

to do so unconvincingly. But there can be no real doubt as to who deserves first place. It is the trial judge, whose gross and repeated unfairness equally amazes and shocks one. The aftermath is still slightly remembered. Of the eight not-too-appealing defendants four were hanged, one committed suicide just before he was to be hanged and three were pardoned after seven years' imprisonment. (Of these three, two had originally been sentenced to be hanged but had their sentences reduced to life imprisonment.) Incidentally, the governor who granted the pardons was, as a consequence, permanently driven out of public life.

All this is recounted in the little book under review. If this were all, one could merely say that it was an excellent retelling of an old and unpleasant story. There is, however, one additional and wholly new feature. From a source not previously available the author is able convincingly to point out who did in fact throw the bomb. It reads almost like a mystery story, a thriller, and the reviewer does not propose to give away the secret. He will merely say that, had the probable facts been known, it would have made it far less necessary to resort to unfairness in order to secure convictions.

In a carefully written little book like this it is unfortunate that the proof-reading has been slipshod. Nor is the appearance aided by the fact that the pages are merely lithoprinted from typewritten sheets. But for those still interested in the old riot it will supply a worthwhile hour or two of reading.

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The Federal Loyalty-Security Program. Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York. New York: Dodd, Mead & Co., 1956. Pp. xxvi, 301. \$5.00.

Although this Report does not add anything particularly novel or startling to prior discussions of the personnel loyalty-security programs, it is nevertheless an extremely valuable contribution. It presents a carefully articulated and comprehensive plan for revision, unanimously adopted by a group of experienced and disinterested private citizens with no prior commitments to the present programs and no apparent strong emotional antagonisms against them.¹ The most radical recommendation contained in the Report is that the security program be limited to sensitive positions, meaning such positions as are designated by the head of the agency concerned as giving access to secret or top-secret information, or having a policy-making function which bears a sub-

¹ The members of the committee, all practicing lawyers, were Dudley B. Bonsal (chairman), Richard Bentley, Henry J. Friendly, Monte M. Lemann, George Roberts, Frederick M. Bradley, Harold M. Kennedy, John O'Melveny, and Whitney North Seymour.

stantial relation to national security. Although the Report was formulated and apparently went to press before the decision of the Supreme Court last Spring in *Cole v. Young*,² it fits with surprising neatness into the situation created by the Court's holding.³ The immediate reaction of the Administration to the *Cole* decision was to favor legislation which would explicitly authorize the approach of Executive Order 10450 by treating all positions in the federal government as "affected with national security" and making them all subject to the security programs.⁴ However, nothing was done before the adjournment of Congress. The subject is undoubtedly slated for thorough reconsideration sometime during the next Congress, perhaps in the light of the Bar Association's report and such additional light as may be shed by the forthcoming report of the bipartisan Commission on Government Security created by the Joint Resolution of August 9, 1955.⁵

The principal justification offered by the Bar Association Committee for its recommendation that the security program be limited to sensitive positions is that the fundamental approach of Executive Order 10450, namely the protection of the national security, should simply be taken at face value. Thus, the Report explains: "[A]ll those positions involving substantial danger to the national security would be covered, and the program would not be diluted by application to positions where there is not such a danger to national security" (pp. 146-47). In further elaboration of this position the Report states that the effect of its recommendation would be to reduce the coverage of the security program from approximately six million persons to something less than a million and a half, and that the most significant result of this reduction would be that "governmental efforts, including the efforts of its trained security personnel, would be concentrated where they are needed" (p. 147). From the point of view of the real merits of the problem, this is unquestionably a hard-headed, sensible and convincing argument. Unfortunately there is so much that is emotional and irrational, as well as political, in the motivations underlying the loyalty-security programs, that it may not be possible to keep the debate on this hard-headed, practical level, or even wise to attempt to do so. Deeply underlying these programs is the attitude which finds expression in the pre-

² 351 U.S. 536 (1956).

