A STUDY OF THE FEDERAL INDUSTRIAL PERSONNEL SECURITY PROGRAMS

by

HAROLD R. YOUNG

AN ABSTRACT

Submitted to the
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ABSTRACT

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Anyone who attempts to discuss the dynamic affairs of our Government is faced with a continual march of events. Consequently, some aspects of this report have already begun their trend toward obsolescence. The present builds on the past, and it is intended that this study will assist someone to build in the future.

The Federal Government operates several industrial personnel security programs. In this research these programs have been reviewed from a historical, legal and administrative viewpoint. Selective aspects of the evolution of the programs and details of their present modes of operation have been presented. A comparison of the three primary industrial personnel security programs has been offered with a discussion of some of their similarities, differences and interrelationships.

The data presented in the thesis was derived from a review of the numerous laws, regulations, procedures and Executive Orders relating to the various industrial personnel security programs of the Federal Government. This mass of detail was analyzed and categorized, then summarized in the study.

This thesis, by its review of the Federal Government's industrial personnel security programs, illustrates some of the problems and issues involved with the programs. Pertinent aspects of the basic problem of individual freedom versus the needs of national security were explored. Concluding comments have been offered in the thesis for the purpose of stimulating and fomenting further research and study in the area.

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H. R. Y.

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CHAPTER I

INTRODUCTION

I. THE PROBLEM

Statement of the Problem

There are several industrial personnel security programs within the framework of the Federal Government. These programs are generally concerned with granting of security clearances to personnel employed by business enterprises having an actual or proposed contractual relationship with the Federal Government.[1] Consideration of the policies governing granting, denying or revoking of security clearances to industrial personnel is the main theme of this study. Although principal attention is given to the methods utilized in granting of security clearances, most emphasis is placed on the procedures used by the various agencies when security clearances have been withheld; for it is from the withholding of security clearances that most of the hue and cry regarding suppression of individual rights and freedoms

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[1]The Port Security Program is an exception to the rule in that personnel covered under its program have no contractual relationship with the Federal Government. It is, however, discussed in this study because it is concerned with the screening of industrial personnel in the interest of national security. The Federal Aviation Agency Program is quite similar in this respect as in others to the Port Security Program. It is, however, not covered in depth in this study because of its limited nature.

is discerned .

The Federal industrial personnel security programs have roots deep in the history of our country. It was, however, the advent of the "cold war" following World War II with the resultant national fears and anxieties that precipitated the rapid growth of these programs. The development of the various Federal programs has been characterized by permutation, diversification and modification. Even at the writing of this report, new and extensive changes in several of the programs are being prepared. What is true today may not be so tomorrow. Therefore, the study must be viewed as a consideration of the programs only as they are in operation at the date of the conclusion of the thesis--31 December 1964.

This study will be considered from a historical, legal and administrative approach. Its purpose is: (1) to provide a succinct review of the Federal Government's industrial personnel security programs, including selective aspects of their historical evolution; (2) to illustrate by this review how these programs have attempted to meet the problem of attaining the proper balance between the rights of the individual and the needs of national security; (3) to explore some of the similarities, differences, and interrelationships of the programs; and (4) to offer some brief concluding comments on several of the problems and issues concerning the programs.

No statistical analysis of the various programs will be made, as to do so would render the study too cumbersome. Several sources are available, however, offering detailed statistics on the scope and operation of the personnel security programs of the Federal Government.[2]

Importance of the Study

There are numerous laws, Executive Orders, regulations and procedures relating to the operation of the industrial personnel security programs of the various Federal agencies. Extensive interest has been generated and many articles and books written on the subject.[3] In this study these programs and related problems and issues are analyzed and summarized so that the mass of complex detail may be reduced to the essentials which will permit serious students of these

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[2]The Association of the Bar of the City of New York, Report of the Special Committee on the Federal Loyalty-Security Program (New York: Dodd, Mead & Company, 1956), pp. 114-117, 219-226; Ralph S. Brown, Jr., Loyalty and Security, Employment Tests in the United States (New Haven: Yale University Press, 1958), pp. 179-181, 487-497; Harold P. Green, "Q-Clearance: The Development of a Personnel Security Program," Bulletin of the Atomic Scientists, XX (May, 1964), pp. 10-14; and Robert W. Wise and Nancy Lou Provost, "New Procedures for Industrial Security Hearings," V Industrial Security (January, 1961), p. 48 footnote.

[3]Leon H. Weaver, Industrial Personnel Security, Cases and Materials (Springfield: Charles C. Thomas, 1964) offers a recent compilation of various materials on the subject. See also Bureau of National Affairs, Inc., Government Security and Loyalty - A Manual of Laws, Regulations and Procedures (Washington: Bureau of National Affairs, Inc., 1962) for a current collection of some of the more important provisions of the programs. Other relevant studies are cited in subsequent chapters.

problems to consider them more conveniently and more meaningfully.

II. DEFINITIONS OF TERMS USED

A special vernacular of terms has evolved with the establishment of the various Federal personnel security programs. Definitions of particular key words or phrases are, therefore, basic to an understanding of the study. For the purpose of this research, the following definitions will be utilized:

Administrative Review Procedures. Those policies and regulations established by the various Federal agencies for hearing and review of personnel cases where security clearance has been suspended, denied or revoked.

Classified information. Any official sensitive information determined by any Governmental agency authorized to classify information as being data which requires protection in the interest of national defense.[4]

Contractor. Any private organization or individual who has an actual or proposed contractual relationship with an agency or department of the Federal Government in which access to classified information is allowable.

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[4]Executive Order 10501, dated 5 November 1953, 18 Federal Register 7049 (1953) establishes the basic categories of classified information used throughout the Federal Government.

Criteria. Listed categories of activities and/or associations which may be used to assist in applying a security standard to an individual being considered for security clearance.

Derogatory information. Any knowledge of a disparaging nature regarding an individual being considered for security clearance under one of the Federal Government's personnel security programs.

Facility security clearance. An administrative determination by a Federal agency that a contractor is eligible from a security viewpoint for access to classified information.

Hearing. An administrative audience held by one of the Federal agencies to listen to arguments for and against issuance of a security clearance.

Industrial security. That portion of internal security which is concerned with safeguarding of classified information in the possession of American industry.

Personnel security. Any facet of industrial security concerned with issuance of security clearances to industrial personnel.

Screening. Consideration and determination of whether security clearance may be granted on the basis of the available information or whether further steps are required.

Security clearance.[5] An administrative determination made under one of the Federal Government's industrial personnel security programs that an individual is eligible from a security viewpoint for access to classified information.[6]

Standard. A statement of the test or rule for measuring individual characteristics essential to security clearance.

Substantially derogatory information. Knowledge which reasonably tends to substantiate the authenticity of one or more of the criteria utilized under the various industrial personnel security programs.

Review. An administrative reconsideration of a personnel security case under one of the Federal industrial personnel security programs.

III. ORGANIZATION OF REMAINDER OF THE THESIS

Basic to an understanding of the industrial personnel security programs is a consideration of the personnel security programs of the Federal Government. Chapter II,

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[5]The terms "access authorization," "authorization for access," and/or "non-security risk" shall all be included under the heading of "security clearance" for this study.

[6]A security clearance under the Port Security Program is an exception in that it is not a clearance to handle classified matter. It is only a decision that the individual's presence in certain waterfront areas and on American merchant ships is not inimical to the security of the United States.

therefore, provides a brief review of the programs for: (1) civilian employees, (2) military personnel, and (3) employees of international organizations. A general consideration of the industrial programs is also offered with a short discussion on Federal agencies which possess limited industrial personnel security programs.

The Department of Defense Industrial Personnel Security Program, the most extensive of the Federal programs, is the subject of Chapter III. It is followed by the Atomic Energy Commission Program in Chapter IV. The last program to be considered in depth is the Port Security Program in Chapter V. It is administered by the United States Coast Guard and deals with issuance of credentials to industrial personnel for access to American vessels and waterfront facilities.

A comparison of the programs outlining some of their similarities, differences and interrelationships is presented in Chapter VI. Chapter VII presents concluding comments derived from an analysis of the preceding chapters. Some problems and issues are also offered in the last chapter in the hope of stimulating further research and study on the subject.

CHAPTER II

FEDERAL GOVERNMENT PERSONNEL SECURITY PROGRAMS

Security in a free society presents a paradox. The rights of the individual must be guarded in order to preserve freedom in the society. Suppression of individual rights by the Government leads to tyranny. Yet, the Government has the authority and indeed the obligation to screen out from its service those of an unsuitable nature; for it is only by entrusting vital secrets to loyal, trustworthy and dependable individuals that the Government can fulfill its duty to protect the security of the nation.

The Federal Government, in its attempt to screen out unsuitable and unsafe individuals, has utilized four personnel security programs. These are the: (1) Civilian Program, (2) International Organizations Program, (3) Military Program, and (4) Industrial Program. The first three of these programs will be briefly considered in this chapter to provide a background for viewing the development and operation of the Industrial Program. The entire industrial program, which encompasses all Federal agencies operating industrial personnel security programs, is briefly reviewed to show its relationship to the other Federal programs. Agencies with relatively minor industrial personnel security programs are offered in this chapter as an introduction to the more extensive programs reviewed in Chapters III, IV and V.

I. CIVILIAN PROGRAM

History

In the broad sense, the question of loyalty of persons employed by the Federal Government is as old as the history of our country. It was not, however, until the enactment of the Hatch Act of 2 August 1939[1] that significant provisions for barring disloyal persons from employment with the Federal Government existed.[2] Section 9A of this Act stated that it was:

> unlawful for any person employed in any capacity by any agency of the Federal Government, whose 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.

Beginning in 1941, all appropriation acts contained loyalty provisions in the form of riders. Congress continued to add these riders to each appropriations statute until they enacted on 9 August 1955 Public Law 331 which permanently

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[1] 53 Stat. 1148 (1939).

[2] For a history of the Federal Civilian Employees Program see Eleanor Bontecou, The Federal Loyalty-Security Program (New York: Cornell University Press, 1953); Commission on Government Security, Report of the Commission on Government Security (Washington: Government Printing Office, 1957), especially pp. 5-24; Walter Gellhorn, Security, Loyalty, and Science (Ithaca: Cornell University Press, 1950); and Thomas I. Emerson, David M. Helfeld, "Loyalty Among Government Employees," Yale Law Journal, LVIII (December, 1948), 1-143.

codified the Hatch Act and the appropriation riders.[3] It requires civilian employees of the Government to execute a loyalty affidavit and makes the violator of the Act guilty of a felony.

Meanwhile, in March 1942, the Civil Service Commission issued War Service Regulations dealing with the loyalty of applicants for employment with the Government. These regulations disqualified from appointment or examination any person if there existed "a reasonable doubt as to his loyalty to the Government of the United States."[4]

In April of 1942, the Attorney General, in an attempt to obtain some standardization between Federal departments regarding loyalty matters, formed the Interdepartmental Committee on Investigations to act as a central source for advice on the handling of loyalty cases of Federal employees. Executive Order 9300, dated 5 February 1943, replaced the Attorney General's committee with the Interdepartmental Committee on Employee Investigation.[5] This was an advisory committee which dealt with cases in which there was evidence of membership in organizations authoritatively held to be subversive. Employees could be removed on disloyalty

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[3] 5 U.S.C.A. 118p-118r (Supp., 1961).

[4] 7 Federal Register 7723 (1942) Section 18.2 (c)(7).

[5] 8 Federal Register 1701 (1943).

grounds if it was shown that the individual was a member of one of the subversive organizations.

President Truman issued Executive Order 9806, dated 25 November 1946, establishing a Temporary Commission on Employee Loyalty.[6] The Temporary Commission was to study existing security procedures and standards regarding applicants or employees of the Federal Government.

Executive Order 9835. As a result of the recommendations by the Temporary Commission on Employee Loyalty, the President issued Executive Order 9835, dated 21 March 1947, the first all-inclusive screening program for Federal employees.[7] Executive Order 9835 prescribed uniform procedures for the administration of loyalty programs for Federal employees. It provided for loyalty investigations of all applicants for and employees of the Executive Branch of the Federal Government.[8]

Under Executive Order 9835, each department or agency head became responsible for establishing a Loyalty Review Program, which included the appointment of one or more Loyalty Boards within the department or agency to hear cases.

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[6] 11 Federal Register 13863 (1946).

[7] 12 Federal Register 1935 (1947).

[8] Gellhorn, op. cit., pp. 129-174 provides a discussion on this Loyalty Program.

Persons charged with being disloyal were given written notice of the charges, an opportunity to answer in writing and to have an administrative hearing where they could appear personally and present evidence through witnesses or affidavits. Cases of an adverse decision could be appealed to the department or agency head and finally to a Loyalty Review Board established within the Civil Service Commission. This Loyalty Review Board reconsidered cases and made advisory recommendations to the department or agency head who in all cases made the final decision.[9]

Provisions were made in Executive Order 9835, dated 21 March 1947 for the protection of confidential informants in certain situations. The investigative agency could refuse to disclose the names of confidential informants if it advised the requesting agency or department that it was "essential to the protection of the informants and to the investigation of other cases that the identity of the informants not be revealed."[10]

Part V of Executive Order 9835 supplied the standard and criteria for the program. Six criteria to be used in

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[9] 12 Federal Register 1935 (1947) Part I 1.

[10] Ibid., Part IV 2.

making a determination of disloyalty were promulgated. The standard for denial of or dismissal from employment was that, "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." This standard was tightened by President Truman approximately four years later under Executive Order 10241, dated 28 April 1951.[11] Under Executive Order 10241 individuals were to be denied or removed from employment if, "on all evidence, there is reasonable doubt as to the loyalty of the person involved to the Government of the United States."

Present Program

It soon became evident that the Truman Loyalty Program under Executive Order 9835, as amended, was not the panacea for the Federal Employees Program. Several statutes dealing with loyalty and security were enacted during the 1947-1950 period[12] culminating with passage of the present statutory base for the Federal Employees Program, Public Law 733, in August 1950.

Public Law 733. This statute provides authority for

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[11]16 Federal Register 3690 (1951).

[12]Bureau of National Affairs, Inc., Government Security and Loyalty - A Manual of Laws, Regulations and Procedures (Washington: Bureau of National Affairs, Inc., 1962) pp. 1:5-1:6 outlines some of the more important legislative enactments during this period.

eleven Federal agencies to suspend or remove their respective departmental civilian employees if "deemed necessary in the interest of national security."[13] Section 3 of the law provides for extension of the provisions of the statute "to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interest of national security."

Executive Order 10450. President Eisenhower, to implement the provisions of Public Law 733, issued Executive Order 10450, dated 27 April 1953.[14] This Executive Order revoked the Loyalty Program established under Executive Order 9835 [15] and extended the provisions of Public Law 733 to all executive agencies and departments.[16]

Under Executive Order 10450 the standard was changed so that employment or retention of employment of Federal employees became "clearly consistent with the interests of national security."[17] A new set of criteria was promulgated in the Executive Order,[18] which enlarged upon the criteria

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[13]64 Stat. 476 (1950), 5 U.S.C.A. 22-1 (Supp., 1961).

[14]18 Federal Register 2489 (1953).

[15]Ibid., Section 12.

[16]Ibid., Section 1.

[17]Ibid., Section 2.

[18]Ibid., Section 8. (a).

of the Truman Loyalty Program and included new security considerations. These criteria include: (1) conduct indicating possible subversive activity; (2) behavior symbolizing pressure risk or lack of reliability, stability or judgment; (3) criminal acts such as espionage, sabotage and treason; and (4) behavior of an unlawful nature which is considered inimical to the democratic processes.

The program originally established under Executive Order 10450 attempted to abolish the two alleged primary defects of its predecessor so that:(1) individuals removed from employment would no longer have the stigma of disloyalty; and (2) persons could be dismissed who, although loyal, had certain character defects or associations that constituted a security risk to the Government. In essence, it attempted to combine loyalty and security considerations into one comprehensive program.[19]

Amendments. Executive Order 10491, dated 13 October 1953, amended Executive Order 10450 by adding as a criterion refusal to testify before a congressional committee on the grounds of self-incrimination regarding charges of "alleged disloyalty or other misconduct."[20] Executive Order 10531, dated 27 May 1954, merely incorporated the additional

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[19]Commission on Government Security, op. cit., p. 4.

[20]18 Federal Register 6583 (1953).

criterion of Executive Order 10491 above into Section 8.(d).[21] The criterion dealing with mental illness was amended by Executive Order 10548, dated 2 August 1954.[22] Executive Order 10550, dated 5 August 1954, revised Section 14 by requiring an immediate report to the National Security Council of deficiencies in the program which were deemed by the Civil Service Commission to be of major importance. It further required certain reporting by agency or department heads to the Civil Service Commission on the manner in which the Executive Order was being implemented.[23]

Under Executive Order 9835, employees or applicants could appeal their cases to the department or agency head and subsequently to the Loyalty Review Board of the Civil Service Commission.[24] No such provisions exist under the present program. Public Law 733 provides for termination of employment when the agency head deems "such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final."[25]

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[21] 19 Federal Register 3069 (1954).

[22] 19 Federal Register 4871 (1954).

[23] 19 Federal Register 4981 (1954).

[24] Supra, note 9.

[25] 64 Stat. 476 (1950), 5 U.S.C.A. 22-1 (Supp., 1961).

The present program entitles United States citizens with permanent or indefinite appointments who have completed the trial or probationary period to: (1) a written Statement of Charges, (2) thirty days to answer the charges and to submit affidavits, (3) a hearing, (4) a review of the case by the agency head or his designated representative prior to a final adverse determination, and (5) a written notice of the final determination made by the head of the agency. All other employees merely receive a Statement of Reasons and an opportunity to submit an answer thereto, as no hearing and review procedures are available to them.[26]

Accompanying the issuance of Executive Order 10450 was a set of Sample Regulations to be utilized by the various agencies in creating minimum standards for their own programs. These Sample Regulations prepared by the Justice Department, while not mandatory, were adopted with slight modifications by the civilian agencies.[27]

The loyalty-security program under Public Law 733 and Executive Order 10450 covering all Federal employees was changed by the Supreme Court's decision in the case of Cole v. Young.[28] In this case the court held that Executive

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[26] Ibid.

[27] See Bureau of National Affairs, Inc., op. cit., p. 11:1 for discussion on this point; see pp. 15:101-15:108 for copy of the Sample Regulation.

[28] 351 U.S. 536 (1956).

Order 10450, which was based on Public Law 733, applied only to individuals in sensitive positions rather than to all Government employees. Sensitive positions were considered to be those where the individual was directly involved with the safeguarding of the country from foreign aggression or internal subversion. Although this decision held that security tests only applied to persons in sensitive positions, subsequent consequences of the decision were not extensive. The Hatch Act and the appropriation riders still applied to all employees. Applicants could still be restricted from employment on the basis of "reasonable doubt" as to their "loyalty to the Government of the United States."[29]

Summary

In summary, a review of the various standards prescribed under the Federal Civilian Program is presented. The Hatch Act and the appropriation riders forbid Federal employment to persons belonging to organizations advocating the violent overthrow of the Government by force or violence. The 1947 Truman Loyalty Program utilized the standard of "reasonable ground for belief of disloyalty" which was changed four years later to "reasonable doubt as to loyalty." The shift in defense and other sensitive agencies from emphasis on loyalty to emphasis on security began with

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[29] Supra, note 4.

Public Law 733, and continued with Executive Order 10450, which states that the employment must be "clearly consistent with the interests of national security." The loyalty standard places major emphasis on the employee's freedom from disloyalty. The security standard, on the other hand, deals with the risk to our national security of having in a particular job a person who may be of weak character or indulge in conduct such that the national security is endangered.

II. INTERNATIONAL ORGANIZATIONS PROGRAM

The International Organizations Program affects United States citizens who are employed by, or seeking employment with, international agencies. The individuals under this program are unique in that they are actual or potential international civil servants rather than employees or prospective employees of the United States Government or its contractors.[30]

The first significant manifestation of a loyalty-security program between the United States and an international agency was the "United States-United Nations Secret Arrangement of 1949."[31] In the summer of that year the

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[30]See Commission on Government Security, op. cit., pp. 369-427; and Bureau of National Affairs, Inc., op. cit., pp. 41:1-41:9 for a discussion and description of the International Organizations Program.

[31]Commission on Government Security, ibid., p. 374.

Secretary-General of the United Nations asked the American Government to assist him in disposing of some undesirable United States citizens on his staff. A secret arrangement was developed between the State Department and the Secretary-General whereby he could submit to the State Department for investigation, the names of United States citizens employed by or being considered for employment with the United Nations. This arrangement was not found to be successful, however, as investigations revealed that a considerable group of disloyal Americans had been employed by the United Nations.[32]

Executive Order 10422

President Truman issued Executive Order 10422, dated 9 January 1953, to provide a procedure for:

> the acquisition of information by investigation and for its transmission to the Secretary General to assist the Secretary General in the exercise of his responsibility for determining whether any United States citizen employed or being considered for employment on the Secretariat has been, is, or is likely to be, engaged in espionage or subversive activities against the United States.[33]

Under this Executive Order individuals were permitted to have hearings before local Civil Service Commission Loyalty-Boards with review possible by the Civil Service Commission's

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[32] Ibid., pp. 376-392 provides a well-documented review of the results of investigations into this problem by the New York Federal Grand Jury, the Senate Internal Security Subcommittee and the House Subcommittee on the Judiciary.

[33] 18 Federal Register 239 (1953).

Loyalty Review Board. The issuance of Executive Order 10450, dated 27 April 1953, which among other things abolished the Civil Service Commission Loyalty Boards,[34] necessitated a change in the International Organizations Program. This was accomplished by Executive Order 10459, dated 2 June 1953, which amended Executive Order 10422.[35]

Present Program

The basis for the present program is Executive Order 10422, as amended. Under this Executive Order, information involving United States citizens is furnished to the various international organizations to assist them in making their personnel selections.

Under the International Organizations Program, identifying data pertaining to the individual is forwarded from the Secretary-General of the United Nations through the Secretary of State to the Civil Service Commission for a preliminary investigation. In certain cases, provisions are also available for investigations by the Federal Bureau of Investigation.[36]

Executive Order 10422, as amended, established an International Organizations Employees Loyalty Board within

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[34] Supra, note 15.

[35] 18 Federal Register 3183 (1953).

[36] Ibid., Part I.

the Civil Service Commission. This Board makes advisory determinations on the loyalty to the United States Government of citizens employed by or being considered for employment with international organizations in which the United States is a member. Provisions exist for hearings in those cases where the Board has made adverse recommendations prior to a final decision by the head of the international organization concerned.[37]

The standard used by the International Organizations Program is "whether or not on all the evidence there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."[38] The International Organizations Program is thus unique among all Government programs, as it is the only one which is strictly a loyalty program rather than a security program.

III. MILITARY PROGRAM

The Military Program covers military personnel of the Armed Forces of the United States.[39] It is based upon the

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[37] Ibid., Part I 5. 6., Part IV. See also Bureau of National Affairs, Inc., op. cit., 41:41-41:44 for copy of regulations dealing with the operations and functions of the International Organizations Employees Loyalty Board.

