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The Right of Federal Security Agencies to Control the Private Lives of Their Employees—Some Recent Developments

In 1972, Congress was confronted with several crucial decisions concerning the extent to which the federal government may be allowed to control the private lives of its employees.¹ Perhaps the most hotly debated issue of this controversy is whether the security agencies (CIA, NSA, FBI²) should be completely exempt from legislation proposed to limit this control. Thus far, these agencies have successfully avoided limitations on their power, but there is growing recognition that the employees of the security agencies are entitled to some measure of protection from arbitrary action.

Recently, public opinion has been thoroughly aroused by several examples of flagrant agency abuses³ which were widely reported in the news media. In a

1. Proposed legislation considered by Congress includes the following:

(a) Senate Bill 2466 and Senate Resolution 163 which are intended to counter the newly reactivated Subversive Activities Control Board, 117 CONG. REC. 19068-72 (daily ed. Nov. 19, 1971).

(b) House Bills 7199 and 7969 which have been drafted to prevent violations of first amendment rights of federal employees.

2. The CIA, NSA, and FBI have been collectively designated as "the security agencies" in the published *Hearings on H.R. 7199 and Related Bills Before the Subcommittee on Employment Benefits of The House Committee on Post Office and Civil Service*, 92d Cong., 1st Sess., (1971).

3. The following two examples received much comment in the news media and are illustrative of the kinds of abuses with which this article is concerned.

In September, 1970, FBI agent Jack Shaw was pressured into resigning "with prejudice" after the FBI discovered a letter written by Shaw which contained criticisms of the bureau's director. The intended recipient of the letter was Dr. Abraham Blumberg, the professor of a graduate course Shaw had just completed at the John Jay College of Criminal Justice in New York City.

The letter was a response to what he considered to be inaccuracies in the professor's classroom characterization of the bureau. While generally supportive of the FBI and its activities, it admitted that a personality cult existed around its director. The stigmatizing effects of a resignation "with prejudice" proved to be a substantial impediment in his subsequent search for employment. Shaw filed suit to have this "taint" removed from his record and the Government, realizing the difficulty of its position, settled out of court. In a further reaction to criticism, Hoover ordered fifteen of his agents who were enrolled in Professor Blumberg's class to withdraw from the John Jay College (from a television program, Interview with Jack Shaw, former FBI Agent, NEW JERSEY SPEAKS, WNET-TV, Feb. 16, 1971).

Thomas Carter, a 26 year old file clerk in the FBI's Washington headquarters, was discharged for "conduct unbecoming an employee of this bureau," after the bureau discovered that Carter's girlfriend, while visiting from Texas, had occupied his room with him for two nights during her stay in Washington. The bureau became apprised of these events when it received an illiterate complaint from a writer whose identity is still unknown.

The stigma of an adverse dismissal was reduced due to the efforts of Carter's two roommates and fellow employees who explained the reasons for his dismissal to a prospective employer, thus allowing Carter to secure a position with a local bank. However, their support of Carter along with

number of instances, the employee who has sought a legal remedy has been successful.⁴ The Government has granted concessions when it realized that the courts are willing to intervene to protect employees whose basic rights have been unnecessarily abridged. This, however, is the result of some recent developments in the law which have rejected a long-standing judicial policy of non-interference in the affairs of governmental agencies. This article will consider those recent cases which have brought about the demise of the right/privilege doctrine and the rise of the substantial interest doctrine; the influence of these cases on the security agencies; the influence of Executive Orders Nos. 11,491 and 11,605; and the impact of legislation regulating government employees' privacy.

Recent Judicial Developments

This policy of judicial non-interference was based upon the "right/privilege doctrine," a theory which asserts that public employment is a mere privilege rather than a right. This privilege may be withdrawn or denied for a reason which might otherwise be considered a deprivation of an employee's constitutional rights. Perhaps the most cogent statement of this doctrine was made in *McAuliffe v. City of New Bedford*⁵ where Justice Holmes, speaking for the Court, asserted:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of this contract. The servant cannot complain, as he takes the employments on the terms which are offered him.⁶

The right/privilege doctrine was not seriously questioned for half a century following *McAuliffe*. It first became an issue in 1947, when President Truman issued Executive Order No. 9835. The Order provided for the appointment of a Loyalty Review Board for the purpose of identifying organizations which were

their failure to have reported the activities of their roommate at the time of his girlfriend's visit, caused the bureau to initiate disciplinary action against them, which induced both to promptly submit their resignations.

In 1970, Carter received a favorable out of court settlement as the result of his legal battle to obtain the removal of the unfavorable stipulation on his employment record. *Carter v. United States*, 407 F.2d 1238 (D.C. Cir. 1968). Carter's success, however, was due to the fortunate coincidence that he was an Air Force veteran, so that his employer, like any other federal employer, was constrained by the provisions of the Universal Military Training and Service Act § 9(b-c), (g)(1), 50 U.S.C. § 459 (b-c), (g)(1), which forbids the discharge—except for cause—of a veteran for the first year after he resumes civilian life.

4. *Supra* note 1.

5. 155 Mass. 216, 29 N.E. 517 (1892).

6. *Id.* at 220, 29 N.E. at 517-18.

"totalitarian, Communist or subversive, or which had a policy approving force or violence to deny others their constitutional rights or to alter the government by unconstitutional means."⁷ The members of these designated groups were either to be discharged or refused employment by government agencies.

