SECURITY TESTS FOR MARITIME WORKERS: DUE PROCESS
UNDER THE PORT SECURITY PROGRAM*

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THE search for security against spies, saboteurs, and other disaffected persons has led to the creation of elaborate programs for the surveillance of federal employees.¹ The same considerations require protective measures among those who, nominally in private employment, produce or develop secret weapons for the military establishment. Thus the Department of Defense requires clearance of defense contractors and their employees before they may have access to classified materials;² and the Atomic Energy Commission has a statutory mandate to investigate the "character, associations, and loyalty" of those to whom it entrusts "restricted data."³ But neither of these martial agencies exercises as much sway over the livelihood of private citizens as does the United States Coast Guard. Better known for its unceasing attention to wrecks, buoys, and icebergs,⁴ since the Korean War the Coast Guard has

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1. For a thorough treatment of the program for federal employees, see BONTÉCOU, *THE FEDERAL LOYALTY-SECURITY PROGRAM* (1953). Exec. Order No. 10450, 18 FED. REG. 2489 (1953), made "security" rather than "loyalty" the controlling standard throughout the executive branch.

2. See MUNITIONS BOARD, *INDUSTRIAL SECURITY MANUAL FOR SAFEGUARDING CLASSIFIED SECURITY INFORMATION* (Dep't Def. 1951); MUNITIONS BOARD, *HOW TO BE CLEARED FOR HANDLING CLASSIFIED MILITARY INFORMATION WITHIN INDUSTRY* (Dep't Def. 1951). The appeal mechanism described in these documents was abolished as of April 1, 1953 by order of Sec'y of Defense Wilson, but a directive of May 4, 1953 replaced it with something quite similar. Secretaries of War, Navy, and Air Force, *Industrial Personnel and Facility Security Clearance Program* (mimeo.).

3. Atomic Energy Act, 60 STAT. 767 (1946), 42 U.S.C. § 1810(b) (5) (B) (ii) (1946). See generally, GELLHORN, *SECURITY, LOYALTY & SCIENCE* (1950).

4. See, e.g., BAARSLAG, *COAST GUARD TO THE RESCUE* (1937).

been charged with weeding out security risks from among seamen and waterfront workers. More than half a million Americans have met the test.⁵ What is striking is that the seemingly small number found wanting—some 2,500⁶—is probably greater than the toll of victims of any other loyalty or security program.⁷ Also striking is the lack of public attention that this aspect of the Port Security Program,⁸ as it is called, has attracted. This inattention becomes truly remarkable in view of the Program's impact: denial of clearance to a seaman bars him altogether from practicing his calling. In this respect the Port Security Program is unique; for though other federal security programs affecting private employment may have the practical effect of excluding a man from his vocation, no other one purports to do so;⁹ they are framed in terms of access to classified matter, and the world of unclassified employment is presumably still open to the reject.¹⁰

5. See p. 1185 *infra*.

6. See note 119 *infra*.

7. Of the 25,566 investigations that reached loyalty boards in the five years the Federal Employee Loyalty Program was in operation, 519 persons were finally dismissed or denied employment. LOYALTY REVIEW BOARD, REPORT ON THE LOYALTY PROGRAM AS OF MARCH 1953 (U.S. Civil Ser. Comm. 1953). A statement on the AEC Program for its more than five years of operation, believed to be forthcoming in 14 SEMIANN. REP. AEC (1953), will report a similar number of denials of clearance. Complete figures on separations under Pub. L. No. 733, 64 STAT. 476, 5 U.S.C. § 22-1 (Supp. 1952), the 1950 statute permitting removal on security grounds from a number of agencies, are unavailable. Under prior security legislation, applicable chiefly to the Dep't of Defense and its components, 56 STAT. 1053 (1942), 5 U.S.C. § 652 (1946), the total number removed from 1942 to 1950 was 375. *Hearings before House Committee on Postoffice and Civil Service on H.R. 7439 (Pub. L. 733)*, 81st Cong., 2d Sess. 30 (1950). See also BONTECOU, *op. cit. supra* note 1, at 145.

8. This article is limited to consideration of personnel screening measures under the Port Security Program. The program has other important aspects, including supervision of explosives handling, the guarding of restricted areas and general security supervision of waterfront areas, and the search of ships coming into American waters for atomic weapons or other explosives. For a review of the Coast Guard's work on these other aspects see N.Y. Times, Feb. 26, 1953, p. 45, col. 6.

9. Other federal security measures affecting private employment are collected in Comment, 62 YALE L.J. 954, n.95 (1953). A federal loyalty program affects employment of Americans by the Secretariat of the United Nations. See Exec. Order No. 10422, 18 FED. REG. 239 (1953), as amended, Exec. Order No. 10459, 18 FED. REG. 3183 (1953); SEC'Y-GEN'L, REPORT ON PERSONNEL POLICY A/2364 (1953).

10. See sources cited in notes 2, 3 *supra*. But if the nature of a person's vocation is such that the Government and its contractors are the only likely employers, as, for example, with an atomic weapons expert, denial of security clearance may have the practical effect of excluding a man from this vocation. See GELLHORN, *op. cit. supra* note 3, at 111, *passim*.

"Classified" material or information refers chiefly to "security information" designated "Restricted," "Confidential," "Secret," or "Top Secret," in accordance with Exec. Order No. 10290, 16 FED. REG. 9795 (1951), and to "restricted data" under the Atomic Energy Act. Cf. the proposed Executive Order released June 17, 1953.

The risk of exclusion that the seaman faces today may reach other occupations tomorrow. The Port Security Program itself rests more lightly on other waterfront workers than on seafarers. A longshoreman (or a shipping company officer or a racketeer) needs a Port Security Card only if his business takes him to docks where cargo of a military nature is being handled. But if the Commandant of the Coast Guard so decides and by regulation so prescribes, the whole waterfront may be closed.¹¹ Similarly, the confinement of Defense Department screening to private employees on highly classified contracts is, as things stand, largely a matter of forbearance. An apprehensive Secretary might decree that *all* employees of *all* contractors must be above suspicion, unless some restrictions are imposed by the courts or by Congress. And congressional scrutiny of executive action is likely to be expansive rather than restrictive in its results when the national security is invoked. As will appear, the sweeping Port Security Program rests on almost off-hand legislative response to the Korean War.¹² Another crisis might direct anxious official attention to power plants, or steel mills, or railroads, or any number of other vital industries.

Consequently, a close look at the Port Security Program has relevance beyond the circumstances that involved the Coast Guard in communist-hunting. The legal issues—the power of the Government to deny private employment, the authorization of the Coast Guard to undertake this program, the adequacy of the standards and procedures it employs—may, if they are confirmed by usage or by judicial approbation, affect the lives of many who are not poor seamen.

Communism and the Shipping Industry

If the state of the world makes sabotage and espionage real dangers, the shipping industry is undoubtedly vulnerable. Ships and docks are bottlenecks through which pass most military equipment bound overseas; and both are acutely flammable types of structures. The accidental catastrophe at Texas City in 1947¹³ now makes insignificant the Black Tom explosion on the Jersey City waterfront in 1916; but at the time Black Tom was a spectacular feat of sabotage.¹⁴ The same rings of German agents who perpetrated the Black Tom explosion were for a while equally successful in planting incendiary bombs in ships' cargoes so that they would catch fire at sea;¹⁵ their dupes were said to be dock workers with pro-German or anti-British sympathies.¹⁶ Moreover, seamen, with their overseas contacts, are particularly useful as

11. See p. 1173 *infra*.

12. See p. 1187 *infra*.

13. N.Y. Times, Apr. 17, 1947, p. 1, cols. 4-8. See *In re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952).

14. See WEYL, *THE BATTLE AGAINST DISLOYALTY* 115 *et seq.* (1951).

15. WEYL, *op. cit. supra* note 14, at 102 *et seq.* See also the account of German attempts to tie up New York Port by subsidizing strikes of dock workers. *Id.* at 103.

16. *Id.* at 104.

spies or couriers for spies. There was a lively traffic in such shady characters during the early years of both World Wars.¹⁷

No significant episodes are reported after our entry into World War II.¹⁸ By that time our security apparatus, and our procedures for the detention of dangerous enemy aliens, were much better organized.¹⁹ Part of that apparatus was a program, then as now administered by the Coast Guard, for limiting access to waterfront installations;²⁰ but so little has been disclosed about its operation that it is not feasible to apportion the credit for our immunity from sabotage. The methods used combined blanket surveillance of property and personnel by the Coast Guard with pinpoint apprehension of known saboteurs by the FBI.

The outbreak of the Korean War created a situation not unlike that in the two World Wars before America became a belligerent. We were not fully at war, with all the restrictions on movement and the sealing of boundaries that then follow; yet we were very decidedly the arsenal of democracy, and it was now to the interests of international communism by political strikes and other devices to cripple our supply lines to Asia and our rearming of western Europe.²¹ Just as the Germans had friendly contacts with compatriots here who had no love for the Allied cause, so communism had its American sympathizers.

Nowhere had they infiltrated more deeply than in some sectors of maritime labor. The miserable conditions of life at sea, and the scarcely better lot of longshoremen, provided in the 1930's a fertile soil for militant communism, and for militant unions.²² The unions faced a chronic oversupply of labor, accentuated by foreign competition with the weak shipping industry.²³ But in the last two decades, while the Government supported them with the Wagner Act²⁴ and the shipowners with subsidies,²⁵ the unions have made great gains

17. *Id.* at 98 *et seq.*, 153 *et seq.*

18. In November, 1947, J. Edgar Hoover, Director of the FBI, said: "[T]his nation came through the war with no enemy-directed acts of sabotage. The enemy espionage efforts were thwarted. . . ." N.Y. Herald Tribune, Nov. 16, 1947, p. 45, col. 3.

19. See WEYL, *op. cit. supra* note 14, at 173 *et seq.*; Brecht, *The Concentration Camp*, 50 COL. L. REV. 761, 766 (1950); Note, *Internal Security Act of 1950*, 51 COL. L. REV. 606, 653 (1951).

20. See notes 44 and 127 *infra*.

21. See, *e.g.*, accounts of the efforts of the French Communist Party to interfere with shipments of war materials to Europe. N.Y. Times, Feb. 17, 1950, p. 16, col. 2; *id.*, Feb. 20, 1950, p. 24, col. 2; *id.*, Feb. 24, 1950, p. 12, col. 3.

22. See, *e.g.*, EDITORS OF FORTUNE, OUR SHIPS 373 *et seq.* (1938) (reprinted from Fortune, Sept., 1937).

23. *Id.* at 307 *et seq.*

24. National Labor Relations Act, 49 STAT. 452 (1935), 29 U.S.C. § 157 *et seq.* (1946).

25. Merchant Marine Act of 1936, 49 STAT. 198 (1936), 46 U.S.C. § 1151 *et seq.* (1946). On the scope of these subsidies see FED. MARITIME BOARD ANN. REP. 12 *et seq.* (1952).

for their members.²⁶ Much of the militancy meanwhile was expended on internal and inter-union strife.²⁷ It was not of a particularly gentle sort, either. Sailors, if they needed instruction in strongarm methods, had long been exposed to it by their masters.

Under these circumstances, many of the contests within and between unions involved pro- and anti-communist alignments. As elsewhere in the labor movement, the AFL-CIO division had some correlation with communist influence, though the plethora of unions in the industry may result from routine rivalry as well as from political schisms.²⁸ Without attempting to unravel all the strands, it does appear that three unions—the National Maritime Union (deckhands), the Marine Cooks and Stewards, and the International Longshoremen's and Warehousemen's Union—have been communist-dominated. Before Korea the NMU, headed by Joseph Curran, turned to an anti-communist position;²⁹ it is still in the CIO. The other two, led by Hugh Bryson³⁰ (MCS) and Harry Bridges³¹ (ILWU), were expelled from the CIO when the CIO purged itself of allegedly communist-controlled unions in 1950.³² This action did not materially weaken the strong leadership of either Bryson or Bridges,³³ although a CIO splinter (Pacific Marine Stewards) broke off

26. See Daykin, *The Status of the Maritime Workers Under the National Labor Relations Act*, 26 ORE. L. REV. 229 (1947). Compare the wage scale of maritime personnel in the year 1940, LANE, *WHAT EVERY CITIZEN SHOULD KNOW ABOUT THE MERCHANT MARINE* 108 *et seq.* (1941), with current wages, DAVENPORT SEAMAN SERVICE, *MERCHANT MARINE ENROLLMENT AND CAREER GUIDE* 4 (1953) (ordinary seamen have risen from a minimum wage of \$55 per month to \$232.92; firemen from \$72.50 to \$259.55).

27. See, e.g., Wollett & Lampman, *The Law of Union Factionalism—The Case of the Sailors*, 4 STAN. L. REV. 177 (1952).

28. On the organization of maritime labor see, generally, SMITH, *LABOR LAW* 54 *et seq.* (1950); PETERSON, *HANDBOOK OF LABOR UNIONS* (1944).

29. See BOYER, *THE DARK SHIP* (1947); Neikind, *Joe Curran: Scaman in Deep Water*, *The Reporter*, March 22, 1950, p. 27.

30. Bryson recently received the dubious distinction of being the first leader of a national or international union to be indicted on charges of perjury in falsely stating that he was not a communist in a non-communist affidavit required by the Taft-Hartley Act. *New Haven Evening Register*, Apr. 18, 1953, p. 21, col. 2. The membership of the MCS, about 5,000, is only about one-tenth that of either the NMU or the ILWU. See generally STAFF REPORT TO THE SUBCOMMITTEE ON LABOR AND LABOR-MANAGEMENT RELATIONS OF THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, *THE MARINE COOKS AND STEWARDS UNION* (82d Cong., 2d Sess. 1953).

31. Bridges' long battle against deportation recently culminated in the reversal of his conviction for conspiring to secure his naturalization by fraudulently representing that he had never belonged to the Communist Party, *Bridges v. United States*, 21 U.S.L. WEEK 4457 (U.S. June 15, 1953).

32. See SEN. DOC. NO. 89, 82d Cong., 1st Sess. 31, 79 (1951).

33. See Hield, *What Keeps Harry Bridges Going*, *Labor and Nation*, Jan., 1952, p. 38. But see the recent report that Bridges might be planning to organize the Marine Cooks and Stewards into a local of the ILWU to counteract the organizing drive of the Seafarers' Int'l Union against the MCS. *N.Y. Times*, Apr. 15, 1953, p. 63, col. 2.

from the MCS, and three important anti-communist locals remained in the ILWU.

