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The Federal Loyalty-Security Program: Report of the Special Committee of the Association of the Bar of the City of New York

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mediately narrowed down to the purpose of legal punishment according to classical Protestant tradition, originally expressed in the writings of Luther and Calvin. Retribution, or the exercise of justice, for a criminal act freely chosen is discounted as a basis for punishment in as much as the author attributes to "realistic" Judeo-Christian tradition, supported by dynamic psychology, an insight into human nature which recognizes the relatively fixed character of youth that renders personal responsibility inappropriate to the issue. To the extent that criminal behavior is conditioned, responsibility is imposed upon the criminal with no fault of his own, only the vicarious responsibility of those determining his conduct. Rehabilitation emerges as the prime purpose of punishment, with the prevention of crime as a necessary result. An indirect appeal is made to the reader for support of, or at least sympathy with, a penal reform that will embody the theories here expounded. Many will be slow to answer the appeal, particularly those who are less deterministic in their ideas of human behavior and are more appalled at the facility of delinquents and criminals to blame others for their conduct. The evidence presented from Protestant tradition is far from convincing; a stronger case can be made for the author's theories on the basis of behavioristic psychology.

Natural law has never found a secure position within the framework of Protestant theology. By theologians such as Karl Barth it is rejected when the Christian is forced to make the inevitable choice between Jesus Christ and natural law. Ernst Troeltsch attributes to it an importance equal to the doctrine of the Trinity. In his paper entitled "Theological Analysis of Natural Law" Joseph D. Quillian, Jr. formulates a theory of Christian Natural Law that is essentially different from the pagan concepts introduced by Aristotle and the Stoic philosophers. This natural law is "completely converted." Since human reason is incapable of knowing the essential nature of natural law, basic natural precepts are matters of faith rather than reason, part of divine revelation. This theory of natural law is in complete harmony with the author's concept of the doctrine of grace, pointing, as it does, to the benevolent sovereignty of God and the responsibility of man. Natural law has, however, lost its philospohical foundation; it is no longer shared by all men; it is ultimately a religious law in the supernatural order of grace.

Regardless of the lawyer's personal position in matters philosophical and religious, he must eventually recognize the extent the present status of law has been shaped by the philosophy and religion of Western society. It is very likely that law will continue to be influenced by these same factors. Objective studies along these lines, particularly if they are as thought-provoking as the ones reviewed here, contribute greatly, therefore, to the legal science of this country.

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The Federal Loyalty-Security Program: Report of the Special Committee of the Association of the Bar of the City of New York. New York: Dodd, Mead & Co., 1956. Pp. xxxvi, 289. $5.00.

Now that the tumultuous excitement and near-hysteria over communism in government have subsided, it is possible to have a dispassionate, scholarly analysis of the problems raised by the Federal personnel security program. This book supplies such a study.

The tone of the report is established at the very outset when the committee states: "There is no irreconcilable conflict between liberty of the citizens on the one side and national security on the other."

An outstanding contribution of the report is its analysis of the entire field of national security. Such an analysis is essential to place the loyalty-security program in its proper perspective. The committee points out that the important components of national strength linked to over-all security are (1) positive or dynamic security, which is based on the economic-political system of our country, (2) military security, (3) international security based on a series of defensive alliances and on our aid to other nations, and (4) internal security.

The analysis proceeds with a catalogue of internal security measures including penal laws on treason, espionage, sabotage, and the advocacy of the overthrow of the government; it then outlines the principal preventive measures in aid of internal security including counter-espionage, detention of certain individuals during an emergency, enforced publicity on subversive organizations through registration, loyalty oaths, restriction on immigration and emigration, physical security measures, civil service requirements, and finally, personnel security.

Thus, in the view of the committee, the personnel security program is one of at least eight measures touching on internal security, and internal security is one of at least four elements of national security.

