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The Anathema of the Security Risk: Arbitrary Dismissals of Federal Government Civilian Employees and Civilian Employees of Private Contractors Doing Business with the Federal Government

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THE ANATHEMA OF THE SECURITY RISK: ARBITRARY DISMISSALS OF FEDERAL GOVERNMENT CIVILIAN EMPLOYEES AND CIVILIAN EMPLOYEES OF PRIVATE CONTRACTORS DOING BUSINESS WITH THE FEDERAL GOVERNMENT

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I. INTRODUCTION

The anathema of the "security risk" has frequently reared its head throughout the recent evolution of constitutional law. In this article, the writer is interested in discussing the development of the "security risk" as it affects first the civilian employee[1] of the federal government and ultimately the civilian employee of a private contractor doing business with the federal government. The writer is not concerned with the situation wherein the "security risk" has been firmly established, but rather with those cases wherein an employee has lost his position or job due merely to the label of "security risk" with insufficient, if any, substantiating evidence. The specific constitutional issue is whether, consonant with the due process clause of the fifth amendment, the federal government for security reasons can, directly or indirectly, in summary fashion, cause the dismissal of an employee from a particular position without affording the employee ample notice or sufficient opportunity to defend himself.

By way of further introduction, the writer would like to impress the reader with the apparent difficulty the federal courts have had with the above-mentioned problem. In *Bailey v. Richardson*,[2] one of the earlier cases, a lower court decision was affirmed because of an evenly divided

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1. In order to preclude this article from becoming overly unwieldy, it has been necessary to exclude from discussion the "security risk" problem as it affects military personnel of the United States. One of the outstanding cases in this area is Harmon v. Brucker, 355 U.S. 579 (1958). See generally 2 BNA GOVERNMENT LOYALTY & SECURITY 31 (1962); BROWN, LOYALTY & SECURITY 81-89 (1958).

2. 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

Supreme Court. In *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*,[3] one of the more recent cases, the original decision of the federal district court was first reversed, two to one, by a three-judge panel of the federal court of appeals and then affirmed, five to four, after rehearing en banc by the same court, which in turn was affirmed, five to four, by the Supreme Court. In both the *Bailey* and the *Cafeteria Workers* cases the dismissal of the employee was upheld as against constitutional arguments. However, in numerous decisions between the *Bailey* and the *Cafeteria Workers* cases, the federal courts reached the opposite result by skillfully avoiding the constitutional question of whether the employee was "deprived of life, liberty, or property, without due process of law."[4]

The writer will first discuss those portions of the various federal security programs which provide for the dismissal of employees based upon security reasons. The article will then deal with the successes and failures of these employees who litigated their dismissals in the federal courts. This will involve essentially a treatment of the cases from *Bailey* through *Cafeteria Workers*.

II. The Congressional and Executive Milieu

A. *The Security Program for the Federal Government Civilian Employee*

1. THE BEGINNINGS

The amount of statutory law on the various security programs for the civilian employees of the federal government, including its departments and agencies, has been so vast[5] that in the following chronology depicting these programs it is necessary to limit discussion to those sections of the acts, orders and regulations which appertain specifically to the dismissal of employees.

The genesis of the security dismissal problem can probably be discovered in Section 9A of the Hatch Act of 1939,[6] which reads as follows:

> (1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose

3. 367 U.S. 886 (1961), *affirming* 284 F.2d 173 (D.C. Cir. 1960).

4. Taylor v. McElroy, 360 U.S. 709 (1959); Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); Peters v. Hobby, 349 U.S. 331 (1955); Coleman v. Brucker, 257 F.2d 661 (D.C. Cir. 1958); United States v. Gray, 207 F.2d 237 (9th Cir. 1953).

5. See, *e.g.*, 1 BNA Government Loyalty & Security 1, 11, 15 (1962); Brown, *op. cit. supra* note 1, at 21-60. BNA Government Loyalty & Security is a comprehensive loose-leaf service which has been extensively used in the writing of this article. For additional material on the loyalty and security programs for the civilian employee of the federal government, see Westin, *Constitutional Liberty and Loyalty Programs*, in Foundations of Freedom 193 (Kelly ed. 1958).

6. 53 Stat. 1148 (1939). Section 9A of the Hatch Act of 1939 was repealed by 69 Stat. 625 (1955), 5 U.S.C. § 118j (1958). The current version of Section 9A may be found in 69 Stat. 624-25 (1955), 5 U.S.C. § 118p-r (1958). See text accompanying notes 45, 46, 47 *infra*.

> compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.
>
> (2) Any person violating the provisions of this section *shall be immediately removed from the position or office held by him*, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person. (Emphasis added.)

In 1940, Congress authorized the immediate removal of any civil service employee of the War or Navy Departments or of the Coast Guard or their field services, where, in the opinion of the Secretary concerned, such removal was warranted by the demands of national security.[7] This authority was subsequently renewed by Congress in a 1942 Act with an identical provision.[8] Also in 1942, the Civil Service Commission, in issuing its War Service Regulations, provided for the removal of a federal government employee where there was "a reasonable doubt as to his loyalty to the Government of the United States."[9]

Beginning in 1939 and continuing through the following years, Congress in its appropriation acts has forbidden the use of appropriated funds to pay "any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States through force or violence."[10] In one of its more notorious moments, Congress, in an endeavor to force the discharge of certain government employees, attempted to utilize these appropriation acts as a substitute for the executive dismissal power. Consequently, in Section 304 of the Urgent Deficiency Appropriation Act of 1943,[11] Congress provided that, after November 15, 1943, no salary or other compensation shall be paid to three employees of the Government, specified by name, out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless the named employees were again appointed by the President with the advice and consent of the Senate prior to such date. However, the United States Supreme Court subsequently invalidated Section 304 as a bill of attainder.[12] In 1946, Congress enacted the

7. 54 Stat. 679 (1940).

8. 56 Stat. 1053 (1942).

9. 7 Fed. Reg. 7723-24 (1942).

10. *E.g.*, 55 Stat. 123 (1941); 55 Stat. 6 (1941); 54 Stat. 621 (1940); 53 Stat. 935 (1939). With only ten omissions, these appropriation riders appeared in every money bill from 1941 to 1956. This type of appropriation rider was rendered unnecessary by 69 Stat. 624-25 (1955). 5 U.S.C. § 118p-r (1958). See S. REP. No. 1256, 84th Cong., 1st Sess. 1, 3 (1955); H.R. REP. No. 1152, 84th Cong., 1st Sess. 1-2, 3 (1955); BROWN, *op. cit. supra* note 1, at 21 n.1. See also text accompanying notes 45, 46, 47 *infra*.

11. 57 Stat. 450 (1943).

12. United States v. Lovett, 328 U.S. 303 (1946).

first of the so-called McCarran riders to appropriation acts, as the Department of State Appropriation Act provided:

> [T]he Secretary of State may, *in his absolute discretion*, on or before June 30, 1947, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States .... (Emphasis added.)[13]

Such a provision was re-enacted in subsequent years and extended to include at least one other agency.[14]

2. THE TRUMAN LOYALTY PROGRAM

On March 21, 1947, President Truman issued Executive Order Number 9835,[15] which provided the first large-scale loyalty program for civilian employees of the federal government. The order was applicable to civilian employees of every department and agency of the executive branch of the United States government.[16] *Inter alia*, the order provided for removal of employees on grounds of disloyalty[17] under the standard that, based "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States."[18] The procedural rights of notice, hearing and appeal were to be accorded to every employee prior to his removal.[19] However, in providing for security measures in loyalty investigations, which could lead to removal, the order stated:

> [T]he investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.[20]

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13. 60 Stat. 458 (1946).

14. 1 BNA GOVERNMENT SECURITY & LOYALTY 1:3-1:4 (1962). See, *e.g.*, 61 Stat. 288 (1947) (Department of State); 62 Stat. 315 (1948) (Department of State); 65 Stat. 594 (1951) (Department of Commerce).

15. 12 Fed. Reg. 1935 (1947).

16. Exec. Order No. 9835, pt. I(1), pt. II(1), 12 Fed. Reg. 1935, 1937 (1947).

17. Exec. Order No. 9835, pt. II, 12 Fed. Reg. 1937 (1947).

18. Exec. Order No. 9835, pt. V(1), 12 Fed. Reg. 1938 (1947).

19. Exec. Order No. 9835, pt. II(4), 12 Fed. Reg. 1937 (1947).

20. Exec. Order No. 9835, pt. IV(2), 12 Fed. Reg. 1938 (1947). For a discussion of the apparent immediate aftermath of this provision, see Rauch, *Nonconfrontation in Security Cases: The Greene Decision*, 45 VA. L. REV. 1175-77 (1959). See also Directive of March

In 1951, Executive Order Number 9835 was amended to impose a more severe standard for removal from employment. The new standard provided "that, on all evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."[21] This standard was generally regarded as shifting the burden of proof from the government to the employee.[22]

Congress was also active in these years. For example, the National Security Act of 1947 provided that "the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . ."[23]

Probably the most significant step taken by Congress in this area of security risk dismissals, and the one with the broadest coverage, was Public Law 733 of 1950 whereby eleven named department and agency heads were authorized to dismiss civilian employees whenever they "shall determine such termination necessary or advisable in the interest of the national security of the United States . . . ."[24] Permanent employees, after they had completed their probationary period, were guaranteed the procedural safeguards of notice, hearing, and review, and a written statement of the decision of the agency head.[25] Other employees, to the extent the agency head determined that the interests of national security permitted, were entitled to notice and an opportunity to submit statements and affidavits on their behalf.[26] Provision was made for the President to

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13, 1948, wherein President Truman stated: "The efficient and just administration of the Employee Loyalty Program under Executive Order No. 9835 of March 21, 1947, requires that reports, records, and files relative to the program be preserved in strict confidence. This is necessary in the interest of our national security and welfare, to preserve the confidential character and sources of information furnished, and to protect government personnel against the dissemination of unfounded or disproved allegations. It is necessary also in order to insure the fair and just disposition of loyalty cases." F.R. Doc. 48-2337, 13 Fed. Reg. 1349 (1948).

21. Exec. Order No. 10241, 16 Fed. Reg. 3690 (1951).

22. 1 BNA GOVERNMENT LOYALTY & SECURITY 1:5 (1962).

23. 61 Stat. 498 (1947), 50 U.S.C. § 403(c) (1958).

24. 64 Stat. 476 (1950), 5 U.S.C. § 22-1 (1958). The eleven original department and agency heads were: Secretary of State; Secretary of Commerce; Attorney General; Secretary of Defense; Secretary of the Army; Secretary of the Navy; Secretary of the Air Force; Secretary of the Treasury; Chairman, Atomic Energy Commission; Chairman, National Security Resources Board (abolished in 1953); and Director, National Advisory Committee for Aeronautics (now the National Aeronautics and Space Administration).

25. 64 Stat. 476 (1950), 5 U.S.C. § 22-1 (1958).

26. *Ibid.* Public Law 733, 5 U.S.C. § 22 (1958), provided the following procedure for all civilian employees. The department or agency head could in his absolute discretion, when deemed necessary in the interests of national security, suspend an employee. To the extent that the department or agency head determined that the interests of the national security permitted, the suspended employee was entitled to be notified of the reasons for the suspension and given an opportunity to file a statement and affidavits. Following such investigation and review as the department or agency head deemed necessary, the employment could then be terminated. Public Law 733 then made provision for permanent employees who had completed their probationary or trial periods.

extend the coverage of the act to other departments and agencies.[27] Probably in an endeavor to unify the program of security risk dismissals, Public Law 733 repealed first the aforementioned section of the 1942 Act which provided for immediate removals in the War and Navy Departments and in the Coast Guard,[28] and second a McCarran Rider to the Department of State Appropriation Act for 1950.[29] Public Law 733 appears to be a Congressional recognition and approval of the Truman Loyalty Program, as well as the basis for the Eisenhower Security Program, which will be discussed shortly.