This brief account of a stormy history is significant for two reasons. It lends support to those who argue that the industry contains many communists, not of an ineffectual intellectual type. And it helps to explain the absence of widespread union opposition to the Port Security Program. Most unions were already belligerently anti-communist, either on principle or as a tactic against rival unions. Sometimes (as in the case of the NMU) this position was held with the extra zeal of the recent convert. When one superimposes on security considerations the attraction of ridding the industry of communist elements, it becomes understandable that the unions and the employers should now join in support of the Security Program.

Though no one would accuse the management groups of communist sympathies, there have been charges that they found advantageous and even encouraged the divisions among labor on the communist issue.³⁴ Indeed, the employers doubtless have profited from this strife to the extent that it dissipated the energies of union leaders. However, the inconvenience of dealing with competing unions, with the risk of work stoppages in which employers are helpless, must check somewhat employers' satisfaction over labor's squabbles, as well as any impulse to foment them. In any case, such employers' associations as the Pacific Maritime Association, the New York Shipping Association, and the National Association of Stevedores have actively supported the Port Security Program.³⁵

The Coast Guard's Role in the Voluntary Security Program

Although the Coast Guard traditionally has been close to the maritime industry because of its responsibility for marine safety, it did not acquire supervisory control over the licensing and certifying of merchant marine personnel until 1942. The Coast Guard inherited these powers from the Bureau of Marine Inspection and its predecessor bureaus in the Department of Commerce which for more than half a century had handled these functions.³⁶ The controls include the issue of licenses and certificates to applicants upon their satisfying prescribed standards of suitability, experience, and ability,³⁷ and investigation of acts of incompetence or misconduct, with au-

34. See, e.g., STAFF REPORT, *op. cit. supra* note 30, at 131-2.

35. See, e.g., N.Y. Times, July 25, 1950, p. 51, col. 2.

36. An Act of 1884, 23 STAT. 118, 46 U.S.C. § 1 (1928), created a Bureau of Navigation in the Dep't of Commerce. In 1932 this Bureau was consolidated with the Steamboat Inspection Service and in 1936 its name was changed to the Bureau of Marine Inspection and Navigation. 49 STAT. 1380, as amended, 46 U.S.C. § 1 (Supp. 1952). Temporary transfer of the functions of this Bureau to the Coast Guard was made by Exec. Order No. 9083, 7 FED. REG. 1609 (1942). This transfer was made permanent by 1946 Reorg. Plan No. 3, 11 FED. REG. 7875, 60 STAT. 1097, as amended, 46 U.S.C. § 1 (Supp. 1952).

37. See, e.g., 62 STAT. 233 (1948), 46 U.S.C. § 229c (Supp. 1952): "Whenever any person applies for authority to perform the duties of radiotelegraph operator of any

thority to revoke or suspend licenses or certificates in proper cases.³⁸ Without a license or certificate a man is not eligible for employment in the marine trades.³⁹ There was considerable opposition on the part of the maritime unions to the original transfer of these functions to the Coast Guard and this antagonism toward the Coast Guard has not altogether abated.⁴⁰

The Coast Guard had another source of power. Since 1917 a federal statute has authorized the granting to the Coast Guard of broad powers over port facilities, vessels, and their personnel during periods of national emergency.⁴¹ This statute was invoked by presidential proclamation in 1917⁴² and again in 1940;⁴³ during World War II it was relied upon as authority for sweeping

vessel, the inspectors shall require possession of a valid first- or second-class radiotelegraph operator license issued by the Federal Communications Commission; and if, upon full consideration, they are satisfied that his character, habits of life, and physical condition are such as to authorize the belief that he is a suitable and safe person to be entrusted with the powers and duties of such a station, they shall grant him a license. . . ." See also 49 STAT. 1330 (1936), as amended, 46 U.S.C. § 672 (Supp. 1952) (seamen); 30 STAT. 764 (1898), as amended, 46 U.S.C. § 226 (Supp. 1952) (captains); 30 STAT. 340 (1898), as amended, 46 U.S.C. § 228 (Supp. 1952) (mates); 29 STAT. 188 (1896), as amended, 46 U.S.C. § 229 (Supp. 1952) (engineers). These requirements are collected and summarized in BUREAU OF LABOR STATISTICS, BULL. No. 1054: EMPLOYMENT OUTLOOK IN THE MERCHANT MARINE, 26 *et seq.* (1951). Cf. *Gove, Sayre & Lazar v. Farley*, Civil Nos. 4596-49, D.D.C., 1949, holding that the due process clause was not violated by Commandant's determination that applicants for radio operator's licenses were not "suitable and safe" persons because of their affiliation with the Communist Party. An appeal from the oral opinion was dropped.

38. 49 STAT. 1380 (1936), as amended, 46 U.S.C. § 239 (Supp. 1952); 46 CODE FED. REGS. c. 1 (1949); *In re Merchant Mariners Documents Issued to Dimitratos*, 91 F. Supp. 426 (N.D. Calif. 1949).

39. 30 STAT. 764 (1898), as amended, 46 U.S.C. § 224 (Supp. 1952); 53 STAT. 1196 (1939), as amended, 46 U.S.C. § 246 (Supp. 1952); 38 STAT. 1169 (1915), as amended, 46 U.S.C. § 672(i) (1946).

40. See, *e.g.*, the statements of officials of the Seafarers' Int'l Union, N.Y. Times, Sept. 24, 1950, p. 106, col. 5.

41. 40 STAT. 220 (1917), as amended, 50 U.S.C. § 191 (Supp. 1952). This statute provides that:

[T]he Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.

42. The Proclamation was issued by the President on Dec. 3, 1917. 50 U.S.C. § 191 note (Supp. 1952).

43. Proclamation No. 2412, 5 FED. REG. 2419 (1940).

security measures at the nation's ports.⁴⁴ These measures were abandoned upon the termination of hostilities in 1945 and the authority was revoked in 1947.⁴⁵

There was thus in being no legal authority for port security measures when South Korea was invaded by the communists in June, 1950. And until the declaration of a national emergency, the 1917 statute could not be invoked. Consequently, on July 22nd the Secretaries of Labor and Commerce with the approval of President Truman issued an invitation to leading shipowners and maritime union leaders to confer two days later on "questions of national security," specifically on ways of preventing communists from remaining active in the American merchant marine.⁴⁶ Representatives of all invited major maritime unions, of the various maritime associations and steamship companies, and of the interested Government agencies attended the conference in Washington. A voluntary plan to weed out communists from the merchant marine during the Korean emergency was agreed upon. Neither Harry Bridges' ILWU nor Hugh Bryson's Marine Cooks and Stewards had been invited to this conference, but representatives of the three anti-communist locals⁴⁷ of the ILWU nevertheless attended and signed the agreement. The core of the agreement was an undertaking by the Coast Guard to determine, on the basis of information furnished by the Federal Bureau of Investigation and the Office of Naval Intelligence, what persons in the merchant marine were poor security risks. All the parties then agreed, quite without legal authority, to deny such persons the right to sail. The resolution provided, in occasionally picturesque language:

"We, the representatives of Maritime Labor, and employer organizations in the Maritime industry, in the current crisis caused by the Communist invasion of Southern Korea, hereby declare ourselves bound by the following policy:

"(1) We pledge full cooperation to the United States Government in the entire period of the emergency.

"(2) We recognize that certain men, because of being known as Communist Party card carriers, subversives, or who are notorious as consistently carrying out policies of the Communist Party, will be classified as bad security risks by the military or proper Government authorities.

"(3) No ship will be delayed because any such men are re-

44. See Exec. Order No. 9074, 7 FED. REG. 1587 (1942); Directives, Commandant of the Coast Guard (April 15 and July 20, 1942).

45. Presidential Proclamation No. 2732, 12 FED. REG. 3583 (1947), revoked Proclamation No. 2412, note 43 *supra*. A Joint Resolution, 61 STAT. 451 (1947), provided that, in the interpretation of the Act of 1917, July 25, 1947, would be deemed the date of termination of any state of war theretofore declared by Congress and of the national emergencies proclaimed by the President in 1939 and 1941.

46. N.Y. Times, July 23, 1950, § V, p. 7, col. 1.

47. Local 10, Local 19, and Local 34.

jected by the United States military or proper Government authorities as a bad security risk.

"(4) If such a man is thus rejected, the Union involved immediately will furnish a replacement. However, the Union or the employee involved, shall have the right to appeal the case before a proper review board, if it feels the classification of any individual is improper or incorrect.

"(5) No man shall be classified as a bad security risk as a means of discrimination because of union activity.

"(6) In any review board set up to review such appeals organized labor and management shall have proper representation as follows: In each principal port one man shall represent the employers, one man shall represent the union, and one man from the Coast Guard. A National appeals board shall be set up in Washington, D.C., comprised of representatives from each group in a similar representation.

"(7) Should any union or organization not here signatory by phony demonstrations, bogus picket lines, etc., endeavor to delay or obstruct vessel movements, all unions signatory shall not assist, condone, or support such movements but shall keep the vessels sailing."⁴⁸

The Coast Guard immediately began screening merchant marine personnel on the West Coast and by August was also screening seamen on foreign-bound voyages of American merchant vessels from East and Gulf Coast ports.⁴⁹ The rough procedure adopted was for the Coast Guard Shipping Commissioner in each port to go aboard a ship and check the name of any person desiring to sign on against a secret list in his possession. Anyone whose name appeared on the list was declared to be a poor security risk; under the agreement management refused to allow him to sign on; the appropriate union sent a replacement from its hiring hall. The tripartite appeal boards called for by the agreement were never established under the voluntary program, but there was an informal interim procedure of appeal to a designated Coast Guard officer in each port and from him to a five-officer board in Washington. In addition, any reject who considered himself improperly screened was encouraged to forward his complaint directly to the Commandant in Washington. The Coast Guard blamed its tardiness in setting up the tripartite boards on the necessity of having all management and the union nominees to the boards fully investigated by the FBI.⁵⁰

48. N.Y. Times, July 25, 1950, p. 51, cols. 2, 3.

49. Two independent screening programs for longshoremen were also initiated in 1950. In Boston the NMU set up its own screening procedure. N.Y. Times, Aug. 22, 1950, p. 51, col. 2. The Army and Navy set up a joint program for screening workers at San Francisco Military Port facilities. *Id.* Sept. 1, 1950, p. 41, col. 6; *id.* Sept. 6, 1950, p. 59, col. 8.

50. N.Y. Times, Sept. 13, 1950, p. 55, col. 1.

Temporary boards consisting of one Coast Guard officer were continued under the statutory program for several months until tripartite board members were cleared. See

THE STATUTORY PROGRAM

Even before the voluntary program was adopted, Senator Magnuson of Washington, at the request of the Department of Justice, introduced a bill to amend the Act of 1917. This measure,⁵¹ hurriedly passed by both houses and signed by the President on August 9, 1950, is entitled "An Act to authorize the President to control the anchorage and movement of foreign-flag vessels in waters of the United States when the security of the United States is endangered, and for other purposes." Its text is as follows:

"Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations

"(a) to govern the anchorage and movement of any foreign-flag vessels in the territorial waters of the United States, to inspect such vessels at any time, to place guards thereon, and if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of rights and obligations of the United States, may take for such purposes full possession and control of such vessels and remove therefrom the officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof;

"(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States. . . ."⁵²

On October 18, 1950, President Truman, under the authority granted him by the Magnuson Act, issued Executive Order 10173 entitled "Regulations Relating to the Safeguarding of Vessels, Harbors, Ports and Waterfront Facilities of the United States."⁵³ This order gave the Coast Guard extensive controls over all vessels entering or leaving United States waters and over all maritime personnel. It thus not only superseded the voluntary program for the seagoing trades, but included in the screening program waterfront employees as well. The Executive Order also made a penal provision of the Act of 1917 applicable to the new program.⁵⁴ Early in November the Com-

introduction to regulations, 15 FED. REG. 9327 (1950), p. 1173 *infra*. But anyone rejected by a one-man board was subsequently allowed to have his case reviewed by a tripartite board as soon as one was constituted in his district. Affidavit of Vice-Admiral Merlin O'Neill, dated Oct., 1951, filed in *Parker v. Lester*,—F. Supp.—(N.D. Calif. 1953), p. 22.

51. 64 STAT. 427 (1950), 50 U.S.C. § 191 (Supp. 1952).

52. *Ibid*.

53. 15 FED. REG. 7005 (1950). The President based the order on a finding that the security of the United States was endangered by reason of subversive activity.

54. The penal provisions provide for seizure and forfeiture of a vessel, fine and im-

mandant of the Coast Guard issued proposed regulations implementing the Executive Order, announced a hearing, and invited comments.⁵⁵ On December 27, 1950, after hearing the views of varied parties including the Maritime Committee of the CIO, the American Civil Liberties Union, Harry Bridges, and Hugh Bryson, the Commandant issued and made official the proposed regulations with a few of the modifications proposed by the ACLU.⁵⁶

The Commandant has gradually expanded the scope of the Port Security Program, by exercising his power to designate areas of the waterfront and categories of vessels subject to the Program. The Executive Order requires the Commandant to designate affirmatively waterfront facilities that are to be restricted,⁵⁷ but it provides that all United States merchant vessels are restricted, subject to the power of the Commandant to create exempt categories.⁵⁸

Because of limited manpower, the Coast Guard first concentrated on the crews of ships in foreign trade, and initiated only a limited waterfront program. But the Commandant has gradually extended the categories of restricted vessels, so that the Program now covers practically all shipping,⁵⁹ even barges on the Great Lakes and the western rivers.⁶⁰ The number of waterfront areas declared restricted has also gradually increased.⁶¹

prisonment of an individual. 40 STAT. 220 (1917), as amended, 50 U.S.C. § 192 (Supp. 1952).

55. 15 FED. REG. 7527 (1950).

56. 15 *id.* 9327 (1950).

57. Exec. Order No. 10173, § 6.10-5, 15 FED. REG. 7005 (1950).

58. *Id.* § 6.10-1. As of March 1, 1953, there were 1,263 privately owned ocean-going vessels of over 1000 gross tons flying the American flag. In addition, 156 Government-owned vessels were being operated by private companies for the Government. 82,538 licensed and certified men were employed on these vessels. NATIONAL FEDERATION OF AMERICAN SHIPPING, RESEARCH REPORTS NOS. 53-3, 53-4 (1953).

American shipowners avoid many forms of Government control and are able to pay wages far below those set by American unions by sailing under foreign flags. From 1939 to 1951 over 738 privately-owned vessels were transferred to foreign registry. See ASS'N OF AMERICAN SHIP OWNERS, SHIPPING SURVEY 1 (March 1952). Port Security screening does not apply to their crews. However, these foreign-flag vessels are subject to other security measures. See p. 1172 *supra*. Some seamen denied security clearance by the Coast Guard have apparently found employment on foreign vessels. Communication to the YALE LAW JOURNAL from Thomas Ray, Director of Research, NMU, dated May 6, 1953, in Yale Law Library.

