News of Science

Industrial Security Program Invalidated by Supreme Court; New Legislation Studied

The Supreme Court invalidated the government's industrial security program, which covers some 3 million defense plant workers, including many scientists, when it held on 29 June that neither Congress nor the President had authorized a program in which suspects were denied the right to confront their accusers. The Court said that there had only been acquiescence, " 'inferred' authorization," by the President and Congress to the procedure that has been established by the Secretary of Defense and his service secretaries. The Court indicated, further, that the Secretary of Defense would not need additional authorization to organize a security program if he provided "the safeguards of confrontation and cross-examination."

The 8 to 1 decision was handed down in the case of William L. Greene, aeronautical engineer and former vice president of the Engineering and Research Corporation (ERCO), Riverdale, Md., whose security clearance was revoked by the Navy in 1953, although earlier he had been cleared on three different occasions. Since ERCO conducts classified defense work, Greene had to be dismissed. One of the firm's principal contracts is for a Navy aircraft flight simulator designed chiefly by Greene, who served the company for 18 years.

The Charges

In April 1954, a year after revocation of Greene's clearance, the Eastern Industrial Personnel Security Board finally presented a statement of charges, all based on incidents that occurred between 1942 and 1947, and granted a hearing. Most of the charges concerned Greene's ex-wife, from whom he had been divorced in 1947, primarily because of problems arising from political differences. He was accused of having associated with certain suspect persons (his wife and her friends); of having joined a bookshop group of questionable loyalty; of having attended a dinner given by the Southern Conference for Human Welfare, later cited as a Communist front organization—a dinner, incidentally, which was attended by many Washington notables, including members of the Supreme Court; and of having associated with officials of the Russian Embassy. In connection with this last charge, high-ranking ERCO officials testified that these contacts were for the purpose of securing business for the corporation.

The 1954 hearing began with a statement by the chairman that the transcript would not include all the material in the file of the case. During the course of the proceedings, the introduction of new subjects of inquiry by the government made it evident that the board was relying on reports from confidential informants. When his appeal was rejected, Greene asked for a detailed statement of findings in support of the decision. He was informed that security considerations prohibited such disclosure. His only recourse was the courts, where he held that he was being deprived of liberty and property without due process of law—"property" being his employment, and "liberty" his freedom to practice his profession. Greene had been earning a salary of $18,000 a year at ERCO, but he was forced to accept a $4400 post as an architectural draftsman.

Warren Writes Opinion

Chief Justice Earl Warren wrote the Court's opinion for the case, in which he was joined by Justices Hugo L. Black, William O. Douglas, William J. Brennan, Jr., and Potter Stewart. Warren said in part:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. . . .

"Under the present clearance procedures not only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the informant said without even examining the investigator personally. . . .

"In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure. The type of hearing was the product of administrative decision not explicitly authorized by either Congress or the President. Whether those procedures under the circumstances comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limits on executive or legislative authority may be. We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination."

Justice Felix Frankfurter wrote a one-sentence concurrence, in which he was joined by Justices John Marshall Harlan and Charles Evans Whittaker, agreeing with the Chief Justice "that it has not been shown that either Congress or the President authorized the procedures whereby petitioner's security clearance

was revoked, [but] intimating no views as to the validity of those procedures." In a separate, special concurrence Harlan amplified his statement by saying he could not subscribe to the Court's opinion because it "unnecessarily deals with the very issue it disclaims deciding." Although Warren had stated that the Court did not need to decide the constitutional question of the right of confrontation, he devoted five pages to discussing it, starting with the Roman law of 2000 years ago.

Clark Dissents

Justice Tom Clark, in a lone dissent, observed:

"Surely one does not have a constitutional right to have access to the Government's military secrets. . . . What for anyone else would be considered a privilege at best has for Greene been enshrouded in constitutional protection. This sleight of hand is too much for me." In his special concurrence Harlan took sharp issue with this view and commented: "It is regrettable that my brother Clark should have so far yielded to the temptations of colorful characterization. . . ."

