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Industrial Security Clearance and Individual Freedom

Douglas P. Beighle

George C. Dalthorp

Ward A. Shanahan

NOTES

INDUSTRIAL SECURITY CLEARANCE AND INDIVIDUAL FREEDOM*

Private firms under government contract produce the major share of equipment needed by our armed forces. In order to be able to perform these contracts the firms must have access to classified information and material. The government has developed several different clearance systems to screen both the factories and their personnel for fitness to handle such matter. This Note will deal with the largest of these, the Department of Defense Industrial Security Program, which affects 22,000 plants and over 3,000,000 personnel.[1] Under this program a "facility clearance" is granted to a factory which is approved for defense work and "personnel clearances" are granted to screened employees. It is with the problems of employee screening that we shall be primarily concerned herein.

There are three security classifications into which information and material are place—confidential, secret and top secret. The employer himself can allow an employee to have access to confidential information by satisfying himself as to the person's loyalty and trustworthiness. Clearance for secret and top secret information must come from the armed forces branch for which the contractor is performing the work.[2]

The extension of the authority of the federal government into the field of private industry and employment in order to safeguard our national security has presented special problems. The cry has been heard that the operation of the government security programs interferes with fundamental

*This Note is an outgrowth of the 1957 National Moot Court Competition, sponsored by the Association of the Bar of the City of New York. The hypothetical case posed for argument raised the issues discussed herein. The joint authors of this Note, and in addition Charles Willey, participated in the law school intramural moot court competition, using the same factual situation. Thereafter, the moot court team participated in the national competition and placed second to the University of Pennsylvania in the final round of arguments.

[1]In addition to the Industrial Security Program the other programs are (a) the Federal Civilian Loyalty Program, applicable to some 2,300,000 persons in the civil service and other governmental positions; (b) the Atomic Energy Program which covers about 80,000 federal employees and the employees of private contractors who have access to AEC information; (c) the Port Security Program applicable to 800,000 seamen and longshoremen and administered by the Coast Guard; (d) the International Organizations Employees Program covering 3,000 persons who work for the United States in the United Nations and other international organizations; and (e) the Passport Program and the Immigration and Nationality Program of the State Department and the Civil Air Transport Program of the Civil Aeronautics Administration. See COMMISSION ON GOVERNMENT SECURITY, REPORT (1957). The commission was created persuant to Public Law 304, 84th Congress.

[2]For clearance up to and including secret, a check is made of the records of national agencies such as the FBI, the military departments, the Civil Service Commission, and the Un-American Activities Committee. For access to top secret information a background investigation is made covering the life of the subject for facts on integrity, reputation and loyalty to the United States. See The Armed Forces Industrial Security Regulation, 32 C.F.R. § 71 (Revised 1955); The Industrial Personnel Security Review Regulation, 32 C.F.R. § 67 (Supp. 1957).

rights of employees guaranteed by the Constitution.[3] On the other hand, it has been said that liberty and security are complementary and not opposing ideas, and that only through security may liberty for all be maintained. This Note will examine the question whether the extension of federal power which has been made in the name of national security may be justified, and more particularly whether a person has a protectable right to a security clearance or to his job in a sensitive industry, what due process demands under these circumstances, and whether the present program satisfies these due process requirements. Before entering into our discussion of these question let us see how the Industrial Security Program operates.

THE ADMINISTRATIVE PROCESS

The program under discussion is contained in two basic federal regulations. One is the Armed Forces Industrial Security Regulation, which is the guide for security officers of the military departments. The other is the Department of Defense Industrial Personnel Security Review Regulation, which sets out the criteria for judging derogatory information, the standard for determining clearances, and the procedures to be followed when a military department has recommended the revocation or denial of clearance.[4]

When a clearance is denied, the denial is initiated by the security officer of a military department handling the contract with the person's employer. The recommendation to withhold the clearance is sent to the Director of the Office of Industrial Personnel Security Review in the Defense Department[5] who refers the case to a central screening board. The screening board can grant the clearance, in which case the approved file is sent back to the employer. The board can also deny clearance, in which case it gives the employee a notice of suspension of clearance, a statement of reasons for the suspension, and notice that upon request he may have a hearing at one of the three regional hearing boards.[6] At the hearing, which is not public, the employee may offer evidence, but he has no right to confront the witnesses which the government used to obtain the case against him. The board has no subpoena power nor is there a provision to compensate and pay the expenses of witnesses for the employee. The board is not required to follow strict rules of evidence and the decision is by majority vote. Only one member of the hearing board need be a civilian; the chairman is a lawyer. The regulation admonishes the board to consider the fact that the employee may be handicapped by his inability to confront or cross-examine witnesses against him, and also the fact that the sources of the

[3]"Few persons seem to realize that in security cases the accused person does not have the protection of the age-old presumption of innocence." O'BRIAN, NATIONAL SECURITY and INDIVIDUAL FREEDOM 64-65 (1955).

[4]32 C.F.R. § 67 (Supp. 1957). Section 67.3-1 sets out the standard for denial of clearance: "that access . . . by the person concerned is not clearly consistent with the interests of national security." Section 67.3-2 establishes 22 criteria which may be used as the basis for denial of clearance.

[5]32 C.F.R. § 67.4-2 (Supp. 1957).

[6]New York, Chicago, San Francisco, 32 C.F.R. § 67.4-3 (Supp. 1957).

government's evidence are unavailable to him. At the conclusion of the hearing the employee is provided with a transcript of the record which does not contain confidential reports, the names of informants or other confidential sources of information.