59. See § 121.02, 16 FED. REG. 817 (1951); § 121.16, 16 *id.* 6180 (1951), amended by 16 *id.* 6868 (1951), 16 *id.* 8846 (1951), 17 *id.* 658 (1952), 17 *id.* 5040 (1952). These Regulations now apply to all merchant vessels of the United States of 100 gross tons and upward engaged in foreign, intercoastal, coastwise, and Great Lakes trade.

60. § 125.37, 16 *id.* 8273 (1951). The Coast Guard recently announced that after July 1, 1953, crew members of harbor craft on the Great Lakes would be required to carry identification-credentials. New Haven Sunday Register, April 26, 1953, p. 4, col. 2. Since these men were not previously licensed by the Coast Guard they are screened under the waterfront program and issued Port Security Cards rather than validated documents.

61. According to latest reports, 24 piers are now restricted at the New York Port. N.Y. Times, Feb. 26, 1953, p. 45, col. 6.

The Initial Screening Process

The administrative keystone of the security program is the provision in the Executive Order that any person employed on any vessel of United States registration or seeking access to any vessel or waterfront facility within the jurisdiction of the United States may be required to carry identification credentials issued by or otherwise satisfactory to the Commandant of the Coast Guard.⁶² Under this authority the Commandant adopted separate but similar procedures for the seagoing trades and waterfront employees. Since seagoing personnel already are required to hold a federal license or certificate, the regulations provide a method for stamping these Merchant Marine Documents "validated for emergency service" when security clearance has been granted.⁶³ The normal validation procedure requires the seaman to apply in the prescribed manner at any Coast Guard Marine Inspection Office. The Office will forward the application to the Commandant in Washington, where it is checked against the files to see if they disclose derogatory information about the applicant. The files contain reports from the various investigative agencies of the Government, such as the FBI and the intelligence branches of the armed forces. The Coast Guard does not employ its own investigators in this program and does not attempt to verify the derogatory information or any evaluation that may be placed on it by the reporting agencies. On the basis of this processing, the Commandant decides whether security clearance will be granted.⁶⁴ The office of application is then notified of the Commandant's decision, and either prepares validated documents for the applicant or a form letter of rejection; these are generally held in that office until picked up by the applicant.⁶⁵

While awaiting clearance, which usually takes about six weeks, the applicant may not sail in any restricted ship unless he can get a "trip letter" from the local Coast Guard Office.⁶⁶ Validated documents or a trip letter are the only acceptable credentials for employment on restricted vessels.⁶⁷

Because longshoremen and other waterfront workers do not have to hold licenses, a slightly different procedure was adopted for them. The Commandant has prescribed certain identification credentials that are considered acceptable for entry into restricted port areas; among them are validated Mer-

62. Exec. Order No. 10173, § 6.10-5, 15 FED. REG. 7005 (1950).

63. 33 CODE FED. REGS. § 121.15 (Supp. 1952).

64. 33 *id.* § 121.13(c).

65. 33 *id.* § 121.13(b) (4).

66. 33 *id.* § 121.07 provides that security clearance "may be given in the form of permission for employment for one voyage, or for a specific length of time, or by the issuance of a document bearing evidence of security clearance." The trip letter procedure is based on this provision. This letter is good for only one trip on one vessel and is generally not issued unless the applicant already has an assured job and there is a shortage in his rating.

67. 33 *id.* § 121.11.

chant Marine Documents and the Armed Forces Identification Card.⁶⁸ Persons not holding such credentials who are regularly employed at waterfront facilities or who have regular public or private business at such facilities may apply for a Coast Guard Port Security Card.⁶⁹ The processing of this application is similar to that of the Merchant Marine Documents, but there is no general provision for the issuance of temporary passes pending clearance.⁷⁰

Criteria for Denial of Clearance

Executive Order 10173 was amended in August, 1951, to provide that clearance will be denied "unless the Commandant is satisfied that the character and habits of life of the applicant therefor are such as to authorize the belief that the presence of such individual on board a vessel or within a waterfront facility would not be inimical to the security of the United States."⁷¹ The form in which this standard is cast seems to impose on the Commandant a responsibility to make an affirmative decision that the applicant is reliable. No overt change in policy, however, accompanied the adoption of this formula in place of the original one, which required a denial *if* the Commandant found that the employment *would* be inimical to security.⁷² If the present form has any significance, it presumably implies that doubts are to be resolved against the applicant.

The Commandant's Regulations provide that in making the required determination he may consider whether, on all the evidence and information available, "reasonable grounds" exist for the belief that the individual:

"(1) Has committed acts of treason or sedition, or has engaged in acts of espionage or sabotage; has actively advocated or aided the commission of such acts by others; or has knowingly associated with persons committing such acts; or,

68. *Ibid.* Other credentials deemed satisfactory by the Commandant are identification credentials issued by federal law enforcement and intelligence agencies to their officers and employees, and credentials issued to public safety officials (*e.g.*, police and firemen) when acting within the scope of their employment.

69. 33 *id.* § 125.15. A sponsor is required to certify that the applicant is employed in work connected with the waterfront or is a member of a maritime union, and that the applicant's statements on his application are true to the best of the sponsor's knowledge. 33 *id.* §§ 125.19, 125.25.

70. 33 *id.* § 125.37, relating to requirement of credentials on barges on the Great Lakes and western rivers, was amended to allow issuance of temporary letters of clearance at the discretion of District Commanders if applicant has applied for a Port Security Card and his service is necessary to avoid delay in the sailing of the vessel. 17 *FED. REG.* 2503 (1952).

71. Exec. Order No. 10173, § 6.10-1, 15 *FED. REG.* 7005 (1950), as amended, Exec. Order No. 10277, 16 *FED. REG.* 7537 (1951), provided that "no licensed officer or certificated man" shall be employed on a vessel unless cleared. This provision was once again amended by Exec. Order No. 10352, 17 *FED. REG.* 4607 (1952), to provide that "no person" shall be employed on a vessel unless cleared.

72. Exec. Order No. 10173, § 6.10-1, 15 *FED. REG.* 7005 (1950).

"(2) Is employed by, or subject to the influence of, a foreign government under circumstances which may jeopardize the security interests of the United States; or,

"(3) Has actively advocated or supported the overthrow of the government of the United States by the use of force or violence; or,

"(4) Has intentionally disclosed military information classified confidential or higher without authority and with reasonable knowledge or belief that it may be transmitted to a foreign government, or has intentionally disclosed such information to persons not authorized to receive it; or,

"(5) Is or recently has been a member of, or affiliated, or sympathetically associated with, any foreign or domestic organization, association, movement, group, or combination of persons (i) which is, or which has been designated by the Attorney General as being totalitarian, fascist, communist, or subversive, (ii) which has adopted, or which has been designated by the Attorney General as having adopted, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or (iii) which seeks, or which has been designated by the Attorney General as seeking, to alter the form of the Government of the United States by unconstitutional means: *Provided*, That access may be granted, notwithstanding such membership, affiliation, or association, if it is demonstrated, by more than a mere denial, that the security interests of the United States will not thereby be jeopardized."⁷³

These criteria will be recognized as essentially those of the Federal Employees Loyalty Program;⁷⁴ they recur, with modifications and embellishments, in other loyalty and security programs.⁷⁵ For waterfront employees the Coast Guard Regulations include additional criteria which are already part of the normal licensing standards for seamen.⁷⁶ They refer to non-political disqualifications like insanity, drunkenness on the job, narcotics addiction, and illegal presence in the United States.⁷⁷ It may be worth noting that the apparent harshness of the standard in the Executive Order is somewhat mitigated by the reference to "reasonable grounds" in the Regulations. This echoes the original wording used in the Federal Employees Loyalty Program,

73. 33 CODE FED. REGS. § 121.13(d) (Supp. 1952).

74. Exec. Order No. 9835, pt. V, 12 FED. REG. 1935, 1938 (1947).

75. See, e.g., DEP'T OF THE ARMY, SPECIAL REGULATIONS 620-220-1, 380-160-2 (1950); 1 DEP'T OF STATE, MANUAL OF REGULATIONS AND PROCEDURES 390 (1951); MUNITIONS BOARD, CRITERIA GOVERNING ACTIONS BY THE INDUSTRIAL EMPLOYMENT REVIEW BOARD (Dep't Def. 1950).

76. See note 37 *supra*.

77. 33 CODE FED. REGS. § 125.29(f) (Supp. 1952). See also 33 *id.* § 125.30, added to the Regulations in 16 FED. REG. 9312 (1951). This provision states that the Commandant will withhold issuance of a Port Security Card to any person with respect to whom administrative or judicial proceedings are currently pending to determine any of the factors listed in § 125.29, until such time as those proceedings are finally resolved.

later changed to require dismissal if "reasonable doubts" of loyalty were found to exist.⁷⁸

The Review Process

The Commandant's determination that clearance will be denied is presented to the applicant as an accomplished fact. A form letter notifies the applicant of the denial and of his right to appeal. This opportunity is created by Executive Order 10173, giving "persons who are refused employment or who are refused the issuance of documents or who are required to surrender such documents" an appeal to tripartite boards.⁷⁹ The Executive Order directs the boards to insure appellants "all fairness consistent with the safeguarding of national security."⁸⁰

Although the Regulations implementing the Executive Order provided for a tripartite board in each Coast Guard District, the clearance of union and management board members continued to delay matters. As a result, the informal appeal procedure of the voluntary program was retained for several months before the formal procedure was in operation. Under the tripartite system as finally established, the board member who represents the Coast Guard is designated chairman; for each case he chooses the other members from panels of management and labor members. An appellant is notified in advance of the composition of the board which will hear his appeal and may peremptorily challenge one management and one labor member of the board. Any member may be challenged upon a showing of good cause.⁸¹

The appellant may (but need not) make a written answer to the "charges"—that is, to the notification in general terms that he fails to satisfy one or more of the criteria. If he wants time to prepare for the hearing, we are advised that continuances are freely given. At the hearing, the appellant may be represented by counsel or other representative of his own choosing, and may elect whether the hearing is to be conducted in open or closed session. But in either case the chairman is given authority to prevent any disclosure of data inimical to the security of the United States. A verbatim record is kept and in case of an adverse ruling by the Commandant the appellant may obtain a copy of it.⁸²

The chairman is responsible for the conduct of the hearing. At the outset, the appellant is told that he is not on trial, but that the board is convened to allow him to present evidence to show why he should be cleared. Indeed, the

78. Exec. Order No. 10241, 16 FED. REG. 3690 (1951), amending Exec. Order No. 9835, 12 FED. REG. 1935 (1947).

79. Exec. Order No. 10173, § 6.10-9, 15 FED. REG. 7005 (1950).

80. *Ibid.*

81. 33 CODE FED. REGS. §§ 121.19, 121.21 (Supp. 1952). A third panel of public members is available in case of shortage or challenge but the Regulations provide that the members of each board (other than the chairman) shall, so far as practicable, represent management and labor.

82. 33 *id.* § 121.23.

board members are directed to avoid the attitude of prosecutor,⁸³ and the Coast Guard presents no evidence. The only evidence adduced is that which comes from the appellant, either on his own initiative or in response to questions by the board. An appellant has an option whether or not to testify under oath, is under no compulsion to answer questions, and, in general, can present his evidence in any way he desires. The scope of the board's questioning in these hearings appears to have been virtually unlimited: questions about economic or political views, family affairs, or church affiliations are apparently frequent. Many of the questions are based on information contained in the investigating agency's file, which all board members usually read before the hearing. It is said to be common practice for the chairman to question an appellant about every piece of derogatory information in the file, unless the questions might reveal the source of the information. The appellant may not see the contents of the file. Thus information about which questions are not asked will often not be revealed to the applicant during the hearing. In some instances, however, boards have suggested to an appellant that it would be a good idea for him to submit some particular type of evidence so that it would appear in the record.⁸⁴ This is probably an oblique way of giving the appellant an opportunity to refute allegations which, supposedly for security reasons, the boards do not raise at the hearing.

Upon the basis of this hearing and the file, the board makes its recommendation to the Commandant.⁸⁵ A statement of reasons is included, as well as any dissent with a signed statement of the dissenter's reasons. The recommendation of the board is not disclosed to the appellant. The Commandant may then make his decision or remand the case to the board for further information. Finally the appellant is notified of the Commandant's decision to grant clearance or to sustain the denial.

If the Commandant's decision goes against the appellant, he has a further right of appeal to the National Appeal Board, which sits only at Coast Guard Headquarters in Washington. This tribunal has a tripartite membership and procedures identical to those of the regional boards.⁸⁶ Once again a recommendation is made to the Commandant who makes a final determination to grant or deny clearance and notifies the appellant.⁸⁷ In effect, therefore, the

83. 33 *id.* § 121.23(b).

84. See testimony of Tilden H. Edwards, Hearing Examiner, Transcript of Record, p. 146 *et seq.*, *Parker v. Lester*,—F. Supp.—(N.D. Calif. 1953).

85. "If, after considering all relevant factors, the Board is of the opinion that the national security will not be endangered by security clearance, it shall so recommend; otherwise, an adverse recommendation shall be made." If the board feels further investigation should be made on any material matter it may so recommend, identifying, if possible, the persons or sources from which additional data should be sought. Exec. Order No. 10173, § 6.10-9, 15 FED. REG. 7005 (1950).

86. 33 CODE FED. REGS. §§ 121.25(e), 121.27, 121.29 (Supp. 1952).

87. 33 *id.* § 121.31. This provision states, "The Commandant is the final authority to grant or deny security clearance."

appeal procedure amounts to two opportunities to convince the Commandant, through the boards, that his original determination was wrong. At no stage does anyone other than the Commandant have authority to make a decision. And, if clearance is subsequently granted, the Regulations do not provide for reimbursing an appellant for his expenses and enforced idleness.

The Program in Operation

These seemingly elaborate arrangements are shot through with inadequacies. They begin with a determination of ineligibility in which the seaman has no voice, and of which indeed he has no notice until he is denied clearance. The denial is a form letter couched in stereotyped terms. In the common case, that of alleged subversive associations, the letter merely parrots that portion of the Regulation making such association a criterion for denial. Sometimes the form of denial used goes so far as to state that the Communist Party is the organization in question. But, so far as we know, no more information is given. There is no way to compel a bill of particulars. Times and places may be vouchsafed at the appeal session, if the Coast Guard's chairman finds any in the file and thinks it discreet to disclose them. Anything resembling confrontation with the evidence or with adverse witnesses is again a matter of grace. If the regional board makes an unfavorable recommendation, the appellant to the National Board is left to guess what charges he failed to refute. Finally, it is worth repeating that the appellant's shots in the dark are all aimed at the inaccessible Commandant, who decides but does not hear. In no way can one fit together pieces to make out a hearing in the conventional administrative law sense. The whole tenor of the Coast Guard scheme is that the seaman's opportunity to speak is to be considered an appeal from action already taken on undisclosed evidence.