The leading case under the Order, *Bailey v. Richardson*,⁸ involved a federal government employee who had been discharged because the Loyalty Review Board found that "reasonable grounds exist for the belief that Miss Bailey is disloyal to the Government of the United States."⁹ In addition to being discharged, her eligibility for future civil service was denied for a period of three years. Her complaint was that in the hearing before the Board, she had no opportunity to confront or cross-examine the witnesses against her. A divided Supreme Court affirmed without opinion¹⁰ the decision of the Court of Appeals that Miss Bailey had no right to trial because she had no right to public employment. The District of Columbia Circuit had stated that, "due process of law is not applicable unless one is being deprived of something to which he has a right."¹¹ Furthermore, it stated that "to hold office at the will of a superior and to be removable therefrom only by constitutional due process of law are opposite and inherently conflicting ideas."¹²

The court considered it irrelevant that her reputation was injured in the process of her dismissal. It reasoned that:

If Miss Bailey had no constitutional right to her office and the executive officers had power to dismiss, the fact that she was injured in the process of her dismissal neither invalidates her dismissal nor gives her the right to redress.¹³

In his dissenting opinion, Judge Edgerton rejected the right/privilege doctrine and commented that: "Dismissal for disloyalty is punishment and requires all the safeguards of judicial trial."¹⁴ He went on to say:

The premise that government employment is a privilege does not support the conclusion that it may be granted on condition that certain economic or political ideas not be entertained.¹⁵

The companion case to *Bailey*, *Joint Anti-Fascist Refugee Committee v.*

7. Exec. Order No. 9385, 3 C.F.R. 627 (1943-48 comp.).

8. 182 F.2d 46 (D.C. Cir. 1950).

9. *Id.* at 50.

10. 341 U.S. 918 (1951).

11. 182 F.2d at 58.

12. *Id.* at 58.

13. *Id.* at 63.

14. *Id.* at 69.

15. *Id.* at 72.

McGrath,¹⁶ also included a challenge to the constitutionality of Executive Order No. 9835. In this case, the Committee protested the procedure by which it was labeled a Communist organization. The Court, without rendering a majority opinion, determined that the label had injured a legally protected right of the plaintiff and that this designation could not be made without providing for the appropriate procedural safeguards. In his concurring opinion, Justice Jackson decided that the right/privilege doctrine was not controlling. He remarked: "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally."¹⁷

A year later in *Weiman v. Updegraff*,¹⁸ the Supreme Court held that a state statute violated the due process clause because it required the dismissal of any state employee who belonged to a Communist front organization whether or not he was aware of its subversive goals. The majority explained:

We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.¹⁹

The Court emphasized the stigmatizing effect of a dismissal based on disloyalty when it declared:

There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy.²⁰

While the right/privilege theory was being eroded, a new principle—the substantial interest doctrine—was emerging to take its place. This new doctrine presumes that there exist basic constitutional rights which the government may not abridge without showing that their infringement is necessary to protect an important governmental interest.

*Cafeteria and Restaurant Workers Union v. McElroy*²¹ presented the Supreme Court with an appropriate context in which to develop this new doctrine. In *Cafeteria Workers*, the Court decided that Rachel Brawner, a civilian cook at a defense installation, was not denied due process when her security clearance was withdrawn without a hearing. However, the summary denial could not be justified by the mere assertion that "because she had no constitutional right to

16. 341 U.S. 123 (1951).

17. *Id.* at 185.

18. 344 U.S. 183 (1952).

19. *Id.* at 192.

20. *Id.* at 191.

21. 367 U.S. 886 (1961).

be [in the plant] in the first place, she was not deprived of liberty or property by the Superintendent's action."²² The Court then identified the determinative criteria:

[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.²³

After *Cafeteria Workers*, the right/privilege doctrine continued to decline until 1967 when it was all but annihilated by the Court's decision in *Keyishian v. Board of Regents*.²⁴ In *Keyishian*, the Court overruled its decision in *Adler v. Board of Education*²⁵ and repudiated New York's complicated teachers loyalty scheme, which required the dismissal of those who had been guilty of "treasonable or seditious words or acts."²⁶ The majority opinion stressed its rejection of "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable . . ."²⁷ The breadth of *Keyishian's* repudiation of the right/privilege doctrine was apparent in the Court's sweeping declaration that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."²⁸

In *Pickering v. Board of Education*,²⁹ the Court further elucidated the substantial interest doctrine and provided an example of its application. *Pickering* dealt with a school teacher who was fired when a local newspaper printed her letter criticizing the Board of Education's approach to raising revenue for public schools. The Court furnished the following guide to the use of the doctrine:

The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen in commenting upon matters of public concern, and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.³⁰

After weighing the competing interests, the majority found that the teacher's

22. *Id.* at 894.

23. *Id.* at 895.

24. 385 U.S. 589 (1967).

25. 342 U.S. 485 (1952).

26. N.Y. CIVIL SERVICE LAW § 105 (3) (McKinney 1959); N.Y. EDUCATION LAW § 3021 (McKinney 1970).

27. 385 U.S. at 605-06.

28. *Id.* at 606.

29. 391 U.S. 563 (1968).

30. *Id.* at 568.

first amendment rights predominated. It explained:

In these circumstances we conclude that the interest of the school administration in limiting teacher's opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.³¹

These recent Supreme Court decisions have provided the lower courts with a mandate allowing them to enlarge the scope of judicial review of governmental conduct. Three district court decisions demonstrate the extent of the lower court's willingness to intervene to protect the victims of arbitrary government action.

