While past membership in the Communist Party or past associations with communists are factors to be considered, they should not be applied mechanically or automatically. Efforts should be made to determine the degree to which the person concerned has broken with past contacts.

24. Report at 49.
25. Ibid.

(3) Mandatory Oral Interview by Screening Officer Prior to Issuance of Letter of Charges

Before a letter of charges based upon loyalty grounds may be issued the Commission's recommendations specify that the screening officer must grant the individual an oral interview and afford him an opportunity to refute or explain any derogatory information. If, after such an interview further investigation is required, the screening officer should request the appropriate investigative agency to make it. Then, after completion of the oral interview and any further investigation, if the screening officer concludes that there is substantial reliable information indicating the existence of reasonable doubt, a letter of charges may issue.

Under existing practices, some departments and agencies do call in the employee and give him an opportunity to explain, but the requirement is not mandatory. The Commission found that in a substantial number of cases an oral interview would have obviated the necessity of filing charges and conducting a hearing.

(4) Suspension, Termination, or Transfer of Suspected Employees

Public Law 733, authorizing suspension and termination when necessary for the interests of national security, has been construed by the attorney general as making suspension mandatory.

Suspension should not occur if instead the employee may be transferred; when suspension is necessary to protect the national security it should be with pay, pending an adverse decision after hearing.

The Commission was of the view that transfer, in lieu of suspension, would not endanger the national security if the transfer could be made to a position where the employee could not do anything harmful to the national security. The Commission further felt that if suspension was necessary because of the non-availability of such other position, an undue hardship would result if the employee lost his means of livelihood before he had the benefit of further investigation or hearing.

Under the recommendations of the Commission when the character of the derogatory information relating to loyalty, and the weight attached thereto by the officer having authority to suspend, are such as to require immediate removal of the employee from the position he then occupies pending either further investigation or hearing, such removal should be accomplished in the first instance by a transfer to another position where there is no opportunity to affect adversely the national security.

If suspension is necessary because no position for which the employee is qualified is available, initial suspension shall be with pay.

The employee shall continue to draw pay until after he has had a hearing and after the head of the agency has made an adverse determination. The ultimate decision to suspend must be made by an officer of the department or agency not inferior in rank to an assistant secretary, or the equivalent thereof.

Although other recommendations permit an employee to appeal an order of final suspension to the Loyalty Review Board, he is not entitled to pay during the pendency of this appeal. If the employee is ultimately cleared he is entitled to full pay less any amounts he shall have earned during the period of suspension without pay. Priority is to be given to processing suspension cases that require further investigation, and to hearing those cases in which a letter of charges has been filed.

(5) Letter of Charges to be Specific and Comprehensive

The letter of charges must be sufficiently detailed and specific, including names, dates and places, to permit the individual involved to make a reasonable answer, and the hearings must be confined to matters contained in the letter of charges.

Although the recommendation states that the "letter of charges should be as specific and detailed *as the interests of national security permit,*"[26] it is the opinion of the writer that the only type of information which may be excluded from the letter of charges under the qualifying words "as the interests of national security permit" is information which would tend to reveal the identity of a confidential informant. This view is predicated upon provisions in other recommendations[27] stating that the substance of derogatory loyalty information supplied by the regularly established confidential informant must be read into the record at the hearing, a copy must be furnished to the individual, and no other derogatory information may be considered unless the individual furnishing the same is available for cross-examination.

Since the hearing is confined to matters raised by the letter of charges, the substance of the derogatory information supplied by the regularly established confidential informant, as well as that supplied by all other persons, would ex necessitate have to be included in the letter of charges.

Existing and preceding security-loyalty programs have been vigorously and justifiably attacked upon the ground that the accused individual frequently has been precluded from making an adequate defense. This was because the notice or letter of charges lacked the

26. Id. at 57. (Emphasis added.)
27. See Confrontation infra.

necessary definiteness and certainty. In the opinion of the writer, specificity in the letter of charges is essential to any system which purports to grant the right of a fair and effective hearing. It is believed that the Commission's recommendation eliminates the basis of any claim that the individual is precluded from adequately preparing his answer to the charges and his defense in support of that answer.

(6) Hearings in the civilian employees' loyalty program, the industrial security, atomic energy, port security, and civil air transport programs—to be conducted by full-time, qualified, trained hearing examiners selected from a civil service eligibility list

Under the former loyalty program prescribed by Executive Order 9835, as amended, cases involving applicants for and conditional appointments to the classified civil service were heard by regional loyalty boards; cases involving all other employees were heard by agency loyalty boards composed of government personnel appointed by the agency head.

Under the existing plan, hearings in the civilian employees' program are conducted by three-man hearing boards. These boards are selected from a roster of government employees maintained by the Civil Service Commission. More than 1800 persons are presently listed on the roster, all of whom were nominated by the various departments and agencies in which they are employed. Requirements are that they be "competent and disinterested employees from outside the department or agency concerned" and "persons possessing the highest degree of integrity, ability and good judgment."

In the industrial security program of the Department of Defense, hearings are conducted by one of three hearing boards located in New York, Chicago, and San Francisco.

In the atomic energy security program hearings are held by local hearing boards consisting of three members appointed by the manager of operations.

In the port security program hearings are conducted by district boards consisting of three members. The commandant designates the chairman of the board and selects two other members, one from labor and one from a business having a contract with the Coast Guard, from a panel selected by the secretary of labor.

While the findings and decision of the hearing examiners proposed by the Commission would be merely advisory to the officer responsible for the final decision, as they are under existing programs, the hearing function in loyalty cases is of the utmost importance. The heads of departments and agencies, the Commandant of the Coast Guard, and other officers vested with responsibility for final decision in the respective programs, do not have the time to review personally every

case. They are dependent in large measure upon the findings and recommendations of the hearing board or officer.

The discharge of a civilian employee, or the denial of clearance, in the industrial security and port security programs on security grounds, is fraught with the gravest consequences to the individual involved. The evaluation of the inferences to be drawn from derogatory information relating to loyalty calls for the highest degree of competent, skilled, trained judgment and for the highest order of intellectual and moral integrity. This is particularly true because the atmosphere in this area may readily oscillate from one extreme, which characterizes all dissent as disloyalty, to the other, which denounces every precaution to protect the national security as a witch-hunt.

While determination of the type required in loyalty or security cases cannot readily, and in the judgment of the writer, should not, be absorbed in the judicial system, every effort should be made to surround the hearing function with the impartiality demanded in the administration of justice, and with the competence expected of judges.