Records of actual hearings are rarely available, and in any event would not tell us much about the ultimate bases of judgment, because the student can never know what has been withheld. But the inadequacy of the formal record only emphasizes the burden on the appellant. Litigation involving the program, shortly to be described, has uncovered some interesting bits and pieces, a summary of which may add color to the general criticisms just made. How representative these instances are, one cannot say.

In one case, the Commandant stated in affidavits the formal allegations against some of the plaintiffs seeking to enjoin the program, and then summarized the conclusions that led to denial of clearance.⁸⁸ Ordinarily these conclusions would never be disclosed to the appellant. Thus, as to one Parker, the charge was that "you have been affiliated with or are a member of the Communist Party and sympathetic to its policies and principles." Clearance was denied, the Commandant said, because it was established that Parker was

88. Affidavit of Vice-Admiral Merlin O'Neill, dated May, 1951, filed in *Parker v. Lester*,—F. Supp.—(N.D. Calif. 1953).

a Party member in 1947, and his later behavior was strongly suggestive of continued membership.⁸⁹ Allegations and conclusions with respect to other plaintiffs ran as follows:

Mendelsohn: "Believed to be a Communist Party member and to have subscribed to and aided in the distribution of Communist literature and publications." Found to have been a member from 1936, Mendelsohn claimed that he was expelled in 1949. But, the Commandant said, Mendelsohn would rejoin the party if it would accept him.⁹⁰

White: "Believed to have been affiliated with or a member of the Communist Party and sympathetic to its policies and principles." Party membership in 1948 and sympathetic activities thereafter were the supposed basis for the denial of clearance to White.⁹¹

Kulper: "Believed to be affiliated with or sympathetic to the principles of organizations, associations, groups, or combinations of persons, subversive or disloyal to the government of the United States." Communist Party membership was not established, only "distribution of literature of the Communist Party" and other sympathetic behavior. The regional board recommended clearance; the Commandant's decision is unknown.⁹²

Payney: "Believed to be affiliated with or a member of the Communist Party and sympathetic to its policies and principles." Payney was cleared.⁹³

Rolfe: (charge not given) The basis for decision against Rolfe was the Commandant's belief in his total sympathy with the Party, which he did not join, it was said, only because membership would grieve his mother.⁹⁴

89. *Id.* at 19: "Information in my possession which I believe and have reason to believe indicates" that he was "a suspected courier for the Communist Party in 1948; that he associates with known members of the Party, and has been engaged in the distribution of subversive literature, and is sympathetic to organizations on the Attorney General's list of subversive organizations."

90. *Id.* at 20: "[I]n 1942 this man was an agitator spreading dissatisfaction among troops going to the Pacific theater of war, stated he was a Communist, was a distributor of Communist literature, and spoke in favor of Communism."

91. *Id.* at 21: "... has been an associate of Party members ... wrote letters protesting the trial of Communist leaders before Judge Medina."

92. Affidavit of Vice-Admiral Merlin O'Neill, dated Oct., 1951, filed in *Parker v. Lester*,—F. Supp.—(N.D. Calif. 1953), p. 27. Affidavit, *supra* note 88, at p. 21: "... has spoken of the Communist Party in terms of highest praise."

93. Affidavit, *supra* note 88, at p. 21.

94. *Id.* at 22: "... has been to Moscow; that he has refrained from joining the Communist Party only because of his belief that such action would be displeasing to his mother; that he is a Communist sympathizer; has solicited people to join the Party; habitually reads Communist literature; that he wrote to Judge Learned Hand of the United States Court of Appeals for the Second Circuit complaining that Judge Medina was not impartial in the recent trial of Communist leaders, that he had failed to select a jury properly, and was doing his utmost to influence the jury against the defendants. He was reported to have torn down an American flag at a MC&S meeting in Cleveland,

One longshoreman's case alleged and found repeated drunkenness on the job.⁹⁵

This scanty sample of cases illustrates the limited extent to which the wholly stereotyped initial charges are ever amplified. It also suggests that a bench mark for denial of clearance is recent Party membership (or intimate association equivalent to membership) and subsequent behavior consistent with continued membership. One would therefore expect the questioning at hearings to probe directly for the appellant's rejoinders to evidence of Party activities at specific times and places. But if we turn to the transcripts of two hearings that were involved in another case (involving different individuals from those just listed) we find that the interrogations merely skirt the supposedly crucial issues.

Guy J. Wickliffe, a Negro waiter and member of the Marine Cooks and Stewards, was charged, in the usual meaningless terms, with affiliation or sympathy with a subversive group, etc. The chairman described this charge as "a general letter which is written to everyone." At the hearing, in February, 1951, the chairman first let it be known that the subversive group which the Commandant had in mind was the Communist Party; and later, in a burst of candor, revealed that Wickliffe was reported to be a Party member in June, 1950. But his only specific questions were directed to Progressive Party activities in 1948, to certain peace rallies, and like matters. Wickliffe denied Party membership. Pressed by Wickliffe for details about his alleged Party activity, the chairman said that he had been informed of none. The entire hearing lasted one hour and forty minutes, and much of that time was taken up with extended remarks by the appellant and the union representative who accompanied him, about general issues of communism and the position of Negroes.⁹⁶

George B. Rogers, who had been sixteen years at sea as a steward, was also a member of the MCS. While Wickliffe was voluble, Rogers was terse. Wickliffe demanded and got more information about the charges; Rogers neither asked nor got any. Wickliffe was equivocal in his attitudes toward communism; Rogers straightforwardly declared himself as opposed to communism now and in the past, and volunteered several instances of non-communist activity. The only "derogatory" information brought out by the questioning was that in 1948 Rogers had twice rented the basement of his house to Progressive Party members for parties, apparently of the fund-raising type, which he did not himself attend; and that he had bought a ticket in a raffle

and to have said at an MC&S meeting in San Francisco in August, 1950: 'The union comes before God and my Country.' He has been a speaker at meetings of organizations on the Attorney General's subversive list."

95. Affidavit of Vice-Admiral Merlin O'Neill, dated Oct., 1951, filed in *Parker v. Lester*,—F. Supp.—(N.D. Calif. 1953), p. 30.

96. In the Matter of Guy J. Wickliffe, Z-696639, Seattle Appeal Case No. 13 (13th Coast Guard District, Feb. 13, 1951).

on a Nash car which was sponsored by the Northwest Labor School.⁹⁷ On the basis of this transcript, the denial of clearance can be explained in only two ways: either Rogers was lying, or the reviewing authorities had a momentary lapse into irrationality.

If the Coast Guard had any direct evidence of Party membership in the Wickliffe and Rogers hearings, that evidence was not opened to attack in any way. And if the few circumstantial episodes which were disclosed and which formed the basis for questioning were considered significant, why was the appellant not previously advised of them? A Coast Guard spokesman recently stated: "It isn't long after the Board begins its questions that the man has a pretty good idea of why he's being denied a port security card. He then has a chance to refute."⁹⁸ Is this fair play? Again, as a matter of fairness, is it a merit or demerit of the system that the board has a chance to study the demeanor of the appellant when an unsuspected issue is thrown at him?

Responses to the Program

The lack of wide opposition to the program suggests that the Coast Guard may be entitled to blessings in heaven, whatever its procedural weaknesses on earth. But while we note the dearth of criticism, it is appropriate to recall the prior commitment of the right-wing unions to the program. Injured individuals within their ranks have no effective forum unless the union officers and the union newspaper take up their cause. The likelihood that an injured individual will receive union support is particularly slight if he happens to be in factional opposition to the leadership. In the case of the NMU, there have been dark charges that the leaders have sent the names of such persons to the Coast Guard as security risks.⁹⁹ There is no evidence to suggest that the Coast Guard has taken intra-union dissidence as proof of subversion; but it is not likely that it would completely ignore the warnings of practical experts on waterfront communism. Thus far the anti-communist unions have largely confined their criticism to the delays in the early phases of the program and to the replacement of the voluntary program with the statutory one, a move which appeared to reflect on their capacity for self-help.¹⁰⁰

97. In the Matter of George B. Rogers, Z-631869, Seattle Appeal Hearing No. 89 (13th Coast Guard District, July 13, 1951).

98. N.Y. Times, Apr. 30, 1953, p. 59, col. 2.

99. See Letter to Commandant, U.S. Coast Guard, from Committee for Democratic Unionism, N.M.U., dated Sept. 14, 1950 (mimeo.). Joe Curran claimed to have a list of at least 200 "articulate Communists" who were exposed by their position on roll-call votes at the annual convention on two resolutions, one calling for expulsion of all Communists from the NMU and the other promising support to the country in the event of war with Russia. All negative voters and abstainers made Curran's list. N.Y. Times, Sept. 13, 1950, p. 55, col. 1.

100. See N.Y. Times, Dec. 28, 1950, p. 45, col. 2.

Consequently, it has been left to the outcast MCS and ILWU to question, on behalf of the men, the necessity and legality of the Port Security Program. Initially, it was argued, and with some point, that the program was discriminatory and useless because passengers, who were free of restrictions, could carry out all the dastardly acts feared from traitorous sailors. This was not completely true, because passengers do not have the run of the ship, nor are they likely to accompany critical military cargoes. In any case, the State Department took the edge off this particular charge of discrimination by tightening passport and visa restrictions.¹⁰¹ An itinerant revolutionary would be hard put to decide whether he would have a better chance of slipping through the mesh as a passenger or as a crew member. A second charge of discrimination was based on the fact that seamen on foreign-flag vessels, even those from communist nations, were allowed to enter our ports and to circulate freely on shore.¹⁰² But in the McCarran-Walter Immigration Act of 1952,¹⁰³ we followed Russia's lead in restricting this ancient and amiable indulgence and began to screen foreign seamen as well as our own. The only sanction against foreigners, however, is denial of shore leave in American ports.

Frontal attacks on the good faith and good sense of the program, appearing in publications and resolutions of the left-wing unions, were given formal expression in a unique move by the Marine Cooks and Stewards Union early in 1951. Through the World Federation of Trade Unions it filed a complaint with the Committee on Freedom of Association of the International Labour Office against the United States Government, charging violation of trade union rights.¹⁰⁴ The complaint alleged that industrial blacklists had been established by the Coast Guard under the guise of security regulations, with the intent of breaking up labor unions and preventing union members from engaging in political activities. Such practices are condemned by either conventions or labor standards recommendations of the ILO.¹⁰⁵ The State Department presented a detailed and vigorous refutation of these charges and

101. See Comment, 61 YALE L.J. 171 (1952); *American Visa Policy and Foreign Scientists*, 8 BULLETIN OF THE ATOMIC SCIENTISTS 210 *et seq.* (Oct. 1952).

102. N.Y. Times, March 9, 1952, § V, p. 8, col. 1; *id.* Apr. 2, 1952, p. 32, col. 2; Chasan & Starr, *Our Unprotected Seaports: A Cinch for Saboteurs*, Sat. Eve. Post, July 19, 1952, p. 17.

103. Pub. L. No. 414, 82d Cong., 2d Sess. c. 477 (June 27, 1952).

104. Case No. 33, SIXTH REPORT OF THE INTERNATIONAL LABOUR ORGANISATION TO THE UNITED NATIONS 212 (1952). On March 23, 1952, MCS, through its president, filed another complaint with the Secretary General of the United Nations, addressed to the Economic and Social Council, alleging the United States Government's violation of trade union rights embodied in (1) General Assembly Resolution 128(II) (1947); (2) the freedom of association convention adopted at the 31st session of the ILO; (3) Art. 55(C) of the Charter of the UN. There has apparently been no action taken upon this "complaint."

105. SIXTH REPORT OF THE INTERNATIONAL LABOUR ORGANISATION TO THE UNITED NATIONS 44 *et seq.* (1952).

asked that the complaint be dismissed.¹⁰⁶ The ILO Committee, under the chairmanship of former Premier Paul Ramadier of France, found none of the allegations valid and dismissed the matter.¹⁰⁷ Of a more conventional character, in April, 1951, an action was begun in the San Francisco federal district court in the name of ten rejected individuals drawn from both the MCS and ILWU. In seeking injunctive relief, the complaint did not challenge the constitutionality of the Magnuson Act; it did allege that the Regulations and actions taken under them were not authorized by that statute. Judge Harris adopted the Government's argument that, whatever the ultimate merit of petitioners' claims, a preliminary injunction should be denied as detrimental to national security.¹⁰⁸ The issue of a permanent injunction did not come to trial until late in July, 1952. By this time, the parties had agreed to narrow the issues in order to make this proceeding, *Parker v. Lester*,¹⁰⁹ a test case on the validity of the program as applied to sailors. Allegations which referred to other waterfront workers were dropped.

Meanwhile a criminal prosecution, *United States v. Gray*,¹¹⁰ had been commenced in Seattle. In the early days of the program, limited personnel for enforcement had made some evasion possible, including the lending and renting of Port Security Cards to uncleared men.¹¹¹ Seamen without validated papers might also get temporary work on ships in port, because this work would not involve the formality of signing articles for a voyage.¹¹² It was apparently for a breach of this latter sort that three members of the Marine Cooks and Stewards were indicted in March, 1952. All had been denied clearance, had unsuccessfully appealed, and now were charged with violation of the regulations by accepting employment on a ship. In June, 1952, before

106. See Case No. 33, *supra* note 104, at 213 *et seq.* See, also, the reply prepared for the State Department by the Coast Guard. U.S. COAST GUARD LAW BULL., No. 194, p. 1 (May, 1952).

107. Case No. 33, *supra* note 104, at 218; N.Y. Times, Mar. 13, 1952, p. 30, col. 5.

108. *Parker v. Lester*, 98 F. Supp. 300 (N.D. Calif. 1951), *appeal dismissed for want of prosecution*, 191 F.2d 1020 (9th Cir. 1951).

109. *Parker v. Lester*,—F. Supp.—(N.D. Calif. 1953).

110. Crim. Nos. 13499-13501, W.D. Wash., 1952.

111. See N.Y. Times, Feb. 10, 1952, p. 95, col. 7.

112. In January, 1952, § 121.16 of the Regulations was amended, 17 FED. REG. 658, to close this loophole. The pertinent amendments provide:

" . . .
 "c. The categories of vessels listed in paragraph (a) of this section are considered to be engaged in trade whether at anchor or made fast to a dock, loading or unloading passengers or cargo, or merely in an idle status awaiting passengers or cargo, but are not to be considered to be engaged in trade if laid up or dismantled or out of commission.