The basic order for the present program is Executive Order 10450 of 1953 (18 Federal Register 2489). The standard of employment fitness is that such employment ". . . is clearly consistent with the interests of the national security," thus representing a shift from the prior standard which denied clearance when ". . . on all the evidence there is reasonable doubt as to the loyalty of the person involved to the Government of the United States." The committee's recommended standard is:

> . . . whether or not in the interest of the United States the employment or retention in employment of the individual is advisable. In applying this standard a balanced judgment shall be reached after giving due weight to all the evidence both derogatory and favorable, to the nature of the position, and to the value of the individual to the public service.[1]

The procedure followed under the program falls into these stages:

1. Investigation to determine whether there is derogatory information about the employee.
2. Screening to determine whether the derogatory information is substantial enough to file charges.
3. Hearing to determine whether the employee should be retained.
4. Appeal or review in some agencies.
5. Decision by the head of the employing agency.

The high percentage of clearances after charges are filed leads the committee to recommend the creation of a central, independent screening board. The committee was impressed with the devastating effect on the employee and his associates in the agency by the mere filing of charges, accompanied by automatic suspension. The damage would be irreparable even though ultimately clearance and back-pay would be obtained.

[1] The Atomic Energy Commission's recently amended regulation on security clearance (21 Federal Register 3103) states: "The decision as to security clearance is a comprehensive, common-sense judgment made after consideration of all the relevant information, favorable or unfavorable, as to whether or not the granting of security clearance would endanger the common defense and security."

In the great majority of security hearings no government witnesses are presented; the reading of the charges usually completes the government's case. In addition to the charges, the hearing board has in hand the complete investigative file sent to the employing agency. The charged employee and his attorney are not allowed to see this file. If government witnesses are presented, they may be cross-examined. The legal rules on evidence are not binding in a security hearing. In stating its conclusions the hearing board prepares two separate documents. The first is a one sentence statement of its decision; a copy of this statement is furnished the employee. The second consists of a detailed statement of findings and conclusion, comparable to a court opinion. This opinion becomes part of the government's file but is not available to the charged employee.

Theer is little wonder that employees' lawyers and disinterested students of the program are horrified by such departures from accepted Anglo-American legal procedures.[2]

The committee's recommendations seem to go a long way towards meeting the major objections raised by critics of the program. In a recent decision the U.S. Supreme Court held that holders of non-sensitive positions were not covered by Executive Order 10450, leaving the handling of such cases to the conventional, less summary Civil Service procedures as recommended by the committee.[3] The committee recommends that pay of suspended employees pending final disposition of charges should continue and, further, that reasonable attorney fees should be paid by the government to employees cleared either at the screening or hearing stage.

In the highly controversial field of confrontation of witnesses, the committee is convinced of the need for protection of key witnesses' identities in some instances but would severely limit this procedure to the relatively few cases where a disclosure would, in the certified opinion of a responsible official, be detrimental to the national security. Even in such exceptional cases it is recommended that data should be given the board which would aid it in evaluating the evidence given by the non-disclosed informant, including a statement whether he obtained the information at first hand or through hearsay. A distinction is made between informants who regularly provide or are employed to provide secret information and other witnesses, including casual informants. It is further recommended that so far as consistent with the requirements of national security a hearing board should make available to the employee the substance of all evidence it takes into consideration which was given by a witness whom the employee has not been permitted to cross-examine. The committee also recommends that hearing boards be required to furnish the employee with written findings of fact and conclusions with only such deletions as are required in the interests of national security.

The book's usefulness is enhanced by an appendix containing statistics on the operation of the various personnel security programs as well as a recollection of all the statutes, orders and regulations covering this subject.

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[2] Lloyd K. Garrison, Some Observations on the Loyalty-Security Program, 23 Univ. Ch.L.Rev 1; Paul A. Sweeney, Alex Elson, Nathaniel L. Nathanson and Richard A. Pear, People, Government and Security, 51 N.U.L.Rv. 79; John Lord O'Brian, National Security and Individual Freedom (1955).

[3] Cole v. Young, 351 U.S. 536 (1956), in which case the employee was an inspector with the Food and Drug Administration.

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