The hearing examiners proposed by the Commission will be full-time employees. They will be attached to an independent Central Security Office and must possess the qualifications fixed by the Civil Service Commission in consultation with the Director of the Central Security Office.

A function so important both to the individual and to the national security should not be relegated to individuals—either in or out of government—who serve merely on a part-time basis and whose primary interests and responsibilities are in other fields.

(7) Assessing the Burden of Proof

The burden of proof rests neither upon the government nor upon the individual under charges. The agency bringing the charge, however, must assume the burden of going forward by submitting to the hearing examiner information tending to show reasonable doubt as to loyalty.

It has been asserted that under existing and former practices in security or loyalty programs, the burden has rested upon the individual under charges to establish his defense. Obviously, in those cases where the charges have been couched only in vague and general terms, the individual has been compelled to gather and present evidence and information affirmatively satisfying the hearing tribunal or agency head that he meets the required standard.

Under the recommendations of the Commission the individual is first of all called in for an oral interview, wherein he is advised of the nature of the derogatory information and given the opportunity to

refute or explain. Thereafter, if a letter of charges is issued, it must be definite and specific; no matters which are not embraced in the charges can be offered or considered unless the charges are amended. If the charges are amended, the individual is given a reasonable time to answer and to prepare his defense to the new matter.

At the hearing the charging agency must present to the hearing examiner the information upon which it relies as the basis for the claim that a reasonable doubt about loyalty exists. This information, with certain exceptions, must be in the form of sworn oral testimony given either at the hearing or through depositions or affidavits. When cross-examination is not permitted the substance of derogatory information supplied by a regularly established confidential informant must be read into the record at the hearing, and a copy must be furnished to the individual under charges.

It is submitted that the recommendations made by the Commission eliminate the claim that the burden of proof rests upon the individual under investigation or charges.

(8) Confrontation and Cross-Examination of Adverse Witnesses

Under the civilian employees', military personnel, international organizations employees', atomic energy, industrial, port, and civil air transport security programs, when loyalty is in issue, derogatory loyalty information may not be considered unless the individual charged has the opportunity to cross-examine under oath the person supplying such information, except when such latter person is a regularly established confidential informant engaged in obtaining intelligence and internal security information, or when such person is not available for service of subpoena by reason of death, incompetence, or other reasons. The hearing examiner must supply the individual under charges with the substance of the information supplied by a regularly established confidential informant and read the same into the record, together with the evaluation as to the reliability of such informant placed upon him by the investigative agency.

Probably the most controversial issue arising out of the operation of the various government loyalty-security programs, both past and present, revolves around the fact that individuals against whom loyalty or security risk charges have been filed have not been given the opportunity to confront and cross-examine under oath confidential informants who have furnished derogatory information. The identity of the so-called confidential informant does not appear from the report of the investigative agency, so even the hearing agency has no means of ascertaining the identity of such confidential informant.

Confidential informants fall, broadly speaking, into two categories: (1) the regularly established confidential informant who is employed

by the government for purposes of gathering intelligence and internal security information; (2) the casual confidential informant—that is, a person in the community who is willing to supply information to the investigative agency with the understanding that his identity will be withheld.

It has been the position of the government that revealing the identity of the regularly established confidential informant who is engaged in intelligence work would be most damaging to the protection of national security, inasmuch as disclosure of his identity would make such informant useless for gathering further information.

In respect to the casual informant, the government has taken the position that if his identity would be disclosed he would refuse to give any adverse information, and as a result the sources of much valuable information required by the government would dry up.

The Commission is of the view that disclosure of a regularly established confidential informant, unless his identity has heretofore been disclosed as a result of his testifying as a witness in a criminal case or otherwise, would have extremely serious consequences on the national security. If the identity of such witness may not be disclosed without compromising the national security, there are only two other alternatives regarding the use of information of the regularly established confidential informant: (1) continue to permit such information to be considered, without allowing the person under charges to cross-examine the informant under oath; or (2) abandon the proceedings against the individual charged, where proof of the charges hinges upon the information supplied by the reguarly established confidential informant.

It has been suggested by those who advocate the latter course that this is the problem which confronts the government in respect to a criminal proceeding. The government must make the decision either to disclose the identity of the regularly established confidential informant, if it is to rely upon his testimony, or otherwise abandon the use of the testimony.

In the opinion of the Commission a proceeding to determine whether an employee should be retained in service or granted clearance, when there is a doubt about his loyalty, is not criminal in nature. Instead, the Commission feels that the proceedings are purely administrative in character, having as their purpose only the determination whether the government employee, in the one case, or the privately employed individual, in the other, meets the appropriate standard for employment or clearance.

If the government follows the course of abandoning charges in cases where proof is solely dependent upon information supplied by the regularly established confidential informant, then it must retain

its own employee or grant clearance to the privately employed indidividual notwithstanding that retention in employment or grant of clearance subjects the government to substantial hazard and risk. The Commission is of the opinion that national security should not be sacrificed by the retention in employment or the grant of clearance where such retention or grant would in fact tend to damage the national security.

The Commission does, however, recognize that an individual under charges is most seriously handicapped if he does not know and has no opportunity to explain or refute the derogatory information supplied by the regularly established confidential informant. It furthermore believes that the substance of such information could be supplied to the individual under charges without sacrificing or compromising national security. Accordingly, it recommends that in situations where the identity of the regularly established confidential informant can not be disclosed without damaging national security, and the head of the investigative agency employing such informant certifies to that effect, the substance of information supplied by such informant, if it relates to loyalty, shall be given to the person under charges. The Commission further recommends that if the person under charges questions the completeness or the accuracy of the information supplied to him, he may request the hearing examiner to call for a further investigation of the matters in dispute. Thereupon it becomes the duty of the hearing examiner, if he deems such additional investigation necessary, to request the investigative agency to make a further inquiry and submit the results to the hearing examiner.

In respect to derogatory loyalty information supplied by the casual confidential informant, the Commission recognizes that many people will refuse to furnish derogatory information if their identity is disclosed or if they are called upon to substantiate their information by testifying under oath at a hearing . It is true that many persons, reluctant to become involved in a controversy of this nature, will undoubtedly refuse to supply derogatory information. On the other hand, in a matter involving the security of the United States, all citizens are the beneficiaries of measures designed to protect that security. The fact that they are interested in the protection of the national security should in some measure overcome their reluctance to give derogatory information when such information relates to protecting the national security. It is obvious that disclosure of the identity of the casual informant will not in itself affirmatively prejudice the national security.