³ The Court held that the Act of August 26, 1950 (64 Stat. 476 [1950], 5 U.S.C.A. §22-1 [Supp., 1955]), the purported statutory basis for the Federal Employees Security Program under Executive Order 10450, authorized dismissal of an employee "only if he occupies a 'sensitive' position and thus that a condition precedent to the exercise of the dismissal authority is a determination by the agency head that the position occupied is one affected with 'national security.'" *Ibid.*, at 551.

⁴ Civil Service Commission Chairman Phillip Young and Attorney General Brownell both expressed approval of a bill to this effect introduced by Representative Walter. Mr. Brownell said he favored such legislation for the interim period until the report next June of the Commission on Government Security. Bureau of National Affairs Government Security and Loyalty Manual, News Letter, 4-5 (August 31, 1956).

⁵ 69 Stat. 595 (1955), 50 U.S.C.A. §781 (Supp., 1955).

amble to Executive Order 9835: "[I]t is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States. . . . [T]he presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes." Again, in the preamble of Executive Order 10450: "[T]he interests of the national security require that all persons privileged to be employed in . . . the Government shall be . . . of complete and unswerving loyalty to the United States." It is this notion that the government is entitled to the undivided loyalty of its servants which provides a good deal of the driving force for continuation of a "loyalty-security" program of undiminished scope.

The foregoing is by no means intended to suggest that this emotional attitude should therefore be allowed to take possession of the field without challenge. Rather it must be met head-on with an attempt to show that an investigative program such as that launched by Executive Order 9835 and continued by 10450 is no way to achieve its laudable objectives. Unfortunately the Report provides relatively little ammunition to support such a challenge. It does note that the security and loyalty programs have, so far as is known, failed to expose any cases of espionage, and also that the morale of the government service has suffered from the effects of the programs. On the other hand, the Report assumes, apparently without specific evidence, that the persons ousted or excluded from sensitive positions by the programs represented a danger that was "not negligible" (p. 122), and that the program is at least partly responsible for dissipating a previous rather widespread "public lack of confidence in the loyalty of Government employees" (p. 123). However, the Report makes no significant contribution toward determining the extent to which programs conceived and administered in the name of loyalty tend to make suspect people whose only suspicious conduct is participation in, or support of, organizations or movements genuinely or apparently devoted to some legitimate kind of economic, social or political reform with which they sympathize. It is probably true that the more obvious abuses of the loyalty-security programs which tended to equate any form of political or economic unorthodoxy with disloyalty to the government of the United States have been both vigorously exposed by other commentators and largely eliminated in terms of the actual results of individual proceedings.⁶ It is also true that the Committee emphasizes the point that the high proportion of clearances granted in cases which go to full hearing suggests that there should be more effective weeding out of the insubstantial cases, either by more realistic evaluation of the so-called derogatory information involving completely open and above-board participation in left-wing or Communist-front organizations, or by informal interviews to clear up misunderstandings or half-truths in the investigative reports. However, the Committee

⁶ Consult, for example, Bontecou, *The Federal Loyalty-Security Program 145-47* (1953); O'Brian, *National Security and Individual Freedom* (1955); Acheson, *A Democrat Looks at His Party* (1955); Biddle, *The Fear of Freedom* (1951).

does not use the information which was supplied to it through counsel in security cases to make the point, plainly implicit in a very high proportion of such cases, that the indicia generally regarded by government security officers as making a prima facie showing either of disloyalty or of being a security risk have no substantial relevance to a sophisticated and mature administration of either loyalty or security standards.⁷ Yet if this assumption could be satisfactorily documented it would go a long way toward providing a convincing demonstration that there would be no significant decrease in the general loyalty of the federal service if the security program were limited to positions in which there was really a security factor involved.