In *McConnell v. Anderson*,³² the district court found that a state university had denied due process by refusing to hire a qualified librarian because of his publicly announced homosexuality when the state had not shown that homosexuality would impair the performance of his duties.

In *Burns v. Pomerleau*,³³ the district court found that the due process clause prevented a municipal police department from refusing to hire a qualified applicant because of his declaration that he was a practicing nudist. As in the *McConnell* case, the *Burns* court placed on the employer the burden of proving that the practices objected to would impair the employee's performance on the job.

In *Castro v. Beecher*,³⁴ the court of appeals would not allow an applicant to be refused a job as a police officer based on his failure to pass an intelligence test. The court ruled that due process would not allow low test scores to be a basis for this denial unless the state civil service commission could prove that the test could validly predict an applicant's ability for police work.

To date, these cases represent the extent to which the judiciary has intervened in the employment practices of federal and state government. However, *Bagacki v. Board of Supervisors*³⁵ illustrates the California Supreme Court's recognition that this limit may not be extended indefinitely. In *Bagacki*, the plaintiff/employee unsuccessfully tried to shift his burden of proof to the municipal employer. Had the court ruled in favor of the employee, the employer would have been obliged to prove that valid reasons existed for an employee's dismissal.³⁶

31. *Id.* at 573.

32. 316 F. Supp. 809 (D. Minn. 1970).

33. 319 F. Supp. 58 (D. Md. 1970).

34. 334 F. Supp. 930 (D. Mass. 1971).

35. 5 Cal. 3d 771, 489 P. 2d 537, 97 Cal. Rptr. 657 (1971).

36. 5 Cal. 3d at 776, 489 P. 2d at 542, 97 Cal. Rptr. at 662.

The foregoing summary of developments in the law indicate that ample legal precedent will soon exist so that employees who are victims of abuse by the security agencies will have an adequate remedy. That such an inference is unfounded will be shown presently.

It must be emphasized that government employers are not required to achieve their goals through a choice of procedures which are least destructive of individual rights.³⁷ The substantial interest doctrine, as it is currently applied, requires the interests of the individual to yield to any dominant governmental interest. The government will prevail where the employer can insist that summary action is necessary in order to protect national security. Thus, the intelligence agencies dealing with employment practices may be allowed freedom of action, which would clearly not be permitted to other government employers; and there is a great potential for abuse where agency power is unchecked.

The Impact of Recent Developments on the Security Agencies

In the United States, the acquisition, processing and analysis of highly classified intelligence data is done by a very large and diverse group of organizations. The organizations purposely are not tightly joined and coordinated, and there is considerable overlap in the functions performed by the various members. This overlap allows the conclusions of one member to be checked against those of another. These organizations, loosely referred to as the intelligence community, are the National Security Agency (NSA), the Defense Intelligence Agency (DIA), the Army, Navy and Air Force, the State Department's Intelligence and Research Division (INR), the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), the Atomic Energy Commission (AEC), the United States Intelligence Board (USIB), and the Treasury Department's Bureau of Customs.³⁸

37. See Bruff, *Unconstitutional Conditions upon Public Employment*, 21 HAST. L.J. 129 (1969).

38. NEWSWEEK, Nov. 22, 1971, at 32. The functions of these organizations may be listed as follows:

<u>Name</u>	<u>Primary Function</u>
National Security Agency (NSA)	Breaking foreign codes and creating U.S. codes.
Defense Intelligence Agency	Attempting to coordinate the work of Army, Navy, and Air Force intelligence.
Army, Navy, and Air Force Intelligence	Reconnaissance including spy satellites. Receives over 80% of the intelligence budget.
State Department Intelligence	Gathering and analyzing data

Recent Supreme Court decisions emphasize the sensitivity of the employee's position as a dominant factor affecting the measure of procedural safeguards to which an employee is entitled. These cases are important when viewed in light of the large number of employees who have access to government secrets. One source has estimated the total intelligence budget at six billion dollars annually, with a total employment of close to 200,000 persons.³⁹

In *Cole v. Young*,⁴⁰ the Supreme Court stressed the nature of an employee's position as a factor determinative of the requirements of due process. The Court held invalid the summary dismissal of a federal food inspector pursuant to Executive Order No. 10,450.⁴¹ That Order was authorized by the Internal Security Act of 1950.⁴² The Court explained:

[It] is difficult to justify summary suspension and nonreviewable dismissals on loyalty grounds of government employees who are not in sensitive positions and who are thus not situated where they could bring about any discernible adverse effects on the nation's security. . . .⁴³

In 1967, the Supreme Court made a similar distinction in *United States v. Robel*.⁴⁴ It held that those sections of the Internal Security Act which denied employment in defense plants to any members of the Communist Party were invalid because they were overbroad. The Court, however, was aware of the security problem and acknowledged the right of Congress to use narrowly

and Research Division (INR)	from service posts.
Federal Bureau of Investigation (FBI)	Internal security including surveillance of foreign agents.
Central Intelligence Agency (CIA)	Analyzes inputs from its own agents and also from the other intelligence agencies; covert promotion of U.S. interests abroad.
Atomic Energy Commission (AEC)	Analyzes data on foreign nuclear developments.
United States Intelligence Board	An organization composed of the above groups, which is chaired by the CIA. It oversees the activities of the intelligence community.
Treasury Department (Bureau of Customs)	Concentrates on drug and economic intelligence.