Under these circumstances, the Commission feels that testimony supplied by a casual confidential informant relating to the loyalty of the person under charges should not be considered by the hearing

examiner, or by the agency head charged with responsibility for the final decision, unless such casual informant is willing to make his identity known and subject himself to the issuance of a subpoena. Therefore, the Commission has recommended that derogatory loyalty information furnished by all persons other than the regularly established confidential informant should not be considered by the hearing examiner or by the agency head unless such person is subject to cross-examination by the person under charges.

If any identified person who has supplied derogatory loyalty information is not available for the service of subpoena because he is dead, is incompetent, is beyond the jurisdiction, or cannot be found, the hearing examiner and the agency head may take into consideration the information supplied by such person notwithstanding the lack of opportunity to cross-examine. In these situations, however, the hearing examiner and the agency head are cautioned to take into consideration that the person under charges has had no opportunity to cross-examine the individual supplying the derogatory information.

The studies made by the Commission demonstrate that, in a very substantial number of security cases under Executive Order 10450, the derogatory information has been supplied by identified persons who would be available to testify in support of the information supplied by them. While no conclusive generalization can be made, it is the opinion of the writer that the number of cases in which proof is dependent upon the derogatory information supplied by confidential informants is not as large as is generally supposed.

In concluding its discussion on the subject of confrontation, the Commission stated in its report:

> The balance to be ever observed between protection of the national security and the safeguarding of individual rights stands out in sharper relief in the problem of confrontation than elsewhere in the loyalty program.
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> The Commission has studied the range of views, legal, constitutional and moral, running from providing a full confrontation in all cases to permitting ex parte dismissals with no hearings or privilege to refute charges. The solution lies somewhere between these opposite poles.
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> . . . . It believes that under its recommendations maximum confrontation is allowed consonant with security requirements; that while not emasculating our confidential investigative sources, they provide for an employee, under definite understandable rules, the opportunity to obtain sufficient information to intelligently present his defense.[28]

28. Report at 68-69.

(9) Power to Subpoena Witnesses

Where loyalty charges are involved, hearing examiners in the civilian employee, atomic energy, industrial, port, and civil air transport security programs, and hearing boards in the military personnel program and the international organization employees' program may issue process for the compulsory attendance of witnesses, subject to the restrictions set out below.

In order to implement recommendations of the Commission providing for the opportunity to cross-examine persons who have supplied derogatory loyalty information, it is necessary that a statute provide authority for the issuance of compulsory process to compel the attendance of witnesses. Under the existing statutes there is no such authority, except where, as in the Atomic Energy Commission, general subpoena power is lodged in a particular department or agency. Notwithstanding the absence of power to subpoena, the Attorney General of the United States has recommended under the existing program that every effort consistent with national security should be made to produce witnesses at security hearings, so that such witnesses may be confronted and cross-examined.

The Commission is of the view that within proper safeguards and restrictions compulsory process should be authorized. Accordingly, the Commission recommends that either the government or the employee may apply to the hearing examiner for the issuance of subpoenas. Excepted from subpoena power, however, are regularly established confidential informants and those casual confidential informants who have given their information on the condition they will not be called as witnesses.

Application for a subpoena must state the name and address of the witness whose testimony is desired and the substance of the testimony to be presented by such witness. If the hearing examiner deems the evidence relevant and not merely cumulative he may issue the subpoena. The hearing examiner may also subpoena witnesses on his own motion. In addition, he may direct that the testimony of the witness be taken by deposition, either orally or on written interrogatories.

The government, under the Commission's recommendation, shall bear the cost of its own witnesses. The individual involved is required to deposit sufficient funds to pay the travel and per diem cost of witnesses subpoenaed at his request, with the proviso that if the individual is cleared, the funds shall be returned to him and the government shall bear the expense.

(10) Requirement of a Written Report

Hearing examiners shall make a written report which shall include findings of fact, advisory recommendations to the agency head, and reasons in support thereof. Examiners are also required to have a verbatim transcript of the record prepared, a copy of which is to be furnished to the individual charged in the event he appeals.

Experience has demonstrated that in the administrative process a mandatory requirement of specific findings of fact as well as a statement of reasons is likely to insure a more careful consideration of the record. Since the recommendation of the hearing officer is advisory only, such findings of fact should also be especially helpful to the officer charged with responsibility for final decision. Furthermore, in situations where an appeal is taken, the individual has opportunity to point out the respects, if any, in which the findings are erroneous or in which they are at variance with the reasons given for the decision.

(11) Right of Appeal to Central Review Board when Decision of Agency Head Is Adverse

Under Executive Order 10450, no provision is made for an appeal. The Commission recommends that in those specific areas in which the initial hearing is conducted by hearing examiners, individuals under charges be entitled to an additional safeguard against an erroneous decision by the agency head through an appeal to a competent and qualified appellate board.

The Central Review Board contemplated by the Commission is to consist of three members, to be appointed by the President with the advice and consent of the Senate. The scope of appellate review is limited to a consideration of the record, and the decision of the Central Review Board is advisory only.

(12) Rights of Probationary Employees and Applicants for Employment

Probationary employees and applicants for employment should be accorded an oral interview, a hearing, and a right of appeal where discharge or denial of employment is based upon doubt about loyalty. Probationary employees are those employees in the classified competitive service who may be discharged without cause during the trial period fixed by civil service regulations.

Under the existing security program, a hearing is not accorded to probationary employees or to applicants for employment who have passed the requisite examination and are on the eligible list. The files of the above employees or applicants follow them from one agency of the government to another. Obviously, when such files con-

tain derogatory loyalty information the opportunities for employment in the federal service are greatly diminished.

The chief argument advanced against granting a hearing to probationary employees and to applicants is the alleged burden of the costs involved. The Commission is of the opinion, however, that it is grossly unfair to debar an individual from employment on loyalty grounds without according him a hearing, and that this consideration outweighs the question of cost.

(13) Changes in Security Standard

There should be no readjudication even if the security standard is changed. Heretofore, one great source of dissatisfaction adversely affecting employee morale has been that, as the security standard changed, further investigation and readjudication has been required. Thus, all employees who were investigated under the standard prevailing under Executive Order 9835 were reinvestigated when the standard established in Executive Order 10450 went into effect.

(14) Binding Effect of Final Decisions

The operation of loyalty and security programs has been subject to criticism because an individual granted employment or clearance by one department or agency may be denied employment or clearance by other departments and agencies.

The Commission believes that once loyalty charges have been filed, the prescribed hearings completed, and the decision of the particular agency head rendered, such decision should be final except in those cases where new information is developed. The decision, whether favorable or adverse to the employee, would be binding upon the agency head who made it, his successors, and the heads of all other agencies.