[38] Ibid., Part II 1.

[39] Ralph S. Brown, Jr., Loyalty and Security - Employment Tests in the United States (New Haven: Yale University Press, 1958), pp. 81-89; Bureau of National Affairs, Inc., op. cit., pp. 31:1-31:20; and Commission on Government Security, op. cit., pp. 111-130 outline details on the operation of this program.

innate disciplinary authority of the services rather than any specific Executive Order or law as are other Government programs. The Army, Navy,[40] and Air Force operate programs under their own regulations but each must conform to the overall policies and procedures of the Department of Defense.

The Military Program essentially began with the issuance of a Joint Agreement by the Secretaries of the Armed Forces, dated 26 October 1948, entitled, "The Disposition of Commissioned and Enlisted Personnel of the Armed Forces of Doubtful Loyalty."[41] The Joint Agreement was directed at those members of the Armed Services who were of doubtful loyalty or known disloyalty. Each of the services developed their own regulations for the implementation of the policies of the Joint Agreement. Various criteria to be considered as creating reasonable grounds for separation from or appointment or enlistment to the Armed Services were listed in the regulation. The standard was provided in Section 5.(c)(1) as "on all the evidence, reasonable grounds exist for belief that the individual involved is disloyal to

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[40]The Coast Guard which operates as part of the Navy in wartime and under the Treasury Department at other times has a program quite similar to that of the Navy. Its program for military personnel will be considered as part of this section while its Port Security Program is covered in detail in Chapter V.

[41]Commission on Government Security, op. cit., p. 111.

the Government of the United States."

After unification of the Military Services in 1947,[42] the Secretary of Defense issued several memorandums on the program.[43] Executive Order 10450, dated 9 January 1953,[44] caused the Defense Department to issue a new directive for the Military Program incorporating the standard and criteria promulgated for the Civilian Program.[45]

Present Program

Department of Defense Directive 5210.9, which is the current basis for the Military Program, was amended several times after its issuance on 7 April 1954 and was finally reissued on 19 June 1956.[46] The standard in Section VIII of the Directive states that:

> appointment, enlistment, induction or retention into or within the Armed Forces shall be that on all the available information it is determined that the appointment, enlistment, induction or retention is clearly consistent with the interests of national security.

The Military Program is thus substantially the same as that

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[42] 61 Stat. 495 (1947).

[43] Commission on Government Security, op. cit., pp. 113-115.

[44] Supra, note 14.

[45] United States Department of Defense, Department of Defense Directive 5210.9 (Washington: Department of Defense, 1954).

[46] Bureau of National Affairs, Inc., op. cit., pp. 31:51-31:58, provides a copy of the Directive as amended.

for civilian employees of the Federal Government. The final decision must be an overall common sense one based upon all the available data and in accordance with the above standard.

IV. INDUSTRIAL PROGRAM

The Industrial Program under the Federal Government is generally divided into two separate sections. The first, the Industrial Defense Program, is concerned with the protection of defense related activities. These industrial activities are considered to be an important aspect of our national security although they have no classified contracts. Executive Order 10421, dated 31 December 1952, established this program and provided the Office of Defense Mobilization with policy responsibilities for setting up an Industrial Defense Program.[47] This program, however, is primarily concerned with the establishments of physical security standards and will not be included in the scope of this report.

The second type of Federal Industrial Program is concerned with the protection of classified information and material in the hands of American industry. This program is divided into physical security procedures for safeguarding of classified information and personnel security which deals with clearance of persons for access to classified information.[48]

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[47] 18 Federal Register 57 (1952).

[48] Supra, Chapter I, note 6, provides an explanation of personnel security under the Port Security Program.

The industrial personnel security programs are the primary subject of this study.

Federal Industrial Programs

The Federal Government operates several industrial personnel security programs. The most extensive programs are the Department of Defense Program, the Atomic Energy Commission Program, and the Port Security Program. These programs are covered in depth in subsequent chapters. A cursory consideration of other agencies with minor programs is offered in this section.

Extensions of the Department of Defense Program. Most of the Federal agencies which operate relatively minor industrial personnel security programs have been brought under the purview of the Department of Defense Program. Section 203 (b) (6) of the National Aeronautics and Space Act of 1958[49] and Section 202 (d) of the Federal Aviation Act of 1958[50] are cited as the authority for extending the Defense Department's Program to the National Aeronautics and Space Administration and the Federal Aviation Agency. Executive Order 10865, dated 20 February 1960, reflects the authority granted by the above laws and additionally authorizes analogous extension of the Department of Defense Program

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[49] 72 Stat. 426, 430 (1958).

[50] 72 Stat. 731, 742 (1958).

to other agencies.[51] Executive Order 10909, dated 17 January 1961 [52] provided that when agencies are brought under the Department of Defense Program the head of the agency or department is authorized to act in the capacity of a department head as outlined in Executive Order 10865.[53] Agreements have been consummated with the following Federal agencies bringing them under the Defense Department Program:

1. National Aeronautics and Space Administration
2. Federal Aviation Agency
3. Department of Commerce
4. General Services Administration
5. Department of State
6. Small Business Administration
7. National Science Foundation[54]

Thus, the above-listed agencies by mutual agreement with the Department of Defense now have their classified contracts with industry governed by Defense Department regulations.[55]

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[51] 25 Federal Register 1583 (1960), Section 1 (b).

[52] 25 Federal Register 508 (1961).

[53] Infra, Chapter III discusses Executive Order 10865 as amended.

[54] United States Department of Defense, Industrial Security Manual for Safeguarding Classified Information (Washington: Government Printing Office, 1963), Paragraph 1.c.

[55] United States Department of Defense, Industrial Security Manual for Safeguarding Classified Information (Washington: Government Printing Office, 1963); Armed Forces Industrial Security Regulation (Washington: Government Printing Office, 1963); and the Industrial Personnel Access Authorization Review Regulation (Washington: Office of Personnel Security Policy, 1960).

Industrial personnel security cases for these agencies are processed under the Industrial Personnel Access Authorization Review Regulation. Industrial facility and personnel security clearances are issued by the Department of Defense for the agencies. In cases of industrial personnel processed under the above Review Regulation the agency is allowed voting representation on the various Boards. The authority for final denials or revocations is vested with the head of the appropriate agency or department.[56]

Agency for International Development. The Department of State's Agency for International Development operates an industrial personnel security program.[57] Under this program the initial evaluation of an industrial contractor or contractor employee is made by the Director, Office of Security. If the Director, Office of Security, finds that rejection or dismissal of an industrial employee "may be required in the interest of national security,"[58] he forwards a recommendation to an Assistant Administrator responsible for the particular

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[56]Infra, Chapter III, provides a discussion on the procedures for handling of agency industrial personnel security cases under the Department of Defense Program.

[57]United States Department of State, A.I.D. Manual No. 610.2, Security Clearance for Contractor and Contractor Personnel Under AID-Financed Contracts (Washington: Agency for International Development, 1964) outlines procedures for clearance of industrial personnel.

[58]Ibid., Paragraph VIII.A.

contract under which the individual is being considered for security clearance. If the Assistant Administrator disagrees with the recommendation,the case is forwarded to the Administrator for a final decision. The final determination in a case is whether or not employment of the person "is clearly consistent with the national interest."[59]

Other Sensitive Agencies. Both the Central Intelligence Agency and the National Security Agency have small industrial personnel security programs. Due to the sensitive nature of these agencies no detailed information on their industrial programs is available.

V. CONCLUSION

The personnel security programs of the Federal Government exhibit certain elements of uniformity and some significant variations. The elements of most significance for this study are the evolution of the different "standards" for screening employees.

The programs for civilian and military personnel use the standard "clearly consistent with the interests of the national security." The program for employees of International Organizations continues to use the standard of "reasonable doubt as to the loyalty of the person involved to the Government of the United States." As will be seen in this study, the standards

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[59] Ibid., Paragraph VIII.C.

for the more important industrial personnel security programs have evolved through several stages from "loyalty" to "national security" and then to "national interest." The details and implications of this evolution as well as a consideration of the development of other standards will be traced in subsequent chapters.

CHAPTER III

DEPARTMENT OF DEFENSE

I. INTRODUCTION

The Department of Defense Industrial Security Program, the oldest and largest of the industrial security programs, has as its objective the safeguarding of classified information in the possession of American industry. It applies to prospective and incumbent contractors, sub-contractors, suppliers, vendors and consultants to the Department of Defense and its activities where the release of classified information to or within industry is involved.

The Industrial Security Program of the Department of Defense is subject basically to procedures as outlined in three documents.[1] The Industrial Security Manual for Safeguarding Classified Information provides detailed procedures for use by industry in handling and safeguarding classified information. The internal procedures utilized by the Military Departments in dealing with the industrial security program are outlined in the Armed Forces Industrial Security

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[1] United States Department of Defense, Industrial Security Manual for Safeguarding Classified Information (Washington: Government Printing Office, 1963); Armed Forces Industrial Security Regulation (Washington: Government Printing Office, 1963); and the Industrial Personnel Access Authorization Review Regulation (Washington: Office of Personnel Security Policy, 1960).

Regulation. The policies and procedures for processing of personnel security clearance cases of industrial employees are outlined in the Industrial Personnel Access Authorization Review Regulation.

Legal Basis

There is no specific statutory enactment upon which the Department of Defense Industrial Security Program is based. It has been argued, however, that implied authority for the program is based upon several statutes and/or Executive Orders,[2] the most important of which is Executive Order 10865, dated 20 February 1960,[3] as amended by Executive Order 10909, dated 17 January 1961.[4] Discussion on Executive Order 10865, as amended, is deferred until later in the chapter.

Security Cognizance

Jurisdiction or cognizance over security matters of a particular plant, office or facility is assigned to a

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[2]Ibid., Industrial Security Manual for Safeguarding Classified Information, Paragraph 2., lists the "Applicable Federal Statutes and Executive Orders" regulating the Industrial Security Program.

[3]25 Federal Register 1583 (1960).

[4]25 Federal Register 508 (1961).

branch office of one of the Military Departments.[5] This Cognizant Security Office acts for the Defense Department on all matters involving the handling and safeguarding of classified defense information. Once security cognizance has been assigned, the contractor deals with and through that agency on all subjects relating to industrial security policy and procedures.[6]

Facility Security Clearance

All organizations under the Department of Defense Industrial Security Program are required to obtain a facility security clearance, hereinafter referred to as facility clearance, prior to being granted access to classified information. There are three levels of facility clearance commensurate with the three categories of classified information; i.e., TOP SECRET, SECRET and CONFIDENTIAL. Certain requirements must be met prior to granting of any level of either an interim or final facility clearance. These requirements will be briefly discussed in the remaining

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[5]United States Department of Defense, Armed Forces Industrial Security Regulation, op. cit., Paragraph 1-305 j. provides an exception to this rule. In communications analysis contracts awarded by Service procurement activities, the National Security Agency retains exclusive security responsibility.

[6]Ibid., Paragraph 1-300-1-305.

paragraphs of this section.[7]

In facility clearance actions the contractor being considered executes a Department of Defense Security Agreement (DD Form 441). This Security Agreement is a contractual document signed by the firm and the Government and obligates the contractor to protect classified information in accordance with the terms of the Security Agreement and the requirements set forth in its attachment, the Department of Defense Industrial Security Manual for Safeguarding Classified Information.

Concurrent with the execution of the Security Agreement, the contractor being processed for a facility clearance must execute a Certificate Pertaining to Foreign Affiliation, (DD Form 441s). This form is a certification by the organization requesting facility clearance regarding the degree of foreign ownership, influence and control in the operation of its firm. It is used by the Cognizant Security Agency in determining the organization's eligibility for

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[7]Ibid., Paragraph 2-103 outlines the basic requirements for facility clearances. Paragraph 2-104 and 2-105 respectively outline additional requirements for facilities requiring access to Restricted Data and/or cryptographic or communications analysis information. The requirement for clearances of consultants to Defense Department contractors and Department of Defense activities are set out in Paragraph 2-114.1 and 2-114.2 respectively.

facility clearance.[8]

In facility clearance actions certain key personnel must be granted individual security clearances as part of the facility clearance. The personnel required to be cleared as part of the facility clearance are specifically outlined in Paragraph 2-107 of the Armed Forces Industrial Security Regulation. Generally, those covered are: (1) principal owners, officers, directors and executive personnel of corporations and associations, (2) owners for sole proprietorships, (3) all general partners for partnerships, and (4) all regents, trustees, or directors for colleges, universities and non-profit organizations.

Facility clearance actions require that the appropriate Cognizant Security Office conduct a National Agency Check[9]

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[8]United States Department of Defense, Armed Forces Industrial Security Regulation, ibid., Paragraph 2-300-2-307 establishes the facility clearance procedures for determining whether or not a facility is under foreign ownership, influence, or control. Facilities which are foreign influenced, controlled or owned cannot be considered for clearance. Paragraph 2-108 provides procedures for execution of Department of Defense Security Agreements and Certificates Pertaining to Foreign Affiliation.

[9]Ibid., Paragraph 2-108.1 provides the scope of National Agency Checks for facilities. Paragraph 2-103 f. requires that a National Agency Check is not required for Interim CONFIDENTIAL facility clearances. The Cognizant Security Office, however, must check available local information on the firm in an attempt to determine if derogatory data exists on the organization prior to granting an Interim CONFIDENTIAL facility clearance. The regulations also provide that the requirement for a National Agency Check on any level of facility clearance action is waived if the home office of a multiple facility organization has had a favorable National Agency Check.

and a survey[10] of the facility for the purpose of: (1) evaluating the firm's ability to safeguard classified information if made available, (2) investigating the company, or parent company if part of a corporation, to determine the extent of foreign ownership, control or influence, and (3) advising the firm's management of their responsibilities under the Security Agreement.

Facility clearances may be denied, suspended or revoked because of: (1) inadequate physical security elements; or (2) denial, suspension or revocation of a security clearance from any owner, officer, director, partner, regent, trustee or executive required to be cleared as part of the facility clearance action. In the first case the contractor may have the facility clearance granted or reinstated by correcting the physical deficiency within a specified period of time. In the latter situation the facility clearance may only be granted or reinstated if the individual in question is subsequently granted a security clearance or is removed from his official position by the contractor with the assurance that he will not be allowed, and can be effectively denied, access to the classified information maintained by the contractor.[11]

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[10] Ibid., Paragraph 2-109 provides the scope and extent of such surveys.

[11] Ibid., Paragraph 2-111.; Paragraph 2-112 outlines special cases where appeals to denials or revocations of facility clearances are not allowed.

If the organization fulfills Government regulations, it is granted a facility clearance by issuance of a "Letter of Notification of Facility Clearance (DD Form 562)." After issuance of a facility clearance the contractor may have access to classified information for either precontract negotiations or the fulfillment of a contract. Periodic inspections are made by the Cognizant Security Agency to see that the regulations of the Security Agreement and its attachment are being adhered to.

Personnel Security Clearances

After a facility clearance has been issued, other employees of the contractor may be granted security clearances. Contractor employees cannot, however, be granted security clearances for access to classified information of a higher degree than the level of the facility clearance at their location.[12]

Negotiators who are designated by the contractor as having to participate in the preparation of quotations or bids may be processed for security clearances concurrent with, but not as part of, the facility clearance action. These security clearances may not be issued prior to granting

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[12] Ibid., Paragraph 2-201 a., b. provide exceptions to this rule for certain consultants and employees of multiple-facility organizations.

of the facility clearance.[13]

Overseas Security Eligibility. United States citizens who are stationed outside the United States, its possessions and Puerto Rico may be granted Overseas Security Eligibility for access to NATO or foreign classified information. To be eligible, however, these citizens must be employees of cleared United States organizations or employees of foreign subsidiaries of cleared United States firms. Procedures for processing of an Overseas Security Eligibility are outlined in Paragraphs 2-400 through 2-404 of the Armed Forces Industrial Security Regulation.

II. HISTORY OF THE PROGRAM

Early History

Espionage[14] and Sabotage Laws[15] were enacted as early as 1918 to provide statutory protection against those persons who might commit acts inimical to the United States. These laws apply to all persons within the country regardless of whether or not they are employed in defense industries. The Air Corps Act of 1926, however, was one of the first significant manifestations of an Industrial Security Program under

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[13] Ibid., Paragraph 2-107.1.

[14] 40 Stat. 217 (1917).

[15] 40 Stat. 533 (1918).

the Military. This act dealt with the security of military aircraft contracts and prescribed that:

> no alien employed by a contractor . . . shall be permitted to have access to the plans or specifications or the work under construction or to participate in the contract trials without the written consent beforehand of the Secretary of the department concerned.[16]

There were additional scattered industrial security programs in effect prior to World War II,[17] but it was the War which acted as the catalyst for the growth and development of the programs.

World War II Period

In the early years of the War considerable confusion existed in the industrial security program as contractors were subject to regulations and directions from each of the Military Services. In an attempt to partially alleviate this situation the War Department in 1942 was assigned responsibility of the program including: (1) control of aliens, (2) handling of subversives, (3) fingerprinting, and (4) other personnel security procedures for both the War and the Navy Departments. The Secretary of War, in turn, delegated to the Provost Marshall General of the Army in September 1942 the

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[16] 44 Stat. 780, 787 (1926).

[17] Commission on Government Security, Report of the Commission on Government Security (Washington: Government Printing Office, 1957), p. 236.

responsibility for overall direction and supervision of the program.[18]

Under Army direction a Military Security Representative was appointed for each defense plant. A Personnel Security Program was formulated, including fingerprinting and checking of personnel records. Persons of doubtful loyalty or background and those in sensitive positions were asked to complete personnel security questionnaires and thereby became subject to possible investigations. However, there existed no specific requirement for issuance of individual security clearances.

A program, under the direction of the Provost Marshall General of the Army, commenced in the early months of 1942 for the termination of subversives from both sensitive war department facilities and industrial organizations. It provided that when sufficient investigation revealed probable subversive activity, the individual could be terminated from his employment. Prior to any removal the Military Security Representative was directed to explore the feasibility with labor and management of having the person in question reassigned to other non-defense type of work. The individual could be administratively removed at any time without explanation and the Government was not required to reveal either the nature or the source of the data causing

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[18] Ibid., pp. 236-237.

the removal.[19]

In November 1942, the Provost Marshall General of the Army by authority of the Secretary of War created a Review Board for dismissed employees, which subsequently became known as the Industrial Employees Review Board.[20] The individual, if discharged from employment, could submit a written request to the Review Board for consideration within thirty days after removal. If, after consideration of the case, the Board determined that the removal had not been for just cause, the individual was entitled to reinstatement.[21]

Post World War II to 1953

The completion of World War II was followed by a great deal of disorder in the field of Industrial Security. The Army, which had directed the program during the war, could no longer efficiently administer it. Both the Navy and the Air Force began assuming responsibility for enforcing security regulations regarding safeguarding of classified information entrusted to their industrial contractors. This divided responsibility led to confusion and duplication. Industrial firms holding contracts with more than one Military

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[19] Ibid., p. 237.

[20] Walter Gellhorn, Security, Loyalty, and Science (Ithaca: Cornell University Press, 1950), pp. 100-104 discusses some problems with this Board from its inception through 1949.

[21] Commission on Government Security, op. cit., p. 238.

Department often found that they had a set of security regulations issued by each department. Contractors were required to obtain one, two, or sometimes even three facility clearances at the same time for the same company location. Additional problems occurred when a facility clearance was found perfectly acceptable to one Military Department but unacceptable to another for contracts of the same classification. No uniform set of rules or regulations existed for the protection of classified information in the hands of United States industry.

Personnel security. March 1946 saw the establishment of a requirement for execution of a written Secrecy Agreement between the War Department and the contractor which required that written consent be obtained from the Government prior to granting of access to TOP SECRET and SECRET War Department data to employees of industrial organizations. The authority to grant written consent was given to the Provost Marshall General of the Army, the commanding general of the Army Air Force and the commanding general of the Manhattan Engineering District. The standard utilized for issuance of written consent was that:

> No consent will be granted unless, after full consideration of the evidence presented, it is determined that the employment of such individual, in the manner proposed, will not be inimical to the interests of the United States.[22]

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[22] Ibid., pp. 238-239. The Navy and its contractors were brought under this standard in June 1947 by request of the Secretary of the Navy.

Methods for processing of security clearances were outmoded as each of the Military Departments issued security clearances for employees under their domain. Security clearances were not necessarily mutually acceptable to each of the Military Departments. No uniform criteria existed to assist in evaluation of personnel security cases. Confusion, duplication and conflicting decisions resulted in long delays in obtaining security clearances.

In an attempt to mitigate some of the problems regarding security clearances of industrial employees, the three Secretaries of the Military Departments agreed on 9 October 1947 to establish a Security Review Board as an interim procedure until the entire security program could be studied and revised. In an agreement dated 17 March 1948 the Military Departments replaced this interim Board with a permanent Army-Navy-Air Force Personnel Security Board. The Military Field Offices were thus enabled to forward for review and consideration all cases in which there appeared to be a justifiable question regarding granting of security clearance. This three-man Security Review Board, with one representative from each of the Military Departments, granted or denied security clearances for industrial employees where appropriate and/or suspended employment of persons on classified work where they felt that continued employment was considered inimical to the security interests of the

United States."[23]

Munitions Board. The National Security Act of 1947 charged the Department of Defense Munitions Board with the responsibility of developing and coordinating internal security between the Military Departments and United States industry.[24] The overall development of procedures, methods and standards in the field of Industrial Security was delegated to the Munitions Board. By April 1949 an Industrial Security Division had been established within the Munitions Board, and it began to issue regulations and procedures for protection of classified information in the possession of industry.[25]

On 7 November 1949 six criteria of derogatory information for use in reaching determinations in personnel security cases were promulgated.[26] Paragraph A. indicated that security clearance would be denied or revoked if "on all the evidence and information available to the Board, reasonable grounds exist for the belief" that the actions or

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[23] Ibid., p. 239.

[24] 61 Stat. 495, 506 (1947).

[25] Commission on Government Security, op. cit., pp. 243-244 offers a listing of some of the more important developments in Defense Department's Industrial Security Program between June 1949 and May 1952.

[26] United States Department of Defense, "Criteria Governing Actions by the Industrial Employment Review Board" (Washington: Department of Defense Munitions Board, 7 November 1949). (Mimeographed.)

associations of the individual fell within the purview of the listed criteria. These criteria were immediately adopted for use by the Industrial Employees Review Board, the Army-Navy-Air Force Personnel Security Board and the Military Departments.

Administrative changes. The Industrial Employment Review Board which had been responsible to the Provost Marshall General of the Army was in 1949 made answerable to the Secretaries of the three Military Departments.[27] In June 1950 the Army-Navy-Air Force Personnel Security Board was also reconstituted and made responsible to the Secretaries of the three Military Departments. Therefore, by mid-1950 all personnel security cases where a Military Department had recommended denial or revocation were forwarded to the Army-Navy-Air Force Personnel Security Board for decision. If this Board made a determination to deny or revoke security clearance, it notified the individual of its decision. The individual was allowed thirty days from the date of receipt of the notification to file a written request for a hearing before the Industrial Employment Review Board, which served as an appellate agency for the program. The Industrial Employment Review Board, which was located in the Munitions Board, heard the subject's case and made a final decision.[28]

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[27]Gellhorn, op. cit., pp. 104-106 discusses the effect of this change and its implications to the program.