Doubtless even if the foregoing picture could be established as holding true for the overwhelming majority of cases, one would still encounter the die-hard position that the whole machinery is justified if it excludes from any form of government service the merest handful of genuinely subversive or disloyal individuals. Insofar as the attitude can be countered by rational argument, it requires consideration of the standards of exclusion from government service which would still be applicable to all government positions. In this connection the Report points out that irrespective of the security program, federal employment is legally barred to Communists and persons who belong to any organization which advocates overthrow of our government by unlawful means; that the Internal Security Act of 1950⁸ bars from government service and from any defense facility members of Communist-action or Communist-front organizations; and finally that the general suitability requirements of the Civil Service Commission would continue to apply to the classified service. In response the objection might be made that these statutory prohibitions apply only to present membership and so might easily be evaded by severing membership upon entering government service. This objection is unrealistic because it is extremely unlikely that anyone disclosing past membership in one of the prescribed organizations would be accepted for federal employment without a convincing demonstration that the severance was genuine. On the other hand, failure to disclose past membership in response to appropriate inquiry would be grounds for dismissal under the provisions of the civil service regulations.⁹

A more serious ground for concern is that the procedural rights of the employee might be substantially less under ordinary civil service procedures than they would be under the security program, particularly if the employee did not come under the Veterans' Preference Act.¹⁰ In a sense the question would be whether a more specific delineation of the grounds for dismissal—assuming of

⁷ This point is made most effectively by Alex Elson, on the basis of his own experience in handling security cases, in *People, Government and Security*, 51 N.W. L. Rev. 83, 87-88 (1956).

⁸ 64 Stat. 987, 992 (1950), 50 U.S.C.A. §§781, 784 (1951).

⁹ 5 Code Fed. Regs. §§2.106-2.107 (Supp., 1956) (referring to "intentional false statements or deception or fraud in examination or appointment").

¹⁰ 58 Stat. 390 (1944), 5 U.S.C.A. §863 (1950).

course that "reasonable doubt as to the loyalty of the person involved to the Government of the United States" were eliminated as one of those grounds—would more than balance the loss of certain procedural rights, particularly the right to oral hearing given by the security program to permanent employees. From the point of view of the general morale of the federal service, the elimination of the threat of loyalty or security proceedings as to the bulk of employees might make the exchange worthwhile. However, it should be noted that there is really no need to be confronted with this Hobson's choice. The civil service regulations might well be revised to assure a hearing, at least as full as that ever accorded under the loyalty or security programs, whenever a disputed question of fact such as secret membership in the Communist Party, or any other deception or fraud, rather than inefficiency or neglect of duty, is the asserted ground for dismissal.

Closely related to the recommendation for limiting the program to sensitive positions is the administrative machinery recommended by the Report for implementing the program. It is suggested that there be created in the Executive Office of the President, the Office of the Director of Personnel and Information Security, with general responsibility both for the personnel security program and for the classification of information which is to be kept secret in the interests of national security.¹¹ The theoretical justification for this union in one office of what might seem at first glance rather disparate functions is that "classification of information and personnel security are both designed to prevent espionage and the disclosure of secret information" (p. 148). The more practical justifications offered are that "[t]he application of the Industrial Security Program of the Department of Defense and of the Atomic Energy Commission's program for employees of its contractors is dependent entirely on access to information that is classified"; while "[a]s to Federal employees the access to classified information is a major reason for these programs and their application" (p. 140). The apparent concern is that the proposed limitation of the personnel security program to sensitive positions, defined in part as those positions requiring access to secret or top-secret information, might be largely vitiated by an over-secretive program for classification of information.¹² Al-

¹¹ So far as the actual control of the personnel security program to be exercised by the director is concerned, the Report seems to recommend a compromise between the unified administration established under Executive Order 9835 and the diverse administration permitted under Executive Order 10450. Unlike the Loyalty Review Board under 9835, the director would not have the ultimate power of disposition of individual cases but would have considerable control over procedures. It seems doubtful that such general supervision would be sufficient to achieve the kind of uniformity in substantive results which the Committee itself regards as desirable. A greater contribution toward such uniformity would be apt to come from the Central Screening Board which the Committee recommends should be established in the Civil Service Commission. In view of the importance which the Committee attaches to the operations of this Board a more appropriate place for it would be in the Office of the Director.