39. *Id.* at 29.

40. 351 U.S. 536 (1956).

41. 3 C.F.R. 936 (1949-53 comp.).

42. 50 U.S.C. §§ 781-98 (1970).

43. 351 U.S. at 546.

44. 389 U.S. 258 (1967).

drawn legislation to deny sensitive positions to those who would use their positions to disrupt defense production.

In *Cole* and *Robel*, the Court considered the threat to national security as a justification for the summary dismissal of defense plant employees who may have access to classified information. In cases involving security agencies, the interest of the United States is quite similar. However, in actual practice, the two situations are treated differently. The courts are much more likely to grant summary judgment in favor of a security agency without considering the sensitivity of the plaintiff employees' position.⁴⁵

This difference in treatment between employees of security agencies and other defense employees is due to those provisions of federal law which allow the directors of the CIA and NSA to dismiss any employee in the interests of national security⁴⁶ and also to the complete exemption of the FBI from the provisions of the Civil Service Act.⁴⁷ However, there seems to be no logical basis for this disparity unless security agency secrets are somehow considered more important than Defense Department secrets. Notwithstanding the government's interest in security, it is hard to justify the use of summary procedures if a complete airing of the dispute would not require the disclosure of classified information. In order to determine whether the holding of a trial would result

45. See note 1, *Carter v. United States*, 407 F.2d 1238 (D.C. Cir. 1968). In that case the District Court for the District of Columbia granted summary judgment in favor of the United States despite the fact that the plaintiff employee was a GS-4 clerk who had no access to highly classified information. The court of appeals reversed, and indicated that it would not have done so but for the coincidence that the plaintiff was still covered by the Universal Military Training and Service Act § 9(b-c), (g)(1), 50 U.S.C. § 459(b-c), (g)(1) (1970). The importance of the plaintiff's employer to national security must have been of great significance. That the FBI is not subject to civil service regulations should not be considered crucial. The *McConnell*, *supra* note 32, *Burns*, *supra* note 33, and *Carter* cases demonstrate the federal courts' willingness to curb a government employer not subject to the Civil Service Act. Assuming that relief be granted in security cases, the next question is *should* it be granted? An argument can be made that it should be granted because the employer has tried to further castigate his employees by including the damaging stipulation on their employment records. As early as 1961, the Court of Appeals for the District of Columbia had forbidden punitive action in summary procedures. The court in *Bland v. Connally* said that the military services were free to dismiss anyone they wished, but they could not in a summary manner "... introduce the element of punishment or labelling into the involuntary separation by characterizing the discharge derogatorily." 293 F. 2d 852, 858 (D.C. Cir. 1961).

46. The National Security Act of 1947, 50 U.S.C. § 403 (c) (1949) and The Emergency Detention Act of 1950, 50 U.S.C. § 833 (1970) give the directors of the CIA and NSA respectively the power to dismiss any employee when the directors consider such termination to be "in the interests of the United States." This power is given notwithstanding the provisions of any other law.

47. All positions in the FBI are excepted from the competitive service and the FBI may discharge its employees for reasons it chooses, subject only to constitutional limitations. 5 U.S.C. §§ 7501, 7512; 28 U.S.C. § 536.

in a breach of security, the court should conduct a hearing in which the focus is on the sensitivity of the employee's position as well as the nature of his alleged misconduct. Of course, the agency should be present during the hearing and be given adequate opportunity to prevent the disclosure of classified information.

Perhaps future decisions will incorporate these procedures so that the courts require the intelligence agencies to justify the assertion of an inordinate degree of control over the private lives of their employees. However, this does not seem realistic as the present composition of the Supreme Court suggests that the liberalizing trend has already reached its peak.⁴⁸ Thus, it seems that employees of the security agencies must rely on legislative rather than judicial reforms if they are to invoke legal sanctions to limit their employer's excessive control over their private lives.

Executive Order No. 11,491—The Right to Bargain Collectively

In 1969, President Nixon issued Executive Order No. 11,491⁴⁹ supplementing Executive Order No. 10,988.⁵⁰ Together, these promulgations establish the right of employees of the Executive Branch of Government to organize and bargain collectively with agency management.

Under Executive Order No. 11,491, a union agreement may include a procedure by which grievances may be resolved as long as such procedures comply with the appropriate civil service regulations. This order might have provided security agency employees (particularly those in non-sensitive positions) with a means of combatting agency abuses but for Section 3(b), which exempts the entire intelligence community.⁵¹

When the collective bargaining process becomes more firmly rooted in government practice, it may well be that the complete exemption of the security agency will be lifted. However, the agencies may still be able to frustrate the objectives of this legislation by retaining an inordinate degree of control over employee's choice of bargaining representative.

48. Mr. Justice Blackmun's first majority opinion for the Supreme Court in *Wyman v. James*, 400 U.S. 309 (1971) seems to have breathed some life into the remains of the right/privilege doctrine.

49. Exec. Order No. 11,491, 3 C.F.R. 861 (1966-70 comp.).

50. Exec. Order No. 10,988, 3 C.F.R. 521 (1959-63 comp.).

51. § 3(b)(1)-(2) of Executive Order No. 11,491 specifically excludes the FBI and the CIA while § 3(b)(3) excludes "any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations."