Clark emphasized that the Court's opinion, by dealing so "copiously" with the constitutional issues, had "put a cloud" over the entire federal employe loyalty program:

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

Hearings Held

On 2 July, 3 days after the decision on the Greene case, the Senate Constitutional Rights Subcommittee, under the chairmanship of Senator Thomas C. Hennings, Jr., (D-Mo.), held a public hearing on methods of providing fair hearing procedures in federal loyalty-security programs, with particular reference to the industrial personnel security review program. One of the witnesses was Ralph S. Brown, Jr., professor of law at the Yale University School of Law and author of the recently published book *Loyalty and Security*.

He pointed out that confrontation and cross-examination are not the only elements of due process that are often ignored in security cases. He then mentioned four other defects, saying:

"First, the . . . alleged need for concealing the sources of derogatory information leads to inadequate charges, so that the employee does not know what he has to defend against. Second, in the hearings additional matters are often raised which have no relevance to the charges, or for that matter to the criteria of the programs. . . . Third, the findings on which decision is based, in the few instances in which they are disclosed, tend to stray from the charges, especially in raising questions of veracity of which the employee has been given no notice. Fourth, though the employee may have, under the regulations, a right of review or appeal to a higher authority than the hearing board, he will usually not be told what the findings are that are being reviewed and therefore cannot appeal intelligently. The Greene case itself demonstrates both of these deviations from fair procedure."

Another witness was Joseph Rauh, prominent Washington attorney and expert on civil liberties cases. He made some particularly constructive comments about the secret informer issue. After pointing out that throughout its history the United States Government had always employed undercover agents, Rauh observed: "I am not against undercover agents. The question is, how you use them. . . . We suggest that you use undercover agents in this field of security as you use them in every other field, as leads to get witnesses who will testify on the open record."

Recently, on 31 July, Senator Hennings announced that he had scheduled additional loyalty-security hearings on 28 and 29 July to which he had invited the Attorney General and the Secretary of Defense. However, both men refused to attend, indicating that the Administration had not yet formulated a position on the subject.

Hennings said that he was disturbed by reports that, as a result of the Greene decision, the Administration is considering the immediate issuance of an Executive Order covering hearing procedures under the industrial security program. He commented:

"I think it is highly important, before either Congress or the Administration acts in this matter, that the constitutional issues be explored carefully and thoroughly. . . . Since the Constitutional Rights Subcommittee is in the middle of a study of fair hearing procedures under the federal loyalty-security program, I do not think action should be taken until this study has been completed."

New Bills Offered

Meanwhile, four new loyalty-security bills have already been offered—one in the House and three in the Senate. Senator Hennings reports that he is preparing a fifth. [These are in addition to H.R. 3693 (Scherer), S.776 (Butler), and S.1916 (Cotton-Stennis), which have been pending since early spring.] The bill before the House is H.R. 8121, introduced by Francis E. Walter (D-Pa.). The Senate has before it S.2314, sponsored by Strom Thurmond (D-S.C.); S. 2392, sponsored by Owen D. Johnston (D-S.C.) and James O. Eastland (D-Miss.); and S. 2416, sponsored by Thomas J. Dodd (D-Conn.) and Kenneth B. Keating (R-N.Y.). The 29-page Thurmond bill provides that regularly established confidential informants shall be protected if the investigative agency concerned determines that the "disclosure of their identity would prejudice the national security." The Johnston-Eastland bill merely authorizes the continuation of the present program, as does the Walter bill in the House. The Dodd-Keating bill, brief and rather vague, provides that the right of confrontation be limited only in cases in which such confrontation or disclosure of a witness' activities would "adversely affect the national security, safety, or public interest." All of the Senate bills are being referred to the Internal Security Subcommittee. The Congress now has an opportunity to establish the structure for a personnel security program that will give consideration both to the legitimate needs of national security and to the requirements of due process.

Top-Level Decision Making in Science and Other Fields To Be Studied by Senate Group

A study of top-level governmental decision making in scientific, educational, and other fields is currently under way in Washington. The Senate's new National Policy Machinery subcommittee, headed by Henry M. Jackson (D-Wash.), will examine the policy-making procedures employed by the government in deciding issues of basic national and international significance. Among the questions that the group will ask are these: Was top-level consideration given to the psychological impact of permitting the Soviet Union to achieve scientific firsts in the missile and satellite field? Is such consideration being