

BOOK REVIEWS

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 & Company. Pp. xxvi, 301. \$5.00.

Because of the importance of the subject matter and the controversy aroused by the publication of the Special Committee's report, two distinguished members of the bar have been invited to evaluate the report from their respective points of view.

I

The Special Committee of the New York City Bar Association has not only provided the nation with a valuable blueprint for improving the various employee security programs, but it has also taken a much-needed step toward restoring faith in the legal profession as defender of civil liberties. For too long most lawyers and their associations have stood aside and allowed a very few to carry the burden of defending both the principles embedded in the Bill of Rights and the individuals accused of Communist activities and associations. The New York City Bar Association, with the assistance of a grant from the Fund for the Republic, has once again raised the banner of the legal profession in defense of individual rights.

Had this been all, the Committee's report on the Federal Loyalty-Security Program would have been a significant contribution to "cold war" America. But this is not all. The report carefully weighs both the requirements of national security and the demands of individual freedom and dignity and sets forth conclusions and recommendations well balanced for the protection of both.

In a word, the conclusion of the Committee is that the Federal Loyalty-Security Program¹ should be restricted to sensitive positions and should be substantially revised to afford better protection to the individual in the restricted area of sensitive positions. This conclusion of the distinguished lawyers of the New York City Bar Association Committee is none the less significant because it has long been the view of most liberal organizations. At least in the field of civil liberties it is often more important *who* says something than *what* he says. The fact that so distinguished a group of lawyers—yes, corporation lawyers—has reached this conclusion may well

1. The Committee uses the term Federal Loyalty-Security Program to include the Personnel Security Program for Federal Employees, the Atomic Energy Commission Program, the Department of Defense Industrial Security Program, the Port Security Program and the International Organizations Employees Loyalty Program.

bring about reforms that those who advocated the same conclusion earlier could never have hoped to accomplish by themselves.

Indeed, the effect of the Committee's proposal to limit the Federal Loyalty-Security Program to sensitive positions² is already apparent. After the recent decision of the Supreme Court in *Cole v. Young*,³ holding that existing federal legislation did not authorize the security screening of employees in non-sensitive positions, there was an immediate demand for new legislation to provide for the screening of all federal employees. Not only has no such legislation been enacted, but both political parties are now on record for limiting the federal employees security program to sensitive positions. The Democratic candidate for President in the recent campaign expressly endorsed the changes proposed by the New York City Bar Association Committee in an address at Walnut Hill, Virginia in September, and Assistant Attorney General George Cochran Doub told the American Bar Association Criminal Law Section at Dallas in August that the Administration was preparing a new executive order limiting the federal employees security program to sensitive positions.

The Committee appears to have considered the possibility that no security program, even for sensitive positions, was required. The Committee pointed out that it had been unable to ascertain that any case of espionage had been encountered by the program (p. 122) and seemed to have doubts that the Soviet Union would any longer utilize as espionage agents persons who could quite easily be detected from their present or previous Communist memberships or associations (pp. 36, 153). Nevertheless, the Committee seems quite rightly to have concluded that some program for screening those persons who have access to secret and top-secret information may act as an obstruction to Soviet espionage and, recognizing the importance of national security in this period of the cold war, doubts must be resolved in favor of a limited screening program.

Many of the Committee's suggestions for improving the various security programs for sensitive positions are in the direction long advocated by practitioners and students in this field.

The Committee suggests a new standard for determining who is a security risk (p. 149), one providing simply that the question "shall be whether or not in the interest of the United States the employment or retention in employment of the individual is advisable" with "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." This

2. The Committee defines "sensitive positions" as those whose occupants would have access to secret or top-secret security information and those whose occupants have a policy-making function related to national security. The Committee's recommendation would result in the abolition of the Post Security Program and the International Organizations Employees Loyalty Program and the drastic limitation of the federal employees security program and the Defense Department's industrial security program. The Committee estimates that under its recommendation the number of persons covered by various loyalty and security programs would be reduced from about 6,000,000 to less than 1,500,000. (p. 146).

3. 351 U.S. 536 (1956).

common-sense standard would certainly be more appropriate than the present standard—that the employee's retention must be "clearly consistent" with the interests of the national security—which appears to put the burden of proof on the accused.

The Committee proposes a central screening board (p. 159) which would cut off inadequate or unwarranted charges before the hearing stage, thus saving many an employee the cost and worry of a hearing. One might raise the question whether it would not be well also to authorize such a screening board to decide whether there was even sufficient information against the employee to warrant a full field investigation which brings FBI and other agents to the neighborhood of the suspect, to his embarrassment and discomfiture.