While the decision regarding what constitutes new information is to be made by the head of the particular agency at the time the question arises, the Commission recommends that such decision should be reached only after consultation with the appropriate legal officer.

(15) Transfer of Personnel Security Clearance from One Government Agency to Another

Under the existing program a scientist having clearance for access to top secret information at a factory operating under a contract with the Air Force is subject to investigation and the delay of obtaining a new clearance if the government should want him to work on a guided missile program conducted by the Navy at some other plant. Full field investigations are required for access to top secret information. These investigations require time and are costly.

Where the standard for clearance in one position is the same as in another, the type of investigation made in determining eligibility for clearance is the same or comparable to the other, and no further re-investigation is required because of lapse of time, no sound reason exists for spending money or time to make a new investigation or grant a new clearance, unless there is something unusual calling for a re-evaluation by the transferee agency.

(16) Loyalty Hearings Afforded to Enlistees or Inductees Rejected during the Screening Process

Under Department of Defense Directive 5210.9, effective June 19, 1956, a registrant for induction who is rejected on security grounds is given a hearing if he so requests. Under the Commission's recommendation, the right of hearing where a rejection has been based upon loyalty ground would be extended not merely to inductees but also to enlistees. The Commission feels that the status of enlistees is similar to that of inductees and that they correspondingly should be entitled to a hearing.

The majority of individuals who are inducted or who apply for enlistment are young men or women. Generally speaking, they do not have the maturity or possess the means to adequately prepare a suitable defense against charges relating to loyalty. The Commission is of the opinion that the government should assume the expense involved in according applicants for enlistment and prospective inductees a hearing when their loyalty is questioned. The Commission further feels that the armed services should supply counsel to these individuals in order that they may be properly represented.

(17) Separation of Personnel from the Armed Forces on Grounds of Possible Disloyalty

It must be remembered that a serviceman who is separated from the armed forces upon the ground that reasonable doubt about his loyalty exists has not necessarily been engaged in any subversive activity. The separation has been based upon information which establishes reasonable doubt about loyalty. There is, of course, a valid distinction between reasonable doubt about loyalty on the one hand and actual disloyalty on the other.

Traditionally, the character of discharge given by the armed services has depended solely upon the conduct or character of the individual demonstrated during the period of his actual service. However, since the institution of security programs, the armed services have frequently hesitated to give an individual who has been released on security-risk grounds an honorable discharge, notwith-

standing that his conduct apart from the security-risk charges merited an honorable discharge.

It is the judgment of the Commission that pre-service conduct of any person separated from the armed services on the ground of reasonable doubt about loyalty should not be considered when determining the type of discharge to be given, except in cases involving falsification of induction or enlistment papers.[29]

Recommendations Designed to Avoid the Dangers of Overclassification

The classification of defense information and materials is presently governed by Executive Order 10501.[30] Section 1 of the order—classification categories—sets forth three designations: top secret, secret, and confidential. The criterion of each category is the effect on national defense that unauthorized disclosure of the information in question would have. The order specifies that no other designation shall be employed to classify defense information. Classifications such as "agency use only," "restricted to department use," etc., are thus excluded from the scope of the order. Section 1 of the order provides:

> Except as may be expressly provided by statute, the use of the the classification "secret" shall be authorized by appropriate authority, *only* for defense information or material which requires *the highest degree of protection.* The top secret classification shall be applied *only* to that information or material the defense aspect of which is *paramount,* and the unauthorized disclosure of which could result in *exceptionally grave damage* to the Nation *such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.*[31]

With respect to the "secret" category, the order states:

> Except as may be expressly provided by statute, the use of the classification "secret" shall be authorized by appropriate authority, *only* for defense information or material the unauthorized disclosure of which could result *in serious damage* to the Nation, *such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or*

29. Accord, Harmon v. Brucker, 78 Sup. Ct. 433 (1958).
30. Exec. Order No. 10501, 18 Fed. Reg. 7049 (1953).
31. Id. at 7049. (Emphasis added.)

> *technological developments important to national defense, or information revealing important intelligence operations.*[32]

With respect to the "confidential" category, the order states:

> *Except* as may be expressly provided by statute, the use of the classification "confidential" shall be authorized, by appropriate authority, *only* for defense information or material the unauthorized disclosure of which *could be prejudicial* to the defense interests of the Nation.[33]

Under the executive order, designated precautions must be taken respecting the custody and safekeeping of classified defense information and materials. Knowledge or possession thereof is to be permitted only to persons whose duties require such access in the interest of promoting the national defense, and then only if they have been determined to be trustworthy.

The Commission's report points out that scientists, engineers, and representatives of industry having contracts with the Department of Defense, Atomic Energy Commission, and other departments and agencies possessing classified defense information and materials, have criticized the existing classification program on three principal grounds: (1) There is a tendency to overclassify defense information and materials, disclosure of which would not substantially injure the national security; (2) Since security at its best can only provide lead time in this highly technological age, overclassification defeats its own purpose in that it retards the free exchange of information; (3) The cost of handling, storing, and transmitting classified information is excessive and imposes undue burdens in light of the risk involved should disclosure occur.

The appearance of Sputniks I and II strikingly illustrates that we do not and cannot hope to enjoy a monopoly in the realm of scientific advance and technological achievement—that the deterrents to aggression we hope to achieve and maintain lie chiefly in getting there with the "fustest" if not with the "mostest." Indiscriminate, non-essential classification operating to prevent or retard the free exchange of information among our own scientists, engineers, and other technicians therefore defeats the very purpose of classification.

(1) Abolition of the "Confidential" Category

The Commission believes that "top secret" and "secret" categories, as presently defined, are adequate to protect national security and recommends abolition of the "confidential" category. "Estimates

32. Id. at 7051. (Emphasis added.)
33. Id. at 7051. (Emphasis added.)

furnished to the Commission indicate that most of the classified defense information and materials fall in the confidential category."[34]

It is highly significant that while Executive Order 10501 contains criteria or illustrations for the type of information that should be classified as "top secret" or "secret," none is provided for the guidance of classifying officers in respect to "confidential" matter. It would indeed be difficult to set forth any confining or limiting example of information the disclosure of which "could be prejudicial to the defense of the nation." The phrase "could be prejudicial" accommodates itself to the broadest of interpretations.

All the departments and agencies of the government which responded to inquiries of the Commission soliciting opinions on the abolition of the confidential category were opposed to it. Their position, generally speaking, was based upon two grounds: (1) abolition of "confidential" would require upgrading of a substantial amount of information to "secret" or "top secret," and (2) the cost in reviewing the great mass of confidential material to determine the need for upgrading would be excessive.