After the determination in a case the board's file is forwarded to the Director of the Office of Industrial Security Review for approval of the record. When the record is found to be satisfactory and the decision of the board is found to be unanimous, the Director may announce the decision as final. This announcement will be to the person concerned and to the military department from which the case arose. He will then order clearance to be revoked, denied or granted as set out in the board's determination. If the decision is not unanimous or the case presents unusual problems the Director will forward the case to the Review Board.[7]

The Central Review Board considers cases from all three regional hearing boards. Ordinarily it reviews the case from the written file only, although it may hear newly discovered evidence at its discretion. The decision is by majority vote and is final unless (a) the board wishes to reconsider the case on its own motion or at the request of the person concerned, (b) the Secretary of Defense or the secretary of any military department requests reconsideration, or (c) the Secretary of Defense reverses, or there is reversal by the joint action of all three military secretaries at the request of one of them.[8]

How the Program Operates

Let us illustrate the operation of the program by a hypothetical case. Assume that John Doe is an electrical engineer. His employer's work consists entirely of classified projects making it necessary that all employees have a security clearance. Doe received by registered mail a notice from the Industrial Security Screening Board that his clearance had been revoked. Accompanying this letter was a statement of reasons particularizing the charges against him. The letter advised that he could have a hearing conducted in accordance with the regulations if he so desired. He requested and received a hearing before the Hearing Board. At this hearing he presented oral and documentary evidence refuting the charges against him. The Department of Defense was represented at the hearing but presented no evidence other than that contained in a secret file to which only the Hearing Board was given access. Doe demanded to know what was contained in the file, to know the names of adverse witnesses, and to have the right to confront them and conduct cross-examination. These requests were refused on the grounds of national security, the Board stating that to grant them would reveal confidential sources of information, the disclosure of which would be inimical to the interests of national security. The Hearing Board affirmed the decision of the Screening Board revoking his clearance; he appealed successively to the Director of the Industrial Personnel Security Review and to the Secretary of Defense. Both appeals were denied.

[7] 32 C.F.R. §§ 67.4-4-7 (Supp. 1957).
[8] 32 C.F.R. § 67.4-8 (Supp. 1957).

When Doe received the original letter advising of the suspension of clearance, his employer discharged him, advising him that his job would be open if and when the clearance was restored. Doe has exhausted all of his administrative remedies and if the adverse decision is allowed to stand it will mean that he is barred from his former position. Can he now turn to the courts and secure judicial review of the determination?

JUSTICIABLE CONTROVERSY

The appeal to the courts, if one does exist, would presumably be predicated on the due process clause of the fifth amendment.[9] However, traditionally, in order to invoke the protection of the due process clause, one must establish two elements: first, that he has been deprived of a legally protcted right; and second, that this deprivation has been without due process of law.[10] A showing that the first element, a legally protected right, is present has generally been held a condition precedent to raising the due process issue.[11]

At first glance, it would appear that Mr. Doe was deprived of a legally protected right because he has been deprived of his job. Historically, the courts have protected the right to work in the common occupations of the community,[12] but they have never been called upon to decide whether there is a constitutional right to hold a particular employment in a particular profession.[13] It would seem that any job involving the granting of a security clearance can be distinguished from this protected "common occupation" category on two grounds: first, that denial of a particular job is not denial of right to practice one's profession; and second, that even if it is, any position requiring a security clearance is not one of the common occupations of the community. Furthermore, the state may, under its police power, condition the right to engage at all in certain professions (law, medicine, dentistry, etc.) upon the possession of qualifications reasonably designed to establish the requisite skill or character needed for such pro-

[9]"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

[10]Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951). The Court there stated: "Due process of law is not applicable unless one is being deprived of something to which he has a right." *Id.* at 58. *Cf.* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 539-40 (1950).

[11]See Davis, *Requirements of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 224 (1956).

[12]Typical is the following quotation from Truax v. Raich, 239 U.S. 33 (1915), at 41: "It requires no argument to show that the right to work for a living in the *common occupations* of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." (Emphasis added.) See Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873); Butcher's Union S. H. & L. S. Co. v. Crescent City L. S. & S. H. Co., 111 U.S. 746 (1884); Meyer v. Nebraska, 262 U.S. 390 (1923); Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).

[13]Research has revealed no cases where a *particular* job in a *particular* profession has been protected. *Cf.* Black v. Cutten Laboratories, 351 U.S. 292 (1956); Sperry Gyrosope Co. v. Engineers' Assoc., 279 App. Div. 630, 107 N.Y.S.2d 800 (1st Dept. 1951), *aff'd*, 304 N.Y. 582, 107 N.E.2d 78 (1952).

fessions.[14] Though the question is still open, a fairly persuasive argument can be made that any particular position with a government contractor contingent upon a security clearance does not fall within the scope of the common occupation cases.

It would therefore seem that if the sole consideration is the right to work in the particular position, the challenger would probably fall short of establishing a justiciable controversy. But the right to a particular job is not the only right that is involved in a security clearance revocation. The Supreme Court has recognized that a security discharge results also in a "badge of infamy."[15] Is not a right of reputation also involved which would fall within the protective scope of the fifth amendment?[16] A security discharge may render a person untrustworthy in the eyes of the world, making it difficult to obtain comparable employment.[17] This incapacity to obtain work when considered in combination with the loss of job could very well be sufficient to satisfy the traditional requirement of a legally protectible right as a condition precedent to court review.[18]

[14]Barsky v. Board of Regents, 347 U.S. 442 (1954). However, this is not to say that a state may impose arbitrary or discriminatory standards for admission. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957). It means simply that no one will have an absolute right to practice medicine because the public welfare, expressed through the state police power, may require certain qualifications. See note 25: *infra*.

[15]The Court in Wieman v. Updegraff, 344 U.S. 183 (1952), quoted Judge Learned Hand on the effect of a security discharge, stating: "There can be no dispute about the consequences visited upon the person excluded from public employment on disloyalty grounds. In the view of the community the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when each man begins to eye his neighbor as a possible enemy." *Id.* at 190-91. See reference to the "badge of infamy" in Peters v. Hobby, 349 U.S. 331, 347 (1955); Sweezy v. State of New Hampshire, 354 U.S. 234 (1957). See also O'BRIAN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 36 (1955). "Persons who are dismissed on grounds of loyalty, in the words of Seth Richardson, former Chairman of the Loyalty Review Board, are 'ruined everywhere and forever.'" BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 65 (1953). It is true that in the Industrial Security Regulation is a statement to the effect that a revocation of a security clearance in and of itself does not carry any implication that the individual is disloyal to the United States. 20 C.F.R. at 1551, para. 67.1-3(b) (1957). Professor Huard of Georgetown Law School has remarked acidly that "unfortunately few people read the Federal Register." 33 GEO. L.J. 194.

