Vanderbilt Law Review

Volume 10
Issue 3 *Issue 3 - April 1957*

Article 4

4-1957

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Recommended Citation
Harold W. Chase, The Federal Loyalty -- Security Program, 10 *Vanderbilt Law Review* 553 (1957)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol10/iss3/4

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COMMENT

THE FEDERAL LOYALTY-SECURITY PROGRAM†

BY HAROLD W. CHASE*

In the long run, the *Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York* will undoubtedly have a profound effect on the national government's complex of programs designed to ferret "security risks" out of government, industrial and maritime jobs. Indeed, the short-run impact has been impressive. Note the following sequence of events:

1. *June 11, 1956*—The Supreme Court in a 6-3 decision ruled that under present law persons who held non-sensitive and non-policy-making posts in the national government could not be removed summarily as "security risks."[1] Patently, this decision narrowed sharply the scope of this security program.
2. *July 6, 1956*—Attorney General Brownell and Chairman of the Civil Service Commission, Philip Young, endorsed a bill sponsored by Representative Francis E. Walter which would have extended the security program to cover all governmental workers and thus override the Supreme Court's decision. Although the Attorney General was a little reserved in his endorsement, indicating that it was really up to Congress to decided and that any changes should be of an interim nature only pending the outcome of the Wright Commission's report (The Wright Commission is the special commission set up by Congress to study the security programs, and is due to make its report to Congress in June, 1957), he did write, "I favor the enactment of HR 11721 [the Walter Bill]."[2] Young was less coy; he called for "speedy enactment" because the Supreme Court's decision "limits drastically the operation of the present security program."[3]
3. *July 9, 1956*—The Report of the Special Committee of the New York City Bar was featured in the nation's press right after its

† Being a Review of REPORT ON THE FEDERAL LOYALTY-SECURITY PROGRAM. By The Special Committee of the Association of the Bar of the City of New York. New York: Dodd, Mead & Co., 1956. Pp. xxvi, 301. $5.00.

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1. Cole v. Young, 351 U.S. 536 (1956).
2. Washington Post and Times Herald, July 7, 1956, p. 1; 12 CONG. Q. ALMANAC 581 (1956).
3. *Ibid.*

release. As will be indicated below the report constituted a real indictment of the program.[4]

4. *November 25, 1956*—The following United Press dispatch appeared in *The New York Times:*

> The Administration will leave it to the new Congress to patch up its battered loyalty-security program, a high Government official predicted today.
>
> Meanwhile, he said, the Justice Department is drawing up for White House approval a proposed Presidential order that will merely extend the program within the limits imposed by the Supreme Court last June. . . .
>
> This official also said the Justice Department would prescribe revised rules to avoid long processing delays for those accused of being security risks.
>
> The Justice Department hoped to have the new regulations in force before the elections Nov. 6. But agencies questioned on proposed revisions had so many ideas for improvements the Department could not digest them quickly.[5]

There can be little doubt that the report of the special committee stayed the hand of the Administration and Congress. For one thing, the report was widely heralded in the nation's leading newspapers. *The New York Times* in its lead editorial said that the Bar Association deserves "thanks for undertaking this sorely needed survey and carrying it through so well" and that "the recommendations should serve as a rallying point for all who sincerely wish to see the Federal employee security program meet the demands of both security and liberty."[6] *The New York Herald Tribune* called it a "judicious and well balanced survey of a critical subject," a "substantial contribution toward the great goal" of both security and liberty.[7] *The Washington Post and Times Herald* implored "all members of Congress" to read "this clear and compelling report before they impose new and needless security regulations."[8] Also, the report itself was well received in official Washington. As Anthony Lewis of *The New York Times* put it, "In language and tone it [the report] was the kind of careful, unemotional document that wins the respect of Washington officials."[9] And Roscoe Drummond, *New York Herald Tribune* Washington staffer, who has been close to the leaders of the Eisenhower Administration assured his readers that "The New York City Bar Association's carefully studied proposals for improving and correcting the unfairness of the Federal employee security program will get a sympathetic response from President Eisenhower. The President is known to favor