Taking note of the second objection above, the Commission's recommendation as to abolition of "confidential" is made *prospective* in its operation. Concerning the first objection, the view that a substantial amount of defense information has been classified as merely "prejudicial," when supposedly if disclosed it could lead to war or a break in diplomatic relations, or to any of the events covered in the criteria for secret and top secret, is consistent only with a hypothesis of laxity and dereliction on the part of the classifying authorities. It is therefore difficult to accept the premise inherent in this objection, that abolition of the confidential category would require a substantial amount of upgrading to "secret" or "top secret." All evidence points to overclassification rather than underclassification.

Elimination of the "confidential" category, in the view of the Commission, involves no substantial risk to security. On the positive side, it would encourage freer exchange of information and ideas promot-

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34. Thus [continues the text] the Department of Defense estimates that 59 percent of its classified material is confidential, as contrasted with 11 percent for secret, and 10 percent for top secret; the State Department indicates 76 percent for confidential, 20 percent for secret, and 4 percent for top secret; the Department of Commerce indicates 76.26 percent for confidential, 23.70 percent for secret, and 0.04 percent for top secret.

The Atomic Energy Commission estimates 49 percent for confidential, 49 percent for secret, and 2 percent for top secret. Only in the Central Intelligence Agency does the percentage of secret exceed the percentage of confidential, the figures in this Agency being 28 percent confidential, 61 percent secret, and 11 percent top secret.

Report at 175.

ing the interests of defense, and eliminate unnecessary costs to the government and private industry.

(2) Development of Training Program for Administrative Personnel

Personnel authorized to classify or to recommend classification should be familiar with the processes which foster scientific and technological advance. Training programs for such personnel should be developed with the specific aid of scientists, engineers, and technicians, familiar with factors relevant to the advancement of scientific and technological progress as well as the need for protecting national security.

Executive Order 10501 expressly requires training and orientation programs for employees concerned with classified defense information to impress each employee with his responsibility "for exercising vigilance and care" in complying with the provisions of the order.

The Commission's report emphasizes the need for people of unusual judgment, who should be not only fully aware of dangers arising out of unauthorized disclosure, but equally aware of the impediments to national defense and security arising out of indiscriminate restrictions upon free exchange of ideas and free access to information.

Recommendations Designed to Promote Uniformity, Consistency, and Efficiency

(1) Creation in the Executive Branch of an Independent Central Security Office

The Commission was directed by Public Law 304[35] to make recommendations concerning the administration of the various security programs "from the standpoints of internal security and effective protection and maintenance of the national security." It found a lack of uniformity in rules and regulations and the application thereof, particularly in screening and hearing procedures; absence of coordination between agencies; duplication of forms and records and in investigative and clearance procedures; lack of training of personnel; failure to maintain appropriate records and statistics; and a wide dispersion of responsibility.

After due consideration of the methods attempted under existing and preceding program to coordinate the activities of all agencies and departments, the Commission concluded that internal consistency in operating an overall security program could be achieved only through centralization of responsibility in a single independent office. At the

35. 69 Stat. 595 (1955), 50 U.S.C. § 781 (Supp. IV, 1957).

same time the Commission sought scrupulously to preserve in the heads of the respective agencies and departments ultimate responsibility for retention in employment and granting or denying of clearance.

The Central Security Office under the Commission's recommendations would consist of a director and his administrative staff, a central review board consisting of three members, and the hearing examiners heretofore discussed. The director and the members of the central review board would be appointed by the President with the advice and consent of the Senate.

Presently, each department and agency promulgates its own rules and regulations. Under the new recommendations, however, the director of the Central Security Office would prescribe rules of practice for conducting hearing and review proceedings and would promulgate regulations, including interpretative guides, as he might deem necessary to promote uniformity in the various loyalty and security programs.

The director is instructed to conduct continuing surveys and inspections and recommend such changes as he deems necessary. He is required to compile and maintain appropriate statistical records concerning the operation of the programs and submit each year a full and complete report to the President and the Congress. He is further charged with responsibility for allocating work among the hearing examiners so as to minimize delay. While he has no authority to classify or declassify defense information, he must determine whether the classification procedures in each agency result in overclassification and must effectively provide for declassification when necessary.

Requirements that hearing examiners meet appropriate qualifications, that members of the central review board be appointed by the President subject to confirmation by the Senate, that hearing examiners and members of the central review board be full time employees and officers, and that the hearing function be allocated to a separate and independent office, all provide reasonable assurance that personnel charged with highly important hearing functions will possess the requisite degree of competence and independence which their responsibility requires.

(2) Consolidation of the Separate Industrial Security Programs of the Military Services into a Single Program under the Office of Security

Confusion and delay in the operation of the military industrial security program results from the fact that the Army, the Navy, and the Air Force each operate their own respective industrial security programs. The regulations promulgated by each branch of the armed

services frequently differ. Differences arise with respect to the measures to be taken for custody and safe-keeping of classified defense information and materials, and with respect to the granting of clearance for access to such information and materials. Many contractors who work for the Army, Navy, and Air Force, complain vigorously about the lack of standardization arising out of the operation of three separate programs.

The unification of the separate military industrial security programs into one integrated program, controlled and operated by an office of security in the office of the Department of Defense, should go far to eliminate the lack of uniformity presently existing.

(3) Transferability of Personnel Security Clearance

As pointed out in Section *(a) (15)* above, the Commission believes that where an individual has been granted clearance for access to classified defense information in one department, agency, or plant, he should not be subjected to further investigation to obtain clearance for access to classified defense information in another department, agency or plant. Transferability should be permitted where the standard for clearance is the same and where the investigation upon which the original clearance was granted was comparable in nature to that required for the subsequent grant. An exception to this rule, however, should be recognized when further investigation is required due to lapse of time or special factors requiring a re-evaluation.

Transferability of clearance under the circumstances set forth should promote uniformity and efficiency in the administration of the security program, and eliminate much of the resentment occasioned by repeated investigations.

Recommendations Designed to Promote Vigorous Enforcement of Effective and Realistic Security Laws

The congressional declaration of policy earlier set out called "for vigorous enforcement of effective and realistic security laws and regulations." A study of criminal statutes presently in force reveals the need for new legislation to cover gaps which interfere with vigorous enforcement of effective and realistic security laws.