The Committee proposes the protection of employees against whom formal charges have been lodged (p. 166) by continuing their pay during suspension and by transferring them whenever possible to non-sensitive positions pending hearing rather than suspending them. One might suggest here that consideration be given to allowing a charged employee a permanent transfer to a non-sensitive position if this is his preference.

The Committee proposes certain rights for applicants (p. 185) not now accorded them except by the Atomic Energy Commission. The Committee suggests that an applicant should, upon his request, be furnished with a statement of all adverse security information concerning him, with the right to file an affidavit denying or explaining this information. This would certainly seem a step in the right direction, but one would hope that applicants would ultimately receive the same procedural protections as those already employed. The Government is too large an employer and too badly needs qualified personnel to permit the barring of an employee on false allegations.

In two of its suggestions—concerning the Attorney General's list and the issue of confrontation—the Committee appears to have been divided and forced to come up with compromises. The Committee suggests either the radical modification or abolition of the Attorney General's list of subversive organizations. (p. 154). One receives the distinct impression that at least some members of the Committee favored the latter step of abolishing the list, with the Department of Justice instructed to furnish to the executive departments on request information in its possession on organizations whose nature was relevant to a particular security inquiry.

Probably the least satisfactory recommendation of the Committee is that related to the accused's right of confrontation by his accusers. (p. 174). The Committee suggests that the identity of regularly engaged undercover agents need not be disclosed even to the hearing board if the head of the investigating agency certifies that the identification of such an informant would be detrimental to the interests of national security. The identities of other informants are to be made known to the hearing board, which would then decide whether they should be called for cross-examination either by the hearing board in the absence of the accused or for actual

confrontation by the accused. One wonders why the second procedure should not be utilized for the first class of cases and why the witnesses in the second class of cases should not regularly be made available for cross-examination. One cannot believe that a hearing board could not be trusted with the examination of even an undercover agent. The existence of undercover agents and their various tricks of the trade were publicly disclosed in the Smith Act prosecutions and there would hardly seem to be adequate reason for refusing to allow the hearing board to examine such agents to find out whether an employee should be forever branded a security risk on their say-so. To ensure that such examinations of undercover agents would not be widely diffused among different boards, this authority might be given to a single board of distinguished personnel.

These and other recommendations of the Committee—centralization of the program, carefully trained security personnel, composition of hearing boards, furnishing of written findings of facts and conclusions to the charged employee, compensation of attorneys for employees—all evidence the high degree of concern which the Committee felt for the rights of the employee. This deep concern for the traditional rights of American citizens, coming at a time when they have been temporarily forgotten, may well have more lasting significance than the specific proposals made by the Committee. For the leadership of the bar will be sorely needed if we are to rebuild the framework of our individual rights in the wake of the flood of hate and fear through which we have so recently passed.

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II

This report constitutes a careful and exhaustive presentation of the federal security program, together with a number of recommendations for its improvement. Mr. Dudley B. Bonsal, of the New York law firm of Curtis Mallet-Prevost, Colt & Mosle, was chairman of the Committee. The Committee included such distinguished members of the bar as Henry J. Friendly, Harold M. Kennedy and Whitney North Seymour, of New York, and Monte M. Lemann of New Orleans. The eminent Professor Elliott E. Cheatham of Columbia Law School headed the staff. A grant from the Fund for the Republic provided the money for the project.

The staff conferred with over 150 people who have had experience with the program or expressed views about it, including government officials, lawyers who had represented government employees in security cases, experts in political science and constitutional law, and journalists. They are referred to in the report as "conferees." The report was ap-

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parently unanimous, although we can be sure that the "conferees" were not. Apart from praise for the energy and effort which have so obviously gone into the report and for its clarity and simplicity, comment must largely be an expression of the writer's own views of the program itself and of the recommendations of the Committee.

The principal recommendation of the Special Committee is a more elaborate procedure, so as to make a dismissal proceeding approximate a judicial trial.

My chief disagreement with both the loyalty-security program and the Special Committee relate to a common feature: the guilt concept. In my opinion the sole test of continued employment should be "suitability." No factor other than suitability was relevant until Executive Order 9835 introduced the concept of "loyalty." Obviously a disloyal employee is not a suitable employee; on the other hand an unsuitable employee is not necessarily a disloyal employee. But a finding of disloyalty involves a stigma, while a finding of unsuitability does not. My own solution would therefore be to remove the stigma and to return to pre-existing procedures. These were, the record indicates, fair and satisfactory to both Government and employee. My point is best understood in the light of the history of federal employee-removal policies and procedures.