Executive Order No. 11,605—Reactivating the SACB

Executive promulgations may operate to limit as well as expand on the rights of government employees. The most notable recent example of such a restrictive decree is Executive Order No. 11,605.⁵² This 1971 promulgation amends an earlier executive order (Executive Order No. 10,450)⁵³ to provide the Subversive Activities Control Board (SACB) with increased authority to determine whether any organization designated by the Attorney General is:

totalitarian, Fascist, Communist, subversive, or which has adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or which seeks to alter the form of government of the United States by unconstitutional means.⁵⁴

Executive Orders No. 10,450 and No. 11,605 are successors to Executive Order No. 9835,⁵⁵ which established the Loyalty Review Board.

Congress provided legislative authority for Executive Orders Nos. 10,450 and 11,605 when it passed the Internal Security Act of 1950⁵⁶ to curb communist subversion of American institutions. This Act set up the SACB.⁵⁷ Executive Order No. 11,605 is largely an attempt to revitalize the SACB and provide it with new powers, since several court decisions following its creation had rendered it largely impotent.⁵⁸

Executive Order No. 11,605 poses a particular threat to the employees of the security agencies because they are among those singled out for special consideration by the promulgation which it amends. This is because the scope and intensity of the investigation conducted pursuant to this Order is directly proportional to the sensitivity of the position held by the person being investigated.⁵⁹

52. 36 Fed. Reg. 12831 (1971).

53. Exec. Order No. 10,450, 3 C.F.R. 936 (1949-53 Comp.).

54. Exec. Order No. 10,450 § 8(a)(5), 3 C.F.R. 938 (1953).

55. 3 C.F.R. 627 (1947).

56. 50 U.S.C. §§ 781-98 (1950).

57. 50 U.S.C. § 791 (1950).

58. In *Communist Party of United States v. Subversive Activities Control Board*, 367 U.S. 1 (1960) measures of the Internal Security Act which imposed penalties on individuals on the theory of guilt by association were held to violate the first amendment. In *Boorda v. Subversive Activities Control Board*, 421 F.2d 1142 (D.C. Cir. 1969) provisions of the Internal Security Act which allowed public disclosure, of an individual's membership in a subversive organization without proof that the individual shared the illegal purpose of the organization, were held in violation of the first amendment.

59. § 3(a) of Executive Order No. 10,450 requires that "the scope of the investigation shall be determined in the first instance according to the degree of adverse affect the occupant of the position sought to be filled could bring about by virtue of the nature of the position on national security

It is hard to question the government's need for broad discretionary powers when dealing with employees who occupy sensitive positions; but a general denial of judicial review to every employee of the security agencies may not be justified. In *Joint Anti-Fascist Refugee Committee v. McGrath*,⁶⁰ Mr. Justice Douglas addressed his concurring opinion to this problem when he commented:

The problem of security is real; and the Government need not be paralyzed in handling it. The security problem, however, relates only to those sensitive areas where critical policies are being formulated or where sabotage can be committed.⁶¹

Executive Order No. 11,605 has come under attack in Congress where Senator Ervin has criticized it as having the effect of allowing the federal government to "protect [American citizens] against thoughts or associations it deems dangerous, [and] to stigmatize its citizens for thoughts or associations it thinks hazardous."⁶² Senator Ervin opposes the provisions of the Executive Order which increase the authority of the SACB, for the following three reasons: (1) that their promulgation was beyond the constitutional power of the President; *i.e.*, it is a direct violation of the doctrine of separation of powers; (2) that they are void for overbreadth; and (3) that they violate the first amendment and due process rights of all members of the organizations or groups designated except those who share the illegal aims of the organization or groups.⁶³

In order to limit the effect of the Order, Senator Ervin introduced Senate Bill 2466⁶⁴ and Senate Resolution 163⁶⁵ on October 5 and 7, 1971. Senate Bill 2466 "would make it unlawful for any employee of the Department of Justice or . . . of the Subversive Activities Control Board to carry out or attempt to carry out any of the additional functions, duties or powers which Executive Order 11,605 . . . purports to confer on the Board."⁶⁶ The bill also denies the use of any funds appropriated by Congress to implement this Order. Senate Resolution 163 expresses the sense of the Senate that Executive Order No. 11,605 is an

'attempt to usurp the legislative powers conferred on Congress by the Constitution' and is an 'infringement on the First Amendment rights of all Americans.' It calls on the President to revoke the Order

. . ." § 3(b) of Executive Order No. 10,450 provides that all such sensitive positions in each department shall be identified by the head of the department and such positions shall be occupied only by persons "with respect to whom a full field investigation has been conducted."

60. 341 U.S. 123 (1951).

61. *Id.* at 180-81.

62. 117 CONG. REC. 19,071 (daily ed. Nov. 19, 1971).

63. *Id.*

64. S.2466, 92d Cong., 1st Sess. (1971).

65. S. Res. 163, 92d Cong., 1st Sess. (1971).

66. 117 CONG. REC. 19,069 (daily ed. Nov. 19, 1971).

or 'amend or revise it to bring it into conformity with article I, section 1, and the First Amendment to the Constitution.'⁶⁷

Notwithstanding the effects of these bills, the impact of Executive Order No. 11,605 may be blunted by court action such as that which nullified similar orders.⁶⁸ In drafting Executive Order No. 11,605, however, an attempt was made to correct the defects which had made previous promulgations targets for litigation. The Order now contains a definition of each type of subversive organization,⁶⁹ although these definitions are themselves somewhat lacking in precision.⁷⁰ Also included are procedural safeguards such as the requirement of a hearing before any organization may be designated as subversive, Communist, etc.⁷¹ In addition, before the government may take action against an individual, it must prove his knowing membership in a designated group or organization.⁷² However, despite the presence of such safeguards, constitutional challenges to this enactment will undoubtedly be made.