(1) Unauthorized Disclosure of Secret and Top Secret Defense Information with Knowledge that Such Defense Information Had Been So Classified Should Be Made a Crime

Public Law 304 which created the Commission on Government Security[36] declared as a matter of national policy that it was vital to

36. See text at notes 1, 28 supra.

the welfare and safety of the United States that there be adequate protection of the national security—against loss, or compromise arising not only from episonage, sabotage, disloyalty, and subversive activities but from *"unauthorized disclosures."*[37]

Under existing laws the unauthorized disclosure of classified information by employees of the government is made a crime, but unauthorized disclosure by other persons is punishable only if the information is obtained and transmitted for the use and benefit of a foreign nation. It must be borne in mind, however, that access to classified defense information and material is not limited to government employees, but is shared by thousands of individuals privately employed in defense plants and in research laboratories. Unauthorized disclosure by such privately employed individuals could have the same consequences as unauthorized disclosure by government employees. Manifestly, unauthorized disclosure in the press could have the same, if indeed not greater, prejudicial effect.

The Commission has recommended that criminal penalties for unauthorized disclosure of secret and top secret defense information and materials should apply not only to employees of the government but to all persons.

If, as recommended by the Commission, the confidential category should be eliminated, a large mass of material heretofore classified would be available to the public and the press, since substantially more than fifty percent of all classified material is in the confidential category. But whether or not the confidential category is abolished, the new proposed criminal sanction would apply only to unauthorized disclosure of top secret and secret as defined in the proposal of the Commission. As so defined, defense information and material would be properly classified top secret only if its unauthorized disclosure could result in exceptionally grave damage to the nation, and classified secret only if its unauthorized disclosure could result in serious damage to the nation.

The Commission has recommended the retention of the criteria contained in Executive Order 10501 for determining what constitutes exceptionally grave damage or serious damage to the nation. Before classifying defense information as top secret, the classifying officer would have to conclude that the disclosure could lead "to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national

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37. 69 Stat. 596 (1955), 50 U.S.C. § 781 (Supp. IV, 1957).

defense."[38] Before classifying defense information or materials as secret, the classifying officer would have to conclude that unauthorized disclosure would cause damage "such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to the national defense, or information revealing important intelligence operations."[39]

The recommendation to attach criminal sanctions for unauthorized disclosure of classified information has been vigorously criticized as an attempt to interfere with the freedom of the press or to impose undue restrictions on the "public's right to know." Apprehensions have been voiced in the press that classifying authorities could successfully conceal corrupt transactions, or their own blunders, through arbitrary classification of defense information and materials as secret or top secret.

The emphasis placed by the Commission on the need for the free flow of information and the concrete recommendations made by it to the end of minimizing overclassification indicate that the Commission was fully aware of the prejudicial effects resulting from arbitrary and capricious classification having no real relationship to the protection of the national security.

During the course of its deliberations the Commission read hundreds of pages of testimony by scientists, engineers, and others, voicing criticisms of the classification program. In addition the views of non-governmental personnel familiar with the operation of the program were solicited by the Commission, and consideration was given to the responses made in answer to these inquiries. Little if any criticism was voiced regarding classification of material and information in either the top secret or secret categories. This would indicate that scientific and technological opinion found no substantial grounds for complaint in respect to top secret and secret classification under the definitions and criteria contained in Executive Order 10501.

No system can be devised to guard against arbitrary, capricious, or corrupt classification under any definition or formula. Hence, if any particular matter has been classified as secret or top secret when it could not have been so classified in good faith, the disclosure of such matter would not fall within the purview of the proposed criminal sanction. If, however, unauthorized disclosure could bring about the kind of damage characterized as exceptionally grave or as serious, no person, whether he be a government employee, a scientist in a research laboratory, a worker in a defense plant, a newspaper reporter, or a

38. Exec. Order No. 10501, 18 Fed. Reg. 7051 (1953).
39. Ibid.

publisher should escape the consequences, providing such disclosure has been made with knowledge or with reasonable grounds to believe that the information has been so classified.

(2) Evidence obtained by wire tap should be admissible in any criminal prosecution for an offense against the security of the United States, where the investigative agency has received express written authority from the attorney general to make such wire tap

In 1927 the Supreme Court held that the admission in evidence of information obtained by the tapping of telephone wires did not constitute a search and seizure within the meaning of the fourth amendment to the Federal Constitution and did not transgress the privilege against compulsory self-incrimination vouchsafed by the fifth amendment.[40] In that same case the Court also decided that the evidence was admissible notwithstanding that the federal law enforcement officers in tapping the wires violated the penal statutes of the State of Washington.

Three members of the Court differed from the majority on the constitutional issue. Mr. Justice Holmes based his dissent upon the view that the evidence was not admissible because the federal enforcement officers had committed a crime in obtaining it. The phrase "dirty business," used by Mr. Justice Holmes in the course of his dissent, has been invoked frequently by those who condemn the use of the wire tap by law enforcement officers. To the writer it would seem that the phrase, in the context in which it was used, was intended to apply not to the act of wire tapping but to the commission of a criminal act by law enforcement officers and the ratification thereof by the government through the use of evidence obtained by criminal means.[41]

Efforts to persuade the Court to overrule the *Olmstead* case have as yet not been successful.[42]

Some seven years following the decision in the *Olmstead* case, Congress enacted the Federal Communications Act.[43] Included therein was section 605, reading as follows:

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40. Olmstead v. United States, 277 U.S. 438 (1927).

41. After stating that he was not prepared to say that "the penumbra of the 4th and 5th Amendments cover the defendant," Mr. Justice Holmes went on to say that, "apart from the Constitution, the Government ought not use evidence obtained and only obtainable by a criminal act." Then followed the words: "For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as Judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed." Id. at 469-70.

42. See On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942).

43. Communications Act, 48 Stat. 1105 (1946), 47 U.S.C. § 151 (1953).

> [N]o person not being authorized by the sender shall intercept . . . and divulge . . . [the] meaning of such intercepted communication to any person. . . .[44]

In *Nardone v. United States,*[45] the Supreme Court ruled that evidence obtained by federal law enforcement officers through interception was inadmissible by reason of section 605, notwithstanding the government's contention that the act was not actually and was not intended to be applicable to law enforcement officers. In the second *Nardone* case[46] the Court held that the ban applied not only to the contents of the intercepted message but to all evidence which the government had obtained solely through the use of information contained in the intercepted communication.