On September 23, 1950, over the veto of President Truman, Congress passed the Internal Security Act of 1950.[30] Among other things, the act made it unlawful for any member of a Communist-action or a Communist-front organization (providing that the member has knowledge or notice that such organization is registered or ordered to be registered) to hold any nonelective office or employment under the United States.[31]

3. THE EISENHOWER SECURITY PROGRAM

A great deal of the litigation involving security risk dismissals of federal government civilian employees revolves around the Eisenhower Security Program. This program was promulgated on April 27, 1953, by Executive Order Number 10450.[32]

Executive Order Number 10450 was not limited in scope to the eleven departments and agencies enumerated in Public Law 733, but rather applied to every department and agency in the Federal Government.[33] The head of each department and agency was given the responsibility "for establishing and maintaining within his department or agency

27. 64 Stat. 477 (1950), 5 U.S.C. § 22-3 (1958). President Truman extended the provisions of Public Law 733 to the Panama Canal and to the Panama Railroad Company. Exec. Order No. 10237, 16 Fed. Reg. 3627 (1951). President Eisenhower extended the provisions of Public Law 733 to all other departments and agencies of the federal government. Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953).

28. 64 Stat. 477 (1950). See notes 7-8 *supra* and accompanying text. Public Law 733 also repealed § 630, Act of October 29, 1949, 63 Stat. 1023. Section 630 also referred to the sections of the 1942 Act providing for immediate removals in the War and Navy Departments and in the Coast Guard.

29. 64 Stat. 477 (1950). The McCarran Rider in question is found in 63 Stat. 456 (1949). The McCarran Rider was absent in 1950 legislation, but reappeared in 1951. 65 Stat. 581 (1951) (Department of State); 65 Stat. 594 (1951) (Department of Commerce). It apparently appeared for the last time in 1952 legislation. 66 Stat. 555 (1952) (Department of State); 66 Stat. 567 (1952) (Department of Commerce).

30. 64 Stat. 987 (1950), 50 U.S.C. §§ 781-826 (1958).

31. 64 Stat. 992 (1950), 50 U.S.C. § 784(a)(1)(B) (1958).

32. 18 Fed. Reg. 2489 (1953).

33. Exec. Order No. 10450, § 1, 18 Fed. Reg. 2489 (1953). The Executive Order does not apply to Congressional employees or to employees of the judiciary. Some of the Congressional agencies, such as the Library of Congress, participate in the Eisenhower Security Program on a voluntary basis. As of 1956 there were about seventy agencies with security programs under the Executive Order. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM 61 (1956).

an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security."[34] Sample security regulations, issued by the Attorney General, were supplied to guide the department and agency heads in establishing their own security programs.[35]

Executive Order Number 10450 authorized each department and agency head to make an investigation upon receipt of any information indicating that the retention in employment of any officer or employee "may not be clearly consistent with the interests of the national security."[36] The investigation was to be designed to develop information as to whether the employment or retention in employment of the person being investigated was "clearly consistent with the interests of the national security."[37] If at any stage of the investigation it appeared that such employment "may not be clearly consistent with the interests of the national security," the department or agency head could immediately suspend the officer or employee, and "following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with [Public Law 733]."[38]

As can be observed from the above quotations, the standard under the Eisenhower program based upon Public Law 733 emphasizes the concept of "national security," rather than "loyalty to the Government of the United States" as did the Truman program. The "security" standard of Executive Order Number 10450 has been interpreted as placing more of a burden upon the suspected employee to clear himself and a heavier onus on the administrator who clears him.[39] One author speaks of the "loyalty" test as being based upon a state of mind equated with the more negative notion of freedom from disloyalty, especially the disloyalty of those who reject our form of government and society and would supplant it, by violence if need be, with communism; whereas the "security" test ideally is concerned with the risk to the United States

34. Exec. Order No. 10450, § 2, 18 Fed. Reg. 2489 (1953).

35. 1 BNA GOVERNMENT LOYALTY & SECURITY 15:101 (1962).

36. Exec. Order No. 10450, § 5, 18 Fed. Reg. 2491 (1953). However, the investigation of persons employed in the competitive service shall primarily be the responsibility of the Civil Service Commission. Exec. Order No. 10450, § 8(b), 18 Fed. Reg. 2492 (1953).

37. Exec. Order No. 10450, § 8(a), 18 Fed. Reg. 2491 (1953).

38. Exec. Order No. 10450, § 6, 18 Fed. Reg. 2491 (1953).

39. BROWN, *op. cit. supra* note 1, at 31-32. Brown also notes the continual hardening of the standard: from reasonable grounds for belief of disloyalty (Truman Loyalty Program), to reasonable doubts as to loyalty (amendment to Truman Loyalty Program); from discharge, if advisable in the interest of national security (Public Law 733), to retention, only if clearly consistent with national security (Eisenhower Security Program). *Id.* at 31.

created by having a particular person in a particular job, and consequently probes weaknesses of character or of conduct and requires an identification of the sensitive areas where risks have to be minimized.[40]

In order to give more content to this test of "security," Executive Order Number 10450 lists criteria which may be the subjects of investigations.[41] These criteria may generally be listed as follows: (1) Unsuitability and Subjection to Pressure; (2) Acts of Sabotage, Espionage and Treason; (3) Sympathetic Association with Subversive Individuals; (4) Advocacy of Force or Unconstitutional Means to Overthrow the Government of the United States; (5) Membership or Sympathetic Association with Subversive Groups; (6) Violation of Security Regulations; (7) Disloyalty; and (8) Claim of the Constitutional Privilege against Self-incrimination.[42]

Executive Order Number 10450 also provided for the security, safekeeping, and holding in confidence of the reports and other investigative material and information developed by the security investigations.[43] The order also revoked Executive Order Number 9835 of March 21, 1947, as amended, which was the basis for the Truman Loyalty Program.[44]

On August 9, 1955, Congress passed an act which prohibited employment by the Government of the United States, or by any of its departments or agencies, of any person who advocated the overthrow of our constitutional form of government or is a member of an organization that advocates the overthrow, knowing the purpose of the organization.[45] The 1955 act also repealed section 9A of the Hatch Act of 1939,[46] and made security riders to appropriation acts unnecessary.[47]

4. CIVIL SERVICE REGULATIONS

Public Law 733, as implemented by Executive Order Number 10450, is not the sole means for currently removing an employee as a security

40. BROWN, *op. cit. supra* note 1, at 4-12. Section 1(a) of the Sample Security Regulation issued in connection with Executive Order Number 10450 reads as follows: "As used herein, the term 'national security' relates to the protection and preservation of the military, economic, and productive strength of the United States, including the Security of the Government in domestic and foreign affairs, against or from espionage, sabotage, and subversion, and any and all other illegal acts designed to weaken or destroy the United States." 1 BNA GOVERNMENT LOYALTY & SECURITY 15:101 (1962).

41. Exec. Order No. 10450, § 8(a), 18 Fed. Reg. 2491 (1953).

42. Exec. Order No. 10450, § 8(a), 18 Fed. Reg. 2491 (1953), as amended, Exec. Order No. 10491, 18 Fed. Reg. 6583 (1953) and Exec. Order No. 10548, 19 Fed. Reg. 4871 (1954). The abbreviated wording of the criteria was taken for the most part from 1 BNA GOVERNMENT LOYALTY & SECURITY 11:2-4 (1962).

43. Exec. Order No. 10450, § 9(c), 18 Fed. Reg. 2492 (1953).

44. Exec. Order No. 10450, § 12, 18 Fed. Reg. 2492 (1953).

45. 69 Stat. 624 (1955), 5 U.S.C. § 118p (1958).

46. 69 Stat. 625 (1955), 5 U.S.C. § 118j (1958).

47. See S. REP. No. 1256, 84th Cong., 1st Sess. 1, 3 (1955); H.R. REP. No. 1152, 84th Cong., 1st Sess. 1-2, 3 (1955); BROWN, *op. cit. supra* note 1, at 21 n.1.

risk. Employees may be removed with less procedural protection under the general suitability provisions of the Civil Service Regulations.[48] The regulations authorize the employing department or agency to remove any employee in the competitive service whose conduct or capacity is such that his removal will promote the efficiency of the service.[49] Among the several causes for removal is the relic from the War Service Regulations of 1942[50] which in present wording reads "Reasonable Doubt as to the loyalty of the person involved to the Government of the United States."[51]

A permanent employee in the competitive service, upon the completion of his probationary period, has the following procedural safeguards in a removal situation: right of notice of charges, right to file an answer and affidavits, right to receive a written decision of action taken with reasons therefor and the effective date of the action, and right of appeal.[52] "He shall not, however, be entitled to an examination of witnesses, nor shall any trial or hearing be required except in the discretion of the agency."[53] Other types of civil service employees may be removed with even less formality.[54] However, in all cases, those with privileges under the Veterans' Preference Act are entitled, as of right, to the opportunity to appear personally in the proceedings for removal.[55]

The potential of the civil service removal apparatus becomes apparent from the following discussion:

> The Civil Service Commission's procedure has carried most of the burden in removing persons listed by the Commission as unsuitable for security reasons. In the period from May 28, 1953, to June 30, 1955, the number of discharges of government employees for alleged security reasons, according to the Civil

48. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *op. cit. supra* note 33, at 58.

49. 5 C.F.R. § 9.101(a) (1961).

50. Note 9 *supra* and accompanying text.

51. 5 C.F.R. §§ 9.101(a), 2.106(a)(7) (1961).

52. 5 C.F.R. § 9.102(a)(1)(i) (1961).

53. *Ibid. Accord*, 37 Stat. 555 (1912), as amended, 5 U.S.C. § 652(a) (1958).

54. An employee serving a probationary or trial period under a permanent appointment may have his services terminated by a notification in writing setting forth the effective date and reasons for his separation. Such employee also has a right of appeal. 5 C.F.R. § 9.103(a) (1961). However, if an employee's services are to be terminated during the probationary or trial period for reasons based in whole or in part on conditions arising prior to his appointment, the employee has approximately the same procedural safeguards as a permanent employee in the competitive service. 5 C.F.R. § 9.103(b) (1961). An employee serving under a temporary appointment may be separated at any time upon notice in writing from the appointing officer. 5 C.F.R. § 9.104(a) (1961). The Civil Service Rules and Regulations regarding removals do not apply to persons in positions excepted from the competitive service by statutes or by the Civil Service Commission. Among others, the Civil Service Commission is authorized to except positions of a confidential or policy-determining nature. 5 C.F.R. §§ 06.1, 06.2, 06.4 (1961).

55. 58 Stat. 390 (1944), as amended, 5 U.S.C. § 863 (1958); 5 C.F.R. §§ 21.10, 22.402, 22.601 (1961). However, the Civil Service Regulations §§ 22.402, 22.601 *supra* provide for the hearing to be held on appeal by the employee from a decision of an administrative officer who has taken adverse action.

Service Commission, was 3,586. Of this figure of 3,586 stated security discharges, 3,241 or over 90 percent were removed under Civil Service Commission's procedure as to general suitability and only 342 were removed under Executive Order 10450. (Three were unaccounted for.) (Footnotes omitted.)[56]

B. *The Security Program for the Employee of Private Contractors*

1. THE CLEARANCE AND ACCESS PROBLEM

By use of the historical approach in the preceding sections this writer has endeavored to demonstrate the increasing concern of both the Congress and the Executive with the problem of national security as manifested in statutes, orders and regulations making provision for dismissing civilian employees of the federal government as security risks. As a corollary to these programs, both the Congress and the Executive have taken steps with regard to national security which have affected employees other than government workers.