The Privacy Bills

Privacy bills now being considered by Congress seem to offer employees of the security agencies as well as employees of all the other executive departments the best hope of limiting job related abuses. These bills have been introduced to curb numerous and extremely varied invasions of privacy of federal employees. These violations of employees' rights have been well documented by Senator Ervin and include a range of activity which may be illustrated by the following examples: (1) compelling employees to buy United States Savings Bonds; (2) ordering them to lobby in their communities in support of specific pieces of legislation or a particular political candidate; and (3) coercing them into painting fences and buying grass seed to be distributed in support of Mrs. Johnson's beautification program.⁷³ The security agencies have been guilty of some of the most flagrant abuses, including the subjection of their employees and job applicants to polygraph tests in which questions are asked concerning their most

67. *Id.*

68. *Supra* note 58.

69. 36 Fed. Reg. 12831-32, § 2 (1971).

70. Exec. Order No. 11,605 defines four categories of subversive organizations as those which are engaged in various types of illegal activity. However, the enactment does not stipulate whether the illegality is to be measured by federal or state law and definitions of these proscribed types of illegal activity which are contained in state statutes may be extremely vague. See "sedition" as defined by GA. CODE § 86-791(2-3) (1971).

71. 36 Fed. Reg. 12831, § 2 (1971).

72. *Id.* at § 1.

73. *Hearings on H.R. 7199 and Related Bills Before the Sub-Comm. on Employee Benefits of the House Comm. on Post Office and Civil Service*, 92d Cong., 1st Sess. 42-67 (1971).

intimate sexual activities.⁷⁴ Some of the officers in these agencies apparently think that in exchange for a salary, they have purchased the whole man and not just his services.⁷⁵

In recent years, Senator Ervin has been the member of Congress who has shown the most concern over these federal agency employment abuses. Senator Ervin has proposed remedial legislation since 1966. From the time when Congress first showed interest in the privacy issue many government agencies have been fearful of limitations on their power and have used their considerable political influence to stifle or dilute proposed corrective legislation. In his testimony before the House of Representatives Committee on Post Office and Civil Service, Senator Ervin has acknowledged the role of political pressure⁷⁶ in the FBI's complete exemption from the legislation he has proposed.⁷⁷ He also gave the following account of his experience with overt pressure from the CIA during a vote on one of his earlier privacy bills:

I might say about the CIA, when this bill passed the first time, they had several agents sitting up in the gallery coming down and calling the senators out from the floor. I thought that maybe there was one investigation that the FBI ought to conduct and that was whether those gentlemen in the gallery were violating a law by trying to influence legislation that way.⁷⁸

Senator Ervin has been successful in getting his current privacy bill approved by a great majority in the Senate despite its coverage of the CIA and NSA.⁷⁹ The major obstacle to the passage of the privacy bills has been the requirement of approval by the House of Representatives Committee on Post Office and

74. A striking example of such activity involved a 25 year old NSA applicant. He was asked the following questions while a polygraph measured his physiological responses:

When was the first time you had sexual relations with a woman? How many times have you had sexual intercourse? Have you ever engaged in homosexual activities? Have you ever engaged in sexual activities with an animal? When was the first time you had intercourse with your wife? Did you have intercourse with her before you were married? How many times? S. REP. NO. 91-873, 91st Cong., 2d Sess. 23 (1970).

75. This attitude was demonstrated in the *Shaw* case, *supra* note 3, when John Malone, the director in charge of the FBI's New York office, demanded the letter Shaw had written in confidence to his law professor. When this demand was refused on the basis that the letter was personal property Malone retorted: "Mr. Shaw, you are an agent from the top of your head to the tip of your toes. What you write, I want to make clear to you, is not your property. You are an agent. What you write is our property." From an Interview with Jack Shaw, former FBI Agent, Television program, NEW JERSEY SPEAKS, WNET TV, Feb. 16, 1971.

76. *Hearings on H.R. 7199, supra* note 73, at 46.

77. S.1438, § 9, H.R. 7969, § 9, 92d Cong., 1st Sess. (1971).

78. *Hearings on H.R. 7199, supra* note 73, at 64.

79. In the 90th Congress, the Senate passed S.1438 with a 79 to 4 vote, and, counting absentees, with the total approval of 90 members.

Civil Service.⁸⁰ In May and June of 1971, this Committee held hearings on Senator Ervin's bill (House Bill 7969) along with another privacy bill (House Bill 7199),⁸¹ introduced by Representative Charles H. Wilson. The two bills are very similar in content and in fact are identically worded with a few notable exceptions. In the hearings before the House Post Office Committee, Representative Wilson gave the following description of the purpose of House Bill 7199 which may apply as well to House Bill 7969: "I am trying to establish judicial and administrative remedies for certain violations of First Amendment rights of citizens who may apply for federal employment or who may work for our government."⁸²

The most significant differences between the two bills relate to the exemptions given the security agencies and may be listed as follows: (1) Senator Ervin's bill (H.R. 7969) provides a complete exemption of the FBI⁸³ while Representative Wilson's bill (H.R. 7199) provides the same qualified exemptions for the FBI as are provided for the CIA and NSA; (2) a provision in H.R. 7969 which is not found in H.R. 7199 requires the employees of the CIA and NSA to exhaust their administrative remedies before seeking relief from either the Board of Employees Rights or the federal courts.⁸⁴ This gives the agencies a period of 120 days after receiving a written complaint from the employee to take corrective action before the courts or the Board of Employees' Rights may intervene.