Recently, the Supreme Court held that evidence obtained by a state law enforcement officer through a wire tap authorized by state statute was not admissible in a federal criminal proceeding.[47] On the same day the Court held a police officer could testify concerning conversation heard by him on an extension telephone, where the recipient of the message had authorized him to listen in, although defendant sender had no knowledge of this fact.[48]

Notwithstanding the first *Nardone* decision, federal agents presently tap wires under the construction placed on section 605 by the Department of Justice—that interception is not prohibited unless accompanied by divulgence. And ever since the *Nardone* decision, the Department of Justice has consistently urged Congress to enact legislation which would permit the use of evidence obtained by wire tap in certain restricted types of criminal proceedings.

The Commission, under its mandate from Congress, was concerned only with the effect of the inadmissibility of evidence in connection with the adequate protection of national security. It had to weigh the fear of unwarranted intrusions upon the privacy of citizens by unscrupulous law enforcement agencies against the inability of the government to punish conspirators who would undermine us all. The *Coplon* case[49] demonstrates that espionage laws cannot be vigorously enforced when the proof required to convict depends upon the admissibility of evidence obtained by wire tap.

The Commission has recommended legislation which would permit, in criminal prosecutions for offenses against the security of the United States, the use in evidence of information obtained by wire tap. Per-

44. Id. at § 605.
45. 302 U.S. 379 (1937).
46. 308 U.S. 339 (1939).
47. Benanti v. United States, 355 U.S. 801 (1957).
48. Rathbun v. United States, 355 U.S. 880 (1957).
49. United States v. Coplon, 185 F.2d 629 (2d Cir. 1950).

missible use, however, would be restricted to cases where the attorney general has given written authorization to make the wire tap to a security investigative agency engaged in conducting an investigation to detect or prevent an offense against the security of the United States. The interception must be specifically described as to time and place in the written authorization. As an additional precaution the proposal requires the attorney general to file reports at six month intervals with the National Security Council, stating the number of interceptions authorized by him and the nature of the offense for which each authorization was given.

Constitutional Issues Arising Out of the Operation of Loyalty-Security Programs

The "serious and far-reaching problems in reconciling fundamental constitutional guarantees with the procedures used to determine the loyalty of Government personnel"[50] which were left unresolved by the Supreme Court in *Bailey v. Richardson*[51] are as yet unsettled. It has been asserted that the loyalty security programs offend the Federal Constitution by: (1) violating the due process provisions of the fifth amendment; (2) abridging freedom of speech and freedom of assembly in violation of the first amendment; (3) violating safeguards provided for by the sixth amendment in criminal prosecutions.

All three of the above constitutional questions were raised in *Bailey v. Richardson.* In this case the plaintiff was a government employee who had been removed under Executive Order 9835 upon the ground that, on all the evidence, there was reasonable ground to believe she was disloyal to the United States. She had been advised by the Regional Loyalty Board that it had information that she was or had been a member of the Communist Party, that she associated on numerous occasions with known communists and that she belonged to two organizations which were named in the attorney general's list of subversive organizations.

The plaintiff admitted that she had been for a short time a member of one of the organizations on the attorney general's list but denied the remaining charges. She requested and was granted a hearing, initially by the Regional Loyalty Board, and thereafter on review by the Loyalty Review Board.

At these hearings plaintiff testified personally and also presented testimony and affidavits of other witnesses attesting to her loyalty to

50. Chief Justice Warren in Peters v. Hobby, 349 U.S. 331, 338 (1955).

51. 182 F.2d 46 (D.C. Cir. 1950), aff'd without opinion by an equally divided court, 341 U.S. 918 (1951).

the United States. No persons other than the plaintiff and her witnesses testified at either hearing. Plaintiff was not given the names of the persons who furnished the information, had no opportunity to cross-examine them, and was not confronted by them. An adverse finding by the Regional Loyalty Board was sustained by the Loyalty Review Board, and plaintiff was discharged by the agency in which she was employed. As a further measure, an order was entered debarring her from re-employment for a period of three years.

Thereafter plaintiff filed suit in the District Court of the District of Columbia for a declaratory judgment and for an order directing her reinstatement. She contended that her discharge was effected without due process of law in violation of the fifth amendment and without safeguards vouchsafed by the sixth amendment, and further claimed that her dismissal denied her freedom of speech and freedom of assembly as guaranteed by the first amendment. That portion of the order which debarred her from eligibility for employment for a period of three years was attacked as a violation of the constitutional prohibition against bills of attainder.

The district court rendered a judgment adverse to plaintiff and she appealed. The court of appeals, relying upon *United States v. Lovett*,[52] sustained her contention that the order barring her from federal service for three years was constitutionally invalid, but ruled adversely to her regarding the remaining constitutional questions. In respect to due process the appellate court held that employment by the government was neither a property nor a contract right, since employees of the government were dischargeable at will absent any statutory limitations upon the power to discharge. In the view of the court there was no "right" to government employment and therefore the due process of law requirements were not applicable. As regards the sixth amendment, which provides that in all criminal prosecutions a defendant is entitled to trial by jury and to be confronted by any adverse witnesses, it was held that an administrative proceeding to determine loyalty is not a criminal prosecution. As to infringement of freedom of speech and freedom of assembly, the court held that since there was no constitutional right to employment there was no impairment of the right of free speech or free association.

Judge Edgerton dissented. He was of the opinion that dismissal upon loyalty grounds constituted the kind of punishment which should entitle an employee to the safeguards of the fifth and sixth amendments. He was further of the view that dismissal merely because of association or because of membership in organizations including the

52. 328 U.S. 303 (1946).

Communist Party abridged the right of freedom of speech and freedom of assembly protected under the first amendment and constituted a denial of due process under the fifth amendment.

The constitutional issues left undetermined in the *Bailey* case were again presented to the Supreme Court some four years later in *Peters v. Hobby*.[53] Dr. Peters, a government consultant, had been discharged from his position on the ground that from all the evidence there was reasonable doubt about his loyalty. This discharge occurred as a result of a "post-audit" conducted by the Loyalty Review Board, after Dr. Peters had on two previous occasions been cleared of charges made against him.

Dr. Peters appealed his case through the federal courts, and the order of discharge was subsequently set aside by the Supreme Court for the reason that the Loyalty Review Board had no authority to conduct the post-audit investigation and make a determination based thereon. In view of this ruling, a majority of the Court held it was unnecessary to pass upon the constitutional issues raised.

Mr. Justice Douglas, while concurring in the result, was of the opinion that the Court could not avoid the constitutional issues in the case. He expressed the view that confrontation and cross-examination under oath were essential to due process. Mr. Justice Black, in his separate concurring opinion, expressed doubt whether the loyalty program embraced in Executive Order 9835 had been authorized by Congress, and he further doubted whether Congress could validly delegate the powers assumed by the President in promulgating the executive order.