[16]Mr. Justice Douglas, in his concurring opinion in Peters v. Hobby, 349 U.S. 331, 350-51 (1955), had this to say about the effect of the government security programs: "We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where government with all its power and authority condemns a man to a suspect class and the outer darkness without the rudiments of a fair trial. The practice of using faceless informers has apparently spread through a vast domain. It is used not only to get rid of employees in the government but also employees who work for private firms having contracts with the government. It has touched hundreds and ruined many. It is an un-American practice which we should condemn. It deprives men of liberty within the Fifth Amendment, for one of man's most precious liberties is his right to work."

[17]Evidence is present that some employers "black list" any person who has had his security clearance revoked. See Morgan, *Federal-Loyalty-Security Removals*, 1946-1956, 36 NEB. L. REV. 412, 444 (1957). Also, some employers, who do not now have any government contracts with security requirements, still require their employees to meet the standards set out in the Industrial Security Regulations because they have the expectation of some day securing such a contract. See Note 8 STAN. L. REV. 234 (1956).

[18]See note 16 *supra*.

IS A LEGALLY PROTECTED RIGHT A SINE QUA NON TODAY?

The previous discussion has been based on the assumption that a legally protectible right must be present to warrant the protection of due process.[19] However, whether that is the test the Court is using today is a further question. There is considerable doubt whether a legally protected right is a *sine qua non* at the present time.[20] The Court threw the privilege-right dichotomy into a state of disorder with its decision in *Wieman v. Updegraff*.[21] In the *Wieman* case members of certain organizations were excluded from employment at a state college pursuant to a state statute. The statute contained no requirement that the members have knowledge that the proscribed organizations were subversive. The Supreme Court held that this lack of a requirement of scienter violated the fourteenth amendment. Faced with its previous statement in *Adler v. Board of Education*,[22] that persons seeking employment in the New York public schools have "no right to work for the state in the school systems on their own terms," the Court through Mr. Justice Clark stated:

> To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.[23]

This language was followed by the Court in *Slochower v. Board of Education*.[24] This same line of reasoning is also present in the recent *Schware*[25]

[19]See note 10 *supra*.

[20]For an excellent discussion of the evolution of the privilege-right dichotomy to the present day, considering both state and federal concepts, see Davis, *supra* note 11.

[21]344 U.S. 183 (1952).

[22]342 U.S. 492 (1952).

[23]344 U.S. at 191-92. The Court clearly extended the scope of the due process clause to an area which has historically been considered only a privilege. For example, in McAuliffe v. Mayor and Council of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892), Mr. Justice Holmes made the now famous remark: "The petitioner may have the constitutional right to talk politics, but he has no constitutional right to be a policeman." See also Bailey v. Richardson, 182 F.2d 46, 58 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951); Dodge v. Board of Education, 302 U.S. 74 (1937); Taylor v. Beckham, 178 U.S. 548 (1900); Crenshaw v. United States, 134 U.S. 99 (1890).

[24]350 U.S. 551 (1956). In the *Slochower* case a professor at Brooklyn College was discharged for invoking the privilege against self-incrimination under the fifth amendment. The discharge was effected without inquiring into the reasons for the professor's action. The Supreme Court held that the discharge violated due process, stating: "To state that a person does not have a constitutional right to Government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by proper authorities." *Id.* at 555. This statement prompted Professor Davis to comment that it "may be inept and illogical or it may be clever obfuscation." Davis, *supra* note 3, at 277.

[25]In Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), the Court reversed a decision of the New Mexico Supreme Court which had sustained the Board of Bar Examiners' refusal to admit Schware, stating (at 238-39): "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." (Citing both Wieman v. Updegraff, 344 U.S. 183 (1952), and

and *Konigsberg*[26] cases involving attorneys seeking admission to state bars. These cases illustrate that the Court is willing to extend the area within which it will protect from loss of employment by methods it conceives to be arbitrary. It follows that the Court would likely also extend the "patently arbitrary or discriminatory" test to apply to government interference with private employees of government contractors through the revocation of security clearances.[27] However, it must be conceded that recently decided cases are not clear on this point. In 1957 the District Court of the District of Columbia held in one decision that a discharged employee has no standing to sue and in a second declined to decide the question. In *Greene v. Wilson*[28] the vice-president and general manager of an engineering corporation had his security clearance suspended by the Government. The employer then discharged him. Greene brought an action for injunction and declaratory judgment to nullify the denial of security clearance. The district court in dismissing the case held that the plaintiff had failed to set forth "any invasion of his legal rights . . . and there is no justiciable controversy."[29] The decision was based upon the right of the Government to impose any condition it deems appropriate in its procurement contracts.[30] The court in its decision ignored both the *Wieman* and *Slochower* decisions and failed to consider that the federal government is subject to constitu-

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Slochower v. Board of Education, *supra* note 24.) The following statement also appears: "We need not enter into a discussion of whether the practice of law is a 'right' or a 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practing except for valid reasons. Certainly the practice of law is not a matter of grace." *Id.* at 238 n. 5.

[26]In a companion case, Konigsberg v. State Bar of California, 353 U.S. 252 (1957), the Court also reversed a decision by the state which had refused admission to the bar. In that opinion, at 262 n. 16, the Court uses the "arbitrary or discriminatory" test originally adopted in the *Wieman* case.

[27]However, it is urged by some that the language of the *Wieman* case should not be extended into the field of security clearances. It is contended that the award or withdrawal of a clearance is strictly a matter of executive discretion and beyond the scope of judicial review. However, this argument loses its force when it is realized that many of the government jobs that clearly fall within the protective scope of the holding of the *Wieman* case are those where the power of removal is a matter of executive discretion. Thus, the Court of Appeals for the District of Columbia Circuit, in Bailey v. Richardson, 182 F.2d 46 (1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951), stated at page 65: "It is our clear opinion that the President, absent congressional restriction, may remove from Government service any person of whose loyalty he is not convinced. He may do so without assigning any reason and without giving the employee any explanatory notice. If, as a matter of policy, he chooses to give the employee a general description of the information which concerns him and to hear what the employee has to say, he does not thereby strip himself of any portion of his constitutional power to choose and to remove. . . ." See also Myers v. United States, 272 U.S. 52 (1926), where Chief Justice Taft discussed in detail the power of removal.

[28]150 F. Supp. 958 (D.D.C. 1957).