"d. By employment is meant the engagement of a person to fill any licensed or certificated berth on board ship whether or not under articles and includes those engaged for standby, relief, or other capacities."

Parker v. Lester had come to trial, Judge Bowen granted defendant's motion to dismiss the indictment in *United States v. Gray*.¹¹³ He found the Executive Order and the Commandant's Regulations partly invalid. He held that the defendants were denied due process of law because they were not advised of the charges and were not "accorded a hearing thereon." Another statement of the same infirmities, however, was qualified by the court's observation that the "defendants were already in the status of employees in the merchant marine at the time the acts complained of in these indictments were committed." It is not clear whether the court, in making this qualification, meant to draw a sharp line between employees and newcomers. This distinction was not pursued in the briefs on appeal to the Ninth Circuit.

While the appeal in *United States v. Gray* was pending, *Parker v. Lester* was finally decided by the district court in April, 1953.¹¹⁴ The court observed: "Where national security is involved, the courts have gone far in permitting limitation of the usual procedural protections."¹¹⁵ Nevertheless, the plaintiffs were accorded partial relief. "[N]o reason appears why the Commandant could not apprise petitioners of the basis for his initial determination with such specificity as to afford them reasonable notice and an opportunity to marshal the evidence in their behalves . . . [A] bill of particulars should be furnished upon demand and the petitioners should be given an opportunity to rebut specific allegations. . . ."¹¹⁶ But on another critical issue, the court said, "[The] opportunity for confrontation and cross-examination of adverse witnesses cannot be afforded a petitioner in these situations without destroying the security program."¹¹⁷

While these cases wound their way through the courts, the Coast Guard had gone stolidly ahead with the program. As has been intimated, it was quite unequal to the initial burden; the entire Coast Guard in October, 1950, numbered about 2,500 officers and 20,500 enlisted men, plus some civilian employees and a handful of hearing examiners.¹¹⁸ These examiners, acting as board chairmen, bore the brunt of clearing up the backlog of appeals. They were spurred on by importunities rarely encountered by these quasi-judicial officers. One examiner tells us that his office was besieged by the distraught wives and children of unemployed sailors whose cases were unresolved. But in time the docket was cleared up. Early in 1953, the Coast Guard was able to announce that it had completed the screening of about 250,000 waterfront workers and 336,000 seamen, or more than 90 percent of all the active workers

113. Crim. Nos. 13499-13501, W.D. Wash., 1952.

114. —F. Supp.—(N.D. Calif. 1953). Page references following are to a mimeographed copy of the opinion helpfully supplied by G. J. Lanning, Esq., Ass't Chief Counsel, U.S.C.G.

115. *Id.* at 18.

116. *Id.* at 20-21.

117. *Id.* at 19.

118. N.Y. Times, Oct. 20, 1950, p. 55, col. 2.

in the industry.¹¹⁹ Its task for the future is chiefly to keep up with newcomers, who doubtless account for the less than 10 percent currently in process.

LEGALITY OF THE PROGRAM

Is a program for screening maritime employees authorized by the Magnuson Act? If so, does that Act set up standards sufficiently definite to evade any lingering vitality in the doctrine of improper delegation of legislative powers? Even if the program outlined in Executive Order 10173 is authorized, do the Commandant's Regulations insure maritime workers "all fairness consistent with the safeguarding of national security" as the order directs? Is this direction merely a restatement of the constitutional requirement of due process, or does it attempt to modify traditional constitutional standards? Should not the procedures of any program under the Act be required to conform to the requirements of the Administrative Procedure Act? In a word, just how far can the Government go in barring individuals on grounds of national security from jobs not in the Government, but in the private maritime industry? These are questions that the Supreme Court, one hopes, will eventually face. Not all of these issues have been raised in the two cases now on their way up, but complete analysis of the program requires consideration of each of them.

First let us consider the legal problems that are peculiar to this program,

119. N.Y. Times, Feb. 26, 1953, p. 45, col. 6. The following is a summary of Coast Guard Security screening as of May 1, 1953 (Source: Communication from Capt. K. S. Harrison, Chief Counsel, U.S.C.G., dated May 6, 1953):

	<i>Port Security Card Applicants (Waterfront)</i>	<i>Seamen</i>
Total screened	270,390	354,228
Cleared initially	268,909	351,310
Denied initially	1,481	2,918
Appeals to local boards	1,072	1,603
Cleared	547	887
Pending	180	131
Denied	226	585
Withdrawn or Postponed	119	0
Appeals to National Board	82	387
Cleared	16	199
Pending	38	3
Denied	28	185
Cleared but later denied because of subsequent information	39	132
Denied and then cleared due to additional information	3	0
Total cleared after original denial	563	1,085
Appeal Bd. recommendations overruled by Commandant:		
Local appeal bd.—favorable recommendation	56	11
Local appeal bd.—unfavorable	2	1
National Appeal Bd.	0	0
Total in denial status May 1, 1953	915	1,833
Total appeals pending May 1, 1953	218	134

and then, more generally, the requirements of due process in denials of private employment for security reasons.

Authority for the Program

Because evidence is sparse as to just what Congress intended when it passed the Magnuson Act, it may be argued that Congress neither contemplated nor intended to authorize a screening program for maritime employees.¹²⁰ The Act itself makes no specific mention either of personnel in the maritime trades or of a screening program. It merely gives the President power to institute measures and issue rules and regulations,

“to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities. . . .”¹²¹

The bill was drafted in the Department of Justice and, upon unanimous consent of the Senate, was introduced by Senator Magnuson as an emergency measure, so there were no prior readings of the bill. The Senator's introductory speech, which came in the midst of debate upon other matters, mentioned the danger of foreign-flag vessels smuggling an atomic bomb or bacteria into the country, declared the need for giving the President authority to control such vessels in American waters without declaring a complete emergency, and stated:

“Furthermore, the bill will allow the President to invoke security measures on the waterfronts—that is to say, around the docks. In my opinion, the bill will have the dual effect of helping clean out whatever subversive influences may exist around the waterfronts and of protecting the country from sneak attacks of the sort I have mentioned. Some of the last strongholds of the Communists in this country exist in some of the waterfront unions, despite the efforts of patriotic maritime labor leaders to clean out some of those unions.

“Under the provisions of this bill, the President could, and probably would, call on the Coast Guard, the FBI, or such other Government agencies as he might wish to use, to give us such waterfront security.”¹²²

Senator Magnuson concluded: “This measure will give the President the authority to invoke the same kind of security measures which were invoked in World War I and World War II.”¹²³ Representative Celler introduced the measure in the House of Representatives under similar circumstances with similar general remarks, but he made no mention at all of the danger of subversive maritime employees.¹²⁴ Both the House and Senate Committee

120. This issue was raised in both *Parker v. Lester*,—F. Supp.—(N.D. Calif. 1953), and *United States v. Gray*, Crim. Nos. 13499-13501, W.D. Wash. 1952.

121. See p. 1172 *supra*.

122. 96 CONG. REC. 10794 (1950).

123. *Id.* at 10795.

124. *Id.* at 11220.

reports on their bills were extremely brief and made no explicit reference to a maritime personnel screening program.¹²⁵

Although the wording of the Magnuson Act does not clearly grant authority to the President to initiate a program for the screening of personnel, it can be argued that Senator Magnuson's declaration that the bill authorized "the same kind of security measures" as those taken during the two World Wars shows an intention to authorize a screening program.¹²⁶ Since the World War II security procedures included personnel screening, Congress must have intended to reinstitute a screening program. And since the World War II screening procedures were more arbitrary than the present program,¹²⁷ *a fortiori* this less arbitrary program must be sanctioned. Moreover, since the World War II procedures were never challenged as unauthorized, Congress had no reason to believe it had to be any more explicit in this legislation than it was in the Act of 1917.¹²⁸

A realistic layman might conclude that Congress never even considered what measures were to be employed when it passed the Magnuson Act. Indeed, during the trial of the *Parker* case the petitioners attempted to introduce a letter from Senator Magnuson, purporting to state that the Port Security Program, as it had developed, was not at all like the security measures he had envisaged upon introducing his bill.¹²⁹ Understandably, the court found it inadmissible.

125. H.R. REP. No. 2740, 81st Cong., 2d Sess. (1950); SEN. REP. No. 2118, 81st Cong., 2d Sess. (1950).

126. Judge Murphy in *Parker v. Lester*,—F. Supp.—(N.D. Calif. 1953), referred to this statement in dismissing the authorization issue in one sentence: "A glance at the legislative history of the statute especially the above-quoted statement by Senator Magnuson also disposes of petitioners' argument that the regulations setting forth the screening procedure were not contemplated and authorized by the statute." Mimeo., n.114 *supra*, at 15.

127. See sources cited note 44 *supra*. The Directive of the Commandant of July 20, 1942 delegated complete responsibility for determining whether a person would be denied access to or removed from a vessel or waterfront facility to the District Coast Guard Officers, who were permitted to subdelegate to Captains of Ports. Such action was to be predicated upon a finding of reasonable grounds to believe that the individual was a saboteur, spy, subversive, unsuitable criminal, drunkard, mental defective, or one "whose presence on board a vessel or on a waterfront facility would, for any reason not listed herein, constitute a menace to the national security or to the safety of life or property." No formal appeal procedure was provided, but a person denied access to or removed from a vessel could submit statements or evidence to the Captain of Port or District Coast Guard Officer who would "if practicable, interview the man concerned and forward the statements or evidence to the Commandant with his recommendations . . . all cases of denial or removal will be reviewed by the Commandant . . . and his action will be final."

128. The Government has also argued that Congress has ratified the interpretation given the Magnuson Act by the Regulations by repeatedly enacting appropriations earmarked for the security program. Brief for Appellant, *United States v. Gray*, Nos. 13499-13501 (9th Cir. 1952), p. 28.

129. Transcript of Record, p. 138, *Parker v. Lester*,—F. Supp.—(N.D. Calif. 1953). Counsel for petitioners argued that the letter, dated July 2, 1952, constituted a

But the likelihood that Congress did not consider exactly what measures it was authorizing when it passed the Magnuson Act does not mean that a screening program is legally unauthorized. It merely requires a court to determine what authority can be implied from the language of the Magnuson Act and the Act of 1917 which it amends. And language granting the President power to "institute such measures and institute such rules and regulations" to safeguard waterfront facilities and vessels seems adequate to authorize a screening program of persons employed on such vessels or waterfront facilities.

Delegation of Power

But a conclusion that this vague grant of power authorizes the President to use a screening program as one measure to safeguard maritime facilities immediately raises another problem. Does the Act prescribe a sufficiently definite standard to avoid invalidity as an improper delegation of legislative power?

There is probably little effective life left in the doctrine that Congress cannot delegate "except under the limitation of a prescribed standard."¹³⁰ Perhaps where the delegation includes the drastic power to exclude from a calling, some specificity of standards may be required.¹³¹ But the Supreme Court in recent years has consistently upheld such standards as "public interest"¹³² and "public convenience, interest, or necessity,"¹³³ which are no more precise than the standard implicit in the power delegated in the Magnuson Act. Moreover, some cases have upheld delegations that did not even specify a standard.¹³⁴ As for other facets of the delegation question, there is no longer any doubt about the power of Congress to authorize an agency to issue regulations, the violation of which is made subject to criminal sanctions.¹³⁵ Nor is there any serious question about the power of the executive to subdelegate to the head of an agency authority delegated to him by Congress.¹³⁶ Thus it would appear that the screening program could survive any attack on grounds

subsequent statement of legislative history and was thus admissible to show that the program was unauthorized. The court held that the letter was mere argument.

130. *United States v. Chicago, M., St.P. & P.R.R.*, 282 U.S. 311, 324 (1931). See DAVIS, *ADMINISTRATIVE LAW* 41 *et seq.* (1951).

131. *Cf. Steuart & Bro., Inc. v. Bowles*, 322 U.S. 398 (1944); *Wright v. SEC*, 112 F.2d 89 (2d Cir. 1940); DAVIS, *op. cit. supra* note 130, at 66 *et seq.*

132. *Avent v. United States*, 266 U.S. 127 (1924); *N.Y. Central Securities Corp. v. United States*, 287 U.S. 12 (1932).

133. *Federal Radio Comm. v. Nelson Bros. Bond & Mtg. Co.*, 289 U.S. 266 (1933).

134. *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Intermountain Rate Cases*, 234 U.S. 476 (1914).

135. *United States v. Grimaud*, 220 U.S. 506 (1911); *McKinley v. United States*, 249 U.S. 397 (1919).

136. See DAVIS, *op. cit. supra* note 130, at 79; Grundstein, *Presidential Subdelegation of Administrative Authority in Wartime*, 16 G. WASH. L. REV. 301, 478 (1948). In 1950 Congress enacted a blanket authorization to the President to delegate to Department heads

of improper delegation. There remains only a faint probability that the Court might combine (1) the uncertainty whether Congress contemplated a personnel security program with (2) the absence of any explicit standards for such a program, and invalidate the program on these grounds, in order to avoid reaching the delicate issue of due process.

Due Process of Law and the Administrative Procedure Act

The most direct route for reaching the procedural inadequacies already outlined is to argue that the Coast Guard Regulations are subject to the requirements of the Administrative Procedure Act.¹³⁷ There is no doubt that the Regulations prescribe procedures not sanctioned by the APA. For example, Section 7(c) provides that "Every party shall have the right to . . . conduct such cross-examination as may be required for a full and true disclosure of the facts." It must be admitted that this and several other Sections of the APA are violated in the program if that statute is applicable.¹³⁸

By way of Section 5 of the Administrative Procedure Act, however, one avenue of escape from the APA appears to be open to the Government, and another is possible. Section 5 lays down procedural standards to be followed:

"In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved. . .

"4. The conduct of military, naval, or foreign affairs."¹³⁹

The quickest escape is to say that military or naval affairs are involved in the program.¹⁴⁰ The only definition of the meaning of these terms in the legislative history of the APA appears in the Attorney General's commentary on the APA addressed to the Senate Committee on the Judiciary. He wrote, "In the fourth exception, the term 'naval' is intended to include adjudicative defense functions of the Coast Guard and the Bureau of Marine Inspection and Navigation, where such functions pertain to national defense."¹⁴¹ The definition seems almost to have been shaped with the then still existing World War II screening procedures in mind, and, if accepted, applies with equal

and to other officials appointed with the consent of the Senate, except when a statute affirmatively prohibits such delegation. 64 STAT. 419 (1950), 3 U.S.C. §§ 301-303 (Supp. 1952).

137. 60 STAT. 237 (1946), 5 U.S.C. § 1001 *et seq.* (1946).