4. N.Y. Times, July 9, 1956, p. 1.
5. N.Y. Times, Nov. 25, 1956, p. 72.
6. N.Y. Times, July 9, 1956, p. 22.
7. N.Y. Herald Tribune, July 10, 1956, p. 18.
8. Washington Post and Times Herald, July 9, 1956, p. 14.
9. N.Y. Times, July 15, 1956, p. E7.

nearly all the changes which the Bar Association committee proposes."[10]

Why did the report have and why will it continue to have an impact on the program? For one thing, it is a good, solid report. Despite this fact, there is little in it that has not been said or recommended before and sometimes better. In short, the impact is a result not so much of *what* is said as *who* says it. The report is the work of a committee and staff of outstanding lawyers whose views on problems essentially legal in nature could not and cannot be ignored by lawmakers and administrators. Although the report was made under the auspices of the New York City Bar on a generous grant from the Fund for the Republic, the President of the Association took pains to reach outside of the New York Bar for members of the Special Committee. Of the nine members, five were New Yorkers including the Chairman, Dudley B. Bonsal; the other four were Richard Bentley of the Chicago Bar and one of its past presidents, Frederick M. Bradley of the District of Columbia, former president of the Louisiana Bar Association, Monte M. Lemann, and John O'Melveny of Los Angeles. The four-member staff included Elliott E. Cheatham, Hughes Professor of Law at Columbia University, and Professor Jerre S. Williams of the University of Texas School of Law. Further, the Committee and staff called upon over 150 conferees composing a very distinguished group of citizens representing virtually every shade of opinion on the subject and including a generous number of practitioners like Attorney General Brownell and Scott McLeod of the State Department.

At the outset of the report, the Committee rather matter-of-factly explains that it found the "civilian personnel security" programs (the Federal civilian employee-loyalty program, the Industrial Security Program of the Department of Defense, the Atomic Energy Commission Program, the Port Security Program, and the International Organizations Employees Program) wanting. ". . . the Committee has found weaknesses in four aspects of the programs:

1. There is a lack of coordination and supervision of the various personnel security programs.
2. The scope of the personnel security programs is too broad in that positions are covered which have no substantial relationship to national security.
3. The standards and criteria do not sufficiently recognize the variety of elements to be considered, including the positive contribution which an employee may make to national security, and they do not readily permit a common sense judgment on the whole record.
4. The security procedures fail in various ways to protect as they could the interests of the government and of the employees. (p. 6).

10. N.Y. Herald Tribune, July 9, 1956, p. 13.

Reflect a moment on the full measure of these "weaknesses" as the Committee lists them. If these weaknesses are the wrongs of the programs then what is left to be right?

Like the man in the old gag who advises the owner of the rattle-trap automobile to jack it up and put a new car under it, the Committee in effect advises the Government to junk its old programs and replace them with a streamlined 1957 model. First, the Committee points out that "At the present time there are six officials or bodies with some measure of responsibility in these matters but without their respective responsibilities being clearly established." (p. 139). It would have an Office of Personnel and Information Security established in the Executive Office of the President whose function would be "to conduct a continuous review and supervision over" the personnel security programs and the classification of information. There are some students of government who, appalled by the constant proliferation of government agencies, would probably prefer to see an existing agency such as the Civil Service Commission take on the task and responsibility. But in view of the program's importance, the need for coordination and the Committee's difficulties in gaining agency cooperation in the past on these matters, it would seem preferable to dramatize the urgency for cooperation and coordination by establishing a new agency at the level of the Executive Office of the President.

Regrettably, the Committee chooses to condemn the breadth of the program only on the grounds of expediency: "We have to choose between a more effective security system in critical posts or a less effective one in all." Yet there is a principle involved, too. In a democratic nation there is no place for a continuous and systematic scrutiny of its citizens by investigative agencies except for compelling reasons and in exceptional cases. In any case, to narrow the scope of the programs the Committee recommends that clearance should be required for only sensitive positions (*i.e.*, where occupant has access to secret or top-secret materials or has "a policy-making function which bears a substantial relation to national security.")

To remedy the shortcomings in standards and criteria, the Committee suggests that the standard for employment or retention be:

> 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).