[29]*Id.* at 959-60.

[30]The Court relied for the most part on Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). The Court in the *Lukens* case made this statement: "Like private individuals and businessmen, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Id.* at 127.

tional limitations in all of its actions.[31] Because of this due process limitation, it cannot impose upon the person contracting to provide materials any arbitrary or discriminatory restrictions.[32] Likewise, it cannot use a contract to impose such conditions upon third parties, *e.g.* the contractor's employees, because it surely cannot do indirectly what it is prohibited from doing directly. Therefore, it would seem that when contracting for defense supplies, the Government cannot force arbitrary or discriminatory requirements of any type, security or otherwise, upon the contractor or his employee, simply by virtue of the procurement contract. It is submitted that for these reasons the decision is erroneous in its holding that the plaintiff established no invasion of his legal rights and failed to set out a justiciable controversy.

The second case, *Dressler v. Wilson*,[33] involved a telephone employee whom the company contemplated using on secret Government installations. When his security clearance was denied by the Government he was discharged. He brought suit against the Secretary of Defense and another government official for a declaratory judgment to the effect that the ruling of the Department of Defense, adverse to him, was null and void, and requested a permanent injunction against the enforcement of the ruling. The district court reviewed the hearing that was afforded to Dressler and decided that the fact that he had refused to offer any evidence refuting the charges was determinative. In dismissing, the court stated that because of the merits of the case it was not necessary to determine whether a justiciable controversy was presented. Thus the court left open this crucial question.

These two decisions are to be contrasted with that of the Court of Appeals for the Ninth Circuit in *Parker v. Lester*.[34] That case involved seamen who were excluded from merchant vessels because of an order which required a security clearance for all seamen.[35] The court of appeals held that the plaintiffs had been deprived of a legally protected right to their "chosen occupation" and struck down the regulation as denying due process.[36] The court established justiciability through reliance on the "common

[31]For example, the Supreme Court in 1947 clearly acknowledged that Congress would violate constitutional limitations if it were to discriminate among religious, political, or racial groups in the hiring or firing of employees, or entering other government contracts. The Court stated: "Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not 'enact a regulation providing that no Republican, Jew, or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' None would deny such limitations on congressional power. . . ." United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947) (dictum).

[32]Frost v. Railroad Commission of California, 271 U.S. 583 (1926); Terral v. Burke Construction Co., 257 U.S. 529, 553 (1922); Coyle v. Smith, 221 U.S. 559 (1911). See also Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Merrill, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879 (1929); Davis, *supra* note 3.

[33]155 F. Supp. 373 (D.D.C. 1957).

[34]227 F.2d 708 (9th Cir. 1955).

[35]Exec. Order No. 10173, 15 FED. REG. 7005 (1950), issued pursuant to the Magnuson Act, 64 STAT. 427 (1950), 50 U.S.C. §§ 191, 192, 194 (1952).

[36]The defect was the use of confidential informants in the hearing. This facet of the decision will be discussed below.

occupation'' cases.[37] However, the case is technically distinguishable from the usual situation presented by the withdrawal of a security clearance in that the denial of a clearance to the seamen was in effect a complete and permanent proscription from occupation as seamen. In the usual case the revocation of a clearance will not bar the person concerned from his ''chosen occupation,'' but only from the limited number of positions where a security clearance is required.[38]

In summation, it would seem that under the ''arbitrary or discriminatory'' test of the *Wieman, Slochower, Schware and Konigsberg* cases a justiciable controversy is presented by the revocation of a security clearance. It is submitted that the district court erred in the *Greene* case, and of course the court did not reach the question of a justiciable controversy in the *Dressler* case. One caveat should be inserted at this point. It is not the writers' contention that the mere fact that a justiciable controversy is presented will justify a judicial review beyond a consideration whether the Industrial Security Review Regulation is constitutional as promulgated. If the court sustains the regulation as written, then its consideration should be limited in subsequent cases to a determination of whether the Screening, Hearing, and Review Boards followed the standards set out by the regulation within the limits of the discretion given them. A discussion of why it is necessary to so limit the scope of judicial review will be considered in greater detail below.

CONFRONTATION OF ADVERSE WITNESSES

Assuming that there is a justiciable controversy presented, how complete a hearing for the revocation of security clearance is required under the due process clause? This problem requires a balancing of two interests: the prevention of espionage on the one hand and the constitutional right of a citizen not to be deprived of life, liberty or property without due process of law on the other. To put it another way, on one side is the vitally important interest of national security at a time when the loss of a key scientific secret could write the obituary of American democratic government; on the other is the danger of warping and impairing our democratic traditions of liberty and fair play—the very things we are striving to protect.[39]

There are many points at which the present Industrial Security Program might be challenged as not satisfying the minimum requirements of

[37]The decision relied heavily on Truax v. Raich, 239 U.S. 33 (1915).

[38]The Solicitor General chose not to seek Supreme Court review of the decision, an equivocal circumstance. See Davis, *supra* note 3, at 239.

[39]"We must never forget that the very purpose of national security is to preserve our independence and liberty and not merely to combat the greatest present danger to it, Communism. The reconciliation and combination of such seemingly opposed elements as liberty and security is the mark of every successful social organization, from the family or the small business to a great nation. It is the principal task of government to effectuate and administer such a combination in public affairs. ASSOCIATION OF THE BAR OF THE CITY OF N.Y., REPORT OF THE SPECIAL COMMITTEE OF THE FEDERAL LOYALTY-SECURITY PROGRAM 43 (1956) (Hereinafter referred to as the NEW YORK REPORT); see also O'BRIAN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM (1955).

due process of law. One is the lack of subpoena power in the Hearing Board, so that even if an individual could justify his actions he has no way of insuring that necessary witnesses would be present at the hearing to testify for him. Adequate notice to meet the charges is not given because information may be omitted, the disclosure of which might be detrimental to national security. Further, there is no right of confrontation and cross-examination of adverse witnesses. The heart of the problem is whether the so-called "confidential informants" should be revealed in any, or in all cases. If there were no compelling need to protect confidential informants, the other difficulties in granting a full and fair hearing could readily be overcome. Therefore, we shall deal only with the question of whether there is a place in our legal system for administrative determinations affecting vital personal interests made on the basis of information obtained from confidential sources. It should be pointed out that the federal Administrative Procedure Act[40] does not apply to security clearance proceedings under the present programs.[41]

Let us examine the considerations on both sides of the question.