[28]Commission on Government Security, op. cit., pp. 244-245.

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Problems. By 1953 a considerable amount of progress had been made in the Defense Department's Industrial Security Program. Uniform regulations governing issuance of security clearances to industrial employees had been established. An Industrial Security Manual for the guidance of contractors in meeting their Department of Defense security responsibilities and requirements had been published.[29] However, there still existed lack of uniformity between the Military Departments regarding the protection and safeguarding of classified information in the hands of United States industry. Many of the problems arose from the fact that the Military Departments interpreted and implemented the broad Munition Board procedures in different manners.

III. 1953 - 1955 PERIOD

General

In an effort to obtain a degree of uniformity in the Industrial Security Program, the Defense Department in mid-1953 issued the Armed Forces Industrial Security Regulation. This regulation provided for the first time a detailed uniform procedure for use by the Military Departments in dealing with Industrial Security. Security cognizance of

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[29]United States Department of Defense, Industrial Security Manual for Safeguarding Classified Information (Washington: Department of Defense Munitions Board, 1951).

an industrial facility was assigned to one Military Department regardless of the number or type of classified contracts. Security clearances were issued in the name of the Secretary of Defense and were acceptable to all Military Departments and their activities.

On 1 July 1953 the Munitions Board was dissolved in a reorganizational change in the Department of Defense. Overall direction and coordination of the Industrial Security Program concerning the protection of classified information in the possession of industry was transferred to the Assistant Secretary of Defense for Manpower, Personnel and Reserve Forces. To further improve the personnel security program, the Secretary of Defense in a memorandum dated 27 March 1953 abolished the Army-Navy-Air Force Personnel Security Board and the Industrial Employment Review Board and directed the respective Secretaries of the Military Departments to establish a new program with Industrial Personnel Security Boards in geographical regions throughout the United States as required by the volume of cases. Concurrent with the creation of these regional Boards, the Secretaries of the respective Military Departments were to establish uniform criteria and standards for use under this new Industrial Security Program.[30]

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[30]Commission on Government Security, op. cit., pp. 247-248.

Industrial Personnel and Facility Clearance Program

On 4 May 1953, the Secretaries of the three Military Departments promulgated a joint directive establishing an Industrial Personnel and Facility Security Clearance Program.[31] Under this program, regional Industrial Security Boards were established in the eastern (New York), central (Chicago), and western (San Francisco) areas. Each of these regional Boards consisted of a separate Screening and an Appeal division composed of representatives of the three Military Departments. All cases where the Military had recommended denial or revocation of security clearance were referred to the appropriate regional Screening Division for consideration.

Section III 11. of the directive provided that no security clearances would be issued if "on all the information, the granting of such a clearance is not clearly consistent with the interests of national security." Twenty-two criteria outlined in Section III 12. were to be used in applying the standard.

Screening. The Screening Division was responsible

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[31]United States Department of Defense, "Industrial Personnel and Facility Security Clearance Program" (Washington: Department of Defense, 4 May 1953). (Mimeographed.) See also United States Department of Defense, Industrial Personnel Security Review Program-First Annual Report (Washington: Office of Personnel Security Policy, 1956), pp. 22-23.

for examining all cases of unfavorable recommendations received from the three Military Departments and for making the initial decision regarding security clearance. In cases where questions existed pursuant to granting of clearance, a proposed denial along with a Statement of Reasons was forwarded to the individual by the Screening Division. The individual received consideration of his case if he responded to the Statement of Reasons. Failure to respond resulted in automatic denial or revocation of security clearance. The Screening Division, upon receipt and consideration of the subject's response to the Statement of Reasons, would either grant, deny or revoke the security clearance.

Review. In the case of an adverse decision the individual could request a hearing before the Appeals Division. After the hearing the Regional Appeals Division made a final decision on the case as no central appellate agency existed for the program. The Secretary of Defense, in a memorandum dated 18 January 1954, however, gave the authority to overrule decisions of the Appeals Division, when such action was deemed to be in the national interest, to the respective Secretaries of the three Military Departments.[32]

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[32]Commission on Government Security, op. cit., p. 248.

Problems

The program, however, by mid-1954 had developed several problems. The Hearing and Appeal Boards had produced a backlog of cases which resulted in long delays. There also was a lack of uniformity between the Boards as to the type of Statement of Reasons as well as administrative procedures utilized for handling of personnel security cases. A committee, composed of representatives of the Department of Defense and the three Military Departments, was therefore appointed in July 1954 to review the program and provide suggestions for improvements.[33]

IV. 1955 - 1960 PERIOD

Industrial Personnel Security Review Program

A new industrial personnel security program was established within the Department of Defense with the issuance on 2 February 1955 of the Industrial Personnel Security Review Regulation.[34] This program, which became effective 2 April 1955, continued the Regional Hearing Boards but incorporated the new feature of a Central Screening Board and a Central Review Board. Under the

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[33] Ibid.

[34] United States Department of Defense, Industrial Personnel Security Review Regulation - Directive 5220.6 (Washington: Office of Personnel Security Policy, 1955).

program security clearance was denied or revoked if it was decided, on the basis of all available information, that access to classified information by the individual in question was not "clearly consistent with the interests of the national security."[35] Paragraph 13. of the regulation provided twenty-two criteria to assist in applying the standard.

Screening. Under the new program, the Military Departments made investigations and the initial recommendation regarding security clearance. If one of the Military Departments recommended denial or revocation of a security clearance the case was forwarded to the Director, Office of Industrial Personnel Security Review for transmission to the Central Screening Board which had been established in Washington, D. C. The three-man Screening Board, by unanimous vote, could grant or continue in effect a security clearance on the basis of the existing record. The Board could also request that the Director obtain additional data through: (1) more investigation, (2) interrogatory to the individual, or (3) a personal interview with the individual in question.[36]

If, after full consideration, the Screening Board felt that security clearance was not warranted, it prepared a Statement of Reasons, in as much detail as possible

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[35] Ibid., Paragraph 12.

[36] Ibid., Paragraph 17.

pursuant to security requirements, outlining the grounds for denial or revocation. The Statement of Reasons was forwarded to the Director who subsequently issued it to the individual. The Director suspended any outstanding security clearances concurrent with the issuance of the Statement of Reasons. The individual was given an opportunity for response to, and review of, the Statement of Reasons. Failure on his part to answer the Statement of Reasons within ten days after receipt of the notice was grounds for automatic denial or revocation of his security clearance. Response afforded the individual a review of his case either on the basis of the existing record or by a hearing, whichever he so desired.[37]

Hearing. There were three Hearing Boards established under the Industrial Personnel Security Review Program of February 1955. The Hearing Boards were located in New York, Chicago and San Francisco and provided the individual with an opportunity to answer the charges as outlined in the Statement of Reasons. The individual with counsel of his choosing could appear personally and present evidence on his own behalf at the hearing. The individual was not given the opportunity to confront or cross-examine confidential informants unless so afforded at the discretion of the Government. If confidential reports or testimony were utilized, however,

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[37] Ibid.

the Hearing Board was required to take into consideration the individual's lack of opportunity for confrontation and cross-examination.[38]

Upon completion of the hearing, the three-man Board made a determination by majority vote and forwarded it along with a discussion of the findings as to the specific allegations enumerated in the Statement of Reasons to the Director of the program.[39] If the decision was unanimous and no unusual circumstances or novel issues were present the Director could announce a final decision. If the vote was not unanimous the Director was required to forward it to the Central Review Board for consideration. In cases where the vote was unanimous but the Director felt that novel issues or unusual circumstances were present he could also forward it to the Central Review Board.[40]

Review. The Industrial Personnel Security Review Program provided for a three-man Central Review Board located in Washington, D. C. Cases that reached the Review Board were considered only on the basis of the written record and determinations were made by majority vote. Decisions of the Review Board were final except that determinations to deny or revoke clearance could be reversed by

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[38] Ibid., Paragraph 20.b.

[39] Ibid., Paragraph 20.

[40] Ibid., Paragraph 21.

the Secretary of Defense or by joint agreement of the Secretaries of the three Military Departments.[41]

The Department of Defense modified the Industrial Personnel Security Review Regulation on 19 March 1959 to take into account the level of classified information to which the individual in question would have access.[42] Under this change in the regulation, decisions in security clearance cases were to take into consideration not only the derogatory data revealed but also the category of classified information to which the individual would be afforded access. Security clearances "for access to classified information of a specific classification category or categories" were denied or revoked if the available information revealed that such access was not "clearly consistent with the interests of the national security."[43] Security clearances thus for the first time were for access to specific categories of classified information.

The program as established under the Industrial Personnel Security Review Regulation provided for overall supervision and direction by a Director. Centralization existed at both the screening and review levels with Boards

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[41] Ibid., Paragraph 22.

[42] 24 Federal Register 3367 (1959).

[43] Ibid., Section 67.1-3.

located in Washington, D. C. Three Hearing Boards operated under the program with the continental United States divided into three regions. The screening level provided the individual with at least one uniform judgment. If he replied to the Statement of Reasons he was given a second judgment at the hearing level and in some cases received a third at the review level.

Greene Case

The final decision by the United States Supreme Court in the case of Greene v. McElroy had much to do with the development of the present Department of Defense Industrial Personnel Security Program.[44] William L. Greene was employed from 1937 until the time of his termination in 1953 with the Engineering and Research Corporation. He began employment as a Junior Engineer and Draftsman and eventually became Vice President and General Manager at an annual salary of $18,000.00

The Army granted Greene a CONFIDENTIAL security clearance on 9 August 1949. He was also granted two TOP SECRET security clearances, one on 9 November 1949 by the Assistant Chief of Staff G-2, Military District of Washington, and another on 3 February 1950 by the Air Materiel Command.

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[44] 360 U.S. 474 (1959); Daniel O'Connor, "The Greene Case," Industrial Security II (July, 1958), pp. 10, 39-41, provides additional background on the Greene case.

The Army-Navy-Air Force Personnel Security Board on 21 November 1951 informed the Engineering and Research Corporation that their facility clearance was in jeopardy of being rescinded because of a tentative decision to revoke Greene's security clearance. The firm was invited to respond to the notification and did so through its President, L. A. Wells, who stated that Greene was considered to be a loyal and prudent American. The Army-Navy-Air Force Personnel Security Board, however, informed Greene on 11 December 1951 that his security clearance had been revoked. He was informed of his opportunity to appear before the Industrial Employment Review Board for a hearing and was given a letter outlining the basis for the revocation. This letter indicated that he had between 1943 and 1947 attended the dinner of a Communist front organization, visited and entertained military representatives of the Russian Embassy and had been closely associated with members of the Communist Party.

Administrative remedies. Greene appeared for a hearing before the Industrial Employment Review Board on 23 January 1952. He explained that the Communist persons with whom he was supposed to have associated were in reality friends of his ex-wife, Jean Hinton Greene. He further stated that visits to foreign embassies including the Russian were done as part of his business. Witnesses presented on his behalf, several who were executives of the Engineering

and Research Corporation, corroborated his reasons for visiting the Russian Embassy. The Government on the other hand presented no witnesses but rather based its case on the investigative report. Greene was not given an opportunity to confront or cross-examine persons who had made statements of a derogatory nature about him and was not allowed access to the investigative report. After full consideration of the case, the Industrial Employment Review Board on 29 January 1952 reversed the decision of the Army-Navy-Air Force Personnel Security Board and notified Greene and his company that he was again authorized to have access to classified information.

The Secretary of Defense in a memorandum dated 27 March 1953 abolished the Army-Navy-Air Force Personnel Security Board, and the Industrial Employment Review Board.[45] The Industrial Personnel and Facility Clearance Program was not instituted until 4 May 1953.[46] During this interim period, on 17 April 1953, Secretary of the Navy Anderson wrote to the Engineering and Research Corporation informing them that after review of the Greene case it was felt that Greene's "continued access to Navy classified security information [was] inconsistent with the best interests of

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[45] Supra, note 30.

[46] Supra, note 31.

National Security."[47] The corporation was requested to exclude Greene from any part of the company where classified projects were being handled and also to deny him access to Navy classified information. Secretary Anderson also informed the company that the Greene case was being passed on to the Secretary of Defense with a recommendation that the decision of 29 January 1952 by the Industrial Employment Review Board be overruled. The Engineering and Research Corporation complied with Secretary Anderson's request thus leading to Greene's termination. Due to Greene's position with the corporation, there was no work available if his security clearance by the Navy was revoked.[48]

Greene had not been given a hearing prior to Secretary of the Navy Anderson's notification of 17 April 1953 to the Engineering and Research Corporation of his revocation of personnel clearance. He requested a reconsideration of the case and on 13 October 1953 received an answer from the Navy arranging for a hearing. The Navy indicated to Greene that his case had been forwarded to the Eastern Industrial Personnel Security Board for consideration and a final decision.

Greene was given a hearing before the Eastern Industrial

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[47] 360 U.S. 474, 481 (1959).

[48] Ibid., p. 476 discusses this point.

Personnel Security Board on 28 April 1954. The Chairman commenced the hearing by stating:

> The transcript to be made of this hearing will not include all material in the file of the case, in that, it will not include reports of investigation conducted by the Federal Bureau of Investigation or other investigative agencies which are confidential. Neither will it contain information concerning the identity of confidential informants or information which will reveal the source of confidential evidence. The transcript will contain only the Statement of Reasons, your answer thereto and the testimony actually taken at this hearing.[49]

He was informed that the suspension of his security clearance was based on substantially the same charges as those covered in his 1952 hearing before the Industrial Employees Review Board. During the course of the hearing, however, it became evident as the Board entered new subjects of inquiry that it was relying on statements of confidential informants and confidential investigative reports. Greene presented his case, was cross-examined but was not given any opportunity to confront or cross-examine these confidential statements. Within a relatively short time after the conclusion of the hearing the Eastern Industrial Personnel Security Board notified Greene it had decided that granting him access to classified information was not clearly consistent with the interests of national security. Greene requested a detailed summary of findings sustaining the Board's determination but

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[49] Ibid., p. 486.

was informed that security considerations prevented such a disclosure.

On 2 February 1955, the Industrial Personnel Security Review Regulation was instituted under the management of the Director, Office of Industrial Personnel Security Review.[50] The new program provided for a Central Review Board so Greene requested on 16 September 1955 a reconsideration of his case before the Central Review Board. On 12 March 1956 the Director, Office of Industrial Personnel Security Review wrote to Greene informing him that the decision of revocation of his security clearance by the Eastern Industrial Personnel Security Board had been considered by the Central Review Board and was affirmed.

Legal remedies. In addition to pursuing the administrative remedies described above, Greene had also undertaken legal action. After the 1954 decision of the Eastern Industrial Personnel Security Board,he filed a complaint in the United States District Court for the District of Columbia requesting a declaration that the revocation of his security clearance was unlawful. He also asked for an order demanding that the Defense Department inform the Engineering and Research Corporation that the revocation of his security clearance was void. Greene's contention was that denying

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[50] Supra, note 34.

him access to classified information based upon statements of confidential informants deprived him of a livelihood without due process of law. He argued that he had been forced out of an $18,000.00 a year job and was unable to obtain other similar employment except as an Architectural Draftsman at a salary of $4,400.00 per annum. Greene stipulated that because of the dependence of most aircraft industries on Department of Defense contracts and his experience in the field of aeronautical engineering he was barred from engaging in many phases of his chosen profession. He argued that the Defense Department had not been authorized by either the President or the Congress to establish an industrial personnel security program which caused persons to lose their employment and possibly be hindered in pursuing their chosen profession based upon security clearance decisions where they have been refused traditional safeguards of cross-examination and confrontation.

The Government argued that the President had authorized, in general terms, the Defense Department to establish procedures for protection of classified information. Although neither the President nor Congress had offered specific authorization, they had in essence acquiesced to the Department of Defense Industrial Personnel Security Program. Therefore, it was felt that the delegation of administrative authority needed to establish an industrial

personnel security program was thereby inferred.

Decision. The Greene case through a series of appeals reached the United States Supreme Court. The Supreme Court released its decision on 29 June 1959 and by a vote of eight to one held that neither the President nor Congress had explicitly authorized the Department of Defense to deprive Greene of his employment in an administrative proceeding where he was not furnished the protection of confrontation and cross-examination. The Chief Justice in his majority report indicated that the holding did not decide if the President had the inherent right to establish an industrial personnel security program, whether action by Congress was necessary, or what the confines on Presidential or Congressional authority might be. Rather, the decision only stated that with the nonexistence of specific authorization from either the President or Congress the Defense Department was not to deprive Greene "of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination."[51]

V. EXECUTIVE ORDER 10865

As a result of the Supreme Court's decision in the Greene v. McElroy, President Eisenhower issued Executive

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[51] 360 U.S. 474, 508 (1959).

Order 10805, dated 20 February 1960, entitled Safeguarding Classified Information Within Industry.[52] The scope of the Executive Order is outlined in Section 1.(a) which provides for the establishment of specific regulations, provisions and safeguards for the protection of classified information released to or within United States industry. The Executive Order in Section 2. provides for the issuance of security clearances "for a specific classification category only upon a finding that it is clearly consistent with the national interest to do so."[53]

Executive Order 10865 lists in Section 1. (a) only five agencies: (1) Department of State, (2) Department of Defense, (3) Atomic Energy Commission, (4) National Aeronautics and Space Administration, and (5) the Federal Aviation Agency, as being authorized and responsible to establish by regulation their own industrial security programs. It does provide, however, in Section 1.(b) that any governmental department or agency, including the aforementioned,

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[52]25 Federal Register, 1583 (1960); Timothy J. Walsh, "An Analysis of Executive Order 10865," Industrial Security, IV (April, 1960), pp. 4, 16-26; Robert W. Wise & Nacy Lou Provost, "New Procedures for Industrial Security Hearings," Industrial Security, V (January, 1961), pp. 4, 38-48 offer excellent perusals of Executive Order 10865.

[53]Infra, Chapter VI provides a discussion on this change in the standard to one of "national interest."

may by agreement with the Department of Defense extend the provisions of the Department of Defense Program to their department or agency.[54]

Executive Order 10909, dated 17 January 1961,[55] amended Executive Order 10865 to furnish travel expenses for witnesses in personnel security cases. It also provides that department and agency heads whose organizations are brought under the Defense Department Program are authorized to act in the capacity of a department head as outlined in the provisions of Executive Order 10865.

Although Executive Order 10865, as amended, delineates procedures for use in the Federal industrial personnel security programs its primary emphasis is on safeguards for the individual being considered for security clearance. Under the Executive Order a final denial or revocation may not be reached unless the individual has been given: (1) a Statement of Reasons, in as much detail as security considerations permit, of the cause for his denial or revocation; (2) a reasonable chance to supply a sworn written answer; (3) an opportunity, after he has supplied the sworn written answer, to appear in person and present evidence on

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[54] Supra, Chapter II, pp. 26-28, covers other Federal agencies and departments presently operating under the Department of Defense Program.

[55] 25 Federal Register 508 (1961).

his own behalf; (4) a reasonable period of time in which to prepare for his appearance; (5) a chance to be represented by an attorney; (6) an opportunity to cross-examine persons either orally or by written interrogatories;[56] and (7) a written advisement regarding the final decision made by the department head or his designee, which, if adverse to the individual, outlines the findings on each allegation in the Statement of Reasons.[57]

Provisions similar to those outlined above were contained in the program under Department of Defense Directive 5220.6, dated 2 February 1955, with the exception of cross-examination of Government witnesses. The Executive Order in Section 4.(a) expressly provides that the individual be given the opportunity to cross-examine those persons having made statements considered adverse to the subject which relate to a controverted issue; a controverted issue being an allegation listed in the Statement of Reasons which has been specifically refuted by the subject in his response to the Government.[58]

Some other considerations of the Executive Order are

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[56] 25 Federal Register 1583 (1960), Section 4.(1)(2) lists the exceptions to the right of cross-examination by the subject. These exceptions are covered in detail under Section VII of this chapter.

[57] Ibid., Section 3.

[58] Supra, note 56.

as follows: (1) Section 6. provides for the issuance of invitations to testify by the Secretary of State, the Administrators of the Federal Aviation Agency and the National Aeronautics and Space Administration, and the Secretary of Defense or the head of any agency or department coming under the Department of Defense Program;[59] (2) Section 7. requires that all denials or revocations of security clearances be in terms of the "national interest" standard rather than a decision "as to the loyalty of the applicant concerned;" and (3) Section 9. allows the department or agency head the right to revoke or deny access to a specific category of classified information if provisions of the Executive Order "cannot be invoked consistently with the national security and such determination shall be conclusive."

A White House statement attendant to Executive Order 10865, as promulgated on 20 February 1960, stated that detailed regulations by each of the departments would be provided to implement the provisions of the order. The Department of Defense provided their implementing regulation for administrative review in industrial personnel security

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[59] 72 Stat. 731, 792 (1958) provides the Federal Aviation Agency with subpoena power while 68 Stat. 919, 948 (1954) gives similar authority to the Atomic Energy Commission.

cases in a directive issued on 28 July 1960.[60]

VI. PERSONNEL SECURITY

General.

Defense Department regulations prescribe that only those persons who require access to classified information in connection with their assigned duties shall be processed for personnel security clearances. Under this program access to a specific category of classified information is granted or continued in effect if it is decided that such access is "clearly consistent with the national interest."[61] Individuals who are granted security clearances are only allowed access to classified information of the same or lower level as their security clearance and only on a

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[60] United States Department of Defense, Industrial Personnel Access Authorization Review Regulation - Directive 5220.6 (Washington: Office of Personnel Security Policy, 1960). Each of the military services has issued detailed regulations for implementing the provisions of Department of Defense Directive 5220.6, dated 28 July 1960. See United States Department of the Air Force, Air Force Regulation No. 205-12, Access Authorization Review for Industrial Personnel and Facilities. (Washington: Department of the Air Force, 14 January 1961); United States Department of the Army, Army Regulations No. 380-14, Industrial Personnel - Access Authorization Review, (Washington: Headquarters, Department of the Army, 9 September 1960); and United States Department of the Navy, OPNAV Instruction 5510.40B, Industrial Personnel Access Authorization Review Regulation. (Washington: Department of the Navy, 17 October 1960). No attempt will be made in this study to cover these detailed departmental regulations.

[61] Ibid., Paragraph III A.

"need to know" basis.[62] Persons to be eligible for security clearances must be at least sixteen years of age for CONFIDENTIAL and eighteen years old for TOP SECRET and SECRET. Aliens are not eligible for security clearance unless they are immigrant aliens who have formally declared their intention to become citizens of the United States.[63]

Consideration for a facility clearance requires security clearances for certain key personnel of the contractor. These key personnel must be granted security clearances to a level commensurate with the clearance for the facility. Denial of security clearances to these key personnel results in denial of the facility clearance itself. These employees, however, have recourse to the hearing and appeal procedures of the Defense Department and if they are subsequently granted security clearance, the organization in turn may be granted a facility clearance.

