

## REVIEWS

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NATIONAL SECURITY AND INDIVIDUAL FREEDOM. By John Lord O'Brian. Cambridge: Harvard University Press, 1955. Pp. 84. \$2.00.

CASE STUDIES IN PERSONNEL SECURITY. Collected under the direction of Adam Yarmolinsky. Washington: The Bureau of National Affairs, Inc., 1955. Pp. x, 310. Distributed on a complimentary basis by the Fund for the Republic.

THESE two important contributions to the literature on the loyalty and security program appear at a time when the pendulum is swinging back from the emotional excesses of the past decade. A bipartisan commission has begun a long overdue assessment of the loyalty and security program among federal employees and defense workers.<sup>1</sup> The Supreme Court has agreed to review a decision involving executive power to dismiss summarily on security grounds federal employees holding nonsensitive, non-policy-making positions.<sup>2</sup> A court of appeals has ruled that the Coast Guard's port security regulations for screening merchant seamen violate due process because opportunity is not afforded for confrontation and cross-examination of informants and adverse witnesses.<sup>3</sup> The Attorney General has announced that he will recommend that Congress abolish the mandatory requirement that an employee be suspended before a hearing on security charges, and that the agency head be given discretion to permit the employee to remain at work pending the outcome of the proceeding.<sup>4</sup> The direction of the current is unmistakable.

Despite this trend, the issues raised by the administration of the loyalty and security program will confront the country for years to come.<sup>5</sup> The few signs of light that have recently penetrated the fog of suspicion and fear have not changed the program's basic institutions. The bureaucracy that administers the program is deeply entrenched and will not be easily dislodged or readily reformed. The Civil Service Commission has revealed that it maintains a card index file with the names of 2,000,000 persons "allegedly affiliated with some sort of subversive organization or activity," and a "central security index" listing 5,000,000 government personnel investigations dating back to 1939.<sup>6</sup> The vast number of dossiers in the possession of executive agencies and congressional committees is, and will remain, a standing invitation to demagoguery and intimidation.

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1. N.Y. Times, Nov. 11, 1955, p. 1, col. 5.
  2. *Cole v. Young*, 226 F.2d 337 (D.C. Cir.), *cert. granted*, 350 U.S. 900 (1955).
  3. *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955).
  4. N.Y. Times, Nov. 16, 1955, p. 8, col. 4.
  5. For the historical background of the program, consult BONTECOU, *THE FEDERAL LOYALTY-SECURITY PROGRAM* c. 1 (1953).
  6. N.Y. Times, Nov. 29, 1955, p. 1, col. 7.

John Lord O'Brian, one of the country's most distinguished lawyers, accurately foresaw the evils of inquisitions into loyalty as early as 1948.<sup>7</sup> His warning went unheeded. His latest volume consists of the two Godkin Lectures on "The Essentials of Free Government and the Duties of the Citizen" which he delivered at Harvard University in April 1955. He speaks in these lectures, not as a prophet scorned, but as a man, fundamentally conservative, imbued with humanistic ideals, who is deeply indignant at the violent departures from standards of decency and fair play that the loyalty and security program has brought with it. Mr. O'Brian's central thesis is that "the two wars, the desperate experience of the great depression, and the threat of atomic warfare" have strengthened an "all-pervasive craving for security at any price,"<sup>8</sup> and that the resulting anxiety has evoked from the Executive and Congress a series of drastic measures "having an appreciable effect upon the constitutional guarantee of the right to think and to speak freely and equally important, the right to criticize freely."<sup>9</sup> There has been established, he states, "something like a new system of preventive law applicable to the field of ideas."<sup>10</sup> The basic Anglo-Saxon legal principle that sanctions shall not be inflicted before an act is committed has been abandoned, he observes, and men have been adjudged untrustworthy "not because of wrongful acts, but because of motives attributed to them, or because of suspicion as to their future conduct."<sup>11</sup> This new doctrine is strikingly exemplified by the Internal Security Act of 1950, which authorizes the President, acting through the Attorney General, to detain any person in time of national emergency when "there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage."<sup>12</sup>

Mr. O'Brian's sharpest criticism is reserved, however, for the "methods and procedures adopted by the administrative agencies in carrying out these programs."<sup>13</sup> He condemns the use of "secret information from anonymous informants regarding whose reliability or competence even the hearing officers have no information," the denial of the right of confrontation and cross-examination, and the use of *agents provocateurs* and paid informants.<sup>14</sup> These practices, he observes, are draining the vitality from the presumption of innocence.