The security programs for both the government employee and the employee of the private contractor doing business with the government present the same problem of providing the potential for arbitrary dismissals of employees due to a determination by the government of the United States, or by one of its departments or agencies, that a specific employee is a security risk. However, the dismissal route is more indirect as it pertains to an employee of a private contractor. In this situation the governmental action is not the actual dismissing, but rather the act of denying the employee, for security reasons, clearance or access either to classified information or to a government installation. By this denial of clearance or access, the government is able to coerce the private contractor into dismissing the employee, if not completely, at least from performing any work under the government contract or at the government installation.

The clearance and access problem is logically limited to those sensitive areas where there is the utmost necessity for tight security measures. In the pages that follow, the writer will briefly discuss those provisions of three of the government's "security for sensitive areas" programs which may result in the removal of a non-government employee from his job. These three programs are: the Department of Defense Industrial Security Program, the Security Program of the Atomic Energy Commission and the Port Security Program.

2. DEPARTMENT OF DEFENSE INDUSTRIAL SECURITY PROGRAM

In this subsection we are concerned with employees of private contractors doing business with the Department of Defense and the Depart-

56. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *op. cit. supra* note 33, at 58.

ments of Army, Navy and Air Force. Such employees may be denied access either to classified information or to a military installation. In either case the result may be the loss of a job.

Much of the arbitrariness with regard to denial of access to classified information has been eliminated as a result of the decision of the United States Supreme Court in *Greene v. McElroy*.[57] This case will be discussed in another section of this article.[58] Since an exposition of the earlier Department of Defense Industrial Security Programs, which aroused the censure of the Court in *Greene*, will needlessly protract this article, the writer will endeavor to discuss the program as it exists today. Unfortunately, in view of the writer's desire to discuss the statutory law prior to the case law, this will necessitate a description of the result prior to the cause.

As a result of the *Greene* decision, President Eisenhower, on February 20, 1960, issued Executive Order Number 10865,[59] pertaining to "Safeguarding Classified Information Within Industry." The President was of the opinion that the order both protected the nation's security and afforded the maximum possible safeguards for the individuals affected by it.[60]

Executive Order Number 10865 authorized the Secretary of Defense and certain other department and agency heads to prescribe, by regulation, such specific requirements, restrictions, and other safeguards as are necessary to protect releases of classified information to or within United States industry.[61] By agreement between the Department of Defense and any other department or agency of the United States, the regulations prescribed by the Secretary of Defense could be extended to protect releases of classified information by such other department or agency.[62]

Under Executive Order Number 10865, authorization for access to classified information could be granted to an individual for a specific classification category only upon a finding that it is "clearly consistent with the national interest" to do so.[63] However, authorization could not

57. 360 U.S. 474 (1959).

58. See text at notes 197-211 *infra*.

59. 25 Fed. Reg. 1583 (1960). Executive Order Number 10865 was amended to incorporate some apparently minor changes by Exec. Order No. 10909, 26 Fed. Reg. 508 (1961).

60. White House Statement on President Eisenhower's Executive Order Revising Industrial Security Procedures, February 20, 1960, in 2 BNA GOVERNMENT LOYALTY & SECURITY 24:1 (1962).

61. Exec. Order No. 10865, § 1(a), 25 Fed. Reg. 1583 (1960). Beside the Secretary of Defense, the other department and agency heads named were: the Secretary of State, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, and the Administrator of the Federal Aviation Agency.

62. Exec. Order No. 10865, § 1(b), 25 Fed. Reg. 1583 (1960).

63. Exec. Order No. 10865, § 2, 25 Fed. Reg. 1583 (1960).

be finally denied or revoked by a department or agency head or his designee unless the individual had been given the following procedural safeguards: (1) a written statement of the reasons access authorization was denied or revoked; (2) a reasonable opportunity to reply in writing to the statement of reasons; (3) an opportunity to appear personally before the department or agency head or his designee; (4) a reasonable time to prepare for such appearance; (5) an opportunity to be represented by counsel; (6) an opportunity for cross-examination; and (7) a written notice of the final decision in the case.[64]

With regard to the right of cross-examination, Executive Order Number 10865 provided that the individual concerned shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the individual relating to a controverted issue *unless*: (1) the department head certifies that the person who furnished the information is a confidential informant engaged in obtaining intelligence information for the Government, and that disclosure of his identity would be substantially harmful to the national interest; or (2) the department head determines that the statement is reliable, material and necessary to the national security, and that the person furnishing the information cannot appear to testify due to death, severe illness, or similar cause (in which case the identity of the person and the information shall be available to the individual concerned), or due to some other cause determined by the department head to be good and sufficient.[65] Whenever the opportunity for cross-examination is not available, the individual concerned shall be given a summary of the information, appropriate consideration shall be accorded to the fact of no cross-examination, and a final adverse determination shall only be made by the department head upon his personal review of the case.[66]

Executive Order Number 10865 also provided the individual concerned with procedural safeguards with respect to the government's use of records and physical evidence other than the investigative reports.[67] In order to assist the individual with his right of cross-examination, provision was made for the issuing, by the department or agency concerned, of invitations and requests to appear and testify.[68] The order further stated that any determination adverse to the individual concerned shall be a determination in terms of the national interest and in no sense a determination as to the loyalty of the individual.[69]

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64. Exec. Order No. 10865, § 3, 25 Fed. Reg. 1583 (1960).

65. Exec. Order No. 10865, § 4(a), 25 Fed. Reg. 1583 (1960).

66. Exec. Order No. 10865, § 4(b), 25 Fed. Reg. 1583 (1960).

67. Exec. Order No. 10865, § 5, 25 Fed. Reg. 1583 (1960).

68. Exec. Order No. 10865, § 6, 25 Fed. Reg. 1583, 1584 (1960), as amended, Exec. Order No. 10909, § 2, 26 Fed. Reg. 508 (1961).

69. Exec. Order No. 10865, § 7, 25 Fed. Reg. 1583, 1584 (1960).

After setting forth the above-mentioned procedural safeguards, the order ended on the following note:

> Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires. Such authority may not be delegated and may be exercised only when the head of a department determines that the procedures prescribed [in the preceding sections of the Order] cannot be invoked consistently with the national security and such determination shall be conclusive.[70]

The Department of Defense subsequently incorporated the provisions of Executive Order Number 10865 into its industrial security program.[71]

The second problem facing an employee of a private contractor doing business with the Department of Defense or a Military Department is the question of access to a military installation. Unfortunately, there do not appear to be any specific orders or regulations pertaining to denial of access to the military installation for security reasons. Rather, the authority for such denial appears to stem from the broad power of the commanding officer of the installation to admit and exclude civilians and civilian personnel in general, and "dealers or tradesmen or their agents" in particular.[72]

3. THE SECURITY PROGRAM OF THE ATOMIC ENERGY COMMISSION

Under the provisions of the Atomic Energy Act of 1946, as amended,[73] no individual shall have access to restricted data until the Civil Service Commission (or the Federal Bureau of Investigation in certain cases) shall have made an investigation and report to the Atomic Energy Commission on the character, associations, and loyalty of such individual, and the Atomic Energy Commission shall have determined that permitting such person to have access to restricted data will not endanger the common defense and security.[74] To this end, the Atomic Energy Commission, by regulation, has set forth criteria and procedures

70. Exec. Order No. 10865, § 9, 25 Fed. Reg. 1583, 1584 (1960).

71. Industrial Personnel Access Authorization Review Regulation, 32 C.F.R. pt. 155 (1961). This Regulation covers the Federal Aviation Agency and the National Aeronautics and Space Administration as well as the Department of Defense.

72. See, *e.g.*, Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 890-94 (1961).

73. 60 Stat. 755 (1946), as amended, 42 U.S.C. Ch. 23 (1958), as amended, 42 U.S.C. Ch. 23 (Supp. II, 1959-60).

74. 60 Stat. 767 (1946), as amended, 68 Stat. 942 (1954), 42 U.S.C. § 2165 (1958). This section of the Atomic Energy Act also applies to employees and prospective employees of the Atomic Energy Commission. Employees of the Atomic Energy Commission also come within the provisions of Public Law 733 and Executive Order Number 10450. See notes 24 and 33 *supra* and accompanying text.

for determining eligibility for access to restricted data or defense information within industry.[75]

Under the Atomic Energy Commission's regulations:

> The decision as to access authorization is a comprehensive, commonsense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would endanger the common defense and security and would be clearly consistent with the national interest.[76]

To assist in making a determination the regulations set forth a number of specific types of derogatory information,[77] similar to those earlier mentioned in connection with the Eisenhower Security Program.[78]

The Atomic Energy Commission's regulations also established the procedures to be followed before an individual may be denied access to restricted data or defense information. A new set of regulations was promulgated on July 12, 1960.[79] These regulations scrupulously followed the demands of Executive Order Number 10865 and in several instances, such as the provisions pertaining to cross-examination, the regulations were replicas of certain sections of the executive order.[80] The Atomic Energy Commission's regulations made provision for notice,[81] a written answer by the individual concerned,[82] a right to and request for hearing,[83] the hearing counsel,[84] the right to be represented by counsel of individual's own choice,[85] appointment of a Personnel Security Board in each case,[86] conduct of proceedings (including the admission of evidence and cross-examination) at the hearing,[87] recommendations by the Board,[88] receipt of new evidence on behalf of the individual concerned,[89] review by the AEC Personnel Security Review Board,[90] final determination by the

75. 10 C.F.R. pt. 10 (Supp. 1962), as amended, 27 Fed. Reg. 4324 (1962).
76. 10 C.F.R. § 10.10(a) (Supp. 1962).
77. 10 C.F.R. §§ 10.10(b), 10.11 (Supp. 1962).
78. See notes 41 and 42 *supra* and accompanying text.
79. 25 Fed. Reg. 6510 (1960). On April 30, 1962, these regulations were amended to include within their scope employees and applicants for employment with the Atomic Energy Commission, 27 Fed. Reg. 4324 (1962).
80. *Compare* 10 C.F.R. §§ 10.27(m), 10.27(n), 10.27(o), 10.27(p), 10.33(c) (Supp. 1962) *with* Exec. Order No. 10865, §§ 4(a), 4(b), 5(a), 5(b), 9, 25 Fed. Reg. 1583, 1584 (1960).
81. 10 C.F.R. § 10.22 (Supp. 1962).
82. 10 C.F.R. §§ 10.22(c), (d) (Supp. 1962).
83. 10 C.F.R. §§ 10.22(c), (e), (f), (g) (Supp. 1962).
84. 10 C.F.R. § 10.25 (Supp. 1962).
85. 10 C.F.R. § 10.22(g) (Supp. 1962).
86. 10 C.F.R. § 10.26 (Supp. 1962), as amended, 27 Fed. Reg. 4325 (1962).
87. 10 C.F.R. § 10.27 (Supp. 1962).
88. 10 C.F.R. § 10.28 (Supp. 1962).
89. 10 C.F.R. § 10.29 (Supp. 1962).
90. 10 C.F.R. §§ 10.30(d), (e), 10.31 (Supp. 1962).

General Manager or the Commission,[91] and notification to the individual concerned of an adverse determination together with the findings.[92] Like the final section of Executive Order Number 10865, the regulations of the Atomic Energy Commission contained a reservation of broad power in the Commission, notwithstanding the procedures previously enumerated, to deny or revoke access to restricted data or defense information "if the security of the nation so requires."[93]

4. THE PORT SECURITY PROGRAM

The Port Security Program exemplifies the problem of access to an installation—in this case, to a vessel or a waterfront facility. In one respect, this program is beyond the realm of this article since the program applies to persons who are in wholly private employment, with the employer having no contractual or other tie to the federal government.[94] However, the effect of a denial of clearance under the Port Security Program has the same, if not more severe, consequences upon the non-government employee as those mentioned in connection with the other security programs. For a seaman, a denial of clearance under the Port Security Program is a bar to employment as a seaman on any United States vessel; for a longshoreman, the denial means that he cannot work in facilities designated by the Coast Guard as restricted.[95]

The statutory basis for the Port Security Program is the Magnuson Act of 1950.[96] Among other things, the Act provided:

> 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—
>
> . . . .
>
> (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.[97]

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91. 10 C.F.R. §§ 10.32(a), (b), 10.33(a) (Supp. 1962).