In addition to its complete exemption for the FBI, Senator Ervin's bill provides the CIA and NSA with three significant exemptions. These same exemp-

80. Senator Ervin's previous privacy bill S.1035 was defeated by this committee.

81. H.R. 7199, 92d Cong., 1st Sess. (1971).

82. *Hearings on H.R. 7199*, *supra* note 73, at 26. Representative Wilson went on to describe the provisions of H.R. 7199 as follows:

H.R. 7199 was designed to protect the federal employee—

From being required to report his race, religion, or national origin.

From being compelled to attend indoctrination lectures or meetings unrelated to his job.

From being forced to take part in civic or other activities unrelated to his job, or from being forced to report on his participation in any such activities.

From being required to submit to psychological interrogation or questioning with a polygraph regarding family relationships, religious beliefs, or sexual relations.

From being compelled to support any candidate for elective office.

From being coerced into buying government bonds or contributing to any cause, however worthy; and

From being required to disclose his property, his sources of income, or his debts.

Moreover, H.R. 7199 would assure every federal employee the right to counsel in any proceeding which might result in dismissal or disciplinary action. Further, it accords the right to civil action in a federal court for violation or threatened violation of the act. Finally, it establishes a Board of Employees' Rights independent of the Civil Service to hear complaints of violations of rights and with authority to issue cease-and-desist orders to protect rights.

83. H.R. 7969, § 9, 92d Cong., 1st Sess. 1971.

84. *Id.* at § 7.

tions which are granted to all three security agencies by Wilson's bill may be described as follows: (1) a security agency may subject an employee to a polygraph test in which questions concerning personal, religious, or sexual matters are asked if the agency director or his designee finds such information necessary in the interest of national security;⁸⁵ (2) authority is provided to the director of each agency to protect or withhold information pursuant to statute or executive order, and the determination of the director is conclusive on whether the release of information sought will be inconsistent with such a statute or executive order;⁸⁶ (3) an employee who is under investigation for misconduct is permitted to have counsel of his choice to an interrogation, but an employee of the security agencies is limited in his selection of counsel to one who works for the agency or who has been approved by the agency for access to the information involved.⁸⁷ In addition to the exemptions provided in these bills, the CIA and NSA would retain the benefits of 50 U.S.C. 403(c) and 50 U.S.C. 833, which allow the agency directors to dismiss any employee when he deems it advisable in the interests of the United States.

If political pressure is not taken into account, there seems to be little reason for granting the blanket exemptions to the FBI while providing more limited exemptions for the CIA and NSA. On the other hand, it does not appear reasonable to deny such limited exemptions to the other members of the United States Intelligence Board,⁸⁸ who share a great deal of secret information with the three security agencies. It should be remembered that classified information is only as safe as its least secure custodian.

H.R. 7199 and H.R. 7969, as presently drafted, satisfy any reasonable objections the security agencies have made thus far. Most of the objections to the bills as currently amended indicate a failure to understand the provisions of these bills.⁸⁹

85. H.R. 7199, § 6, 92d Cong., 1st Sess. (1971); H.R. 7969, § 6, 92d Cong., 1st Sess. (1971).

86. H.R. 7199, § 7, 92d Cong., 1st Sess. (1971); H.R. 7969, § 8, 92d Cong., 1st Sess. (1971).

87. H.R. 7199, § 1(k), 92d Cong., 1st Sess. (1971); H.R. 7969, § 1(k), 92d Cong., 1st Sess. (1971).

88. *Supra* note 38.

89. In the *House Post Office Comm. Hearings on H.R. 7199*, *supra* note 72, at 30, an example was suggested to demonstrate the crippling effect of the privacy bills on the security agencies. The situation posed was that of a secretary who spent her working hours typing secret documents for the FBI and who might attend meetings of a revolutionary terrorist action group at night. It was suggested that section 1(d) of either H.R. 7199 or H.R. 7969 would prevent her from being questioned regarding these outside activities. A careful reading of section 1(d), however, would indicate that the prohibition against making inquiries concerning an employee's outside activities only applies to activities not related to the employee's job. In this instance, the secretary's membership in such an organization would unquestionably relate to her employment, as the entire mission of her employer is the maintenance of national security. Most other objections can be met in a similar manner.