138. *E.g.*, § 5(c) (separation of functions); § 7(c) (burden of proof); § 7(d) (transcript as exclusive record for decision); § 8(b) (right to submit proposed findings, conclusions, and exceptions); § 9(b) (revocation of licenses).

139. 60 STAT. 239, 5 U.S.C. § 1004 (1946).

140. In *Parker v. Lester*,—F. Supp.—(N.D. Calif. 1953), Judge Murphy held: "That act is on its face not applicable . . . Evidently, the President was operating in the area of military and naval affairs." Mimeo., n.114 *supra*, at 14.

141. SEN. DOC. NO. 248, 79th Cong., 2d Sess. 226 (1946).

force to the present ones. Though the commentary has no special weight as legislative history, what it lacks in authority it makes up in plausibility.

The other possible way out of Section 5 has some of the characteristics of a revolving door—you keep going around if you're not careful. It would appear that the Coast Guard program does not concern a "case of adjudication required by statute"; the Magnuson Act is altogether silent about adjudication or hearing. But the Supreme Court in *Wong Yang Sung v. McGrath*,¹⁴² a deportation case, held that the absence of a statutory provision for an "adjudication . . . after opportunity for an agency hearing" was not decisive of the APA's applicability. The requirement of a hearing might be read into a statute in order to save it from unconstitutionality. If that were the case, as Mr. Justice Jackson wrote for the Court, Congress could hardly have intended that a constitutionally required hearing should be accompanied by fewer safeguards than one that was a matter of grace. "[T]he limiting words [of Section 5] . . . exempt hearings of less than statutory authority, not those of more than statutory authority."¹⁴³ However, the Court had previously determined that an alien in Wong's plight was constitutionally entitled to a hearing; in the Port Security cases that is precisely what is to be decided. So, are we in or out of the APA? It is our contention that the Constitution does require these proceedings to be adjudicated "on the record after opportunity for an agency hearing," and if the APA adds any helpful refinements, well and good. But if we can get the Port Security Program into the APA only by first resolving the constitutional issues, the APA is not the easy solution we are looking for. Because of the "naval . . . affairs" exemption, it is probably not a solution at all.

Protection of the Fifth Amendment

Now, what does the Constitution require in a case like this? Due process of law, we have assumed; but there have been certain recent cases in which Fifth Amendment due process was effectively withheld, and we must either distinguish them or give them decent burial before we can go on to consider the content of due process. We summarily put to one side the recent cases that have practically stripped aliens of constitutional protection against the immigration authorities.¹⁴⁴ Wickliffe and Rogers are native-born; Rogers proudly hails from Cornerstone, Arkansas!¹⁴⁵ We can also avoid discussing cases that involve the fullest exercise of the war power, for example the shock-

142. 339 U.S. 33 (1950).

143. *Id.* at 50.

144. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Carlson v. Landon*, 342 U.S. 524 (1952); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). See *Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 644, 672-6 (1953).

145. *Op. cit. supra* note 97, at 3.

ing Japanese-American detention cases;¹⁴⁶ fortunately, the present emergency has not reached that pitch, and Wickliffe and Rogers are not Nisei.

We could also avoid the holding in *Bailey v. Richardson*,¹⁴⁷ that the Government does not have to afford due process in dismissing its own employees, by reiterating the fact that the Coast Guard program bears on private employment. But that case deserves further attention because it is responsible for a misleading doctrine. On the premise that employment in the executive department is "at the will of the appointing authority, not for life or for fixed terms," the Court concluded that "to hold office at the will of a superior and to be removable therefrom only by constitutional due process of law are opposite and inherently conflicting ideas. Due process of law is not applicable unless one is being deprived of something to which he has a right."¹⁴⁸ The Supreme Court affirmed *Bailey v. Richardson* by an equally divided court,¹⁴⁹ with Justice Clark not participating. But two subsequent cases involving state employees and the Fourteenth Amendment are inconsistent with the proposition that due process does not apply to job removals. In *Adler v. Board of Education*,¹⁵⁰ petitioners contended that a provision of New York's Feinberg Law denied due process by making membership in a subversive organization presumptive evidence of unfitness to teach. The Court did not deny the pertinence of the due process argument. Instead, the Court implicitly accepted its relevance by holding that it was not unreasonable to base a prima facie case of disqualification on knowing membership in an organization that had been found to advocate the overthrow of government by unlawful means. Then, in *Weiman v. Updegraff*,¹⁵¹ a unanimous Court held that an Oklahoma loyalty oath for state employees "must fall as an assertion of arbitrary power. . . . The oath offends due process" because it is tainted by an "indiscriminate classification of innocent with knowing activity" in proscribed organizations. Here the Court openly met the argument that there could be no denial of due process because there was no right to public employment, and said, "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."¹⁵²

146. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). See Rostow, *The Japanese American Cases: A Disaster*, 54 YALE L.J. 489 (1945).

147. 182 F.2d 46 (D.C. Cir. 1950).

148. *Id.* at 58.

149. 341 U.S. 918 (1951). As is customary in such cases, there were no written opinions.

150. 342 U.S. 485 (1952).

151. 344 U.S. 183 (1952) (Justice Jackson not participating).

152. *Id.* at 192.

Though *Weiman v. Updegraff* disposes of *Bailey v. Richardson*'s "no right—no due process" doctrine, the attitude of the Supreme Court at the time it affirmed *Bailey* is note-

If the *Weiman* case extends due process to public employment, *a fortiori* the Fifth Amendment applies to private employment. So it is hardly necessary to try to decide abstractly whether exclusion from private employment pursuant to a statute is a deprivation of liberty, or property, or both.¹⁵³ If we characterize it as a property interest, as in a price or rate level, the path of administrative process is straight and narrow.¹⁵⁴ There is, however, one byway that seems to lead entirely away from due process standards. We should therefore investigate it, but only briefly, for it is a blind alley. Seamen, as a routine peacetime matter, must have licenses or certificates from the Government to pursue their calling. If that fact conjures up the confusion of doctrine surrounding the requirements for license revocation, stern exorcisms are called for. License revocations without due process are sometimes justified by the proposition that the holding of the license is a mere privilege and not a right. But, as we have just demonstrated in the case of employment denials, the privilege-right dichotomy is meaningless.¹⁵⁵ License denials without notice and a hearing are justified "if an occupation be one which serves no socially useful purpose."¹⁵⁶ Seafaring, however, is a socially useful occupation. Finally, it is noteworthy that the peacetime regulations under which seamen's licenses may be denied or revoked are in fact models of full administrative due process.¹⁵⁷

If we think of the right to pursue a calling as a liberty protected by the Fifth Amendment, analogies are few.¹⁵⁸ The most important one in our time seems to be the deprivation of liberty endured by conscripts. Paradoxically,

worthy. The same eight Justices who split in that case simultaneously voted 5-3 to reverse a dismissal of the complaint in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), where the issue was the authority of the Attorney General of the United States to designate organizations as "totalitarian, fascist, communist or subversive." Justice Burton's opinion resulted in a narrow holding that, on the pleadings, the Attorney General's action must be considered arbitrary. Space does not permit further analysis of the case here; see BONTECOU, *THE FEDERAL LOYALTY-SECURITY PROGRAM* 225-35 (1953). From the six opinions in the *Joint Anti-Fascist* case it seems reasonable to deduce that a majority of the Court still recognizes that due process requires notice and hearing where administrative action invades any substantial private right.

153. Cf. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897); *Meyer v. Nebraska*, 262 U.S. 390 (1923). See *Butchers' Union v. Crescent City*, 111 U.S. 746, 754, 760 (1884) (concurring opinions).

154. See *Morgan v. United States*, 304 U.S. 1 (1938); *Ohio Bell Tel. Co. v. Public Utilities Comm.*, 301 U.S. 292 (1937).

155. DAVIS, *ADMINISTRATIVE LAW* 250 (1951); Byse, *Opportunity to Be Heard in License Issuance*, 101 U. OF PA. L. REV. 57, 69 (1952).

156. Tuttrup, *Necessity of Notice and Hearing in the Revocation of Occupational Licenses*, 4 WIS. L. REV. 180, 186 (1927). But see DAVIS, *op. cit. supra* note 155, at 251 *et seq.*

157. See sources cited in notes 37, 38 *supra*.

158. See *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952) (revocation of passport without notice and hearing a denial of due process because right to leave the country is part of liberty).

the courts have been rather less jealous of the administrative standards of Selective Service than of the standards controlling public utility commissions; the interpretations of due process in draft cases have not been expansive.¹⁶⁰ The paradox is explainable, we think, on several grounds. First, service in the armed forces, even if it is the result of coercion, still represents the citizen's "supreme and noble duty of contributing to the defense of the rights and honor of the nation."¹⁶⁰ Second, there is the persistent supposition that conscription signalizes an extraordinary emergency. Third, there is a strong belief that, if the draft is to be fair, it must be all-inclusive. When the banner of due process is borne by those claiming exemption, it commands less respect than usual.

These attitudes are all illustrated in the very recent and relevant case of *United States v. Nugent*.¹⁶¹ The Selective Service Act,¹⁶² in providing for the exemption of conscientious objectors, stipulates procedural arrangements not available to other registrants. If the exemption is initially denied by the local board and the case is before the appeal board, the statute directs the Department of Justice to conduct an "inquiry" and a "hearing."¹⁶³ The results go as recommendations to the appeal board, which is not bound to follow them.

The registrant in the *Nugent* case claimed that he was entitled to have access to the FBI's report (the statutory "inquiry"); and the Second Circuit so held.¹⁶⁴ The Supreme Court, reversing, held that the statute and the Constitution were satisfied when the registrant had an opportunity to present evidence before the Department of Justice hearing officer, and when, as was the practice, he was entitled to be advised of the "general nature and character" of "unfavorable" information in the investigation report.¹⁶⁵ In context, the word "hearing" in the statute did not contemplate "formal and litigious procedures," because the Department of Justice was not deciding anything. The Court described the Department's role as that of an "auxiliary service" in a "special class of cases." "The duty to classify—to grant or deny exemptions to conscientious objectors—rests upon the draft boards, local and appellate, and not upon the Department of Justice."¹⁶⁶ The Department's only duty is to "forward sound advice, as expeditiously as possible, to the appeal

159. *Compare* *Estep v. United States*, 327 U.S. 114 (1946) (availability of limited judicial review), *with* *Orloff v. Willoughby*, 345 U.S. 83 (1953) (denial of commission under Doctors' Draft Law not unlawful discrimination).

160. White, C.J., in *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918).

161. 73 Sup. Ct. 991 (1953) (Frankfurter, Black, and Douglas, JJ., dissenting; Jackson, J., not taking part).

162. 62 STAT. 604 (1948), 50 U.S.C. APP. § 451 *et seq.* (Supp. 1952).

163. 62 STAT. 604, 613 (1948), 50 U.S.C. APP. § 456(j) (Supp. 1952). See 32 CODE FED. REGS. § 1626.25 (Supp. 1952).

164. *United States v. Nugent*, 200 F.2d 46 (2d Cir. 1952), 101 U. OF PA. L. REV. 692 (1953).

165. *Nugent v. United States*, 73 Sup. Ct. 991, 994 (1953).

166. *Id.* at 995.

board."¹⁶⁷ So construed, the statute does not violate the Fifth Amendment. The Court pointed out that the Selective Service Act, designed to "impose a common obligation of military service on all physically fit young men," was a "valid exercise of the war power. . . . [Its] procedures must be geared to meet the imperative needs of mobilization and national vigilance. . . ."¹⁶⁸

Thus, in the peculiar atmosphere surrounding Selective Service, the Court held that "hearing" does not mean "hearing." And it may well be right, so far as congressional intent is concerned, because the whole scheme of Selective Service rests on the informed but informal decisions of the local boards.¹⁶⁹ These boards are not aloof judicial tribunals; their members are drawn from the neighborhood; their obligation is to apportion the community's quota fairly. The registrant seeking exemption clearly has the burden of making out his claim; and the board may gather information in unconventional ways.¹⁷⁰ The appeal boards are confined to the file collected by the local board, and to a written statement by the appellant.¹⁷¹ The FBI inquiry and the Department of Justice hearing for conscientious objectors are unique within the system.

If all this represents due process, it has little bearing on our Coast Guard problem. Selective Service leads to honorable military duty; Port Security screening to the stigma of exclusion as a security risk. Congress has mitigated the hardships of military service by re-employment rights and by the great variety of veterans' benefits; the barred seaman is left to his own resources. And on the precise issue decided by *United States v. Nugent*—the availability of the FBI reports to the conscientious objector—it should be emphasized that the Court treats these reports as part of an "auxiliary service," and that their details are not disclosed either to the appellant or to the board which decides his claim.¹⁷² But the investigative materials withheld from subversive

167. *Id.* at 996.

168. *Ibid.*

169. See SIBLEY & JACOB, CONSCRIPTION OF CONSCIENCE c. IV. (1952); Cornell, *Exemption from the Draft: A Study in Civil Liberties*, 56 YALE L.J. 258 (1947).

170. Compare *United States ex rel. Trainin v. Cain*, 144 F.2d 944 (2d Cir. 1944), with *United States ex rel. Levy v. Cain*, 149 F.2d 338 (2d Cir. 1945) (permissible degree of reliance on advisory panel of rabbis).

171. See 32 CODE FED. REGS. §§ 1626.12, 1626.24 (1951).

172. The opinion is unsatisfactory because it quite failed to meet this point, one that troubled the dissenters and the able judges below whose views were overruled. The FBI reports in question help shape the recommendations of the Department of Justice hearing officers; these in turn presumably influence the appeal boards; see SIBLEY & JACOB, CONSCRIPTION OF CONSCIENCE 76 (1952). But the reports are withheld from the appeal boards as well as from the registrants. This remote reliance on un rebutted "secret police reports," Judge Hincks said, raises a question whether the methods of selection are indeed "fair and just" within our Anglo-Saxon concepts of justice and due process." *United States v. Geyer*, 108 F. Supp. 70, 72 (D. Conn. 1952). *Contra*, *Imboden v. United States*, 194 F.2d 508 (6th Cir. 1952).

The Court also failed to give any consideration to the value that these reports would have to the registrant, or to the policy grounds for withholding them. For a weak attempt

seamen may be the blood and bones of the Commandant's decisions, both at the beginning and at the end of the screening process.

The "liberty" of conscripts has required some digression, because of the apparent pertinence of the *Nugent* case. If we may now assume that government denial of private employment is not controlled by the law of aliens, Nisei, government workers, liquor licensees, or conscripts,¹⁷³ we may move on to the climactic problem: the meaning of administrative due process in these security cases.

How Flexible Is Due Process?

