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Book Review (reviewing Eleanor Bontecou, *The Federal Loyalty-Security Program* (1953))

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BOOK REVIEWS

THE FEDERAL LOYALTY-SECURITY PROGRAM. By Eleanor Bontecou. Ithaca: Cornell University Press, 1953. Pp. xi, 367. \$5.00.

Miss Bontecou's review of the federal loyalty program down to 1952 is one of eleven books published since 1946 in the Cornell Studies on Civil Liberty. The series has come to make a major library on some of the more important and perplexing issues of our time. Miss Bontecou's excellent study exemplifies the strengths of the sequence as a whole. It is in the idiom of scholarship; it is factual in emphasis; it is acute in its observations about policy; and it is written with notable self-restraint, in a tone of quiet indignation.

Prior to the appearance of the book our knowledge of the federal loyalty program came chiefly from the Executive order itself, some early law review writings,¹ the spate of Washington anecdote, and the two great cases in which the program was tested in court, *Bailey v. Richardson*² and *Joint Anti-Fascist Refugee Committee v. McGrath*.³ This was material enough for heated controversy about the merits of the program, and the large policy issues it posed have long been apparent. Miss Bontecou's objective, however, has not been to re-debate the large issues, but rather to add to our sense of fact about the program's actual operation. And she has succeeded admirably.

The book has careful chapters on the genesis of the program, its legal aspects, the parallel English experience, and a seventy-five page appendix of official documents. But the core of the book is four consecutive chapters of some 170 pages taking up in sequence: the mechanics of adjudication; the problem of the FBI investigation; the study of seventy-five individual loyalty cases; and the Attorney General's list of suspect organizations.

In several respects the chapter on the mechanics of adjudication is the most striking. It is clear that the agency and Review Board personnel,

1. The pioneer article is Emerson and Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1 (1948); there is an exchange of views between Mr. Hoover and the authors in the same volume at 401 *et seq.* See also Richardson, *The Federal Employee Loyalty Program*, 51 COL. L. REV. 546 (1951); BIDDLE, FEAR OF FREEDOM 197-245 (1951); BARTH, LOYALTY OF FREE MEN, c. V-VIII (1951); and see generally the prospectus for a scientific study of the program's impact on government employees, Jahoda and Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 YALE L.J. 295 (1952).

2. 182 F.2d 46 (D.C. Cir. 1950).

3. 341 U.S. 123 (1951).

although not perfectly qualified for their novel and difficult assignments, did their jobs conscientiously and without the "animus of the witch hunter." We are reminded, therefore, that the program was conceived and executed by men of good will and was not an earlier manifestation of what we now term McCarthyism. The disturbing conclusion, that I at least would draw, is that the good will does not seem to have greatly improved matters.

The book makes it abundantly clear that there was more than one program. A variety of agencies were left autonomous under the order, and the result was a welter of conflicting jurisdictions, procedures, and standards. Beyond this, the Review Board failed to impose uniform procedures on the agency boards within its jurisdiction. Thus, the agency boards made the first evaluations and conducted the original hearings followed significantly different practices with respect to such important matters as the conduct of inquiry at the hearing, the insuring of counsel to the employee, the disclosure of adverse information, the specificity of charges, and the appearance at the hearing of adverse witnesses. "The result is," says Miss Bontecou, "that the actual protection afforded the employee, and incidentally the government, . . . depends largely upon the agency in which a case arises."⁴

The chapter underscores several other points. The Review Board made it the practice to have decisions stated only in the summary form of the Order itself without any disclosure of the basis for the decision. As a consequence, no system of precedent developed which might slowly have given content to the vague standards of the Order and which might have made the operation of the program more accessible to public scrutiny.

A further point about the Board's practice goes to the heart of a central controversy about the program: whether it was not necessarily adjudicating an indelible status of disloyalty rather than making simply a discretionary employer judgment that an employee was unsuitable. This is the issue which most sharply split the Court of Appeals in the *Bailey* case. Miss Bontecou tells us that the boards were scrupulous about preserving the secrecy of their information and decisions from the public generally. But they did feel it appropriate that the decision be communicated to any prospective employer of the discharged employee, and the Chairman of the Review Board is quoted as saying this would "mean a man is ruined everywhere and forever. No reputable employer would be likely to take a chance in giving him a job."⁵ Whatever the original intentions of the program, this meant that it in fact subjected citizens,

4. P. 59.

5. P. 65.

simply because of the accident that they were working for the government, to a definitive governmental adjudication of their loyalty under admittedly inadequate procedures and most dubious substantive standards. Despite the ability and force of Judge Prettyman's majority opinion in the *Bailey* case, it is difficult to put aside the conclusion that Judge Edgerton was right after all.