The Committee explains that this standard would be more explicit as to the factors to be weighed than the present standard and would allow the decision to rest more on a "common sense judgment" than the

present standard which requires that retention be "clearly consistent" with the interests of national security. The Committee should have added that this would be the first time a "standard" of a security program would require that "the value of the individual to the public service" be taken into consideration. This adds a new and desirable dimension to the standard; it accentuates the positive as well as the negative side of the employee's record.

To meet the difficulties engendered by using a person's associations to determine his suitability, the Committee recommends that:

> A person's associations with organizations or individuals may properly be considered in determining his security suitability. But a conclusion against his security suitability on the ground of such associations should not be reached without adequate basis for determining that he shares, is susceptible to, or is influenced by, the actions or views of such organizations or individuals. (p. 152).

Further, it recommends that the Attorney General's list be abolished or revised significantly so that among other things organizations ten-years defunct would not be listed, organizations would be given notice and an *opportunity to be heard in conformity with the requirements of due process of law.* The difficulty that some organizations have had to date in obtaining a real hearing such as the kind prescribed in the Administrative Procedures Act is beyond understanding. Are there two kinds of "fair procedures"—one for "good" people, another for "bad"?

One of the most interesting proposals of the Committee is that the new Director establish training courses for security personnel to acquaint them with the nature and techniques of Communism. Had such a course been in existence years ago it undoubtedly would have helped those who were naive about Communism and Communists. Although it is hard to believe that such naivete exists today, such training might be helpful in days to come when the twistings and turnings of the Communist line might once again make it possible for Communists to deceive the unwary.

The Committee calls for extensive revisions in the procedures currently employed in the various security programs. First, it incorporates a kind of grand jury procedure in its suggested program. It points out that "The filing of security charges has such a tremendous impact upon persons directly and indirectly involved, and constitutes such significant waste of manpower through suspension of persons charged and involvement of government personnel in the administration of the procedures, that every effort should be made to file charges only when a substantial security issue is presented." (p. 160). The Committee would establish a central screening board in the Civil Service Commission whose function it would be to determine whether or not security

charges should be filed against an alleged risk; it also suggests the procedures that the screening board should use.

Second, it urges that pending final disposition of charges, the accused be transferred to a nonsensitive post where feasible. Where it is not feasible, the Committee suggests that the suspended employee continue to be paid.

Third, the Committee advocates important changes in the composition of the hearing boards and the hearing procedures. Instead of having hearing boards composed exclusively of government employees, it would have the three-member panels constituted in this fashion: one member an employee of the employing agency, one member a lawyer, and one member from outside the government service. As to hearing procedures, the Committee feels that screening and hearing boards should have the power to subpoena witnesses and that "It should be the policy of the government to permit employees to cross-examine adverse witnesses . . . unless the disclosure of the identity of the witness or requiring him to submit to cross-examination would be injurious to national security." (p. 174). Even in cases where it is deemed dangerous to security to produce the informant in "open" session, the Committee urges that the informant appear before the board without the employee being present. The Committee is obviously unhappy about the many cases in the past where the accused could not cross-examine his accuser even where there was no real reason for withholding the identity of the informant. They feel that giving the boards subpoena power will have a healthy effect on producing such informers in hearings. Obviously these proposals would afford an accused more protection from baseless charges and mistakes in identity than current procedures.

To mitigate the penalty of paying lawyers' fees and to encourage the innocent to defend themselves, the Committee suggests that "cleared employees" should be entitled to reimbursement for lawyers' fees. Its members also urge their legal brethren to ensure "adequate representation of employees in security proceedings" through lawyer reference plans in the bar associations.

Finally, the Committee would extend to applicants for positions and probationary employees the opportunity to rebut adverse security information but would not provide them the opportunity to a full hearing.

