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The Federal Loyalty-Security Program / Report of the Commission on Government Security

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for this course of action. The history over the centuries of stock investment by the unsophisticated has not been particularly happy. If it could be assumed that only pros played the stock market, the necessity for expensive and time-consuming regulatory machinery would disappear. Professionals in smaller numbers could be expected to look after their own interests; if they did not, the social loss would not be great.

Obviously, this theoretical alternative is out of the question. Rising incomes increase the pressure of investable funds. The pull of common stocks as an inflationary hedge and higher income source is powerful, particularly for retirement investment. To exclude the common man from these advantages would be totally repugnant to the American dream. And it is generally agreed that the nation must tap every available source of equity investment if it is to maintain or arrive at an adequate rate of economic growth.[35] Finally, the normal incentives of commercial expansion may be expected to spur the stock exchanges and the brokers to sell their wares where they can. Barring serious depression, public stock ownership will continue to grow.

"People's Capitalism" and "Corporate Democracy" are slogans with an inverse relationship. Each expansion of the first undermines the second. Every sale of common stock to a new small investor adds to the fractionation of share ownership which lies at the root of the impotence of shareholder voting as a check on management. Every extension of common stock ownership to an inexperienced small investor adds to the ranks of those who may be expected to lay claim, both politically and morally, to new legal protection of their interests. Every victory for the cause of the Exchange's People's Capitalism accelerates the development of new legal techniques designed to temper the power of corporate management.

Joseph Livingston's book, though it does not say so, documents the end of one era of corporate reform and foreshadows the beginning of the next.

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THE FEDERAL LOYALTY-SECURITY PROGRAM. Report of the Special Committee of the Association of the Bar of the City of New York. New York: Dodd, Mead & Co., 1956. Pp. xxvi, 301. $5.00.

REPORT OF THE COMMISSION ON GOVERNMENT SECURITY. Washington: G.P.O., 1957. Pp. xxxiii, 807. $2.50.

WHILE many useful studies of loyalty-security programs have appeared in the past decade, it involves no slight to their intrinsic merit to say that a special importance attaches to the reports of the New York City Bar and the Commis-

35. See, *e.g.*, THE CHALLENGE TO AMERICA: ITS ECONOMIC AND SOCIAL ASPECTS 22 (Rockefeller Bros. Fund Special Studies Project Report IV, 1958).

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sion on Government Security. These are not only books but events in the field they describe. For the authority of their sponsors entitles them to special attention from those in the legislative, executive and judicial arms of the government who are required to deal with these matters.

Neither report would discard personnel security programs, although both would somewhat reduce their scope. Both conclude that substantial reforms are needed, including greater co-ordination of the numerous separate programs. While both reports would make changes in the ultimate tests of loyalty and security to be applied, the tests—so-called "standards" and "criteria"—would necessarily remain vague. And they would still involve an ostensible inquiry into character and attitudes intended to show a greater than average, or greater than tolerable, probability of improper future activity—an inquiry fraught with dangers and difficulties. Again, though both purport to grant the individual charged a greater quantum of procedural rights, these would still necessarily be somewhat curtailed. Faceless informers, though fewer, would still be with us. In short, neither report would change the fundamental nature of personnel security programs. This is unavoidable, but it does not mean we should throw up our hands in despair. Efforts to achieve some improvement are worth examining closely even though they cannot achieve the ideal.

A striking feature of both reports is the length to which they go to avoid controversial reference. The existence of Senator McCarthy, for example, could not be guessed from either. One gets only vague hints from the Commission report, and none at all from the Bar's, that loyalty-security matters once were a burning political issue or that there was such a phrase as "the numbers game." This is quite understandable: both groups were concerned with finding the widest possible area of agreement and with placing loyalty-security problems on a plateau of cool deliberation. But this means that neither report will give great aid to the future historian.

It means also that one cannot appraise Bar and Commission proposals for substantive and procedural changes without taking account of a third component of loyalty-security determinations, which we may call external factors—such as political pressures, the temper of popular feeling, the attitude of security adjudicators, and the fear of congressional review. While external factors can enter into any adjudication, their potential play is obviously greatest where the standards are necessarily vague and procedural rights are necessarily curtailed. This, in turn, adds to the other considerable arguments that loyalty-security programs, though needed, are a necessary evil and that their scope should be restricted as narrowly as possible.