Mr. O'Brian is troubled by the indifference on the part of the general public to these practices. He views with concern the public opinion study by Professor Samuel Stouffer<sup>15</sup> which indicated widespread hostility to the exercise of First Amendment rights. He has faith, however, that in time the "sense of fair

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7. O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592 (1948).

8. NATIONAL SECURITY AND INDIVIDUAL FREEDOM 7.

9. *Id.* at 21.

10. *Id.* at 22.

11. *Id.* at 47.

12. 64 STAT. 1021 (1950), 50 U.S.C. § 813(a) (1952).

13. NATIONAL SECURITY AND INDIVIDUAL FREEDOM 32.

14. *Id.* at 36.

15. STOFFER, COMMUNISM, CONFORMITY AND CIVIL LIBERTIES (1955). See succeeding review, 65 YALE L.J. 572 (1956).

play," the "conscience," and the "moral tradition" of the American people will be reasserted.<sup>16</sup> Mr. O'Brian writes in the intellectual tradition of Milton's *Areopagitica* and John Stuart Mill's essay *On Liberty*.

He sums up his critique of the loyalty and security program in these words:

"The gravest fault in the present system is not the attempt to provide adequate security, but rather in the failure to appraise more accurately the extent of the danger and then to test proposed measures of security by the yardstick of long-established guarantees of the freedom of the individual. The answer to the problem is not necessarily the abolition of security programs, but a drastic revision by men soundly educated in the history of freedom and in the history of constitutionalism."<sup>17</sup>

These are familiar themes. They are restated here with clarity and eloquence.

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*Case Studies in Personnel Security*, prepared under the supervision of Adam Yarmolinsky, furnishes abundant documentation for Mr. O'Brian's charges. The Yarmolinsky volume consists of reports concerning fifty loyalty and security cases involving government civilian employees, industrial employees, military personnel, merchant seamen and employees of international organizations. The study was financed by the Fund for the Republic. In an introduction, Mr. Yarmolinsky indicates that this is a preliminary report and that additional cases, about 250 in all, are presently being collected.

Each case is identified only by number. The employee's position is described, particularly with reference to access to classified matter. The agency's charges are set out, usually verbatim; the employee's response to the charges is summarized; the hearing is described in some detail; and the outcome of the case is given. The time involved in the proceeding and the time spent by counsel in preparation and his fee are also noted. The materials were collected by lawyers, with the consent of the employees involved, from the files of counsel who represented or advised the employees (the government files were not available to the interviewers). Mr. Yarmolinsky does not assert that these cases are necessarily representative, but attorneys familiar with the loyalty and security program could attest that they are typical. In about half of the cases involving civilian employees of the federal government reported by Mr. Yarmolinsky the employee was cleared and reinstated. Authoritative figures are not available, but there are indications that the percentage of individuals cleared after hearing is greater than in these selected cases.

There is an unintended note of irony in the phrase "case studies" in the title, for this collection of cases has no parallel in legal casebook literature. The orthodox collection of cases consists in the main of opinions by courts or administrative tribunals. One will search Mr. Yarmolinsky's collection of cases in vain for a single statement by the authorities of the reasons why an

16. *E.g.*, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 82-83.

17. *Id.* at 46.

individual has been adjudged disloyal or a security risk.<sup>18</sup> The absence of a corpus of freely accessible written opinions has profound implications. There is no doctrine of *stare decisis* in the loyalty and security program. Different employees similarly situated may be treated unequally and no one is the wiser. Indeed, as the Ladejinsky case demonstrates, the *same* employee may be treated differently by different agencies. The absence of published opinions in these cases precludes the evolution of uniform and appropriate standards of judgment. It has stymied the free play of informed professional criticism. The persons immediately involved are denied one of the most fundamental rights in any rational system of justice—an explanation by the adjudicating agency of the reasons for its decision.<sup>19</sup> The absence of opinions has led to bewilderment, bitterness and a pervasive feeling of injustice.<sup>20</sup> Secrecy in government has hitherto been regarded as abhorrent to our traditions. As Lord Acton put it: "Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity."<sup>21</sup>

