Critical Issues

Screening Federal Employees

A Neglected Security Priority

by
DAVID MARTIN

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DAVID MARTIN served for almost 20 years on the staff of the Senate Subcommittee on Internal Security. From 1959 until the end of 1970, he was attached to the staff of the late Senator Thomas J. Dodd of Connecticut, the vice-chairman of the Subcommittee. In this position, his portfolio as a staff assistant embraced internal security, foreign policy, and national defense. From 1971 until the end of 1978, he was senior analyst for the Internal Security Subcommittee and wrote many of its reports, including its final report on "The Erosion of Law Enforcement Intelligence and Its Impact on the Public Security." He is the author of two books on wartime Yugoslavia and of many articles on foreign affairs and problems of internal security. His last book, published by the Hoover Institution Press in 1978, was entitled *Patriot or Traitor: The Case of General Mihailovich*. Since retiring from the Senate, he has served as a consultant for the Standing Committee on Law and National Security of the American Bar Association.

Library of Congress Card number 83-47643

ISBN 0-89195-034-6

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Preface

This monograph is the product of several years of continuing, if intermittent, research. The initial impetus for the study was provided by the alarming information on the state of the Federal Employee Security Program developed in the course of hearings held by the internal security unit of the Senate Subcommittee on Criminal Laws and Procedures in 1978.

The study is based in large degree on an extensive reading of the available literature and official documents. But the principal contribution came from numerous conversations with people who have served in various capacities in the Federal Employee Security Program—as investigators, as directors or recent directors or officials of the personnel security programs in federal departments and agencies, or as officials and recent officials of the FBI and the Department of Justice.

Two previous drafts were submitted to the Office of Personnel Management (OPM) and the Department of Defense (DOD) for their comments and correction. Relevant portions of the drafts were also submitted for the scrutiny of the State Department, the Justice Department, the Energy Department, and the CIA. Copies were also submitted for the critical review of a dozen or more old-time professionals, including high-ranking officials—some of them current, some of them recent—in various sectors of the Federal Employee Security Program. The fact that an official reviews a paper for accuracy does not of course signify that he endorses all of the estimates and opinions to be found in the paper. But I think it worth noting that the old-time professionals who were consulted, without exception, expressed the conviction that the paper did not overstate the seriousness of the situation.

All members of Congress, even the most liberal, would agree that the government has the right—indeed, it has the responsibility—to institute procedures for assuring itself that those who are going to fill sensitive positions in government are of good character and unquestionable loyalty to the United States. One has to wonder, therefore, how Congress could have permitted the massive, year-by-year erosion of the Federal Employee Security Program without interceding to stop the rot. Perhaps none of the members were really aware of how bad the situation had become. Whatever the reason, it is my hope that this preliminary study will inspire Congress to embark upon a comprehensive investigation for the purpose of establishing all the facts and exploring the possibility of legislative remedies.

Recently there have been three encouraging developments. In January 1982, on the direction of General Richard G. Stilwell, Deputy Undersecretary of Defense (Policy), the Department of Defense set up a high-level panel to review the entire question of personnel security in the DOD. The panel was chaired by David O. Cooke, Deputy Assistant Secretary of Defense (Management), who has had extensive experience in the field of personnel security. Toward the end of April, the panel submitted a report, which examines all the Department's personnel security programs in a refreshingly objective manner and recommends a series of improvements in DOD procedures—some of which parallel the recommendations made in this monograph. These recommendations are now under study, and there is reason to hope that at least some of them will be acted on affirmatively.

The entire question of personnel security procedures has also been undergoing examination in the Office of Personnel Management at the initiative of OPM Director Donald J. Devine. Here, too, there is reason to hope that the arduous study of recent months will produce a number of significant improvements despite the continuing constraints imposed by court decisions and budgetary considerations.

The third development that holds promise for the future is FBI Director William Webster's statement to the Senate Subcommittee on Security and Terrorism that the FBI is engaged in a rewriting of its domestic intelligence guidelines with a view to removing some of the more serious constraints resulting from the Levi guidelines. Director Webster assured the Chairman, Senator Jeremiah Denton (R-Ala.), that the Subcommittee would be given an opportunity to examine the revised guidelines and comment on them before they were finalized.

It is my hope that those involved in the reevaluation of our personnel security programs in DOD, OPM, and other government agencies have found my research and suggestions helpful.

Some of the proposals made here may infringe somewhat on a purist view of privacy rights and First Amendment rights. The proposals, moreover, may offend rigid civil libertarians. The far left, on the other hand, rejects out of hand the need for an employee security program of any kind. What seems undeniable, however, is the need to restore the confidence that federal employees in sensitive positions can be trusted. If the proposals in this study are not acceptable, then other means must be found to reconstitute an effective Federal Employee Security Program.

Without naming any of the many people who assisted me, I would like to thank them all for their patient acceptance of my repeated demands on their time. I will, however, make one exception to this general rule because I would like to take this opportunity to pay a personal tribute to the late Walter ("Wally") I. Waldrop, who served as Deputy Director of the Personnel Investigations Division of the Civil Service Commission/ Office of Personnel Management from 1967 to 1979 and who died on

June 16, 1982. His wisdom and judgment are reflected at many points in this study.

Like so many others who worked in the field, Wally was a dedicated personnel security professional. He knew what good personnel security requires and knew that the government's program was being gutted on a year-by-year basis. Some of them offered resistance—without any effect—to the combination of forces which appeared to be irresistibly destroying all the defenses that had been built up over a period of years. Others retired early out of a sense of complete frustration. Still others ate their hearts out and developed ulcers or other stress-related physical symptoms. Wally was one of the best of them all.

Introduction

The Sad Plight of the Federal Employee Security Program

The 1930s and the World War II years were years of appalling innocence in the major Western countries on all matters related to communist subversion and infiltration. Because of this innocence, there were no effective safeguards against communist infiltration in government. In the United States, this resulted in a massive infiltration of various government offices, which was the subject of highly publicized hearings in the House and Senate ranging from 1948 to 1955. It was not only Alger Hiss. Through these hearings, the American people learned for the first time that Soviet agents had filled the number two slot and other nearby slots in the Treasury Department, that they had held a number of key positions in the State Department, and that they had also held key positions in the Roosevelt White House, in the Office of Strategic Services (OSS), and in other departments of the U.S. government.

These revelations were primarily the work of a number of defectors from the Soviet intelligence apparatus—Igor Gouzenko in Canada; Whittaker Chambers, Hedda Massing, and Elizabeth Bentley in the United States. Apart from the fact that their independent testimony jibed completely on essential points, the FBI in its followup investigations found nothing but confirmation of the charges they had made. These charges were directed almost without exception against people then living, who were capable of defending themselves. The great majority of those who had been identified invoked the Fifth Amendment when they were hailed before congressional committees.

In April 1953, the Senate Internal Security Subcommitee embarked on a series of hearings on interlocking subversion in government departments. In doing so, the subcommittee noted that scores of agents had penetrated the United States government and had influenced American foreign policy.

Summarizing the evidence presented by various witnesses, including some two score government employees who persistently invoked the Fifth Amendment, the Senate Subcommittee on Internal Security reported:

> They colonized key committees of Congress. They helped write laws, conduct congressional hearings and write congressional reports. They advised cabinet members, wrote speeches for them, and represented them at intergovernmental conferences. They staffed interdepartmental committees which prepared basic American and world policy. They traveled to every

continent as emissaries and representatives of the American people. They attended virtually every international conference where statesmen met to shape the future.

They used each other's names for reference on applications for federal employment. They hired each other. They promoted each other. They raised each other's salaries. They transferred each other from bureau to bureau, from department to department, from congressional committee to congressional committee. They assigned each other to international missions. They vouched for each other's loyalty and protected each other when exposure threatened.

On the basis of these exposures, the need for a personnel security program designed to prevent communist penetration of government offices was accepted in principle in the 1950s by all members of Congress—liberals as well as conservatives. However, over the past two decades, and in particular over the past seven years, there has been a serious erosion affecting all aspects of the Federal Employee Security Program. In most government departments, very little is left of the loyalty-security program originally spelled out by President Truman in Executive Order 9835 (March 1947) and rewritten by President Eisenhower in Executive Order 10450 (February 1953), which established a government-wide loyalty and suitability program. What is left is essentially a suitability program, tailored to weed out applicants who are lacking in competence or deficient in character or are unacceptable because of serious criminal history records, but possessing little direct relevance to the task of weeding out those whose activities or associations pose a danger to the national security. Even as a suitability program, it has been seriously undercut by the general weakening of suitability criteria and by the so-called nexus principle which, in effect, bars disqualification because of flaws such as heavy drinking, occasional drug use, homosexuality, etc., unless a definite nexus can be established between the weakness in question and the applicant's ability to perform his job.

How bad the situation has become may be gauged from a few basic facts.

First, as matters stand today, "mere membership" in the Communist Party, the Ku Klux Klan, and other subversive organizations on either side of the spectrum is not a bar to federal employment, even in sensitive positions. To disqualify an applicant, there must be evidence that the membership is *knowing* membership and that the applicant has engaged, or intends to engage, in criminal activities in conjunction with his membership. In most cases, this places an almost impossible burden of proof on the government.

But even this tells only a small part of the story. If the government today were to reverse itself on the implications for federal employment of membership in the Communist Party or other subversive organizations,

it still would not be able to take effective action to implement this reversal of policy. This is because there is no current domestic intelligence data base against which the names of applicants can be checked; because, when checks are made, cooperation is frequently not forthcoming from state and local offices and from the private sector; and because there are no national security criteria for the guidance of investigators, adjudicators, and administrators.

How did all this come about? The situation is the product of a complex of developments, involving both Democratic and Republican administrations, decisions of the Supreme Court, Acts of Congress—in particular the Privacy Act and the Freedom of Information Act of 1974—and arbitrary rulings by the Civil Service Commission (now known as the Office of Personnel Management) putting the most restrictive interpretation on court decisions and the requirements of privacy legislation. Another factor is the widespread tendency, when economies have to be effected, to put personnel security at, or near, the bottom of the priority totem pole. Still another factor is the anti-intelligence hysteria in the wake of Watergate.

Particularly damaging has been the near total destruction of the domestic intelligence data base laboriously built up by the FBI and local and state law enforcement agencies over several decades. In the old days, applicants for federal employment were routinely checked against (1) the files of the FBI; (2) the personal reference card system maintained by the Security Research and Analysis Section (SRAS) of the Civil Service Commission (CSC); (3) the extensive domestic intelligence records maintained by state and local agencies; (4) the files of the House Internal Security Committee (previously the House Un-American Activities Committee). But the priceless reservoir of domestic security intelligence at state and local levels has for the most part been destroyed or locked up; the FBI has for all practical purposes been out of the domestic intelligence business since 1976; and the SRAS and the House Internal Security Committee no longer exist.

The destruction of the domestic intelligence data base took only a few years to accomplish. It will take many, many years to undo the damage.

The FBI, which used to be the principal agency involved in making the National Agency Checks on applicants, has largely withdrawn from the domestic security field since the imposition of the restrictive 1976 guidelines. In 1974 the FBI opened or reopened over 55,000 cases on subversives and extremists. By June 1982 only ten individuals and four organizations were under active domestic intelligence investigation.

In 1967 the CSC referred the cases of 2,223 applicants to the FBI for full field investigations because preliminary evidence based on National Agency Checks (NACIs) had turned up information bearing on the national security. By 1977 the number was down to 81. The author was

told that the last time an NAC was converted into a full FBI field investigation was in 1978.

No personnel security program can be implemented without a very high degree of cooperation from the public and public institutions and from other governmental agencies—federal, state, and local. Until the mid-70s, the Civil Service Commission could count on such cooperation. Today many state and local jurisdictions do not cooperate at all because of the Privacy Act and Freedom of Information Act, and private citizens, all the way up to federal judges, frequently refuse to cooperate if they have adverse information because, under the Privacy Act, OPM can no longer guarantee confidentiality. One respected federal judge told the author that he did not know a single member of the federal judiciary who would provide derogatory information about an applicant for federal employment if he possessed such information.

Mention must also be made of a number of Supreme Court decisions—and interpretations of these decisions—which have served to reduce the effectiveness of the Federal Employee Security Program.

The first of these, *Cole v. Young*, handed down in 1956, found that the term national security in the Act of August 26, 1950, was intended to comprehend "only those activities of the government that are directly concerned with the protection of the nation from internal subversion or foreign aggression" and that mere membership in a communist or other subversive organization did not justify dismissal unless the employee in question occupied a "sensitive" position.

In *Keyishian v. Board of Regents*, handed down in January 1967, the Court ruled that mere knowing membership was not enough to justify exclusion from the faculty of New York State University. It has been the general tendency until now to apply the *Keyishian* ruling to government positions despite the Court's statement limiting its decision to "such positions as those held by appellants."

In *United States v. Robel*, also handed down in 1967, the Court held that employment in industrial defense facilities could not be denied to an applicant because of mere membership in the Communist Party.

There were other decisions by the Supreme Court which compounded the difficulties in other ways, but the three decisions listed above are probably the best known. There were also a number of decisions by District Courts that have served as restrictive precedents.

The most damaging decisions were essentially the work of the Warren Supreme Court. The Burger Court, in a major decision on the constitutionality of questions about subversive associations (*Law Students Civil Rights Research Council, Inc., et al., v. Wadmond et al.*), ruled that questions on membership in subversive organizations addressed to applicants for the New York Bar were not unconstitutional if they were carefully worded to conform with previous Court decisions.

The damage done by court decisions and restrictive legislation was

compounded by a series of self-inflicted restrictions. In 1976, for example, the Civil Service Commission (CSC) ruled, based on its interpretation of court decisions and of the Privacy Act, that questions relating to membership in subversive organizations had to be eliminated from applications for federal employment in nonsensitive positions. In 1977, this ruling was extended to cover sensitive positions as well. The upshot of this is that the Office of Personnel Management (OPM) today cannot even make a preliminary determination that an applicant is a member of such an organization, so that it would be in a position to determine whether this is knowing membership or membership with an intent to engage in an overt act.

Much damage has also been done by the tendency—on the part of Congress as well as of most government departments—to assign very low budgetary priority to their personnel security programs. When cuts have had to be made, the personnel security divisions have generally suffered more than other divisions. Here are several examples:

- In 1965, the Civil Service Commission eliminated the requirement for full field investigations for noncritical-sensitive positions (which have access up to Secret). The Department of Defense followed suit shortly thereafter.
- The Department of Health and Human Services, with 170,000 employees, has had its personnel security division reduced to a staff of three, as against 333 investigators and staff assistants in its Civil Rights division.
- In 1976, Congress mandated a 27 percent cut in the personnel of the Defense Investigative Service, which processes personnel investigations for the Department of Defense. By June 1, 1981, this had resulted in a backlog of 83,000 investigations. According to the DOD, this backlog was having a serious adverse effect on operational readiness and defense production. The General Accounting Office estimated that the backlog might be costing the DOD almost $1 billion a year, and strongly urged that the DIS be provided with 888 additional staff. Some progress has been made in adding staff and reducing the backlog, but the situation still remains serious.
- Although the NACI (National Agency Check with Inquiries) still remains the minimal investigation for employees in nonsensitive and noncritical-sensitive positions, it is now being proposed, in the interest of economy, that employees in nonsensitive positions (1,098,166 out of 1,652,083 positions surveyed in 1980) be subjected only to an NAC. The saving effected would be approximately $11.00 per applicant ($36.29 against $25.05). This would be a highly questionable procedure, because without written inquiries to reinforce the National Agency Check, the employing agency would not even be able to confirm that the applicant is who he says he is.

The continuing pressure to economize at the expense of the employee security program makes no sense. The total cost of the program, gov-

ernment wide, is probably under $200 million per year. In the author's opinion, double this amount would not be too high a price to pay for an effective personnel security program.

From a personnel security standpoint, one of the most dangerous practices that has established itself over the past two decades is the widespread resort to the waiver of full field investigations prior to filling critical-sensitive positions with applicants or appointees.

Executive Order 10450 provided for the use of such waivers only "in case of emergency"; in each case, the head of the agency had to approve the appointment as "necessary in the national interest," and the background investigation had to be undertaken without further delay. A majority of the agencies apparently now feel that the cost of leaving such positions unfilled for several months outweighs any risk that may be involved in a post-appointment investigation. A survey of eleven agencies conducted in mid-1980 by the Office of Personnel Management (OPM) revealed that most investigations were now being processed on a post-appointment basis. Only two of the agencies reported pre-appointment waivers in less than 34 percent of the cases. Seven of them reported such waivers in 90 to 100 percent of the cases.

The waiver of pre-employment field investigations has been strongly and repeatedly criticized as bad security practice by the Department of Justice and the CSC/OPM. The various departments and agencies appear to have shrugged off these repeated criticisms and moved ahead to make the waiver their procedural norm. This situation must be reversed. It will not be reversed, however, unless investigative staffs are maintained at a level that permits them to operate without the constant encumbrance of a two to six month backlog.

The Federal Personnel Manual, basing itself on EO 10450, calls for a reinvestigation of the incumbents of all critical-sensitive positions five years after appointment and "at least once each succeeding five years." Personnel security professionals regard periodic reinvestigations to be just as important as—perhaps even more important than—initial investigations. Long-term ideological moles will frequently enter government at a relatively low level and do nothing that might compromise their position until they achieve important positions at the policy-making or operational levels. Similarly, those who have character weaknesses or personal backgrounds that would make them easy targets for the KGB recruiters become far more attractive after they have moved up the ladder and have access to important information.

Government wide, the performance record on the requirement for reinvestigations is at an abysmally low level. DOD has suspended indefinitely all such investigations. In other departments and agencies, reinvestigation is becoming increasingly rare. OPM reports that between 1977 and 1981 the number of requests for reinvestigation received from

GAO fell from 277 to 84; the State Department from 114 to 50; NASA from 254 to 151.

This is an area where dramatic improvement would be possible, given a combination of a firm administrative directive and the funds necessary to restore the reinvestigative program to an adequate level.

The Situation in the Department of Defense

There are weaknesses in the personnel security procedures in the Department of Defense (DOD) that give serious reason for concern.

Enlistees are required to undergo an ENTNAC, which is a National Agency Check without a fingerprint check. This qualifies them for access to information and technology up to the level of Secret. It would, for example, qualify an enlistee for service aboard a nuclear submarine. Access to Top Secret information or to officer duty aboard a nuclear submarine requires a Background Investigation (BI)—now an Interview-oriented Background Investigation (IBI) (see below). Officer candidates for all services are accepted on the basis of an NAC—now almost meaningless because there is no data base.

Under the pressure of a midyear backlog of 83,000 cases awaiting background investigation, the Department of Defense, in July 1981, made a number of drastic cutbacks in the scope of its personnel security program, including its application to members of the armed forces and defense contractor personnel. Periodic reinvestigations were suspended indefinitely. The standard BI, which used to have a scope of five years, was reduced to an IBI, consisting of an NAC and a one-hour (average) interview. The IBI has been strongly criticized by other components of the personnel security community, including OPM, the State Department, the Energy Department, and CIA. CIA professionals point out that many applicants, when interviewed in the field by skilled investigators, will pass muster with flying colors, while they flunk the polygraph miserably when the same questions are put to them in Washington. One senior CIA official described the IBI as a very serious danger to the national security.

DOD is now giving serious consideration to abandoning the IBI and returning to the old-fashioned BI. In December 1981, the Defense Investigation Service (DIS), which conducts the Background Investigations for DOD, was given the authorization for 768 additional positions, of which approximately two-thirds were allocated to investigators. This expansion of DIS will contribute to reducing the backlog, but it is almost certainly not enough to permit the liquidation of the backlog, plus the resubstitution of the standard BI for the IBI, plus a return to the requirement for five-year reinvestigations of all those with access to Top Secret or over.

Recommendations

Given these facts, it would be natural to ask if our Federal Employee Security Program is not beyond repair, or at least beyond repair in any reasonable time frame. The problems are unquestionably enormous—but we must address them because the penalty for failing to do so goes to our survival as a nation. Certain of the most basic repairs are going to be very difficult and time-consuming (among other things because they will require legislation). There are, however, a number of "quick fixes," especially in the case of the suitability program, that can be made without serious delay—a few months, a year, perhaps a bit longer—by administrative action only, without the enactment of new legislation.

As was pointed out, the Federal Employee Security Program really consists of two parts. The first part has to do with security strictly perceived—that is, in the sense of screening out elements whose associations with organizations found to be subversive renders them unsuitable for employment on national security grounds. The second part of the program has to do with suitability. Inevitably, there is a strong overlapping between the two because those who are untrustworthy or engage in "criminal, dishonest, infamous or notoriously disgraceful conduct," or drink excessively, or use drugs, are clearly more vulnerable targets for the many KGB recruiters who are active in this country, or more liable to be careless with confidential information or documents to which they have access. In fact, the majority of those convicted of espionage since World War II did not become agents for ideological reasons; they succumbed, rather, because of monetary or sexual enticement or blackmail.

Administrative directives not supported or required by law can very easily be replaced by directives from the new administrators. Handbooks prepared under previous administrations can be replaced by new handbooks designed to enhance the quality of our personnel suitability program. Here are some of the things that could and should be done.

1. The lax 1975 suitability guidelines for adjudicators, currently in use by OPM, should be completely rewritten.
2. The directives promulgated by the chairman of the Civil Service Commission or the chief counsel of the CSC going back to 1965 should be reexamined with a view to eliminating or rewriting all those weakening directives not absolutely required by law.
3. The entire body of Supreme Court rulings relating to federal employment should be reexamined with a view to replacing the extremely constrictive interpretations, passively accepted for some two decades now, with viable, more conservative interpretations.
4. The quality of investigation and adjudication should be improved by funding more intensive training courses, plus refresher courses, for investigators and adjudicators.
5. There should be a tightening up on the waiver of the pre-employ-

ment Background Investigation (BI), which has now become the rule in most agencies.

6. There should be a firm return to the requirement for a reinvestigation at five-year intervals of all employees in sensitive—or at the very least, critical-sensitive—positions.
7. Adequate funding must be provided for the manpower requirements that would be made necessary by such improvements. This will need a budgetary assist from Congress.
8. DOD should, at the earliest possible date, abandon the IBI and return to the requirement of a full field Background Investigation for all those with access to Top Secret or higher classifications.
9. Some formula must be found for recasting the "nexus" provision so that agencies are not placed in the ridiculous position of having to hire employees whom they have many valid reasons for not hiring, but about whose flaws and weaknesses they cannot provide a definite nexus to ability to perform the job.
10. The OPM and the Justice Department must team up to represent the interests of the Federal Employee Security Program before the courts far more vigorously and effectively than heretofore.
11. A new executive order should be issued, making it clear that it is the intention of the Administration to maintain an effective program to ensure that applicants for employment in sensitive government positions possess the qualities of integrity and unswerving loyalty to the United States.

In all of these areas, quick fixes are possible; the time required depends more on the commitment of the principal actors than on the amount of reading and writing to be done. The institution of the improvements suggested above should quite quickly—let us say, over several years—result in a much stronger suitability program than we have today.