92. 10 C.F.R. §§ 10.32(c), 10.33(b) (Supp. 1962).

93. 10 C.F.R. § 10.33(c) (Supp. 1962).

94. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM 66 (1956).

95. *Id.* at 67. For an excellent discussion of the Port Security Program, see Brown & Fassett, *Security Tests for Maritime Workers: Due Process under the Port Security Program*, 62 YALE L.J. 1163 (1953).

96. 64 Stat. 427 (1950), 50 U.S.C. § 191 (1958).

97. 64 Stat. 428 (1950), 50 U.S.C. § 191 (1958).

On October 18, 1950, President Truman implemented the Magnuson Act by issuing Executive Order Number 10173.[98] The order provided that no person shall be issued a document for employment or be employed on a merchant vessel of the United States (with certain exceptions to be designated by the Commandant of the United States Coast Guard) unless the Commandant of the United States Coast Guard was satisfied "that the character and habits of life of such a person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States . . . ."[99] For this purpose, provision was made for special validation of merchant marine documents, the form, conditions and manner of which were to be prescribed by the Commandant.[100]

Executive Order Number 10173 further provided that any person on board any vessel or seeking access to any vessel or any 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 United States Coast Guard, who was authorized to designate those categories of vessels and areas of the waterfront where such credentials were to be required.[101] The identification credential to be issued by the Commandant was to be known as the Coast Guard Port Security Card, which would be issued only if the Commandant was 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."[102] Provision was made for appeals where loss of employment resulted from the operation of the above-mentioned requirements of Executive Order Number 10173.[103]

On December 27, 1950, under the authority of Executive Order Number 10173, the Coast Guard published regulations pertaining to security of vessels and security of waterfront facilities.[104] The regulations pertaining to security of vessels were subsequently declared violative of due process by the United States Court of Appeals for the Ninth Circuit in the case of *Parker v. Lester*.[105] This case will be discussed in another section of this article.[106] The Coast Guard regulations pertaining to both

98. 15 Fed. Reg. 7005 (1950). Executive Order Number 10173 was amended by Exec. Order No. 10277, 16 Fed. Reg. 7537 (1951) and Exec. Order No. 10352, 17 Fed. Reg. 4607 (1952).

99. Exec. Order No. 10173, § 6.10-1, 15 Fed. Reg. 7005, 7007 (1950), as amended, Exec. Order No. 10352, 17 Fed. Reg. 4607 (1952).

100. Exec. Order No. 10173, § 6.10-3, 15 Fed. Reg. 7005, 7007 (1950).

101. Exec. Order No. 10173, § 6.10-5, 15 Fed. Reg. 7005, 7007 (1950).

102. Exec. Order No. 10173, § 6.10-7, 15 Fed. Reg. 7005, 7007 (1950), as amended, Exec. Order No. 10277, 16 Fed. Reg. 7537 (1951).

103. Exec. Order No. 10173, § 6.10-9, 15 Fed. Reg. 7005, 7007 (1950).

104. 15 Fed. Reg. 9327 (1950).

105. 227 F.2d 708 (9th Cir. 1955).

106. See text at notes 175-79 *infra*.

security of vessels and security of waterfront facilities were amended[107] and now contain detailed provisions regarding standards,[108] notice and answer,[109] hearing boards,[110] hearing procedure (which includes right to participate in the hearing, right to be represented by counsel, right to present witnesses and offer other evidence, and right to cross-examine any witness),[111] appeals,[112] and notification of the final decision.[113]

III. THE JUDICIARY AND THE GREAT DICHOTOMY

A. *The Federal Government Civilian Employee in the Courts*

1. THE EARLY CASES

In the preceding sections the writer has endeavored to lay down the massive structure of the federal loyalty and security programs as they have been authorized by congressional legislation and implemented by executive orders and administrative regulations. In the remaining sections of this article the writer will attempt to show how these loyalty and security programs and the employees dismissed under them fared in the federal courts.

The expression "the Great Dichotomy" has been utilized in the title to this part of the article. The writer, in his analysis of the cases, has become impressed with the proposition that, for the most part, when the courts uphold the dismissal of an employee, they do so as against constitutional arguments of the first, fifth and sixth amendments; however, when the courts have apparently become so appalled by the arbitrariness of the dismissal that they desire to invalidate the dismissal, they do so by a process of statutory interpretation and have steadfastly adhered to the principle of avoiding the constitutional issue. The two early cases which will be discussed in this section do not exactly coincide with this proposition; but beginning with *Bailey v. Richardson* in the next section, "the Great Dichotomy" should become readily apparent.

By way of background and for purposes of demonstrating some of the initial judicial responses to the congressional and executive security and loyalty programs, two relatively early cases should be considered. The first is the case of *United States v. Lovett*,[114] decided by the Supreme Court on June 3, 1946. This case has been alluded to in the discussion earlier of loyalty and security measures contained in appropriation bills.[115] In Section 304 of the Urgent Deficiency Appropriation Act of

107. 33 C.F.R. pts. 121, 125 (1962).
108. 33 C.F.R. §§ 121.03, 125.19 (1962).
109. 33 C.F.R. §§ 121.11, 125.35 (1962).
110. 33 C.F.R. §§ 121.13, 121.15, 121.17, 125.37, 125.39, 125.41 (1962).
111. 33 C.F.R. §§ 121.19, 125.43 (1962).
112. 33 C.F.R. §§ 121.23, 125.47 (1962).
113. 33 C.F.R. §§ 121.21, 121.25, 125.45, 125.49 (1962).
114. 328 U.S. 303 (1946).
115. See text accompanying notes 10, 11, 12 *supra*.

1943, Congress provided that after November 15, 1943, no salary or compensation should be paid to Lovett and two other named employees of the federal government out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were, prior to November 15, 1943, again appointed by the President with the advice and consent of the Senate.[116] The three named individuals had been charged in the House of Representatives with "subversive" beliefs and "subversive" associations. The Supreme Court, in considering Section 304, stated the general rule to be that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. Permanent proscription from any opportunity to serve the government was held to be punishment and consequently Section 304 was invalidated as a bill of attainder.

On December 14, 1946, the United States Court of Appeals for the District of Columbia decided the case of *Friedman v. Schwellenbach.*[117] Friedman had been discharged from the position of chief of the classification division of the War Manpower Commission, because the United States Civil Service Commission, acting under the previously mentioned War Service Regulations of 1942,[118] had determined that there was a reasonable doubt as to his loyalty to the Government of the United States. Friedman was not in the classified Civil Service, but held his position, subject to a character investigation, under a wartime relaxation of the Civil Service procedures. In upholding the discharge, the court, noting that Friedman was accorded the fullest opportunity to present his case, made the following comments:

> The United States has the right to employ such persons as it deems necessary to aid in carrying on the public business. It has the right to prescribe the qualifications of its employees and to attach conditions to their employment. The War Service Regulation which permits the removal from federal service of one concerning whose loyalty to the government the Civil Service Commission entertains a reasonable doubt undoubtedly was reasonable and proper . . . . We are not concerned here with the question as to whether Friedman was in fact disloyal. Under the regulation he could be removed from service if the Commission had a reasonable doubt as to his loyalty. After investigation and patient hearings, the Commission continued, in its opinion, to have a reasonable doubt.
>
> In these circumstances the Commission's finding is conclusive. It is beyond our province, and it was beyond the province of the

116. 57 Stat. 450 (1943).
117. 159 F.2d 22 (D.C. Cir. 1946), *cert. denied*, 330 U.S. 838 (1947).
118. See note 9 *supra* and accompanying text.

> District Court, to review the finding of the Civil Service Commission that it had a reasonable doubt as to whether Friedman was loyal to the government, because it has long been held that the courts will not review managerial acts, not clearly arbitrary, of executive officials performed within the scope of their authority, and will not substitute their judgment in such matters for that of the officials.[119]

The United States Supreme Court subsequently denied certiorari in the *Friedman* case.[120]

2. THE BAILEY CASE

One of the most significant decisions concerning the federal loyalty and security programs was the case of *Bailey v. Richardson*.[121] This was the only decision regarding security dismissals of federal government civilian employees under the Truman Loyalty Program and the Eisenhower Security Program in which the highest appellate court to write an opinion fully discussed and ruled on constitutional issues.

The *Bailey* case arose under the Truman Loyalty Program.[122] Miss Bailey was employed in the classified civil service from August 19, 1939, until June 28, 1947, when she was separated due to a reduction in force. On March 25, 1948, she was given a temporary appointment, and on May 28, 1948, she was reinstated as a training officer with the Federal Security Agency, subject to an investigation of her qualifications.

On July 31, 1948, Miss Bailey received a letter from the Regional Loyalty Board of the Civil Service Commission indicating that certain derogatory information had been received which she should explain or refute. The letter advised her of her right to an administrative hearing and contained interrogatories inquiring as to her membership in various allegedly subversive organizations. Miss Bailey denied each item contained in the interrogatories, except that she admitted past membership for a short time in the American League for Peace and Democracy. She vigorously asserted her loyalty to the United States and requested an administrative hearing.

A hearing was held before the Regional Board wherein Miss Bailey appeared and testified and presented other witnesses and numerous affidavits, but no person, other than those presented by her, testified, nor did the government reveal the names of those who informed against her or the method by which her alleged activities were detected. On November 1, 1948, Miss Bailey was informed by the Regional Board that, "on all the evidence, reasonable grounds [existed] for belief that [she was]

119. Friedman v. Schwellenbach, 159 F.2d 22, 24-25 (D.C. Cir. 1946), *cert. denied*, 330 U.S. 838 (1947).

120. Friedman v. Schwellenbach, 330 U.S. 838 (1947).

121. 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

122. See text at notes 15-31 *supra*.

disloyal to the Government of the United States." Miss Bailey was to be separated from the service and barred from competing in civil service examinations for a period of three years.

Miss Bailey appealed to the Loyalty Review Board and requested a hearing, which was granted. She appeared, testified and presented affidavits at the hearing, but no person other than Miss Bailey testified, and no affidavits other than hers were presented on the record. The Loyalty Review Board sustained the determination of the Regional Board. Miss Bailey thereupon brought action for a declaratory judgment and for an order directing her reinstatement. Relief was denied and an appeal to the United States Court of Appeals for the District of Columbia Circuit followed.

Judge Prettyman, speaking for the appellate tribunal, introduced the problem with these comments:

> [Miss Bailey] was not given a trial in any sense of the word, and she does not know who informed upon her . . . . But the question is not whether she had a trial. The question is whether she should have had one.[123]

The first issue discussed by the court was whether the procedure followed by the Loyalty Boards conformed to Executive Order Number 9835, the basis for the Truman Loyalty Program. In holding that the procedure was authorized, the court ruled that the use of the word "evidence" in the expression "on all the evidence" which was contained in the executive order[124] did not connote "evidence" in the jurisprudential sense, but meant "information" and consequently included "information" disclosed secretly to the hearing tribunal. The court further ruled that the specificity of charges required by the executive order[125] was sufficiently discretionary that the charges need not include the names of the informants against Miss Bailey or the dates or places of her alleged activities.

After disposing of certain contentions under the Lloyd-Lafollette Civil Service Act,[126] the court then decided that that part of the order

123. Bailey v. Richardson, 182 F.2d 46, 51 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

124. Exec. Order No. 9835, pt. V(1), 12 Fed. Reg. 1938 (1947) provides as follows: "The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, *on all the evidence,* reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." (Emphasis added.)