While the two reports have much in common, there are notable differences, some real and some apparent. Under the latter heading, a general impression seems to have developed that the scope of loyalty-security testing would be materially expanded by the Commission's proposals but materially diminished by those of the Bar. There is some basis for this impression but on analysis it seems less than imposing. The major quantitative change would flow from

both sets of proposals with respect to the Department of Defense's Industrial Security Program, which requires security clearance for those employees of government contractors having access to classified documents. Both Bar and Commission would eliminate clearance for employees having access only to "confidential" material. In fact, the Commission goes further to recommend complete abolition of the "confidential" category, despite the universal views of department officials to the contrary. The greatest apparent difference between Bar and Commission relates to employees of the federal government. At first reading, one gathers that the Bar recommends a "personnel security program" limited to so-called sensitive positions, while the Commission recommends a "loyalty" program for all federal employees. But this apparent contrast tends to fade from view on closer examination of the details of the two proposals, particularly in relation to civil service procedures, which the Bar contemplates would continue to be used in examining all federal employees from a loyalty standpoint.

The clearest differences between the two reports are those of form, style and tone. Whereas the Bar report is a masterpiece of orderly concision, the Commission's is sprawling, often prolix, and sometimes contradictory. It contains a good deal of ore but one needs strength and patience to mine it. To be sure, the Commission stakes out a larger area. It deals, as does the Bar, with the various personnel programs covering government workers, employees of government contractors, maritime workers under the Port Security Program and employees of international organizations. It also, unlike the Bar, treats passports, immigration and naturalization procedures, military personnel programs and civil air transport employees. Further, its official mandate required the Commission to devote much of the bulk of its report to drafts of proposed legislation, regulations and guides for decision.[1] Still, with these allowances, it is not too much to say that the Commission report, far from superseding the Bar's, has given it added utility; one really needs it as a guide and compass for a tour through the Commission study.

For example, it is to the Bar report that one must turn for a compact and orderly discussion of ends and means. We are reminded at the outset that personnel security programs are but one of several aspects of national security. Among the others are "positive or dynamic security"—"the economic-political system on which the strength and influence of the country have largely rested"[2] —military security, international security and also, under the head of internal security, punitive provisions and preventive measures, including personnel programs, against treason or espionage. The Bar is convinced that counterespionage is the most vital of the preventive measures.

Having established personnel programs as at most only a lesser part of our true security measures, the Bar proceeds to catalog their defects. They are injurious to our traditions of liberty and fair play; and they can defeat their own

1. 69 STAT. 596 (1955), 50 U.S.C. § 781(6) (Supp. V, 1958).
2. P. 40.

ends by slowing scientific development, injuring relations with our allies and inhibiting outspoken reports by government servants, particularly in the foreign service. These reminders, though hardly novel, help the reader place personnel security programs in proper perspective. They lead one naturally to the ultimate conclusion that these programs have inherent defects and should thus be confined as narrowly as possible, although the Bar seems to shrink from putting the matter in quite these terms.

The Commission and its staff were clearly not oblivious of these basic considerations, but they have provided no comparable aid to the thoughtful reader. Some discussion of these questions can be found after a good deal of searching. But one ends by feeling that the Commission recognized fewer of the inherent defects of the programs and was less impressed by those that it saw. Moreover, the Commission seems to reject an approach based only on what serves the interests of national security. For we are told that "where a reasonable doubt as to loyalty exists, no person should be retained in Government service, no matter how valuable his contribution might be."[3] This pronouncement might be more persuasive if some infallible test existed for separating the loyal from the disloyal.