Although the doctrine established by the court of appeals in *Bailey v. Richardson* has not been expressly overruled or repudiated, two later decisions by the Supreme Court cast doubt upon those parts of the *Bailey* opinion that are predicated on the premise that government employment is not a right.

In *Wieman v. Updegraff*[54] the Supreme Court declared invalid as a violation of due process an Oklahoma statute barring from state employment individuals who refused to take an oath regarding their membership in or affiliation with certain proscribed organizations. The Court held that the statute failed to differentiate between members who had knowledge of the organizations' purposes at the time they joined and those who did not. In the course of his opinion Mr. Justice Clark, speaking for the majority, said:

> We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional pro-

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53. 349 U.S. 331 (1955).
54. 344 U.S. 183 (1952).

tection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.[55]

In *Slochower v. Board of Higher Education*[56] the Court held that to discharge a teacher under a charter provision of the City of New York without a hearing, solely on the ground that he had claimed the privilege against self-incrimination in a collateral proceeding, violated due process of law in contravention of the fourteenth amendment. The Court said:

> To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities.[57]

The ruling of the Court in the *Wieman* and *Slochower* cases lend support to the implication that merely because employment with the federal govenment is a privilege rather than a right does not automatically render the due process provision of the fifth amendment inapplicable.

The Court of Appeals for the Ninth Circuit, in *Parker v. Lester*,[58] has held that due process requirements of the fifth amendment are applicable to the security program for maritime employees. In this case the plaintiffs were merchant seamen who had been denied clearance on security grounds but furnished no bill of particulars. Absent their security clearance they were unable to pursue their chosen vocation. They brought an action to enjoin enforcement of the Coast Guard regulations, contending that the regulations as enforced denied them due process of law in contravention of the fifth amendment. Under the procedure then in force the Commandant of the Coast Guard made the initial determination whether clearance should be denied. No person could be issued a document required for employment unless the commandant was satisfied that the character and habits of life of the person were such as to authorize the belief that his presence on board ship would not be inimical to the security of the United States. After an initial denial of clearance appeals were provided, first to a local and thereafter to a national appeal board.

The court of appeals held that the regulations as enforced violated due process, because the information given to an individual denied clearance was not sufficiently specific to permit him to make a defense. The court specifically refrained from passing upon the question whether regulations might properly be adopted which in some degree qualified the ordinary right of confrontation and cross-examination

55. Id. at 192.
56. 350 U.S. 551 (1956).
57. Id. at 555.
58. 227 F.2d 709 (9th Cir. 1955).

of individuals who had supplied derogatory information. The Department of Justice, after obtaining several extensions of time for filing applications for certiorari with the Supreme Court, ultimately concluded not to do so.

Following the decision in *Parker v. Lester* the regulations of the Coast Guard were amended with the view to curing the defects previously held objectionable. As of this date no cases involving the amended regulations have come to the attention of the writer.

The use of confidential information as the basis for denying a passport under the passport security program has been attacked as a violation of due process of law. This issue reached the Court of Appeals for the District of Columbia in *Boudin v. Dulles*[59] and *Dayton v. Dulles*.[60] In these cases the court did not pass upon the constitutional issue but remanded the cases for further consideration with directions that, in the event the secretary of the state denied a passport on the basis of confidential information, he should so state, together with the reasons why such information could not be disclosed.

Upon reconsideration by the secretary of state the passport was issued to Boudin but denied to Dayton. In connection with the denial of a passport to Dayton, the secretary stated that he had reached his conclusion partly on the basis of confidential information contained in the files of the Department of State, the disclosure of which might prejudice the national security and the conduct of United States foreign relations. Dayton brought a proceeding in a district court to review this action. The court held that denial of the passport on the basis of confidential information under the circumstances violated neither procedural nor substantive due process.[61]

On appeal the judgment was affirmed.[62] The Supreme Court granted certiorari on January 13, 1958.[63] The case squarely presents the constitutional validity of the use of confidential information in connection with the denial of a passport, and the issue should be settled in the near future.

The armed services, in determining the kind of discharge to be issued to a member separated on security-risk grounds, have from time to time taken into consideration not merely the conduct of an individual while in the service but the pre-service conduct on which

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59. 235 F.2d 532 (D.C. Cir. 1956).
60. 237 F.2d 43 (D.C. Cir. 1956).
61. 146 F. Supp. 876 (D.D.C. 1956).
62. Dayton v. Dulles, 26 U.S.L. Week 2203 (1957).
63. 78 Sup. Ct. 342 (1958)

the security determination was made. The validity of such action has been challenged as a violation of due process.[64]

In the *Harmon* case[65] the plaintiff, who had been separated from the Army on security-risk grounds, was given an "Undesirable Discharge." He applied unsuccessfully to the Army Discharge Review Board and to the Army Board for the Correction of Military Records to have the type of his discharge changed contending that his character and efficiency had been rated excellent throughout his entire army life. This relief was denied. In the district court Judge Youngdahl, while expressing the opinion that certain property rights and civil rights accrued to the holder of an honorable discharge, granted summary judgment against the appellant on the ground that the court lacked jurisdiction to review the nature of the discharge. The court of appeals affirmed, one judge dissenting. The Supreme Court has recently reversed and remanded the case to the district court stating that the type of discharge should be determined solely by his military record in the army.[66]

CONCLUSION

If we assume that the due process clause is applicable to all of the government loyalty-security programs, it does not follow that the procedures deemed essential to a fair hearing must be the same in each program. The requisites of due process may be less exacting when the government is dealing with its own employees or when the government is dealing with the determination of persons to whom it is willing to grant access to classified information than when the government's action cuts off a private individual's means of livelihood or when it prevents the private citizen from traveling abroad.

Sharp differences of opinion are bound to exist about whether the proposals of the Commission, if adopted, would meet the constitutional objections heretofore directed against the current programs and their predecessors. Such differences will be resolved, if at all, only if and when the constitutional void in this area has been filled. There is, however, room for the belief that many who differ on the constitutional issues will agree that the recommendations mark a substantial advance in affording greater protection to the individual without adversely affecting the protection of the national security.

64. See Bernstein v. Herren, 136 F. Supp. 493 (S.D.N.Y.), aff'd, 234 F.2d 434 (2d Cir. 1956); Schustack v. Herren, 234 F.2d 134 (2d Cir. 1956); Harmon v. Brucker, 137 F. Supp. 475 (D.D.C. 1956), aff'd, 243 F.2d 613 (D.C. Cir. 1957).

65. Harmon v. Brucker, supra note 64.

66. 78 Sup. Ct. 433 (1958).