125. Exec. Order No. 9835, pt. II(2)(b), 12 Fed. Reg. 1937 (1947) provides in part: "The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit . . . ."

126. 37 Stat. 555 (1912), as amended, 5 U.S.C. § 652 (1958). In holding that Miss Bailey did not come under the provisions of this act, the court claimed that since she had been separated from the service for some months she was not "in the classified service," as required by the act, during that period nor during the period of her conditional reinstatement. The act provided as requisites to removal that the employee have: (1) notice; (2)

which barred Miss Bailey from the federal service for three years was invalid under the decision in *United States v. Lovett*,[127] after which Judge Prettyman said:

> We did not understand appellant to urge the unconstitutionality of her dismissal, apart from the three-year bar. But there is a difference of opinion among us in that respect, and we, therefore, state our views upon the point.[128]

The writer is interested in this statement since if the case were limited to the issue of the three-year bar, the major constitutional issues would have been avoided in this as well as in the succeeding cases and the constitutionality of the federal loyalty and security programs for federal government civilian employees would never have been determined. However, the court in *Bailey*, conceivably as obiter dicta, did undertake the constitutional issues. As a result, the court felt forced to assume that Miss Bailey was not merely being denied appointment, entitling her to no procedural constitutional rights, as the court in fact believed, but that she was a government employee in the classified service who was being dismissed.

The court proceeded to the constitutional issues, the first of which was whether the sixth amendment, containing the judicial procedure of jury trial, confrontation by witnesses, etc., applies to a dismissal from government service. In holding that it did not, the court distinguished the *Lovett* case by indicating that dismissal from employment, unlike permanent proscription from government service, was not punishment requiring judicial procedure.

The second constitutional issue was whether the due process clause of the fifth amendment required that Miss Bailey be afforded a hearing of the quasi-judicial type before being dismissed. The court noted that government employ was not "property," "liberty" or "life" and that consequently the terms of the due process clause did not apply to the holding of a government office. Further, due process was not applicable unless one is being deprived of something to which he has a right, and the holding of executive offices is at the will of the appointing authority. The court held that the due process clause did not restrict the President's discretion or the prescriptive power of Congress in respect to executive personnel.

The third constitutional issue was whether Miss Bailey's dismissal impinged upon the rights of free speech and assembly protected by the

copy of the charges; (3) reasonable time for filing answers with affidavits; and (4) written decision on the answers. However, as the court noted, the act provided that no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal.

127. 328 U.S. 303 (1946).

128. Bailey v. Richardson, 182 F.2d 46, 55 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

first amendment, since the dismissal was premised upon alleged political activity. This issue was not one of procedure but rather one of substance, going to the ultimate validity of the dismissal. The court noted that in the interest of the efficiency of the public service, there existed in the Congress and in the President the power to regulate the conduct of government employees because of their political beliefs, activities or affiliations. Although the first amendment guarantees free speech and assembly, it does not guarantee government employ.

The court next considered and decided three points going more to the heart of the Truman Loyalty Program. First, reasonable grounds for belief of disloyalty is a sufficient basis for valid removal. Since, as the court claimed, there is no right to government employ, it was not necessary that the presence of Miss Bailey constitute a clear and present danger, before she could be dismissed.[129] Second, the qualification and disqualification of executive employees is for executive determination. It would violate the doctrine of separation of powers for the judiciary to determine whether or not a suspicion of disloyalty existed. Third, the court appeared to say that alleged membership in the Communist Party and other allegedly "subversive" organizations was a sufficient ground for suspicion of disloyalty and not an instance of invalid discrimination.[130]

The final issue considered by the court was whether dismissal from government employ for suspicion of disloyalty was an exception to the established doctrines and rules generally applicable to government employees and their dismissal from service. Among Miss Bailey's claims under this issue was the contention that she had been stigmatized and her chance of making a living seriously impaired. However, the court claimed that "if Miss Bailey had no constitutional right to her office and the executive officers had power to dismiss her, the fact that she was injured in the process of dismissal neither invalidates her dismissal nor gives her the right to redress . . . ."[131] The court also looked at "the

129. In the area of free speech under the first amendment, "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Holmes, J. in Schenck v. United States, 249 U.S. 47, 52 (1919). The court in *Bailey* apparently felt compelled to discuss the non-applicability of this rule as to Miss Bailey's dismissal. For support of the proposition that the clear and present danger test should be applied to the government employee, see Sherman, *Loyalty and the Civil Servant*, 20 ROCKY MT. L. REV. 381 (1948). This article was noted by the court in *Bailey*.

130. Miss Bailey's contentions were that the revealed information in her particular case was insufficient ground for suspicion of disloyalty, that the interrogatory showed that the basis for her dismissal was an alleged membership in the Communist Party and other allegedly "subversive" organizations, and that this was an invalid discrimination. The court resolved these contentions against Miss Bailey, but the court's holding in this regard is not exactly clear. See Bailey v. Richardson, 182 F.2d 46, 62-63 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

131. *Id.* at 63.

public side of this controversy," and believed that "disloyalty in the Government service under present circumstances is a matter of great public concern, and revelation of the methods of detecting it and of the names of witnesses involve public considerations of compelling importance."[132]

In summarizing the court's conclusions, Judge Prettyman made the following comments:

> It is our clear opinion that the President, absent congressional restriction, may remove from Government service any person of whose loyalty he is not completely convinced. He may do so without assigning any reason and without giving the employee any explanatory notice. If, as a matter of policy, he chooses to give the employee a general description of the information which concerns him and to hear what the employee has to say, he does not thereby strip himself of any portion of his constitutional power to choose and to remove.
>
> We conclude that the Executive Order before us and the proceedings under it violated no constitutional limitation upon the executive power of removal; that no constitutional right was involved in this non-appointment or dismissal; and that, in so far as the circumstances imposed hardship upon the individual, the exigencies of government in the public interest under current conditions must prevail, as they always must when a similar clash arises.[133]

The court thereupon upheld the dismissal of Miss Bailey in all particulars with the exception of the three-year bar.[134]

Apparently outraged by Miss Bailey's dismissal "for her supposed disloyal thoughts . . . from a wholly nonsensitive position in which her efficiency rating was high,"[135] Judge Edgerton wrote a vigorous dissenting opinion in *Bailey*.[136] His contentions were: (1) Executive Order 9835 requires evidence and an opportunity for cross-examination; (2) Dismissal for disloyalty is punishment and requires all the safeguards of a judicial trial; and (3) Miss Bailey's dismissal abridges freedom of speech and assembly.

In a four-to-four split, the United States Supreme Court affirmed without opinion the court of appeal in *Bailey*.[137] However, in two sub-

132. *Id.* at 64.

133. *Id.* at 65.

134. *Id.* at 66. The *Bailey* decision was followed in Washington v. McGrath, 182 F.2d 375 (D.C. Cir. 1950), *aff'd*, 341 U.S. 923 (1951).

135. Bailey v. Richardson, 182 F.2d 46, 66 (D.C. Cir. 1950).

136. *Id.* at 66-74.

137. Bailey v. Richardson, 341 U.S. 918 (1951). The only statement made by the Supreme Court was: "*Per Curiam*: the judgment is affirmed by an equally divided Court." Compare Washington v. McGrath, 341 U.S. 923 (1950), *affirming by an equally divided Court* 182 F.2d 375 (D.C. Cir. 1950). For Supreme Court treatment of that portion of the

sequent cases, not dealing with the federal loyalty and security programs, the United States Supreme Court cast serious doubt upon the categorical statement that "there is no constitutionally protected right to public employment" and promulgated the proposition that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."[138] Since much of the theory underlying the *Bailey* decision is based upon the proposition that "there is no constitutionally protected right to public employment," there arises the obvious query of what remains of the *Bailey* decision if the United States Court of Appeals was, in fact, acting upon an invalid premise. The magnitude of this query becomes apparent when one considers that the closest the United States Supreme Court ever came with respect to the constitutional issues arising from the loyalty and security programs for the federal government civilian employee was the four-to-four affirmance without opinion in the *Bailey* case.

3. THE SUPREME COURT CASES

In the years following *Bailey*, the United States Supreme Court was highly successful in forgetting that constitutional issues ever existed in the loyalty and security programs for civilian employees of the federal government.

The first case to be considered is the 1955 case of *Peters v. Hobby*.[139] Peters, employed as a Special Consultant in the United States Public Health Service of the Federal Security Agency, which was not work of a confidential or sensitive character and did not entail access to classified material, had been twice cleared as to his loyalty by the Agency's Security Board. Subsequently, and despite the Agency's Board findings which were favorable to Peters, the Civil Service Commission's Loyalty Review Board, acting solely on its own motion, determined that there was a reasonable doubt as to Peters' loyalty. The Review Board informed Peters of its decision and notified him that he was barred from federal service for a period of three years. Thereafter, Peters was removed from his position. Peters challenged his debarment and removal, claiming that the action taken against him was in violation of Executive Order Number 9835 which was the basis for the Truman Loyalty Program. He also complained that the action, because of the denial of any op-

Truman Loyalty Program authorizing the Attorney General to draft a list of subversive organizations, see Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), *reversing* 177 F.2d 79 (D.C. Cir. 1949) and International Workers Order v. McGrath, 182 F.2d 368 (D.C. Cir. 1950).

138. Slochower v. Board of Education, 350 U.S. 551, 555-56 (1956); Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952). Both cases dealt with the issue of loyalty of employees of the state government. Yet, as late as 1954, the United States Court of Appeals for the District of Columbia Circuit was still categorically maintaining that "there is no vested right in federal employment." See Jason v. Summerfield, 214 F.2d 273, 277 (D.C. Cir.), *cert. denied*, 348 U.S. 840 (1954).

139. 349 U.S. 331 (1955).

portunity to confront and cross-examine his secret accusers, violated the due process clause of the fifth amendment; that his debarment violated the prohibition against bills of attainder and ex post facto laws; and that his removal and debarment, solely on the basis of his political opinions, violated his right to freedom of speech. The Supreme Court announced that it had granted certiorari (Peters had been unsuccessful in the lower courts), "because the case appeared to present the same constitutional question left unresolved by this Court's action in *Bailey v. Richardson*."[140] However, the court concluded "that the Loyalty Review Board's action was so patently in violation of the Executive Order . . . that the constitutionality of the Order itself does not come into issue."[141] The case was decided primarily upon the proposition that the Civil Service Commission's Loyalty Review Board had no authority under Executive Order Number 9835 to review rulings favorable to employees or to adjudicate individual cases on its own motion.[142] *Peters v. Hobby* also contained two concurring opinions on the basis that the case should have been decided on constitutional issues,[143] and a two-man dissent to the effect that the Loyalty Review Board's action was not invalid.[144]

In 1956, the Supreme Court decided the case of *Cole v. Young*.[145] Although the constitutional issues considered in *Bailey* and avoided in *Peters* apparently were not even raised in *Cole*, the *Cole* case should be noted since it involves an interpretation of Public Law 733 of 1950,[146] and Executive Order Number 10450,[147] the basis for the Eisenhower Security Program, and is concerned with the extent of the President's dismissal powers in security cases. Cole, a preference-eligible veteran under the Veterans' Preference Act, was dismissed from his classified civil service position as a food and drug inspector for the Department of

140. *Id.* at 333.

141. *Id.* at 338. For a discussion of the constitutional issue and the Supreme Court's refusal to reach it, see Rauch, *Nonconfrontation in Security Cases: The Greene Decision*, 45 VA. L. REV. 1175, 1178-79 (1959).

142. This proposition is determined by a very strict reading of the following two sections of the Executive Order:

"The [Loyalty Review]Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned." Exec. Order No. 9835, pt. III(1)(a), 12 Fed. Reg. 1938 (1947). "A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency . . . and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation." Exec. Order No. 9835, pt. II(3), 12 Fed. Reg. 1937 (1947).