The improvement of the personnel security program, as distinct from the suitability program, will require much more time and effort—although here, too, there are some things that can be undertaken without delay, e.g., rewriting the domestic intelligence guidelines imposed on the FBI by Attorney General Edward Levi in 1976. In a hearing before the Senate Subcommittee on Security and Terrorism in early July 1982, FBI Director Webster informed Chairman Denton that the FBI was engaged in redrafting the Levi guidelines because they imposed excessive restrictions on the FBI's ability to monitor subversive and terrorist organizations.

The two central requirements for the implementation of an effective Federal Employee Security Program are (1) the establishment of guidelines for agency directors, adjudicators, and investigators; and (2) the reconstruction of a domestic intelligence data base by reactivating the FBI in the field of domestic intelligence and reviving the OPM's Security Research and Analysis Section.

The reconstruction of the domestic intelligence data base will require a much better balance between the right of the nation to protect itself and the privacy rights of the individual than is today the case. Among other things, the FBI will have to be relieved of some of the restraints imposed on it in the course of the post-Watergate anti-intelligence hysteria. Virtually mandatory would be an amendment to the Privacy Act to specifically exempt domestic intelligence files from disclosure.

To provide the greatest possible assurance that some of the abuses of the past will not be repeated, a nonpartisan domestic intelligence advisory board should be constituted, in which the judicial profession, the academic community, the legal community, and business and labor are all represented. It would have oversight responsibilities in the field of domestic intelligence plus the responsibility for preparing, as quickly as can judiciously be done, a list of organizations in which membership would raise serious questions of suitability for employment in sensitive positions. The listing should be public and should be accompanied in each case by a summary of the reasons for the listing. Organizations thus designated should be given administrative due process rights to challenge the designation. Beyond this, of course, they could appeal their cases to the courts. They should also have the right to ask for a delisting hearing if they wish to demonstrate that their activities have changed significantly since the listing was promulgated.

If the Privacy Act and the Freedom of Information Act are amended to exempt investigative and adjudicative files from disclosure, it will still be possible to observe administrative due process. Applicants about whom derogatory information is developed should be provided with a summary of this information and with an opportunity to respond to it before a final decision is made. In addition, virtually every agency has a built-in machinery of appeal against adverse decisions—and beyond this, at the administrative level, there is the final right of appeal to the autonomous Merit Systems Protection Board.

Here are a few additional recommendations the author would like to urge:

- Individuals who are denied employment on national security grounds should not be stigmatized as loyalty risks. Instead, the determination should simply state that the applicant has been found "unsuitable" for federal employment.
- The Federal Torts Claims Act should be amended to protect federal employees from the threat of civil suits by providing an exclusive remedy against the United States government in cases involving allegations of tortious conduct by government employees acting in an official capacity. (Such legislation is now pending.)
- Legislation should be considered which would make mandatory the cooperation of state and local authorities with the DOD and other

government agencies in the matter of personnel investigations related to the Federal Employee Security Program. The possible need for compensating state and local agencies should also be examined.

- A blue ribbon panel similar to the Loyd Wright Commission of the 50s should be set up to look at the entire question of the personnel security situation.

In order to provide a lead and set the tone for all government departments and agencies, President Reagan should speak out on the matter and issue a new executive order, reaffirming the need for sound personnel security practices in government and establishing some basic rules for the conduct of such a program.

January 27, 1983. As we go to press, a check with the Department of Defense and the Office of Personnel Management reveals that at OPM there has in recent months been some significant progress, with indications of more to come. New guidelines for adjudicators are in the final stages of preparation. A decision has been made not to go along with the recommendation of the Interagency Task Force calling for the substitution of a NAC for a NACI in the case of Level I employees. The proposal that investigative files be retained for seven years only has also been turned down.

Within the past few months, OPM has also made some progress in improving its access to state and local law enforcement records. The State of Pennsylvania has passed legislation directing police departments to accept requests from OPM in the same way that they would requests from components of the federal criminal justice system. Proposals are also pending that would give OPM comparable access in New Jersey and Massachusetts, as well as in New York City.

DOD seems to be moving toward the use of polygraphs in appointments to the most sensitive positions, whose occupants have access to Secret Compartmented Information (the highest level of classification). It has also been recommended that the polygraph be used on a random basis in the periodic reinvestigations of those in sensitive positions. Despite the very strong recommendations of the high-level interdepartmental task force which submitted its report on personnel security in April 1982, the indications are that the Defense Department will stick with the IBI (a one-hour—average—interview) as a substitute for the full field background investigation in processing personnel for sensitive and critical-sensitive positions. At the very highest level of sensitivity, however, there will be ten-year background investigations.

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The Constitution does not guarantee public employment. City, State, and Nation are not confined to making provisions appropriate for securing competent professional discharge of the functions pertaining to diverse governmental jobs. They may also assure themselves of fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it. No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organization engaged in such endeavor.

Justice Felix Frankfurter, in
Garner v. Board of Public Works of City of Los Angeles,
341 05 716, 724-725, 1951

The Need for Personnel Security

The need for a personnel security program is accepted in principle by virtually all members of Congress, liberals as well as conservatives. In practice, however, this acceptance has, over the past decade or more, been rendered meaningless by the one-sided insistence on the right of privacy. The right of privacy is very important—but it is not the only right. The government also has rights—and one of the most important of these is the right to protect itself and the public against subversion and terrorism and domestic violence. The exercise of this right of self-protection undeniably conflicts at certain points with the right of privacy or, to be more precise, with the absolutist conception of the right of privacy. This is so for the simple reason that it involves such procedures as personnel investigations and the maintenance of an effective domestic intelligence operation and domestic intelligence files. Common sense points to the need for a reasonable compromise between the right of privacy and the right of the government to take measures to protect the security of the nation. Instead, today the right of privacy is overwhelmingly paramount, while the personnel security program essential to the protection of the nation has been reduced to a fragmentary and moribund condition.

The history of the post-World War II period, both in this country and in western Europe, is filled with incidents that dramatically demonstrate the need for rigorous personnel security practices designed to protect our government from the risks inherent in employing in positions of responsibility either people of questionable character or stability —of whom there are many—or people who are ideologically committed to the destruction of our form of government. The latter constitute only a tiny fraction of the population, but they are capable of inflicting enormous damage if they move into sensitive positions in government.

In the late 1940s and early 1950s, as a result of the revelations of Whittaker Chambers, Elizabeth Bentley, and Hedda Massing, all self-confessed Soviet agents, the American public learned that some 40 people who held high positions in the United States government and international agencies were, in fact, Soviet agents. The roster of revealed agents included Alger Hiss, who had served as Assistant Secretary of State for International Organization Affairs; Harry Dexter White, Assistant Secretary of the Treasury under Henry Morgenthau; Lauchlin Currie, Executive Secretary to President Roosevelt; Larry Duggan, head of the State Department's Latin American Division; and Frank Coe, another top Treasury employee who later became head of the International Monetary Fund.*

Since these early revelations were made, there has been a steady succession of cases—less spectacular, perhaps, but nevertheless highly important—involving disloyalty and espionage by United States government employees. A random selection reminds us that Irvin Chambers Scarbeck, second secretary of the U.S. Embassy in Poland, was sentenced to 30 years in November 1961 on a charge of espionage; that Nelson C. Drummond, a U.S. Navy enlisted man, was sentenced to life imprisonment in August 1963 on a similar charge; that Sgt. Robert C. Johnson was sentenced to 25 years in July 1965; that William Henry Whalen, a retired lieutenant colonel, was sentenced to 15 years in March 1967;

*Of the government officials named above, only Alger Hiss went to prison. The essence of the case against him had to do with treason, but because of the statute of limitations he was charged with having perjured himself in denying that he had transmitted secret State Department documents to Whittaker Chambers, a confessed Soviet courier. Harry Dexter White appeared once before the House Un-American Activities Committee—and then died of a heart attack before his second scheduled appearance. Subsequently, both Attorney General Herbert Brownell and J. Edgar Hoover made statements indicating that they regarded the case against Harry Dexter White as ironclad. Lauchlin Currie, when asked to appear before the Senate Internal Security Subcommittee in 1952, went to Colombia and has never returned to the United States. Larry Duggan, who had been asked to testify before the Senate Subcommittee at about the same time, fell from a New York skyscraper window under mysterious circumstances. Frank Coe invoked the Fifth Amendment when he was asked, "Are you a Soviet agent, Mr. Coe?" He was immediately dismissed by the International Monetary Fund. Shortly thereafter he went to Red China where he served as a financial advisor to the government until his death in the summer of 1981.

that Edwin Gibbons Moore II, a retired CIA employee, was sentenced to life imprisonment in June 1977 on a charge of espionage; that Christopher John Boyce, a TRW contract employee, was sentenced to 40 years in prison in December 1977 for passing sensitive information about our reconnaissance satellites to the Soviets; that in November 1978, William Kampiles, a minor CIA employee, who got his hands on a priceless manual on the KH 11 satellite (designed to monitor Soviet SALT violations) and sold it to the Soviets, was also sentenced to 40 years in prison. Just before this study was completed, there was the case of 2nd Lt. Christopher M. Cooke, USAF, who confessed to passing on to the Soviets highly classified information to which he had access as the deputy commanding officer of a Titan missile site. (The charges against him were dismissed by the Court Martial on the grounds that he had been promised immunity if he confessed.)

Other traitors who held important positions managed to get away before the law could catch up with them. In the summer of 1960, two employees of the supersecret National Security Agency, Bernon F. Mitchell and William H. Martin, defected to the Soviet Union, gave away vital technical know-how on U.S. coding and decoding capabilities and procedures, and lent themselves to a sustained and malicious propaganda campaign against the United States. And we are currently confronted with the case of Philip Agee, who resigned from the CIA in 1968, convinced that he had become a "servant of the capitalism I rejected." Since that time, making no bones about the fact that he considers himself a Marxist, he has been devoting himself to publicly identifying CIA agents.

This partial listing could be expanded many times over.

The other Western nations have been shocked similarly from time to time to discover that men who held high positions in their governments were in reality Soviet agents. England received its first shock from the case of Klaus Fuchs, a top-ranking nuclear scientist, who passed on vital information about the H-bomb to the Soviets. Years later it was shocked once again to learn that Kim Philby, the head of British counterintelligence, was also a Soviet agent—as were his confederates, both high-ranking officers in the Foreign Service, Guy Burgess and Donald Maclean. All three defected to the Soviet Union before they could be apprehended. In Germany in recent years there have been many instances of espionage by people who held important government positions, the best known of which was the case of Guenther Guillaume, a personal secretary to Chancellor Willy Brandt.

Even neutral countries have not escaped the attention of the KGB. In Sweden in 1964, there was the sensational case of Colonel Stig Wennerstroem, a retired air force colonel who had served from 1952 to 1957 as air force attaché in Washington. Wennerstroem was convicted on the charge that he had supplied information to the Soviets continuously

from 1948 to 1963 and had gravely compromised Sweden's national defense. Neutral Switzerland went through a similar experience in 1976 when Brigadier General Jean-Louis Jeanmarie, a member of the military general staff, was convicted of spying for the Soviets for 18 years, massively compromising Switzerland's defensive preparations.

It would be difficult to place a dollar figure on the total damage done to the interests and defenses of the Western nations by such Soviet agents. Sweden is reported to have spent in excess of $100 million in reorganizing its defenses as a result of the Wennerstroem revelations. The Jeanmarie case is reported to have cost Switzerland a comparable sum of money. Then there is the case of Harry Dexter White who, in the period following World War II—over the opposition of the War Department, the State Department, and the Bureau of Engraving and Printing—pushed through his personal recommendation that the Soviets be provided with duplicates of the American printing plates for German occupation currency. This surely cost the U.S. billions of dollars. Much more important, however, in White's case, is the fact that, through the Morgenthau Plan* of which he was the author, he was able to serve the Soviet objective of keeping Germany in the war as long as possible so that the Red Army would have more time to push to the West in Europe.

On the basis of this long and dismal record, it should not be necessary to defend the proposition that all those employed by the U.S. government, especially in sensitive positions, should undergo careful scrutiny before they are approved for such employment.

The argument may be made that a substantial majority of those who have been apprehended and sentenced as Soviet agents are people who could not have been spotted in advance because there were no subversive associations of any kind in their backgrounds, and the weaknesses which led to their downfalls were not predictable. It is true that there are far more instances where government employees or members of the armed forces have succumbed because of monetary or sexual enticements or blackmail than there are instances where the motivation was

*The Morgenthau Plan, in essence, called for the deindustrialization of Germany and its conversion into a pastoral country. It was strongly opposed by both the War Department and the State Department because it undercut the position of those Germans who wanted to end the war, many of whom were in contact with our own intelligence. In July of 1944, indeed, anti-war sentiment at high level resulted in the attempted assassination of Hitler by Count von Stauffenberg, an incident which was followed by hundreds of executions and the forced suicide of General Rommel. The Morgenthau Plan was used by Hitler to bolster his position. The Nazi press depicted it as a Jewish-American plan for the permanent impoverishment of Germany. Governor Thomas Dewey made the statement that the plan was worth ten new divisions to Hitler. Obviously, if the anti-Nazi Germans had been able to overthrow Hitler and make peace in the fall of 1944, scores of thousands of lives would have been saved and the war would have ended with the Soviets hundreds of miles to the east of where they finally stood on VE Day in May of 1945. The Morgenthau Plan foreclosed any such possibility.

primarily ideological. But this is true only when it comes to passing on classified information. Even here, it would be appropriate to recall that all of the dozen or more post-World War II atom bomb spies in the United States, Canada, and Great Britain were spies for ideological reasons.

There are, however, other vital areas of agent activity, capable of inflicting enormous damage, where the motivation *is* primarily ideological. This would certainly be true in the area of policy manipulation (Alger Hiss, Harry Dexter White, Burgess and Maclean, Guenther Guillaume). It would also be true of the kind of operational sabotage carried out by Kim Philby, who did great harm to British intelligence operations by virtue of his key position as chief of MI6 (counterintelligence). Finally, while it is not excluded that physical sabotage in time of war can be arranged on a mercenary basis, the chances are that, in this area of risk, ideological motivations pose a substantially greater danger.

Perhaps another point should be made here to underscore the importance of having a domestic intelligence machinery and an adequate data base in existence *before* a country is plunged into war. Kim Philby, Burgess and Maclean, and Anthony Blunt (whose exposure as a wartime Soviet agent four years ago led to the revocation of his knighthood) were all members of an openly communist group on the Cambridge campus in the early thirties. So was James Klugman, who played a sinister role in promoting the British decision to abandon the Yugoslav resistance movement of General Draja Mihailovich and throw all World War II allied support to the avowedly communist movement led by Marshal Tito. Had there been any meaningful domestic intelligence operation in existence in Britain at the time, it certainly would have picked up masses of detailed information about the activities and membership of the Cambridge group. And had such domestic intelligence been available, it is probable that Britain could have avoided the catastrophic damage inflicted by the combined activities of this remarkable group of communist intellectuals from which Soviet intelligence was able to recruit some of its ablest and most effective agents. But Britain and the United States, before World War II, had very little in the way of domestic intelligence. For this they both paid a heavy price.

2

The Anatomy of the Federal Employee Security Program

Prior to 1939, the criteria governing the employment of applicants by federal departments and agencies had to do essentially with general suitability—primarily the factors of competence and personal integrity. This was the thrust of the Civil Service Act of 1883, the first legislation in a long series bearing on the problem of employability. In line with this, civil service investigations prior to 1939 were as a rule limited to questions of character and general suitability.

The Hatch Act of 1939 was the first law to deal specifically with the question of loyalty. Section 9A prohibited federal employees from "membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States." Over the years this was followed by a progression of executive orders and acts of Congress, which led to the emergence in the mid-50s of a formalized and effective loyalty-security program.

After the Hatch Act, there was President Roosevelt's Executive Order 8781 of June 12, 1941, which required the fingerprinting of all employees in the executive civil service. In the spring of 1944, the Civil Service Commission established a Loyalty Rating Board to handle cases involving derogatory information with regard to loyalty. About the same time, the Civil Service Commission began compiling a security index and general information file. In November 1946, President Truman issued an executive order establishing a Temporary Commission on Loyalty. Based on the Commission's report, President Truman on March 2, 1947, promulgated Executive Order 9835, which stipulated that employment in the executive departments or agencies could be refused if "...on all the evidence, reasonable grounds exist for the belief that the person involved is disloyal to the government of the United States." EO 9835 was superseded in February of 1953 by Executive Order 10450, signed by President Eisenhower, which basically broadened the loyalty program to include suitability. It is EO 10450, as amended, that governs the employee security program today in the competitive civil service.

EO 10450 said that:

> ...the interests of the national security require that all persons privileged to be employed in the departments and agencies of the government shall be reliable, trustworthy, of good conduct and character and of complete and unswerving loyalty to the United States.

It called upon the head of each department and agency of the government to establish and maintain "an effective program to insure that the employment and retention in employment of any civilian officer or employee...is clearly consistent with the interests of the national security." It stipulated that the employment of civilian officers or employees in government agencies and departments should be made subject to investigation, the scope of the investigation to be regulated "according to the degree of adverse effect the occupant of the position...could bring about, by virtue of the nature of the position, on the national security."

EO 10450 required the heads of departments and agencies to designate as sensitive any position where the occupant would be in a position to bring about "a material adverse effect on the national security." It also stipulated that any position designated sensitive "shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted," and that "in no event shall the investigation include less than a National Agency Check, including a check of the fingerprint files of the Federal Bureau of Investigation and written inquiries to appropriate local law enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation." The Federal Personnel Manual added the stipulation that occupants of sensitive positions be reinvestigated every five years.

EO 10450 gave to the Civil Service Commission the primary responsibility for conducting investigations of persons entering or employed in the competitive service.

To assist investigators in deciding whether the employment or retention in employment of a person being investigated was "clearly consistent with the interests of the national security," EO 10450 listed the following criteria:

1. Depending on the relation of the government employment to the national security:
   (i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.
   (ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.
   (iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.
   (iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.
   (v) 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.

2. Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit any act of sabotage, espionage, treason, or sedition.
3. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation whose interests tend to be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.
4. Advocacy of use of force or violence to overthrow the government of the United States, or the alteration of the form of government of the United States by unconstitutional means.
5. Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, 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.
6. Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.
7. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

With minor modifications, these criteria still govern—theoretically—the operation of the federal employee security program.

In its second paragraph, EO 10450 underscored the need for fairness, impartiality, and equitable treatment and for the adjudication of cases by mutually consistent standards between government departments and agencies.

Prior to 1965, the federal work force was divided into two categories for purposes of investigation—*nonsensitive* and *sensitive*. All sensitive positions required a full field Background Investigation. Since 1965, however, all civilian positions in the competitive service have been divided into three basic categories—*nonsensitive*, *noncritical-sensitive*, and *critical-sensitive*. Only the very limited number of critical-sensitive positions require full Background Investigations.

The Federal Personnel Manual defines sensitive positions as "those positions the occupants of which could bring about, by virtue of the nature of their positions, a material adverse effect on the national security." It makes it mandatory to classify positions as sensitive if the occupants will have access to Top Secret, Secret, or Confidential information.

The Personnel Manual defines critical-sensitive positions by positing these criteria:

- Access to TOP SECRET defense information;
- Development or approval of war plans, plans or particulars of future or major or special operations of war, or critical and extremely important items of war;
- Development or approval of plans, policies and programs which affect the overall operations of an agency—that is, policy-making or policy-determining positions;
- Investigative duties, the issuance of personnel security clearances, or duties on personnel security boards;
- Fiduciary, public contact, or other duties demanding the highest degree of public trust.

Noncritical-sensitive positions are defined as all other sensitive positions that do not meet the above criteria.

The Office of Personnel Management (OPM), previously the Civil Service Commission (CSC), conducts the National Agency Checks (NACs) for almost all government agencies. The NAC involves a check of the fingerprint and investigative files of the FBI, the files of the OPM, the files of the appropriate intelligence and investigative agencies and armed forces. It also used to involve a check with the personal reference card files maintained by the Security Research and Analysis Section of the CSC/OPM, the files of the House Internal Security Committee, and the domestic intelligence files of state and local law enforcement agencies. These sources, however, are no longer available to the Federal Employee Security Program. (This will be discussed in detail at a later point.)

In the case of nonsensitive and noncritical-sensitive positions, the NAC, as required by EO 10450, is supplemented with written inquiries to references, schools, former employers, local police departments, etc., and the entire procedure is then called an NACI. The inquiries are important among other reasons because they help to establish that the subject is who he says he is. The NACI is the minimum investigation conducted for federal employment by the OPM. However, enlistees in the armed forces undergo a somewhat abbreviated investigation called an ENTNAC, which is an NAC without an FBI fingerprint check. Officer candidates are required to undergo an NACI.

In the case of critical-sensitive positions, the NAC is combined with a full field Background Investigation, which involves record checks and personal interviews with neighbors, friends, references, employers, schools, business associates, and others who have general knowledge of the subject, as well as law enforcement agencies. It also generally involves a credit check.

Operationally, the Federal Employee Security Program is divided into three distinct sectors: the Department of Defense (DOD), including the

armed forces; the 54 federal departments and agencies whose investigative programs come under the direct authority of the OPM; and the law enforcement and intelligence agencies. The State Department, as an intelligence-using agency, would be in this last category.

Because of its size and the massive annual turnover in the armed forces, DOD accounts for the bulk of personnel security investigations—some 900,000 in 1978 out of a total of 1.4 million.* The great majority of these investigations are NACs or ENTNACs, but about 120,000 are BIs or Special BIs.

In that same year, 1978, the Civil Service Commission conducted some 325,000 personnel security investigations, while the remaining 175,000 were conducted by the Departments of Justice, State, and Treasury and by the CIA.

There are several qualifications that have to be made to the above description of the division of labor in the personnel security field. Executive Order 10450 had given the CSC the authority to conduct investigations of applicants for employment throughout the civilian sector, including the civilian sector of DOD. Under a rather complex arrangement—which makes for divided responsibilities—the CSC had delegated to the Department of Defense the responsibility for conducting Background Investigations of its own civilian employees, and there have been similar delegations of authority in the case of the intelligence and law enforcement communities. A number of the agencies and departments that conduct most of their own BIs (e.g., Treasury Department, State Department, and the National Security Agency) still call on the OPM to assist in the processing of some of the less important positions requiring Background Investigations.

Applicants for government employment are given protection and consideration far exceeding the norms of the private sector. If an applicant is not selected, he may appeal the decision to a review authority in the agency itself. If the decision is not reversed and the applicant remains dissatisfied, he may carry his appeal to an independent body, the Merit Systems Protection Board, which, according to those in the field of personnel security, has, at least until recently, tended to tilt heavily to the side of the applicant or employee.

Such an anatomical description of the Federal Employee Security Program makes it sound like a reasonably neat and orderly operation. Unfortunately, it provides no clue to the true state of affairs.

*Search Group Inc., *Federal Access to State and Local Criminal Justice Information for Federal Personnel Security and Employment Suitability Determinations*, Sacramento, California, March 1979.

3

The Erosion of Employee Security

Over the past two decades, and in particular over the past seven years, there has been a progressive retreat from the concept of personnel security in government. In most government departments, very little is left of the personnel security program, properly speaking. What does remain of it is essentially a personnel *suitability* program, capable in many cases of weeding out applicants who are lacking in competence or deficient in character or are unacceptable because of serious criminal history records. (Even in this limited function the program's effectiveness has been sadly reduced by privacy legislation and by a whole series of regulatory constraints.) It is virtually incapable, however, of weeding out applicants who have ties or associations that raise serious questions of suitability from a national security standpoint, or which are clearly inconsistent with the national interest.