¹² Another subordinate issue regarding the relations between personnel security and classification is presented by the suggestion that, apart from policy-making functions, sensitivity

though this is certainly a legitimate and reasonable concern, the appropriateness of the remedy suggested is not quite so obvious as the Report assumes. Aside from the fact that the skill and experience required for the two facets of the job seem quite distinct, there is also the possibility that in actual practice combination of the two functions in a single office might increase rather than decrease the tendency to overclassification. The actual result would depend, of course, upon the personal attitude of the director and the pressures to which he was subject. Indeed there may be grounds for skepticism as to the significant effect which any outside office might have upon departmental policies with respect to classification.

So much for the Bar Association Committee's report insofar as it would limit the scope of the security program to sensitive positions. What about the more specific recommendations with respect to the application of the program within that area? First, there is the problem of the formulation of the substantive standard to be applied. We have progressed from "reasonable grounds . . . for belief that the person involved is disloyal to the Government of the United States" through "reasonable doubt as to the loyalty of the person involved to the Government of the United States" and finally to "clearly consistent with the interests of the national security."¹³ There is some evidence, partly from the motivation behind these changes and partly from the variations in result in reconsideration of substantially the same cases, that these changes in formulation have accounted for a measure of greater sternness in application of the programs. The Report does not attempt to probe this question. It does, however suggest another formulation, namely:

The personnel security standard shall be whether or not in the interest of the United States the employment or retention in employment of the individual is advisable. In applying this standard a balanced judgment shall be reached after giving due weight to all the evidence, both derogatory and favorable, to the nature of the position, and to the value of the individual to the public service [p. 149].

According to the Report's explanation, this suggested standard, like the present one embodied in Executive Order 10450, is designed both to give greater protection to the government and to cast less reflection on the individual than the loyalty standard of Executive Order 9835. It also attempts to go further than

be defined as access to secret and top-secret, rather than to confidential information. The principal argument offered in support of this qualification is that it is already accepted for all practical purposes in administration of the industrial security program, since employees with access only to confidential information may be cleared by the employer himself, without governmental investigation. It is true that the employer's investigation must conform to certain governmental standards, but it also appears that these are no more exacting, and perhaps less so, than those applicable to investigation of federal employees irrespective of the security program.

¹³ The quoted standards are from Exec. Order No. 9835, 12 Fed. Reg. 1,938 (1947); Exec. Order No. 10241, 16 Fed. Reg. 3,690 (1951); and Exec. Order No. 10450, 18 Fed. Reg. 2,489 (1953), respectively.

10450 in explicitly authorizing the deciding officials to weigh the value of the particular employee's services, his affirmative contribution to security, against the amount of risk suggested by the derogatory information. Finally the Report explains that the proposed standard attempts to get away from any artificial notions of burden of proof implied by the present standard of "clearly consistent" and that it would be in accord with the new regulations of the Atomic Energy Commission which provide that "[t]he decision as to security clearance is a comprehensive, common sense judgment" (p. 151). It may be recalled that Mr. Curtis, in his critique of the Oppenheimer case, blamed the result in large part upon the "worship of a system which stultifies our good judgment by subjecting it to the artificial presumption of a doubt."¹⁴ Insofar as the proposed standard would relieve us of this stultifying presumption, it seems eminently desirable. Not so clear is the desirability of a standard couched simply in terms of whether the employment of the individual is advisable in the interests of the United States. The Report itself emphasizes that the investigatory and hearing procedures of the security program should be concerned only with matters relating to the employee's "security suitability." It is reasonably clear, for example, that the question of the particular employee's competence, or even unique competence for the particular job, would not be within the province of a security hearing board. Then how could such a board make an over-all common sense judgment with respect to the advisability of the individual's employment in the interest of the United States? Of course, the ultimate employing authority has to make such a judgment, taking into account the needs of the particular program, the potential contribution of the particular individual concerned, and the amount of risk involved arising from any derogatory information regarding security suitability. But since the screening boards and the hearing boards will not be in any position to make such a judgment, they should not be called upon to apply a standard which implies it. This suggests that if there is to be a security program concerned entirely with factors relating to security, the standard of judgment should relate only to such factors, leaving the employing agency free to override a judgment of disqualification on security grounds if the affirmative necessities of government require it.