Mr. Yarmolinsky's collection of cases is singular in another respect. A collection of "Cases on Contracts" would be deemed curiously incomplete if it did not mention such landmark cases as *Hadley v. Baxendale* or *Falck v. Williams*. The Yarmolinsky collection eschews the great loyalty cases which have stirred the nation—Oppenheimer, John Paton Davies, John Stewart Service, Wolf Ladejinsky, Peters, Dorothy Bailey, Chasanow and Landy. An illuminating commentary on the relation between state and individual in our times could be written on the basis of these cases. But equally instructive are the modest, unsensationalized cases of the sort that Mr. Yarmolinsky has collected—such as those involving a journeyman carpenter,<sup>22</sup> an inspector of carcasses and meat products,<sup>23</sup> a boiler fireman,<sup>24</sup> a clerical

18. In authorizing agency heads to suspend and terminate the employment of individuals "when deemed necessary in the interest of national security," Congress provided that before termination of his employment, the employee should be given "a written statement of the decision of the agency head." 64 STAT. 476 (1950), 5 U.S.C. § 22-1 (1952). In *Cole v. Young*, 226 F.2d 337 (D.C. Cir. 1955), the court of appeals held that a letter from the agency head notifying the employee that "his employment had been ordered terminated 'based on the study of all the documents in your case'" constituted a "decision." *Id.* at 341. The court reasoned that there is a "difference between 'opinions' and 'decisions'. . . . 'Opinions' state the reasons, and 'decisions' merely state the action taken." *Ibid.* This illiberal construction blocked badly needed reform.

19. A committee of Parliament concluded in 1936 that the right of a party "to know the reason for the decision" is a principle of "natural justice" from which administrative agencies should not depart. Report of Committee on Ministers' Powers, CMD. No. 4060, at 75-80, quoted in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 n.17 (concurring opinion by Frankfurter, J.).

20. See Kaufman & Kaufman, *Some Problems of Treatment Arising from the Federal Loyalty and Security Program*, 25 AM. J. ORTHOPSYCHIATRY 813 (1955).

21. Nichols, *Lord Acton*, 1 UNIVERSITY OBSERVER 10, 14 (1947).

22. Case No. 105, CASE STUDIES IN PERSONNEL SECURITY 128.

23. Case No. 136, *id.* at 158.

24. Case No. 146, *id.* at 177.

employee<sup>25</sup>—which dramatize the grotesque extension of the security program to areas that do not have the remotest connection with any rational conception of the national safety.<sup>26</sup>

The cases collected here show clearly the extent to which the loyalty and security program has disregarded the wisdom of experience accumulated over the centuries with respect to the proper standards for reaching just results:

(1) *There is no doctrine of double jeopardy.* An employee may be retried repeatedly on the same charges. In one case reported by Mr. Yarmolinsky an employee was required to answer charges in 1948; the same charges in 1952; and the identical charges in 1954.<sup>27</sup>

(2) *There is no statute of limitations, nor any recognition of the concept of fairness underlying the constitutional prohibition against ex post facto laws.* In one case reported here the inquiry reached back to activities of the employee in 1931.<sup>28</sup> Typical of the charges is this one: "That about 1937-38 in or around [city & state], you actively participated in collecting funds for purchase of an ambulance for the use of the Loyalist Army in the Spanish Civil War."<sup>29</sup> As these cases show, the activities and associations of a lifetime are deemed to be legitimate areas of inquiry.

(3) *There are no standards of relevancy or competence.* Since the charges are vague and the criteria of judgment are ill-defined, there are no bounds to the inquiry in loyalty and security hearings. In one case reported by Mr. Yarmolinsky, an employee was asked by board counsel: "What do you think of female chastity?"<sup>30</sup> My favorite example of this sort of thing from Yarmolinsky's collection involves the employee who was "asked rather sharply why the fact that her father-in-law took so long to get dressed was something funny. . . . Approximately twenty minutes [of the hearing] were taken up with questions relating to the fact that her father-in-law took a long time to get dressed."<sup>31</sup>

(4) *The right to confront and cross-examine one's accusers is denied.* As Mr. Yarmolinsky's cases show, a loyalty "hearing" usually consists of the testimony of the employee and the witnesses summoned by him in his behalf. The government virtually never produces any witnesses to substantiate the charges. The informant appeared in only one of the cases involving federal employees reported by Mr. Yarmolinsky, and he finally admitted that if he saw the accused employee "come up in the street I don't know who he is, even."<sup>32</sup> Denied confrontation, the employee is limited in many cases to an

25. Case No. 37, *id.* at 38.

26. See Shils, *Security and Science Sacrificed to Loyalty*, 11 BULL. ATOM. SCIENTISTS 106 (1955).

27. Case No. 51, CASE STUDIES IN PERSONNEL SECURITY 60.

28. Case No. 53, *id.* at 74.

29. Case No. 18, *id.* at 21. Compare the hostility of the judiciary to "archeological excavations" in anti-trust cases. *United States v. Oregon State Medical Soc'y*, 343 U.S. 326 (1952).