Negotiators may be processed for security clearances concurrent with, but not as a part of, the security clearance for the facility. Denials of security clearances to negotiators and to additional personnel cleared after a firm has been granted a facility clearance in no way affect the status of such a facility clearance. The firm, in fact, may

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[62]United States Department of Defense, Industrial Security Manual for Safeguarding Classified Information, op. cit., Paragraph 3.w. explains the "need to know" provision.

[63]Ibid., Paragraph 15 a.b.d.

even continue to employ these individuals as long as they are effectively denied access to classified information.

All security clearances issued as part of the facility clearance and those for negotiators who are processed concurrent with the facility clearance action are granted by the Government. TOP SECRET, SECRET and all levels of security clearances for immigrant aliens are also issued by the Government. Contractors, with the exception of colleges, universities or graphic arts facilities, may grant final security clearances through CONFIDENTIAL.

CONFIDENTIAL security clearances are based upon a determination by the contractor that: (1) the employee's records of employment are in order, (2) there is no known information about the employee which would indicate that access to classified information is not clearly consistent with the national interest, and (3) the Application and Authorization for Access to Confidential Information (DD Form 48-2) has been properly executed. In order to grant a CONFIDENTIAL security clearance the DD Form 48-2 must reflect that:(1) the employee is a citizen of the United States; (2) he has never had a security clearance suspended, denied or revoked; (3) he has never ended a prior employment with a contractor or the Government when his security clearance was pending, unless the security clearance was subsequently granted by the Government; and (4) the

answers to Questions 18a. through f. regarding membership in, or association with, organizations on the Attorney General's List are negative. When the determinations as listed above cannot be made by the contractor, he is required to forward the case to the Cognizant Security Office for consideration.[64]

Questions 16 and 17 on the Application and Authorization for Access to Confidential Information (DD Form 48-2) are concerned with employees who have lived in Sino-Soviet Bloc countries or who presently have relatives or relatives of their wives residing in Sino-Soviet Bloc countries. These security clearance cases are considered Hostage Cases and are referred to Cognizant Security Office for further disposition.[65]

Submission for security clearance. Applications for security clearance are submitted along with necessary forms by the contractor to the Cognizant Security Office. The Cognizant Security Office, upon receipt, reviews all of the necessary forms and initiates with the proper military investigative unit the appropriate level of investigation for the clearance involved.[66]

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[64] Ibid., Paragraph 18.b.

[65] United States Department of Defense, Armed Forces Industrial Security Regulation, op. cit., Paragraph 2-201.4 lists procedures for processing of Hostage Cases.

[66] The Cognizant Security Office forwards investigative requests to their military investigative units which are for the respective Military Departments; Army--Intelligence Corps Command; Navy--Office of Naval Intelligence; and Air Force--Office of Special Investigations.

Investigations

The scope and extent of an investigation on an individual seeking security clearance varies with citizenship, the type of organization with which he is employed and the level of classified information to which he will be afforded access. If derogatory information is developed in the course of the inquiry, the investigation is expanded, as required, so that sufficient information is obtained whereby a decision on whether to grant, deny or revoke security clearance can be made. If the industrial employee terminates his employment for any reason the investigation is discontinued.

Table I presents the investigative basis for the various categories of security clearances as outlined in Paragraph 2-203 of the Department of Defense Armed Forces Industrial Security Regulation.

Background Investigation. A complete Background Investigation is required for TOP SECRET security clearances of United States citizens and TOP SECRET, SECRET and CONFIDENTIAL security clearances for immigrant aliens. Background Investigations are complete perusals into the subject's integrity, reputation and loyalty to the United States and usually cover the person's life from his eighteenth birthday or for the last fifteen years whichever

TABLE I

INVESTIGATIVE BASIS FOR VARIOUS LEVELS
OF PERSONNEL SECURITY CLEARANCES

UNITED STATES CITIZENS		IMMIGRANT ALIENS	
CLEARANCE LEVEL	INVESTIGATIVE BASIS	CLEARANCE LEVEL	INVESTIGATIVE BASIS
Top Secret	Background Investigation	Top Secret	Background Investigation
Interim Top Secret	National Agency Check (1)	Interim Top Secret	Not Authorized
Secret	National Agency Check	Secret	Background Investigation
Interim Secret	Local Records	Interim Secret	National Agency Check (1)
Confidential	National Agency Check	Confidential	Background Investigation
Interim Confidential	Local Records	Interim Confidential	National Agency Check
Confidential (2)	Completion of DD Form 48-2, inspection of company records, other as determined by the clearing industrial firm.	(1) Requires special authorization from the Secretary of the Contracting Military Department or his appointed representative. (2) Investigation conducted and clearance granted by industrial organization except colleges, universities and graphic arts facilities.	

is the lesser period.[67]

National Agency Check. A National Agency Check includes reviews of the dossiers of several governmental agencies.[68] National Agency Checks are required for Interim TOP SECRET, SECRET and CONFIDENTIAL security clearances granted to United States citizens and Interim SECRET and Interim CONFIDENTIAL security clearances granted to immigrant aliens. Interim TOP SECRET for citizens of the United States and Interim SECRET for immigrant aliens, however, require special authorization from the Secretary of the Contracting Military Department or his appointed representative. Interim TOP SECRET security clearances are not authorized under any conditions for immigrant aliens.

Local Record Check. A check of Local Records is required for issuance of an Interim SECRET or Interim CONFIDENTIAL security clearance to United States citizens.

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[67]United States Department of Defense, Armed Forces Industrial Security Regulations, op. cit., Paragraph 2-208 b. provides a description of the scope of a Background Investigation; see also United States Department of the Air Force, Air Force Regulation No. 205-6, Personnel Investigations, Security Clearance and Access Authorization (Washington: Department of the Air Force, 11 June 1962.), Paragraph 8., for a sample of the detailed areas of inquiry for a Background Investigation.

[68]United States Department of Defense, Armed Forces Industrial Security Regulation, ibid., Paragraph 2-208 a. lists the agencies checked under the Department of Defense Program for completion of a National Agency Check.

A check of Local Records includes a satisfactory review of government forms submitted under the clearance requirements, other similar information available in the Cognizant Military Department files and other local records as available.

Other. CONFIDENTIAL security clearances which may be granted by the contractor are based upon inspection of the employees company records, completion of the Application and Authorization for Access to Confidential Information (DD Form 48-2), and other investigation as required by the individual firm.[69]

Special Considerations

Interim security clearances. When emergency situations develop where crucial delays in granting of security clearances would be inimical to the best interest of the Government, interim security clearances may be granted. Such clearances are based upon lesser investigative requirements than prescribed under the regulations and are granted on a temporary basis pending fulfillment of the complete investigation. Interim security clearances, however, may not be issued unless a request has been initiated for a final investigation.[70] If during the course of an investigation derogatory information is developed, the interim

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[69] Supra, note 64.

[70] United States Department of Defense, Armed Forces Industrial Security Regulation, op. cit., Paragraph 2-201.

clearance may be withdrawn pending completion of the entire investigation.[71] Withdrawal of interim security clearance, however, is not considered as denial or revocation and as such not subject to appeal under the Administrative Review Procedures.[72]

Additional clearance requirements. Clearance requirements for access to Restricted Data are outlined in Paragraph 2-204 of the Armed Forces Industrial Security Regulation. Provisions governing issuance of security clearances for access to cryptographic information are listed in a supplement to the Industrial Security Manual for Safeguarding Classified Information.[73] Special clearance requirements for access to communication analysis information are prescribed by the National Security Agency. A denial or revocation of access to either cryptographic or communication analysis information is a separate action not appealable under Defense Department regulations[74] and outside the scope of this report.

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[71] Ibid.

[72] United States Department of Defense, Industrial Security Manual for Safeguarding Classified Information, op. cit., Paragraph 15.c.

[73] United States Department of Defense, Cryptographic Supplement to the Industrial Security Manual (Washington: Government Printing Office, 1961), Paragraph 13.

[74] United States Department of Defense, Industrial Security Manual for Safeguarding Classified Information, op. cit., Paragraph 42., 42.1.

Emergency denials, suspensions or revocations. Denials or revocations of security clearances are made under the procedures of the Industrial Personnel Access Authorization Review Regulation. However, certain high echelon officials of a Military Department may suspend a security clearance previously granted in exceptional cases where the information supplied indicates that retention of the security clearance by the individual would "constitute an immediate threat to the national interest."[75] If significant evidence exists indicating the possibility of espionage the emergency suspension may be taken by an authorized subordinate. Such a suspension of security clearance is made pending further investigation and consideration under the provisions of the Industrial Personnel Access Authorization Review Regulation.

Application of the Criteria

Decisions to grant, deny or revoke security clearances are made in the light of the standard and criteria as set forth in the Defense Department's Industrial Personnel Access Authorization Review Regulation. To assist in making a determination on security clearances the regulation provides twenty-one criteria of the types of activities and associations

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[75]United States Department of Defense, Industrial Personnel Access Authorization Review Regulation, op. cit., Paragraph IV.A.

which may be used in applying the standard.[76] Generally these criteria deal with types of activities which, if engaged in by the subject, would create serious doubts as to his suitability for security clearance. In applying these criteria to the standard in a particular case such factors as the following regarding the individual's conduct may be considered: (1) its seriousness; (2) its implications; (3) its recency; (4) its motivation; (5) the degree of its voluntary undertaking with knowledge of the circumstances involved; and (6) the probability of its continuing in the future. The ultimate decision on granting, denying or revoking security clearance, therefore, is an overall common-sense one based upon all available pertinent information.[77]

Screening of Repoarts

Upon completion of an investigation, the military investigative unit forwards the report along with any other pertinent data to the Cognizant Security Office for screening and an initial decision. The Cognizant Security Office may grant the security clearance, return the case for additional investigation or recommend denial or revocation. If the Cognizant Security Office decides to grant a security clearance, it issues a Letter of Consent (DD Form 560) to the

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[76] Ibid., Paragraph III.B.

[77] Ibid., Paragraph III.C.1.

requesting facility. If, however, a decision to grant a security clearance cannot be made, the case is forwarded to the Cognizant Military Department with a recommendation that the security clearance be denied or revoked.

Upon receipt of a security clearance case from the Cognizant Security Office, the Cognizant Military Department reviews it for adequacy. The Cognizant Military Department may return it for further investigation or make a decision to grant, deny or revoke the security clearance. If a decision is made to deny or revoke the security clearance, the case is forwarded along with a recommendation to the Office of Industrial Personnel Access Authorization Review for further consideration.

VII. ADMINISTRATIVE REVIEW PROCEDURES

The Administrative Review Procedures for the Department of Defense are authorized in the Industrial Personnel Access Authorization Review Regulation. This regulation establishes uniform methods, standards and criteria for processing of personnel security cases to final determinations.

The Department of Defense Program is administered by a civilian director appointed by the Secretary of Defense, who reports directly to the Assistant Secretary of Defense for Manpower. It provides for a Central Screening Board and a Central Review Board, both located in Washington, D. C.,

and three Field Boards in New York, Washington, D. C. and Los Angeles respectively. A staff of attorneys is also included as part of the Office of Industrial Personnel Access Authorization Review to act as Counsels for the Defense Department. All persons appointed as board or staff members or Directors must possess TOP SECRET security clearances.[78]

Screening Board

The Central Screening Board is appointed by the Secretaries of the three Military Departments. The Board consists of three members, military or civilian, one from each of the Military Departments with a Chairman appointed by the Director.[79]

Upon receipt of the investigative report and other pertinent data, the Screening Board makes an initial determination regarding the individual's security clearance. A decision to grant or continue in effect a security clearance is made by unanimous vote in an executive session where only members of the Screening Board are present. In such decisions the Screening Board notifies the Director who, in turn,

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[78] Ibid., Paragraph II.

[79] Ibid., Paragraph II.F. provides that when agency cases are referred for consideration under the program it shall be the appropriate Administrator's privilege to appoint one member to the Screening Board and two members to the Central Review Board. In such instances the Screening Board consists of four members and the Central Review Board of five members.

contacts the appropriate agency or activity regarding the decision. If the Screening Board feels that further processing of the case is required it may ask the Director to: (1) request additional investigation, (2) forward a written interrogatory to the individual, (3) arrange for an interview with the person in question, or (4) set up an interview with any person who has provided information relevant to the case. If the decision is adverse to the individual or if the vote to grant or continue in effect a security clearance is not unanimous, the case is processed further under the provisions of the regulation.[80]

Suspension. The Screening Board may at any time during its consideration of a case suspend an existing security clearance. In such a case the Cognizant Military Department, the contractor, and the individual are notified of the determination to suspend.

The Screening Board may also decide to suspend for a period of one year a previously granted security clearance in a case "involving a serious and willful violation of security regulations."[81] This determination may be invoked irrespective of a favorable decision by the Board if it

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[80] Ibid., Paragraph IV.C.

[81] Ibid., Paragraph IV.J.1. This provision for a one year suspension of security clearance was instituted in a revision to the Industrial Personnel Access Authorization Review Regulation, dated 16 November 1963.

believes that after consideration of the facts in the case, such a suspension is required in order to safeguard classified information. A Statement of Reasons regarding the one year suspension is prepared by the Screening Board and forwarded to the Director for transmission to the individual along with notice of his clearance status pending a final decision. If the individual contests the suspension within fifteen days after receipt of the Statement of Reasons it does not take effect until a final decision has been rendered. If, on the other hand, the subject does not contest the suspension within the fifteen day period the Director orders it into effect. At the expiration of the one year suspension the individual must then reapply for reinstatement of his security clearance.[82]

Notice. When the Screening Board reaches a decision unfavorable to the individual, it prepares in as much detail as security considerations permit, a Statement of Reasons for the denial or revocation. The Director upon receipt of the Statement of Reasons from the Screening Board forwards it along with a copy of the Industrial Personnel Access Authorization Review Regulation to the individual in question. The Director informs the subject of the status of his security clearance pending a final decision in the

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[82] Ibid., Paragraph IV.J.

case. TOP SECRET and SECRET security clearances are automatically suspended or limited to CONFIDENTIAL commensurate with the issuance of the Statement of Reasons.[83] The individual is also informed of the requirements for submitting a written answer to the Statement of Reasons prior to being afforded an opportunity for a hearing. No answer or an insufficient answer by the individual to the Statement of Reasons results in a denial or revocation of security clearance.

Answer. To be eligible for a hearing the individual must file under oath or affirmation, a written reply to the Statement of Reasons. The written answer must specifically concede, contradict or disclaim knowledge of each and every allegation and supporting fact enumerated in the Statement of Reasons. A general denial of the allegations set forth in the Statement of Reasons is not regarded as sufficient and may be rejected by the Director. If the Director declines to accept the individual's answer the case is decided on the basis of the record.

In submitting a written answer in accordance with the above procedures the individual may elect to request either a hearing or a decision on the basis of the record including his answer to the Statement of Reasons. In the latter

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[83] Ibid., Paragraph IV.C.5., however, provides that the Screening Board must make a suspension or limitation decision in cases where the security clearance had been previously granted as a result of Board action under any industrial personnel security review program.

situation the Director forwards the case to the Central Review Board for a decision while in the former he assigns it to a Field Board for a hearing. If a hearing is to be held, the individual is afforded: (1) an opportunity to appear personally and present evidence on his own behalf, (2) a reasonable time in which to prepare for the hearing, (3) the right to counsel of his choice, and (4) an opportunity to cross-examine witnesses making statements or allegations adverse to his case.[84]

Field Boards

There are three regional Field Boards which hear personnel security cases. Each of the Boards consists of three members, one from each of the Military Departments; they may be either civilian or military employees. Each Field Board must have either one civilian member and one qualified attorney or a civilian member who is a qualified lawyer.

The Chairman of the Field Board upon receipt of the case from the Director designates a time and place for the hearing. The hearing is designed to be an administrative inquiry held so that: (1) the subject may appear personally in support of his eligibility for a security clearance and

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[84] Ibid., Paragraph IV.E.2.f. covers exceptions to the right of cross-examination of witnesses.

(2) the Defense Department may peruse the facts of the particular case in question. In most instances the hearing is held at the regional office of the Field Board, but it may upon request from the subject or at the discretion of the Chairman convene at other locations.[85] If the individual fails to appear at the hearing without providing sufficient justification, the Field Board returns the case to the Director who in turn revokes or denys the security clearance.

Conduct of hearings. The hearing is a closed one attended only by the members of the Field Board, the individual and his attorney or representative, the Department Counsel and other authorized personnel of the Defense Department. The hearing is normally convened with a reading of the Statement of Reasons [86] and the individual's answer thereto, followed by a general statement by the subject or his attorney. The individual then presents his case through the use of witnesses testifying in his behalf and by offering documents and other data in support of his application for security clearance.

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[85] Ibid., Paragraph II.C.1. provides that the Field Boards may convene panels at other than the regional office to offer more convenience to the person involved.

[86] Ibid., Paragraph IV.E.1.g. provides that the Field Board may amend the Statement of Reasons so that it conforms with the available information. If amendments are made the subject is given additional time to answer the amendments and to obtain and present evidence regarding the amendments.

The hearing is conducted without limitation to the technical rules of evidence admissibility as required in United States courts. Any evidence, oral or documentary, may be considered if it is relevant and material. Upon receipt of a notice from the individual or the Department Counsel a ruling is made as to whether testimony is to be taken personally, by disposition or through cross-interrogatories.

Physical evidence, other than investigative reports, may be considered without authenticating witnesses if subject to rebuttal, providing the evidence was supplied by an authorized investigative organization. Such evidence, if classified, and if related to a controverted issue, may be considered without the subject being afforded an opportunity to review it, providing: (1) the department head or his designee has made a decision that it seems to be material; (2) the department head or his designee has determined in view of the degree of access being considered that failure to consider it would be of substantial harm to the national security; and (3) the applicant is given a synopsis of the evidence in as much detail as national security permits.[87]

Confrontation and cross-examination. No information adverse to the subject on any controverted issue may be

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[87]Ibid., Paragraph IV.E.2.

admitted unless the information has been made available to the subject and (1) he has raised no protest to its consideration, or (2) he is given an opportunity to cross-examine the individual providing the information.[88] Cross-examination by the individual or his attorney may be handled orally for witnesses present at the hearing or through cross-interrogatories for testimony taken by deposition or interrogatories.

The right of cross-examination by the individual of persons making adverse statements has some explicit limitations. First, the subject may not cross-examine witnesses or statements relating to the character of persons or organizations listed in the Statement of Reasons unless such information relates to the subject himself.[89] Second, the individual may only cross-examine witnesses or statements on controverted issues. If he has not specifically answered in his response to the Director the allegation made in the Statement of Reasons, he may not cross-examine either the person or the information regarding the specific allegation.[90]

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[88] Ibid., Paragraph IV.E.2.f.

[89] Ibid., Paragraph IV.E.2.g.

[90] Walsh, op. cit., p. 20. provides a discussion on this point.

Other exceptions are provided relative to the right of cross-examination by the individual. These exceptions include cases where the department head furnishing the statement certifies that the individual supplying the information is a confidential informant who has been utilized to acquire information of an intelligence nature and that divulgence of his identity would cause substantial harm to the national interest.[91] The individual may also be restricted from cross-examination in cases where the person supplying the data is unable to appear for testimony as a result of (a) severe illness, death, or similar cause or (b) because of some other reason specified by the department head as being good and sufficient.[92] If information is utilized from persons falling into the category of (a) above, the head of the department or his special designee must determine that the individual furnishing the information and the information itself appears to be accurate and reliable and that failure to review it would, in view of the access desired, be detrimental to the national security.

In all cases where denial of the right of cross-

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[91]United States Department of Defense, Industrial Personnel Access Authorization Review Regulation, op. cit., Paragraph IV.E.2.f.(1).

[92]Ibid., Paragraph IV.E.2.f.(2); see also Wise and Provost, op. cit., pp. 42-43 for consideration of this limitation on the right of cross-examination.

examination under the above procedures is involved the subject is furnished in as much detail as security considerations permit, a synopsis of the information; appropriate regard is given to the fact that the subject was not afforded the opportunity for cross-examination; and a final decision adverse to the subject is made only by a department head predicated upon his personal examination of the case.

If during the course of the hearing the Field Board determines that certain facts have not been adequately investigated or fully explored, it may petition the Director to request further inquiry by the appropriate investigative unit. The Chairman of the Field Board may also allow the individual supplemental time in which to obtain additional evidence or submit a brief.

A written transcript of the hearing is furnished to the individual at his request. This transcript, however, is perused prior to its release by the Field Board to ensure that it does not contain classified information or any data which might tend to identify either confidential investigative methods or sources.[93]

Recommendation of the Field Board. The Field Board after consideration of the entire record and any arguments offered or briefs submitted makes a decision in the case.

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[93]United States Department of Defense, Industrial Personnel Access Authorization Review Regulation, op. cit., Paragraph IV.E.1.j.

After making a determination in a case, the Field Board prepares a report containing: (1) a listing of the questions presented, (2) a synopsis of the evidence obtained, (3) findings of fact regarding each allegation, (4) its conclusion pursuant to each question offered for consideration, and (5) a recommended determination in the case. Upon completion, the report is forwarded through the Director to the Central Review Board for consideration. No copy of the Field Board's report is made available to the subject.[94]

Review Board

The Secretaries of the three Military Departments each appoint one member, military or civilian to the Review Board. The Board must have one member who is an attorney and at least one member who is a civilian. The Director designates one of the Board to serve as Chairman.

The Review Board makes a final determination in all cases except those where the decision is adverse to the subject and he has been denied the right of cross-examination under the above-listed provisions. In such cases when the Reyiew Board concludes that security clearance to a specific category of classified information is not warranted, it forwards the case through the Director to the Secretary of Defense or the appropriate agency or department head for a

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[94] Ibid., Paragraph IV.F.

final decision.[95]

The Review Board in reaching its final decision is empowered to accept or reverse the recommendation or modify the finding and conclusions of the Field Board. It may return the case through the Director to the Field Board for further testimony or other proceedings or may request supplemental investigation.

A final decision by the Review Board is reached by majority vote and if not unanimous, a minority opinion is filed. The majority opinion includes a finding on the various facts, an analysis of the evidence presented and a presentation of the basis for the decision.

The Review Board is required to execute certain procedural actions prior to making a final determination in a personnel security case. First, if the Review Board makes a tentative decision which is adverse to the individual it forwards, through the Director, to the individual a notice of this determination. This notice enumerates the proposed findings for or against the individual with regard to each of the allegations listed in the Statement of Reasons. The individual is given an opportunity to appear personally or file a written brief about the tentative decision. If, on the other hand, the Review Board's tentative determination

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[95]Ibid., Paragraph IV. H.

is favorable to the individual the Board forwards, through the Director, notice of the decision to the Department Counsel. The notice outlines the Board's proposed findings for or against the individual regarding each of the allegations listed in the Statement of Reasons. The Department Counsel is then given an opportunity to file a written brief or appear personally before the Board.

