The "Small Print" Gives The Lie to the Claim That Made The Headlines

Debunking That "Right of Confrontation" in The New Security Report

Here are some of the loopholes in that "right of confrontation" recommended by the report of the Commission on Security:

1. It would not apply to "regularly established confidential informants." But many of these have proven to be unreliable. Some have become notorious as perjurers. Several have been committed as alcoholics or insane.

2. Even when some scandal or court appearance has disclosed the name of one of these informants, the "derogatory information" furnished by him may be considered by the hearing examiner without an opportunity for cross-examination if he is unavailable "because of death, incompetency, or other reason."

Casual Informants Shielded, Too

3. Casual informants may not be subpoenaed for cross-examination, either, if they gave information to the FBI on the promise that their identity would not be disclosed.

The report says the examiner is not to consider derogatory information supplied by informants immune from cross-examination. But this may prove to be quite a feat since the Security Commission also says (p. 68), that nothing in its recommendations on confrontation "should be construed to require the investigating agency to exclude from its report any information derived from any source." So the FBI could go on using such casual information, and yet keep the source a secret from those accused. How is the examiner to blot such information from his mind?

The proposed new security law seems to contradict itself on this point. Section 84 says the hearing examiner is not to consider such information. But Section 86 says (p. 714) that "notwithstanding" this provision "the examiner may receive in evidence . . . information or documentary material offered in behalf of the Attorney General, in summary form or otherwise, without requiring the disclosure of classified information." Presumably if the Attorney General declared the source of the information classified, it could then be put in evidence without giving the accused a chance to confront or cross-examine.

Hard on Defense Workers

4. A special loophole as wide as a hangar door appears in the case of workers in defense facilities. Section 84 (page 713) limits the right of confrontation in industrial security cases. Eight kinds of charges are exempt (p. 709-10) from the right of confrontation.

These include charges as vague as "any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy," "any facts which furnish reason to believe that the individual may be subjected to coercion, influence or pressure which may cause him to act contrary to the best interests of the national security," and "any other activity, association or condition which tends to establish reasonable ground for belief that access by such individual to classified information or to any security facility will endanger the common defense and security."

These are sweeping enough to cover malicious gossip in a shop or factory without giving the accused a chance to cross-examine the source.

"Justice and Fair Play"

"Should charges of disloyalty reach the hearing stage, the Commission recommends other safeguards to the person involved. The constitutional guarantee that 'In all criminal cases, the accused shall enjoy the right . . . to be confronted by the witnesses against him,' has never applied to administrative inquiries or loyalty hearings. However, the consequences of a person being declared disloyal are so grave that the Commission felt justice and fair play require that he be permitted to confront and cross-examine witnesses who have furnished derogatory information against him, whenever it may be done without harm to the national security."

—Press Release, Commission on Security.

In addition, it must be kept in mind that all these loopholes and exceptions also affect the statement of charges given the accused. The charges are supposed to be "as specific and detailed as the interests of national security permit" (p. 699). In practice this has meant withholding specific details which might identify the informant. Yet lack of details as to time and place, for example, may make it impossible to disprove an accusation.

5. The widest loophole of all is that opened up by the final sentence of Section 84 (p. 713). This says the "right of confrontation" shall not apply to charges brought "under any other security program."

This refers to discharges as a "security risk" under the so-called "suitability" regulations of the Civil Service Commission. These provide for no right of confrontation. Indeed except in case of veterans they do not provide for any real rights of hearing or appeal, and the Commission on Security recommends that the special hearing rights granted veterans by Section 14 of the Veterans Preference Act of 1944 be repealed by Congress.

"Suitability" Charges Preferred

Against this background the reader may understand better what the report means when it says (p. 85), "the best evidence available to the Commission indicates that since the beginning of the current security program . . . the vast majority of so called 'security removals' have in fact been suitability removals, handled under normal civil service or related procedures. There is no reason to doubt that this practice, *particularly under the Commission's recommended expanded regulations,* can be continued. Where there is a choice of procedures, the suitability procedures should be followed." (Italics added).