30. Case No. 10, CASE STUDIES IN PERSONNEL SECURITY 12.

31. Case No. 55, *id.* at 80.

32. Case No. 51, *id.* at 68.

affirmative statement of his loyalty. The accused employee must assume the burden of proving that he is not disloyal.

One factor generally overlooked in discussion of the administration of the loyalty and security program—the lapse of time between the charges and final disposition, and between the hearing and notification to the employee—is highlighted by the reports of these cases. In one case the proceeding from the time of service of interrogatories to the date of the final ruling consumed about two years and five months.<sup>33</sup> In another case an employee was not notified of the decision until eight months after the hearing.<sup>34</sup> Delays of this character inevitably intimidate and exhaust the employee.

Mr. Yarmolinsky's collection reflects admirable craftsmanship. The text is lucid. The pertinent materials are well organized. This is an important volume for anyone concerned with loyalty and security problems.

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The question must inevitably occur to any reader of these two volumes, "In what direction should the country now turn?" Mr. Yarmolinsky's work is purely descriptive; he makes no policy recommendations. Mr. O'Brian would "strictly . . . confine the operation of these programs to specific points or specific areas which in good faith can be denominated as sensitive."<sup>35</sup> The British, for instance, have limited their security program to persons whose work is vital to the security of the state; only about 20,000 individuals are affected.<sup>36</sup>

Mr. O'Brian also would insist that no individual be branded as disloyal or a security risk without an opportunity to confront and cross-examine his accusers.<sup>37</sup> The probability that this reform will be made seems slight. The denial of confrontation is now a matter of settled executive policy.<sup>38</sup> The Supreme Court has twice been asked to decide that denial of confrontation is a denial of due process, but in the *Bailey* case<sup>39</sup> the Court divided four-to-four, and in *Peters v. Hobby*<sup>40</sup> it side-stepped the issue and rested its judgment on procedural grounds that will have little significance as precedent. If Mr. O'Brian's suggestion were adopted, it would probably temper some of the harshness of the loyalty and

33. Case No. 10, *id.* at 13.

34. Case No. 88, *id.* at 124.

35. NATIONAL SECURITY AND INDIVIDUAL FREEDOM 63.

36. BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 263 (1953). As of June 30, 1953, the FBI had processed 4,772,278 loyalty or security forms since 1947, and had made 27,326 full field investigations and 27,200 preliminary investigations during that same period. ANNUAL REPORT OF THE ATTORNEY GENERAL 21-22 (1953).

37. NATIONAL SECURITY AND INDIVIDUAL FREEDOM 74.

38. The policy of the executive department has been authoritatively summed up as follows: "National security demands that certain types of information be kept confidential and that the employee be denied confrontation and cross examination of confidential informants." Brief for Respondents, p. 24, *Peters v. Hobby*, 349 U.S. 331 (1955).

39. *Bailey v. Richardson*, 341 U.S. 918 (1950).

40. 349 U.S. 331 (1955).

security program. But the Oppenheimer case indicates the limitations of the proposal. Oppenheimer was tried on evidence that was disclosed to him. He was permitted to confront and cross-examine his accusers. Yet many thoughtful persons are convinced that the result in that case was unjust, and there is no doubt that the proceeding did incalculable damage to the morale of the scientific community and to America's good name throughout the world.

The pith of the matter, as Thurman Arnold has pointed out, is that the loyalty and security hearings are character trials, and a trial or hearing is not a suitable instrument in a democracy for passing upon a man's character.<sup>41</sup> The cases gathered by Mr. Yarmolinsky show that a loyalty hearing involves a judgment of a man's beliefs and associations throughout his lifetime. The Oppenheimer case demonstrates the impossibility of satisfactorily evaluating such intangibles even when the procedure is consistent with traditional standards and the judges are honorable and conscientious. In short, the nature of the subject is such that it may be impossible to devise any fair trial or hearing procedure.