When either the individual or the Department Counsel, as appropriate under the provisions listed above, is to appear personally or file a written brief, the other party shall also be entitled to do likewise. The opportunity to file written briefs or to appear personally before the Review Board is permitted so that the individual or the Department Counsel, as appropriate, may offer their positions in the case. Arguments are allowable, but the entire proceeding is based exclusively upon the record of the case made at the hearing before the Field Board. No witnesses are called or testimony taken.[96]

Final Decisions

A final determination reached by either the Review Board or the agency or department head is announced by the Director. If the decision is favorable to the individual he is advised only of the determination reached. When the

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[96] Ibid., Paragraph IV.G.

decision is adverse to the subject, however, he is informed of the determination reached and also the conclusions, for or against him, regarding each allegation listed in the Statement of Reasons.[97]

Reconsideration of Cases

Cases where the individual has failed to answer a Statement of Reasons and thus had his security clearance denied or revoked may be reconsidered by the Screening Board. Reconsideration by the Screening Board requires a request from the Director or the individual after a decision by the Screening Board that such a reevaluation of the case is justified because of newly discovered evidence or for some other good reason.

Cases may be reconsidered by the Review Board at its own discretion or at the request of the subject, if they determine that newly discussed evidence or some other good reason justifies such a reconsideration. They may also reconsider cases where the Secretary of Defense, the Director, the Secretary of one of the Military Departments or an appropriate department or agency head requests it.[98]

A Defense Department agency or activity which acquires new derogatory data on an individual may cause a case to be

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[97] Ibid., Paragraph IV.H.

[98] Ibid., Paragraph IV.H.3.

reconsidered. Cases are forwarded to the Director for reconsideration after the agency or activity has reviewed the complete record of any prior proceedings and determined that revocation of the security clearance is justified because of this new additional derogatory data.[99]

VIII. CONCLUSION

The Industrial Personnel Security Program of the Defense Department affects more industrial employees than any other program. It is designed to safeguard classified information released to industry by ensuring that only trustworthy and suitable individuals are allowed access to our national secrets.

The present Department of Defense Industrial Personnel Security Program has become quite sophisticated in comparison to the program utilized during the early 1940's. During the early World War II years questionable industrial employees were removed from their employment without explanation or the possibility of recourse.

The completion of World War II saw the establishment of the requirement for written consent by the Government for granting of access to TOP SECRET and SECRET classified information. The first standard required that issuance of

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[99] Ibid., Paragraph V.B.2.

security clearance be made only if it were not "inimical to the interests of the United States." By the late 1940's the Military Departments had established an Army-Navy-Air Force Personnel Security Board to consider security clearance cases with an Industrial Employees Review Board acting as an appellate agency.

The first extensive Industrial Personnel Security Program under the Department of Defense was established in May 1953 under the Industrial Personnel and Facility Clearance Program. This consisted of three Regional Boards, each with a Hearing and Appeal Division. Under this program security clearance was denied or revoked if granting of clearance was not "clearly consistent with the interests of national security."

A more centralized system for personnel security was created under the Industrial Personnel Security Review Program established in 1955. It provided for a Central Screening Board, Regional Hearing Boards and a Central Review Board. This organizational structure is presently utilized under the Department of Defense Program.

Confrontation and cross-examination of persons or statements adverse to the subject were not required until after the Greene case decision in 1959. The issuance of Executive Order 10865, as amended, changed the standard so that security clearances are presently issued when it is "clearly consistent with the national interest."

CHAPTER IV

ATOMIC ENERGY PROGRAM

On 6 August 1945 an American bomber dropped an atomic bomb on the Japanese city of Hiroshima. The physical impact of the bomb was felt by the people of Japan, but its other repercussions echoed throughout the rest of the world. Indeed, this event began a new historical era, an era that bears the label of "The Atomic Age."

Secrecy was a characteristic of the development of the Atomic Energy Program from its inception. Not until that fateful day of 6 August 1945 did the American public realize that an Atomic Energy Program had been carried out by a top secret organization of the Government. Even after Hiroshima and throughout the completion of World War II, the program remained cloaked in secrecy. Since then, the field of Atomic Energy has continued to have security controls although they have become much less stringent in recent years.

Security in the Atomic Energy Program has been basically divided into three interdependent areas: (1) physical security, (2) personnel security, and (3) document and information control. Personnel security has been concerned with the determination of eligibility for security clearance of employees of the Atomic Energy Commission and its contractors, licensees and access permittees where

actual or possible access to Restricted Data is involved. This chapter will present the historical development of personnel security under the Atomic Energy Program and its present mode of operation.

I. EARLY HISTORY OF THE PROGRAM

January 1939 saw the announcement of the hypothesis of fission and its experimental confirmation. In March of the same year, a conference was held with the Navy Department to discuss the possible military use of the large amounts of energy released in the process of fission. The Navy Department expressed an interest in the discovery, but it was not until October of 1939 that the Government actually became involved.[1]

On 11 October 1939 President Franklin D. Roosevelt was visited by Dr. Alexander Sachs, a well-known economist. Sachs, supported with a correspondence from Albert Einstein, informed the President that Germany had made substantial advancement in the process of fission and could possibly produce an atomic bomb in the near future. Shortly after his meeting with Dr. Sachs the President appointed an Advisory Committee on Uranium, composed of top military and

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[1]Henry D. Smyth, Atomic Energy for Military Purposes (Princeton: Princeton University Press, 1945), pp. 45-47.

scientific personnel, to study the problem. In June 1940 the National Defense Research Committee was established to obtain scientific assistance for military problems concerning Atomic Energy, and the Uranium Committee was reconstituted under it.[2] The Uranium Committee remained as a subdivision of this Research Committee until November 1941 when it was transferred to the Office of Scientific Research and Development. Here it remained until a reorganization of the Atomic Energy Program began in the early months of 1942.[3]

Military Control

A gradual transfer of work from the Office of Scientific Research and Development to an administrative unit established by the War Department, called the Manhattan Engineering District, began in early 1942. By the summer of 1942, the Army Corps of Engineers under the Manhattan Engineering District was assigned control of the procurement and engineering functions of the Atomic Energy Program. As the industrial effort got under way, the military began playing an increasingly important role. The era of complete military control commenced in May 1943 with the transfer of all research and development contracts to the Manhattan Engineering District.[4]

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[2] Ibid., pp. 47-49.

[3] Ibid., pp. 75-79.

[4] Ibid., p. 86.

All work on the Atomic Energy Program during the war was secret. The details of the two billion dollar undertaking were known only to a handful of scientists, the military leaders of the Manhattan Engineering District and the top echelons of the Government. Rigid security regulations were imposed for the protection of the project. The wartime work on the Atomic Energy Program was a military monopoly, but the actual work was primarily carried out by industrial contractors and universities. This industrial participation was a feature which remains as an intricate part of the Atomic Energy Program.

Personnel security under the military. The Atomic Energy Program under the Manhattan Engineering District was divided into administrative units or areas. Each area was assigned a Security Officer who was fully responsible for security clearances of all persons connected with the program in that area. All persons associated with the program, even though working in unclassified positions, were investigated.[5] Those having access to TOP SECRET or SECRET information were extensively investigated by the Army's Military Intelligence. The Area Security Officer was responsible for reviewing the

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[5]United States Congress, Joint Committee on Atomic Energy, Investigations into the United States Atomic Energy Project, Part 23, 81st Congress, 1st Session (Washington: Government Printing Office, 1949), p. 977, outlines the investigative basis for persons associated with the program.

investigative reports and clearing those persons whose reports were evaluated as not containing sufficient derogatory information to establish a question as to the individual's eligibility for security clearance. Cases where the reported derogatory information was of a criminal nature were disposed of administratively by the Area Security Officer. If, however, he encountered a case of a loyalty nature or one which required an evaluation of the derogatory data in relation to the individual's value to the program, the case was referred to the Chief of Security and Intelligence Division at Oak Ridge, Tennessee. Final disposition of the case was then made by the Chief of Security and Intelligence Division or by succeeding higher commands, depending upon the circumstances.[6]

Denials of security clearances were handled in varying methods by the military. The individual either had his employment terminated for administrative reasons or was transferred to a less sensitive job. The denial of security clearance was not made public and no administrative review was given to the affected person. The urgent and highly secret nature of the Atomic Energy Program required swift action. Cases were abruptly dealt with where the individual's dependability was a matter of question. However,

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[6]Ibid.

because talent for conducting atomic research was both needed and limited, many persons were cleared by the military as calculated risks. Investigations were continued and, in some instances, surveillance maintained on these questionable individuals.[7]

II. ATOMIC ENERGY ACT OF 1946

The successful culmination of the war effort led to many problems with the Atomic Energy Program. The War Department complained that the program was drifting without specific legislation and becoming stagnated.[8] Congress, realizing the need for legislation in the field, responded by enacting the Atomic Energy Act of 1946.[9]

The basic objective of the statute was outlined in Section 1.(a) which declared the policy of the United States to be:

> subject at all times to the paramount objective of assuring the common defense and security, the development and utilization of atomic energy shall, so far as practicable, be directed toward improving the public welfare, increasing the standard of living, strengthening free competition in private enterprise, and promoting world peace.

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[7] Ibid.

[8] Commission on Government Security, Report of the Commission on Government Security (Washington: Government Printing Office, 1957), p. 189.

[9] 60 Stat. 755 (1946).

The act in Section 2. provided for a civilian Atomic Energy Commission headed by five full time commissioners with a General Manager to administer the daily operations of the program. The Commissioners, all United States citizens, were appointed by the President with the advise and consent of the Senate. The General Manager, in turn, was appointed by the Commission and served subject to its discretion.

The statute gave the Commission the responsibility for the protection of a special category of classified information labeled "Restricted Data."[10]

The Commission was directed in the Act of 1946 to establish a license system for regulation of fissionable or source materials.[11] Employees of licensees as well as employees of contractors were required to obtain security clearances prior to being afforded access to Restricted Data. For the sake of brevity the term "contractor" shall hereinafter be used to designate licensees of the Commission as well as Atomic Energy Commission contractors.

Congress prescribed in the Act of 1946 stringent regulations for dealing with personnel employed under the Atomic Energy Program. It concluded that security clearance for personnel could not be left to the discretion of the

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[10] Ibid., Section 10.(b)(1).

[11] Ibid., Sections 4.(e), 5.(b)(3), 7.

agency as customarily was the case. The statute required contractors to agree in writing not to allow any persons access to Restricted Data until the Federal Bureau of Investigation had completed an investigation as to their character, associations and loyalty and the Commission had determined that such access would not "endanger the common defense and security."[12] Employees of the Atomic Energy Commission were subject to similar provisions, but the Commission was allowed to authorize in emergency situations employment prior to completion of the required investigations.[13] Persons carried over from the Manhattan Engineering District were required to be reinvestigated and their cases re-evaluated. These former Manhattan Engineering District employees were granted interim security clearances pending an investigation by the Federal Bureau of Investigation and a determination of their eligibility by the Commission.[14]

The Atomic Energy Act of 1946 provided for the transfer of the Atomic Energy Program from the military to the civilian Atomic Energy Commission in the Executive Branch. The transfer of the program to the Atomic Energy Commission was completed at midnight on 31 December 1946

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[12] Ibid., Section 10.(b)(5)(B)(i).

[13] Ibid., Section 10.(b)(5)(B)(ii).

[14] Ibid., Section 10.(b)(5)(B)(iii).

with the Commission receiving full control of the Atomic Energy Program.[15]

Personnel Security

The Commission maintained in full force the security policies and procedures which had been utilized under the Manhattan Engineering District Security Manual, dated 26 November 1946.[16] However, it met promptly with the Federal Bureau of Investigation and the Attorney General to develop new procedures for personnel investigations and security violations.[17]

The Commission's program for personnel security applied to both employees of the Atomic Energy Commission and its contractors. The effect of security clearance, however, varied between the two groups. Denial of security clearance to an employee of the Atomic Energy Commission was a denial of employment while a similar denial to an employee of a contractor was merely a denial of access to Restricted Data. Thus, if an employer could locate work which did not require access to Restricted Data, the employee could be retained.

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[15]Executive Order 9816, 31 December 1946, 12 Federal Register 37 (1946).

[16]United States Congress, Joint Committee on Atomic Energy, op. cit., p. 976.

[17]United States Atomic Energy Commission, First Semi-annual Report (Washington: Government Printing Office, 1947), p. 8.

Personnel Clearance Letter. On 14 February 1947, the General Manager released a letter, entitled, "Personnel Clearance," revoking the security program carried over from the Manhattan Engineering District with respect to personnel security. Under the letter new policies and procedures for security clearance of personnel were established, an Acting Director of Security appointed and a Personnel Security Section organized.[18] Under this procedure all Personnel Security Questionnaires were forwarded from the Field Operating Security Offices through the Commission's Personnel Security Section to the Federal Bureau of Investigation for an investigation. All persons who were employed under the Atomic Energy Program were subject to investigations. Contractor personnel who were employed on the construction of fissionable material plants and other secret installations all received minimum personnel investigations which included checks of the Federal Bureau of Investigation central files. Other persons working under the program who required access to Restricted Data were subject to Full Field Investigations.

Investigative reports were forwarded to the Personnel Security Section where they were reviewed for completeness

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[18]United States Congress, Joint Committee on Atomic Energy, op. cit., p. 978.

and content. If no derogatory information was found, the person was granted a clearance by the Acting Director of Security. Cases which contained derogatory information were given a second reading, and, if the derogatory data was evaluated as being of a non-substantial nature, the clearance was granted. In these latter cases the attention of the Field Office was invited to the derogatory information. Such cases were designated as "invite cases." In cases where the reported information was of a substantially derogatory nature, the case was held pending further investigation or a decision by the General Manager or, in rare cases, the Commission itself. The General Manager, after review of the case, had the authority to take one of the following actions:

(1) Authorize the granting of clearance on an "invite" basis.
(2) Authorize the denial of security clearance.
(3) Cancellation of consideration for employment where the individual was an applicant for employment with the Atomic Energy Project.
(4) Refer the case to the Commission for review and concurrence or disagreement with the recommendation for denial of clearance.
(5) Appoint an "ad hoc" Board to consider the case and make recommendations to the General Manager regarding a final security determination. (This practice was initiated in May 1947.)[19]

As stated above, the practice of using an "ad hoc" Review Board was first utilized in May 1947. In July 1947

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[19] Ibid., pp. 978-979.

the Commission adopted a recommendation creating an official Personnel Security Review Board.[20] This Board, composed of five prominent citizens, made advisory recommendations regarding the appropriate disposition of questions relative to personnel security clearances. It also prepared general suggestions regarding the development of standards and criteria for adjudication of personnel security problems.[21] In the summer of 1948, the initial members of the Personnel Security Review Board tendered their resignations, and it ceased to function in September of that year. The need for such a Board on a full time basis, however, soon became apparent, and on 10 March 1949 the Commission announced the appointment of a Permanent Personnel Security Review Board.[22]

General Manager Bulletin. On 15 April 1948 the General Manager issued bulletin number GM-80 which provided for decentralization of the Personnel Security Program of the Atomic Energy Commission.[23] A list of nine interim criteria,

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[20]Ibid., p. 980.

[21]United States Atomic Energy Commission, Fourth Semi-annual Report (Washington: Government Printing Office, 1948), p. 51.

[22]Walter Gelhorn, Security, Loyalty, and Science, (Ithaca: Cornell University Press, 1950), p. 85.

[23]United States Congress, Joint Committee on Atomic Energy, op. cit., 948. See also pp. 949-950 for detailed procedures on processing of personnel security clearances under GM-80.

to assist in evaluating if reported information was substantially derogatory, was enclosed as an attachment to GM-80.[24] Under this new procedure the responsibility for screening of personnel security cases was delegated to the various local Managers of Operations. They were given the authority to grant security clearances in those cases evaluated as not containing substantially derogatory information. The authority to deny or revoke personnel security clearances was, however, retained by the General Manager.

Interim Procedure for Administrative Review. On 15 April 1948 an Interim Procedure was adopted for administrative review of security cases where the employee's clearance eligibility was in doubt.[25] This Interim Procedure applied to employees of the Atomic Energy Commission and to employees of contractors subject to security clearance under the Atomic Energy Act of 1946. The right to request a hearing was made available only to those persons already under the program. It was not until 19 September 1950 that this opportunity was extended to applicants for employment with the Commission and/or with Atomic Energy Commission contractors where access to Restricted Data was required.

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[24] Ibid., p. 949 provides a list of the criteria.

[25] 15 Federal Register 6241 (1950). See also the United States Atomic Energy Commission, Fourth Semiannual Report, op. cit., p. 52. for discussion on this procedure.

Prior to 19 September 1950 an applicant for employment with the Commission or an applicant for clearance with the contractor had his security clearance determination made on the basis of the investigative report with no appeal possible from a denial.[26]

The Interim Procedure enacted 15 April 1948 was utilized in cases when new and substantially derogatory data was discovered. In some cases the employee was suspended from access pending a final decision. In most cases, however, the individual was afforded the opportunity for administrative review prior to a determination to revoke security clearance. Under this procedure an individual whose security clearance was in doubt was notified in as much detail as possible as to the reason for the question regarding his eligibility for clearance. He was given the opportunity to answer in writing all questions concerning his eligibility for security clearance and to appear before a local Personnel Security Board for a hearing where he was able to have benefit of counsel and could present evidence on his own behalf personally or through witnesses. The local Personnel Security Board after sifting all the available evidence then made a recommendation to the local Manager of Operations as to

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[26]United States Atomic Energy Commission, Ninth Semi-annual Report (Washington: Government Printing Office, 1951), p. 35.

whether security clearance should be issued. The Local Manager, in turn, reviewed the case and made a recommendation to the General Manager. If the recommendation was adverse to the subject, he was given an opportunity to appeal the case to the Personnel Security Review Board in Washington, D. C. The General Manager at his own discretion could also, with notice to the subject, submit cases to the Personnel Security Review Board. After consideration of the case the Review Board made a recommendation to the General Manager who was responsible for making the final decision.

Informal Interview. Another development in the Commission's Personnel Security Program during its early years was the procedure for informal interview. This procedure was first used in May 1947 by the "ad hoc" Review Board and later continued under the program. The Commission used the informal interview if it felt that some derogatory implications in the investigative report might be counteracted or explained by verifiable extenuating information. It could also use this procedure when it was felt that further information might be gained which would warrant or permit more extensive investigation. The procedure was not employed, however, in a case where prima-facie evidence falling within the purview of the criteria clearly indicated that an informal interview would not resolve the question raised by the derogatory information.

Under the informal interview procedure an individual whose security clearance was in question could informally discuss various aspects of the investigative report with a representative of an Atomic Energy Commission Security Office. Upon completion of the informal interview the Security Office notified the Local Manager who: (1) granted the security clearance, (2) requested additional investigation, or (3) recommended that formal hearing procedures be instituted.[27]

New procedures. During 1948 the Commission analyzed and codified the results of its experience gained in handling of personnel security cases. Criteria to assist in determining eligibility for security clearance were promulgated on 5 January 1949 in a regulation entitled "AEC Personnel Security Clearance Criteria for Determining Eligibility."[28]

In September, 1950 the Commission published detailed procedures for processing of personnel security cases.[29]

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[27]United States Atomic Energy Commission, Fourteenth Semiannual Report (Washington: Government Printing Office, 1953), pp. 69-70; see also United States Congress, Joint Committee on Atomic Energy, op. cit., p. 983 for a detailed description of the informal interview procedure.

[28]14 Federal Register 42 (1949); see also United States Energy Commission, Fifth Semiannual Report (Washington: Government Printing Office, 1949), pp. 121-122 for discussion on these criteria.

[29]15 Federal Register 6241 (1950); see also United States Atomic Energy Commission, Ninth Semiannual Report, op. cit., pp. 108-114.

The procedures expanded the coverage of the regulations to applicants for employment with the Commission as well as applicants for employment with Atomic Energy Commission contractors. Concurrent with the issuance of these regulations the Commission issued revised criteria to assist in the evaluation of personnel security cases.[30]

The requirement of having all investigations conducted by the Federal Bureau of Investigation was found to be both time consuming and unnecessary. Therefore, in 1952 the Civil Service Commission was given the authority to conduct certain investigations of personnel seeking security clearances under the Atomic Energy Commission Program.[31]

Committees

The Atomic Energy Act of 1946 had created three committees which were to operate in conjunction with the Commission. First was the Joint Committee on Atomic Energy composed of members of Congress.[32] The relationship of the Commission and the Joint Committee for the first few years was scarcely one of harmony. The discord reached its

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[30]United States Atomic Energy Commission, Ninth Semiannual Report, ibid., pp. 120-123 provides a list of the criteria.

[31]66 Stat. 43 (1952).

[32]60 Stat. 755, 772-773 (1946).

greatest peak in 1949 when the Joint Committee began a full scale investigation into the Atomic Energy Program. The Personnel Security Program of the Atomic Energy Commission was particularly scrutinized by the Joint Committee. The Committee specifically disagreed with the Commission's policy of granting emergency security clearances to certain individuals before a Full Field Investigation by the Federal Bureau of Investigation.[33] Although the members of the Joint Committee were not in agreement with the Commission's use of this procedure, subsequent reports revealed that only an extremely small percentage of emergency security clearances were later revoked.[34]

The second committee created by the Atomic Energy Act of 1946 was the Military Liaison Committee.[35] This committee was designed to coordinate the activities of the Commission and the National Military Establishment with regard to military uses of atomic energy. Coordination was maintained to see that the activities of the Commission were in agreement with the interests of national security.

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[33] Ibid., Section 10.(b)(5)(B)(ii) provided for granting of emergency clearances by the Commission.

[34] United States Congress, Joint Committee on Atomic Energy, op. cit., pp. 104-105.

[35] Supra, note 32 at Section 2.(c).

The General Advisory Committee, composed of prominent individuals in the field of science, was the third committee established by the 1946 Atomic Energy Act.[36] This committee was developed to provide the Commission with technical consultation on scientific matters relative to various production, and research and development activities. Neither the Military Liaison Committee nor the General Advisory Committee played an important role in the Personnel Security Program of the Commission.

Personnel Security Through 1953

The Atomic Energy Commission's Personnel Security Program had by 1953 developed to a considerable degree. Procedures for processing of personnel security cases had been formulated and issued. Criteria with which to apply the standard were developed and promulgated. The opportunity for administrative review had been extended to applicants for employment with Atomic Energy Commission contractors and to applicants for employment with the Commission.

Generally speaking, by 1953 the assets of the Atomic Energy Commission's Personnel Security Program far outweighed the liabilities. The problem of confrontation of witnesses was possibly the Commission's biggest liability. The

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[36] Supra, note 32 at Section 2.(b); see also United States Congress, Joint Committee on Atomic Energy, op. cit., pp. 279-315 for a general discussion on this committee.

individual whose security clearance was in question did not have an opportunity to confront and cross-examine persons supplying information to the Government if these individuals were designated as "confidential informants" by the Federal Bureau of Investigation. Another problem was the all-inclusive designation of the term "Restricted Data." Its broad definition required an undue number of employees to obtain security clearances. The requirement of a Full Field Investigation for all persons having access to Restricted Data also resulted in added expense and delays. However, considering the development of personnel security under the Atomic Energy Program from its inception until 1953, one finds that it was one of orderly evolution.