The "expanded regulations" recommended by the Commission would allow government workers to be fired as "unsuitable" under the same vague clauses quoted above from the industrial security program as exempt from the right of confrontation.

Thus if other loopholes were not enough to protect a casual informant from cross-examination, the FBI could always use his information in a "suitability" proceeding where there is no right of confrontation.

When all this is added up, it will be seen that the "right of confrontation" recommended with so much fanfare by the report amounts to no more than a public relations smokescreen.

The Beginning of A Red Smear Attack on the Judiciary?

While the report of the Commission on Security found the FBI practically perfect (see the adjoining box), it cast doubt on the trustworthiness of the Federal judiciary. Scant attention has been paid to this aspect of the report though it may prove the opening gun of a new attack on the courts. The report is calculated to create the impression that recent liberal decisions may be due to the influence of subversive assistants on Federal judges. The report recommends that Court aides be screened for loyalty and "suitability." This would make it difficult for a judge to hire a law clerk or secretary whose ideas seemed too liberal to the FBI. It would also open judges to future McCarthy style smear attack on the charge of hiring or retaining suspect assistants. The potential of this attack for undermining faith in the courts is obvious. It proved too much, however, for only one member of the Commission, James P. McGranery, Truman's last Attorney General, and by no means a liberal. Here is what he had to say in dissenting from this part of the Commission report:

"This member wishes to express a vigorous dissent from the Commission recommendation (p. 106) that *'The judicial branch of the Government should take effective steps to insure that its employees are loyal and otherwise suitable from the standpoint of national security';* and he submits that this recommendation is irrelevant to the scope of the Commission inquiry, not based on any need that has been demonstrated by facts ascertained or ascertainable, a gratuitous conclusion drawn from premises that are purely conjectural.

Judiciary Supposed to Be Independent

"The independence of the Federal judiciary has throughout America's history been the warranty of constitutional government in this Republic. A Federal judge is mindful of the sacred responsibility that is his whether presiding over a trial, hearing an argument, instructing a grand jury or a petit jury, sentencing a defendant, or preparing an opinion. The Founding Fathers provided for continuation of judicial service during good behavior of the judge, and, it is submitted, would have found it as difficult as does this member of the Commission—to envisage the possibility that any conscientious judge—

Practically Perfect

"The Commission has found little fault with the investigative standards, methods or personnel of the executive branch. The competency and fairness of the Federal Bureau of Investigation's trained force in investigating and reporting on Federal personnel loyalty and security matters has not been seriously questioned except by the perennial critics of all security measures and by the uninformed."

—Commission on Government Security, Report, P. 56.

or as the Commission report expresses it (p. 106): '. . . *Federal judges, busy with ever crowded court calendars, must rely upon assistants to prepare briefing papers for them.*'

"It is submitted that such a Federal judge is not 'busy'—he is either lazy or confused. In either instance, the remedy is to proceed to impeach the individual judge—not merely to contaminate the crutch upon which he leans. The Commission report continues to explain, excuse, accuse and conjecture—

"'*False or biased information inadvertently reflected in court opinions in crucial security, constitutional, governmental or social issues of national importance could cause severe effects to the Nation's security and to our Federal loyalty-security system generally.*' (p. 106).

No Evidence Any Such Judge Existed

"This journey into a fanciful world has summoned up a hypothetical judge who is not only lazy and confused but almost unconscious—certainly unaware that his opinion is 'inadvertently' reflecting false or biased information.

"This member of the Commission is happy to report that no evidence was presented at Commission conferences tending to indicate that such a judge is now a member of the Federal judiciary, by appointment of the President of the United States with the advice and consent of the Senate.

"Neither was any evidence presented that at any time in our history such a judge menaced national security by being 'busy with the ever crowded court calendars' or by inadvertent acceptance of 'false or biased information.' This member regrets the unwarranted intrusion into the judicial branch of our government by the recommendation in the foregoing report."

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