These recommendations, all of them, make good sense. All of them are worthy of adoption. The only fault this reviewer can find with them is that in three important respects they do not go far enough. First, it is time to stop this arrant, un-American nonsense of not permitting the accused to face his accuser. During the days when the hysteria about Communism was at its peak, many of us, including this reviewer, felt that there were some cases where it was imperative to

conserve the anonymity of the accuser.[11] It appeared then that there was no alternative. Actually there is. In cases where people are brought to court for alleged crimes, the government has the option always of either producing the accusers or dropping the case. In short, if it is important enough to oust a particular risk then his accuser should be produced in the hearing. If it is important that the informant remain anonymous then no official action should be taken. The comment of Justice Jackson in *United States ex rel. Knauff v. Shaughnessy* is appropriate:

> Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is nothing compared to the menace of free institions inherent in procedures of this pattern.[12]

The decision of the United States Court of Appeals, Ninth Circuit, in a case involving the failure of the United States Coast Guard to confront some merchant seamen with their accusers before ousting them from their jobs as security risks merits quoting at length:

> It may be assumed that this determination will remove from the investigative agencies, to some degree, a certain kind of information and that, in the future, some persons will be deterred from carrying some of these tales to the investigating authorities. It is unbelievable that the result will prevent able officials from procuring proof any more than those officials are now helpless to procure proof for criminal prosecutions. But surely it is better that these agencies suffer some handicap than that the citizens of a freedom loving country shall be denied that which has always been considered their birthright. Indeed, it may well be that in the long run nothing but beneficial results will come from a lessening of such talebearing. It is a matter of public record that the somewhat comparable security risk program directed at Government employees has been used to victimize perfectly innocent men. The objective of perpetuating a doubtful system of secret informers likely to bear upon the innocent as well as upon the guilty and carrying so high a degree of unfairness to the merchant seaman involved cannot justify an abandonment here of the ancient standards of due process.
>
> It should be noted that the rights of the individual here considered are also fundamental in the sense that if they are limited, qualified or non-existent in the case of merchant seamen they can be modified or limited or held non-existent as applied to all other persons. It cannot be said that in view of the large problem of protecting the national security against sabotage and other acts of subversion we can sacrifice and disregard the individual interest of these merchant seamen because they are comparatively few in number. It is not a simple case of sacrificing the interests of a few to the welfare of the many. In weighing the considerations of which we are mindful here, we must recognize that if these regulations may be sustained, similar regulations may be made effective in respect to other

11. CHASE, SECURITY AND LIBERTY 53. (1955).
12. 338 U.S. 551 (1950).

> groups as to whom Congress may next choose to express its legislative fears.[13]

To allow a procedure whereby a person may be punished (whether it constitutes punishment in the legal sense or not) without having an opportunity to defend himself is a travesty on justice. And we know pragmatically that despite protestations to the contrary and the best intentions in the world, the tendency in these security programs has been not to produce the accusers even where there is no real reason for not doing so.

A second deficiency of the report is the failure to deal with the problems which a dismissed employee faces in trying to obtain employment after dismissal. Under present practice, a prospective employer writing an agency to find out why an employee has been dismissed will be told that the employee was dismissed for failure to meet the standards of the present security program. Obviously, in this day and age, this is the kiss-of-death as far as job-procuring goes. And remember these people are guilty of nothing more than being *suspected* of possible future action inimical to the security of the United States. There must be a better way of handling this situation. Perhaps, an employee should be permitted to resign *pro forma* even after an adverse decision before a hearing board. This would allow him to indicate to a prospective employer that he left the agency of his own accord and the agency could when inquiry is made write that he resigned without prejudice.

Third, new applicants and probationary employees should be afforded an opportunity to a real hearing where they are denied jobs on security grounds. Read this lame excuse of the Committee for denying them such a hearing:

> On the other hand, there would be a danger to effective administration if all applicants for positions were afforded the full procedural protections of the security program. 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. Thus, it is desirable to avoid adding to the burdens of government by making full security procedures available to all applicants. (p. 187).

In sum and substance this is a very fine report, my own criticisms notwithstanding. In addition to the portions of the report discussed in detail above there are excellent chapters on the issues involved, the Communist threat, the operation of the current programs and an excellent appendix which includes statistics on the programs, important statutes, orders and regulations. This report should be studied by all lawyers and others interested in conserving our great Anglo-Saxon tradition of freedom and justice.

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13. Parker v. Lester, 227 F.2d 708, 720-21 (1955). It is significant that the Government chose not to take this case to the Supreme Court. See N.Y. Times, March 25, 1956, p. 1.