IV. ATOMIC ENERGY ACT OF 1954

On 30 August 1954 the Atomic Energy Act of 1946 was superseded by a new Atomic Energy Act.[37] This new act continued in force all provisions of the 1946 Act which were not inconsistent with the policies of the Act of 1954.[38] This

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[37] 68 Stat. 919 (1954).

[38] United States Atomic Energy Commission, Seventeenth Semiannual Report (Washington: Government Printing Office, 1955), p. 104; see also United States Congress, Atomic Energy Legislation through 86th Congress, 1st Session (Washington: Government Printing Office, 1960) pp. 168-174 for cross reference charts comparing the Atomic Energy Act of 1946 with the Atomic Energy Act of 1954.

Act of 1954, as amended, is the statutory base for the present Atomic Energy Commission Program. The Act of 1954 created a new type of security clearance. An "L" clearance was created for contractor employees and others who did not require access to Restricted Data classified higher than CONFIDENTIAL. The requirement of "Q" clearances for all employees of the Commission and other persons requiring access to SECRET and TOP SECRET Restricted Data was continued under the new act.[39]

The 1954 Atomic Energy Act attempted to modify some of the secrecy restrictions of the 1946 act so as to allow a greater amount of industrial participation. An Access Permit program was instituted to encourage civilian uses for atomic energy.[40] Individuals or organizations with a potential need or use for Restricted Data in the development of atomic energy for their business, trade or profession may be issued an Access Permit. The Access Permit is not a security clearance and does not authorize any person to have access to Restricted Data. Persons desiring to obtain Restricted Data must possess either an "L" or a "Q" security clearance. Access to TOP SECRET Restricted Data, or

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[39]John G. Polfrey, "The AEC Security Program Past and Present," Bulletin of the Atomic Scientists, XI (April, 1955), pp. 106-109, 130 provides a comparison of the 1946 and 1954 acts.

[40]10 C.F.R. 25 (1963) provides procedures and standards for issuance of Access Permits.

information regarding the manufacture, design or use of atomic weapons is not available under the Access Permit Program. For this study the term contractor will include access permittees and their employees.

Investigations

Section 145 (f) of the Atomic Energy Act of 1954 authorizes the Commission to establish specifications and standards as to the scope and extent of security investigations. A National Agency Check is required for all "L" clearances except those of aliens. A Full Field Investigation, which is a complete perusal into the background of the individual through personal contacts by investigative agents, is required for all "Q" clearances and both "L" and "Q" clearances for aliens. Investigations for security clearances are based upon the location and the type of work being done by the individual as well as the sensitivity of the Restricted Data to which the person will have access. They are designed to obtain information on the individual's general suitability, reliability and loyalty.

Section 145 (a) of the Atomic Energy Act of 1954 requires that the Civil Service Commission or the Federal Bureau of Investigation make an investigation and report to the Atomic Energy Commission regarding the character, associations and loyalty of any person desiring access to Restricted Data. No individual is allowed access until the

Commission has determined on the basis of the investigation that such access will not "endanger the common defense and security."[41]

The initial investigations under the Atomic Energy Program are made by the Civil Service Commission. If derogatory information is developed during a National Agency Check a Full Field Investigation is commenced if requested by the Commission. The Civil Service Commission completes all investigations except when developed derogatory information raises a doubt as to the loyalty of the individual, in which case it is referred to the Federal Bureau of Investigation for the Full Field Investigation.[42]

The Federal Bureau of Investigation makes investigations of various groups requiring access to Restricted Data if the President deems it to be in the national interest.[43] It also conducts investigations of specific positions which are certified by a majority of the Commission as being of a "high degree of importance or sensitivity."[44]

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[41] 68 Stat. 919, 42 U.S.C.A. 2011 (1964), Section 145 (b) provides the exception to this rule. It states that the Commission or General Manager may permit access to Restricted Data prior to an investigation if they determine that such action is "clearly consistent with the national interest." Section 143 outlines procedures for permitting access to Restricted Data to Department of Defense personnel.

[42] Ibid., Section 145 (c).

[43] Ibid., Section 145 (d).

[44] Ibid., Section 145 (e).

Reports of investigations. Upon completion of the required investigation, the investigative reports of the Civil Service Commission and/or the Federal Bureau of Investigation are forwarded to the Division of Security in Washington for recording. They are then transmitted to the appropriate Operations or Area Offices for consideration.

Screening

The local Manager of Operations has the responsibility for screening of investigative reports to ascertain whether security clearance can be granted on the basis of the report or whether further administrative action is necessary. In actual practice the Manager of Operations has delegated the responsibility for the initial review of investigative reports to the local Security Office.

The local Manager of Operations may immediately grant security clearance in cases which include no derogatory information and in cases containing non-substantially derogatory information following a second reading. Cases evaluated as containing substantially derogatory information are referred to the Director, Division of Security in Washington, D. C. The local Manager is also required to refer all cases to the Director, Division of Security where granting of a security clearance would conflict with a prior denial of a security clearance by another Governmental agency. The Director, Division of Security, after reviewing

the report may: (1) authorize the granting of security clearance on the basis of the existing record, (2) request supplemental investigation, (3) authorize the Manager of Operations to conduct an informal interview, or (4) authorize the initiation of Administrative Review procedures.[45]

Application of the criteria. The criteria used to apply the standard in personnel security cases have grown out of experience gained in evaluating various cases. The major sets of categories of derogatory information to be used as guides in the determination of eligibility for security clearance were first published as of 5 January 1949.[46] These criteria have been revised from time to time as experience and circumstances warranted.

The criteria describe types of conduct which if engaged in by persons being considered for security clearance would create serious questions regarding their loyalty or suitability. They are suggestive rather than decisional and are designed to provide guidance for officials evaluating personnel security cases. The enumerated criteria are by no means all inclusive, and the Commission is not precluded for considering information as derogatory in cases even though it does not agree with or is outside the scope of the

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[45] 10 C.F.R. 10.10(c) (1963).

[46] Supra, note 28.

listed criteria.[47]

The criteria are divided into two main categories. Category (A) includes those types of derogatory information which create a presumption of security risk. If there are grounds sufficient to create a reasonable belief as to the veracity of one or more of the items listed under Category (A), they can be the basis for a recommendation of denial or revocation of security clearance. Category (B) is composed of types of derogatory information where the extent of the activities, the time period when the activities occurred, the time elapsed since the activities took place and the attitudes of the individual are considered prior to a determination of presumption of security risk.[48]

Revisions To Regulations

In mid-1956 the Commission issued a new procedure for handling of personnel security cases.[49] The criteria used in determining eligibility for security clearance and the Administrative Review Procedures were incorporated into one regulation. This new regulation which applied to employees of the Atomic Energy Commission as well as its contractors was the first published after the issuance of

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[47] 10 C.F.R. 10.10(b) (1963).

[48] Ibid., Section 10.10(d).

[49] 10 C.F.R. 4 (1956).

Executive Order 10450, dated 27 April 1953,[50] for Federal employees.

In 1960 the Atomic Energy Commission for the first time established an entirely separate Industrial Personnel Security Program.[51] The existing regulation[52] was amended so that it was applicable only to employees, consultants and applicants for employment with the Atomic Energy Commission. The new procedure entitled,"Criteria and Procedures for Determining Eligibility for Access to Restricted Data or Defense Information within Industry," was created to meet the requirements of Executive Order 10865, dated 20 February 1960.[53] In May, 1962 the Commission again reverted to one Personnel Security Program for Atomic Energy Commission employees and industrial personnel.[54] This amendment established the current regulations for use under the Personnel Security Program of the Atomic Energy Commission.[55]

V. ADMINISTRATIVE REVIEW PROCEDURES

General

The Atomic Energy Commission's Administrative Review

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[50] 18 Federal Register 2489 (1953).

[51] 10 C.F.R. 10 (1960).

[52] Supra, note 49.

[53] 25 Federal Register 1583 (1960).

[54] 27 Federal Register 4325 (1962).

[55] 10 C.F.R. 10 (1963).

Procedures provide methods for administrative hearings and reviews under the Personnel Security Program. These procedures are utilized when it has been determined that the question or questions regarding the person's eligibility for security clearance cannot be favorably resolved by informal interview or supplemental investigation.

Suspension. If derogatory information is developed on an individual who possesses a current security clearance, the local Manager of Operations, after reviewing the investigative report, is required to forward his recommendation regarding suspension of security clearance through the Director, Division of Security to the General Manager. In making the recommendation, the local Manager has to consider such factors as: (1) the extent and degree of seriousness of the derogatory information; (2) the possibility of access to classified information by the subject; and (3) the person's opportunity by reason of his job to commit acts which may have an adverse effect on the national security. After receipt of the local Manager's recommendation, the General Manager makes a determination on suspension of the individual's security clearance during the hearing and review proceedings.[56]

Notice. The first procedural step in the Administrative Review Procedures is a letter including a Statement of

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[56] 10 C.F.R. 10.21 (1963).

Charges to the person involved, presenting, in as much detail as security considerations permit, the reliable information which has created a substantial doubt regarding eligibility for security clearance.[57] The letter is prepared by the Security Division, approved by the Office of the General Counsel and signed by the Manager of Operations. In addition to the Statement of Charges, the letter explains his right to appear personally before a Personnel Security Board, to present evidence in his own behalf, and to be represented by counsel. He is informed that failure to notify the Manager of Operations within a twenty day period will be regarded as waiver of the hearing and review procedure. In that event, the Manager of Operations will make a recommendation to the General Manager for final action on the basis of the existing record.[58]

Hearing Counsel. When the individual whose security clearance is in question files a written answer indicating a desire to appear before a Personnel Security Board, the Manager of Operations appoints an Atomic Energy Commission attorney to act as Hearing Counsel. It is the Hearing Counsel's responsibility to prepare the Commission's case and meet with the individual or his attorney to make

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[57] Ibid., 10.22(a)(b).

[58] Ibid., 10.22.

arrangements for an expeditious hearing of the case.

The Hearing Counsel is responsible for the examination and cross-examination of witnesses and otherwise assisting the Board in the conduct of the administrative hearing in such a way as to develop all facts, both favorable and unfavorable, which have a bearing on the case. He is, however, prohibited from participating in the deliberations of the Board or in expressing an opinion to the Board regarding the merits of the case.[59]

Personnel Security Boards

When all arrangements are made for the hearing, the local Manager of Operations appoints a three member Personnel Security Board. The local Manager selects the Board from a panel made up of employees of the Commission, its contractors and/or any other individual who he believes possess the necessary degree of ability, integrity and good judgment. Whenever practicable, the Manager selects at least one member who is an attorney and one member who is cognizant of the subject's general type of work. All Board members are required to possess Atomic Energy Commission "Q" clearances. Provisions are made so that no employee of a Commission contractor can serve on a case involving another employee of, or applicant for, employment with his firm.[60] The Boards

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[59] Ibid., 10.25, 10.27(c).

[60] Ibid., 10.26.

are established on a temporary basis for the one case. However, as one report stated, "managers of some installations appoint the same persons over and over again so that the board, in effect, becomes one established under indefinite appointment."[61]

Challenges. When the local Manager has appointed the Board, he notifies the individual of its composition and his right to challenge any member for cause. It is the responsibility of the local Manager to sustain or reject the challenge or challenges and to notify the individual of his decision. If a challenge is sustained, the Manager appoints such new members as necessary and notifies the individual of the change. The person has a right to challenge the new members and all challenges are dealt with in the same manner as the original challenge. When the question of challenge is resolved, the individual is given advance notice of at least one week regarding the time and place of the hearing.[62]

Conduct of Hearings. The hearing is a private one presided over by the Chairman of the Personnel Security Board.[63] Voting is done in either open or closed sessions

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[61] The Association of the Bar of the City of New York, Report of the Special Committee on The Federal Loyalty - Security Program (New York: Dodd, Mead & Company, 1956), p. 97.

[62] 10 C.F.R. 10.26(f)(g)(h).

[63] Ibid., 10.27(a).

on all questions except recommendations to deny or grant security clearance, which is always done in a closed session.[64]

The hearing is commenced by reading of the Statement of Charges after which the Government presents its case including witnesses. The individual or his attorney has an opportunity to cross-examine any person who has made either an oral or written adverse statement relating to a controverted issue, except: (1) if the head of the department furnishing the information has certified that the individual supplying the data is a "confidential informant" who has been engaged in intelligence work for the Government and that disclosure of his identity would be substantially detrimental to the national interest; (2) if the individual who has furnished the information cannot appear at the hearing: (a) because of death, severe illness or similar cause, or (b) because of some other cause considered by the Commission as "good and sufficient."[65] When procedures for nonconfrontation of witnesses are utilized, the subject is given a summary of the information, in as much detail as the national security permits, and due consideration is given to the fact that he did not have an opportunity to cross-examine.[66]

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[64] Ibid., 10.27(e).

[65] Ibid., 10.27(m).

[66] Ibid., 10.27(n).

After the Government's case is completed, the individual presents his case. He is allowed to testify on his own behalf, introduce documentary evidence of various types and present his own witnesses. If the individual in question needs assistance in the production of witnesses, the Hearing Counsel may at his discretion request the local Manager to issue subpoenas.

The administrative hearings are conducted with the Board having a great deal of latitude in the admission of evidence. It can admit any evidence, even hearsay evidence, for good cause without regard to the technical rules of admissibility. Any matters, either oral or written, which are considered relevant, material and competent to the issue in question can be considered.[67] Physical evidence other than the investigative reports, which have been furnished to the Commission in order to assist them in safeguarding Restricted Data or defense information, can be admitted without authenticating witnesses subject to rebuttal.[68]

The Chairman of the Board has the responsibility of seeing that only authorized persons have access to Restricted Data and/or defense information which might be disclosed during a hearing. If the subject is denied access to some

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[67] Ibid., 10.27(g).

[68] Ibid., 10.27(o).

classified physical evidence, the Board may still receive and consider it if the Commission has made a preliminary determination that: (1) the physical evidence seems to be material; (2) failure to admit the evidence would be substantially harmful to the national security; and (3) if a summary, in as much detail as the national security permits, is made available to the individual.[69]

Recommendation of the Personnel Security Board. When making its decision the Personnel Security Board is to take into consideration such factors as: (1) the credibility and probable veracity of the witnesses; (2) the lack of evidence on important points; (3) the accuracy of documentary evidence; (4) the fact that the individual was or was not afforded an opportunity for cross-examination of confidential informants; (5) the person's past employment record; and (6) the nature and/or sensitivity of the position.

The Personnel Security Board reaches its decision by a majority vote with dissent allowable. It prepares a recommendation including specific findings on each of the allegations contained in the Statement of Charges. The Board's recommendation is favorable if it is of the belief that granting of security clearance "will not endanger the common defense and security and will be clearly consistent

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[69] Ibid., 10.27(p).

with the national interest;" otherwise the recommendation is adverse to the individual.[70]

Action on recommendations of Personnel Security Board. The Board's recommendations and any dissent therefrom are submitted to local Manager of Operations who is required to review the entire record. The Manager, in turn, transmits it to the General Manager through the Director, Division of Security. If the General Manager believes that some specific matters needed clarification, he may return the record to the local Manager for further consideration by the Personnel Security Board. In those cases where a denial of security clearance has been recommended by the Board, the local Manager is required to submit a statement regarding the effect of a denial of security clearance on the Atomic Energy Program. In cases adverse to the individual, he is notified in writing of the decision along with a report on the Board's findings regarding each of the allegations contained in the Statement of Charges. The subject is also informed of his right to (1) request a review of the case, and (2) to submit a brief in support of his arguments to the Atomic Energy Commission's Personnel Security Review Board. If the individual fails to request a review by the Personnel Security Review Board, the case is decided on the basis of the

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[70] Ibid., 10.28.

existing record.[71]

The General Manager may also request that the Personnel Security Review Board consider a case where a local Board has made a recommendation favorable to the individual. In such cases the individual is informed of the sections in the Statement of Charges which the General Manager believes need clarification and of his right to submit a brief.[72]

Personnel Security Review Board

The Atomic Energy Commission Personnel Security Review Board is located in Washington, D. C., and acts as an appellate agency for personnel security cases. Its judgment in personnel security cases is based upon a consideration of the record of the hearing supplemented by additional testimony or briefs. The Board may return the case through the General Manager to the local Manager of Operations for further proceedings or prepare a recommendation. The Board upon completion of its deliberations submits its recommendation and findings on the record of the case to the General Manager.[73]

Final Determination

In making a final determination on a case, the

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[71] Ibid., 10.30.

[72] Ibid.

[73] Ibid., 10.31.

General Manager or the Commission are to give due recognition to the favorable as well as the unfavorable information on the person in question. They are required to consider the effect of a denial and the value of the individual to the Atomic Energy Commission's Program.

The final determination regarding granting or denying of security clearance is made by the General Manager on the basis of the record and all recommendations, except in those cases where the individual has not been given an opportunity to confront and cross-examine witnesses who have provided adverse information. In this latter instance, a decision to deny or revoke security clearance is made by the Commission itself on the basis of the record. The Commission is also given the authority to deny or revoke security clearance in any case if so required by national security.[74]

The individual is notified of the decision through the local Manager of Operations. If adverse to the individual, he is notified of the findings with respect to each of the allegations contained in the original Statement of Charges.

Reconsideration of Cases

Cases may be reconsidered under the Atomic Energy Commission Program when new substantially derogatory information is received or when there is a considerable increase

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[74] Ibid., 10.33.

in the scope or sensitivity of the classified information to which the individual will be afforded access. Provisions also exist under the regulations for reconsideration of personnel security cases where new evidence is developed or convincing proof of reformation or rehabilitation exists.[75]

VI. CONCLUSION

The Atomic Energy Program from its very inception was one of secrecy. The Military, the first Atomic Energy Act in 1946 and the second Act in 1954 to some degree have attempted to conceal this vital element of our national defense. Personnel security, which attempted to limit access to classified information to persons of proven suitability, reliability and loyalty, began under the Military Manhattan Engineering District with hastily established investigative and screening procedures. The advent of civilian control by the Atomic Energy Commission ushered in new and more extensive procedures for personnel security. In 1947 a Personnel Security Review Board was established. 1948 saw the creation of an Interim Procedure for Administrative Review as well as the development of a definite series of criteria for determining eligibility. The right of appeal to an adverse decision was expanded in 1950 to include applicants for

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[75] Ibid., 10.34.

employment with the Commission and its contractors. In 1960 the Commission established separate personnel security procedures for industrial personnel. Two years later the entire Atomic Energy Commission Personnel Security Program was combined and remains so today.

All levels of security clearance under the Atomic Energy Commission Program are granted by the Government. The decision to grant security clearance is a comprehensive, common-sense one made on the basis of all the available information. Security clearances are granted if it "will not endanger the common defense and security and will be clearly consistent with the national interest" to do so.

CHAPTER V

PORT SECURITY PROGRAM

I. INTRODUCTION

The Port Security Program is concerned with the security of vessels, ports, harbors and waterfront facilities under the jurisdiction of the United States. Included under the program are the supervision of loading and unloading of explosives and other hazardous cargoes, the establishment and enforcement of fire prevention measures and regulation of access to vessels and waterfront facilities. The United States Coast Guard, which functions under the Navy in time of war and under the Treasury Department at all other times, operates the program. The Commandant of the Coast Guard is charged with the overall direction and administration of the program.

Personnel security under the Port Security Program is somewhat unique in that the persons affected under the program have no contractual relationship, actual or proposed, with the Government. Two concurrent Personnel Security Programs exist under the Port Security Program. One is concerned with validation of Merchant Mariners' Documents for individuals seeking employment in the United States Merchant Marine; the other with issuance of Port Security Cards to harbor workers and other persons desiring access to restricted areas of

American ports. Hereinafter, the issuance of these documents may be described as granting of security clearance. The program attempts to limit access to United States merchant vessels and restricted areas of waterfront facilities under United States jurisdiction to those persons whose presence is not "inimical to the security of the United States."[1] The two Personnel Security Programs are considered separately in this chapter although many aspects of their evolution and present mode of operation are naturally quite similar.

II. HISTORY OF THE PROGRAM

Wartime Programs

World War I. The Port Security Program had its formal beginning in the Act of June 15, 1917.[2] This Act in Title II provided that if the President declared a national emergency the Secretary of the Treasury could, subject to the President's approval, establish regulations regarding movement, inspection and anchorage of any vessel located within United States territorial waters and could, by and with the President's consent, take control of any vessel and "remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on

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[1] 33 C.F.R. 121.03, 125.19 (1962).

[2] 40 Stat. 220 (1917).

board thereof."

President Woodrow Wilson proclaimed a national emergency on 3 December 1917 and ordered the Secretary of the Treasury to implement the provisions of Title II of the Act of June 15, 1917.[3] Under the provisions of the Act, the Coast Guard operated a Port Security Program for the duration of World War I.

World War II. On 29 June 1940 President Roosevelt issued Proclamation No. 2412, again invoking the provisions of the Act of June 15, 1917.[4] In November of the next year he again transferred the Coast Guard to the Navy Department.[5] The President, by Executive Order 9074, dated 25 February 1942, directed the Secretary of the Navy to take the necessary action for protection of American ships, ports, harbors and waterfront facilities not directly under the supervision of the Secretary of War.[6] The Secretary of the Navy, in turn, delegated the responsibility for this function to the United States Coast Guard.[7]

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[3]40 Stat. 1725 (1917). [4]5 Federal Register 2419 (1940).

[5]Executive Order 8929, dated 1 November 1941, 6 Federal Register 5581 (1941).

[6]7 Federal Register 1587 (1942).

[7]Order from Secretary of the Navy to the Commander-in-Chief of the fleet, dated 29 April 1942, cited in the Commission on Government Security, Report of the Commission on Government Security (Washington: Government Printing Office, 1957), p. 325.

Administration and direction of the security aspects of the program were delegated to each of the Captains of the Port. The Port Security Program was concerned with denying entrance to or removing from ships, harbors, piers, ports and waterfront facilities all individuals whose presence was found to be "inimical to the national war effort by reason of, but not limited to, drunkenness, violation of safety orders or subversive inclinations as demonstrated by utterances or acts."[8] This Port Security Program continued until the end of the war, when the Coast Guard was again returned to the Treasury Department.[9] The authority for the wartime Port Security Program was, however, not revoked until 1947.[10]

Communist Infiltration in Maritime Unions

Beginning in the mid-1930's, communist infiltration into the maritime unions grew into significant proportions by the post World War II period. Several maritime unions were communist dominated and were expelled from the Congress of Industrial Organizations because of communist infiltration. The West Coast International Longshoremen's Union

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[8]United States Coast Guard, Captain of the Port Manual, 14 May 1942, p. 113, cited in the Commission on Government Security, ibid., p. 325.

[9]Executive Order 9666, dated 28 December 1945, 11 Federal Register 1 (1946).

[10]61 Stat. 451 (1947).

with its leader, Harry Bridges and the Maritime Cooks and Stewards Union led by Hugh Bryson were exposed as examples of communist domination in American unions.[11] Neither expulsion by the Congress of Industrial Organizations or exposure by various Congressional committees, however, deterred the Communist Party from its objective of control over United States maritime unions.