Testifying before the Senate Subcommittee on Criminal Laws and Procedures in 1978, Alan K. Campbell, Chairman of the Civil Service Commission, stated that applicants could not be denied employment in the federal competitive service on the basis of what is called "mere membership" in subversive organizations of the far left or the far right—including the Communist Party, the Socialist Workers Party (SWP), the KKK, the American Nazi Party, the Palestine Liberation Organization (PLO), and the Puerto Rican Socialist Party (a frankly Castroite organization) as well as the several Maoist organizations. For employment to be denied, there had to be knowing membership *plus some overt act* or evidence of intention to commit such an act.

In line with this, the Civil Service Commission in 1977 had taken the stand that applicants for employment, even in sensitive positions, could not be asked about membership in organizations committed to the violent overthrow of the United States government or to the use of force for political change; nor, in the absence of an overt act, could information about such membership coming from a third party source be entered into the record of the investigation.

This was confirmed by Mr. Robert J. Drummond, Jr., Director of the CSC Bureau of Personnel Investigations, in the course of a 1978 ap-

pearance before the Senate Subcommittee on Criminal Laws and Procedures, in the following exchange:

> SENATOR THURMOND: And you would not maintain in your files the information that a man is a member of the Communist Party or any organization that stands for the violent overthrow of our government. Mere membership would not be enough to allow you to put that in your files—you would have to have some overt act?
>
> MR. DRUMMOND: Yes. We would have to have something more than mere membership.

The absolute ban on investigation into what is euphemistically called "mere membership" was reflected in the following paragraph taken from a 1978 handbook for Civil Service Commission investigators:

> Members of an organization are reported to have set fire to the campus ROTC building. If the subject of investigation is reported to be a member of this group, our inquiry would be limited to his/her activities, if any, in connection with the act of arson.

Such self-imposed restrictions are crippling enough by themselves. But they exacerbate the basic damage done by a series of court decisions, by the virtual destruction of the intelligence data base on subversive and violence-prone organizations, and by the catastrophic effect that privacy legislation and the 1976 FBI guidelines have had on the ability of federal agencies to maintain records or to obtain information from state, local, and private sources, or even from other federal agencies.

The basic ruling that applicants cannot be asked about membership in subversive organizations stands to this day, although it must be noted that, thanks to a change in management, there have been some significant changes for the better, so that today investigators interviewing third parties are permitted to ask in a general manner about membership in questionable organizations and may report any such statements by witnesses in their own words. The Investigators' Handbook quoted above has now been replaced by a new handbook, which avoids such inane instructions.

In theory, employment may be denied on the basis of membership in a subversive organization (1) if it is knowing membership, and (2) if it can be established that the applicant has engaged in an overt act or has a specific intent to further the unlawful aim of the organization. But this theoretical permission is completely ineffective because of the near-total absence of a domestic intelligence base, the lack of guidelines for adjudicators, and the limitations on questions to applicants. Nor does it nullify the fact that information about membership or knowing membership, even if confirmed, is under present standards unactionable without evidence of criminal complicity or criminal intent.

Another factor contributing to the degradation of the Federal Em-

ployee Security Program is the fact that investigators, analysts, and administrators concerned with personnel security have been compelled for some years now to operate without accepted criteria and guidelines.

The situation existing today in effect nullifies long-standing and repeated legislative requirements. It also makes a mockery of the provisions of executive orders relating to personnel security in government promulgated by President Truman in 1947 and by President Eisenhower in 1953. It flies in the face of a whole series of Supreme Court decisions, which are in essential harmony with Justice Frankfurter's statement quoted above, in upholding the constitutionality of measures designed to "safeguard the public service from disloyalty."

Court Rulings and Self-Imposed Restrictions

The series of circumstances and decisions that brought the Federal Employee Security Program to its present lamentable state cannot be attributed to any single agency or any single administration. It is the product of a complex of developments, involving both Democratic and Republican administrations, decisions of the Supreme Court, Acts of Congress, in particular the Privacy Act and the Freedom of Information Act of 1974, and arbitrary rulings by the Counsel for the Civil Service Commission, putting the most restrictive interpretations on Supreme Court decisions and other court decisions and on the requirements of the privacy legislation. It is also a product, as will be discussed later, of the widespread tendency to put personnel security at or near the bottom of the priority totem pole. Finally, it is a product of widespread misunderstanding of the nature and purpose of the federal personnel security program, a misunderstanding that tends to equate it with "witch-hunting" and "McCarthyism."

Critics charge that EO 10450 is out of date and that it requires amendment or even rewriting in order to make it a viable administrative and legal instrument. However, subject to certain changes suggested by Supreme Court decisions, it remains the law of the land (no matter what weaknesses it may suffer from) and the guiding authority for the various executive agencies in the conduct of their own employee security programs.

The Eisenhower Executive Order had been preceded in 1950 by Public Law 733, which dealt primarily with the problem of applicants and employees who "although loyal to the United States, act in a manner which jeopardizes national security, either through wanton carelessness or general disregard for the public good." The House report from which this quote was taken also pointed out that this bill made "ample provision for the employment in nonsensitive agencies of certain of those employees who may be classified in sensitive departments and agencies as security risks."

At the time Executive Order 10450 was promulgated, the situation seemed clear enough. Nor was there any significant partisan division within Congress. However, over the ensuing period there were several developments that served to weaken Executive Order 10450 and restrict its application.

In 1956, the Supreme Court (*Cole v. Young*, 351 US 536) found that the term "national security" (not defined in the 1950 Act) meant "only those activities of the government that are directly concerned with the protection of the nation from internal subversion or foreign aggression," and that membership in a communist or other subversive organization did not fall within the dismissal procedures set forth by Executive Order 10450, unless the employee in question occupied a "sensitive" position. The Court accordingly ordered the reinstatement of Cole as a food and drug inspector for the Department of Health, Education and Welfare. In thus interpreting the intent of Congress, the Supreme Court stated that its construction was limited to the Act of 1950 and was not directed at EO 10450. Despite this disclaimer, however, it was inevitable that *Cole v. Young* would have a chilling effect on the future implementation of EO 10450.

The Court's decision brought a storm of protest from Congress. As Thomas Murray, an influential Democrat, later put it, there never had been any indication that "any member of the Committee or the House felt that its provisions were limited to so-called sensitive positions." Francis E. Walter, a senior member of the House Judiciary Committee, said in anger, "It was intended by the Congress to make it possible to get rid of a person, no matter what job he had, if that person was a part of this conspiracy to destroy this government. . . . We intended that we were going to rid ourselves in the government of this kind of employee. The case of *Cole v. Young* in my judgment is the most striking example of the invasion by the Court of the legislative prerogative that I have seen in many years."

The Court's decision nevertheless had a far-reaching and many-sided impact. In its wake, the federal agencies were compelled to restore 109 dismissed employees to their positions and to award some $579,000 in back pay. Since the time of this decision there have been virtually no dismissals on loyalty grounds with respect to nonsensitive positions—this despite the fact that such positions constitute over 95 percent of the total civilian federal work force.

A second important restriction on the original intent of EO 10450 resulted from a letter written on November 18, 1965, by John W. Macy, Jr., Chairman of the Civil Service Commission, to the heads of federal departments and agencies. The letter, written at the direction of President Lyndon B. Johnson, redefined *sensitive* positions by dividing them into *critical-sensitive* and *noncritical-sensitive*. Under EO 10450, full field investigations had been required for all sensitive positions. Under

the Macy directive, pre-appointment full field investigations were required only with respect to persons considered for critical-sensitive positions. (In 1980, the federal civilian service, not including DOD, State, and CIA, had a total of 1,389,000 positions classified nonsensitive; 191,000 classified noncritical-sensitive; and just under 79,000 classified critical-sensitive.)

In the aftermath of the Macy directive, there was a sharp decrease in the number of applicants requiring full field investigations prior to their appointment, for the simple reason that there are far more noncritical-sensitive positions than there are critical-sensitive positions. The division into critical-sensitive and noncritical-sensitive positions has its supporters even among those who favor a strong Federal Employee Security Program and are critical of many of the concessions that have served to weaken the program. Their argument is that each full field investigation conducted by OPM costs $1450 to $1900 (as of July 1982), and that, in the interest of economy, the number of full field investigations must be limited to those positions where the national security could be jeopardized by a disloyal employee. The argument against this is that the loose noncritical-sensitive definition covers a tremendous amount of territory and, in some agencies—including DOD—involves access to Secret (but not Top Secret) documents.

It should be noted that, under President Carter's Executive Order of December 1978, the classification and handling of Top Secret documents were made so cumbersome that, in a number of government departments, many items which would in previous years have been given a Top Secret designation were classified Secret in the interest of avoiding difficulty. This situation was recently improved as a result of President Reagan's promulgation of EO 12356.

Compared with the annual salaries paid to occupants of noncritical-sensitive positions, a $1450 to $1900 expenditure at the outset for the purpose of assuring the government of an applicant's loyalty and integrity and general suitability for the specified position would appear to be a modest and prudent investment. And compared with the cost of national defense, the additional cost involved in such a procedure would be trifling.

The final point is that, from the standpoint of the ultimate cost to taxpayers, an enhanced personnel security program would probably pay for itself, in terms of insuring that the government obtains the best qualified candidates and in terms of giving the government an additional measure of protection against the infiltration of underworld elements and against the kind of fraud and other criminal diversionary activities that were rampant in the General Services Administration only a few years ago.

On the heels of the Macy memorandum, another serious blow was struck at the Federal Employee Security Program by two related deci-

sions handed down by the Supreme Court—*Elfbrandt v. Russell et al.*, decided on April 18, 1966, and *Keyishian v. Board of Regents of the University of the State of New York, et al.*, decided on January 23, 1967. *Keyishian* is the case more frequently quoted, but both decisions—or perhaps we should say, the interpretations placed on both decisions—have had decidedly adverse effects.

Elfbrandt had to do with an Arizona state law calling for prosecution on perjury charges of any teacher who took the required oath to support the Federal and State Constitutions, and then "knowingly and willfully" remained or became a member of the Communist Party or any other organization committed to the overthrow of the state or federal government. By a 5-4 majority the Court found that:

> Political groups may embrace both legal and illegal aims, and one may join such groups without embracing the latter.
>
> Those who join an organization without sharing in its unlawful purposes pose no threat to constitutional government, either as citizens or as public employees.
>
> . . . The Arizona Act is not confined to those who join with the "specific intent" to further the illegal aims of the subversive organization; because it is not "narrowly drawn to define and punish specific conduct as constituting a clear and present danger" it unnecessarily infringes on the freedom of political association.

In a stinging dissent, Justices White, Clark, Harlan, and Stewart wrote:

> According to unequivocal prior holdings of this Court, a State is entitled to condition public employment upon its employees abstaining from knowing membership in the Communist Party and other organizations advocating the violent overthrow of the government which employs them; the State is constitutionally authorized to inquire into such affiliations and it may discharge those who refuse to affirm or deny them. [Eight Supreme Court cases are cited in support of this statement.] The Court does not mention or purport to overrule these cases; nor does it expressly hold that a State must retain, even in its most sensitive positions, those who lend such support as knowing membership entails to those organizations, such as the Communist Party, whose purposes include the violent destruction of democratic government.
>
> Under existing constitutional law, then, Arizona is free to require its teachers to refrain from knowing membership in the designated organizations and to bar from employment all knowing members as well as those who refuse to establish their qualifications to teach by executing the oath prescribed by the statute. Arizona need not retain those employees on the governor's staff, in the Phoenix police department or in its schools who insist on holding membership in and lending their name and influence to those organizations aiming at violent overthrow.

On the legal reach of the Court's finding, the minority statement had this to say:

> It would seem, therefore, that the Court's judgment is aimed at the criminal provisions of the Arizona law which expose an employee to a perjury prosecution if he swears falsely about membership when he signs the oath or if he later becomes a knowing member while remaining in public employment. But the State is entitled to condition employment on the absence of knowing membership; and if an employee obtains employment by falsifying his present qualifications, there is no sound constitutional reason for denying the State the power to treat such false swearing as perjury.

In *Keyishian*, the Court struck down as overbroad a New York State statute disqualifying individuals for faculty positions at the State University on the basis of membership in the Communist Party. Once again the vote was 5-4, with White, Clark, Harlan, and Stewart dissenting. In brief, the Court ruled that "mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion *from such positions as those held by appellants*" [emphasis added]. The Department of Justice and the Civil Service Commission have taken the stand from the beginning that *Keyishian* applied with equal force to government positions, and they have conducted themselves accordingly. This has confronted them with a formidable burden of proof. In light of the exact language quoted above, it is at least debatable that the Court intended *Keyishian* to apply to government, especially to sensitive government positions. And in the light of the Court's decision four years later in the *Wadmond* case, discussed below, the stand taken by the Civil Service Commission becomes incomprehensible.

Elfbrandt v. Russell and *Keyishian v. Board of Regents* are frequently cited as justifications for the do-nothing policy regarding identified subversives prior to 1976 and for the elimination in 1976-1977 of the "Have you ever been a member..." question. Almost completely overlooked in the literature on this subject, however, is the Supreme Court decision in February 1971 in the case of *Law Students Civil Rights Research Council, Inc., et al., v. Wadmond et al.* Sequentially, this was the last decision—and the most explicit one—on the specific matter of questions addressed to membership in subversive organizations. The appellants had challenged the constitutional validity of certain procedures and questions used in screening applicants for admission to the New York Bar. One of the two numbered questions which were directly challenged read:

> 26. (a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivi-

sion thereof should be overthrown or overturned by force, violence or any unlawful means?—If your answer is in the affirmative, state the facts below.

(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any state or any political subdivision thereof by force, violence or any unlawful means?

The Supreme Court (now the Burger Court), by a vote of 5–4 (with Justices Black, Douglas, Marshall, and Brennan dissenting), upheld the New York Bar on all points. On the question quoted above, the majority decision said:

> Question 26 is precisely tailored to conform to the relevant decisions of this Court. Our cases establish that inquiry into associations of the kind referred to is permissible under the limitations carefully observed here. We have held that knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals, may be made criminally punishable...*It is also well settled that Bar examiners may ask about Communist affiliations as a preliminary to further inquiry into the nature of the association and may exclude an applicant for refusal to answer* [emphasis added].

It must be noted that question number 26 was worded in a manner that carefully conformed to the Court's decisions *Elfbrandt* and *Keyishian*. In effect, however, this wording leaves it up to the applicant to make a subjective decision on whether or not his membership was knowing membership and whether or not he had the specific intent to further the unlawful aims of the organization to which he belonged. If he decides that he didn't really know, he could answer question 26 in the negative. The question as drafted is much better than asking no questions at all about membership in subversive organizations—and it also makes nonsense of the argument that Supreme Court decisions made it mandatory to eliminate such questions from the standard application form for federal employment. It seems, however, that, in dealing with applications for employment in sensitive government positions, it would make more sense to simply inquire about membership, leaving the government agency to decide, on the basis of further investigations, whether or not the applicant was a knowing member and whether or not he had the required specific intent. The emphasized segment of the Court's decision strongly suggests that this is the sequence the Court had in mind. The applicant could be informed in a footnote to the question that mere membership is not a bar to federal employment, that the quality of the membership would have to be taken into consideration, including whether or not it was knowing membership and whether or not he had the specific intent to further the illegal aims of the organiza-

tion. This should be sufficient to make the question conform to any requirements of previous Court decisions. (A draft of a proposed question, relating to membership in subversive organizations, is included in the recommendations at the end of "The Essential Requirements: II".)

Justice Department and OPM officials with whom the author discussed the matter could not recall a single case since *Keyishian* where the government has attempted to deny employment on the basis of membership in subversive organizations—even when the government was in possession of hard evidence of such membership. Instead, in a number of the most serious cases, it has had to resort to the subterfuge of finding some other valid suitability grounds to justify the denial of employment. In cases where the position involved was not critical-sensitive and the personal record of the applicant did not appear too outrageous, the tendency has been to pursue the path of least resistance.

Another historic decision was handed down in 1967 in *United States v. Robel*, which held that even employment in industrial defense facilities could not be denied to the applicant because of membership in the Communist Party, in accordance with the provisions of the Subversive Activities Control Act of 1967.

The Warren Supreme Court was responsible for most of the decisions that have created difficulties for the Federal Employee Security Program. A number of the key decisions were the product of 5 to 4 votes. It is altogether probable that, if the same cases had come before the Burger Supreme Court, the vote would have gone the other way. During its history, the Supreme Court has on more than one occasion reversed decisions taken by antecedent Courts when experience has demonstrated the inherent untenability of such decisions. Conceivably the Burger Court would look with favor on legislation which in effect reverses some of the previous decisions.

While the previous two decades, thanks to court decisions and administrative restrictions, had witnessed a significant weakening of the Federal Employee Security Program, over the past seven years a rapid succession of retreats has resulted in its near-total demolition. Many of the retreats during this period were not mandated by the courts but were the product, rather, of exaggerated administrative reactions or of excessive interpretations of the requirements of the law by the Civil Service Commission.

In September 1975, the Commission closed down the extensive personal reference card system—the so-called Security Index—maintained by its Security Research and Analysis Section, against which all applicants were supposed to be checked under EO 10450. The reason given for the action was that it was probably in violation of the Privacy Act.

In October 1976, the CSC eliminated loyalty questions from application forms for employment in the federal civil service. This time the reason given was that "recent court decisions have prohibited routine

inquiry into an individual's membership in certain organizations." This directive, however, had a caveat which permitted the asking of such questions where sensitive positions were involved. In a follow-up directive issued one year later, this caveat was cancelled in the case of sensitive positions because "the commissioners accepted the legal opinion of the Commission's General Counsel that Question 21 has a chilling effect on First Amendment rights and Question 22 is unconstitutionally vague."*

The question must be raised whether all the retreats ordered by the Civil Service Commission were really made mandatory by Supreme Court decisions and by the Privacy Act. For example, the November 12, 1973, memorandum which finally led to the elimination of questions dealing with organizational affiliations said that "recent decisions of the Supreme Court make it clear that mere membership in an organization that espouses the unlawful overthrow of the government may not be inquired into, and that the only fact of relevance is membership with knowledge of the unlawful purpose of the organization and with specific intent to carry out that purpose." But at the point where the Commission moved to eliminate all questions relating to membership in the Communist Party or other subversive organizations and issued rulings that even third parties could not be asked such questions about applicants for employment and that such information could not be incorporated in the investigative record if offered on a voluntary basis, the Commission was imposing an interpretation that went far beyond the requirements of the Supreme Court decisions. Before a determination can be made that an applicant has been a knowing member of the Communist conspiracy, sharing a specific intent to carry out its purposes, it is clear that the fact of membership must first be established. The 1976-1977 CSC rules governing applications for federal employment made it impossible to arrive at such a preliminary determination. (As has been pointed out previously, OPM rules today do encourage investigators to inquire about membership in questionable organizations, but such questioning has limited impact because of the mayhem wrought on domestic intelligence and the absence of approved guidelines for government departments and agencies.)

It is to be noted that the Defense Department placed no comparable construction on the Supreme Court's decisions.

Similarly, without waiting to see whether the extensive personal reference card system maintained by its Security Research and Analysis Section could withstand legal scrutiny in the light of Privacy Act and Supreme Court decisions, the Civil Service Commission in 1975 moved

*A detailed account of these developments is to be found in a report entitled "The Erosion of Law Enforcement Intelligence and Its Impact on the Public Security" put out by the Senate Subcommittee on Criminal Laws and Procedures in December 1978. The author of this paper was also the author of the report.

to inactivate and seal these records, basing this action on the advice of Counsel that it was required by the Privacy Act. In so doing, the Commission greatly weakened its ability to alert dependent federal agencies to the existence of adverse information on applicants for employment, pointing to the need for full field investigations. This reduction in its in-house capabilities was all the more damaging because of the increasing difficulty of obtaining information from local law enforcement agencies and institutions and because of the drastically diminished capabilities of the FBI in the field of internal security. Since then, all the reference cards and files of source documents have been boxed and placed in storage, and the entire Security Research and Analysis Section (SRAS), whose task it had been to compile and maintain these files, has been disbanded. With this matter we shall deal in more detail in a later section.

The Destruction of the Domestic Intelligence Data Base

From the standpoint of screening out elements whose employment might pose a danger to the national interest or national security, it is imperative that those responsible for administering the Federal Employee Security Program have at their disposal a domestic intelligence data base, which would enable them to identify at least a substantial proportion of those applicants who are, or have been, associated with a broad variety of extremist and subversive or front organizations. These would include:

- organizations committed to the violent overthrow of the government
- organizations committed to the use of violence for political purposes
- organizations which conspire to deny civil rights to any group of American citizens
- organizations which operate under the control of or in collusion with hostile foreign powers
- organizations which serve as fronts or support organizations for any of the above categories
- organizations which have engaged in conspiratorial activities directed against the security of the United States government or the integrity of its operations.

In the 1950s and 1960s such a domestic intelligence data base did exist. It had three principal components. The first component was the very large body of domestic intelligence on file with the FBI. The second consisted of the organization files and reference library and personal reference cards maintained by the Security Research and Analysis Section of the Civil Service Commission. The third component was the mass of detailed information on file with state and local law enforcement agencies, many of which had vigorous domestic intelligence programs.

There were also two ancillary components of the domestic intelligence data base that should be mentioned.

First, there were the files of the House Internal Security Committee (formerly the House Un-American Activities Committee). The files of the House Committee were regularly consulted by investigators for the Civil Service Commission in accordance with the requirements of EO 10450. Second, there were the domestic intelligence files on violence-prone and revolutionary groups in the custody of the U.S. Army. These files had their beginnings in the 1950s, when President Eisenhower used the Army repeatedly to enforce school desegregation in the southern states and the Army found it necessary to equip itself with intelligence about the KKK and other violent segregationist organizations and elements in order to discharge its duties. In the late sixties, the focus changed. Then it was a matter of dealing with mass rioting in the cities, organized subversion in the armed forces, and sabotage of the war machine and other illegal acts to impede the military by extremist groups in the anti-war movement. The Army's files were shared with other defense agencies which confronted similar problems, although they were not involved in the containment of the many devastating big-city riots.

Today all the components of the domestic intelligence data base have either ceased to exist or have for all practical purposes been lost as investigative resources available for the support of the Federal Employee Security Program.

The Department of Defense, bowing to strong congressional consensus against military involvement in domestic intelligence, instructed the services in March 1971 to terminate all domestic intelligence activities targeted against non-DOD personnel, and ordered their existing files destroyed.* The House Internal Security Committee was terminated in 1975.** The files of the Committee are in storage, where their usefulness is nil. The Security Research and Analysis Section of OPM has been

*In 1972, one year after the Defense Department discontinued all domestic intelligence activities and ordered its files destroyed, the Supreme Court, in *Laird v. Tatum*, dismissed a complaint that DOD's activities were unconstitutional. In effect, the Court decided that, because the plaintiffs had not suffered objective harm, the Court could not reach the merits of the plaintiff's suit. The Court of Appeals decision, which the Supreme Court was reviewing, had, however, dealt with the question of constitutionality in these terms:

> To quell disturbances and to prevent further disturbances the Army needs the same tools and, most importantly, the same information to which local police forces have access....No logical argument can be made for compelling the military to use *blind* force. When force is employed, it should be intelligently directed, and this depends on having reliable information...in time....
>
> The information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newstand.