In terms of procedure alone, the most controversial aspect of the loyalty-security programs has concerned the confrontation of adverse witnesses. The Report struggles earnestly with this question and comes up, in effect, with no substantial change from the most advanced stages of the present program. The Report urges that every effort should be made to produce all adverse witnesses for confrontation by the employee. It also suggests machinery designed to make this proposal something more than a pious hope (as it is likely to be in many cases under the present program): namely, that the government be given subpoena powers for the purpose of compelling attendance of witnesses at security hearings and that funds be provided for defraying the expenses of such

¹⁴ Curtis, *The Oppenheimer Case* 276 (1955).

witnesses. However, it also recognizes the authority of the investigative agencies to withhold the identity of confidential informants, whose information is considered by screening and hearing boards, provided that the head of the department or agency which obtained such information certifies that the identification or presence of such an informant would be detrimental to the interests of national security. With respect to other witnesses it is suggested that the hearing board should determine whether they should be produced for cross-examination, or whether they should be interrogated by the board without the employee being present or whether affidavits should be accepted without any appearance. Under the procedures outlined it seems likely that there will be sufficient confrontation of witnesses except in the case of the "certified confidential" informant. It also seems likely that the investigative agencies will continue to protect the confidentiality of their informants as a matter of course, making it impossible for even the hearing boards to subject their reliability to any searching examination. This is all the more disturbing because recent events involving the discrediting of government witnesses in Communist cases¹⁵ suggest that the government's informants are not always completely reliable, and that at least some of the confidential informants referred to in security proceedings would be apt to be discredited if subjected to searching outside examination. It is also difficult to understand why they could not at least be subjected to examination by members of the hearing or screening boards—presumably themselves highly trustworthy individuals—who by consultation with the employee and his counsel could be armed with the kind of questions which might otherwise be asked on cross-examination. The Committee justifies its position in this matter with the following rationale:

The Communists would gladly sacrifice some of their own number to unmask undercover agents of the Federal Bureau of Investigation; . . . if we were to insist upon confrontation to the injury of counter-espionage, a personnel security system much broader in scope and much more stringent and more difficult of application would almost surely be necessary [pp. 177-78].

The Committee's conclusion with respect to confrontation by the employee himself may indeed be justified by such considerations, particularly if the security program is limited, as proposed, to really sensitive positions. Nevertheless, there is still room for a more penetrating investigation of the value of the so-called confidential informant to the serious counter-espionage work of the investigative agencies.

Another baffling and somewhat unsatisfactory part of the Report is that dealing with applicants and probationary employees. This is unfortunate because in one sense this is the area of the greatest practical significance so far as the immediate future is concerned; most present employees who might be

¹⁵ E.g., *Communist Party of U.S.A. v. Subversive Activities Control Board*, 351 U.S. 115 (1956); *Mesarosh v. United States*, 352 U.S. 808 (1956). Compare Garrison, *Some Observations on the Loyalty Security Program*, 23 U. of Chi. L. Rev. 1, 10 n. 15 (1955).

seriously questioned under the security program have already been through at least one proceeding. The recommendation is that:

So far as is consistent with the interests of national security, an applicant for a position covered by the programs who is denied employment should, upon request . . . be furnished with a statement of all adverse information concerning him . . . or a statement that there is no such adverse information [p. 185].

The applicant is then to have an opportunity to file an affidavit in reply, which is to be part of the security file. An applicant for, or a probationary employee in, a sensitive position is also to be afforded an opportunity to explain adverse information in an informal interview in any case where the general counsel of the agency recommends that an interview be given because of the importance of the particular person's employment to the agency. The Report does not undertake to justify the more limited rights of applicants and probationary employees, as compared with permanent employees, on the grounds advanced by some that federal employment is a privilege, not a right,¹⁶ but rather on the more practical grounds that "there would be a danger to effective administration if all applicants for positions were afforded the full procedural protections of the security program" (p. 187). The particular concern expressed is that:

Many persons could avail themselves of these procedures when prospects for employment were almost nonexistent, or only for the purpose of clearing their records with no intention of pressing the application for employment after clearance [p. 187].