Voluntary Plan to Combat Communist Infiltration in Maritime Industry

The Korean conflict brought to the fore the need for more stringent security safeguards in the maritime industry to combat communist infiltration. Representatives from labor and management met at the invitation of the Secretaries of Commerce and Labor on 24 July 1950 in an attempt to develop more adequate security measures to protect against communists remaining active in the maritime industry.[12] As a result of the meeting, a Voluntary Plan for screening of seamen to protect against infiltration by subversives during the Korean emergency action was declared.[13] The Voluntary

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[11] Commission on Government Security, op. cit., pp. 326-331; Ralph S. Brown, Jr. & John D. Fassett, "Security Tests for Maritime Workers: Due Process under the Port Security Program," 62 Yale Law Journal (1958), pp. 1165-1168.

[12] The New York Times, 23 July 1950, p. 7, col. 1.

[13] Brown and Fassett, op. cit., pp. 1170-1171, provides a copy of the Voluntary Plan resolution and also a review of its operation.

Plan outlined provisions for the operation of ships by persons who had been granted security clearances. Persons who were rejected as bad security risks by the Government were automatically denied employment by management, and the unions immediately supplied a replacement. Under the Voluntary Plan a Review Board was created as an appellate agency for those persons rejected as bad security risks.[14]

The Secretary of the Treasury, at the direction of the President, ordered the Coast Guard to implement the policies of the Voluntary Plan in July 1950.[15] The Coast Guard began screening seamen desiring employment on United States merchant vessels, and persons designated as security risks were denied the right to sail. The Coast Guard was not, however, vested with appropriate legal authority to operate such a program until four months later.

III. LEGAL CONSIDERATIONS

Magnuson Act

The statute, approved 9 August 1950, commonly referred to as the Magnuson Act after its sponsor, Senator Warren Magnuson, amended Title II of the Act of June 15, 1917.[16]

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[14] The New York Times, 25 July 1950, p. 51, col. 2,3.

[15] Commission on Government Security, op. cit., 332.

[16] 64 Stat. 427 (1950), 50 U.S.C. 191 (1958).

The Magnuson Act was enacted as a result of the Korean emergency situation and became the legal basis for the current Port Security Program. The act authorizes the President to implement a Port Security Program whenever he determines that United States security is "endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances of threatened disturbances of the international relations of the United States."[17] Under the Act of June 15, 1917, the President had to declare a national emergency before a Port Security Program could be instituted. The Magnuson Act provides that the President merely has to decide that the national security is endangered from, among other things, subversive activity, to institute such a program. The Magnuson Act as promulgated in 1950 expanded the scope of the Port Security Program to include protection of ports, harbors and waterfront facilities of the continental United States, the Panama Canal Zone and all other water and territory under United States jurisdiction.[18] Under the Act of June 15, 1917, only vessels were under the purview of the Port Security Program.

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[17] Ibid.

[18] Ibid., 50 U.S.C. 191 (b) (1958).

Executive Order 10173

President Truman, to implement the provisions of the Magnuson Act, issued Executive Order 10173, dated 18 October 1950.[19] The President declared that by reason of subversive activity the security of the country was endangered. He, therefore, prescribed in the Executive Order rules for the protection of vessels, ports, harbors and waterfront facilities under the jurisdiction of the United States.

Executive Order 10173 provided the Commandant of the Coast Guard with the responsibility for overall direction of the Port Security Program. The Executive Order stated that any person employed on, or seeking access to, any vessel or waterfront facility under United States jurisdiction may be required to obtain identification credentials issued by, or satisfactory to, the Commandant. It was left to the Commandant to designate the types of vessels and areas of the waterfront where such credentials would be required.[20] The Commandant was given authority to prescribe rules as to the form of credentials required under the program, and the conditions and manner of their issuance.[21]

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[19] 15 Federal Register 7005 (1950).

[20] Ibid., Paragraph 6.10-5.

[21] Ibid., Paragraph 6.10-3, 6.10-7. The Commandant, however, was to consult with the Secretary of Labor prior to issuance of regulations pertaining to waterfront employees.

Under the provisions of Executive Order 10173, no person was to be issued a security clearance if the Commandant was satisfied that "the character and habits of life" of the person were "such as to authorize the belief that the presence" of the individual "would be inimical to the security of the United States."[22]

The Commandant of the Coast Guard was directed in Executive Order 10173 to appoint Appeal Boards for persons who were refused the required credentials under the program. The Boards were to be composed, so far as practicable, of one Coast Guard officer, one employee of management and one employee of labor. The members from labor and management were to be nominated by the Secretary of Labor and were required to possess suitable security clearances. These Appeal Boards were to make recommendations to the Commandant, who was responsible for final decisions.[23]

Amendment - 1951. Executive Order 10173 was amended by Executive Order 10277, dated 1 August 1951.[24] The standard as revised in Paragraphs 6.10-1 and 6.10-7 required that the Commandant could not grant security clearance unless he was "satisfied that the character and habits of life" of

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[22] Ibid., Paragraph 6.10-1, 6.10-7.

[23] Ibid., Paragraph 6.10-9.

[24] 16 Federal Register 7537 (1951).

the individual were "such as to authorize the belief that the presence of" such a person "would not be inimical to the security of the United States."

Amendment - 1952. Executive Order 10173 was again amended by the issuance of Executive Order 10352, dated 19 May 1952.[25] Under this amendment Paragraph 6.10-1 was revised. The original Executive Order 10173 provided that no person was to be issued a document required for employment on a United States merchant vessel, "nor shall any licensed officer or certified man be employed on a merchant vessel of the United States unless the Commandant . . ." The revision changed this section to read, "nor shall any person be employed on a merchant vessel of the United States unless the Commandant . . ."

Coast Guard Regulations

The Commandant of the United States Coast Guard pursuant to the Magnuson Act and Executive Order 10173 published proposed regulations for the security of vessels and waterfront facilities on 9 November 1950.[26] After public hearings, the proposed regulations, with slight modifications, became permanent effective 27 December 1950.[27]

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[25] 17 Federal Register 4607 (1952).

[26] 15 Federal Register 7527 (1950).

[27] 15 Federal Register 9327 (1950).

The first permanent Coast Guard Regulations dealt with the issuance of security clearances for persons working on United States merchant vessels and/or desiring entrance to those areas of American waterfront facilities designated as restricted. Security clearances were granted after a security check had determined that the individual was "a safe and suitable person."[28] Persons whose characters were such as to justify the belief that their presence would not be inimical to United States security were regarded as safe and suitable individuals. Security clearances for merchant seamen could be granted for one voyage, for a specific length of time or permanently by issuance of a document containing evidence of the security clearance. Waterfront employees desiring access to restricted areas of American ports were issued Port Security Cards as evidence of security clearance.

Administrative Review Procedures for persons denied security clearances were also promulgated in these early regulations. Provisions included the right of a local hearing with an appeal possible to a National Board. The Commandant was designated to make the final decision in all cases.

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[28] Ibid., 121.05.

Parker v. Lester

The Port Security Program has come under the consideration of several courts.[29] The most significant case in respect to its impact on the Port Security Program was that of Parker v. Lester.[30] The decision in this case although specifically concerned with maritime employees did force changes in Coast Guard regulations which affected all persons covered under the Port Security Program.

District Court. The plaintiffs, six merchant seamen, sought an injunction against the enforcement of certain Coast Guard regulations concerned with the Port Security Program and issued pursuant to the Magnuson Act and Executive Order 10173, as amended. It was alleged by the plaintiffs that the regulations, as promulgated and as administered, acted to deprive them without due process of law of their opportunities to follow their chosen vocations.

In this case the seamen had been denied security clearances. The Commandant, as required under the regulations, had notified the subjects of the general basis for the denial of their security clearances. The notices consisted of form letters advising them of the denial and

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[29]See Bureau of National Affairs, Inc., Government Security and Loyalty - A Manual of Laws, Regulations and Procedures (Washington: Bureau of National Affairs, 1964), pp. 51:101-51:280 for some of the more important court cases under the Port Security Program.

[30]Parker v. Lester, 112 F. Supp. 433 (1953).

stating in each case that, "this finding is based on the belief that you are affiliated with, or sympathetic to an organization, association, group or combination of persons subversive or disloyal to the Government of the United States."[31]

The procedures utilized for hearings varied among each of the seamen, with quite a difference being found between the practices of the Interim and Tripartite Boards.[32] In a case before a Tripartite Board, one of the seamen was questioned in detail as to his alleged misconduct. Parker, on the other hand, appeared before an Interim Board where he was told that it was believed that he was a Communist Party member and he would have to prove otherwise to be granted a security clearance. Parker denied the charge but had little opportunity to clear himself, as no witnesses appeared against him; nor was he informed as to the specific information on which the Coast Guard based its decision.

The District Court granted a limited injunction in the case enjoining the Coast Guard from enforcing certain of the regulations. The Court held specifically that there was no

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[31] Ibid., p. 439.

[32] Ibid.; see also Supra note 23 for proposed composition of Boards as outlined by Executive Order 10173. Such Tripartite Boards were not established until June 1951. Therefore, between October 1950 and June 1951 Interim Boards, composed on the local level of one Coast Guard Officer and on the National level of five Coast Guard Officers, sat for all Port Security cases.

reason why the Commandant of the Coast Guard could not make his notice definitive enough to afford the subject: (1) a reasonable idea of the basis for the adverse decision, and (2) an opportunity to obtain evidence with which to answer the allegations. As District Judge Murphy stated in the opinion, "a bill of particulars should be furnished upon demand and petitioners should be given an opportunity to rebut specific allegations of misconduct or other acts and associations which the board considers probative."[33] The Court also held that the Boards should provide the subjects with the details of evidence used against them even if it were not feasible due to security considerations to reveal the source of the information. The District Court did, however, hold that complete cross-examination and confrontation of adverse witnesses by the subjects could not be afforded, as it would, in essence, destroy the security program. Judge Murphy concluded that the need to protect governmental investigative procedures was greater than the disadvantages which accrued to the seamen as a result of not being afforded complete confrontation or cross-examination.[34]

As a result of the District Court's decision the Coast Guard revised its regulations in May 1956 for both maritime

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[33] Ibid., p. 444.

[34] Ibid., pp. 443-444.

employees and dock workers. The new regulations provided that the subject's notice be specific enough to allow the individual an opportunity to marshal evidence on his own behalf with which to refute the allegations. The notice was not to be worded so specifically, however, that it disclosed the source of the information or the identity of the informant.

Circuit Court. The District Court decision was appealed by the plaintiffs who claimed that it had erred in qualifying and limiting its injunction.[35] The plaintiffs asserted that the District Court should have enjoined the Coast Guard from operating any screening program under the regulations as originally proposed or amended.

The Circuit Court in a two to one decision held that the regulations of the Coast Guard for screening of merchant seamen as security risks was unconstitutional. They stated that the Port Security Program screening system allowed no provision "for notice and an opportunity to be heard as generally understood to be required by the provisions of the Fifth Amendment relating to due process."[36]

The Circuit Court asserted that although the Magnuson Act itself was not unconstitutional and the Government could adopt regulations for screening of merchant seamen, the

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[35]Parker v. Lester, 227 F. 2d 708 (9th cir. 1955).

[36]Ibid., p. 716.

regulations then in use were unconstitutional in the manner of their enforcement and administration. The Court held that, in decisions adverse to the individual, reasonable notice of the basis for such a decision, an opportunity to gather data for refutation and an opportunity for confrontation and cross-examination of adverse witnesses and informants was required. The appellate court argued that confrontation and cross-examination of adverse witnesses would not destroy the security screening as was stated in the original decision. It felt that the District Court's qualification of allowing the Coast Guard to not reveal in its notice to the subject the source or identity of its adverse data was much too liberal. Such a qualification, it stated, gave the "Coast Guard carte blanche to withhold substantially any information the officials may choose to keep from the seamen."[37]

The Circuit Court, however, did not rule on whether or not a screening program for merchant seamen could be adopted which in some manner might meet the necessary requirements of confrontation or cross-examination. It only stated that the system being utilized at that time by the Coast Guard was unconstitutional.

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[37] Ibid., p. 722.

Further action. The case again came before the courts with the Government arguing that the previous denials of security clearances to the seamen should be held in abeyance until their cases could be reprocessed under the new Coast Guard regulations issued in May 1956. The Government's plea was rejected and an Order and Decree subsequently issued enjoining the Coast Guard from any further delay in issuance of security clearances to the seamen. The Government did not appeal the decision.[38]

IV. PERSONNEL SECURITY

General

Under the Port Security Program maritime employees and waterfront personnel must hold credentials, issued by or acceptable to, the United States Coast Guard which certify the acceptability of the possessor. Such credentials indicate that the individual has been granted a final security clearance; no provision is made under the Port Security Program for interim clearances.

Two concurrent Personnel Security Programs were developed, implemented and currently operate under the Port Security Program. One is concerned with security clearance for merchant seamen and the other with security clearances for waterfront employees desiring access to restricted areas

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[38] Lester v. Parker, 235 F. 2d 787 (9th cir. 1956).

of United States ports. The Commandant of the Coast Guard has issued separate regulations pursuant to each of the programs.[39]

Standard. The standard for security clearances under both programs is basically the same as that of Executive Order 10173, as amended; that the individual's character and habits of life are such that his presence on United States vessels, waterfront facilities, ports, or harbors will not "be inimical to the security of the United States."[40]

Criteria. The criteria listed in the regulations deal with memberships, affiliations and associations with persons and/or groups in such a manner as to jeopardize the security interests of the United States. They are alike for all persons covered by the Port Security Program, but four additional criteria are listed for waterfront employees.[41] These additional criteria are suitability considerations dealing with insanity, certain criminal offenses, drunkenness on the job or narcotics addiction and/or illegal presence in the United States. The additional criteria were not written into the Coast Guard regulations for merchant seamen, because they had been covered for several years by similar

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[39] 33 C.F.R. 121, 125 (1962).

[40] Ibid., 121.03, 125.19.

[41] Ibid., 125.10 (f) (g) (h) (i).

provisions establishing licensing standards for maritime employees.[42]

Early Coast Guard regulations allowed the Commandant to consider whether, on the basis of all the information available, reasonable grounds existed for the belief that the individual: (1) had committed acts of treason, sabotage or espionage; (2) was under the influence of a foreign government; (3) had advocated the overthrow of our Government by force or violence; (4) had intentionally disclosed classified defense information to unauthorized persons; or (5) was or recently had been a member or associated with an organization designated by the Attorney General as totalitarian, fascist, or subversive.[43] These criteria for denial of security clearances have been refined through the years but still remain substantially as outlined in the early regulations.

Merchant Marine

All persons seeking full or part time employment in the United States Merchant Marine on vessels of 100 gross tons or more must possess a Merchant Mariners' Document stamped with a "special validation endorsement for emergency

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[42]Brown & Fassett, op. cit., p. 1176.

[43]15 Federal Register 9327, 121.13 (d), 125.29. (1950).

service."[44] The validation indicates that the individual has been granted a security clearance by the Coast Guard. A denial of security clearance by the Coast Guard results for all practical purposes in denial of employment in the Merchant Marine.[45]

Submission. Merchant Mariners seeking security clearance are required to submit a written "Seaman's Certificate Application" under oath through the Coast Guard Marine Inspection Office to the Commandant.[46] If the Commandant feels that the application is insufficient for making a decision, he may request that the subject submit additional information. Consideration of the application is held in abeyance pending receipt of the information. Failure by the subject to supply the required information results in termination of consideration for security clearance.[47] If the

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[44]33 C.F.R. 121.01(a) (1962); see 121.01(d) for regulations concerning employment of persons on American vessels located in foreign ports when cleared mariners are not available.

[45]Brown and Fassett, op. cit., pp. 1174-1175 discusses this point at length.

[46]33 C.F.R. 121.05 (1962).

[47]Ibid., 121.05 (c) (2), 125.05 (d) (2). These sections along with the application were revised in 1960 as a result of a decision in the case of Graham v. Richmond, 272 F. 2d 517 (D.C. cir. 1959). In this case the Court held that the then current regulations were inadequate in that they did not indicate that refusal to answer questions on the application was sufficient to justify rejection of the application. According to the Court merchant seamen were entitled to hearings even if they declined to answer questions on the application. The revised regulations made refusal to supply the required additional data grounds for denial of further consideration of an application.

subject supplies the required data, it is referred along with the application to a Coast Guard Screening Committee for consideration.

Investigation. The original Coast Guard regulations issued pursuant to the Port Security Program seemed to indicate that some type of investigations would be made under the program. They provided that should a "Board feel that further investigation should be made on any material matter, it may so recommend."[48] Current regulations make no reference to the existence, scope or extent of any investigations, although it would appear that some type is made under the program.[49] The investigation conducted is probably best described as a limited National Agency Check.

Suspension. Coast Guard regulations provide procedures for consideration of cases where an individual already possesses a security clearance.[50] In such cases the subject is requested to submit a written answer under oath to the Commandant pursuant to the areas in question. The subject has thirty days after receipt of the Commandant's request to submit an answer. Failure to answer prevents a favorable determination by the Commandant, but he may at his discretion

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[48] 15 Federal Register 9327, 121.25 (b) (1950).

[49] Infra, note 70 for discussion on this point.

[50] 33 C.E.R. 121.09 (1962).

arrange for the subject's case to be considered by the Boards. If the subject submits an answer, the case is forwarded to the Screening Committee for consideration.

Screening. The initial screening of applications and such additional data as required by the Commandant is handled by a three-man Screening Committee composed of one representative each from the Legal Division, the Merchant Vessel Personnel Division and the Intelligence Division. This central Screening Committee, located at Coast Guard Headquarters in Washington, D. C., makes an analysis of the case, prepares a recommendation and forwards both to the Commandant.[51] The Commandant, upon receipt of the Screening Committee's analysis and recommendation, either grants the security clearance or processes the case under the Administrative Review Procedures.

Waterfront Employees

Security clearances are required for entrance to those ports, harbors, vessels and/or waterfront facilities designated as restricted by the Coast Guard.[52] Under the program for waterfront employees, the Commandant directs the

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[51] Ibid., 121.05 (e).

[52] Ibid., 121.53 establishes additional requirements for identification credentials for access to certain vessels operating within United States navigable waters such as the Great Lakes and Western Rivers.

local Captain of the Port to provide the types of areas which may be restricted and requires public notice of such designations.[53] The Army, Navy or Air Force may close certain areas of ports, however, and the Coast Guard has no authority to control access or screen personnel in these areas.[54]

Workers regularly employed on waterfront facilities or vessels, as well as individuals having regular business dealings with the administration, operation or maintenance of vessels, cargoes or waterfront facilities, may be issued Coast Guard Port Security Cards. Issuance of Port Security Cards indicates that the individual has been granted a security clearance.

Submission. Waterfront employees desiring security clearance must prepare an "Application for Coast Guard Port Security Card" under oath and forward it to the Commandant through the local Captain of the Port. The application must be certified and sponsored by a representative of the applicant's employer or his labor union. At the time of submission he must present proof of his citizenship and be fingerprinted. If the Commandant feels that the individual has not supplied the required information, he may request additional data to meet the requirements. If the applicant

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[53] Ibid., 125.15.

[54] Commission on Government Security, op. cit., pp. 345, 365.

fails to supply the data, the Commandant notifies him that no further action will be taken unless the requested information is furnished.[55] If the requested information is supplied, the Commandant refers the matter to the Screening Committee for analysis and recommendation.[56]

Additional procedures. Procedures for screening, investigation and suspension of waterfront employees are basically the same as those outlined above for the merchant seamen. The Commandant may grant security clearance and issue a security clearance if he is satisfied that the individual's presence will not be inimical to United States security. Otherwise the case is handled under the Administrative Review Procedures.

V. ADMINISTRATIVE REVIEW PROCEDURES

General

The Administrative Review Procedures under the Port Security Program apply equally as well to both merchant seamen and waterfront workers. They will, therefore, be discussed as one in this report.

Notice. After the Commandant has made a proposed initial decision to deny or revoke security clearance, he

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[55] 33 C.F.R. 125.21 (b), 125.29 (a); see also supra note 47 on Graham v. Richmond.

[56] Ibid., 125.29 (b).

notifies the individual in writing of the determination. The notice, hereinafter referred to as the Statement of Reasons, outlines the specific allegations and is duly required, consistent with national security, to contain "names, dates, and places in such detail as to permit reasonable answer."[57]

Answer. The subject has twenty days from the day of receipt of the Statement of Reasons to file a written answer. The subject's answer may contain any evidence which he feels will be pertinent, including statements or affidavits from third parties.[58] The answer must be specific with names, dates and places, rather than just merely a blanket denial of the allegations.

If the subject's answer is deemed sufficient to refute the allegations presented in the Statement of Reasons, the Commandant may grant security clearance.[59] If the determination is adverse to the subject, the Commandant refers the case to a Local Hearing Board.[60]

Local Hearing Board

Each Local Hearing Board is composed of three members,

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[57] Ibid., 121.11 (a), 125.35 (a).

[58] Ibid., 121.11 (b), 125.35 (b).

[59] Ibid., 121.11 (d), 125.35 (d).

[60] Ibid., 121.11 (e), 125.35 (e).

one representative each from the Coast Guard, labor and management. The Coast Guard employee, an attorney, is appointed as Chairman by the Commandant. The other members are selected from a panel of persons nominated by the Secretary of Labor, as provided for in Section 6.10-9 of Executive Order 10173, as amended.

Challenges. Under the Port Security Program the subject has two peremptory challenges, one for the management representative and one for the labor representative, as well as an unlimited privilege to challenge for cause. Provisions also exist for outstanding citizens to be appointed as alternates in the event of sustained challenges. The Chairman rules on all challenges except when challenged himself, in which case the Commandant decides.[61]

The Chairman is charged with the responsibility of making the arrangements for the hearing, including: (1) fixing the time for the hearing; (2) informing the subject of the time and place of the hearing, the members of the Board and his privilege to challenge; (3) acquainting the individual with his privilege to (a) appear personally, (b) have the benefit of counsel, (c) present evidence on his own behalf, and (d) cross-examine adverse witnesses; and (4) informing the subject that the Hearing Board will continue to process

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[61] Ibid., 121.17, 125.41.

the case without additional notice to him if he has not requested within ten days after receipt of the hearing notice an opportunity to appear personally.[62]

Conduct of Hearings. The Coast Guard procedures call for the hearing to be conducted in an orderly and decorous manner at an open or closed session, whichever the individual prefers. A transcript is made of the hearing which is made available to the subject upon request. The hearing is commenced with a reading of the Statement of Reasons, after which the Government enters its case. The individual presents his case and may introduce all relevant matters through documents or witnesses. He is not bound by the technical rules of evidence admissibility. Limited confrontation of adverse witnesses is allowed the subject. The provisions provide that all effort be made to have witnesses present "in order that such witnesses may be confronted and cross-examined by the applicant or holder."[63] If confidential information is used, the Hearing Board is to take such a fact into its consideration when reaching a decision.[64] The Board's determination is based upon all the information presented at the hearing as well as all other data developed

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[62] Ibid., 121.15, 125.39.