**The House had previously defeated by a wide majority a move by the Committee on Committees to eliminate the Committee on Internal Security. But then the Democratic Caucus circumvented the House vote by failing to include the Internal Security Commit-

completely closed down. The FBI and local and state law enforcement agencies have seen their capabilities in the field of domestic intelligence reduced almost to the vanishing point.

How did all this come about?

In the case of OPM, the erosion of its ability to contribute significantly to the personnel security process stems from the implications of the Privacy Act of 1974, the erosion of the domestic intelligence data base, and a series of self-imposed restrictions, to which we have already referred, and which we shall discuss in more detail later.

In the case of the FBI, the enactment of a far more stringent Freedom of Information Act of 1974 and the 1975-76 investigation by the Church committee on the Senate side and the Pike committee on the House side both resulted in serious curtailment of the Bureau's internal security activities. But the final blow was the Domestic Security Guidelines issued in March 1976 by the then Attorney General, Edward Levi. Under these guidelines for the conduct of domestic intelligence operations, a full investigation could not be launched unless it was preceded by a "preliminary investigation" and then a "limited investigation." A "preliminary investigation" in the field of internal security could be undertaken on the basis of allegation or information that an organization or an individual was engaged in, or was about to engage in, crimes of violence. These investigations, under the guidelines, were to involve the use of only the least intrusive techniques. If the preliminary investigation suggested the need for further information, FBI headquarters or the Special Agent in Charge was given the power to authorize, in writing, a "limited investigation." "Full investigations" could be authorized only by FBI headquarters on the basis of "specific and articulable facts," giving reason to believe that the individual or group was engaged or might be engaged in violations of the federal law involving the use of force or violence.

The guidelines limited a preliminary investigation to several months and a full investigation to one year—a time limit that could be extended only on the written authorization of the Department of Justice.

There are some extremist organizations engaged in acts of violence or terrorism which meet the requirements for a full investigation under the Levi guidelines. Examples of such organizations would be the KKK, the Weather Underground, and the FALN, the major Puerto Rican terrorist organization. But there are far more organizations in the extremist spectrum that do not meet these criteria. Among these are groups like the Socialist Workers Party (a Trotskyite organization), the Revolutionary Communist Party, the Progressive Labor Party, and a variety

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tee in its report establishing the House committee structure for the session. This was not subject to amendment on the floor. Despite widespread indignation, the House voted to approve the report on committees because it had no practical alternative.

of other self-designated Marxist-Leninist groups, all committed to the forceful overthrow of the U.S. government and to working for its defeat in the event of war. None of these groups was found to meet the Levi criteria because the ultimate crime to which they are committed may still be many years away; for the moment, they are simply engaged in organizing and propagandizing in support of this ultimate crime, fomenting subversion in the armed forces, and creating as much conflict and chaos as they can in the industrial sector—all activities that can invoke the protection of the First Amendment.

Also excluded by the Levi guidelines would be organizations such as the U.S. Peace Council, the American affiliate of the World Peace Council—without question the most notorious and most effective of Moscow's international front organizations; the National Lawyers Guild, which both House and Senate committees have described as a legal front for the Communist Party, but which has over the past two decades developed into a legal action group representing an array of radical left organizations and terrorists; and the North American Congress on Latin America (NACLA), whose echoing of the Castro propaganda line throughout the Americas, supported by frequent direct contact with the Castro government and pro-Castro groups in other countries, raises serious questions of a domestic security nature. Ideally, the United States government should have at its disposal information about all such organizations so that it would be in a stronger position to resist their efforts to infiltrate government agencies. But with no intelligence available and no criteria to guide administrators, the government obviously can offer no effective resistance.

It is not a matter here of arguing that membership in front organizations should be treated in precisely the same way as membership in the Communist Party or other subversive organizations. There are numerous dupes and innocents who are in no way committed to the violent overthrow of the U.S. government and whom many would consider public-spirited citizens, who have permitted themselves to be drawn into various front activities. Membership for a period of time in a single front organization is not today, and should not be, a bar to federal employment. But as Professor Sidney Hook once observed, while one may excuse membership in one or two front organizations on grounds of innocence, by the time an individual has served in twenty such organizations over an extended period of time, a pattern is established which exceeds the plausible boundaries of innocence. Membership in a front organization is a legitimate personnel security consideration because it raises the question of whether it is part of a larger pattern.

The Levi guidelines predictably had an immediate and devastating effect on what remained of the FBI's domestic security program. In 1974, the FBI opened or reopened over 55,000 cases on "subversives and extremists," according to a GAO report. Two years later, the GAO

reported that "as of early October 1977, 17 organizations and approximately 130 individuals were under domestic intelligence investigation." The situation since that time has continued to go downhill.

How bad the situation had become by mid-1978 was frankly admitted by Sebastian S. Mignosa, Chief of the Domestic Security Section of the FBI, in an appearance before the House Permanent Select Committee on Intelligence on July 31, 1978. When Mr. Mignosa was asked whether his section handled subversive organizations coming under the Loyalty and Security Program called for by Executive Order 10450, his reply was, "We don't have any of those." When he was next asked who in the FBI dealt with such organizations, he replied, "There isn't any at the moment.... There isn't any of those type cases at the moment."

Actually the FBI still does maintain surveillance of a handful of organizations committed to terrorism and violence or involved in foreign espionage. But according to highly knowledgeable sources, its current domestic intelligence operation represents a cutback of perhaps 95 to 98 percent from the levels of the 50s and 60s. This may well be an understatement. In testimony before the Senate Subcommittee on Security and Terrorism on August 11, 1982, FBI Director Webster informed Senator Denton that the FBI had active domestic intelligence investigations going on four organizations and ten individuals.

In 1965 the CSC referred the cases of 2,223 applicants to the FBI for full field investigations because preliminary evidence based on NACs had turned up information bearing on the national security. By 1977 the number was down to 81. The author was told that the last NAC report converted to a full FBI field investigation was in 1978.

The report on the attempted assassination of President Reagan issued by the Treasury Department in August 1981 states:

> Interviews for this report with FBI and Secret Service personnel indicated that the *total* number of preliminary, intermediate, and full domestic security investigations involving both individuals and groups which were open at the time of our inquiry was far less than at *any* time covered by the GAO report (emphasis in original text).

The Treasury Department's report discussed the Attorney General's guidelines at considerable length because of the impact these guidelines have had on the capabilities of the Secret Service. It said that "the Secret Service's protective capabilities have been impaired by the decline in the quantity and quality of intelligence collected by the FBI, which is the primary source of the Service's domestic intelligence," and it suggested that the Attorney General's domestic security guidelines for the FBI be modified in a manner which permits the FBI "to pursue domestic security investigations where no criminal predicate is available."

The same arguments would be applicable to the reintegration of the FBI into the Federal Employee Security Program.

At the state and local levels, the 1970s also witnessed a massive destruction of intelligence files dealing with extremist organizations of both the far left and the far right. The State of Texas Public Safety Division destroyed its domestic intelligence files in 1974. The files of the New York State Police have been under lock since 1975; Washington, D.C., Baltimore, Pittsburgh, and other cities destroyed their files; the files of the Chicago Police Department have been locked up since March 1975; while in New York City, Los Angeles, and other major cities there has been a wholesale destruction of files, in most cases exceeding 90 percent of the previous total.

Many law enforcement agencies at state and local levels have completely abandoned the domestic intelligence function and terminated their domestic intelligence units.

By itself, the abandonment of the domestic intelligence function and the massive destruction of domestic intelligence files would be catastrophic enough. But, as we shall discuss later, the situation has been further aggravated by the fact that, as a result of the fears generated by privacy legislation at the federal and state levels, law enforcement agencies—which in the past always freely shared intelligence—no longer share the little intelligence they still have on hand.

The Devaluation of the NACI and the Background Investigation

It is not surprising that today's NACIs and Background Investigations produce far less substantive reports than those of ten or fifteen years ago. In the old days, the Civil Service Commission could count on the complete cooperation of federal, state, and local agencies, and a very high degree of cooperation from private citizens, institutions, and corporations. There were also, as we have pointed out, extensive domestic intelligence files maintained by state and local law enforcement agencies, as well as the files of the FBI and of the Security Research and Analysis Section. But the priceless reservoir of domestic security intelligence at state and local levels has for the most part been destroyed or locked up; the FBI has for all practical purposes been out of the domestic intelligence business since 1976; and SRAS no longer exists. Private citizens, all the way up to the level of federal judges, frequently refuse to cooperate if they have adverse information because, under the Privacy Act and *Jane Doe v. U.S. Civil Service Commission*, the OPM can no longer guarantee confidentiality, if the information furnished in confidence is used as the basis for an adverse employment decision. One respected federal judge told the author that he does not know a single colleague on the federal bench who would provide derogatory information, if he possessed it, about an applicant for federal employment. The result of all this has been a dramatic decline in the value of

the NACI and the Background Investigation, especially as they relate to organizational affiliations that pose a danger to the national security.

In testimony before the Senate Subcommittee on Criminal Laws and Procedures in 1978, Stuart Knight, Director of the Secret Service, estimated that the Service was receiving at the most 50 percent of the amount of intelligence it used to receive to assist it in the protection of the president and the government, and that if one took into consideration the reduced quality and detail of the intelligence that was still available, the total loss of information was probably in the neighborhood of 75 percent. Substantially the same testimony was given by the Secret Service on July 31, 1981, before the Senate Subcommittee on the Constitution. It is common knowledge that the Secret Service, precisely because its mission is to protect the president, receives an exceptionally high degree of cooperation from local, state, and federal agencies. If the intelligence available to the Secret Service today stands at approximately 25 percent of what it used to be, it would not be an unreasonable assumption that the information bearing on the national security brought together by the standard NACI procedure probably rates substantially *less* than 25 percent of that of a decade ago or two decades ago.

The NACI still remains the minimal investigation for employees in non-sensitive and noncritical-sensitive positions. It cannot be abandoned because then we would have nothing. Clearly it must be retained, despite its very much reduced value in recent years. Instead of retaining the NACI, however, it is now being proposed that for Level I employees, in a five-level system being considered as a replacement for the present three-level system (Level I embraces the majority of the federal employees surveyed in an interagency task force study), the NACI be reduced to an NAC. This means that no form letters will be sent out to check on the identity of the applicant, on whether he has a local criminal record, etc. According to OPM, this position constituted a concession to the insistence of DOD in the interagency task force which produced the proposal for the five-level system. Having helped to produce the report, however, DOD, because of residual differences, refused to sign it.

The standard Background Investigation has not fared much better than the NACI. The basic reasons for the reduced quality of the BI have already been discussed. On top of this, the BI has suffered from successive reductions in scope. Before 1961, the BIs of applicants and appointees went back to 1937 or the subject's eighteenth birthday. In 1960, recognizing that a fixed 1937 starting point was illogical, the CSC reduced the period covered by the BI to fifteen years, or the period since the eighteenth birthday. Within this new scope, a serious effort was made to conduct third-party interviews covering that span of time. In 1968 the CSC, after consulting the agencies, again reduced the scope of the standard BI—this time to five years' intensive coverage. The

DOD followed suit a few years later in its BIs on military personnel. The intelligence and law enforcement agencies still generally adhere to the fifteen-year scope, but in OPM, DOD, and other agencies, the trend is still downward.

While the OPM still retains the five-year scope, veteran investigators say that today's investigative reports are quantitatively and qualitatively inferior to those of ten or fifteen years ago and this by a factor of some 25 to 30 percent. This is something that should be easily verifiable. As matters stand today, the average BI conducted by OPM involves some 31 contacts of all kinds, of which sixteen are personal interviews. The average investigation of civilian employees previously conducted by DOD involved a total of fourteen contacts, according to the same report. (There was no figure given for the number of personal interviews, but it was substantially less than fourteen per case, and it is conceded that many of these interviews were conducted over the phone. This was prior to July 1981. Since that time, DOD has suspended third party interviews entirely and has switched to subject interviews for military personnel.) Measures under discussion today raise the serious possibility that the program may be further downgraded. Under the five-level system which is now under serious consideration by OPM and other agencies, Level I employees, as indicated above, would be subjected to an NAC only; Level II employees (in whose case the risk is defined as "opportunity for *significant but reversible* damage to the national security") would be subjected only to an NACI; while Level III employees (in whose case the risk is defined as "opportunity for effecting *serious but generally reversible* damage to the national interest") would be subjected to a Limited Background Investigation (LBI), involving an NAC plus one year of personal coverage plus four years of written inquiries. The coverage specifications call for "in-person interviews with a minimum of three knowledgeable people." In the case of the standard BI, there are in-person interviews with anywhere from twelve to 30 or more witnesses. The standard BI is proposed for retention at the more sensitive Level IV. A fifteen-year Special Background Investigation is proposed for the most sensitive positions at Level V.

Thus, in effect, the quality of the Federal Employee Security Program has been squeezed from two sides. On the one hand, it has become progressively more difficult to obtain information; and on the other hand, there has simultaneously been a progressive reduction in the amount of time and energy invested in personnel investigations.

The FBI's reduced domestic intelligence activities, which have made it impossible for the Bureau to put its impressive capabilities at the disposal of the Federal Employee Security Program, constitutes yet another factor in the weakening of the BI. In the old days, if a preliminary investigation turned up evidence pointing to the possibility of subversive involvement, the case would automatically be referred to the FBI, and

the FBI would then conduct a full field investigation of its own and report back to the Civil Service Commission or the other government agency involved. Over the past few years, however, when OPM has sent the FBI cases requiring further investigation because of evidence or allegations of subversive involvement, the FBI almost invariably has returned the case to OPM with the suggestion that OPM itself conduct the investigation. Obviously, if the FBI has relevant information, it does forward it to the requesting agencies.

This is not a simple matter of the FBI's withdrawing from its responsibilities. In defense of the FBI, it must be noted that under the restrictions imposed by existing laws and existing guidelines it has become virtually impossible to conduct an effective domestic intelligence operation. To compound the damage, law enforcement agencies are at risk of having to pay a heavy price for intelligence operations they conducted in the past. The Socialist Workers Party, for example, has been suing the FBI for $40 million on the allegation that it was subjected to illegal surveillance. In another suit recently settled in Chicago, after seven years' litigation, the presiding judge noted that the FBI had furnished documents "at a rate substantially in excess of 1,000 pages per week... from mid-1977 through late 1980," and that these documents, totalling "several hundred thousand pages...reflect an extensive cross section of FBI domestic intelligence activities in the Chicago area during the period 1940 through 1980." As a result of a FOIA request, each of these several hundred thousand pages had to be gone through on a line-by-line, word-by-word basis before they were released—a chore that must have accounted for tens of thousands of man-hours.

In summing up this section, it should be repeated that, despite the serious devaluation of the NACI and the BI, the background checks being conducted today do have an important, if limited, utility, because they still do turn up criminal history information and other information having a general bearing on the question of suitability. But for the reasons already set forth, they turn up very little information directly related to national security requirements.

Closing Down the Civil Service Commission's SRAS

A more detailed history of the Security Research and Analysis Section of the CSC/OPM would be in order at this point because there is much evidence that the old Civil Service Commission was not simply restricting the Section's functions in response to mandatory rulings by the Supreme Court but was, instead, eager to seize at every legal and bureaucratic pretext for diminishing the function of the SRAS because there were those in the CSC who were philosophically opposed—some on bureaucratic, some on civil libertarian, some on quasi-legal grounds—to the requirements of an effective personnel security program.

The SRAS had the specific assignment of helping the CSC, through a careful search of its records, to meet the requirements for National Agency Checks under Executive Order 10450. From the early 1950s, when President Eisenhower promulgated EO 10450, until the early 1970s, the Security Research and Analysis Section (previously known as the Security Research Section) was a very active operation with an experienced and dedicated staff of over 40 people; by 1975, it was down to 20. By the end of 1979, the staff had been reduced to the point where it consisted of the section chief and two assistants, one a Grade 4 and the other a Grade 5.

The chief of the Section, W. ("Rush") Yarosh, was a man with impressive qualifications who had served with military intelligence in the U.S.A., Germany, Japan, and other countries from 1945 to 1961; had retired with the rank of Lieutenant Colonel; had then served for a period of ten years as a Special Assistant for Security to the Director of the Intergovernmental Committee on European Migration in Geneva, Switzerland, screening refugees and Displaced Persons admitted to the United States (this position gave him access to, and liaison with, the intelligence communities of ICEM's 28 member nations); and had then moved in 1970 into the position of chief of the Security Research and Analysis Section. It is indicative of the attitude of the bureaucracy to the SRAS that, although Yarosh made repeated efforts on their behalf, there was no promotion in grade for any of the SRAS employees during the last five years of the Section's existence.

Over a period of years, the SRAS was able to build up some formidable resources that greatly facilitated the task of preliminary investigation and saved the country many millions of dollars, at the same time as it enhanced the quality of our personnel security program.

First, there were several million personal and organizational reference cards, based overwhelmingly on public record sources. Since each news item was indexed on a separate card, individuals with extensive and consistent records of extremist activities were sometimes the subjects of numerous cards pointing to the original source items that carried their names.

Second, there were organizational files containing research materials culled from the national and local media, and from the publications of the various left-revolutionary and front organizations and of right-wing extremist groups.

Third, there was a massive library of newspapers and publications put out by the Communist Party USA and other Marxist-Leninist organizations committed to the revolutionary overthrow of the United States government. This library, for example, contained bound volumes of the *Daily Worker* (organ of the Communist Party), going back to the 1920s. The bound publications occupied some 50 feet of wall space, floor to ceiling, in the office of the Security Research and Analy-

sis Section. These publications were supplemented by a large library of reference books and by complete sets of the many hundreds of volumes of hearings and reports published by the Senate Subcommittee on Internal Security and by the House Internal Security Committee (previously the House Committee on Un-American Activities) from the time of its inception to the time of its termination in 1975.

Finally, there was an extensive library of urban telephone directories and city directories, going back many years. This was an invaluable resource, which enabled the SRAS and CSC to verify identity and do quick checks of the various addresses listed by the applicant, and to pinpoint neighbors in each community at the time he claimed to have lived there.

These were basic tools with which the Security Research and Analysis Section worked. *None of these now exist.*

The argument used by the CSC General Counsel in recommending the sealing of the SRAS reference card system was that such record keeping was, in effect, prohibited by Section (E)(7) of the Privacy Act, which reads:

> Agencies shall maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or unless pertinent to or when in the scope of an authorized law enforcement activity.

Instead of sealing the personal reference cards, CSC could have reacted at the time by exploring three different possibilities. First, they could have argued that their uncollated personal reference card system did not constitute a system of records or files on individuals. Alternatively, they could have held that their responsibilities for the Federal Employee Security Program made them an authorized law enforcement activity of the U.S. government and that the reference cards were essential to the discharge of these responsibilities. As still another alternative, they could have sought authorizing legislation on an urgent basis. Instead, they capitulated without a struggle. Needless to say, this capitulation greatly impaired the ability of the SRAS to gain access to the vital information contained in the files.

How did the sealing of the SRAS Security Index come about?

On June 3, 1975, Robert J. Drummond, Jr., Director of the Bureau of Personnel Investigations, wrote a lengthy memorandum to Robert E. Hampton, Chairman of the CSC, in which he recommended that the Commission discontinue the use of the personal reference cards immediately. The key paragraphs of this memorandum indicate the defeatism and lack of understanding that have characterized a substantial number of the CSC's high command in years past. These paragraphs are quoted below, together with a running commentary.

In FY 1974, approximately 450,000 cases were searched through the files of the Security Research and Analysis Section (SRAS). This number represents all of the cases on which the Civil Service Commission conducts a National Agency Check plus about 32,000 cases on which searches are conducted, but a National Agency Check has not been scheduled, etc., special searches for experts, consultants, instructors and other types of persons who are exempted from the investigatory requirements of Executive Order 10450. For the same period the SRAS produced information regarding possible identity on 6,255 cases (1.39 percent), and after research reported records out on 2,919 cases (0.65 percent).

[COMMENT: The fact that SRAS produced information bearing upon possible subversive associations in 2,919 cases out of 450,000 cases searched through its files is clearly intended to belittle its performance--especially when the number of cases is restated as 0.65 percent. In reality, this is a rather impressive accomplishment. The overwhelming majority of those who apply for government employment are loyal citizens. The entire purpose of a personnel security program in government is to try to weed out the one in 100 or one in 200 whose associations do raise serious questions about suitability for government employment on security grounds. If SRAS had reported records out on five percent, or even three percent, of the cases referred to it, this would have been excessive enough to raise serious questions about the discretion exercised by the Section. If, in practice, SRAS found evidence pointing to a need for further FBI investigation in 0.65 percent of the cases, it suggests that it performed in a careful and responsible manner.]

It is true that a substantial portion of the information in the files is in the form of published hearings or has been published in newspapers, magazines, and other periodicals. The thrust of the question is that since the information is already in the public domain, where is the invasion of privacy. In my view, the infringement on individual rights and privacy comes about once we take this information that is in the public domain and index it by name. Then we are maintaining files on how individuals exercise their First Amendment rights.

In the public notice required by the Privacy Act we are identifying the Security Research and Analysis Index as records on "individuals who may be listed in an investigative leads file composed of information obtained from investigative reports, the public records, and various publications." I am sure this will pique the interest of sufficient numbers of citizens to cause us considerable workload responding to their requests as to records that we have on them. In many cases we will be unable to respond properly without further investigation to determine whether the requestor is the same "John Doe" mentioned in the Index.

[COMMENT: The personal reference cards in the Security Research and Analysis Index were not really files on individuals but simply investigative leads to the source documents containing the items refer-

enced. A file, as such, did not come into existence until an individual applied for federal employment. At this point it became mandatory to open an investigative file on the applicant, and the published items referenced in the index became part of this file. In the case of the great majority of applicants, there were no references. In the case of those whose public record activities raised questions related to the national security, a search of the files could, and quite often did, result in the compilation of a number of public record items which pointed to the need for further FBI investigation. Certainly there is validity to the argument that the SRAS procedure was not the equivalent of "maintaining files on how individuals exercise their First Amendment rights." And certainly the investigative process makes it mandatory that government agencies be placed in a position to assemble the bits and pieces of an applicant's personal record at the point where he applies for federal employment.]

> As indicated in my memorandum of February 18, even if we were to conclude that the keeping of such a file is an essential part of our investigative responsibilities, and thus, pertinent to and within the scope of an authorized law enforcement activity, I think that continued maintenance and use of the file will eventually bring embarrassment to the Commission. (I am not sure we could successfully argue that the Commission is engaged in an "authorized law enforcement activity" by virtue of our responsibilities for administering the merit system through various statutes and executive orders.)
>
> Privacy aside, it is one thing for the Commission to maintain records on individuals who are applicants or employees. However, in the case of the Security Research and Analysis Index, we maintain records on individuals who are neither applicants nor employees of the federal government and may never be applicants or employees.

[COMMENT: The answer to the statement that it would be difficult for the Commission to argue that it was an "authorized law enforcement activity" is the fact that the CSC/OPM does today refer to itself as such an activity. The objection to maintaining records "on individuals who are neither applicants nor employees of the federal government and may never be applicants or employees" is characteristic of the ultra-civil libertarian approach which characterized many of the Commission's findings during this period. If there does not exist in some form records against which applicants for federal employment can be checked, then clearly it would be impossible to create such records at the point of application. In effect, this is an argument for no federal security employee program at all in deference to the supreme right of privacy.]