The reports confirm several impressions about the operation of loyalty-security programs: vast numbers of citizens have been affected by some form of program, and the confusion and uncertainty caused by differing agencies, standards and procedures are enormous. The product of statutory enactments and executive orders during the last twenty years, broad scale loyalty-security programs have largely developed since the Truman Executive Order No. 9835 in 1947,[4] which turned on a standard of loyalty. The Eisenhower Executive Order No. 10450 [5] is now in effect, positing not loyalty, but security suitability as the proper standard. To give content to its test, the Order lists subjects of information to be investigated, which have come to be called "criteria." One general class bears upon dependability of an employee, a second upon his subjection to "pressure which may cause him to act contrary to the best interests of the national security,"[6] and a third upon acts and associations which tend to show the person is disloyal. Still another class refers to "any criminal, infamous, dishonest, immoral or notoriously disgraceful conduct . . . ."[7] By its terms, the Executive Order extends to all employees of the executive branch the procedures of P.L. 733,[8] which grants to heads of agencies the power to suspend employees without pay, *pendente lite*. Although the Supreme Court in *Cole v. Young* [9] limited the reach of the statute to sensitive positions, a substantial number of employees in the executive branch are still covered.

3. P. 49.
4. 12 FED. REG. 1935 (1947).
5. 18 FED. REG. 2489 (1953).
6. Exec. Order No. 10450, § 8(a) (1) (v), 18 FED. REG. 2491 (1953).
7. *Id.* § 8(a) (1) (iii).
8. 64 STAT. 476 (1950), 5 U.S.C. §§ 22-1 to -3 (1952).
9. 351 U.S. 536 (1956).

A further complication—and one of considerable importance—lies in the fact that federal employees may also be tested on loyalty and security grounds under civil service procedures for determining general suitability for employment. In fact, according to the Bar, civil service procedures have been used in over ninety per cent of the alleged "security" cases.[10] Under these procedures, unlike those established by the Executive Order, a hearing is required only for veterans, a group which now comprises about half the federal payroll. One wonders how the choice has been made among available procedures. The Bar perhaps offers a clue by quoting this notable statement in 1955 by the then Chairman of the Civil Service Commission: "The firing business is merely the method of how you get the man off the payroll after the agency head has reached the conclusion he shouldn't be on it in the interests of the American people."[11]

There are still other factors of complexity and variation. The Executive Order is implemented by separate regulations issued by each of some seventy-odd executive agencies. Moreover, all this relates only to government employees. The variation in standards and procedures is multiplied when we look at the federal programs for others, such as employees of government contractors.

Both Bar and Commission make recommendations for greater co-ordination and uniformity. The Commission proposals would go somewhat the further through creation of a Central Security Office which would, among other things, provide a panel of full-time trial examiners. But the method seems extreme to cure a lack of co-ordination between departments. The title of the proposed new agency has an ominous ring; and there is reason to fear that such an agency might become too "security-minded," or at least be preoccupied with its box score and continued existence. Moreover, it seems doubtful that the weighing of individual facts in a security hearing involves an appropriate role for expertise.

In their proposals with respect to standards and criteria for judgment, both Bar and Commission would at least eliminate the pointless variation that now exists among the various programs in their formulations of the concept of a security risk. The two proposed security standards are similar though not identical. Both are intended to encourage common-sense results by being less encumbered by an apparent burden of proof than the present Executive Order, under which clearance requires a finding that employment be "clearly consistent with the interests of national security."[12]

In so far as government employees are concerned, Bar and Commission seem to part company. The Bar favors continuance of a security approach, while the Commission advocates return to a loyalty standard, with all other security

10. P. 58.

11. Statement of the Hon. Phillip Young, *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess. 806 (1955), quoted in THE FEDERAL LOYALTY-SECURITY PROGRAM 58.

12. Exec. Order No. 10450, § 2, 18 FED. REG. 2489 (1953).

considerations being reserved for judgment of suitability for employment in the civil service sphere. When seen in their total setting, however, the apparent differences in approach become somewhat blurred; and the reasons advanced in support of neither are wholly satisfying. The Bar argues that less stigma would attach to discharges under a standard which does not isolate the factor of loyalty; but this would hardly comfort those whose loyalty is not drawn into question. The Commission, in advocating a loyalty standard seems, at times, comfortably deluded by the belief that its recommendations for broader procedural rights would permit loyalty testing with real accuracy. Yet its confidence seems to waver, for it recommends that where a choice exists civil service procedures should be used.