Factors in Favor of the Use of Confidential Informants

Due process is not a rule or a form of procedure that can be reduced to a rigid formula. As Mr. Justice Holmes stated, "it is familiar that what is due process of law depends on the circumstances. It varies with the subject matter and necessities of the situation."[42] The "circumstances" are these: The United States and the Soviet Union are currently engaged in a life or death cold war. The Russians have demonstrated amazing scientific achievements. At this stage of the nuclear-missile race, one leak of information divulging a crucial defense secret, such as the key to a successful defensive missile, could be disastrous. The purpose of a personnel security program is to protect these secrets by preventing security risks from obtaining access to pertinent information. The determination that a person is a security risk is based largely on information from various informants. It has been said that it is of vital importance to our counterespionage systems to keep the identity of these informants confidential. The issues, then,

[40]60 STAT. 237 (1946), 5 U.S.C. § 1001 (1952).

[41]A security clearance proceeding is not a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," within the meaning of section 5 (60 STAT. 241 (1946), 5 U.S.C. § 1005 (1952)). But even if it were, exception (4) involving military, naval and foreign affairs functions would probably remove these proceedings from the operation of the Act.

The APA applies only where Congress by some other statute requires an administrative hearing. *Legislative History of the Administrative Procedure Act*, S. Doc. No. 248, 79th Cong., 2nd Sess. 22, 79, 226, 360 (1946); *Accord*, American Trucking Association v. United States, 344 U.S. 298, 320, 321 (1953): "In short, § 7 [required hearings] applies only when hearings were required by the statute under which they were conducted to be made on the record and with opportunity for oral hearing." Parker v. Lester, 227 F.2d 708, 715 (9th Cir. 1955), held that it did not apply to clearances under the Port Security Program because the statute in question did not specify that there should be a hearing. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), held that the APA was applicable to a deportation case where hearing requirements have previously been read into a statute by the Supreme Court to save it from invalidity. The Court has read no such hearing requirements into security clearance proceedings.

[42]Moyer v. Peabody, 212 U.S. 78, 84 (1909).

involve the evaluation of the importance of the use of confidential informants and the determination whether due process requires their revelation each time the Government feels it is necessary to deny or revoke a security clearance.

Revelation of confidential informants would directly hamper United States counterintelligence operations.[43] Information from confidential sources apparently led to the espionage conviction of Col. Rudolf Abel, probably the most important Russian spy ever caught in this country.[44] The confidential informant in today's security hearing may give the tipoff for tomorrow's espionage indictment.

Confidential informants can be roughly broken down into two classes, the casual informant and the regular agent. While there is a much greater justification for not revealing the secret undercover agent, it would be harmful to the investigative agencies if even the casual informant were revealed. In a security or counterintelligence investigation, items of information are collected from many sources. When the seemingly unrelated bits of information are evaluated, one statement by the "man next door" may provide the key to the entire pattern. Practically all of this sort of information is furnished only on the understanding that it will be kept confidential. In order to retain the confidence of the public, the FBI and the other investigative agencies would be required to obtain the consent of any informants whose testimony was to be revealed.[45] It is a fact of human experience that a great many persons would refuse to divulge information concerning a neighbor or an associate if either their statements were revealed or they were required to testify in an open hearing.

Another reason for protecting confidential informants is that fear of reprisal may prevent them from giving information if their names are revealed. In criminal trials it is often impossible to get testimony because of witnesses' fears for the safety of themselves and their families. Ordinary hoodlums are willing to threaten and injure informants to avoid or prevent damaging testimony, the acid blinding of Victor Reisel being a case in point.[46] The Communists, whose declared objective is domination of the world, would hardly be restrained by moral compunctions from intimidating probable informants if it were necessary to prevent exposure of their activities.

Experience has indicated that when the identity of informants is revealed they stop giving information. The Judith Coplon trial represents the only occasion on which the Government revealed an entire investigative file. Within days a series of informants advised the FBI that in view of this breach of confidence they could not provide information in the future.[47]

[43]Hoover, *Confidential Nature of FBI Reports*, 8 SYRACUSE L. REV. 2 (1956); Krasilovsky, *Evaluating the Role of the Informer: The Value of Secret Information*, 40 A.B.A.J. 603 (1954).

[44]See N.Y. Times, Aug. 13, 1957, § 1, p. 14.

[45]Hoover, *supra* note 43.

[46]Mr. Justice Clark points out that in narcotics cases, "Once an informant is known the drug traffickers are quick to retaliate. Dead men tell no tales. The old penalty of tongue removal . . . has been found obsolete." Rovario v. United States, 353 U.S. 62, 67 (1957) (dissenting opinion).

[47]Hoover, *supra* note 43, at 9.

The New York Report also recognizes that *casual* informants might not give information if confrontation were required, and that the usefulness of carefully established *undercover* agents would be totally destroyed.[48] It is also interesting to note that neither Great Britain nor Canada has provision for confrontation in their security programs.[49]

There is little question of the necessity for not revealing the professional undercover agent even if it does mean the loss of a job and the other consequences to a particular individual resulting from a security discharge. "The Communists would gladly sacrifice some of their own number to unmask undercover agents of the Federal Bureau of Investigation."[50] Further, the revelation of such informants might require the establishment of a still stronger system of personnel security. In the words of the New York Report: "If we were to insist upon confrontation to the injury of counterespionage, a personnel security system much broader in scope and much more stringent and more difficult of application would almost surely be necessary."[51] Research has uncovered no case suggesting that a sovereign government must lay bare its intelligence information concerning a potential enemy. Why should the United States government be required to divulge the counterintelligence network through which it combats espionage by detecting enemy agents and preventing security leaks?

If the government were forced to reveal any of its confidential informants, either casual or undercover, it would be forced to choose between accepting the resulting damage to its counterintelligence systems, or allowing an individual it considers to be a security risk to continue to have access to security information.[52] Either is perhaps too great a price to pay. Thus, the use of confidential informants in a security clearance proceeding can be justified as being required by national security.