The Constitution is silent on the subject of removal from federal employment. During the first forty years of government under the Constitution, removal procedures were entirely at the discretion of the appointing officer and, apart from a flurry during the Jefferson administration, attracted little attention. The subject came to the fore in the administration of President Jackson, the most ruthless of our presidents with respect to employee removals. Shortly after his inauguration, Jackson, adopting what has been called the "proscriptive policy" or "spoils policy," dismissed from one-sixth to one-fourth of all federal civil employees. Applied on the same scale today such a policy would involve dismissal of from 400,000 to 600,000 employees.

Although President Jackson has often been severely criticized for this policy, its constitutionality has never been challenged. Thus, the late Professor Alexander Johnston, conceding that President Jackson gave "at least an appearance of Caesarism," continued, "but it was a strictly constitutional Caesarism. The restraints of the written law were never violated."

And the policy has its defenders. In his work, *The Age of Jackson*, Professor Arthur M. Schlesinger, Jr., a leading spirit in the ADA, an organization frequently critical of the federal security program, justifies President Jackson's policy because, he says, it "contributed to the main objective of helping to restore faith in the government."

Although never subsequently used to such an extreme, the "proscriptive policy" remained a feature of government administration for many years. The Civil Service Act of 1883 to some extent regulated the engagement of federal employees, but not their dismissal. The first removal

protection for federal employees was afforded by an executive order issued by President McKinley on July 27, 1897. This order forbade removal "except for such cause as will promote the efficiency of the service." The removing officer was required to state his reasons in writing. The removing officer was further required to furnish the employee with a copy of the charges against him and to allow him a reasonable time for answering them in writing. The order was silent as to witnesses and hearings but the Civil Service Commission construed the order not to require them.

President McKinley's order received general public approval. The *New York Tribune*, for instance, was ecstatic, and the *New York Times* stated that President McKinley had "done the country a service and himself honor."

In 1912, at the behest of Senator LaFollette, Congress wrote the substance of President McKinley's order into statute law, the so-called "Lloyd-LaFollette Act." At the time Senator LaFollette had protested the Taft Administration's treatment of federal employees. Purporting to act as their champion, Senator LaFollette introduced his bill. The bill and the resulting statute made explicit the Civil Service Commission's construction of President McKinley's order by providing expressly: "No examination of witnesses nor any trial or hearing shall be required, except in the discretion of the officer making the removal." The bill passed both Houses of Congress without a dissenting vote and was approved by President Taft August 24, 1912. It is still the law in non-security cases. In 1948 the Lloyd-LaFollette Act was re-enacted, with amendments not material for purposes of this discussion, and approved by President Truman. The act, in its re-enacted form is now title 5, section 652, of the United States Code. The implementing civil service regulation is 5 C.F.R. § 9, especially § 9.102.

That Senator LaFollette proposed this measure at a time when he was aggressively crusading on behalf of federal employees against alleged unkindnesses by the current Administration would suggest that the procedure provided by President McKinley's order had worked satisfactorily from 1897 to 1912; and apparently it has worked satisfactorily ever since. I know of no agitation for its amendment or repeal.

In the light of what followed, the key words in the Executive Order of July 27, 1897 and of the Lloyd-LaFollette Act can be seen to be "promote the efficiency of the service." In other words, all that was required when an employee was removed was that his removal would "promote the efficiency of the service." It would promote the efficiency of the service to remove a traitor. It would also promote the efficiency of the service to remove an employee who wore such loud shirts that his fellow workers were distracted. Indeed, it would promote the efficiency of the service to remove an employee whose services were no longer needed for any reason. The Special Committee refers to the Lloyd-LaFollette Act procedure as relating to the "suitability" of the employee; that is, all that a dismissal decides under ordinary civil service procedures is that the em-

ployee is not "suitable" for further employment, and that word seems as good any other.

In the early post-war era it became apparent that the Soviet Union had developed the fifth column technique to a high degree and was engaged in a serious effort to infiltrate the government as well as the organizational life of the country generally; further, that the Soviet Union found its recruits for this infiltration in the Communist Party and in Communist fronts.