Previously, the section dealing with Executive Order No. 11,605 placed emphasis on the importance of the government's interest in matters relating to the national security. That interest is no less vital in the context of privacy legislation. When considering whether every conceivable objection has been satisfied, one must balance the interests of the individual against those of the government. The individual interest has been described by Justice Brandeis as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."⁹⁰

The effectiveness of this proposed legislation in eliminating abuses by the security agencies is, however, at best only partial. The weakness of the privacy bills lies in their failure to adequately cover a situation where the employee's alleged misconduct is a product of his personal relationship with another individual⁹¹ and the agency has received knowledge of misconduct from a source other than the employee himself. In this situation, the employer could dismiss or discipline the employee⁹² without having to violate the provisions of these bills by asking the employee to submit a report covering his activities⁹³ or to submit to an interrogation concerning these matters.⁹⁴ The provision allowing the employee to bring counsel to an interrogation which could lead to disciplinary action⁹⁵ may afford some protection, but the exemption granted the security agencies dilutes its effect by limiting the choice of counsel to an agency employee or one who has agency approval. It is obvious that an agency may exert considerable influence over a counsel who is also its employee. Also, it is unlikely to approve of an advocate who will assert his client's rights too vigorously.

A Proposed Solution

If the employees of the security agencies are to be afforded adequate protection, they must have the opportunity to have their grievances reviewed by a tribunal which is independent of their employer. This protection could be provided

90. 277 U.S. 438, 478 (1928).

91. § 1(b) of H.R. 7199 and H.R. 7969 only prohibits a federal agency from taking notice of its employees' attendance or lack of attendance at any assemblage, discussion, or lecture. The bills do not prevent the agency from taking notice of the employees' relationship with another individual.

92. § 1(b) of H.R. 7199 and H.R. 7969 makes it unlawful for a federal agency to dismiss or discipline an employee by reason of the employees' failure to comply with any requirement or action made unlawful by the act.

93. § 1(d) of H.R. 7199 and H.R. 7969 would make it unlawful for a federal agency to ask an employee to report on his non-job related activity.

94. § 1(e) of H.R. 7199 and H.R. 7969 would make it unlawful for a federal agency to interrogate an employee regarding his personal relationship with any person connected with him by blood or marriage.

95. § 1(k) of H.R. 7199 and H.R. 7969.

without sacrificing the vital interests of national security by the creation of a special court. The exclusive function of this court would be to review the complaints of federal employees whose access to the regular judicial system would be restricted because an ordinary trial would necessitate the public disclosure of classified information. The jurisdiction of the special court should not be limited to the three security agencies but should include the civilian employees of the entire intelligence community.

In order to maintain the court's requisite degree of independence from agency control, judges who had no connection or responsibility to any intelligence community employer would have to be appointed. These judges would, of course, also have to obtain security clearances at a sufficient level so as to be able to hear controversies involving any employee.

Deference to the interests of security would necessitate the use of procedures which omit some of the usual safeguards that are present in a conventional trial. For example, the traditional use of a jury in the role of fact-finder would require an unacceptably large number of persons to be privy to the secret information disclosed during the course of the trial. It would also be difficult to recruit enough jurors who have appropriate security clearances to hear the matters discussed and who, at the same time, have no relation to the defendant agency. The trials would of necessity have to be held *in camera* in a secured area with records sealed. Finally, the availability of appeal from the decisions of the special court would be severely limited.

Despite these concessions to the interests of security, these special courts would provide intelligence community employees with a meaningful review of agency abuses which would be a clear improvement over the presently existing remedies. For this reason, the existence of these courts would greatly benefit the agencies by improving the morale of their employees. Also, careers in these agencies would become more attractive so as to facilitate recruitment of the best qualified personnel.

Conclusion

The legal developments which were summarized in the foregoing sections indicate an increased willingness of courts and lawmakers to supervise federal agencies in their dealings with employees. It is important to note that the agencies whose primary mission relates to intelligence have been granted the greatest discretion in their employment practices. However, the authority to terminate an employee for security reasons does not justify all abridgements of his constitutional rights. The current trend in this area of the law is away from the use of outmoded formalisms such as the right/privilege doctrine and toward a more flexible criteria such as the substantial interest doctrine. Use of the latter

doctrine makes the task of courts and the lawmakers more difficult in that they must determine what action may legitimately be justified in the name of national security. In *United States v. Robel*⁹⁶ and *Cole v. Young*⁹⁷ the federal government failed to demonstrate a threat to security which was sufficient to justify a summary dismissal of employees who occupied nonsensitive positions. The drafters of the privacy legislation carefully considered the interest of national security agencies while trying to give federal employees the increased protection of the Bill of Rights. Executive Order No. 11,605⁹⁸ places its emphasis proportionately on the sensitivity of the position whose occupant is being investigated. Executive Order No. 11,491⁹⁹ now provides a total exemption for the entire intelligence community; however, it may be that once collective bargaining is well-rooted in government practice, some of its benefits may also be provided for these employees.

While these current judicial and legislative trends indicate an increased concern for the rights of federal employees, the employees of security agencies may still be denied a remedy when the agency decides that in the interests of security, the employee must be denied access to the courts. What is really needed is a special court which can hear these controversies without sacrificing security.

In future legislative and judicial determinations regarding the rights of employees of the security agencies, it is hoped that the decision-makers will not lose sight of a significant interest of government that coincides with that of the employees. The importance of this interest was emphasized by John Stewart Mill, in his warning:

A state which dwarfs its men in order that they be more docile instruments in its hands even for beneficial purposes—will find that with small men no great thing can really be accomplished. . . .¹⁰⁰

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96. 389 U.S. 258 (1967).

97. 351 U.S. 536 (1956).

98. 36 Fed. Reg. 12831 (1971).

99. 3 C.F.R. 861 (1966-70 comp.).

100. J. MILL, ON LIBERTY 117-18 (Appleton, Century & Crofts eds. 1947).