143. 349 U.S. 331, 349-52 (1955).

144. *Id.* at 353-57.

145. 351 U.S. 536 (1956).

146. See text at notes 24-28 *supra*.

147. See text at notes 32-44 *supra*.

Health, Education and Welfare on the ground that his continued employment was not "clearly consistent with the interests of national security." Cole appealed to the Civil Service Commission under the procedures of the Veterans' Preference Act,[148] but the Commission refused to entertain the appeal holding that the right of appeal was inapplicable to dismissals authorized by Public Law 733. The Supreme Court held that Public Law 733 was intended to authorize the suspension and dismissal only of persons in "sensitive" positions and that a condition precedent to the exercise of the dismissal authority was a determination by the agency head that the position occupied is one affected with the "national security." The Court, however, interpreted Executive Order Number 10450 as enjoining upon the agency heads the duty of discharging any employee of doubtful loyalty, irrespective of the character of his job and its relationship to the "national security." Consequently, the standard prescribed in the Order was not in conformity with Public Law 733. Since no determination had been made by the department head, acting under the executive order, that Cole's position was one in which he could adversely affect the "national security," his discharge was not authorized by Public Law 733 and he was, therefore, entitled to the procedures of the Veterans' Preference Act. In so holding, the Court made the following comments:

> [I]t is difficult to justify summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in "sensitive" positions and who are thus not situated where they could bring about any discernible adverse effects on the Nation's security. In the absence of an immediate threat of harm to the "national security," the normal dismissal procedures seem fully adequate and the justification for summary powers disappears. Indeed, in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets.[149]

There was a three-man dissent in *Cole* maintaining that the President's standard of "complete and unswerving loyalty" not only in sensitive places, but throughout the government, was authorized by Public Law 733.[150]

The case of *Service v. Dulles*[151] came before the United States Su-

148. 58 Stat. 390 (1944), as amended, 5 U.S.C. § 863 (1958), provides that preference eligibles may be discharged only "for such cause as will promote the efficiency of the service" and, among other procedural rights, "shall have the right to appeal to the Civil Service Commission."

149. Cole v. Young, 351 U.S. 536, 546-47 (1956).

150. *Id.* at 565-69.

151. 354 U.S. 363 (1957).

preme Court in 1957. Despite several prior successive "clearances," the Loyalty Review Board conducted a new hearing on Service, decided unfavorable to him, and advised the Secretary of State to remove him from his employment as a Foreign Service Officer. Relying solely on the opinion of the Board and without any independent determination of his own, the Secretary of State discharged Service under the authority of Executive Order Number 9835, as amended (the basis for the Truman Loyalty Program), and under the authority of a McCarran Rider which gave the Secretary absolute discretion with regard to security dismissals.[152] However, the Secretary had published regulations providing for certain procedures to be followed in cases of loyalty and security dismissals. In the case of *Service*, the Secretary did not follow his own regulations. The Court held that despite the broad language of the McCarran Rider, if the Secretary promulgated regulations limiting his absolute discretionary power under the Rider, he was bound to follow the regulations. Consequently, Service's discharge was invalid. One of Service's contentions had been that his discharge was based upon procedures contrary to due process of law, but the Court refused to consider this issue.[153]

The final Supreme Court case to be considered in this section is *Vitarelli v. Seaton*,[154] decided in 1959. Vitarelli had been discharged from his position as an Education and Training Specialist with the Department of Interior, a position not designated as sensitive. He was not a veteran, had no protected Civil Service status, and could have been discharged summarily without cause. However, the Secretary of Interior, instead of dismissing Vitarelli without giving any reason, decided to give a reason which was national security, and proceeded under Public Law 733, Executive Order Number 10450, and departmental regulations which provided procedural standards for dismissals of employees on security grounds. Like the Secretary of State in *Service*, the Secretary of Interior did not conform to his own regulations. The court interpreted *Cole v. Young* as holding that Public Law 733 did not apply to non-sensitive positions only if the procedures thereunder were *more* summary than would otherwise have been accorded the employee. Since in the case of Vitarelli, Public Law 733 accorded him procedures *less* summary than to which he would otherwise have been entitled, and since the Secretary elected to proceed on security grounds, the procedures under Public Law 733, as implemented by the executive order and departmental regulations, were applicable, and the Secretary's failure to follow his own regulations voided the dismissal. One of the instances of the Secretary's non-conformance with his regulations was his failure to produce an informant for cross-examination, where the identity of the informant had

152. See text at note 13 *supra*.
153. Service v. Dulles, 354 U.S. 363, 372 (1957).
154. 359 U.S. 535 (1959).

been revealed during the course of the hearing. The Court reasoned that since the informant was identified, he was not a "confidential informant" and should have been presented for cross-examination. In fact, the Department of Interior produced no evidence and no witnesses in support of the charges against Vitarelli. However, in view of the Secretary's failure to follow his own regulations, the Court did "not reach the question of the constitutional permissibility of an administrative adjudication based on 'confidential information' not disclosed to the employee."[155] A revised notice of dismissal without designating any reason whatsoever had been delivered to Vitarelli while his case was pending in the lower courts. The majority of the Supreme Court held this revised notice to be ineffective as an exercise of the Secretary's summary removal power, but a four-man dissent contended otherwise.[156]

4. THE LOWER FEDERAL COURT CASES

In the years following the decision in the *Bailey* case, the federal courts in the District of Columbia Circuit had occasion to consider various facets of the loyalty-security programs for civilian employees of the federal government which had not been examined by the United States Supreme Court and also to re-examine some of the old propositions. In this section these lower court decisions will be briefly discussed.

Despite the changing view of the United States Supreme Court, the United States Court of Appeals for the District of Columbia Circuit, as late as 1954, reiterated and re-emphasized the proposition that there is no vested right in federal employment.[157] In the same case the court held that the clearance of a postal employee under the original standard of the Truman Loyalty Program authorizing dismissal if "reasonable grounds exist for belief that the person involved is disloyal" did not preclude a subsequent re-examination and discharge of the employee under the amended standard authorizing removal if "there is a reasonable doubt as to the loyalty of the person involved."[158]

Attempts during these years to have Executive Order Numbers 9835 (Truman Loyalty Program) and 10450 (Eisenhower Security Program) declared unconstitutional and void met with failure.[159] However, not all decisions were unfavorable to the employee. The discharge of a federal civil service employee, solely on evidence that he was a member of an organization which had been designated by the United States Attorney Gen-

155. *Id.* at 540 n.2.

156. *Id.* at 546-49.

157. Jason v. Summerfield, 214 F.2d 273, 277 (D.C. Cir.), *cert. denied*, 348 U.S. 840 (1954).

158. Jason v. Summerfield, 214 F.2d 273 (D.C. Cir.), *cert. denied*, 348 U.S. 840 (1954). See also 18, 21, 22 *supra* and accompanying text.

159. Association of Lithuanian Workers v. Brownell, 247 F.2d 64 (D.C. Cir.), *vacated*, 355 U.S. 23 (1957); National Lawyers Guild v. Brownell, 225 F.2d 552 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 927 (1956).

eral as an organization seeking to overthrow the United States Government by unconstitutional means, was held to be improper under the Truman Loyalty Program, in absence of a specific finding by the agency head that upon such evidence reasonable grounds exist for belief that the employee is disloyal to the government.[160] Where an employee was charged with being a member of, employed by, and making a contribution to a listed organization and the reasons for his dismissal were that the organization was found to advocate the overthrow of the government by unconstitutional means and the employee was found to be aware of that aim and to support it consciously and actively, it was noted that the reasons differed substantially from the charges and consequently the dismissal could not be predicated upon such findings.[161]

Letters to employees to the effect that continued employment would not be clearly consistent with the interests of national security, were held to be insufficient, under the Eisenhower Security Program, to constitute finding, since "findings" in the context of the Program contemplated something more than a mere conclusory statement notifying the employee that he is a "security risk."[162] A person holding an indefinite appointment as a civilian employee of the Navy may not be discharged for security reasons during his trial or probationary period of service without observance of the procedures prescribed by Public Law 733 which apparently gave such employee the right to submit statements and affidavits.[163]

A dismissal of an employee of the Department of Commerce under a McCarran Rider authorizing the Secretary to terminate employment of any employee "whenever he shall deem such termination necessary or advisable in the best interests of the United States" was upheld, but the court noted that such dismissal carried no implication that the employee might be either disloyal or a security risk.[164] Where an employee was removed, not because of disloyalty, but because of allegedly making false statements in his application by answering in the negative a question as to whether he was a member in any Communist organization, it was held that he was not entitled to the procedures of notice, hearing and appeal afforded by Executive Order Number 9835.[165]

It will be recalled that the case of *Cole v. Young* excluded those in non-sensitive positions from the impact of the Eisenhower Security Program.[166] As a result, employees discharged from non-sensitive positions for security reasons had cause to seek reinstatement. In this con-

160. Kutcher v. Gray, 199 F.2d 783 (D.C. Cir. 1952).
161. Kutcher v. Higley, 235 F.2d 505 (D.C. Cir. 1956).
162. Coleman v. Brucker, 257 F.2d 661 (D.C. Cir. 1958).
163. Haynes v. Thomas, 232 F.2d 688 (D.C. Cir. 1956). See also note 26 *supra.*
164. Scher v. Weeks, 231 F.2d 494 (D.C. Cir.), *cert. denied*, 351 U.S. 973 (1956).
165. Garvin v. Gillilland, 141 F. Supp. 394 (D.D.C. 1956).
166. See text at notes 145-50 *supra.*

nection, it was held that a postal employee who was discharged for security reasons acted reasonably in awaiting the results of the *Cole* case, so that a delay of two years and eight months before seeking reinstatement was excused and the employee was not guilty of laches.[167] However, a delay of thirty-three months from the time of discharge, which included a delay of seventeen months from the decision in the *Cole* case, was inexcusable and the discharged employee was barred by laches from seeking reinstatement.[168] An employee reinstated on the basis of *Cole v. Young* is entitled to back pay.[169]

B. *The Employee of the Private Contractor in the Courts*

1. THE PORT SECURITY CASES

The earliest cases with regard to the non-government employee and the federal loyalty and security programs arose under the Port Security Program. The initial Coast Guard Regulations implementing the Port Security Program were immediately challenged in the courts as a denial of due process of the law.

In the case of *United States v. Gray*,[170] a criminal proceeding, the defendant seamen were charged with unlawfully entering upon and accepting employment on merchant vessels of the United States without first obtaining specially validated Merchant Marine documents as required under the Port Security Program. The defendants had been denied such documents after a hearing in which the seamen were accused of being sympathetic to the policies or principles of, or affiliated with, the Communist Party and other subversive groups or of being otherwise associated with the Party in such a manner as to indicate that the seamen were poor security risks. No particulars were given. The United States Court of Appeals for the Ninth Circuit was of the opinion that the screening operation initiated by the Magnuson Act[171] was a legitimate war measure and the executive order[172] and the Coast Guard Regulations[173] issued in implementation of the Magnuson Act did not appear on their face to infringe the due process clause of the fifth amendment, but the tribunal approved the proposition that "due process in the context of the screening program is properly definable in terms of the maximum

167. Duncan v. Summerfield, 251 F.2d 896 (D.C. Cir. 1957).

168. Jones v. Summerfield, 265 F.2d 124 (D.C. Cir.), *cert. denied*, 361 U.S. 841 (1959).

169. Schwartz v. United States, 181 F. Supp. 408 (Ct. Cl. 1960); Leiner v. United States, 181 F. Supp. 400 (Ct. Cl. 1958). For other back pay cases involving the loyalty-security programs for civilian employees of the federal government, see cases cited in 1 BNA GOVERNMENT LOYALTY & SECURITY 19:11-19:12 (1962). See also Brown v. United States, 122 Ct. Cl. 361 (1952); Jackson v. United States, 121 Ct. Cl. 405 (1952); Lezin v. United States, 98 F. Supp. 574 (Ct. Cl. 1951); Mendez v. United States, 119 Ct. Cl. 345 (1951).