It is perhaps true that, given the nature of the grounds for dismissal and prestige of the Federal Government, this was an inescapable consequence of the program however operated. But Miss Bontecou suggests that had the Board furnished employees with a precise and detailed statement of its findings, it might have materially mitigated the hardship on them.⁶

Finally, in her comment on the mechanics, Miss Bontecou makes an excellent point on the Board's insistence that charges be filed against the employee if there was any derogatory information in his file and that preferably he be cleared only *after* full hearing. As a result, many employees were exposed to the anxiety and humiliation of the receipt of charges of disloyalty and the ordeal of a hearing, where it could well have been avoided. The fact that the vast majority of employees charged did succeed in clearing themselves in the subsequent proceedings hardly meets the point. Perhaps the most obvious harms of the program resulted not to those discharged but to those indiscriminately forced to clear themselves.

Chapter iii, on investigations, is admirably sane and by and large reassuring although it suffers inevitably from the inaccessibility as to what the FBI actually does and what an average FBI report looks like. Miss Bontecou tells us that the reports frequently include substantial data favorable to the subject of the investigation and that care is taken always to have more than a single agent contribute to the report on a given individual. She agrees with Mr. Hoover that the incorporation of un-evaluated raw data in the FBI report is not only tolerable but indispensable. This would be true if the subsequent procedures were keyed to it. But here we do not have an initial investigation which is to be followed by the discipline of a criminal trial. Inevitably, as the loyalty program operated, the *ex parte* investigation was disturbingly crucial; and the decision, even after hearing, was based largely, and often exclusively, on adverse testimony furnished by the hearsay of the reports. A further difficulty is hardly the fault of the FBI; but, given the great prestige of the FBI, there was and is the constant danger that the reports will be taken as

6. Professor Gardner has ably advanced this point. See Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 B.U.L. REV. 176 (1953).

something more definitive than, as Mr. Hoover scrupulously insists, they are meant to be. Finally, Miss Bontecou queries whether it might not have been wiser to have the FBI interview the employee, too, as part of the original file.

The most original part of the book and the one that raises the greatest expectations is Chapter iv dealing with the cases themselves. Miss Bontecou has managed to collect some seventy-five cases to study intensively, in part from transcript and in part from interviews with counsel and employee. Of course, in no case did she have access to the FBI files. The harvest, although useful, is in the end somewhat disappointing and is only a little better than the anecdotal information previously obtainable. Miss Bontecou recognizes that her cases are not a fair sample, and the statistical accounting of their characteristics is done only half-heartedly. Again, she has chosen, perhaps for the sake of those involved, to present only snatches of the cases horizontally, and we never get a clear impression of any one case as a whole. The difficulties in her path were undeniably great and serve to underscore one major source of uneasiness about the whole program—namely, that it was so largely beyond public scrutiny.

Nevertheless, some interesting conclusions are suggested by the chapter. In really none of her cases was something more than membership in the Communist party involved; and in less than one-third was past or present membership even charged—and in the large majority of these the charge was successfully met. It would not be a reckless guess, therefore, that in the majority of all cases something less than past membership was in issue and that in many cases it was something considerably less, including membership in “front” organizations, “sympathetic association” with “fronts,” following the Party line, and reading Communist literature. In a substantial number of cases the charges involved “sympathetic association” with persons who were suspect, frequently only because of their membership in “fronts.” This extension of the circumstantial evidence of association appears to have haunted the proceedings. There were cases in which the suspected associate had been cleared by the time his employee friend was charged. Furthermore, the Board would not permit the accuracy of the charge against the associate to be challenged by the employee. The material thus reinforces the familiar criticism that much of the time and energy of the program was taken up with trivia, with marginal cases of socially conscious, perhaps eccentric, persons who could hardly have been the “subversives” the government had in mind when the program was begun.

One rather surprising finding is the infrequency with which non-confidential adverse witnesses actually testified. There was no procedure

for compelling witnesses to attend the hearings, and many of the boards were frankly skeptical of the utility of having them testify in any case. Miss Bontecou notes only seven cases, of her seventy-five, in which adverse witnesses appeared in person and makes it evident that in six of these their appearance had a decisive impact on the outcome.

The confidential witness was, of course, a major problem under the program since his identity was withheld even from the boards. Miss Bontecou ably questions whether, even on a generous view of security needs, many of these witnesses could not well have testified. The use of the confidential informer was a principal issue in the *Bailey* case, and it is slightly reassuring to be told that the *Bailey* case was extreme in that *all* of the adverse testimony came from confidential informants.