The sealing of the personal reference cards, however, did not affect the SRAS organizational files, which were probably the most complete

records of their kind maintained by any government office. In the course of personnel investigations it frequently happens that the name of some relatively unknown organization will crop up and the question that has to be confronted by reviewers and adjudicators is how much importance they should attach to association with such an organization. The files of SRAS contained vital information bearing on such questions—and since the FBI had virtually taken itself out of the internal security field in 1976, SRAS was the only office in the U.S. government where such current information was available. By the end of 1978, however, even this important residual function had, for all practical purposes, come to an end because neither the Civil Service Commission nor the agencies for whom they handled personnel investigations appeared to be interested in domestic intelligence bearing on subversive and violence-prone organizations. The SRAS organizational files were still there—but they were not being used.

With the reference cards locked up, the staff reduced to a meaningless level, and organizational files largely unused, Peter Garcia, the new Assistant Director of OPM for Personnel Investigations, found it difficult to justify the operation. In January of 1980, Yarosh was given five days to clean out his office and he was then assigned to another position. The 130 file cabinets containing research materials were jammed into 50 file cabinets for moving, and the entire office was reduced to two desks manned by the Grade 4 and Grade 5 assistants (who were, incidentally, much more qualified than their grades suggest).

On July 9, 1980, the OPM wrote to Karen Boyd, President of Local 32 of the American Federation of Government Employees, informing her that the Division of Personnel Investigations "is preparing to inactivate the Security Research and Analysis Section...on or about July 21, 1980," that all SRAS records would be sent to storage as soon as possible, and that the two remaining employees in the Section would be reassigned to other duties. And so the research files, the extensive reference library, the organizational index, and the telephone directories and city directories were boxed and sent elsewhere.

The CSC/OPM, through this series of actions, has deprived itself of virtually every in-house investigative tool that previously used to serve the old Civil Service Commission.

Certainly, this series of acts, which added up to a decision not to maintain research files of any kind—even files based on public record material—flies in the face of common sense. When appropriate agencies of the United States government deny themselves the right to compile, from media sources, information essential to identify personalities or organizations whose commitments and activities pose a potential threat to the national security or to the national interest, they are, in effect, denying the government the basic right to take reasonable action to preserve itself.

In its early days, the Federal Employee Security Program attracted many knowledgeable and dedicated people who, through years of personal exposure to the problem, were able to bring expertise to the administration of the program. But the progressive degradation of the program over the past decade has resulted in the early retirement of the great majority of the experienced personnel security hands. Their places have been taken, for the most part, by young, inexperienced people who are now trying to perform a job they do not understand—with no internal security background, little or no training, no in-house data base to assist them, no guidelines, and no encouragement. It is not their fault that the Federal Employee Security Program, in most departments and agencies, has now become a costly and almost meaningless charade that is doing grave damage to our national security. They, too, are victims of the system.

The Freeze on the Exchange of Domestic Intelligence

These self-inflicted injuries to the Federal Employee Security Program have been compounded by the progressive chill on the exchange of data between state and local agencies and the federal government. In the past, these agencies always freely shared such intelligence. Commenting on the situation that has arisen in consequence of privacy legislation at the federal and state levels, Captain Justin Dintino, Chief of Intelligence for the New Jersey Police, told the Senate Subcommittee on Criminal Laws and Procedures in 1978:

> The free flow of intelligence between Federal, State, and local agencies is essential to an effective law enforcement operation. To the extent that this flow is restricted, law enforcement is handicapped. And today this flow is terribly restricted, at every level and in every direction: From city-to-city, from State-to-State, from State agencies to Federal agencies, and from Federal agencies to the State and local level. This is a disastrous situation and we've got to find some way of reversing it.

Commenting on the same situation, a previous GAO report dated December 16, 1977, said:

> Due to legal constraints and nonresponses to inquiries, CSC cannot check some local enforcement records, even though the check is required by Executive Order 10450. By September 1976, the Chicago area [of CSC] had stopped sending [requests for information] to law enforcement agencies in New York, California, Minnesota, New Mexico, Massachusetts, and Illinois, and 86 cities in other States, because the agencies refused to release criminal information to CSC. Some of the larger cities are Detroit, Indianapolis, and Washington, D.C. Thus, an investigation cannot surface criminal information on individuals who reside in these areas, unless the information is also on file with the FBI.

When Alan K. Campbell, Chairman of the U.S. Civil Service Commission, appeared before the Senate Subcommittee on Criminal Laws and Procedures in March 1978, he confirmed that this was an accurate description of the situation that existed in 1976 and he said that there had been no improvement since that time.

In August 1980, in an effort to induce a more cooperative attitude on the part of state and local law enforcement authorities, OPM mailed out a pocketsized brochure captioned "The U.S. Office of Personnel Management: An Authorized User of State and Local Criminal History Information." The booklet described the OPM program, made the argument that its need for criminal history information is critical to the national security and interest, and pointed out that its requirement for such information is based on statute and is consistent with the regulatory requirements of the Law Enforcement Assistance Administration. OPM believes that it is now getting improved cooperation from many law enforcement agencies as a result of its continuing exercise in education and public relations. But the situation nationwide is still very bad, with some of the major industrial areas, including New York City, Pennsylvania, New Jersey, and Massachusetts, not cooperating at all or cooperating in a very niggardly manner. As recently as January 1981, an internal information bulletin of the OPM Personnel Investigations Division indicated that OPM continues to operate under the same handicaps that so crippled the operation of the Civil Service Commission. The bulletin said:

> Since the enactment of the 1974 Privacy Act, many state and local authorities have become increasingly sensitive to the issue of individual privacy. A number of these authorities have interpreted their responsibilities in the area of individual privacy to include increased restrictions on the dissemination of criminal history data in state and local files to noncriminal justice agencies in the federal government, even though the legal and regulatory authorities of these agencies, including the investigative authorities of the OPM, meet all of the requirements for access. Privacy consideration and a number of other factors, such as the workload involved in processing federal agency requests for information, have been used by a number of state and local authorities as a basis for denying federal agencies access to all or part of the information in their files.

Suitability: The Dilemma of the Adjudicator

Personnel security is intertwined with "personnel suitability." "Suitability" has to do with such things as general character, trustworthiness, and reputation. It has important implications for the personnel security program because those who are untrustworthy or engage in "criminal, dishonest, infamous or notoriously disgraceful conduct," or drink excessively, or use drugs, are clearly at risk from a personnel security standpoint. Although it is manifestly impossible to screen out all such

"security risks," it is a reasonable assumption that the great majority of those who have been recruited by the Soviets on a mercenary basis or as a result of sex or blackmail suffered from some such flaws. If a significant percentage of such elements can be eliminated in the course of the employee screening process, the government stands to gain, both in terms of performance and in terms of enhanced security.

Executive Order 10450 was intended to establish a government-wide program embracing both personnel suitability and personnel security. We have up to this point concerned ourselves primarily with the decline of the personnel security program. However, there has at the same time been a parallel decline in the quality of the personnel suitability program—and for much the same reasons.

What it all boils down to is that, as the General Accounting Office has pointed out in several reports, it has become much more difficult to obtain information of any kind from government offices as well as from the private sector because the disclosure provisions of the Privacy Act have had a chilling effect on potential witnesses possessing derogatory or other than favorable information about applicants or appointees. In addition to this, there has been a dramatic change over the past two decades in legal and social philosophies, so that information, which would have resulted in disqualification ten or twenty years ago, is simply considered immaterial or unactionable today.

The government's personnel suitability program has been further bedeviled by the so-called nexus principle, which emerged from the D. C. Circuit Court's decision in the case of *Norton v. Macy* (417 F. 2d 1161, C.A.D.C. 1969). Under this principle, if an applicant's record contains information which might otherwise disqualify him, he may not be disqualified unless a "nexus," or specific rational connection, can be demonstrated between his conduct or weakness and his ability to perform satisfactorily his duties in the position for which he has applied.

In all divisions of the United States government, the adjudicators who make the final recommendations on suitability for government employment play a role of critical importance in the employee selection process. This is so because it is the adjudicator who makes the final decision in all cases where there is derogatory information to be evaluated or where the information developed by the investigation is considered insufficient by the reviewer. Adjudicators, of course, have to have guidelines. The guidelines for adjudicators (Federal Personnel Manual System/United States Civil Service Commission, "Determining Suitability for Federal Employment," FPM Supplement 731-1) lists a number of factors that may serve to disqualify an applicant for employment. But each factor is now conditioned by so many caveats and exceptions that the poor adjudicator more often than not is left wondering which way to turn. (The manual, which was published in 1975, is still in current use.)

An applicant can be disqualified because of delinquency or misconduct in previous employment. However, in order to do so, "the evidence must show a pattern of conduct which would be incompatible with successful performance in the position applied for or employed in."

Applicants can be disqualified for federal employment if they have committed "serious crimes involving basic questions of honesty, integrity and character, unless they have established records of rehabilitation." But the caveats here are numerous.

Under the Prisoner Rehabilitation Act of 1965, government departments and agencies were enjoined to provide employment opportunities for rehabilitated criminals. The theory was that, if government wanted private enterprise to provide such employment opportunities in order to reduce the rate of recidivism, then government itself had to provide the lead. Initially the procedure was to defer the consideration of such applications for two years. If at the end of that time the subject had not become involved in any new difficulties with the law, he was considered rehabilitated and eligible for employment. As matters stand today, however, good behavior in prison is considered evidence of rehabilitation, and a convict emerging from prison with a one- or two-year good behavior report is theoretically—and quite frequently in practice—eligible for immediate employment, even in sensitive positions.

Offenders who violated the law before their eighteenth birthday and whose offenses were finally adjudicated in juvenile courts or under youth offender laws, are not required to admit to the arrest and sentencing in filling out their civil service employment application forms. If, despite this fact, the investigator learns from other sources that the subject was sentenced in a juvenile court, this information may not be used to disqualify the applicant for appointment to a position in the federal competitive service. This would make it possible for a youthful offender who committed a number of burglaries just before he turned eighteen and was thereafter sentenced to six months' detention by a juvenile court, to come out of prison and walk right into a job as a government guard.

Nor does an applicant have to admit to a conviction under state or federal law prior to age 26 if the conviction has been set aside pursuant to the provisions of the Federal Youth Corrections Act. Nor does he have to admit to it if the record of his conviction has been expunged under state or federal law.

The personnel suitability handbook provides that applicants for government employment can be disqualified if they have engaged in "notoriously disgraceful conduct." However, it warns that "evaluators must be careful to avoid letting personal disapproval of such conduct influence their decisions. Disqualification in such cases is warranted only "when the notoriety accompanying the conduct can be reasonably

expected to affect adversely the person's ability to perform his or her job or the agency's ability to carry out its responsibilities."

The handbook further notes that "court decisions require that persons not be disqualified from federal employment solely on the basis of homosexual conduct." This apparently is a blanket rule which applies equally to nonsensitive, noncritical-sensitive, and critical-sensitive positions.

The handbook lists current excessive use of intoxicating beverages as another justification for denying employment. However, it points out that under Public Law 91-616, enacted on December 21, 1970, "no person may be denied or deprived of federal civilian employment. . .*solely* on the ground of prior alcohol abuse or alcoholism." One would imagine that, in determining what constitutes rehabilitation, the handbook would at least stipulate a six-month or one-year period of abstinence—which used to be the practice. The section dealing with this matter, however, is so vaguely worded that, in theory, a one-month abstinence could be considered proof of rehabilitation. "Rehabilitation," says the section, "is not necessarily time-framed. There can be strong evidence of rehabilitation covering a brief period of time. . . ."

An applicant can also be denied employment because of the current illegal use of narcotics, drugs, or other controlled substances. However, the handbook notes, "if it is determined that an applicant, or an appointee serving a probationary period, is currently using any substance listed in Appendix A, Schedule of Controlled Substances, the fact of such illegal use will not necessarily, in and of itself, be sufficient to deny eligibility for appointment of an applicant or removal of an appointee. . . .all circumstances surrounding the use of the controlled substance must be examined to determine whether a rational relationship exists between the individual's conduct and some identifiable detriment to the efficiency of the service."

Each case, says the handbook, should be adjudicated on its own merits, and the adjudicator should take into consideration the kind of drug used, the patterns of use, how the drug was obtained, the date on which use started and the last date used, circumstances and environment at the start of drug use, assistance in cure and rehabilitation, nature of treatment and prognosis, social behavior and attitude since discontinuance of drug use, history of previous rehabilitation efforts, circumstances and environment at the time of discontinuance of drug use.

In order to make an intelligent adjudication that takes into consideration all of these factors, an adjudicator would have to be a combination of King Solomon, a professional psychologist, a sociologist, and a drug expert.

The handbook says that, while continuing use of LSD, marijuana, and other controlled substances is disqualifying, "no specific period of

rehabilitation can be established." This wording would suggest that an applicant who had abstained or said he had abstained for a month's time from the use of marijuana, LSD, cocaine, or other drugs, might be considered eligible for government employment even in a sensitive position. Actually the situation is somewhat worse than this. So tolerant has the system become today, according to several personnel security professionals interviewed, that, even in the case of someone who currently uses drugs in his off time, it would be necessary to demonstrate a virtually absolute "nexus" between the applicant's off-time drug use and his ability to perform his job before he could be disqualified.

In the case of those who have already been appointed to government positions and are discovered to be drug users, present regulations require that they be given an opportunity to seek counseling, with the time off counted as sick leave. Only if the appointee refuses to seek counseling, or if he seeks counseling but fails in his effort at rehabilitation, can he be terminated.

The handbook states that "traitorous or disloyal acts" are disqualifying, as is "knowing and active membership in an organization whose stated aim is destruction of the constitutional form of government by unconstitutional means, with the specific intent to carry out that destruction." It justifies disqualification where there is "*a reasonable doubt of the loyalty of the applicant or employee to the government of the United States.*" It then goes on quite properly to note that "peaceful protest and dissent are rights guaranteed by the Constitution," and gives as examples of such peaceful protest, participation in the anti-Vietnam war demonstrations or demonstrations for or against the busing of school children. But it provides absolutely no guidelines for the adjudicators in helping them to determine what kind of associations and activities are protected by the Constitution and, on the other hand, what kind of associations and activities would constitute justification for reasonable doubt of loyalty.

The situation has been further complicated by the fragmentation of the adjudication program subsequent to the Civil Service Reform Act of 1978. Previously, the adjudication program for the complex of some 55 departments and agencies serviced by the Office of Personnel Management (OPM) was concentrated in the Civil Service Commission (OPM's predecessor organization). This at least had the advantage of making for uniform standards of adjudication. Today, the major portions of the adjudication program have been delegated to various agencies and departments by OPM. Standards of adjudication in the departments and agencies tend to be extremely lax because this is the direction in which the guidelines point, because many agency directors do not have a feeling for the importance of personnel security, and because it is only natural that the adjudicators should further weaken the program in

making their own interpretations of the legal interpretations that have been handed down to them in the form of guidelines.

Standards of adjudication are significantly better in the intelligence community, the law enforcement agencies, the Department of Justice, and the Department of the Treasury. Within the limitations imposed on them by court decisions and acts of Congress, these agencies appear to be making a serious effort to protect the national interest through the adjudicative process. How difficult this has become, however, is apparent from the statement of a senior Justice Department lawyer who said that, in the absence of some dramatic factor justifying disqualification on other grounds, it would almost be necessary to prove a case of treason in order to justify nonselection of a technically qualified applicant with a revolutionary record.

A senior officer in the Navy's Civilian Personnel Department, when asked how the Navy would react to the knowledge that an applicant for a sensitive position was a long-time member of the Communist Party, replied that she frankly did not know how the implications of membership in the CPUSA would be regarded. As for homosexuality, marijuana, and excessive drinking in their off hours, it would be necessary to prove the existence of some absolute nexus between these weaknesses and the on-duty performance of the applicants in order to deny them employment.

A presumption of a nexus, or of a potential nexus, in such cases, would certainly not be unreasonable—indeed, on a common-sense basis, most ordinary mortals would favor such a presumption in the interest of not putting the government or the armed forces at risk. As the rules are interpreted and applied today, however, such risk is apparently considered a matter of secondary importance.

The nexus principle is badly flawed for another reason. It is frequently impossible to provide proof of the existence of a nexus before an applicant has worked on the job for a while. Once an applicant has been put on the payroll, however, it becomes extremely difficult to get rid of him—despite the fact that he is theoretically on one year's probation—because the criteria for separation are much more stringent than the criteria governing initial employment.

Commenting on all of the restrictions under which adjudicators today must operate, an old-time professional told the author that the adjudicator's lot is not a happy one because, in effect, he has been hired to do a job which he cannot satisfactorily perform.

There is no quick fix for this situation. To effectively remedy the personnel suitability and security programs is going to require (1) some new legislation, (2) the reestablishment of a domestic intelligence data base, (3) some additional funds for the government personnel security operation, and (4) a basic rewriting of handbooks such as "Determin-

ing Suitability for Federal Employment" in a manner which places the optimum interpretation on existing laws and which, at the same time, strikes a better balance between the prerogatives of the individual applicants and appointees and the prerogatives—and responsibilities—of the government as employer.

Getting new legislation enacted is going to take a number of years. Some things can be done in less time, however. In relatively short order, for example, it should be possible to examine the body of regulations and directives based on interpretations of existing laws, and to rewrite them wherever there appears to be a possibility of interpreting the law in a manner more in harmony with the requirements of sound personnel security and suitability practices. There is absolutely no reason, for instance, why the regulations governing the employment of former criminals, alcoholics, and drug abusers should not stipulate specific time limits for proof of rehabilitation. It might be stipulated that ex-prisoners would be considered eligible for employment in non-sensitive positions if they had not violated the laws for one year after release; and that they would be eligible for employment in sensitive positions after two years of good behavior. And there are many other common-sense things that could be done without delay through the simple process of rewriting legal interpretations and administrative directives.

Until recent years, it was the accepted concept that employment by the federal government was a privilege rather than a right. As things are today, however, federal employment has come to be regarded as an inalienable entitlement, and the government in effect has come to be regarded as the employer of last resort. This concept appears to have taken charge of the entire adjudication process. This by itself tends to create a situation highly prejudicial to sound personnel security practices. It is mandatory that we find our way back to the old-fashioned principle, upheld in repeated court decisions, that, while every citizen has the right to apply and compete for government service, on a basis of equality with other applicants, federal employment itself must continue to be regarded as a privilege.

Cutting the Costs of Personnel Security: A Study in False Economy

There are factors other than FOIA and the Privacy Act and constraints on investigators that have contributed to the decline of the Federal Employee Security Program. One of these has been the low priority which most government agencies—including the Department of Defense but not including the intelligence and law enforcement communities—have assigned to their personnel security programs since the early 1960s. Personnel security divisions have been starved for funds and starved for staff and their programs have been deemphasized and cheapened to the point where many conscientious senior employees

have taken their retirements early out of a feeling of complete frustration. Although the implementation of an effective security program requires personnel of high competence and superior judgment, those assigned to jobs in the field of personnel security have all too frequently been employees of inferior competence and limited background. This tendency has been exacerbated by the fact that few officials with personal ambition gravitate voluntarily to the area of personnel security because it is a field where the prospects for advancement are limited and where it is virtually impossible to make a name for oneself. Every ambitious officeholder wants to do a good job. But the field of government personnel security is today encumbered by so many restrictions that even the most conscientious bureaucrat would find it impossible to turn in a truly effective performance.

In harmony with all this, it has been a frequent practice on the part of government agencies, when economies were called for, to effect these economies primarily at the expense of the personnel security machinery. (The tendency to do so has no doubt been further encouraged by the fact that the various offices directly concerned with the personnel security program produce an invisible and unquantifiable product—better security.) The examples are numerous.

In 1965, the Civil Service Commission eliminated the requirement for full field investigations in the case of noncritical-sensitive positions—which are in most departments far more numerous than critical-sensitive positions. In 1972, it stopped budgeting for an investigators training program.* It progressively reduced and then dismantled the Security Research and Analysis Section. It cut back on the scope and reduced the thoroughness of Background Investigations.

Finally, there is the matter of the limitations placed on the Investigations Evaluation Branch (IEB) which is supposed to function as a quality control unit in the field of investigation. Theoretically, IEB is required to review each agency every two years by doing spot checks on their personnel security procedures. According to a September 1980 report,** because of IEB's limited resources, some agencies and offices, including OPM itself, had not been reviewed in five or more years, and some had never been reviewed. [OPM now states that this situation has improved and that the IEB since January 1981 has had the resources to cope with its assignment.]

It should be emphasized once again that the systematic budgetary starvation of the Federal Employee Security Program is not limited to the OPM. It is government wide, and the responsibility is shared by

*In the latter part of 1979, Peter Garcia, the present Assistant Director for Personnel Investigations of DPI, reinstituted a one-week training program for investigators and four such one-week programs have now taken place. But from 1972 to 1979 there was no training.

**Office of Internal Evaluation, OPM, *Personnel Investigations: Ways to Improve Services and Reduce Costs*, September 1980.

Congress as well as the federal bureaucracy. It was Congress, for example, which in 1976 mandated a 27 percent cut in the personnel of the Defense Investigative Service (DIS)—a reduction in force that has played a major role in the almost paralyzing backlog of Background Investigations against which the Department of Defense is now struggling.

One of the most dramatic examples of excesses perpetrated against the personnel security program in the name of economy is to be found in the Department of Health and Human Services, which has a total staff of some 170,000 employees. A number of years back, the Department's Office of Internal Security, whose primary function was personnel investigation, had a staff of 38. As recently as two or three years ago, there were ten professional and support staff in the Division of Personnel Investigations. Today it is down to a staff of three—the director, one specialist, and one clerk. As a result of the inversion of values imposed by the Carter Administration, there still are, by way of contrast, 333 investigators and staff assistants assigned to the civil rights division of HHS. It is not that civil rights are unimportant—but surely, in any rational plan of things, personnel security would have to be assigned at least equal importance.

The General Accounting Office must also be given a portion of the blame for the government-wide tendency to cut back on the costs of personnel security programs. Indicative of the recurring theme of its several studies of the situation is its August 1979 report, "Costs of Federal Personnel Security Investigations Could and Should Be Cut." It has yet to produce a report entitled "The Quality of the Federal Employee Security Program Must Be Improved."

It would, perhaps, be too much to expect GAO, whose strong point is managerial expertise, to manifest a sophisticated understanding of the need for an effective employee security program and the myriad problems involved in such a program. Internal security has over the past two decades become an increasingly arcane profession. The great majority of those who might qualify as experts are now out of government, and of those who remain, it is highly questionable that GAO possesses any meaningful representation.