Both Bar and Commission were understandably concerned with the way evidence has been weighed, particularly in so far as it concerns membership and other associations. Necessarily, much of what they say is hortative in nature, but authoritative statements of what common sense should dictate may do some good. Both reports warn that while a person's associations are relevant, they should lead to no automatic conclusions. Both find grave defects in the Attorney General's list, which are multiplied by the blind uses to which it has been put not only in the federal programs but also by state, local and private groups. Unless such defects can be remedied, the Bar would abolish the list; and the Commission recommends drastic revision.

Perhaps the most troubled area of loyalty-security programs is procedure. Both Bar and Commission advocate broader procedural rights; and, while they might have gone further, their proposals, by contrast with the past, necessarily tend toward improvement. Both reports emphasize the importance of confrontation of witnesses and are eloquent in dispraise of past practices under which the right to a hearing has been seriously undercut by lack of subpoena power and the government's general failure to produce its witnesses. Their recommendations would probably lead to a greater measure of confrontation but how much more cannot be said with assurance. While both Bar and Commission would grant subpoena power, they would leave its exercise in the discretion of the hearing body, even beyond the understandable case where the investigative agency certifies that production of witnesses would destroy valuable sources of secret information. Both groups, moreover, would continue the practice of giving the hearing body only an advisory role and leaving the final say to the agency head. A wiser answer, perhaps, would be to allow the agency head to reverse only when the hearing body has recommended dismissal.

By way of further qualification of the procedural recommendations in the sphere of government employees, it must be remembered that they would apply only to proceedings under the security and loyalty programs which Bar and Commission, respectively, have proposed. They would not affect dismissals pursuant to civil service procedures.

The development and operation of federal loyalty-security programs suggest that unfair procedures have been used with tragic costs both to individuals

and to the ability of the federal government to retain and attract desirable employees. In the process, the values embodied in the first amendment have been seriously damaged; the fear of being improperly classified as a "risk" has inhibited freedom of expression and association. One must assume also some disservice to our larger national security interests, particularly through retarding scientific advance.

While these evil effects would be reduced by the recommendations of both Bar and Commssion, loyalty-security programs are in their nature an evil. The Bar report at times comes close to saying so but ultimately shrinks from expressing this hard truth. Like the Commission, though in more modest tone, it overstates the virtues of its recommended program as being "substantially free of the weaknesses and defects which have appeared in connection with the present programs."[13] And it goes on to say that "national security would be adequately protected and no reasonable citizen could feel that this was being achieved at the sacrifice of our basic principles of liberty and our sense of fairness."[14] The statement goes too far. Both reports repeat the uniform rhetoric of all official pronouncements in this area that the problem is one of reconciling security requirements with our traditional concepts of liberty. But this clearly implies that some sacrifice of cherished values—therefore some evil—is involved. This is made no more attractive by quoting Cardozo to the effect that the "reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites . . . are the great problems of the law."[15]

The way the rhetoric is turned can make a difference: recognition of loyalty-security programs as an evil forces a constant search for ways of reducing their scope—a search which indeed seems to animate the Bar report. The most effective step is to eliminate loyalty-security testing entirely, wherever possible. So far as federal employees are concerned, the Commission opposes any cut in the scope of loyalty testing, whether or not the job involves any real risk to national security interests, because "disloyalty should not be rewarded by the prestige and emoluments of public employment."[16] By contrast, the Bar purports to limit its proposed security program to "sensitive positions," which as presently defined would cover about half a million persons, somewhat less than twenty-five per cent of the total federal payroll. This also marks the area to which the Supreme Court has, by statutory interpretation, restricted the present program.[17] But the force of the Bar's proposal—and perhaps the Court's holding—becomes doubtful when the present "program" and the Bar's proposed "program" are examined more closely; as noted, both seem to leave open the possibility of loyalty or security testing under civil service procedures.

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13. P. 17.
14. *Ibid.*
15. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 4 (1928), quoted in THE FEDERAL LOYALTY-SECURITY PROGRAM 44.
16. P. 4.
17. Cole v. Young, 351 U.S. 536 (1956).