So far, we are in agreement with Judge Murphy's conclusion in *Parker v. Lester* when he said, "The deprivations suffered by petitioners are substantial. In the hierarchy of legally protected values, the right to private employment occupies a lofty place—certainly a higher one than occupancy of a government job or possession of a driver's license." "But," he continued, "judicial solicitude for the petitioners, however great, is limited by countervailing considerations of equal magnitude. The countervailing consideration here in play is the undoubted right of the Nation to protect itself from subversion."¹⁷⁴ To that also, amen. What restrictions on liberty do these countervailing considerations admit? To Judge Murphy, the "maximum procedural safeguards which can be afforded petitioners without jeopardizing the security program" include adequate notice of specific charges and opportunity to rebut them;¹⁷⁵ but, as has been earlier indicated, they stop short of confrontation and cross-examination of adverse witnesses.¹⁷⁶ He decided also that due process does not demand that the hearing be held before the suspects were kept off vessels.¹⁷⁷

One may agree that due process is a fluid concept, but its fluidity is intended to accommodate it to the varying demands of fundamental justice, not to facilitate pouring it down the drain. Before we capitulate to the demands of national security (which in this case means chiefly the demands of security officers to protect their sources of information), it should be recalled that the very existence of the Port Security Program, or any similar one, is a considerable invasion of liberty. Thus substantive rights, also subject to due process, are put in jeopardy. If national security demands that communists

to formulate one, see *Elder v. United States*, 202 F.2d 465, 469 (9th Cir. 1953). These cases all appear to involve only harmless information about the religious status of conscientious objectors; see Heisler, *The Law Versus the Conscientious Objector*, 20 U. OF CHI. L. REV. 441, 446 (1953).

173. The authors accept the state of the law of due process, to the extent that it restricts the rights of these classes of persons, only as a necessity not a duty.

174. *Parker v. Lester*,—F. Supp.—(N.D. Calif. 1953). Mimeo., n.114 *supra*, at 17.

175. *Id.* at 19-21.

176. *Id.* at 20-21.

177. *Id.* at 20.

or drunkards be kept off merchant ships, it becomes necessary to use the utmost care to see that we are going no further than the situation requires.

We are now abandoning Judge Murphy to embrace the formula laid down in the impressive dissent of Justice Jackson in *Shaughnessy v. United States ex rel. Mezei*.¹⁷⁸ In this very recent case a bare majority of the Court held that an alien who, by reason of a protracted absence from the country, had lost his status as a resident, could as an applicant for admission be detained indefinitely on Ellis Island if no other country would give him shelter, and that the law need not require the Attorney General either to disclose the reason for exclusion or to grant any hearing. Even though Justice Jackson's reasoning could not persuade a majority of the Court in the present climate and in an alien's case, surely it will gain the ascendancy in other times and circumstances. It is a pleasant necessity to quote key passages from his opinion, and hard to avoid the temptation to include some of the Jacksonian barbs at the spectacle of Mr. Mezei "putting the Government of the United States in such fear that it was afraid to tell him why it was afraid of him."¹⁷⁹ We invite the reader, wherever Justice Jackson refers to "detention of an alien" to substitute "exclusion of a seaman from his calling," and see how it fits.

"The interpretations of the Fifth Amendment's command that no person shall be deprived of life, liberty or property without due process of law, come about to this: reasonable general legislation reasonably applied to the individual. The question is whether the Government's detention of respondent is compatible with these tests of substance and procedure."¹⁸⁰

"Substantively, due process of law renders what is due to a strong state as well as to a free individual. It tolerates all reasonable measures to insure the national safety, and it leaves a large, at times a potentially dangerous, latitude for executive judgment as to policies and means.

"After all, the pillars which support our liberties are the three branches of government, and the burden could not be carried by our own power alone. Substantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur, as to what is reasonable policy under conditions of particular times and circumstances."¹⁸¹

"I conclude that detention of an alien would not be inconsistent with substantive due process, provided—and this is where my dissent begins—he is accorded procedural due process of law. . . .

"Procedural fairness, if not all that originally was meant by due

178. 345 U.S. 206, 218 (1953). The best documented discussion of the notice and hearing elements of administrative due process is Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 149 (1951). See, also, Justice Douglas' powerful address on procedural due process to the American Law Institute, May 20, 1953. N.Y. Times, May 21, 1953, p. 8, col. 3.

179. 345 U.S. 206, 219 (1953).

180. *Id.* at 222.

181. *Ibid.*

process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law.

"If it be conceded that in some way this alien could be confined, does it matter what the procedure is? Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied."¹⁸²

"The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-examine informers and to produce evidence in one's behalf, is especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed."¹⁸³

"Congress has ample power to determine whom we will admit to our shores and by what means it will effectuate its exclusion policy. The only limitation is that it may not do so by authorizing United States officers to take without due process of law the life, the liberty or the property of an alien who has come within our jurisdiction; and that means he must meet a fair hearing with fair notice of the charges."¹⁸⁴

"It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone."¹⁸⁵

It would be superfluous to try to embroider the close fabric of Justice Jackson's argument. Nevertheless, what the Justice finds inconceivable is accepted as sober fact by many responsible officials and observers. They believe that the withholding of evidence is unavoidable, because to disclose it would end the usefulness of undercover agents, and to expose witnesses to cross-examination would make them keep silent.¹⁸⁶ This proposition permeates the Port Security Program, and every other federal security program. It is used to excuse the vagueness of charges: if you tell a suspect in detail what his subversive connections have been, he may be able to infer the source of the infor-

182. *Id.* at 224.

183. *Id.* at 225.

184. *Id.* at 228.

185. *Ibid.*

186. See note 188 *infra*, and accompanying text. See the testimony of J. Edgar Hoover, Director of the FBI, *Hearings before House Appropriations Committee on Dep't of Justice Appropriations Bill*, 80th Cong., 2d Sess. 245-7 (1947). See, also, Hoover, *A Comment on the Article "Loyalty Among Government Employees,"* 58 YALE L.J. 401, 404, 410, 417 (1949).

mation. It excuses the absence of confrontation: the Government cannot afford to expend its informers. And cross-examination: how many citizens will tell about their neighbor's strange doings if they may be subjected to the ordeal of testimony? It excuses the extraordinary fact that the officials who hear and decide may not even know the source of the charges: after all, the Federal Bureau of Investigation cannot jeopardize its contacts with secret agents T-3 and D-4 and other confidential informants by revealing their identity to civilian board members, or even to Vice-Admirals. So the Commandant may be advised only that a source of "known reliability" has seen the suspect's Party card. To whom is the reliability known? To the Federal Bureau of Investigation, and "that," as one skeptical loyalty board member was told by a reviewing official, "should be enough for you."¹⁸⁷

We do not propose to instruct the reader on the virtues of cross-examination and the unreliability of informers. Nor do we mean to lecture those who believe that the FBI and other investigative agencies could not bear up under the burdens of due process of law. In the recommendations that follow, we will try to justify our view that this whole problem of confrontation is a matter of police convenience, not of national necessity, and that it can be resolved any time the courts bear down on the prosecutors. As we see it, if the Congress and the Executive think it necessary to exclude private citizens from a lawful calling on grounds of national security in an emergency short of war, they can do it; but if they further think it necessary to eliminate fair notice and hearing, they cannot do that. Reasonable men may disagree on whether a fair hearing can exist without the right to cross-examine, but the lack of this right cannot, from the standpoint of Justice Jackson, be excused on the grounds of expediency.

If confrontation is really a life-and-death issue, the familiar process in constitutional adjudication of balancing interests might come into play. One extraordinary thing is that the courts are being asked to take judicial notice of these alleged necessities on the most casual basis. The court in *Parker v. Lester* based its decision on a press release, quoted from the *Washington Post*, in which the late Seth Richardson, Esq., the first Chairman of the Loyalty Review Board, reported the judgment of the Federal Bureau of Investigation that

"[P]ractically none of the evidential sources available will continue to be available to the Bureau if proper secrecy and confidence cannot at all times be maintained with respect to the original source of information, and that if the source of such information is to be disclosed—save in the exceptional case—the Bureau can be of much less service to the Board in making the essential basic investigation."¹⁸⁸

187. Interview by senior author with a Loyalty Board member.

188. *Washington Post*, Dec. 28, 1947, p. 10, col. 3; *Parker v. Lester*,—F. Supp.—(N.D. Calif. 1952).

Giving full weight to the integrity and responsibility of the FBI officials whose views were thus disclosed, can the courts cut the heart out of the constitutional requirement of notice and hearing on the authority of a press release in the *Washington Post*?

PROPOSALS FOR ADEQUATE PROCEDURES

An outline of what we believe constitutional due process requires in this sort of case will suffice to show that it does not require anything suicidal. A step-by-step review of the controversial stages of a case results in these fairly simple proposals:

1. The seaman must be given detailed notice of the charges against him. Whether it is in the form of one document, or of a notice summarizing the charges, followed by a bill of particulars, is not important, provided that the summary initial notice makes it clear that the man is entitled on request to whatever relevant details he needs to make his defense.¹⁸⁹ It is doubtless convenient for the Coast Guard to serve a meaningless mimeographed statement that clearance has been denied, in the language of the Executive Order, whenever and wherever it catches up with an errant seaman. But surely with airmail and other rapid communication facilities at its disposal it will require little time to convey precise charges to a man when he comes ashore. The possibility that a lawful notice will disclose confidential sources is no ground for dispensing with it; the Coast Guard's alternatives to revealing such sources are discussed under point 3 below.

2. Can a man already in maritime employment be excluded pending the hearing and decision in his case?¹⁹⁰ This is in itself a substantial deprivation, because it may take a year to carry a case to its conclusion. At the same time, if the dangers that the program guards against are real, they are scarcely met by leaving a trained saboteur in a position to blow up the Panama Canal while his case is under adjudication. Fortunately, there is a simple and equitable escape from this dilemma: let the Government reimburse the seaman for lost wages if he is ultimately cleared. Back pay to compensate for summary suspension that turns out to have been unnecessary is a familiar

189. DAVIS, *ADMINISTRATIVE LAW* 279 *et seq.* (1951). See *Parker v. Lester*, *supra* note 188, Mimeo., n.114 *supra*, at 20: "[I]n cases such as these, no reason appears why the Commandant could not apprise petitioners of the basis for his initial determination with such specificity as to afford them reasonable notice and an opportunity to marshal the evidence in their behalves."

190. Cf. *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950), involving multiple seizures of goods under the Food and Drug Act, where it was held that "it is not a requirement of the due process that there be judicial inquiry before discretion can be exercised. It is sufficient, *where only property rights are concerned*, that there is at some stage an opportunity for a hearing and a judicial determination." *Id.* at 599 (emphasis added).

feature in labor law and arbitration;¹⁹¹ more to the point, it is a part of the new federal employees' security program.¹⁹² We cannot assert with confidence (as the decisions stand) that due process requires reimbursement; but reimbursement we think would eliminate any question of breach of due process arising from screening first and hearing afterward.

The consequence of this proposal may be to create a claim for lost wages in all those who have so far been cleared, and in any who may now be cleared after their cases are re-opened. Since, as champions of due process, we consider reimbursement only elementary justice,¹⁹³ as taxpayers we can view such a modest drain on the Treasury with equanimity. There are other hardships imposed by a proceeding of this sort that not even money can assuage. In future cases, however, the issue is likely to be of diminishing importance. Most cases will concern newcomers to the industry. They can be required to wait a reasonable time for security clearance, just as they must wait for the processing of their certificates of competence.

3. At the heart of due process is the opportunity to face and rebut the evidence on which the charges are based. This requirement does not mean that the Government must unearth an informer every time it wants to bar a communist. The problem is no different from that faced by a criminal prosecutor in many cases. If he wants to protect his undercover sources, he must use their information only as leads on which to build an independent record. There is a well-recognized evidentiary privilege which, under most circumstances, the prosecution can invoke to block inquiry into the source or content of the original lead.¹⁹⁴ If the prosecutor or investigator believes that the

191. See Note, 62 YALE L.J. 488 (1953) *passim*.

192. See note 1 *supra*. Pub. L. No. 733, 64 STAT. 476, 5 U.S.C. § 22-1 (Supp. 1952), the statutory basis for the new program, provides: "That any person whose employment is so suspended or terminated under the authority of this Act may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person. . . ." For similar provisions applicable to the now defunct Federal Employees Loyalty Program, see *Barnes v. United States*, 108 F. Supp. 382 (Ct. Claims 1952).

193. The Internal Security Act of 1950, 64 STAT. 987, 50 U.S.C. § 781 *et seq.* (Supp. 1952), gives a person unjustly detained under the provisions of Title II (Emergency Detention) the right to submit a claim to the Detention Review Board which has authority to hear and determine such claims. *Id.* § 819(j). A detainee may appeal from an order denying such indemnification. *Id.* § 821.

194. See Sanford, *Evidentiary Privileges Against the Production of Data within the Control of Executive Departments*, 3 VAND. L. REV. 73, 76 (1949); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 YALE L.J. 1091, 1094 (1951).

The privilege not to disclose the identity of an informer does not relieve the Government of its obligation to prove a case by competent evidence. This is also true of the

development of other evidence against the security suspect is too arduous, or that it would lead to uncomfortably accurate inferences about the identity of the original informer, the situation is awkward but not disastrous to national security. Informers are expendable. To come down to cases, it seems unlikely that the operative who is planted in a Communist Party cell can go on indefinitely. In time he will be detected, or will have to be relieved from the fatigue and psychological strain of leading a double life. At least so it would seem to the innocent layman in these matters.¹⁹⁵ Once he is brought above-ground, as were the seven "plants" to testify in the Smith Act prosecution of the first-string Communist leaders,¹⁹⁶ then he is available to testify in other cases about all his observations. In his testimony he may be exposed to unpleasant cross-examination. That is part of the price of being an informer.

The opportunity to confront and examine is not an absolute requirement of due process if there is some other way for a party to get a fair hearing.¹⁹⁷ But its indispensability to the respondent is nowhere clearer than in these cases where the charge is usually one of subversive political activity, and the evidence often from political spies. They may be paragons of patriotism, or neurotic scoundrels (or both).¹⁹⁸ The best way our law has discovered to test their veracity is to put them on the witness stand. It will represent a remarkable shift in our legal values when they give much weight to the *ex parte* evaluation of a security officer, himself anonymous in many instances.