A slightly different approach is to argue that an award of a security clearance is so inextricably linked to the preservation of the counterintelligence systems that it must by its very nature be a matter of executive discretion. Whether to award or deny a security clearance is not a question of fact which can be determined absolutely; rather, it requires a present judgment of what an individual's future action might be. A situation somewhat analogous to the award of a security clearance is the power of the executive to deny an Army commission to a physician draftee who refuses to say whether he is a Communist.[53] The Court's holding on that ques-

[48]NEW YORK REPORT 176.

[49]*Ibid.*

[50]*Id.* at 177.

[51]*Id.* at 178.

[52]"If FBI reports are disclosed in administrative or judicial proceedings, it may be that valuable underground sources will dry up. But that is not the choice. If the aim is to protect the underground of informers, the FBI report need not be used. If it is used, then fairness requires that the names of the accusers be disclosed." United States v. Nugent, 346 U.S. 1, 14 (1953) (dissenting opinion by Mr. Justice Douglas). In making this choice the government would necessarily weigh the importance of the informant against the sensitivity of the position. Therefore, following Mr. Justice Douglas' reasoning, the more sensitive the position, the greater the need to reveal the informant. Conversely, the greater the importance of the informant, the more likelihood that the choice would be to leave the security risk on the job.

[53]Orloff v. Willoughby, 345 U.S. 83, 99 (1953).

tion was based on the proposition that a commission is discretionary because grounded on a trust which can only be extended on the basis of faith in a man's patriotism, fidelity, loyalty and trustworthiness. A security clearance is granted on the basis of faith in similar qualities, and must also be discretionary.

Thus it can be argued that the determination of whether confidential informants can be revealed without damage to the security of the nation must be left in the hands of the executive. In justifying the use of confidential information in an overseas airline licensing case the Supreme Court stated:

> The President . . . has available intelligence services whose reports are not and ought not be published to the world. It would be intolerable that the courts, without relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.[54]

But this is not to say that the executive should be allowed absolute and unreviewable discretion no matter how arbitrary or discriminatory its actions are. The scope of judicial review will be commented on below.

Legal Precedent for Use of Confidential Informants

A limitation on individual interests, which ordinarily might be arbitrary, becomes acceptable to due process if the limitation has a reasonable relationship to the protection of a national interest against an apprehended danger. For example, Civil Service employees were denied the right to political activity by the Hatch Act. Under most circumstances this would be a direct infringement of a first amendment freedom, yet the Supreme Court upheld the denial because it had a reasonable relationship to the protection against the apprehended danger of inefficiency in government service caused by civil servants' political activity.[55] The apprehended danger to our security system is probably even more potent. In fact, the Court recently declared that national security was an "overriding necessity."[56]

Due process is violated only when the right infringed is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[57] It follows that procedures which have been found acceptable to the scheme of justice in the past should not now be struck down as violations of due process without careful consideration. Information from confidential sources has been made the basis of decisions affecting individual rights or interests in several other areas of the law. For example, the Attorney General was held to have acted within the limits of his discretion in denying bail to a resident alien, pending deportation action, where in a habeas corpus hearing challenging his decision the government affidavit stated that confidential information indicated that the

[54]Chicago & Southern Air Lines v. Waterman Corp., 333 U.S. 103, 111 (1948).
[55]United Public Workers v. Mitchell, 330 U.S. 75, 102, 103 (1947), restated in Communications Assn. v. Douds, 339 U.S. 382, 405 (1950).
[56]Cole v. Young, 351 U.S. 536, 547 (1956).
[57]Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

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alien had previously been a Communit.[58] An alien who had lived in the United States for twenty-five years visited a short time behind the Iron Curtain. He was denied re-entry into the United States on the basis of confidential information, the disclosure of which "may be prejudicial to the public interest."[59] A war bride was excluded from the United States without a hearing on the basis of confidential information.[60] The Attorney General's discretion in using undisclosed confidential information as a basis for refusing to suspend deportation of an alien has been upheld.[61]

A conscientious objector being tried for failure to submit to induction was not denied due process of law when he was not permitted to see the FBI reports or to know the names of the persons who supplied the information that was contained in them.[62] It has been held that due process does not require confrontation and cross-examination of witnesses in dismissals of government employees.[63] A tariff determination on the basis of confidential information has been upheld.[64] No quasi-judicial hearing is necessary in determining whether a previously granted probation should be revoked.[65] Due process is not violated when a judge in a murder trial, after a jury verdict of guilty, with recommendation of life imprisonment, imposes the death sentence after considering the information supplied by confidential informants who were not confronted or cross-examined by the accused.[66]

In several of the above decisions the Court was sharply divided and the use of confidential informants was the subject of a number of vigorous dissenting opinions.[67] It is true that most of the decisions involved such individuals as aliens and convicted criminals. But it is also true that in many

[58]Carlson v. Landon, 342 U.S. 524 (1952).

[59]Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206 (1953).

[60]U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

[61]Jay v. Boyd, 351 U.S. 345 (1956).

[62]United States v. Nugent, 346 U.S. 1 (1953). "[T]he statutory scheme for review . . . entitles them to no guarantee that the FBI reports must be produced for their inspection. We think the Department of Justice satisfies its duties under § 6 (j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the time supplies him with a fair resumè of any adverse evidence in the investigator's report." *Id.* at 5, 6; *cf.* Simmons v. United States, 348 U.S. 397 (1955); Gonzales v. United States, 348 U.S. 407 (1955); Imboden v. United States, 194 F.2d 508 (6 Cir. 1952). United States v. Jacobson, 154 F. Supp. 103 (W.D. Wash. 1957), extended the doctrine of the *Jencks* case (discussed below) to a prosecution of a conscientious objector for failure to submit to induction. The court held that the defendant was entitled to examine the original FBI reports and not just a resumè of them. The court also expressed the belief that the *Nugent* case would be decided differently if it were before the present Supreme Court. In a directly conflicting decision, the Fourth Circuit refused to apply the *Jencks* doctrine to a conscientious objector case. Blalock v. United States, 247 F.2d 615 (4th Cir. 1957).

[63]Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 198 (1951).

[64]Norwegian Nitrogen Co. v. United States, 288 U.S. 294 (1933).

[65]Escoe v. Zerbst, 295 U.S. 490 (1935).