The pressure brought to bear on OPM by the GAO proposal is reflected in the five-level system being proposed by an interagency task force for designating the sensitivity of positions and activities. Of a total of 1,652,083 positions tentatively surveyed in connection with the recommended system, 1,098,166 fall in Level I under the new arrangement. In order to save $11 per position, the new plan proposes to reduce personnel investigations in Level I from an NACI to an NAC ($36.29 against $25.05).* The NACI, as we have pointed out, has traditionally

*These figures, compiled in 1981, represent the *total* cost of processing NACs and NACIs —the cost to OPM, the cost to the employing agency, and the costs to the FBI, DOD, and to the other agencies with whom records are checked.

been considered a minimal investigation. Reducing it to an NAC means that letters will not even be written to local police departments (unless there is information indicating that such checks are necessary) asking whether the applicant has a criminal record—indeed, without the inquiries to reinforce the National Agency Check, the employing agency would not even be able to confirm that the applicant is who he says he is. Veteran investigators with whom the proposal was discussed feel that, for the sake of achieving a minimal saving, the quality of the investigation that is going to be accorded the great majority of government employees will suffer seriously.

The punitive budgetary treatment of the offices concerned with personnel security might lead one to think that it was a matter of saving billions or at least hundreds of millions of dollars. Actually, the total annual cost of the government's personnel security program, compared with its purpose and importance, is ridiculously low. A report put out by the Comptroller General in August 1979 gave these figures for the cost of the program, government wide, but not including the Department of Defense, for fiscal year 1978:

	Number	Costs (millions)
Full field investigations	152,057	$61.6
Other investigations, such as updates, NACI, and NAC	1,140,812	10.1
Total	1,292,869	$71.7

If we add to this the rough figure of $90 million for the Department of Defense and make some allowance for agency investigations not covered by the GAO survey, the total cost for 1978 would be substantially under $200 million.

There are many areas in the bloated federal bureaucracy where cuts—even heavy cuts—can be imposed to advantage. But that is not the case with the Employee Security Program. Like our national defense establishment, this program has to be rescued from the incremental economies imposed on it year after year. If the entire operation were beefed up to the point where it cost double what it costs today, it seems to the author of this paper that this would still be little enough to pay for enhancing the quality of the Federal Employee Security Program.

The Jane Doe Decision

A decision of far-reaching significance for the future of the Federal Employee Security Program was handed down on January 16, 1980, by the Federal Court for the Southern District of New York (*Jane Doe v. U.S. Civil Service Commission*). Jane Doe was a candidate for a White

House fellowship. In the course of an investigation by the Civil Service Commission, two of the 35 witnesses interviewed stated that she appeared to be afflicted with kleptomania, that she had stolen some very small items from them. Their statements were given on condition of confidentiality. When Jane Doe was not selected for the White House fellowship, she petitioned under the Privacy Act for a copy of her investigative file. She was given a copy of her file, with the identities of the two adverse witnesses deleted. She then sought to persuade the Civil Service Commission to eliminate from her file the information provided by the adverse witnesses, or alternatively, to compel the adverse witnesses to come forward and confront her. The Civil Service Commission turned down this request. She then brought suit against the Civil Service Commission charging that the Commission had unconstitutionally violated her liberty interests by disclosing derogatory allegations against her without affording her an opportunity to refute the charges.

In its decision, the Court upheld her complaint. It ruled that "if the agency wants to include the derogatory report in Doe's file, she must have a chance to question the sources and challenge their credibility." The Court also found that the CSC's investigatory and disclosure procedures violated Doe's right to due process and it ordered the agency to provide Doe with an opportunity to refute the allegations, with appropriate discovery if necessary. Finally, the Court found that Doe had "a constitutionally based cause of action against the named defendants in their individual capacity." Presumably this ruling could also be extended to investigative witnesses.

In the aftermath of *Jane Doe v. U.S. Civil Service Commission*, the Office of Personnel Management on November 28, 1980, proposed sweeping changes in the conduct of personnel investigations. The proposal, while conceding that OPM investigative reports have traditionally contained information from confidential sources, suggested that in future investigations, if a source refuses to withdraw his request for confidentiality, the information from that source would not be reported.

The proposal also stated that:

> When an agency, as a result of information in an OPM report of investigation, changes a tentative decision (selection, promotion, grant clearance, etc.) to an unfavorable decision, it must provide the subject the specific reason(s) for the decision based on the information in the report, and allow the person a specified period of time, fifteen (15) calendar days, to respond. An extension of time to respond may be granted for sufficient cause. The subject must be given an opportunity to respond orally, in writing, or both, and to have the right of representation.

Going beyond the changes that may have been indicated by the Court's decision in *Jane Doe v. U.S. Civil Service Commission*, OPM proposed changing the retention schedule of investigative files from

twenty years to seven years. This is a completely arbitrary time frame. If an investigation terminates in nonselection, and if the subject of the investigation eight or nine years down the line reapplies for employment in the federal government, the record of his previous investigation would not be available under OPM's proposed retention schedule. In the case of those who are selected for government employment, it would seem far more logical to retain investigative files for the duration of their employable years. In the case of those who are rejected for reasons related to loyalty or security, files should be retained at least until they reach age 65, and retained indefinitely where they deal with case histories that have a continuing application or are of historical interest.

The OPM reports that no action has yet been taken on the November 28, 1980, proposal although the proposal itself and agency comments on it are under active consideration.

The *Doe* decision will, if permitted to stand unchallenged, have a very serious effect on future investigations under the Federal Employee Security Program. It has been recognized in the past that there are many valid reasons why witnesses who possess adverse information about applicants for federal employment may condition their cooperation on a pledge of confidentiality. When, under the old system, several confidential witnesses provided corroborative accounts of an adverse nature, this evidence would be weighed very seriously. Today, all that is over.

Even more distressing are the implications of the Court's decision upholding the right of Jane Doe to claim damages from investigators and Civil Service Commission officials who had contact with her case. For reasons of simple human nature, investigators will be far less likely to report adverse information that comes to their attention, and adjudicators and personnel directors will be far less likely to make adverse determinations if this can result in a suit for tens of thousands of dollars. Indeed, quite a few investigators and officials working in the field of personnel security have taken out insurance against this possibility. Clearly the safest course for them to follow would be to avoid all adverse information and all adverse determinations, except in the most glaring cases. It is common knowledge in the personnel security community that this is precisely what many investigators and reviewers do—although there are a surprising number who still report the facts and exercise their objective judgment despite the uncertainties attendant on doing so.

There can be no contesting the Court's contention that Jane Doe should have been advised of the allegations against her and should have had an opportunity to respond to the allegations before the information was passed on to the panel in charge of selections for the White House fellowship program. The question is whether this basic due process requirement could not be achieved without insisting on the identification

of confidential witnesses and without making investigators and officials civilly liable for information recorded or decisions reached in good faith.

Long before the Privacy Act, it was the Civil Service Commission practice to advise applicants about whom derogatory information had been received of the general nature of this information and invite their response. But this did *not* give them access to the investigative file and adjudicative report.

The Department of Justice wanted to appeal the *Jane Doe* decision precisely because it was felt that the Court had gone far beyond the actual requirements of due process in the restrictions it imposed on future investigative procedures. Unfortunately, the CSC/OPM, instead of appealing, made a settlement with Jane Doe for $25,000 in actual damages, and agreed to restore her name to the list of those eligible for White House fellowships. Having settled the case, the OPM automatically made a future appeal against the Court's decision impossible. The *Jane Doe* decision, in consequence of this failure, now constitutes a precedent that may very well become the law of the land. In this instance, as in so many instances before it, the CSC surrendered valuable ground without putting up a fight to the finish in the courts. In doing so, it has compromised the operations of the personnel security programs in all sectors of the government.

In the first part of 1980, the OPM's Division of Personnel Investigations (DPI) made an effort to change the rules in a positive direction. Under its newly defined rule, if a witness refused to recommend an applicant, the investigator was instructed to report his reason or reasons, no matter what they were, approximately in the witness's words. The rationale for this was that the inclusion of the information did not have to be defended, since it was simply a matter of reporting accurately the witness's reason for refusing to recommend. The *Jane Doe* decision, however, introduces an element of ambiguity into this more rational approach.

4

Personnel Security Procedures in Individual Agencies

Personnel security procedures vary dramatically from agency to agency. Some are better; some are worse. In the following chapter, we examine the procedures in the Department of Defense, the intelligence agencies and the FBI, and the Departments of State, Justice, and Energy.

The Department of Defense

The Defense Department, it has been estimated, is responsible for some 75 percent of all Background Investigations conducted within the Executive Branch. This is only natural, given the size of the defense establishment and the highly classified nature of much of its activity. The quality of the personnel security program in the Department of Defense is, therefore, of vital concern.

Civilian employees of DOD fall under the provisions of Executive Order 10450. Military personnel are not governed by EO 10450, but instead are screened under a parallel program which is basically similar to that which governs the civilian employees, but whose authority derives from the president's inherent power as commander-in-chief of the armed forces, rather than from an executive order or act of Congress. The present military personnel security program is based on DOD Directive 5200.2-R, 1979. The purpose of this directive is stated in the following terms:

> To establish policies and procedures to ensure that acceptance and retention of personnel in the Armed Forces, acceptance and retention of civilian employees in the Department of Defense (DoD), and granting members of the Armed Forces, DoD civilian employees, and other affiliated persons access to classified information are clearly consistent with the interests of national security.

Like all other government departments, DOD's personnel security program has suffered grave damage as a result of the destruction of the domestic intelligence data base, the virtually complete suspension of

domestic intelligence activities by law enforcement agencies, and the impact of privacy legislation on the investigative process. Defense Department officials claim a much higher degree of cooperation from government agencies and private institutions and citizens than does the OPM. (OPM challenges this.) But the degree of cooperation makes very little difference when there is no domestic intelligence available. The director of the Defense Investigative Service (DIS) told the author that, while his service does receive a good deal of criminal history information from local law enforcement agencies, he could not recall a single item of information from local sources in recent years that had to do with the matter of subversive associations.

The FBI does possess extensive domestic intelligence files going back beyond 1976, but it has added precious little new intelligence since that year. Since virtually all military enlistees are in the 18 to 21 age group, the FBI's pre-1976 domestic intelligence files have very little relevance as a data base for screening out youthful left-wing and right-wing extremists who might pose a danger to the integrity of the armed forces—as potential saboteurs, as inciters of racial incidents, as espionage agents, or as revolutionary agitators who might at some future date surface on command. About the best DOD can hope to do is to keep a careful eye open for troublemakers after they pass the point of induction.

Although the DOD does much better when it comes to simple criminal history information, even in this area it has been having a lot of difficulty. A study by SEARCH GROUP, Inc.* reported that the recruiting services were having major problems in obtaining criminal justice or related data. It said that "the recruiting commands are often denied access to criminal history data even in states that provide access to other DOD components and to other federal agencies." It quoted the following paragraph from the December 1978 issue of DOD's *Command* magazine:

> A Marine Corps study found that the flaw in current recruiting is not so much malpractice as it is the recruiter's inability to check out the applicant's statements. Many school and police jurisdictions simply take a strict approach and provide no personal information. It leaves recruiters with no means of checking out statements.

The SEARCH study points out that DOD's ability to obtain access to criminal history information varies significantly from one state to another. Because of sealing and purging standards and other limitations, only 17 states release both conviction and nonconviction data to DOD requestors; 15 states release only conviction data; four states provide

*Search Group, Inc., "Federal Access to State and Local Criminal Justice Information for Federal Personnel Security and Employment Suitability Determination," Sacramento, California, March 1979.

little or no access to records; and the remainder are a mixed bag. While noting that most states do cooperate in one degree or another with DOD, the study reports that "only a small group of states disclose all criminal history under all circumstances to all DOD components."

The blame for this situation stems to a large degree, says the study, from a restrictive interpretation of Law Enforcement Assistance Administration (LEAA) regulations. Under these regulations, state and local agencies receiving LEAA assistance are barred from disclosing nonconviction data to a noncriminal justice agency unless the disclosure is for a purpose authorized by "statute, ordnance, executive order or court rule." The restrictions persist despite a finding by LEAA's General Counsel that under various statutes and executive orders, the DIS does qualify to receive nonconviction information.

Senior DOD officials concerned with the program told the author that, while they feel that they do better than most other government agencies, their difficulties in accessing information, instead of diminishing, have continued to grow in recent years.

Thanks to all these limitations, there are some worrisome shortcomings in DOD's personnel security procedures at several levels.

Enlistees, as has been pointed out, are required to undergo an ENTNAC, which is an NAC without a fingerprint check. This is supplemented at the point of recruitment by form inquiries sent out by the various recruiting commands to high schools and to state and local criminal justice agencies. DOD officials feel that this makes the ENTNAC the virtual equivalent of an NACI, minus the fingerprint checks. DIS says that it dispenses with the fingerprint search in the case of enlistees because an ENTNAC search comes back in 28 days, while a full NAC takes an average of 59 days. This delay, they say, could have a serious adverse effect on the recruiting process. The question remains whether it would not be sounder procedure to induct enlistees on the basis of an ENTNAC, and then proceed with the fingerprint check. To this, DOD replies that their studies have shown that very little potentially disqualifying information has been lost through omitting the fingerprint check from the ENTNAC program. On this point, DOD's evaluation appears to be in conflict with that of other agencies, including the intelligence and law enforcement agencies. Perhaps this is an area where a study conducted by an independent panel of experts might be helpful.

If the ENTNAC turns up no disqualifying information, the enlistee is taken aboard and qualified for access to information and technology up to the level of Secret. This is reason for serious concern when one considers, to take one possibility of many, that a youthful radical, committed to the defeat of the United States in the event of war (a cardinal tenet of all Marxist-Leninist groups), might easily qualify as a crew member aboard a nuclear missile submarine or, after taking a course of

instruction, as a computer programmer. (While all officers aboard nuclear submarines undergo a background check—now an IBI—the majority of enlisted men do not.) Unfortunately, DOD, with the best of intentions, can do nothing about this situation in the absence of a domestic intelligence program and data base, and in the absence of any official guidelines.

The dangers inherent in recruiting youthful followers of the numerous Marxist-Leninist groupings and organizations become apparent from even a random reading of their press. For example, *Challenge*, the newspaper of the Maoist Progressive Labor party, said in its issue of December 23, 1981:

> Our Party is actively organizing some working class youth across the U.S. to win them to the fight for socialist revolution in the schools, in the communities, and inside the military. Those of our comrades and friends in the military are organizing there to win soldiers and sailors to join with the rest of the working class to turn imperialist World War III into a civil war for socialism....

This is the vintage Leninist position on the duties of revolutionaries in imperialist countries in the event of war. With minor variations, it is one of the most frequently repeated dogmas of the entire revolutionary left. It would be prudent for the Free World to take with deadly seriousness the Marxist-Leninist commitment to work for the defeat of their own country and to turn the "imperialist" war into a civil war for socialism.

Civilian employees are accepted by DOD on the basis of an NACI, with access, again, up to the level of Secret. To the author this appears to be a quite inadequate level of investigation in a department where much of the information to which such a clearance gives access is so extremely sensitive. DOD officials with whom the matter was discussed were quite frank in admitting that even the NACIs they receive are frequently unsatisfactory or incomplete. They said that OPM, which conducts the NACIs for DOD civilian employees, frequently sends in reports which fail to follow through on the disposition of arrest information, fail to check or develop negative information by subject interviews, and suffer from gaps in the Inquiries portion of the NACI because OPM does not make a second effort to obtain a reply if its first communication is ignored. The armed services have on occasion sent back such incomplete NACIs to OPM with the request that they make a special effort to obtain the additional information. OPM claims that the problem is very much exaggerated. In a recent letter to DOD dealing with this complaint, OPM noted that, over the period April 1, 1980, to June 30, 1981, it had conducted a total of 90,000 NACIs for DOD, of which 65, or 0.07 percent, were returned for further investigation. Of the 65 re-

turned NACIs, 22 received further investigation. The other 43, OPM decided, did not require further work.

Members of the armed forces can now be cleared for access to Top Secret information on the basis of an "Interview-oriented Background Investigation" (IBI), consisting of a one-hour interview (average reported duration), an NAC, a credit check, and, in some cases, "select scoping," in which investigators seek to zero in on problem areas suggested by the interview or the NAC. (The IBI will be discussed in more detail in the pages that follow.) Civilians, however, whose clearances are governed by OPM rules, must undergo a full field Background Investigation to qualify for Top Secret. This is supplemented, as is always the case, with an NAC. Retired FBI officials and personnel security officers with whom the author discussed the matter uniformly expressed the opinion that, although personal interviews can be very useful tools, the IBI by itself is a seriously inadequate investigative procedure to justify access to Top Secret.

Access to the most sensitive kind of information, Sensitive Compartmented Information, requires a full fifteen-year BI. More than this would be unreasonable.

There is reason for concern, too, about the state of DOD's industrial security program for industrial contractor personnel. For Confidential clearances, DOD relies on checks make by the contracting companies. For Secret clearances, it requires an NAC—a procedure, to repeat again, that has been gravely devalued from a national security standpoint. For Top Secret clearances the rules require an IBI. The investigations are conducted by the Defense Investigative Service (DIS), but the actual clearance decision is made by the Defense Industrial Security Clearance Office (DISCO). If DISCO refuses clearance, the case is sent to the Pentagon for review. If the decision is still negative, there are provisions for the company or employee to appeal with an assurance of due process.

A GAO report of September 15, 1981, "Faster Processing of DOD Personnel Security Clearances Could Avoid Millions in Losses," stated that, to avoid extensive delays in some programs, DOD has had to issue an increasing number of interim clearances to industrial personnel. Like the waivers of pre-employment security investigations that have been granted so extensively by other government departments, the interim clearance is followed at some later date by a National Agency Check and a Background Investigation. The GAO report said that 9,600 interim clearances were issued to industrial personnel in 1980, compared to 6,100 in 1978. It noted that an unknown number of the interim clearances issued had to be revoked subsequently because of disqualifying derogatory information developed by the investigation. "GAO believes," said the report, "that the increase in the use of interim clearances increases the risk to the national security."

In response to this criticism, DOD says that interim clearance procedures are based on many factors, including the clearance level required, the sensitivity of the assignment, etc. They point out, for example, that in the case of a request for Top Secret clearance, an interim clearance may be granted only after an NAC has been favorably completed and the IBI has been initiated. This interim procedure, says DOD, when properly implemented, provides a judicious balance between security considerations and the manpower needs of DOD.

As things stand today, those in charge of personnel security at DOD may be correct in this appraisal. The question is whether it would not be far better to provide the DIS with the necessary manpower to enlarge the scope of their investigations, and, at the same time, to keep up with their investigative workload so that no significant detriment to the defense production program would result from the delay in processing clearances in the proper sequence. It would also be helpful if DOD could fill in the quantity for the "unknown number of interim clearances" which the GAO said had to be revoked subsequently because of disqualifying derogatory information.

This situation has come about primarily because the Defense Department's personnel security program has suffered drastically from budgetary constraints. In 1976, Congress, in an ill-considered action, mandated a 27 percent cut in the personnel of DIS. By June of 1981, DIS had a backlog of some 83,000 investigations waiting to be completed. This figure included prospective employees, defense contractor employees, and officers and enlisted men awaiting assignment in sensitive positions. According to a June 1981 memorandum to the secretaries of military departments, the Chairman of the Joint Chiefs of Staff and directors of Defense agencies, DIS was at that time opening a thousand cases a week more than it closed, and this had produced a situation in which large numbers of personnel could not be productively utilized because they did not have security clearances. This had resulted in a serious degradation of operational readiness. It was also delaying, in some cases by more than a year, the finalization of contracts for classified hardware because new contractors and their employees had to undergo security checks before they entered into production.

For once, the General Accounting Office, which has generally called for more economy in the government's personnel security program, came to the rescue. On September 15, 1981, the Comptroller General sent to the Congress a report, previously quoted, captioned, "Faster Processing of DOD Personnel Security Clearances Could Avoid Millions in Losses." The GAO stated:

> Security clearance requests for DOD and industry personnel have increased substantially since 1978 without a corresponding increase in DOD and FBI personnel who investigate and process the requests. Pro-

cessing delays—some averaging 220 days—are costly and could weaken national security. Based on an industry study, GAO estimates that 1982 productivity losses could cost the government as much as $920 million—$340 million for industry and $580 million for DOD.

The report noted with approval that the Deputy Undersecretary of Defense for Policy had asked the Secretary of Defense for an additional $12.5 million for DIS to cover 880 new positions, including 595 investigators. In December 1981, 768 additional spaces were authorized for DIS, approximately two-thirds of which will be filled by investigators. The authorized expansion of DIS is still in process. It will contribute somewhat to reducing the backlog, but almost certainly not enough—especially if DOD cancels the abandonment of reinvestigations and returns to the requirement for full field Background Investigations, instead of IBI's, for all those with access to Top Secret and over.

The report also noted that the FBI Identification Division, which checks fingerprints in connection with all government employee security programs, was badly understaffed, with the result that its turnaround time had increased from fourteen workdays in 1978 to 58 calendar days in June of 1981. This obviously contributed to the processing backlog at DOD. It recommended that the Identification Division be substantially augmented, suggesting the addition of 570 new positions at a cost of about $7.8 million.

The amounts suggested in connection with both of GAO's recommendations are miniscule against the standards of contemporary government spending. They are expenditures that are vital to the domestic and national security. The question remains whether Congress and the Administration will show sufficient understanding of the problem of personnel security to make the very modest budgetary changes recommended by the GAO.

To help cope with its horrendous investigative backlog, the June 1981 DOD memorandum, signed by Undersecretary Frank Carlucci, called for a moratorium on all periodic reinvestigations, a blanket prohibition on BIs for those whose access was at the Secret or lower level, and the reassignment of investigators from other military departments to the DIS. In the case of military personnel under consideration for Top Secret clearance, it called for substituting the IBI, consisting of an intensive interview with the subject, for the full field BI, which involves personal interviews with a substantial number of third parties and searches of records.

By mid-September 1982, the backlog had been brought down to approximately 50,000 cases.

Senior DOD officials concerned with the personnel security program take the stand that the shift to the IBI was made in the interests of improved quality rather than the interests of economy. They refer to a

study conducted by DOD* in which 471 cases—appropriately divided between military personnel, DOD civilians, and industrial contract employees—were evaluated according to both the old method and the new method. According to the report, the two types of investigation turned up a total of 186 items of significant adverse information. Of the 186, both the old and the new forms of investigation produced adverse information in 92 cases, or 49 percent; the old type investigation turned up adverse information in another 22 cases, or 12 percent; and the IBI turned up adverse information in another 72 cases, or 39 percent.

DOD officials further point out that the evaluation of the IBI pilot project was accomplished by senior adjudicators of the various DOD components, who carefully reviewed the entire investigative process.

Long-time personnel security professionals express serious reservations about these findings. One reason for their skepticism is that the DOD report gives no indication of the degree of thoroughness of the BI. They say it is important to know how many witnesses were interviewed, whether the interviews were conducted in person or over the telephone, how many records were searched, and the facts about other variables. They point out that the figures themselves do not indicate the type of adverse information volunteered by the witnesses or its gravity. As an example, they argue that if an interviewee were a member of the Communist Party or some other extremist organization, he would almost certainly not volunteer this information in response to a question—although he might, to achieve credibility, admit to some nondisqualifying peccadillos in his past record. They also take issue with DOD's assertion that the old-fashioned full field investigation has become ineffective because there is no real "take" from neighborhood investigations or interviews with persons given as references, professors, etc. They point to the fact that our law enforcement and intelligence agencies all insist on full field Background Investigations.