170. 207 F.2d 237 (9th Cir. 1953).

171. Notes 96, 97 *supra* and accompanying text.

172. Notes 98-103 *supra* and accompanying text.

173. Note 104 *supra* and accompanying text.

procedural safeguards which can be afforded the individual without jeopardizing the national security."[174] In view of this standard, the court disapproved of the manner in which the regulations were administered in the case under consideration, holding that the information furnished the seamen did not apprize them of the basis for the adverse determination with such specificity as to afford them notice and an opportunity to marshal evidence in their behalf and that the information was so general in character as to afford virtually no opportunity for refutation beyond a mere denial of the charges. Consequently, the indictments were dismissed.

The most significant case under the Port Security Program and one of the leading cases on the access problem and probably the one glaring exception to the "Great Dichotomy" is *Parker v. Lester.*[175] This was an action brought by seamen, who had been denied security clearance, for declaratory and injunctive relief with regard to Port Security Program. The plaintiffs claimed that the Coast Guard Regulations, or the administration thereof, through which they had been deprived of their opportunities to pursue their chosen occupations, were void and illegal, since the seamen were being deprived of their liberty to pursue their occupations without due process of law. The United States Court of Appeals for the Ninth Circuit undertook the constitutional issue. The court agreed that the Magnuson Act authorized both the screening of seamen and the promulgation of regulations to accomplish that end, since the screening of persons who are security risks was permissible as a matter of substantive due process. However, the court noted that "the liberty to follow [one's] chosen employment is no doubt a right more clearly entitled to constitutional protection than the right of a government employee to obtain or retain his job."[176] The court held that the Coast Guard Regulations fell short of furnishing the minimum requirements of due process with respect to notice and opportunity to be heard. The tribunal claimed that the regulations made no provision for these two elements and would not find that the national security in this case required *"a screening system which denies such right to notice and hearing."*[177] While recognizing that screening programs might be adopted which in some degree qualify the ordinary right to confrontation and cross-examination of informers, the court criticized the then present regulations by posing the question:

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174. United States v. Gray, 207 F.2d 237, 241 (9th Cir. 1953).

175. 227 F.2d 708 (9th Cir. 1955). For subsequent history of the case, see Lester v. Parker, 235 F.2d 787, 237 F.2d 698 (9th Cir. 1956).

176. Parker v. Lester, 227 F.2d 708, 717 (9th Cir. 1955).

177. *Id.* at 718. The court of appeals in *Parker v. Lester*, in explaining its refusal in *United States v. Gray* to find that the Coast Guard Regulations, on their face, infringed the due process clause of the fifth amendment, maintained that certain of the evils of the Regulations were not apparent to the court, when the opinion in the *Gray* case was written. Parker v. Lester, 227 F.2d 708, 722 (9th Cir. 1955).

> Is this system of secret informers, whisperers and talebearers of such vital importance to the public welfare that it must be preserved at the cost of denying to the citizen even a modicum of the protection traditionally associated with due process?[178]

There was a dissent in *Parker v. Lester* which noted that the Supreme Court in *Peters v. Hobby* chose not to determine the constitutional issue and appeared to state that if any constitutional issue were to be determined in *Parker* it should be done by the Supreme Court.[179]

As has been noted earlier, the Coast Guard Regulations were amended as a result of *Parker v. Lester*.[180] But, the Port Security Program still sailed in troubled waters. The District of Columbia Circuit held that the refusal of a seaman to answer certain questions with regard to allegedly subversive activities was a factor to be considered in determining whether "the presence of the individual on board would be inimical to the security of the United States," but that such refusal in and of itself could not automatically disqualify the seaman under the Magnuson Act from private employment in the Merchant Marine.[181]

Before we leave the Port Security Program, brief mention should be given to the rather remarkable case of Eugene Dupree, who ran the gamut of the federal court system trying to force the government to rectify an alleged wrong under the Port Security Program. Dupree was denied security clearance and brought an action for an injunction to compel the issuance of a security clearance certificate, but while the action was pending the Coast Guard amended its regulations to provide a new administrative appeal. Consequently, the district court dismissed the complaint because of the failure of Dupree to exhaust his administrative remedies.[182] Thereafter, the Commandant of the Coast Guard reversed his determination and granted Dupree clearance. Dupree then brought an action in the Court of Claims against the United States for wages lost while he was denied clearance, but the Court of Claims dismissed the action.[183] Dupree next brought an action against the United States under the Federal Tort Claims Act for alleged negligence in denying him clearance, but the district court dismissed the complaint,[184] and the court of appeals affirmed the dismissal.[185] Finally Dupree brought another action under the Federal Tort Claims Act for negligent interference with future employment, and again the district court dismissed the complaint, and

178. *Id.* at 719.
179. *Id.* at 724.
180. See text at note 105 *supra.*
181. Graham v. Richmond, 272 F.2d 517 (D.C. Cir. 1959). For another aspect of the port security problem, see Homer v. Richmond, 292 F.2d 719 (D.C. Cir. 1961).
182. Dupree v. Byrd, 123 F. Supp. 656 (E.D. Pa. 1954).
183. Dupree v. United States, 141 F. Supp. 773 (Ct. Cl. 1956).
184. Dupree v. United States, 146 F. Supp. 148 (E.D. Pa. 1956).
185. Dupree v. United States, 247 F.2d 819 (3d Cir. 1957).

the court of appeals affirmed the dismissal.[186] Thereafter, the court of appeals denied rehearing,[187] and the Supreme Court denied certiorari[188] and also rehearing.[189]

2. CLASSIFIED INFORMATION CASES

Monumental gains were achieved by the employee of the private contractor doing business with the federal government, when the employee attacked those portions of the federal government loyalty and security programs pertaining to access to classified information. Although the Security Program of the Atomic Energy Commission[190] saw little judicial action,[191] the Department of Defense Industrial Security Program[192] was the source of continual controversy.

In the early cases wherein the employee judicially contested denial of access to classified information under the Department of Defense Industrial Security Program, he was less than successful. In one case, the employee's complaint was dismissed for failure to effectively serve the named defendants.[193] In another case, proceedings were stayed until the employee exhausted his administrative remedies.[194] In still another case, the employee's complaint was dismissed for both of these reasons plus other procedural defects.[195] In a fourth case, the court, in refusing to overrule a Defense Department determination that it would be inimical to the best interest of national defense to permit the plaintiff-employee access to classified information, expressed doubts as to whether the constitutional requirements of due process applied to the procedures in question and stated that, even if such requirements were applicable, there was no constitutional requirement of confrontation with witnesses outside of the criminal courts.[196]

The picture changed with the case of *Greene v. McElroy*.[197] This case involved the validity of the government's revocation of security clearance granted to Greene, an aeronautical engineer employed by a

186. Dupree v. United States, 264 F.2d 140 (3d Cir. 1959).
187. Dupree v. United States, 266 F.2d 373 (3d Cir. 1959).
188. Dupree v. United States, 361 U.S. 823 (1959).
189. Dupree v. United States, 361 U.S. 921 (1959).
190. See text at notes 73-93 *supra*.
191. One of the apparently few cases under the Security Program of the Atomic Energy Commission was Pitts v. United States, 263 F.2d 353 (9th Cir.), *cert. denied*, 360 U.S. 935 (1959), which affirmed a conviction of an employee of a private contractor doing business with the federal government for wilfully making a false statement on an Atomic Energy Commission Personnel Security Questionnaire. A similar case arose in connection with a Department of Defense Personnel Security Questionnaire. See United States v. Giarraputo, 140 F. Supp. 831 (E.D. N.Y. 1956).
192. See text at notes 57-72 *supra*.
193. Bessel v. Clyde, 260 F.2d 240 (3d Cir. 1958).
194. Cohen v. Leone, 18 F.R.D. 494 (E.D. Pa. 1955).
195. Webb v. United States, 21 F.R.D. 251 (E.D. Pa. 1957).
196. Dressler v. Wilson, 155 F. Supp. 373 (D.D.C. 1957).
197. 360 U.S. 474 (1959).

private manufacturer which produced goods for the armed services. He was also vice-president and general manager of the manufacturing concern. Greene was discharged from his employment solely as a consequence of the revocation because his access to classified information was required by the nature of his job. After his discharge, Greene was unable to secure employment elsewhere as an aeronautical engineer.

In the various hearings culminating in the revocation, Greene presented several witnesses attesting to his loyalty, but the various security boards apparently relied upon sundry investigatory reports and statements of confidential informants which were not made available to Greene. The boards thereupon determined that the granting of clearance to Greene for access to classified information was "not clearly consistent with the interest of national security." This determination had been based on Greene's associations and activities from 1942-1947.[198]

Greene judicially attacked his revocation of clearance but was unsuccessful in the lower federal courts.[199] However, Greene's contentions were finally upheld by the United States Supreme Court in a decision written by Mr. Chief Justice Warren. The Chief Justice stated the issue as follows:

> [W]hether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination.[200]

Mr. Chief Justice Warren examined the appropriate executive orders and acts of Congress but found no such authorization. Although the Chief Justice talked on occasion in terms of due process or used words of similar import,[201] perhaps almost to the point of indicating a con-

198. The security board found that from 1942-1947, Greene associated closely with his then wife and her friends, knowing that they were active in behalf of and sympathetic with the Communist Party; that during part of this period Greene maintained a sympathetic association with a number of officials of the Russian Embassy; that during this period Greene's political views were similar to those of his wife; that Greene had been a member of a suspect bookshop association, had invested money in a suspect radio station, had attended a suspect dinner, and had, on occasion, Communist publications in his home; and that Greene's credibility as a witness in the proceedings was doubtful. *Id.* at 490.

199. Greene v. McElroy, 254 F.2d 944 (D.C. Cir. 1958), *affirming* Greene v. Wilson, 150 F. Supp. 958 (D.D.C. 1957).

200. Greene v. McElroy, 360 U.S. 474, 493 (1959).

201. *E.g.*, "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment. . . ." *Id.* at 492. "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." *Id.* at 507.

stitutional ruling,[202] the *Greene* decision must be confined to the actual holding in the case, to wit:

> We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.[203]

Three Supreme Court justices in *Greene*, while joining the majority, limited their concurrence to the holding that it was not shown that either Congress or the President authorized the procedures whereby Greene's security clearance was revoked, intimating no views as to the validity of these procedures.[204] One of the three justices, concerned over the Court's allusions to the constitutional issue, wrote a special concurrence wherein he specifically stated that the Court was abstaining from a constitutional decision.[205] There was a vigorous dissent written by Mr. Justice Clark.[206] The closing words of this dissent are interesting in view of the *Cafeteria Workers* case which will be considered shortly. Mr. Justice Clark's conclusions were:

> While the Court disclaims deciding this constitutional question, no one reading the opinion will doubt that the explicit language of its broad sweep speaks in prophecy. Let us hope that the winds may change. If they do not the present temporary debacle will turn into a rout of our national security.[207]

As discussed earlier, the *Greene* decision brought about significant changes in the Department of Defense Industrial Security Program.[208] The *Greene* case also had an impact on case law. In a companion case to *Greene*, the Department of Defense reversed its earlier position and granted clearance to the employee in question, thereby mooting a consideration of the merits by the Supreme Court.[209] In another case, the

202. After quoting several remarks of the Chief Justice, one writer made the following comments: "Can anyone doubt, on the basis of this review of the Court's opinion in *Greene*, that the five members of the Supreme Court who subscribed to that opinion believe that there is a constitutional right of confrontation and cross-examination in hearings under the industrial security program? Can anyone doubt, on the basis of the quoted passages stressing the traditional significance of confrontation and cross-examination, that these five justices would reach the same result in hearings under the Federal Employees' Security Program? Can anyone doubt the dissenting Justice's statement that the opinion speaks 'in prophecy' of a future holding that confrontation and cross-examination are the constitutional right of every American before he is denied his job, his livelihood, and his reputation?" Rauch, *Nonconfrontation in Security Cases: The Greene Decision*, 45 VA. L. REV. 1175, 1185 (1959).