[66]Williams v. New York, 337 U.S. 241 (1949).

[67]For example, in Jay v. Boyd, 351 U.S. 345 (1956), the Court divided 5 to 4. Justice Reed wrote the majority opinion, joined by Burton, Clark, Minton and Harlan. Warren, Black, Frankfurter, and Douglas dissented, each in a separate opinion. Two of the majority, Reed and Minton, have since been replaced by Justices Brennan and Whittaker.

there was a greater personal interest at stake and a far less significant national interest than in a security clearance proceeding.

Factors Against the Use of Confidential Informants

Perhaps the best illustration of what *can* happen when reports from confidential informants are the basis for the decision in a security clearance proceeding is the case of *John Jones,* a real case with a fictitious name:

> [A] co-worker informed the FBI that he had heard Jones express Communist ideas to another employee, and that Jones had told the informant that he was going to join a subversive organization.
>
> At the hearing, on direct examination by members of the Security Hearing Board, it appeared that the . . . informant had never been displeased by anything that Jones had done in their work together, and was simply doing his duty as a loyal citizen.
>
> On cross-examination, however, the informant admitted that he could not recall the nature of the pro-Communist ideas expressed by Jones, except that he was positive that they were pro-Communist; that he did not know what Communism was, "except that it is a form of political party which threatens world supremacy and so on and so forth. . . ."
>
> The informant further testified that the subversive organization Jones had told him he was going to join was *Americans for Democratic Action,* and that an attorney-friend of the informant had told him that *Americans for Democratic Action* was "as Communist as Russia itself." Towards the close of the cross-examination, (after it had been developed that the informant had at one time been Jones' supervisor and that thereafter Jones had advanced rapidly in grade, becoming the informant's supervisor), the informant admitted that on several occasions Jones had taken credit for the informant's work.[68]

One wonders what Jones' chances would have been if he had been denied the right of cross-examination.

It cannot be denied that the lack of the opportunity to confront adverse witnesses in an administrative proceeding is not in accordance with the usual concept of a fair hearing. Cross-examination has been termed the greatest legal engine for the discovery of truth ever invented.[69] It is doubtful whether the handicap to the charged employee is entirely cured by the regulation directing the Hearing Board to "take into consideration the fact that the person may have been handicapped in his defense by the non-disclosure to him of classified information or by his lack of opportunity to identify or cross-examine persons constituting sources of information."[70]

[68]Brief for the American Civil Liberties Union as amicus curiae, p. 14-15, Peters v. Hobby, 349 U.S. 331 (1955), also set out in Davis, *supra* note 11, at 213-214. See also a similar account by Judge Pope in Parker v. Lester, 227 F.2d 708, 720 n. 19 (9th Cir. 1955), as to the suspension as a security risk of Abraham Chasanow, a civilian employee of the Navy, and the examples cited in hearings before the Senate Sub-committee on Government Employees Security Program reported in United States News and World Report, Sept. 9, 1955, p. 128.

[69]5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940).

[70]32 C.F.R. § 67.4-6 (b) (Supp. 1957).

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Mr. Justice Douglas, in a case involving the loyalty discharge of a government employee on the basis of confidential information, lucidly expressed the liberal view as follows:

> Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to cross-examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal people, like Titus Oates, who revel in being informers. They may bear old grudges. Under cross-examination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.[71]

While it might be possible to justify the denial of confrontation in cases where the most sensitive of security information is involved, there is a grave danger of doing so in programs involving three million persons, and which are likely to extend indefinitely. Such an inroad into the individual freedoms is a large foot in the door for continued and expanding curtailments of these freedoms. It would have the effect of dulling the senses of people and of laying the groundwork for further encroachments. The end result could well be the alteration of the American system into one similar to that of the Communist foe. Mr. Justice Douglas expressed this idea as follows:

> In days of great tension where feeling runs high, it is a temptation to take shortcuts by borrowing from the totalitarian techniques of our opponents. But when we do, we set in motion a subversive influence of our own design, that destroys us from within. . . .[72]

Thus, particularly in the less sensitive areas, the maximum amount of confrontation consistent with security should be afforded. This is also in the best interests of the Government. If inaccurate information from an informant causes a competent scientist to unjustly lose a clearance, the whole country suffers the loss.

Court Decisions on the Use of Confidential Informants in Security Clearance Proceedings

The question of the use of confidential informants in security clearance proceedings has been before the courts frequently during the past few years. The question remains unsettled. In the 1950 decision of *Bailey v. Richardson*,[73] the plaintiff was discharged from a federal government position due to reasonable doubt about her loyalty. Although she was neither given a chance to know the nature of nor to meet the evidence against her, her discharge was upheld. However, the court of appeals did not meet the question here under consideration because the decision was based on the

[71]Peters v. Hobby, 349 U.S. 331, 350-351 (1955) (concurring opinion).

[72]Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 176 (1951) (concurring opinion).

[73]182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 198 (1951).

proposition that there is no constitutionally protected right to government employment.

Five years later the Court granted certiorari in *Peters v. Hobby*[74] with the express purpose of settling the question. That case also involved a loyalty discharge of a government employee. The Court decided that the discharge was invalid, but sidestepped the main issue and decided on the technical ground that the action of the Central Loyalty Review Board in re-considering Dr. Peters' clearance on its own initiative was erroneous.

Cole v. Young[75] considered the power of the Government to extend to the heads of non-sensitive agencies the power of summary suspension and unreviewable dismissal over their civilian employees, when deemed necessary in the "interests of national security." The Court held against such extension saying:

> [I]t is difficult to justify summary suspensions and unreviewable dismissal on loyalty grounds of employees who are not in "sensitive" positions and who are thus not situated where they could bring about any discernible adverse effects on the Nation's security . . . in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets.[76]

This language indicates that the Court might approve the lack of "procedural safeguards," including the lack of confrontation of adverse witnesses, in cases of loyalty discharges of government employees in sensitive areas. It is not a long step from denying confrontation in discharges of government employees to denying confrontation in revoking a clearance necessary for a job in private employment. Further substantiating this position is the statement by the Court that "the greater the sensitivity of the position, the smaller may be the doubts that would justify termination."[77]

Uncertainty as to how the Supreme Court would rule has resulted in considerable difficulty and conflict in the lower federal courts. The Ninth Circuit, in *Parker v. Lester*,[78] held that the Coast Guard's Port Security Program violated the due process clause because merchant seamen must have fair and reasonable notice of adverse information used in making a security determination. That program did not allow confrontation and cross-examination of adverse witnesses. Judge Pope in considering the hearing afforded under the Port Security Program said:

> Is this system of secret informers, whisperers and talebearers of such vital importance to the public welfare that it must be preserved at the cost of denying to the citizen even a modicum of the protection traditionally associated with due process?[79]

[74]349 U.S. 331 (1955).
[75]351 U.S. 536 (1956).
[76]*Id.* at 546.
[77]*Id.* at 554.
[78]227 F.2d 708 (9th Cir. 1955).
[79]*Id.* at 719.