[63] Ibid., 121.19 (f), 125.43 (f).

[64] Ibid., 121.19 (g), 125.43 (g).

through investigations or made available by the subject.

Recommendation of the Local Hearing Board. A Local Hearing Board's recommendation is decided by majority vote with a written dissent allowable. The recommendation, with dissent if applicable, along with a memorandum of the reasons buttressing such a recommendation and a complete record of the case is forwarded to the Commandant for disposition.[65]

Action by Commandant

Upon receipt of the Hearing Board's recommendation, the Commandant makes a decision in the case. Under actual conditions the Commandant has a special advisory Board composed of certain staff members which reviews the case again prior to his decision.[66] If the decision is adverse to the individual, he is so notified and informed of his right to have the case reviewed by the National Appeal Board.

National Appeal Board

All reviews under the Port Security Program are heard by the National Appeal Board in Washington, D. C. The subject may appear before this National Appeal Board if he has requested a hearing within twenty days after receipt of the notice from the Commandant. The case is considered by

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[65] Ibid., 121.19 (m), 125.43 (m).

[66] Bureau of National Affairs, Inc., op. cit., p. 51:8.

the Appeal Board, even if the subject does not appear personally.

The structure and procedures utilized by this National Appeal Board are substantially the same as those utilized by the Local Hearing Boards. Upon consideration of the case, the National Appeal Board forwards its recommendation and reasons therefor along with a transcript of the proceedings to the Commandant for disposition.

Final Determination

The Commandant of the Coast Guard is the final authority in all cases. Upon receipt of the National Appeal Board's recommendation he may make a decision or return the case to the National Appeal Board for a rehearing. Once he has made a final decision, the Commandant notifies the subject of the ultimate determination which does not include the Board's recommendation but only a holding for or against him.

VI. CONCLUSION

The current Port Security Program for all practical purposes began shortly after the commencement of the Korean conflict in 1950 with passage of the Magnuson Act, and issuance of Executive Order 10173. The program was established as a response to and protection from Communist infiltration of maritime and waterfront unions. Coast Guard regulations were issued dealing with screening of personnel

who would be employed in the merchant marine or in restricted areas of American ports.

Persons under the program are required to have credentials issued by or acceptable to the Coast Guard which indicate issuance of a security clearance. Denial of security clearance differs between the two groups, however. Denial of security clearance to a merchant seaman means denial of employment,[67] while denial of clearance to waterfront workers does not preclude them from working in non-restricted areas of ports.[68] However, as the Commandant may at any time designate a port or an area of a port as restricted, waterfront employees denied security clearance may find employment quite difficult to obtain.

All security clearances under the Port Security Program are granted, denied or revoked by the Commandant of the Coast Guard. Procedures for screening, hearing and reviewing of cases are established by Coast Guard regulations. These regulations, however, do not outline the investigative basis upon which persons are considered for security clearance. The Coast Guard does not have an investigative unit for conducting security investigations of industrial personnel, and, as one report states, it believes that it has "no

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[67] Supra, note 45.

[68] Commission on Government Security, op. cit., p. 344.

authority to make an investigation as such."[69] An investigation is made on all persons receiving security clearances, however, the extent and scope of which seems to be a matter of confusion.[70] There appear to be no provisions for conducting Full Field Investigations in cases where derogatory data is developed during an initial check.

The original 1942 standard used under the Port Security Program allowed denial of security clearances to those persons whose presence was found to be "inimical to the national war effort." Executive Order 10173 promulgated in 1950 provided that no person could be issued a security clearance if such "would be inimical to the security of the United States." This standard was amended one year later so that security clearances presently may not be granted unless the Commandant believes that such clearances "would not be inimical to the security of the United States."

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[69] Ibid., p. 357.

[70] Ibid., p. 348 states that the FBI makes a name and fingerprint check on applicants; Association of the Bar of the City of New York, Report of the Special Committee on the Federal Loyalty-Security Program (New York: Dodd, Mead and Co., 1956), p. 87 states that all persons under the Port Security Program receive National Agency Checks; Bureau of National Affairs, Inc., op. cit., p. 51-3 claims that aliens receive National Agency Checks while American citizens are checked against files containing reports from various Governmental investigative agencies.

CHAPTER VI

THE PROGRAMS COMPARED

The industrial personnel security programs described in the preceding chapters possess a considerable degree of uniformity. Some differences do exist, however, which make a brief comparison of the programs useful. This chapter provides a comparison of the three major programs and discusses some of their similarities, differences and interrelationships.[1]

I. GENERAL

Scope

The Department of Defense and the Atomic Energy Commission industrial personnel security programs are compatible although they possess distinctly different legal bases. Both programs apply to actual or proposed contractors where access to classified information is involved. The Port Security Program, on the other hand, is unique in that the persons covered are not being considered for access to classified information and have no contractual relationship, actual or proposed, with the Federal Government. It

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[1] The Association of the Bar of the City of New York, Report of the Special Committee on the Federal Loyalty-Security Program (New York: Dodd, Mead & Company, 1956), pp. 73-113 offers a cross-comparison of most of the Federal Government's personnel security programs.

is concerned with security clearances for merchant seamen on United States vessels of 100 gross tons or more and with waterfront employees desiring entrance to restricted areas of American ports.

The Department of Defense Program has three categories of security clearances, namely, TOP SECRET, SECRET and CONFIDENTIAL, in descending order of sensitivity. The Atomic Energy Commission Program has two types of security clearances, a "Q" clearance which is required for access to TOP SECRET and SECRET information and an "L" clearance which is essential for access to CONFIDENTIAL information. Under the Port Security Program, there are no specific types or levels of security clearance as a clearance is not granted for access to classified information. With the exception of information containing Restricted Data which is protected in conformance with the requirements of the Atomic Energy Act of 1954,[2] both the Department of Defense and the Atomic Energy Commission protect classified information in accordance with the basic provisions of Executive Order 10501, dated 5 November 1953.[3]

Standards

All programs have security standards which are

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[2]68 Stat. 919, 42 U.S.C.A. 2011 (1964).

[3]18 Federal Register 7049 (1953).

statements of the tests or rules for measuring characteristics essential to security clearance.[4] The basic Atomic Energy Commission statute provides that no person will be allowed access to Restricted Data until it has been determined that such access will "not endanger the common defense and security."[5] Commission regulations add the words "and will be clearly consistent with the national interest" to this basic standard.[6] Paragraph III.A. of the Defense Department's Industrial Personnel Access Authorization Review Regulation requires that access be granted only if it is "clearly consistent with the national interest." The Port Security Program calls for granting of security clearance if it will not "be inimical to the security of the United States" to do so.[7]

Criteria

The criteria used under all three programs list types of conduct and/or associations which if engaged in by the individual may preclude the granting of a security clearance. Most of the criteria used under the Federal industrial

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[4]Leon H. Weaver, Industrial Personnel Security, Cases and Materials (Springfield: Charles C. Thomas, 1964), pp. 32-36 provides a discussion on the standards used by Atomic Energy Commission and the Department of Defense.

[5]Supra, note 2 at 2165a.

[6]10 C.F.R. 10.28 (1963).

[7]33 C.F.R. 121.03, 125.19 (1962).

personnel security programs have been adapted from those used under the Federal program for civilian employees. Both the Atomic Energy Commission and the Department of Defense have added criteria for use under their programs,[8] but each retains the basic criteria as outlined by Executive Order 10450, dated 27 April 1953.[9] The Port Security Program, which lists somewhat different criteria for both merchant seamen and waterfront employees, has also patterned its criteria after Executive Order 10450.

II. OPERATIONS OF PROGRAMS

Investigations

Security investigations of industrial personnel are handled primarily by the Federal Bureau of Investigation, the Civil Service Commission and the intelligence branches of the three Military Departments. Basically two types of security investigations are utilized under the Federal Government's industrial personnel security programs. These are the National Agency Check and the Full Field Investigation, or as it is sometimes referred to, the Background Investigation.

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[8]Leon H. Weaver, op. cit., pp. 26-32 offers a ready reference and comparison of the criteria used under the Department of Defense and the Atomic Energy Commission Programs.

[9]18 Federal Register 2489 (1953).

Most SECRET clearances under the Department of Defense Program and "L" security clearances under the Atomic Energy Commission Program require National Agency Checks. Industrial personnel under the Port Security Program receive a somewhat limited National Agency Check. Full Field Investigations are required for Atomic Energy Commission "Q" clearances and Department of Defense TOP SECRET security clearances. In all programs, except the Port Security Program, provisions exist for expansion of National Agency Checks when such investigations develop derogatory data.

Contractor investigations. The Department of Defense Program has the distinctive feature of allowing its contractors to investigate their employees for granting of CONFIDENTIAL clearances.[10] Contractors may determine the scope of their investigations within the framework of Paragraph 18 b. of the Department of Defense Industrial Security Manual for Safeguarding Classified Information. If such investigations indicate that clearance cannot be granted, the cases are then referred to the Defense Department for disposition.

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[10]Ralph S. Brown, Jr., and John D. Fassett, "Loyalty and Private Employment: The Right of Employers to Discharge Suspected Subversives," 62 Yale Law Journal 954, 973 (1953); and Thomas E. Harris, "Statement on the Industrial Personnel Access Authorization Review Regulation," Hearings before the Senate Judiciary Subcommittee on Constitutional Rights, 86th Congress, 2d Session, Part 4 (2 July 1959), pp. 1998-2000 discuss some problems involved with allowing contractors to grant CONFIDENTIAL security clearances.

Screening

The Department of Defense has centralized the screening function under its program as has the Coast Guard for the Port Security Program. The Atomic Energy Commission, on the other hand, has a decentralized system whereby the local Manager of Operations is responsible for the screening process. The Commission Program has also made fairly extensive use in its screening procedures of the informal interview, while the Department of Defense has practically never used it. There are no provisions for this procedure under the Port Security Program.

Granting of security clearances at the screening level is handled by the local Manager of Operations in the Atomic Energy Commission Program. In the Defense Department Program, a unanimous determination by the Central Screening Board is sufficient. The Port Security Program provides for a decision by the Commandant of the Coast Guard upon receipt of an advisory determination from the Screening Board.

Administrative Review Procedures

The Atomic Energy Commission allows applicants as well as employees recourse to the Administrative Review Procedures of its program. This extension of procedural safeguards to applicants is unique in the family of personnel security programs where clearance is being granted for access

to classified information. Department of Defense provisions, on the other hand, expressly prohibit any "personnel security clearance action . . . prior to the employment of the individual by a contractor."[11]

Hearings. The hearing stage in all three programs provides a degree of decentralization. The Department of Defense has three regional Hearing Boards geographically located in separate sections of the country. The Port Security Program and the Atomic Energy Program have local Hearing Boards at several locations throughout the country determined by their internal administrative operations.

The composition of the Hearing Boards differs under all three programs. The Defense Department confines the membership of its boards to representatives of the three Military Departments. The Atomic Energy Commission Boards may include employees of contractors, individuals from private walks of life or employees of the Commission. The Port Security Program combines features of the other two and has a Board membership of one representative each from the Coast Guard, organized labor and management. The Port Security Program also allows leading citizens to serve on its Boards under certain conditions. Both the Port Security

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[11] United States Department of Defense, Industrial Security Manual for Safeguarding Classified Information (Washington: Government Printing Office, 1963), Paragraph 19.

and the Atomic Energy Commission Programs allow the individual the right to challenge members of the Hearing Boards.

The actual operation of the hearings is quite analogous under the three programs. The Port Security Program, however, is singular in allowing the hearing to be conducted at an open session if desired by the individual. The Atomic Energy Commission authorizes the issuances of subpoenas where the other programs merely provide for invitations to testify.

Review. The Department of Defense Program has a centralized system for review of industrial personnel security cases as do the Atomic Energy Commission and the Port Security Program. In all programs the individual may appear personally before the Review Board or file a written brief. The Department of Defense Review Board, however, is much more limited in its latitude than the Boards of the other programs. Its consideration of a case is based solely on the record of the Hearing Board proceedings and any briefs submitted. On the other hand, both the Port Security and Atomic Energy Commission Programs allow for the submission of new evidence and additional testimony. The Port Security Review Board functions on a much broader scale with the person being afforded for all practical purposes "a new and complete hearing."[12]

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[12]The Association of the Bar of the City of New York, op. cit., pp. 102-103.

Final Decision

In all industrial personnel security programs, the final decision on security clearances rests with the head of the department or agency. The Commandant of the Coast Guard in the Port Security Program makes the ultimate determination in all cases. Under the Atomic Energy Commission, the final decision is usually made by the General Manager. However, provisions do exist where certain cases are required to go to the Commission itself for a final determination. In the Defense Department Program, the Central Review Board generally makes the final decision. This determination may, however, be overruled by the Secretary of Defense or the Secretaries of the three Military Departments acting unanimously. Certain cases must also be decided only by the Secretary of Defense.

III. CONCLUSION

Under the Department of Defense and Atomic Energy Commission Programs, security clearance relates to access to classified information by the individual. Suspension of access pending a final security decision does not mean that the individual need be terminated or suspended from employment. The Port Security Program, applicable to dock workers, is similar to the above programs in that individuals still may be employed as long as they are not allowed access to

restricted port areas.[13] Under the portion of the Port Security Program which applies to merchant seamen, suspension of security clearance in effect constitutes denial of employment.

Each of the industrial personnel security programs of the Federal Government has differently worded standards for issuance of security clearances.[14] All of the standards, however, would seem to be in agreement in imposing the responsibility for resolving all doubts in favor of the Government.

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[13]Ralph S. Brown, Jr., and John D. Fassett, op. cit., pp. 954-984; and Joseph F. Doherty, "Security Risk Discharges," Industrial Security, VII (July, 1963), pp. 4-5, 14-18, 40 discuss some of the problems involved in discharging of industrial personnel by employers.

[14]Infra, Chapter VII provides a discussion of some of the possible implications and meanings of the standards.

CHAPTER VII

CONCLUDING COMMENTS

I. GENERAL

From the preceding discussion on the industrial personnel security programs of the Federal Government, it is easy to discern that they are not ephemeral. Problems have been inherent in the programs since their inception and will remain for years to come. As one author has stated: "Barring a cataclysm or the millennium, these problems will be with us for a long time."[1]

The industrial personnel security programs were born out of a need for some type of protection against those who would subvert our democratic way of life. The "cold war" necessitated increased emphasis on the Federal Government's requirements for safeguarding the national security. The national fears aroused by the McCarthy era were an impetus to the already rapid expansion and tightening of the security provisions of the programs. Growing pains were experienced by the Federal agencies during this evolutionary process. The turbulence surrounding the programs reached its peak in the mid-fifties but has subsided in recent years. Now that

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[1]Ralph S. Brown, Jr., Loyalty and Security, Employment Tests in the United States (New Haven: Yale University Press, 1958), p. vii.

the turmoil has abated, the maelstrom quieted, a relatively dispassionate analysis may be made of the programs in the light of their historical evolutions.

Oppenheimer Case

Probably the best known personnel security case of the Federal Government is that of J. Robert Oppenheimer, former director of the Los Alamos Laboratory. Although it is not an industrial personnel security case, it is interesting to consider this case as an example of the evolution of personnel security under the Federal Government.

Oppenheimer was granted a security clearance under the wartime Manhattan Engineering District at a time when the standards and criteria were applied with substantial flexibility. In 1954, during the height of the national concern over communist infiltration in the Government, he was declared a security risk, and his clearance was revoked.[2] Nearly ten years later, in 1963, with the more acute problems and tensions of Government personnel security having greatly receded, he was chosen to receive the Fermi Award, the highest honor conferred by the Atomic Energy Commission. The selection of Oppenheimer for this award is described "as

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[2]United States Atomic Energy Commission, In the Matter of J. Robert Oppenheimer, Transcript of Hearing before Personnel Security Board, (Washington: Government Printing Office, 1954); see also ibid., Texts of Principal Documents and Letters of Personnel Security Board, General Manager, Commissioners, (Washington: Government Printing Office, 1954).

a symbolic action to 'clear the name' of the scientist . . ."[3] To date, Oppenheimer's security clearance has not been returned, but these recent developments would seem to indicate that such a move is not far off.

II. PROBLEMS AND ISSUES

Individual Freedom vs. National Security

Most controversy regarding the industrial personnel security programs as well as other personnel security programs of the Federal Government centers around freedom of the individual vs. the needs of national security. An increase in the balance of either tips the scales and is followed by cries of anguish from proponents on both sides respectively of the controversy. Many claim that the industrial personnel security programs suppress civil liberties and undermine American democratic traditions and freedoms. As Gellhorn has stated: "Restrictions justified as necessary safeguards of freedom may in fact safeguard freedom out of existence altogether."[4] Others feel that we should not endanger our national security by feelings of

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[3] The New York Times, April 5, 1963, p. 1, col. 2; see also ibid., October 25, 1963, p. 33, col. 1, for President Eisenhower's discussion of the case.

[4] Walter Gellhorn, Industrial Freedom and Governmental Restraints (Baton Rouge: Louisiana State University Press, 1956), p. 40.

undue solicitude for the freedoms of the individual. Whatever one's feelings, the extensive concern for individual rights of personnel under the various programs has brought about considerable refinement and reorientation in the programs in certain respects.

Due process. Critics of the Federal Government's industrial personnel security programs claim that security clearances are often denied without recourse to due process of law.[5] Others argue that the administrative hearings for personnel security cases are not courts of law, and, as such, individuals are not on trial or subject to punishment. As one member of the Department of Defense has stated regarding the program, "there is no intent as in a court of law, to determine guilt or innocence, or to punish those of dubious loyalty or doubtful character. . . ."[6] Yet, the stigma surrounding denial of security clearance,[7] or, in some

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[5]Eleanor Bontecou, "Due Process in Security Dismissals," The Annals of the American Academy of Political and Social Science, CCC (July, 1955), pp. 102-103 discusses due process in relation to personnel security cases; Lloyd K. Garrison, "Some Observations on the Loyalty-Security Program" University of Chicago Law Review XXIII (Autumn, 1955) 2. provides a consideration of elements of due process which are missing in security cases.

[6]Herbert Lewis, "The Industrial Security Program of the DOD, The Industrial Personnel Access Authorization Review Program," Industrial Security VII (October, 1963), p. 67.

[7]The Supreme Court in Wieman v. Updegraff, 344 U.S. 183 (1952) described a loyal dismissal as a "badge of infamy." It is questionable if a security as opposed to a loyal dismissal is any less damaging.

instances, the loss of one's livelihood may be regarded as punishment in some quarters, especially by those so affected.

American jurisprudence requires that the state must prove guilt, and, until such is the case, the accused is presumed to be innocent. Many persons feel that under the industrial personnel security programs of the Federal Government the burden of proof is on the individual, and a presumption of guilt exists. Proponents of the personnel security systems argue that their purpose is to safeguard the national security. Administrative hearings are not required to prove a subversive or deleterious act but merely to determine whether or not the individual may be trusted.

The right-privilege distinction is one that is constantly found in any discussion of personnel security programs.[8] The Government's doctrine is generally that security clearances are privileges and as such not subject to the safeguards of procedural due process. A security clearance, as one Government official has stated, "is a privilege the basic nature of which is a fiduciary relationship between the individual and the government. Only those individuals

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[8]Robert W. Wise, Nancy Lou Provost, "New Procedures for Industrial Security Hearings," Industrial Security V (January, 1961), 46-48; and Kenneth Culp Davis, "The Requirement of Trial-Type Hearing," Harvard Law Review LXX (December, 1956), 222-232 offer some observations on this situation.

who are qualified . . . shall have the privilege."[9] Others argue that it is a constitutionally protected right, and, therefore, the traditional safeguards of due process must be applied.[10] The courts have invariably strayed from establishing specific guidelines as to what due process entails in security determinations. As Davis states, the "right-privilege dichotomy is too crude for consistent application, and the courts have often sought and found ways to circumvent it."[11]

Confrontation. Article VII of the Bill of Rights provides that the individual "be confronted with the witnesses against him." This right of being able to face one's accusers is a basic tenet of our legal system. Many believe that the use of confidential informants in security proceedings is debilitating to our national stature and unfair to the individual in question. As Fred Cook expressed it in his book, The FBI Nobody Knows, the "cult of the informer is one of the most pernicious a great democracy ever was deluded into sanctifying." Complete confrontation, on the other hand, would deprive the investigative agencies of most of

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[9]George Mac Clain, "The Industrial Security Program of the Department of Defense, Security Clearances - Protection of the Rights of Individuals," Industrial Security VI (October, 1962), 72.

[10]Supra, note 5 for discussion on this point.

[11]Davis, op. cit., p. 276.

their sources of information. The issuance of Executive Order 10865, dated 20 February 1960, was the latest attempt by the Government to provide maximum requirements for confrontation and cross-examination within the limits of national security.[12]

Standards. The standards for security clearance used by the various industrial personnel security programs has caused considerable discussion. Many persons feel that the standards are vague and subject to considerable subjective evaluation. Others feel that these standards must be broad because of the diverse situations existing from case to case. Another consideration is that possibly the differences in the standards are only a matter of semantics. One author has suggested "that the question as to whether the standards are different cannot be resolved by study of the words in the regulations, but would necessitate an analysis of how they are interpreted and applied in concrete cases."[13]

The change from the "national security" standard to a "national interest" standard is an interesting one.[14] It

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[12]25 Federal Register 1583 (1960).

[13]Leon H. Weaver, Industrial Personnel Security, Cases and Materials (Springfield: Charles C. Thomas, 1964), pp. 32-33.

[14]Ibid., pp. 23-25; and Timothy J. Walsh, "An Analysis of Executive Order 10865," Industrial Security IV (April, 1960), 18 discuss some possible implications of this change.

remains to be seen whether or not this change will be of value to the industrial personnel security programs.

III. FINAL CONSIDERATIONS

These then are some of the problems and issues facing the industrial personnel security programs of the Federal Government. There are real dangers to be faced. This country is involved in a form of warfare and international anarchy in which subversion and espionage are important weapons. The needs of national security are real and imminent. One must not lose sight, however, of the rights and freedoms of the individual, as this is the factor which separates the democratic from the totalitarian society.

No doubt many of the criticisms of the Federal industrial personnel security programs have been justified. One finds in the published literature many more criticisms of the programs than justifications for their existence. As Leon Weaver has suggested, this situation exists "because critics of the systems tend to write articles and security officers do not."[15] It is, therefore, time for students of the subject as well as security professionals in Government and Industry to delve into these problems. Research and study by security personnel will do much to rebut some undue

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[15] Ibid., p. viii.

criticisms and to enhance the professional status of the security field. Professional security organizations, such as the American Society for Industrial Security, should take the lead in encouraging and stimulating research.

It is felt that the key to solving the basic problems of the Government's industrial personnel security programs lies with improving the skills of the individuals working in the system. At all phases of the process (investigation, screening, hearing and review), individual judgments and evaluations are made. By availing the individual with training and education, we can better equip him to make the necessary evaluations in an intelligent and enlightened manner.

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