203. Greene v. McElroy, 360 U.S. 474, 508 (1959).

204. *Ibid.* The justices were Justices Frankfurter, Harlan and Whittaker.

205. *Id.* at 509-10. The special concurrence was written by Mr. Justice Harlan.

206. *Id.* at 510-24.

207. *Id.* at 524.

208. See text at 57-72 *supra.*

209. Taylor v. McElroy, 360 U.S. 709 (1959).

United States Court of Appeals for the District of Columbia, citing *Greene*, reversed per curiam a decision of the district court adverse to the employee seeking security clearance.[210] Later, this same court, apparently still under the influence of the spirit of *Greene*, reversed a district court's determination that the employees failed to exhaust their administrative remedies.[211]

3. ACCESS TO A MILITARY INSTALLATION

Undoubtedly, one of the greatest security risk defeats suffered by an employee of a private contractor doing business with the federal government occurred in the question of access to a military installation. The case to be considered in this section is the 1961 case of *Cafeteria & Restaurant Workers Union, Local 437, AFL-CIO v. McElroy*.[212]

This case involved the dilemma of Rachel Brawner, a short-order cook at a cafeteria operated by her employer, M & M Restaurants, Inc., on the premises of the Naval Gun Factory under the command of a rear admiral. Access to the factory was restricted and identification badges were issued to persons authorized to enter the premises by the Security Officer, a subordinate of the rear admiral. One of the provisions of the contract of M & M with the Gun Factory was that M & M would not engage or continue to engage any person who failed to meet the security requirements under applicable regulations, as determined by the Security Officer.

After six years of employment, Rachel Brawner was required to turn in her identification badge because the Security Officer determined that she had failed to meet the security requirements of the installation. This determination was subsequently approved by the rear admiral. A request for a hearing was denied by the rear admiral.

An action was brought in a federal district court to compel the return to Rachel Brawner of her identification badge, so that she might be permitted to enter the Gun Factory and resume her former employment. The district court dismissed the complaint. The dismissal was first reversed by a three-judge panel of the United States Court of Appeals for the District of Columbia, but later affirmed after rehearing en banc by that court.[213] The United States Supreme Court granted certiorari because of an alleged conflict between the decision of the court of appeals and *Greene v. McElroy*.[214] The Supreme Court in a five-to-four decision

210. Spector v. McElroy, 269 F.2d 242 (D.C. Cir. 1959).
211. Silver v. McNamara, 296 F.2d 591 (D.C. Cir. 1961).
212. 367 U.S. 886 (1961).
213. Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 284 F.2d 173 (1960).
214. Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 364 U.S. 813 (1960).

affirmed the court of appeals, Mr. Justice Stewart writing the majority opinion.[215]

Mr. Justice Stewart claimed that two issues were presented: (1) whether the commanding officer of the Gun Factory was authorized to deny Rachel Brawner access to the installation in the way he did; and (2) if he was so authorized, whether his action in excluding her operated to deprive her of any right secured by the Constitution.

With regard to the first issue, the Court considered the *Greene* case, noted that the constitutional issues were not reached in that case, and proceeded on the premise that the explicit authorization found wanting in *Greene* must be shown in the present case. The Court found such authorization in the general power of a military commanding officer to exclude at will persons who earned their living by working on military bases and also in two specific naval regulations approved by the President, one of which provided that with certain exceptions the responsibility of the commanding officer for his command is absolute, and the second of which provided that dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer for certain purposes. The Court, consequently, held that there was explicitly conferred upon the rear admiral power summarily to deny Rachel Brawner access to the Gun Factory upon the Security Officer's determination that she had failed to meet security requirements.

As to the second issue, Rachel Brawner contended that the due process clause of the fifth amendment required that she be advised of the specific grounds for her exclusion and be accorded a hearing at which she might refute them. The majority of the Supreme Court disagreed. Mr. Justice Stewart stated that "the Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest."[216] The Court then balanced the interests of the parties and noted that in its proprietary military capacity, the federal government has traditionally exercised unfettered control, while an interest closely analogous to Rachel Brawner's, the interest of a government employee in retaining his job, can be summarily denied. The Court recognized that there existed some constitutional restraints on the government in dealing with their employees, but claimed that this was not tantamount to the proposition that all such employees have a constitutional right to notice and a hearing before they can be removed. Since the Court believed that the announced grounds of Rachel Brawner's exclusion were not patently arbitrary or discriminatory (the Court indicating that she could not be excluded merely because she was a Democrat or a Methodist) but in

215. Mr. Justice Stewart was joined by Justices Frankfurter, Clark, Harlan and Whittaker.

216. Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 894 (1961).

accord with the contract with M & M, no constitutional right had been violated.

Mr. Justice Stewart emphasized that the circumstances of this case did not clothe the employee with "a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity."[217] The Court argued that Rachel Brawner failed to meet the particular security requirements of a specific military installation, she was not accused of disloyalty, and her opportunities for employment elsewhere either with M & M or with another employer were not impaired. The Court thereupon held that the due process clause was not violated.

Four justices dissented in the *Cafeteria Workers* case in an opinion written by Mr. Justice Brennan.[218] The dissenters doubted whether the removal of Rachel Brawner's identification badge for security reasons without notice of charges or opportunity to refute them was authorized by statute or executive order, but proceeded to the constitutional question. Mr. Justice Brennan contended that, under the majority's holding, Rachel Brawner was entitled to no process at all. The minority was further concerned over the fact that the employee was excluded as a "security risk" which in common understanding carried a very sinister meaning. The dissenters argued that the government ought not to affix a "badge of infamy" to a person without some statement of charges and some opportunity to speak in reply. Mr. Justice Brennan made the following conclusions:

> In sum, the Court holds that petitioner has a right not to have her identification badge taken away for an "arbitrary" reason, but no right to be told in detail what the reason is, or to defend her own innocence, in order to show, perhaps, that the true reason for deprivation was one forbidden by the Constitution. That is an internal contradiction to which I cannot subscribe.
>
> . . . .
>
> It may be, of course, that petitioner was justly excluded from the Gun Factory. But in my view it is fundamentally unfair, and therefore violative of the Due Process Clause of the Fifth Amendment to deprive her of a valuable relationship so summarily.[219]

The Supreme Court subsequently denied a petition for rehearing in the *Cafeteria Workers* case.[220]

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217. *Id.* at 898.

218. *Id.* at 899-902. Mr. Justice Brennan was joined by Mr. Chief Justice Warren and Justices Black and Douglas.

219. *Id.* at 901, 902.

220. Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 368 U.S. 869 (1961).

IV. CONCLUSION

A great deal has occurred in the realm of security risk dismissals between the enactment of Section 9A of the Hatch Act and the Supreme Court's rendering of its decision in the *Cafeteria Workers* case. One glaring generalization still prevails and that is that in almost every loyalty and security program considered in this article, there is a provision for the use of undisclosed confidential information. However, by both statutory law and case law the disastrous effect on the employee of the use of such material has been greatly minimized. There are also possibilities currently existing in most loyalty and security programs for summary and arbitrary action, though this too has been minimized.

With respect to the civilian employee of the federal government, several summarizing remarks can be made. According to the *Bailey* case, the due process clause in no way restricts the power of the executive with regard to security risk dismissals. Although *Bailey* has never been overruled, with the possible exception of the employee in a non-sensitive position, the later Supreme Court decisions indicate that the civilian employee of the federal government is entitled to some constitutional protection before he can be dismissed as a security risk. We can also state generally that the Supreme Court will thoroughly scrutinize a security risk dismissal and demand that the action of the dismissing official strictly comply with the departmental regulations, that the regulations in turn strictly comply with the Executive Order, and the Executive Order in turn strictly comply with Public Law 733. Undoubtedly, this Kelsian progression should be taken one step further so that the Court would demand that Public Law 733 strictly comply with the Constitution. However, the Supreme Court has not as yet reached this stage.

We know that the security program for civilian employees of the federal government is limited to sensitive positions. We know also that when such an employee is discharged for security reasons, he is entitled to at least the procedures provided by Public Law 733, even though he may be in a status which would require no process at all if he were dismissed without a reason. Categorically we can say little more about the security program for civilian employees of the federal government.

With regard to the employee of the private contractor, he may be denied access to a military installation for security reasons in summary fashion without specific charges for his exclusion and without an opportunity for a hearing. However, such an employee cannot be denied employment as a seaman, nor presumably be denied access to the waterfront, for security reasons without notice and the opportunity to be heard. With respect to classified information, an employee may not be denied such access for security reasons without the safeguards of confrontation and cross-examination unless specifically authorized by the President or

Congress. So far, the President has by Executive Order provided for cross-examination with limited exceptions. However, the department head still retains power, presumably only in critical situations, to summarily deny access to classified information.

For a short period of time, it appeared that certain general statements by the "liberal" wing of the Supreme Court in the *Greene* case were manifestations of an intention by the Court to insist upon, under the due process clause, certain procedural safeguards before an employee could be dismissed or denied clearance for security reasons. But, the "conservative" wing by a subsequent decision in the *Cafeteria Workers* case has turned the general statements of *Greene* into complete nullities by restricting *Greene* to its narrow holding and in spirit at least disregarding as obiter dicta the gratuitous words of *Greene* pertaining to due process. It might be noted in passing that identical turnabouts have occurred in Supreme Court decisions in analogous areas of constitutional law during recent years.[221]

Although in several instances the judicial attitude toward the various security programs, both for civilian employees of the federal government and for employees of private contractors doing business with the federal government, is far from clear, some recent action on the administrative front may indicate a future clarification of the overall problem of security risk dismissals. It will be recalled that shortly after the *Greene* decision, the President issued an Executive Order defining the procedures to be utilized by the Department of Defense and other specified departments and agencies for determining the granting or denial of access to classified information to employees of private contractors.[222] It will also be recalled that the Atomic Energy Commission thereafter adopted a set of regulations scrupulously following the procedural demands of the Executive Order.[223] On April 30, 1962, the Atomic Energy Commission expanded these regulations to include the security clearance not only of the employees of private contractors, but also of the employees of and the applicants for employment with the Atomic Energy Commission.[224]

Since the safeguards were greater for the employee of the private contractor than those previously granted to the employee of the Atomic Energy Commission, it is submitted that the action of the Commission represents: (1) a recognition that the problem of security risk dismissals is the same for the employee of the federal government as it is for the employee of the private contractor doing business with the federal govern-

221. *Compare* Watkins v. United States, 354 U.S. 178 (1957), *with* Barenblatt v. United States, 360 U.S. 109 (1959); *compare* Pennsylvania v. Nelson, 350 U.S. 497 (1956), *with* Uphaus v. Wyman, 360 U.S. 72 (1959).

222. See text at note 70 *supra.*

223. See text at note 80 *supra.*

224. 27 Fed. Reg. 4324 (1962).

ment;[225] and (2) a realization that the employee of the federal government may be entitled to greater safeguards before he is discharged as a security risk than he has been receiving.

Belief has already been expressed that other departments and agencies of the federal government might follow the example set by the Atomic Energy Commission.[226] If this were to materialize, then it would be another step toward restricting the anathema of the security risk to those cases in which the security risk has been established in fact as well as in form.

225. It should be noted that prior to the *Greene* case and the resultant Executive Order, the Atomic Energy Commission grouped the two categories together. See 21 Fed. Reg. 3103 (1956).

226. See Miami Herald, May 2, 1962, p. 8B, cols. 1-4.