A better approach would combine two suggestions that have been made in some quarters: the elimination of all sensitive positions from civil service protection and the abolition of all loyalty or security tests for the balance of the federal payroll. Those in sensitive positions would, of course, be subject to investigation from the standpoint of loyalty and other security factors. But since dismissals from such positions would require no stated reasons, no necessity would arise for branding anyone as disloyal or as a security risk. A further effect would be to increase, from about fifteen to about thirty-three per cent, the proportion of federal positions excepted from civil service. This fact, besides eliminating loyalty testing of two thirds of all federal employees, would probably make such a solution unpalatable to the Congress.

Another approach, which has been considerably discussed, is to reduce the rigor of these programs by mitigating the sentence: to transfer the employee to a nonsensitive job instead of firing him. This is apparently close to the thinking of both Bar and Commission. Both groups propose this action while a federal employee is under charges, and would welcome such a solution by government contractors under the Industrial Security Program. Although such an approach would necessarily be limited so long as loyalty testing affects all federal employees—as contemplated by both Bar and Commission—it would obviously form a significant part of any program which confined loyalty and security testing to sensitive positions.

In the procedural area, abnormal curtailment of rights of confrontation and cross-examination, in the interests of protecting vital sources of information, should also be restricted. Some have suggested that the government should, as in a criminal case, be required either to produce its witnesses or drop its charges. This will simply not do with respect to positions which are really "sensitive." But is it not a tenable view as to all other positions? It would seem, moreover, a likely position of the Supreme Court if it ever rules on procedural due process in this area. In the nature of things, the Court would have to work out a compromise which would whittle down due process standards to the extent required by the real interests of national security. The Court might well—and properly—say that a loyalty proceeding involving a nonsensitive job requires the production of all witnesses.

Where curtailment of rights of confrontation and cross-examination is necessary, it should be offset as much as possible by special attempts to assist the accused. The Bar and Commission reports would be worth while if they accomplished nothing more than elimination of the shocking procedure of suspending employees without pay when charges are filed. Both reports recognize the hardship involved in the many months typically elapsing between beginning and end of a security proceeding, a hardship which often renders other procedural rights academic. And both are suggestive of further possibilities for improving the lot of the accused. For example, the expenses of his witnesses should be borne by the government in all cases, as the Bar proposes, not merely when the suspect is ultimately cleared, as the Commission recommends. The

same should be true of attorney's fees, which the Commission would deny, and the Bar would grant only if the employee is cleared. The outcome should make no difference since, with standards inherently vague and procedures less than ideal, the result is imperfect at best.

What, finally, can be said of the overall value and effect of these two reports? While neither set of proposals goes as far toward improvement as one might wish, both would provide something more civilized than the present system. But will any of the suggested improvements be given effect? And if so, is it too late to do much good?

We learn from each report that the wholesale screenings and rescreenings of federal employees have been completed, and that the programs applicable to them have, since at least 1955, been concerned largely with applicants and new employees. This certainly suggests that the major damage has already been done. Still, the two reports are not wholly concerned with locking the proverbial barn door after the horse has been stolen. There is a constant turnover in the federal payroll; and the national interest demands that talented people not be repelled from seeking government positions. This gives special importance to the proposals by both Bar and Commission of granting some procedural rights to job applicants and probationary employees. Moreover, it must be remembered that both reports deal with far more than federal employees. Most notably, the impact of their proposals with respect to the Industrial Security Program would, if adopted, be quite considerable. And just as the evils of the federal programs have been multiplied through imitation by state, local and private measures, so also, one can hope, would be the proposed improvements.

One hesitates to predict the chances of adoption of Bar and Commission recommendations. For some time, proposals for legislative change have seemed to be on dead center, with those for tightening and those for relaxing security measures in apparent equilibrium. Still, the former pressure for ever broader and tougher loyalty-security programs has materially abated. And one can reasonably speculate that the launching of Sputnik may here, as well as in the field of education, have stimulated some useful second thoughts.

If the point has in fact been reached where the cons as well as the pros of security programs can be soberly considered and weighed, a focus for such thinking is, by good fortune, at hand in the Bar and Commission reports. In such an enterprise, the Commission's work is sure to be a standard reference. One would hope the same of the Bar's. Its orderly analysis, comprehensive references to variant points of view and competing values, and yet its extreme concision, make it not only valuable in itself but also an almost indispensable guide to the vast bulk of the Commission report.

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