In the light of events of the past decade, no prudent person can gainsay the real and persistent danger of espionage, or the genuine need for appropriate precautions. But spies and saboteurs will not be detected by the clumsy apparatus of the loyalty and security program. Of course persons lacking fidelity and discretion should not be allowed to occupy positions vital to the security of the country. But screening out such persons involves judgments as to competence, the kind of decisions made every day by employers and principals. No great corporation would undertake to ascertain the trustworthiness of its employees by a trial process.<sup>42</sup> Investigation and judgments as to these matters can be made without the trappings of a quasi-judicial inquiry.

In any event, it would seem better to have no hearing than the kind of hearings described in Mr. Yarmolinsky's collected cases. The loyalty and security hearing offers the community the illusion of a result arrived at by an independent and informed deliberative body which has weighed the evidence and afforded the employee his day in court.<sup>43</sup> The stigma of a discharge in such cases is greater than in a case involving summary dismissal, for the reason that the employee will be understood to have been dismissed, not arbitrarily, but after what appears to be a quasi-judicial hearing. The use of a hearing has significant political implications and deep psychological roots. It enables the Executive to appear just and righteous. It cloaks the proceedings in a mantle of fairness. Public criticism is deflected; the community's misgivings are quieted. Psychologically, a quasi-judicial hearing enables those responsible for the program to relieve the guilt and anxiety aroused by the "dirty business" in which they are engaged. They can comfort themselves with the fantasy that they are observing the ritual prescribed by the community for determining

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41. Arnold, *Due Process in Trials*, 300 ANNALS 123 (1955).

42. Cf. BERLE, *THE 20TH CENTURY CAPITALIST REVOLUTION* 91 (1954).

43. See Fortas, *Outside the Law*, 192 ATLANTIC 42, 44 (1953).

who is innocent and who shall be punished. Perhaps these same factors underlie the purge "trials" in totalitarian states.

If, as Mr. O'Brian suggests, we are suffering from a mass neurosis, the appropriate therapy, as in the treatment of an individual's neuroses, is one calculated to produce a realistic understanding of the problem. In an individual, a concern for security that is disproportionate to any actual danger is a symptom of emotional illness. The individual whose energy is bound up in defenses against fancied threats is handicapped in effectively mobilizing his psychic energy against the problems of the real world. The drive for security tends to produce greater insecurity. The loyalty and security program is based upon a far-reaching misconception of the danger to the national safety. The threat does not arise from the eccentric, the unorthodox or the dissenter. Yet such individuals are the subjects of the cases reported by Mr. Yarmolinsky. Because the loyalty and security program is misdirected, it has tended to heighten insecurity. Enormous sums of money and the brain-power of countless individuals have been invested for a return that is negligible in terms of the national safety. The value of an effective counter-intelligence corps would far exceed that of the much publicized, highly politicized loyalty and security program. An essential prelude to any reform of the program is an accurate and objective description of the true magnitude of the danger of treason, espionage, sabotage and subversion. As Mr. O'Brian puts it, we need "to appraise more accurately the extent of the danger."<sup>44</sup> Steps appropriate to meeting these hazards can then be taken. In 1948, Mr. O'Brian pointed out that if we are going to investigate men's beliefs and associations, "we must pay the price for it." "Are we prepared to do this?" he asked. "And is the result worth while?"<sup>45</sup> These questions, which strike at the heart of the matter, are as pertinent today as they were eight years ago.

ABE KRASH †

COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES: A CROSS-SECTION OF THE NATION SPEAKS ITS MIND. By Samuel A. Stouffer. Garden City, New York: Doubleday and Company, 1955. Pp. 278. \$4.00.

THIS is a detailed report on a sociological survey of attitudes toward civil liberties done in the summer of 1954 under the auspices of the Fund for the Republic. Although the major findings of the survey have been widely publicized, perhaps there is still room for discussion of some of their implications for lawyers and legal theorists.

If the study is accurate, a sizable proportion of the American public are in favor of sharply curtailing the civil liberties of Communists and other "radicals." More than half of the interviewees in a representative national sample

44. NATIONAL SECURITY AND INDIVIDUAL FREEDOM 46.

45. O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592, 609 (1948).

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