Obviously Judge Pope would have nothing to do with the use of confidential informants.

As stated above, in *Greene v. Wilson* the District Court for the District of Columbia held that an employee of a defense contractor, dismissed because his security clearance was revoked under the Industrial Security Program, was deprived of no legal rights giving rise to a justiciable controversy.[80] However, the same court in the subsequent case of *Dressler v. Wilson*,[81] also involving a dismissal from private employment after a clearance was revoked, stated that "there is no constitutional requirement of confrontation with witnesses in a proceeding outside of the criminal courts."

No discussion of the use of confidential informants would be complete without mention of the *Jencks* case.[82] The holding there was simply that an accused has a right to examine, for the purposes of impeachment, reports *previously* made to the FBI by witnesses *presently* testifying in a criminal trial. It *should* have no bearing on the question of the use of confidential informants in a security clearance proceeding because (1) the *Jencks* case involved no confidential informants (the informants were on the witness stand) and (2) it was a *criminal* trial. In a criminal trial an accused has all of the protections afforded under the sixth amendment. It would be foolhardy to apply the same rules to a security case. Imagine the situation if in order to revoke a top secret clearance the Government had to prove to twelve jurors beyond a reasonable doubt that the retention of a clearance by the charged individual would not be clearly consistent with national security.[83]

However, the *Jencks* case has already resulted in the reversal of Smith Act convictions which had previously been affirmed by courts of appeals.[84] The Jencks case may have an even greater effect as a result of extensions made by lower courts from its narrow holding. Congress, apparently fearing such extensions, reacted quickly in passing a statute construing the case solely in terms of a "criminal prosecution," thereby attempting to limit its application.[85] However, in a recent case from the Court of Appeals for the District of Columbia[86] the doctrine of the *Jencks* case was extended to administrative proceedings and the above statute was cited without any indication from the court that perhaps the spirit of the statute was being violated. That case involved a proceeding before the Subversive Activities Control Board to determine whether the Communist Party was a Communist-action organization. The court directed the Board to permit the Communist Party's attorneys to examine two reports previously

[80]Sperry Gyroscope Co. v. Engineer's Association, 304 N.Y. 582, 107 N.E.2d 78 (1951), held that a project engineer on a guided missile project had no cause of action after being summarily dismissed from his employment as a result of the revocation of his security clearance.
[81]155 F. Supp. 373 (D.D.C. 1957).
[82]Jencks v. United States, 353 U.S. 670 (1957).
[83]The standard for revoking or denying a clearance under the Industrial Security Program is whether "on the basis of all the available information, that access to classified information by the person concerned is not clearly consistent with the interest of national security." 32 C.F.R. § 67.3-1 (Supp. 1957).
[84]Scales v. United States, 76 Sup. Ct. 9 (1957); United States v. Lightfoot, 76 Sup. Ct. 10 (1957).
[85]71 STAT. 595, 18 U.S.C. § 3500 (1957).
[86]Communist Party of United States v. Subversive Activities Control Board, 26 U.S.L. Week 2332 (D.C. Cir. Jan. 9, 1958).

made for the FBI by one of the Government's witnesses before the Board. The doctrine has also been extended to a civil trial revoking a certification of citizenship on the ground of fraud[87] and to the prosecution of a conscientious objector for failure to submit to induction.[88] The latter decision is almost directly contrary to the 1953 Supreme Court case of *United States v. Nugent*.[89]

CONCLUSION

The authors feel that some modification of the Industrial Security Program is in order. Confrontation and cross-examination of adverse witnesses by the charged employee should be granted in all cases where it would not be detrimental to the counterintelligence functions. The crux of the problem is who should decide which informants should be revealed and what review is to be afforded this decision. We feel that the executive department should continue to determine which informants may be revealed. But it should also be required to actually consider the circumstances of each case to see if a particular informant should be required to testify. There should be no blanket determination that no informant shall testify. In other words, the executive should determine in its *discretion* which informants will be revealed, but the courts should have the power to determine whether discretion is *actually* being exercised. Further, the courts should be able to review the basic regulations to determine whether they are arbitrary or discriminatory.

It is beyond the scope of this paper to make more specific recommendations, but two monumental studies have been made in this general field which contain detailed recommendations for changes in the security programs. They are the *Report of the Commission on Government Security* and the *Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York*. It is submitted that Congress and the Executive should give serious consideration to the conclusions contained in them in any attempt to modify the security programs.

In light of the recent liberal opinions of the United States Supreme Court we feel that the conclusion of the American Bar Association's Committee on Communist Tactics, Strategy and Objectives is pertinent to the problem of this paper:

> We strive to find the proper degree of balance between liberty and authority. It is traditional and right that our courts are zealous in protecting individual rights. It is equally necessary that the executive and legislative branches take effective action to gird our country in defense against Communist infiltration and aggression. If the courts lean too far backward in the maintenance of theoretical rights, it may be that we have tied the hands of our country and have rendered it incapable of carrying out the first law of mankind—the right of self preservation.[90]

DOUGLAS P. BEIGHLE
GEORGE C. DALTHORP
WARD A. SHANAHAN

[87]United States v. Matles, 154 F. Supp. 574 (E.D.N.Y. 1957).
[88]United States v. Jacobson, 154 F. Supp. 103 (W.D. Wash. 1957).
[89]346 U.S. 1 (1953).
[90]U.S. News & World Report, Aug. 16, 1957, p. 139.