It is difficult to see why either of these considerations would be applicable to a probationary employee who is already on the job and presumably as anxious to remain as any other government employee. As for applicants, it would seem that once the employing agency certifies that it seriously is interested in hiring the person, it is clear that the prospects of employment are far from "almost nonexistent." There is still the possibility that the applicant is only pretending to want the job in order to get a security clearance but this seems to be a highly unrealistic concern in view of risks of subjecting oneself to a security check in the first place, and the embarrassment of withdrawing from the field after clearance has been obtained. Furthermore, as a pragmatic test, it appeared at the hearings of the Humphrey Committee, that several agencies of the government do accord substantially the same hearing rights to applicants and probationary employees as they do to permanent employees without any untoward results.¹⁷ Consequently, it seems the Committee was unduly impressed by the fear—apparently expressed by some government officials—that such a system

¹⁶ For example consult the testimony of Mr. Phillip Young in Hearings before the Subcommittee on Reorganization of the Committee on Government Operations on S. J. Res. 21, 84th Cong. 1st Sess., 535-36 (1955).

¹⁷ The Air Force representative testified that probationary employees were given hearings as a matter of course, and applicants were in unusual circumstances. Hearings, *op. cit. supra* note 16, at 233. The Atomic Energy Commission representative testified that hearings were given as a matter of course to applicants as well as to all employees. *Ibid.*, at 281.

would prove impracticable. It is true that the Committee qualifies its recommendation in this regard by suggesting that the Director of Personnel and Information "should study this problem and the administrative difficulties involved to determine whether additional protection to applicants should be instituted in other areas" (p. 188). Nevertheless, the comparative importance of the security program to new employees who have not yet been cleared, and its consequent significance in determining the attractiveness of federal service for the foreseeable future, makes it particularly unfortunate that the examination of the Committee into this problem was not more penetrating and its recommendations more incisive.

Of course, the remarkable thing is not that this Report has a few fuzzy edges and on some points leaves considerable to be desired, but rather that so representative a group of practicing lawyers was able to agree on such a forthright and comprehensive program of revision. It is devoutly to be hoped that both the bi-partisan Commission on Government Security and ultimately Congress and the Administration will take seriously the fundamental recommendations of the Committee.

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The Law of Bankers' Commercial Credits. By H. C. Gutteridge and Maurice Megrah. London: Europa Publications, 1955. Pp. xiii, 214. 25/-.

Considering the importance of the documentary credit in the structure of British overseas trade,¹ it is surprising to find how little this topic has engaged the attention of English legal writers. The reappearance of Professor Gutteridge's pioneering work of the 1930's² is, therefore, a very welcome addition to the meager body of literature which at present exists on this subject.³ Originally intended as a collaborative effort on the part of Professor Gutteridge and Mr. Maurice Megrah, the Secretary of the British Institute of Bankers, the new edition now stands as the sole work of the latter, due to the unfortunate death of its first author in 1953.

¹ One banker estimates that as of 1952 one-half of the aggregate value of visible world trade was conducted in sterling. Thackstone, *The Methods of Financing Foreign Trade: the Part Played by the Banks, Banking and Foreign Trade*, Lectures delivered at the Fifth International Banking Summer School, Oxford, 125, 132 (1952). Consult also, Witheridge, *The Finance of Foreign Trade: Lectures delivered before the Institute of Bankers* 36 (1950).

² Gutteridge, *The Law of Bankers' Commercial Credits* (1st ed., 1932).

³ There is, however, a considerable body of periodical literature on this subject in the United States, in addition to Finkelstein's major work: *Legal Aspects of Commercial Letters of Credit* (1930). In England, the most fruitful discussions are to be found in the various issues of the *Banker's Magazine*, the *Journal of the Institute of Bankers*, and in Davis, *The Law Relating to Commercial Letters of Credit* (2d ed., 1953). Probably the best treatise on the subject, however, is the American work of Ward and Harfield, *Bank Credits and Acceptances* (3d ed., 1948).