In this situation President Truman, on March 21, 1947, issued Executive Order 9835, the original loyalty order. This order provided for the systematic investigation of the "loyalty" of all federal employees. The standard for removal was that "reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." On April 28, 1951 President Truman, by Executive Order 10241, revised the standard so as to authorize removal whenever there appeared "a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

The respective agency heads were charged with the immediate administration of the program. The order, further, created a Loyalty Review Board in the Civil Service Commission. Employees were authorized to appeal from adverse rulings by the department heads to this Board. Also, the Board was given a certain supervision over the administration of their respective programs by the agency heads.

The Act of August 26, 1950 authorized the heads of specified agencies deemed especially sensitive (*viz.*, the Departments of State, Commerce, Justice, Defense, the Atomic Energy Commission) to dismiss employees who were "security risks." The purpose of this act was explained by its principal sponsor, the Department of Defense: Many employees not subject to removal because loyal and efficient, or at least not demonstrably disloyal or inefficient, were nevertheless not reliable from a security point of view because of evil habits, such as alcoholism and homosexuality.

President Eisenhower changed both the standard and the method of administration by Executive Order 10450, issued April 27, 1953. Under the terms of that order the employee was to be dismissed unless his "retention" was "clearly consistent with the interests of the national security." The Loyalty Review Board was abolished and full administration of the program left with the agency head with a single exception: the agency board to advise the agency head was to be recruited exclusively from other agencies.

This history of the federal employee removal procedures has been condensed to emphasize what I believe to be the salient feature of the loyalty-security program and the report of the Special Committee.

Federal employees, the public generally and such organizations as the American Civil Liberties Union have apparently always acquiesced in the sketchy procedures of 5 U.S.C. § 652. Writers whose devotion to liberty is unquestioned found no procedural vice in dismissals not based upon confrontation of witnesses and other features of judicial trials, although they might disagree with such dismissals as a matter of policy.

The Special Committee obviously believe that the employee will be better protected by the more judicial type procedures they recommend. I am most fearful that the result will be quasi-judicial findings of guilt after hearings at which the cards were stacked against the employee. Whatever the rules provide, officials simply are not going to keep an employee in whom they have lost confidence. If the only way to get rid of him is to find him guilty of something, they are likely to do so. But such a finding of guilt will be taken more seriously by the world at large than a dismissal for "unsuitability."

Another difficulty with the elaborate procedures recommended by the Special Committee is the delay that they will necessarily cause. In my opinion far more suffering was caused in loyalty cases by delay than by any other factor. In the particular cases that I happen to know of, the dismissed employees promptly got new jobs and were soon earning more than their government salaries—a great deal more in at least one instance; but they had been wretched while their cases were under consideration.

In support of the recommendations of the Special Committee it may be urged that so long as the Government makes guilt rather than suitability the test of employment, more elaborate procedures are necessary. This argument is not without force, but the Committee was making recommendations for improvement of the program. For the reasons stated, I believe that reversion to suitability as the test of employment would be the outstanding improvement.

The Special Committee recommends that the final decision be left to the agency head. With this recommendation I am entirely in accord. Under our system of organization of the executive branch it is the agency heads who have the responsibility of getting things done. Looking at employment as a means of accomplishing the employer's objectives, the test should be the confidence of the agency head—realizing that agency heads, being human, vary markedly in their judgments of men. It seems to me that in this recommendation the Special Committee recognizes that dismissal should rest on unsuitability and not on guilt.

The Special Committee further recommends the creation of an "Office of Director of Personnel and Information Security" for purposes of coordination—more or less corresponding to the old Loyalty Review Board. So long as the agency heads have principal authority, this coordination can be helpful. But uniformity can be carried too far, assuming again that the test is to be suitability and not guilt.

Another recommendation with which I heartily agree is training for security personnel. One difficulty with the loyalty-security program in its early days was that these personnel had little background on Communist activities and had difficulty in distinguishing Communists from Socialists and liberals. By the end of the Truman Administration they had been pretty well educated. The Eisenhower Administration transferred many of them to other work and got in a new and unsophisticated set who had to learn all over again.

The Special Committee touches on a point which to my mind is most important. Is the program well adapted to the present *modus operandi* of Soviet espionage? From 1923 to, say, 1946 the Soviet Union was recruiting domestic agents through the Communist party and Communist fronts. Hence in 1947 and succeeding years it was worthwhile to look into the membership of federal employees in these organizations. But Communism no longer attracts our youthful intellectuals. I wonder whether the effort expended in searching out the associations of those joining the federal service today is justified. And is it not possible that there is less energy left for the detection of such techniques as Soviet espionage is now using?

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