Government's privilege to withhold military secrets. See *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

195. See, e.g., CALOMIRIS, *RED MASQUERADE* (1950); PHILBRICK, *I LED 3 LIVES* (1952).

196. *Dennis v. United States*, 341 U.S. 494 (1951); BONTECOU, *op. cit. supra* note 152, at 134-5; Donnelly, *supra* note 194, at 1122 *et seq.*

197. See GELLHORN, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 510 *et seq.* (2d ed. 1947); DAVIS, *ADMINISTRATIVE LAW* 469 *et seq.* (1951). See also *Nugent v. United States*, 73 Sup. Ct. 991 (1953) *passim*.

198. "The Loyalty Board convicts on evidence which it cannot even appraise.

The critical evidence may be the word of an unknown witness who is 'a paragon of veracity, a knave, or the village idiot.' His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judge and the accused. The accused has no opportunity to show that the witness lied or was prejudicial or venal. Without knowing who her accusers are [the accused] has no way of defending. She has nothing to offer except her own word and the character testimony of her friends."

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 180 (1951) (Justice Douglas' concurring opinion, commenting on *Bailey v. Richardson*). Also see Justice Douglas' dissenting opinion in *Nugent v. United States*, *supra* note 197, at 998; BARTE, *THE LOYALTY OF FREE MEN* 113 *et seq.* (1951); COUNTRYMAN, *UN-AMERICAN ACTIVITIES IN THE STATE OF WASHINGTON* 286 *et seq.* (1950); Donnelly, *supra* note 194, at 1094; Rauh, *Informers, G-Men and Free Men*, *The Progressive*, May, 1950, p. 9; *New Haven Evening Register*, June 29, 1952, p. 1 (State Dep't apologizes to Owen Lattimore for order barring his leaving the country based on false tip).

The other objection that is raised on security grounds against confrontation is that it will prevent ordinary citizens from giving information, because of the resulting trouble and embarrassment for those who are required to testify.¹⁹⁹ This unproved assumption is a reflection on the loyalty of the whole populace. If communist sailors do threaten our security, is it believable that other citizens will shirk their duty to help identify them?

4. A shift in the burden of proof, from the seaman to the Government, would signalize the conversion of the present "appeals" into proper hearings. The original standard²⁰⁰ should be partly restored and partly revised to require the Commandant to grant clearance unless on all the evidence and *on the record* he finds that the presence of the man on board ship or on the waterfront would be inimical to the national security. This would mean that at the hearing affirmative evidence would have to be presented to establish that the respondent was ineligible as charged, under one or more of the criteria specified in the Regulations.²⁰¹ Though it may not be constitutionally essential, the presentation of the Government's case should preferably be made by someone other than the board chairman.²⁰² The Coast Guard's advocate, however, should not cast himself in the role of a prosecutor. In other security programs, measures have been taken to avoid an unduly adversary atmosphere by designating an employee to "assist" the board in the presentation of the case.²⁰³ Whatever the success of such regulations, there is merit in attempting to present the Government's case dispassionately. We urge this simply because of the fact that most of the men charged do not, we understand, have counsel.²⁰⁴

5. Contrary to the present practice, the recommended decision of the hearing board and the report on which it is based should be made available to the respondent. It would be permissible to rest the power of final decision

199. See *Elder v. United States*, 202 F.2d 465, 469 (9th Cir. 1953); WEYL, *THE BATTLE AGAINST DISLOYALTY* 193 (1951); Hoover, *A Comment on the Article "Loyalty Among Government Employees,"* 58 YALE L.J. 401, 410 (1949).

200. See p. 1175 *supra*.

201. See, e.g., § 7(c) of the APA, 60 STAT. 241 (1946), 5 U.S.C. § 1006(c) (1946): "[N]o sanction shall be imposed or rule or order be issued except . . . as supported by and in accordance with the reliable, probative, and substantial evidence."

202. See, e.g., § 5(c) of the APA, 60 STAT. 240 (1946), 5 U.S.C. § 1004(c) (1946): "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. . . ." See DAVIS, *ADMINISTRATIVE LAW* 417 *et seq.* (1951).

203. See Atomic Energy Commission, *Security Clearance Procedures*, 10 CODE FED. REGS. § 4.15(o) (Supp. 1952); Department of the Army, *Civilian Personnel Loyalty-Security Adjudications*, Spec. Regs. No. 620-220-1 ¶ 22.a (1950); Department of Justice, *Sample Security Regulations under Exec. Order No. 10450* § 8(g) (April 23, 1953 draft).

204. Information informally received by authors.

either in the hearing board or in the Commandant; but if the Commandant continues to decide these cases we should think that some opportunity to communicate with him must be afforded. The simplest and most effective way to reach the Commandant is by permitting the appellant to take exceptions to or make comments on the board's report. This is not to be taken as a demand for formal findings of fact, by either the board or the Commandant, or for a new hearing or oral argument before the Commandant. Due process does not require any prescribed channels of argument and appeal.²⁰⁵ At the same time, it is well to keep in mind that a multiplicity of appeals does not overcome fundamental denials of due process.

We are in danger of losing both ourselves and our readers in the nuances of what is desirable, as distinct from what is required in administrative proceedings. To recapitulate the main points, what we take to be constitutionally required is that the decision in a case of this sort must be based on a reviewable²⁰⁶ record, made after detailed charges supported by substantial evidence presented at a hearing. The skeleton of the present program can, if it is desired, be left intact; but some of the functions must be markedly altered.

TWO MAJOR POLICY ISSUES

Preoccupation with the essentials of procedural due process should not be allowed to obscure other important aspects of the Port Security Program. We can only raise, without resolving, a cluster of problems that gather around two related questions: who is to set the substantive standards for clearance of personnel, and who is to decide the cases?

Congress, of course, is the proper organ of government for initially defining the circumstances that will justify exclusion from private employment on security grounds; this is not a matter of internal housecleaning for the executive branch. We have already granted that the delegation found in the Magnuson Act is probably legally sufficient;²⁰⁷ but we do not intend to defend it as wise legislation. Even if the degree of urgency that existed in the autumn of 1950 excused such hasty action, it is never too late to mend. Indeed, the present Congress could with some profit direct its eager investigative eye to

205. Cf. *FCC v. WJR*, 337 U.S. 265 (1949). See DAVIS, *ADMINISTRATIVE LAW* 319 *et seq.* (1951).

206. We express no opinion about the precise form or scope of judicial review, beyond the assumption that the courts will always find a way to correct arbitrary administrative action. Cf. Fuchs, *Administrative Determinations and Personal Rights in the Present Supreme Court*, 24 *IND. L.J.* 163 (1949); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 *HARV. L. REV.* 1362, 1386-1402 (1953).

The two pending cases under the Coast Guard Program represent obvious ways of obtaining judicial review of denials of clearance. *United States v. Gray*, Crim. Nos. 13499-13501, W.D. Wash., 1952 (defending criminal prosecution based on refusal to comply with a denial); *Parker v. Lester*,—F. Supp.—(N.D. Calif. 1953) (injunction).

207. See p. 1189 *supra*.

the Port Security Program. These are some of the questions a congressional committee might ask: is there any necessity for continuing the wide-flung screening program at all? What has three years' experience demonstrated about the threats of espionage and sabotage, and the most effective ways to combat them? What criteria have been found to apply to actual cases? Has anyone turned up, for example, who has "committed acts of treason or sedition," or has "intentionally disclosed military information"?²⁰⁸ Or have those who have been labelled security risks incurred this doom because of their membership in or sympathetic association with subversive organizations? If the latter, what has been the effective dividing-line between the cleared and the uncleared? The Commandant's belief that a man is currently a communist? Recently? Ever? On another tack, what are the bases for extending or restricting the coverage of the program? Would it not be sufficient to apply it to certain ships on certain missions, just as it is confined to certain docks? What wild alarm required its extension to the crews of "barges on the Great Lakes and the western rivers"?²⁰⁹

With some answers, Congress might then rationally decide whether it wanted to continue the program, and in what form. So might the courts reach a rational decision, if they are asked to say at what point due process calls a halt to harsh substantive standards.

The necessity for such a decision on substance might be hastened by the very act of requiring procedural due process. Suppose that, following such a decision, the administrative authorities feel that they are unduly hampered. Might they attempt to undercut the court's edict by expanding the categories of sin? They might redraw the criteria so as to authorize inferences of ineligibility from conduct now considered inoffensive. Or, under the existing criteria, the triers may begin to leap from small incidents to great conclusions. For example, the present criteria make recent sympathetic association with a subversive organization ground for exclusion, but a proviso permits an escape for the suspect provided he can show "by more than a mere denial" that the association won't jeopardize security.²¹⁰ If it turns out to be inconvenient to make a record on open evidence, a first step could be to delete the proviso, and then make sympathetic association unequivocally disqualifying, defining "recent," say, as any time since 1939. If this did not sufficiently tip the balance toward the authorities, the next step would be to expand the content of the elastic concept of "sympathetic association." To take an illustration from the Rogers hearing described earlier,²¹¹ buying a ticket in a raffle run by an organization deemed subversive could be considered to be motivated by sympathy for the organization rather than by the hope of winning a Nash.

208. See the criteria set forth p. 1175 *supra*.

209. See p. 1173 *supra*. They might include some habitual drunkards. See BISELL, *A STRETCH ON THE RIVER* (1950).

210. See p. 1176 *supra*.

211. See p. 1181 *supra*.

What will the Court do if it is faced with such a case? "Substantively, due process . . . tolerates all reasonable measures to insure the national safety . . . [and] will always pay a high degree of deference to congressional and executive judgment. . . ." ²¹² So wrote Justice Jackson in the *Mezei* case, with Justices Black and Douglas not joining in that part of his dissent. If, as we may, we put to one side the cases involving government employment,²¹³ only the *Taft-Hartley Oath Case* ²¹⁴ serves as a guide to what the Supreme Court will consider a reasonable measure in private employment. The oath as construed and upheld by a majority of the Court requires a denial of present membership in organizations devoted to lawless overthrow of the Government. Furthermore, an evenly divided Court sustained that portion of the oath which demands an abjuration of belief in such means.

In the *Taft-Hartley Oath Case* the Court had the benefit of a debated and deliberate congressional judgment; here Congress gave the Executive a blank check. In the Taft-Hartley instance, the most thunderous spokesmen of organized labor had voiced their abhorrence of the oath;²¹⁵ in the Port Security Program, the major maritime unions (though they may someday rue it) have until now acquiesced in this extension of Government power over their membership. If a case reaches the Supreme Court on the substantive aspects of the Program, the Court will be in an exposed position; and one hesitates to predict that it will hold even the weak line that commanded a majority in the *Oath Case*.

On our last question—where the administrative power to decide these cases is to lie—little of a positive nature can be said. This issue also requires knowledge of further facts, such as an investigation by the Senate Committee on Government Operations could disclose. In this part of the investigation we should want to know more about the operation of the Coast Guard. We should assume that the Commandant, though he accepts the responsibility of decision, must in fact rely heavily on his subordinates. Who are they, and what is their training? Is the Commandant, taken either as the person incumbent at any time, or as the symbol for the institutionalized decision of the Coast Guard, the proper repository of power? If the final power were to be reposed in a board separated from the investigative and enforcement duties of the Coast Guard, what kind of a board? Is the tripartite principle, conceived as a means for resolving large conflicting interests of management and labor, properly applied to cases involving individual adjudication? There is a lack of detachment in persons drawn directly from the ranks of maritime labor and management; however, the present boards may provide better representation of the labor interest than is found on the usual "public" board.

The hypothetical congressional inquiry would unavoidably ask questions

212. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 222 (1953) (dissenting opinion).

213. See p. 1192 *supra*.

214. *American Communications Association v. Douds*, 339 U.S. 382 (1950).

215. *E.g.*, John L. Lewis; see N.Y. Times, Aug. 30, 1947, p. 28, col. 7.

about the competence of the Coast Guard to make this kind of decision at all. Since the investigation is not likely to occur in the immediate future, we feel constrained to suggest some private doubts. Honorable as is the Coast Guard's history of stalwart service, nothing in it has equipped its officers to sit in judgment on the loyalty of private citizens. We say "loyalty" in full realization that this is a security program. Although a disqualification on security grounds should not necessarily carry a stigma of disloyalty, we are fairly confident that it does, because we are confident that most of the cases concern alleged subversive connections.

There is a real awkwardness here. If the Coast Guard has the responsibility of safeguarding the ports, as it has, what outside board or official can execute a most ticklish part of that responsibility? But at the same time, one hesitates to leave these delicate judgments—far different from deciding the responsibility for a collision, or the penalty for jumping ship—to men wearing a uniform, and trained to the sea, not to the law. These doubts can be overcome. The Coast Guard has lawyers; and one has heard practitioners speak highly of both the military and civilian members of the Industrial Employment Review Board.²¹⁶ But in the end, the present authors' confidence is shaken by one episode, perhaps trivial in itself. An attorney recently wrote the Coast Guard requesting detailed charges on behalf of a seaman client. He was advised in reply that, "the rules of evidence do not apply to proceedings of this nature hence specificity of charges are [*sic*] not necessary." This blunder²¹⁷ leaves one with a shuddering suspicion that the rules of logic do not apply either.

Comment on all these critical issues has been tentative and brief. One excuse for this inadequacy can be advanced, and it needs to be underscored. There are not enough facts available about the need for and operation of the Port Security Program to support intelligent policy decisions, whether by the Congress, the courts, or the public. Two interests are said to justify the silence that enfolds this as well as other security programs: first, the danger of revealing too much of our protective measures to those who would confound them; second, the desire to protect from needless publicity the victims of the program. Both interests are legitimate, but both have limits which, we think, are often exceeded. As for letting the enemy know how successful we are in balking his knavish tricks, surely he must know already, if the Program has been hitting the correct targets. And as for protecting the reputation of the innocent, it can be preserved without a total blackout of the

216. This Board screened Defense Department contractors and their employees for access to classified material. It had a civilian chairman and one military member from each of the three services. See note 2 *supra*.

217. If the Coast Guard functionary had checked the appropriate Port Security Regulation, 33 CODE FED. REGS. § 121.23(g) (Supp. 1952), he would have learned that "The *technical* rules of evidence shall not apply" (emphasis added); and he might then have perceived its familiar purport, which is to avoid rigid exclusionary rules.

cases. One suggestion would be to enlist a group of disinterested and public-spirited citizens to abstract and comment on a sample of cases, while concealing the identity of the parties.

As things stand, a critic of these activities, which affect the lives and livelihood of so many people, is left, in his search for significant facts, hunting for the proverbial black cat in a dark room. Only on the issue of procedural due process do we feel confident what the standards should be. As Justice Frankfurter recently wrote, "The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies. . . . In a country with our moral and material strength the maintenance of fair procedures cannot handicap our security. Every adherence to our moral professions reinforces our strength and therefore our security."²¹⁸

218. *Nugent v. United States*, 73 Sup. Ct. 991, 998 (1953) (dissenting opinion).

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