Miss Bontecou has included considerable material bearing on the content of inquiry at the hearings. It is here that the program is easiest to caricature, and she is once again admirably careful. Undoubtedly, questions were asked about almost anything—from views on the Russian ballet, to Paul Robeson records, to what the employee thought of the loyalty program. The famous question asked Miss Bailey about the segregation of Negro blood is noted, along with Mr. Blair's letter of explanation as to why he asked the question. It would be, as Miss Bontecou takes pains to point up, most unfair to take any one question as showing what the boards regarded as sufficient evidence of disloyalty. Certainly, no employee was discharged because he liked Russian ballet. Under some circumstances the skillful use of such roving inquiry might yield useful insight as to the employee, and there is little reason to doubt that the questions were asked with pure motives. But the frequency with which they were asked does point up two serious difficulties. First, it indicates that the substantive target of the program was hopelessly vague, and second, it indicates that inevitably such questions made the program look as though it were directed quite broadly at nonconformity. It is one of Miss Bontecou's most effective insights about the program that it was pre-eminently a law which must not only operate justly but look as though it operated justly. And undoubtedly the program looked less fair than it in fact was.

Finally, the chapter reminds us of the formidable costs to the employee of carrying through a loyalty hearing and of the frequency with which he underwent double or triple jeopardy.

The chapter on the Attorney General's list again adds to our insight. The two most obvious difficulties with the listings concern the lack of meaning that "subversive" has when applied to an organization and the lack of procedure by which the Attorney General chose to make his deter-

minations—the point which won relief for the organizations in the *McGrath* case. Miss Bontecou has, however, concentrated at another level of the problem, and a new picture of the lists emerges. It is clear that the practice of listing organizations had a prior history, a part of which touches the liberals' concern over fascist organizations in the late 30's and during the war. The official list has continued to show a substantial number of fascist organizations, including the Ku Klux Klan, and the listing has by no means been allowed to run riot. It has been kept notably smaller than that compiled by the House Committee on Un-American Activities, for example, and the Attorney General has stubbornly resisted outside pressures to expand it. Further, there is evidence that the listing was done with care by a staff of thirty-five lawyers and elaborately reviewed before promulgation.

Nevertheless, on the net balance the picture is at once more disturbing. Not only were there no hearings of any sort, but the staff working up the lists relied chiefly on information already in the various official files. And the Board ruled that the accuracy of the listing could not be challenged by the employee at his loyalty hearing. Far more arresting is the fact that the majority of the organizations listed were defunct at the time they were first listed and that most of the listings appear to have had no direct impact on loyalty cases.

The bulk of the chapter carefully reviews the history of seven different types of organizations, varying from the International Workers Order, a mutual insurance group, to Commonwealth College, to the National Council for American-Soviet Friendship. In each case the checkered career of the organization is carefully sketched, and in each case Miss Bontecou concedes there was reasonable basis for listing it by the time it was listed. Working within that concession, she effectively challenges the probative value of membership in each of the organizations. In each case, by the time Communist domination became obvious, the organization was on the verge of going out of business anyway, and in each case the significance of membership was so clouded by prior events as to be negligible.

What emerges from this part of the book, then, is a complex picture of the list, which has much the same profile as the loyalty program as a whole. The listing was not done indiscriminately, or without any evidence, or in an arbitrary attempt at censorship. Once again, the practice looked worse than it probably was. The real vice was not so much that the "wrong" organizations were listed as that the listing was fatally retroactive and that membership even in the "right" organizations was almost meaningless on the issue of personal loyalty. And this was the

only justification for compiling the list to begin with. Finally, as with the loyalty dismissal, the official act of listing necessarily had grave extra-loyalty order consequences. The prestige of this list was much greater than that of its poor competitors, and it has been incorporated by reference for wide additional use by state, local, and private agencies. Perhaps more than any other feature of the program, the official listing of organizations, apparently by fiat, worked to corrupt the public sense of patience, tolerance, and fairness.

The book is, then, a considerable job. My only irritation comes from its failure to more coherently collect and assess the fugitive statistics about the program. The numbers that are given inevitably suggest the query as to just how much of a problem there was in the first place.

The special relevance of the book for the law man need not be belabored. It shows once again that the civil liberties problems of the day are truly on a legal frontier and that they have a complexity far removed from the classic free speech issues that aroused Milton, Mill, and Bagehot. In addition, it provides a notable instance in which to explore the interconnections between procedural due process and substantive standards, for here it is difficult indeed to say where the problems of the one begin and those of the other end.

One puts the book down, amid the clash and clamor of current headlines, with something of a sense of nostalgia for the good old days when the equities of the loyalty order were the issue. The program which placed governmental employees under such close surveillance for four years should have put to rest the country's anxiety about subversives in government. Instead, as we all know, the controversy goes on as though the loyalty program had never existed, and we appear dedicated to the proposition that one "subversive" in government is one too many in the literal sense that it is worth any price to get rid of him. The principal agency of loyalty investigations has become the congressional committee, in contrast to which the loyalty boards of which Miss Bontecou writes were indeed paragons of decency.

Miss Bontecou's study permits us to make a sane assessment of how much we deviated from our best traditions in the adoption and execution of the loyalty program from 1947 to 1952. It is a stunning reminder of how much the scene has deteriorated since the book was written.

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