Personnel security officials in other agencies also point to a 1980 survey of the comparative effectiveness of neighborhood investigations conducted by OPM and DIS. A joint memorandum signed on May 7, 1980, by William R. Fedor for the Office of the Secretary of Defense and Harold T. Johnson for OPM reported that, in 109 cases reviewed by OPM, 20 neighborhood checks, or 18 percent of the total, produced "less than favorable information," and 11 percent of this information was not available from other areas of coverage. In the case of DIS, of 188 cases reviewed, only five cases, or 2.6 percent, produced "less than favorable information." The striking difference in results is probably due to the fact that OPM did much more neighborhood interviewing than DIS and that OPM interviews are all conducted on a personal ba-

*Department of Defense, *Test Results, New Background Investigation*, Washington, D.C., March 1981.

sis whereas DIS has frequently tolerated telephone interviews in an effort to economize on manpower and money. The results do, however, strongly suggest that properly conducted neighborhood interviews can add significantly to the information on which adjudications have to be based in the case of critical-sensitive positions.

DOD officials counter these criticisms with the argument that they have had more experience with investigations than any other agency and the other agencies are simply behind the times.

Discussions with officials in a number of departments and agencies, however, revealed no one in the field of personnel security who did not have serious misgivings about the IBI.

A senior State Department official said that, while they find their personal interviews with applicants for sensitive positions highly useful, such an interview is, at the best, an adjunct to a full field investigation rather than an adequate substitute for it.

A senior CIA personnel security professional went further. He said that he considered the IBI a very serious danger to the national security. He noted that the CIA interviews applicants in depth before they are brought to Washington for polygraphing and processing—and it has been their experience that many applicants, when interviewed in the field by skilled professional investigators, will pass muster with flying colors, while they flunk the polygraph miserably when the same questions are put to them in Washington.

The Department of Energy refuses to accept an IBI conducted by the Defense Department as an adequate background investigation for military officers assigned to the Atomic Energy Commission. Several retired FBI officials who were interviewed also expressed grave misgivings about the IBI.

The situation calls for a thorough reexamination of the adequacy of the IBI.

DOD personnel security officials readily agree that the most effective system would be to combine the in-depth subject interview with the old-fashioned BI based on third-party interviews and document searches—as the intelligence and law enforcement agencies and the State Department do. Their argument is that they have to accept budgetary constraints as a fact of life, that this compels them to make a choice between the two approaches, and, confronted with this choice, they have opted for the IBI over the BI.

This argument really goes to the heart of the matter confronting those concerned with the problem of personnel security in our defense establishment. By and large they are competent and dedicated professionals who have a genuine understanding of the importance of sound security practices. But they do not make budgets or determine policy; these things are done at higher levels of government. Only within very narrow limits can they resist the restrictions on personnel security prac-

tices that have been accepted by the OPM and most of the agencies it services. They derive some satisfaction, for example, from the fact that when OPM ruled in 1975 that applicants could no longer be asked whether they were members of the Communist Party or other revolutionary organizations, the Defense Department did not follow suit. But it should be noted, conversely, that OPM has some legitimate criticisms of its own regarding the personnel security procedures of DOD.

There is nothing DOD can do about the destruction of the domestic intelligence data base or about the major damage done to federal employee security investigations by the Privacy Act and other privacy legislation. As for their operating budgets, like good soldiers they have been disposed to accept what has been given to them and have tried to do their best in the face of incremental cutbacks that inevitably strike at the integrity of the investigative process. They would be the first to agree that with more staff they could do a better job. But until Congress and the Administration remove some of the restrictions and provide them with the necessary means, about the best we can hope for is the sadly inadequate—and dangerous—investigative product we are now getting.

The Intelligence Agencies and the FBI

There are two areas where government agencies still adhere or try hard to adhere to fairly stringent personnel security requirements—the intelligence community and the law enforcement community.

In September 1979 the Subcommittee on Oversight of the House Permanent Select Committee on Intelligence, after holding hearings with the various agencies involved, brought out a staff report on Security Clearance Procedures in the Intelligence Agencies. The report reviewed procedures in both the intelligence-producing agencies (the CIA, the Defense Intelligence Agency, and the National Security Agency) and the major intelligence-using agencies (the State Department and the Department of Defense). It found tremendous differences in standards and procedures. "Each agency," it reported, "conducts its own investigation, and all such investigations differ one from the other in depth, scope and technique." The investigation of the Subcommittee focused heavily on the procedures used to screen applicants for access to Sensitive Compartmented Information (SCI), a category of intelligence data that calls for special controls in handling restricted information within a compartmented intelligence system.

Despite the very limited value of the current National Agency Checks and the restrictive effects of privacy legislation, the CIA and the NSA have made great efforts to keep their background checks effective. While most government agencies check back only on the last five years of an applicant's life (or the years from the eighteenth birthday, which-

ever period is shorter), the CIA's Background Investigation of applicants goes back fifteen years (or the years from the eighteenth birthday). It interviews a minimum of five character references with a view to establishing the habits, loyalty, character, and morals of the individual. In addition to organizational associations, it considers such factors as emotional stability, personal idiosyncracies, financial responsibility, employment record, marital difficulties, alcohol abuse and other drug use, homosexuality, and gross character deficiencies. The applicant must submit to both a physical exam and a psychiatric screening. The CIA also requires polygraph examination of all applicants. Everyone who has unescorted access to the CIA premises must undergo such an examination, including guards, cleaners, contractor personnel, and military personnel.

According to the House subcommittee report, the CIA turns down approximately 10 percent of all applicants for reasons of trustworthiness or security—a very high percentage when compared with other government agencies. Of the ten percent rejected, fully 75 percent were turned down because of their polygraph performance or because of the combination of this performance with Background Investigations. Only 24.5 percent were turned down because of information developed by the Background Investigation itself. In addition, many of those—approximately 5 to 6 percent—who apply to CIA do not make it beyond the screening unit that receives their applications and gives them preliminary interviews. An additional 7 percent fall by the wayside after the initial screening and security check for reasons of suitability. In all, therefore, approximately 23 percent of those who apply to CIA do not make it.

The CIA tries hard to be fastidious about periodic reinvestigations of its employees. The first two and one-half years are considered a probationary period. At the end of this time, the employee must undergo another investigation, which includes a complete polygraphic examination, including questions about life style. Thereafter, the reinvestigations are conducted at five-year intervals. If anyone receives an overseas assignment, his entire file is rescreened before he is dispatched. If there is any reason to have doubts about an employee because of his behavior or because of adverse information received subsequent to his employment, an investigation, again including a polygraphic examination, can be ordered at any time.

The guidelines for adjudicators are considerably more stringent than they are in other sectors of the government. For example, whereas other government departments tend to regard the use of marijuana at the best as a medical problem with no application to security, the CIA continues to regard marijuana as a legitimate security issue.

A basically similar procedure, with certain differences, is followed by the National Security Agency. The polygraph examination is the first

step in the NSA's clearance process for civilian employees, and NSA explicitly uses the polygraph as a primary tool for the development of adverse information. Unlike the CIA, the NSA does not, however, require military personnel attached to their agency to submit to the polygraph unless they volunteer to do so.

NSA reported to the Subcommittee that at least 95 percent of all negative information on applicants came from the polygraph. Of 2,531 applicants who were processed during fiscal year 1978, 775, or 32 percent, were rejected. Still more striking were NSA's statistics on clearances granted for access to Sensitive Compartmented Information (SCI). Of 1,799 applicants whose processing was completed during fiscal year 1978, only 1,024 were granted SCI clearance while 775 were denied clearance. These results appear draconian when compared to those of the Defense Intelligence Agency which granted SCI clearances to 5,937 employees in the same fiscal year while denying clearance to only 48, or to those of the Army which granted SCI clearance to 9,790 while denying it in 710 cases.

No study exists of personnel investigative procedures of the FBI comparable to the report on the intelligence community procedures that we have just quoted. But it is noteworthy that the FBI, in its comment on the report proposing the establishment of the new five-level personnel security program (see page 46), made the observation that it would continue to give all applicants for employment with the Bureau a fifteen-year Background Investigation.

The Departments of State, Justice, and Energy

While the focus of this paper is primarily on the Office of Personnel Management and the Department of Defense, which together account for the bulk of the Federal Employee Security Program, the author spent some time with the personnel security officials in the Department of State, the Department of Justice, and the Department of Energy. The notes that follow indicate what some government departments have done to try to cope with the limitations and prohibitions imposed on them by court decisions, or bureaucratic interpretations of court decisions, and the agonizing paucity of funds for personnel security purposes.

The Department of State

While the State Department has all of its National Agency Checks conducted by the OPM, the bulk of its Background Investigations—roughly 1,200 to 1,400 per year—are conducted by its own corps of Special Agents. These Special Agents are highly trained: they have to go to school for nine or ten weeks before they are assigned. In addition to doing the personnel investigations for the Department, they have other

duties such as the protection of visiting VIPs, the investigation of fraud, etc.

For all positions with access to Top Secret and all Foreign Service positions, the Department requires a seven-year full field Background Investigation and for a limited number of highly sensitive posts it requires investigations of fifteen-year scope. The Special Agent reinforces the field investigation of the applicant with a one to one and one-half hour personal interview. If information is developed in the course of the initial BI and personal interview that suggests the need for further investigation, the applicant may be called back for a re-interview that may run from one to three hours. The file is then sent to an evaluator (the equivalent of adjudicator in other departments), who makes a decision based on the information in the file.

The Department's personnel security division confronts the same difficulties as other government departments in trying to do the job it is supposed to do. The Privacy Act and the absence of a domestic intelligence data base render their National Agency Checks virtually worthless from the standpoint of screening out subversives and extremists, and of limited utility in identifying applicants with criminal backgrounds. Drug usage and homosexuality are matters of serious concern to them, but under the "nexus principle" (It's giving us fits," one officer told the author), there is frequently not much they can do when such information crops up in the course of an applicant investigation. Like all other government departments, they are bound by the laws and by the decisions of the Justice Department.

Their evaluators must be cautious in arriving at any negative determination (1) because the *Jane Doe* decision makes all of them liable to court suits if the applicant takes exception to their ruling; (2) because under the Privacy Act, applicants can access not only the investigative file, but also the evaluator's report; and (3) because, in the case of litigation, they know that the Justice Department lawyers are reluctant to defend, and there must always be some uncertainty about the financial costs to the employee if the case actually does come to court. The present position is that the Justice Department will defend an investigator or a personnel security official if he has not himself acted in violation of the law. The trouble is that there are differing interpretations of the law, and the conscientious personnel security officer would, in some cases, interpret the law in a manner not acceptable to the Justice Department because he considered the applicant a serious security risk or otherwise unworthy of government employment.

There are many such cases involving various government departments before the courts today—this despite the fact that the government bends over backwards to grant administrative due process to disappointed applicants. In the case of any adverse decision, the evaluator's report will probably go for review to the division chief. If there still re-

mains some question, it may be referred for final review to the director of personnel security for the Department. And if the adverse determination still stands, the applicant can ultimately appeal his case to the Undersecretary for Management.

Those in charge of personnel security at the State Department have strong feelings about the advisability of keeping waivers of pre-employment Background Investigations to a minimum, and they say that the Reagan Administration has been pretty good about not pressuring them for such waivers. They strongly endorse the importance of periodic reinvestigations at five-year intervals and they try to conduct such investigations for the most sensitive positions. But they are frank in admitting that, because of budgetary limitations, they are not able to meet the problem as well as they would like to. They thought that they might be conducting regular reinvestigations of perhaps 10 percent of the Department's employees who have secret access clearances. When such investigations are conducted, they generally include a review of the file, an updated NAC, a credit check, and personal checks with the employee's last supervisor and perhaps one or two developed sources.

They express concern about the Defense Department's acceptance of the IBI (Interview-oriented Background Investigation) because they are afraid that, if its use becomes the accepted practice in a department as sensitive as DOD, the pressure will be on other sensitive government agencies to economize in the manner of DOD. From their own experience with background interviews, they consider them very useful as adjuncts to full field Background Investigations, but definitely not a substitute for them.

In the case of the State Department, as in the case of several of the other agencies with whom interviews were conducted, one has the impression of a dedicated group of professionals trying hard to do an effective job under limitations that make it utterly impossible.

The Department of Justice

The Department of Justice (DOJ) has its own Personnel Security Regulations. The regulations currently in use, published on August 18, 1978, bear the identifying number DOJ 2610.2. Under these regulations, within the limitations imposed by existing law, the Department appears to be doing a conscientious job of trying to optimize an exceedingly frustrating and difficult situation.

Attorneys, law clerks, Schedule C employees, and all employees in the office of the Attorney General and his senior aides, as well as all positions in the FBI, are investigated by the FBI itself. Applicants for all other positions are investigated by the CSC/OPM, unless the OPM delegates the responsibility for the investigation to an alternate investigative agency.

Unlike most other departments in government, the Department of

Justice has only nonsensitive and sensitive positions—the sensitive being interpreted in a manner which embraces both sensitive and critical-sensitive as these terms are used by the OPM. The section defining sensitive positions within the DOJ is much more comprehensive than the comparable definitions in the personnel security regulations of most other agencies.* However, even in the Justice Department, there have been problems in defining sensitive positions and then designating them. Under Department orders promulgated several years ago, for example, a sensitive position is defined as one where the occupant has access to national security information. By common-sense standards, however, there are many highly sensitive positions where the occupants do not have such access. This includes law enforcement officers, Drug Enforcement Agency (DEA) employees, and U.S. marshals and their supporting clerks who in some cases may be involved in very sensitive operations such as witness protection.

The officers in charge of the personnel security program of the Department of Justice are keenly aware of the gravity of the problem throughout the government, not excluding their own department. They point out that their own regulations still take a strong stand against the hiring of applicants to fill sensitive positions prior to the completion of full field Background Investigations, without the signature of the head of the organizational unit to which the applicant is to be assigned, affirming that the waiver is in the national interest. This certainly puts them significantly ahead of most government agencies, where the waiver of pre-employment investigation has, as we have pointed out, now become the general rule.

They also insist that, despite the limitations of funds, they try hard to conduct periodic reinvestigations of incumbents of all *sensitive* positions at intervals of five years as is required by the regulations. They note, however, that in their own department, as in all other departments, there is a built-in conflict between the personnel division and the division in charge of personnel security. Officials in the personnel division are primarily interested in filling vacant positions with bodies that can put out an acceptable performance. They are not oblivious to the requirements of personnel security; on the other hand, because their positions demand no such competence, they have only limited knowledge and understanding in this area. Conversely, officials in the division of personnel security are concerned primarily with the requirements of security and are perhaps inclined to underestimate the problems of personnel directors.

One of the core problems, they feel, is the need for a firm and clear definition of *sensitive* positions. At the very least, it is their belief, the definition should be stretched to cover all positions directly involved in

*The criteria governing *sensitive* positions are reproduced on page 99 as Appendix I.

law enforcement activities. How difficult the situation has become is apparent from the remarks of one prominent Justice Department lawyer, who said that, "As things are today, in order to disqualify someone who has a revolutionary record for employment, we would just about have to be in a position to prove a charge of treason against him."

The Department of Energy:
Problems of Personnel Security in Atomic Energy Installations

The state of our personnel security program in our atomic energy installations calls for special consideration because most of the installations and activities covered by the program operate with contract employees. These activities include the research and development, manufacture and testing of nuclear weapons, production of special nuclear material, and the Navy's nuclear reactor program.

As far as its own employees are concerned, the Department of Energy (DOE) appears to have reasonably tight procedures—at least somewhat tighter than in many other sectors of the government. To a large degree, this is because of the provision written into the Atomic Energy Act of 1954; Section 145, for example, stipulated that nothing in any executive order shall conflict with the provisions of the Act, while Section 161B authorized the Commission to promulgate its own rules and regulations designed to protect the security of its operations—including the physical security of installations and special nuclear materials; to protect the health of its employees; and, in general, to minimize the danger to life and property. In other government agencies, the classification of information is an administrative action. In the case of the Atomic Energy Commission/Department of Energy, restricted data is classified by law.

The Atomic Energy Act of 1954 requires that all contractors and contractor employees be the subjects of security checks. The Atomic Energy Commission (now the Department of Energy and the Nuclear Regulatory Commission) was made responsible for determining the scope of these checks, while the CSC/OPM has the responsibility for conducting the security checks. EO 10450 calls for an NACI as the minimum investigation for federal employees. However, in the case of the many thousands of contractor personnel who work in noncritical-sensitive positions, the Atomic Energy Commission interpreted the Atomic Energy Act as meaning that only government employees had to be covered by NACIs and that other contract personnel at this level could be covered by National Agency Checks only. This resembles the situation in DOD, where contractor personnel have access to Secret on the basis of an NAC. Such an arrangement, as has been pointed out several times, has become almost completely worthless because of the destruction of virtually the entire domestic intelligence data base.

There are, needless to say, many thousands of critical-sensitive posi-

tions in our atomic energy installations that are filled by contract employees. In recent years the filling of such sensitive positions has required an average of approximately 15,000 Background Investigations per year, which represent roughly two out of three of all Background Investigations conducted by the OPM for all government agencies. These investigations are conducted at an average cost today of $1,600 per case, for a total expenditure on personnel security of $24.3 million.

Here again, because of the limitations that affect all sectors of the federal establishment, we wind up with what might be described as a general suitability investigation devoid of any significant national security component.

5

Three Areas of Special Weakness

Waiver of Pre-employment Field Investigations for Sensitive Positions

From a personnel security standpoint, one of the most dangerous practices that has established itself over the past two decades is the widespread resort to the waiver of full field investigations prior to filling critical-sensitive positions with applicants or appointees.

Executive Order 10450 provided for the use of such waivers only "in case of emergency"; in each case the head of the agency had to approve the appointment as "necessary in the national interest." The justification universally invoked in defense of this increasingly widespread practice is that the OPM's Division of Personnel Investigation (DPI) generally took from 80 to 110 days to complete the average full field investigation and that this delay greatly complicated the hiring process. In the interest of moving ahead and filling vacant critical-sensitive positions, a majority of the agencies apparently now feel that the cost of leaving such positions unfilled for several months outweighs any risk that may be involved in a post-appointment investigation.

How widespread the waiver practice has now become may be gauged from the following table, reproduced from a survey put out in September 1980 by OPM's Office of Internal Evaluation.

Percentage of Background Investigations Processed Post-Appointment 6-1-80 to 7-15-80

Agriculture	98% (42 of 43 cases)
FCC	100% (2 of 2)
HHS (HEW)	96% (73 of 78)
IDCA (AID)	34% (23 of 68)
Justice—BOP	94% (137 of 146)
Justice—DEA	32% (14 of 44)
NSA*	67% (6 of 9)*
SEC	(no reports during this period)
SBA	90% (9 of 10)
DCT	90% (26 of 29)
VA	100% (4 of 4)

*The percentage given for NSA is really misleading because OPM processes only guard positions for the Agency. NSA processes the great majority of its own applicants and grants very few waivers for sensitive positions.

When waivers of pre-employment investigations have become the general rule, it is obvious that the heads of the agencies no longer adhere to the requirement that each such appointment be justified as "necessary in the national interest." Nor do they follow the requirement of both OPM and EO 10450 that, where there is a waiver of pre-employment investigation, the request for investigation be filed no later than three days from the day of appointment.

Waivers are bad practice, from both the standpoint of weeding out security risks and the standpoint of weeding out incompetents, criminals, and other undesirable elements. It is self-evident that most administrators find it a much more difficult exercise in interpersonal relationships as well as government-employee relationships to dismiss an employee after he has been in the office for two or three months than they would to deny him employment in the first place if a full field investigation turned up information justifying denial or raising serious questions of suitability. In addition, to dismiss someone after appointing him to a sensitive position is also a reflection on the judgment of the selecting administrator. The study from which the above table was reproduced points out that "the three agencies which process a substantial proportion of their Background Investigations reports prior to appointment (IDCA, DEA and NSA), reported making other than a favorable determination at a rate *nearly double* that of the other eight agencies." (Emphasis in the original.)

The waiver of pre-employment field investigations has over the years been the subject of recurring complaints by officials of the CSC/OPM and the Department of Justice concerned about sound personnel security practices. For example, on March 7, 1972, Robert E. Hampton, Chairman of the CSC, sent a three-page letter to the heads of all agencies strongly criticizing the waiver practice that had become common in many agencies and urging a return to the pre-employment full field investigation as the normal procedure. The letter quoted the following paragraphs from a communication sent earlier that year by Robert C. Mardian, Assistant Attorney General, Internal Security Division, Department of Justice:

> I question the wisdom of such a practice at any time, and I am particularly disturbed that such a practice apparently is being utilized on a fairly widespread basis. The fact that an individual is not permitted access to classified information pending completion of a full field investigation only deals with one aspect of the problem. As you well know, access to classified information is but one of the criteria utilized for designating a position as critical-sensitive. A person in such a position may very well be in a position to make or effect policy decisions of the utmost importance....
>
> The Department of Justice considers it extremely important that applicants for or appointees to critical-sensitive positions receive a full field investigation prior to appointment....

The Hampton letter pointed out to the delinquent agencies that a number of agencies, including the Department of Justice, had resorted to waivers only on rare occasions, and had found it "both feasible and advantageous to conduct pre-employment full field investigations." In addition to the obvious advantages from a security standpoint, the letter said, pre-employment investigations also serve the selection process by helping to develop advance information about general abilities, growth potential, trustworthiness and personal integrity, and other qualities that call for consideration.

But despite the almost universal recognition of the dangers of post-employment investigations, the practice has become more widespread, year by year, until today it has become the norm in many government agencies.

Under its current director, Mr. Peter Garcia, DPI has now reduced the average time requirement for a full field investigation to 73 days and hopes to get it down to 60 days. However, the government agencies queried by the Office of Internal Evaluation indicated that DPI would need to provide 30-day or better service before they would be willing to delay appointments pending completion of investigation.

This attitude on the part of the agencies really begs the question. It must be emphasized again that when we talk of full field "Background Investigations" we are really talking of the very small percentage of government positions that have been designated "critical-sensitive." For such investigations, it makes no sense to aim for a rigid 30-day deadline. A majority of the cases are simple enough to be processed in 30 days or even less—especially if the applicants can be persuaded to voluntarily provide copies of their school records, birth records, their divorce papers if they are divorced, and other documents that are not readily available to the investigator, but about whose substance he must seek to be informed. On the other hand, there are many very complicated cases involving subjects who have held numerous positions in different cities and different countries. Such cases may require more than 60 days, even with the best of effort. And if adverse information is turned up in the course of the investigation, checking it out carefully in the interest of fairness is a process with unpredictable time requirements. There are no shortcuts to sound personnel security procedures—as was dramatically demonstrated recently by the forced resignation of Max Hugel, who had been appointed director of CIA's covert intelligence operations after an expedited seven-day background investigation. So, while it is proper and helpful to aim for a mean deadline of 30 days, this deadline should not be too rigidly construed.

Abandonment of Reinvestigations

The Federal Personnel Manual, as has been pointed out, calls for periodic reinvestigations of employees in sensitive positions at five-year intervals. The Manual has this to say on the subject:

> The incumbent of each critical-sensitive position shall be required, five years after his appointment, and at least once each succeeding five years, to submit an updated personnel security questionnaire to the appropriate security officer in his department or agency. This questionnaire shall be reviewed, together with the personnel file of the incumbent, previous reports of investigation concerning him, and any other appropriate documents. A determination shall then be made regarding what further action, if any, is appropriate; for example, a check of local police and credit records, a national agency check, or an updated full field investigation.

It would be folly to assume that from the standpoint of the national security, one can stop worrying at the point where an applicant has been employed on the basis of a positive Background Investigation. Common sense suggests the importance of periodic rechecks, and the five-year interval stipulated by EO 10450 and by the Federal Personnel Manual is not unreasonable.

There is general agreement among personnel security professionals on the importance of regular periodic reinvestigation. Even people of good background and apparently solid character are frequently vulnerable to financial pressures, sexual enticement, or blackmail. Indeed, employees who pass their Background Investigations with flying colors may succumb to such vulnerabilities.

As matters stand today, however, the reinvestigation, or the "update" investigation as it is sometimes called, is far more frequently honored in the breach than in the observance. The Department of Defense, as has been pointed out, has indefinitely suspended reinvestigations in an effort to reduce its investigative backlog. OPM, which conducts reinvestigations at the request of most other government agencies, reports a dramatic falling off in the number of such requests received from key departments and agencies in recent years. Between 1977 and 1981, the number of requests received from GAO fell from 277 to 84; the State Department from 114 to 50; NASA from 254 to 151. The figures for previous years are not available, but there is no question that they were substantially greater than for 1977.

This is an area where dramatic improvement would be possible, given a combination of a firm administrative directive and the funds necessary to restore the entire reinvestigative program to an adequate level.

Americans Employed by International Organizations

On January 9, 1953, as one of his last acts in office, President Truman promulgated Executive Order 10422, which set up, by agreement with the United Nations, procedures governing the investigation of United States citizens either employed or being considered for employment in the Secretariat of the U.N. and its various agencies. The action was

motivated by the embarrassment caused, both to the State Department and the U.N., when 27 Americans in the employ of the U.N. were called before the Senate Subcommittee on Internal Security during the course of 1952, and repeatedly invoked the Fifth Amendment in response to questions about communist associations. The employees in question were dismissed by Secretary General Trygve Lie. When they appealed their case, the Secretary General set up a commission of internationally prominent jurists to consider their appeal and also to consider the larger matter of how to avoid such situations in the future. Based on recommendations of the Commission, there emerged an agreement between the Secretariat and the United States government under which the U.N. committed itself not to employ any American national without first submitting his name for a background check by the United State government.

The Commission of Jurists denied the appeal of the dismissed employees and recommended against reinstatement. Speaking about the uniform use of the Fifth Amendment by the plaintiffs, the Commission said:

> In our opinion, a person who invokes this privilege can only lawfully do so in circumstances where the privilege exists. If, in reliance upon this privilege, a person refuses to answer a question, he is only justified in doing so if he believes or is advised that in answering he would become a witness against himself.
>
> In other words, there can be no justification for claiming this privilege unless the person claiming the privilege believes or is advised that his answer would be evidence against himself of the commission of some criminal offense. It follows from this, in our opinion, that a person claiming this privilege cannot thereafter be heard to say that his answer, if it had been given, would not have been self-incriminatory, or, if not, he has invoked his constitutional privilege without just cause.
>
> As, in our opinion, he cannot be heard to allege the latter, he must, by claiming privilege, be held to have admitted the former. Moreover, the exercise of this privilege creates so strong a suspicion of guilt that the fact of its exercise must be withheld from a jury in a criminal trial.

The Commission of Jurists advised the Secretary General of the United Nations that he should regard it as of the first importance to refrain from employing any United States citizen who he has reasonable grounds for believing is, or is likely to be, engaged in espionage or subversive activities against the United States.

The Commission further advised the United States that it should make available to the Secretary General information on which the Secretary General might make a reasonable determination as to whether sufficient grounds existed for believing that a U.S. citizen had engaged, or was likely to engage, in espionage or subversive activities.

Two paragraphs of the Preamble to EO 10422 are worth quoting:

> WHEREAS in the participation by the United States in the activities of the United Nations it is in the interest of the United States that United States citizens who are employees of the Secretariat of the United Nations be persons of the highest integrity and not persons who have been, are, or are likely to be, engaged in espionage or subversive activities against the United States; and
>
> WHEREAS it is in the interest of the United States to establish a procedure for the acquisition of information by investigation and for its transmission to the Secretary General in order to assist the Secretary General in the exercise of his responsibility for determining whether any United States citizen has been, is or is likely to be, engaged in espionage or subversive activities against the United States...

The Executive Order established an International Organizations Employees Loyalty Board inside the Civil Service Commission. This board was given the authority in cases referred to it of inquiring into the loyalty to the government of the United States of U.S. citizens who were either employed, or under consideration for employment, by the seventeen United Nations organizations or the 63 other international organizations of which the United States is a member.

The United States, like other member nations of the United Nations, is provided with a certain quota of the U.N. Secretariat staff. The quota, which is based on a rather complicated formula, will vary from year to year. Last year this quota came out to 17 percent of the total number of staff positions. Of the 508 professional positions provided for by the American quota, quite a number were in senior policy areas. While they are not employees of the American government, their employment impinges in a very direct way on the national security—not only because U.N. activities are important but also because the KGB is formidably represented in the U.N. apparatus. It was only reasonable, therefore, that President Truman and the U.N. Secretariat should have decided that it was in their mutual interest to set up a program providing for background investigations of American applicants for U.N. employment. Under the agreement, the U.N. Secretariat forwarded to the State Department copies of all applications for employment by U.S. citizens. The State Department had the Civil Service Commission conduct a Background Investigation; adverse findings were submitted for the consideration of the International Organizations Employees Loyalty Board with provision for due process; and the results of the investigation were forwarded to the U.N. The same procedure was followed in the case of other international organizations. The total number of applicants processed annually has approximated 1,500 in recent years.

In December 1975, EO 10422 was modified by President Gerald R. Ford in Executive Order 11890. While most of the original language of

EO 10422 remained intact, the revision substituted a much reduced level of investigation, the NAC, for the standard full field background investigation that had previously been required. As has been repeatedly pointed out in this monograph, today's NAC has very little substantive significance. Indeed, as a background investigation bearing on loyalty, it is close to worthless.

Actually, the NAC now required for applicants for employment by international organizations is substantially less than the standard NAC. Apparently the State Department took the stand that it would serve no purpose to gather background information dealing with suitability because the only question really at issue was the applicant's loyalty. In line with this, the CSC/OPM was instructed not to check criminal history files and not to make fingerprint checks. This is a questionable approach to the problem because it leaves the entire matter of suitability checks to the international agencies—which, for obvious reasons, have far more difficulty than the U.S. government in obtaining law enforcement information and other information bearing on character and integrity. It is also a questionable procedure from a security standpoint because, as we have pointed out, a criminal background makes an employee more vulnerable to recruitment as a result of blackmail or monetary enticement.

The international organizations are very important places, and many of the positions being filled are highly important positions. It is not just the U.N., but an entire phalanx of related organizations like the World Bank, the World Health Organization, the International Monetary Fund, etc. For the year ending September 30, 1981, OPM processed the NACs of 1,130 American citizens who applied for positions with the U.N. and the other international organizations. This figure by itself provides some indication of the scope of the problem. It is of vital importance that the United States government assure itself of the basic loyalty of all those who move into such positions. It is of almost equal importance, because every American employed by an international organization is in effect an ambassador of his nation, that criminals and scoundrels of various varieties be flagged down before they are appointed to positions from which it would be difficult to remove them.

In further harmony with the general tendency to downgrade personnel security investigations, the form questionnaire that applicants for positions in international organizations were obliged to fill out for the State Department was reduced from five pages to one page.

One of the reasons given for retreating from a full field BI to a demi-NAC was that, with the Civil Service Commission's investigative backlog running from 90 to 120 days, it was unreasonable to impose such delays on the personnel hiring process in the U.N. It is true that, from an administrative standpoint, a 120-day delay in getting clearance for a U.N. applicant would create all kinds of difficulties. But if Congress

thinks it is important that we should be able to assure ourselves of the loyalty of the American contingent of professionals at the U.N., then clearly the solution is to provide OPM's Division of Personnel Investigations with the manpower necessary to keep their investigations on a 30-day basis.

6

Measures Necessary to Resuscitate the Program

So much damage has been done that, even with the most energetic effort, it is going to be a long and difficult task to recreate a viable Federal Employee Security Program. In the paragraphs that follow we shall examine some of the recommendations that have been made and outline those measures that the author considers essential to the revitalization of the program.

The GAO's Recommendations

Despite a potentially harmful overemphasis on cost cutting and efficiency and inadequate emphasis on quality, the General Accounting Office in a series of reports has made some recommendations that merit attention. In its last report ("Costs of Federal Employee Security Investigations Could and Should Be Cut") dated August 31, 1979, the GAO recommended "that the Congress consolidate into one law the authority to investigate and judge the suitability of federal employees, including the potential of employees in sensitive positions to impair national security." It also said that Congress should consider:

- Restrictions imposed on personnel investigations by other laws such as the Privacy Act of 1974 and court decisions protecting individuals' constitutional rights.
- Whether OPM should investigate occupants of nonsensitive positions only to determine prior criminal conduct, leaving to employing agencies the responsibility for assessing applicants' efficiency.
- The need to define, in a manner acceptable to the courts, disloyal acts which should bar federal employment.
- The scope of investigation needed for the several levels of security clearance granted federal employees.
- Whether there is a need in the legislation for provisions to aid OPM to obtain local law enforcement information: for example, reimbursing local law enforcement agencies for supplying information, receiving assistance from federal law enforcement agencies, or clarifying OPM's legal authority to have local arrest information.

These recommendations had originally been offered in a previous report by GAO. GAO had also recommended in a prior report that, in the interests of economy and the application of uniform investigative standards, consideration be given to consolidating personnel investigations under one agency. In its August 31, 1979, report it seems to have backed off somewhat from this last position. On the one hand, it points out that "costs may increase as a result of consolidation because some agencies have indicated a strong desire to retain their investigators for other work, and the Office of Personnel Management may need more staff." On the other hand, it appears to have been impressed by the resistance to the consolidation proposal offered by most of the agencies that today conduct all or even some of their own investigations. These include the Department of State, the FBI, the Bureau of Engraving and Printing, and the constituent law enforcement agencies of the Treasury such as the IRS, the Secret Service, the Customs Service, and the Bureau of Alcohol, Tobacco and Firearms. "These agencies," said the 1979 report, "explain that their positions required special investigative work and that their investigators were more qualified and had access to more criminal and fiduciary records than OPM." While this may very well be true with regard to criminal and fiduciary matters, it is probably not true with regard to the experience of their investigators in the national security field.

While conceding that applicants for certain sensitive positions today undergo inadequate investigation, the GAO report argued that in many cases the degree of investigation exceeds the requirement of the position and that much money could be saved by abbreviating and streamlining investigations, encouraging the sharing of investigative resources by the federal agencies and by having OPM adopt some of the demonstrated improvements that have already undergone testing in other agencies. Finally, it urged that OPM move to develop adequate classification criteria—that is, criteria defining which positions require which degree of investigation.

The author of this paper, after long consideration, has come to the conclusion that the advantages of centralizing personnel investigations and adjudications far outweigh the disadvantages. The DOD, the intelligence community, the FBI, and other segments of the law enforcement community have requirements that exceed and are very different from the requirements of other government agencies. It would make sense, therefore, for these agencies to continue to operate their own personnel security programs. However, once we have made these exceptions, the case for consolidating the personnel security apparatus becomes compelling.

It is not just a matter of applying uniform investigative and adjudicative standards, important though this is in its own right. The consolidation of personnel investigations and adjudications under a single agency

would also save money at the same time as it improved the quality of the employee security program. Clearly, it will be easier to maintain high standards for investigators and adjudicators, if the program is in the hands of a single agency, than it is today with the adjudicative program fragmented on a government-wide basis.

Changes Proposed by the Interagency Task Force

In response to the GAO report, the OPM set up an interagency task force to study the implementation of the GAO recommendations. The task force report, which has now been finalized, centers around a proposal for a new five-level system for designating the sensitivity of federal positions. As has been pointed out, OPM and the other government agencies currently conducting investigations operate on the basis of a three-level system in which the designations are nonsensitive, noncritical-sensitive, and critical-sensitive. The chart below lists, in the words of the report, the five levels of the proposed system and the degree of investigation proposed for each level.

	LEVEL OF RISK	REQUIRED INVESTIGATION
Level I	Opportunity for effecting *limited but reversible* damage to the national interest.	National Agency Check (NAC).
Level II	Opportunity for effecting *significant but reversible* damage to the national interest. (Level II has access to national defense materials through *Secret*.)	National Agency Check and Inquiries (NACI), supplemented by a credit check for financial type positions.
Level III	Opportunity for effecting *serious but generally reversible* damage to the national interest. (Involves duties concerning matters of considerable importance to the national defense; rights and interests of individuals; protection of property and lives; enforcement of federal laws, regulations or rules...; or the economic well-being of the nation.)	Basic NAC plus Limited Background Investigation (LBI), involving one year personal coverage plus four years' written inquiry plus credit check. Intensive coverage for the most recent year to include in-person interview of a minimum of three knowledgeable witnesses.
Level IV	Opportunity for effecting *exceptionally grave, not easily reversible* damage to the national interest. (Involves duties concerning matters of clearly major importance to the national defense, with access through *Top Secret*; rights and interests of individuals; protection of lives; enforcement of federal laws; economic well-being of the nation; general public safety and internal security; or continued effectiveness and integrity of the federal service.)	Basic NAC plus Background Investigation (BI) of five years' scope, or back to age 18, with at lease three years' coverage. Credit check.

Level V	Opportunity for effecting *inestimable, not easily reversible* damage to the government's ability to effectively conduct the public's business domestically; retain the public's confidence and trust; defend the nation from foreign aggression; carry out the nation's foreign policy objectives; or protect against internal subversion, espionage, sabotage or other illegal acts which threaten the public's safety or internal security of the nation.	Basic NAC plus Special Background Investigation (SBI) of 15 years' scope, or back to 18th birthday. Fifteen-year employment check; five-year credit check; five-year residence check; 15-year education check, including three years' personal coverage; five-year foreign travel check, plus full coverage for overseas residences of more than five years.

It was the thinking of the task force that the vehicle for implementing the new five-level system should be a new executive order to replace Executive Order 10450, as amended, which is, by general consent, now outdated. The task force also felt that in anticipation of a new executive order, the participating agencies should move immediately to implement the new five-level system.

Although OPM has made no formal decision to move to the five-level system, it is clear that there is widespread support for it. Certainly, a fifteen-year background check appears in order for Level V positions, and the degree of investigation required in the case of Level IV also appears adequate. But old hands in the field of personnel security share the opinion that the degree of investigation called for in the cases of Levels I, II, and III is inadequate. In particular, they express misgivings about the proposal to reduce the NACI to an NAC in the case of Level I positions. Foregoing written inquiries, they point out, would make it impossible to find out whether the subject is who he claims he is, or has lived where he said he lived, or has done what he said he has done.

Serious consideration should be given to firming up the investigative procedures in the proposed five-level system by

- increasing the NAC to an NACI in the case of Level I,
- adding an in-depth subject interview to the NACI in the case of Level II,
- substituting a standard Background Investigation (BI) in the case of Level III,
- adding an in-depth subject interview to the Background Investigation in the case of Level IV,
- adding an in-depth subject interview to the Special Background Investigation (SBI) in the case of Level V.

Subject interviews, it should be pointed out, have been found to be particularly effective by the State Department and the intelligence agencies as well as the Defense Department.

Essential Requirements I:

Some Areas Where "Quick Fixes" Are Possible

After this recitation of facts, it would be natural to ask if our Federal Employee Security Program was not beyond repair, or at least beyond repair in any reasonable time frame. Certain of the most basic repairs are going to be very difficult and time-consuming because they will require legislation. There are, however, a number of "quick fixes," especially in the case of the suitability program, that can be made without serious delay—a few months, a year, perhaps a bit longer—by administrative action only, without the enactment of new legislation.

Broadly perceived, the Federal Employee Security Program, as has been pointed out, really consists of two parts. One part has to do essentially with suitability; the other part has to do with loyalty. There is, however, a strong overlapping between the two because those who are untrustworthy or engage in "criminal, dishonest, infamous or notoriously disgraceful conduct," or drink excessively, or use drugs are clearly more vulnerable targets for the many KGB recruiters who are active in this country, or more liable to be careless with confidential information or documents to which they have access. In fact, the majority of those convicted of espionage since World War II did not become agents for ideological reasons; they succumbed rather because of monetary or sexual enticements or blackmail.

The other part of the personnel security program has to do with security strictly perceived—that is, in the sense of screening out elements whose associations with organizations found to be subversive rendered them unsuitable for employment on national security grounds.

Which part of the personnel security program is more important would be very difficult to state in quantitative terms; both parts are important. While the mercenary agents are more numerous than ideological agents, the long-term mole who enters government as a junior employee and over the years rises to a policy-making position of great importance unquestionably constitutes a much greater danger in terms of his capacity for damage to the national security. (Harry Dexter White, who served as Assistant Secretary of the Treasury under Roosevelt, is a prime example of the damage that can be done by a solidly entrenched mole. Kim Philby in Britain is another.) While all quantification is difficult, it is probable that in time of peace, the suitability side of the personnel security program—properly conducted—is as important or even more important. Today, this suitability program is in a shambles. However, if it ever came to war, we would almost certainly find that we face far greater dangers because of our abandonment of a personnel security program *per se*.

Reconstitution of the personnel security program proper is bound to

take many years because there are a number of major legislative and attitudinal obstacles to overcome. But there is no reason why those in charge of personnel security cannot make a number of "quick fixes," on a purely administrative basis, that would in reasonably short order enhance the quality of our personnel suitability program and even of the personnel security program.

Administrative directives not supported or required by law can very easily be replaced by directives from the new administrators. Handbooks prepared under previous administrations can be replaced by new handbooks designed to enhance the quality of our personnel suitability program. In the paragraphs that follow, some of the possible "quick fixes" are discussed. [A notation at the end of each section indicates whether it relates to the suitability program or the personnel security program or to both programs.]

1. The lax 1975 suitability guidelines for adjudicators, currently in use by OPM, should be completely rewritten.

2. The Office of Personnel Management can also do a good deal to bring about an early improvement in the situation by promulgating new directives that have the effect of nullifying at least the more questionable of the restrictive directives put out by the Civil Service Commission and the OPM on the advice of counsel in recent years. Obviously, these new directives would have to be in compliance with Supreme Court decisions, but, where doubt exists, the issue should be resolved on the side of improved personnel security. No concession should be made to diminished personnel security procedures unless these concessions are specifically ordered by the courts. [*Personnel Security and Suitability*]

3. The Office of Personnel Management and the Justice Department must team up to represent the interests of the Federal Employee Security Program before the courts far more vigorously and effectively than heretofore. There are admittedly some points where privacy rights come into conflict with the right of the government to safeguard itself against the danger of infiltration by elements ideologically committed to its destruction or in the service of hostile intelligence. The problem is to strike a balance between these two "rights." If privacy rights are zealously represented in a whole series of court cases related to the Federal Employee Security Program, and if there is no comparably forceful presentation of the security requirements and rights of the United States government, inevitably the judges are going to come down on the side of absolute privacy. [*Personnel Security and Suitability*]

4. The serious problem inherent in the waiver of pre-employment Background Investigations for critical-sensitive positions will almost certainly prove to be completely untractable unless the agencies charged with the responsibility for Background Investigations are provided with adequate personnel to keep their workload on a current basis. Government departments and agencies have indicated that they would be willing to make pre-employment investigations the rule rather than the exception if the waiting time for an investigative report could be reduced to 30 days. But so long as the average report takes 90 days or more to produce, personnel directors, anxious to fill important positions, are almost certain to compromise on the call for a full field Background Investigation before an applicant can be entered into a critical-sensitive government position. In the latter part of 1981, the OPM investigative staff was sharply reduced in strength. The justification for this was that the government was hiring far fewer employees on a monthly basis. Without the cutbacks, OPM might have been able to liquidate its backlog and put its investigative program on a 30-day basis. With the cutbacks, the chances are that the backlog will remain as it is today. [*Personnel Security and Suitability*]

5. The implementation of a more effective Federal Employee Security Program not only requires more investigators than are currently servicing the various agencies but also calls for more intensive training of investigators and adjudicators. The *Project 10 Report* of February 1975 placed very heavy emphasis on the matter of training. In the case of investigators, it called for a minimum of two weeks of formal classroom instruction and on-the-job training encompassing at least the first year of duty. This was to include "an initial period during which the trainee accompanies an experienced investigator to learn by example; a succeeding period during which the trainee is accompanied by an experienced investigator who observes his work and coaches him on proper technique and approach; a period of close review of complete work, tapering off as the trainee gains experience; frequent supervisory consultations on the trainee's progress"; participation with other trainees in periodic conferences; and repeated refresher training courses.

   The proposed investigator training program outlined by the *Project 10 Report* was almost encyclopedic in its coverage. It included general indoctrination on the agency investigative mission and the government-wide investigations program; full field Background Investigations; information sources, witness selection, and interviewing techniques; treatment of loyalty-security

issues; subject interviews; prohibited areas of inquiry or practice; constitutional rights, civil rights, and privacy considerations; suitability and misconduct investigations; indoctrination in adjudication principles; work planning, office procedures, and travel and mileage conservation; investigatory attitudes, appearance, and conduct; and practice sessions in interviewing and reporting.

The *Project 10 Report* also discussed at length the question of adjudicator qualifications and training. Adjudicators perform a function of very great importance. If they are unqualified or inadequately trained, they may make personnel decisions which are potentially damaging to the national security. Conversely, an ill-prepared adjudicator may do injury to the rights of applicants because he does not know how to evaluate the evidence provided by the investigative staff. Most of the government agencies surveyed reported that they did not require prior training of adjudicators, that they received their training on the job. In addition, the survey conducted revealed no discernible uniform pattern of supervision for adjudicators. The Report recommended that persons selected as adjudicators should not only possess in high degree the attributes of integrity, maturity of judgment, objectivity, and discretion, but that they should have "varied experience in investigations, security, suitability, or field, requiring significant skills in the organization and evaluation of evidence;" a familiarity with the legal framework within which adjudications are conducted; and a "genēral knowledge of subversive organizations, their ideologies, sources of information on these organizations, and hostile intelligence techniques." The Report also recommended that all adjudicators be required to attend an intensive basic training course in adjudication and that an effort be made to standardize adjudicator selection criteria, training, and supervision.

Needless to say, investigator training and the selection, training, and supervision of adjudicators fall far behind the quality recommended by *Project 10*. [*Personnel Security and Suitability*]

6. The Civil Service Commission witnesses who appeared before the Senate Subcommittee on Criminal Law in 1978 made the point that over the previous ten years not a single applicant had been denied appointment to the federal service on the basis of reasonable doubt as to loyalty, and that from 1956 to 1968 only twelve applicants had been denied employment on this basis. This, they said, was because of a reluctance over the entire history of the Federal Employee Security Program to stigmatize individuals as "loyalty risks" or "security risks." There were, however, over

500 applicants who were denied employment and employees who were dismissed on general suitability grounds, when the real reason was the existence of serious doubt as to loyalty.

Many years ago some of the hardest heads in the Federal Employee Security Program had come to the conclusion that it was self-defeating to deny employment on findings that an applicant was a "loyalty risk" or "security risk." They proposed, instead, that applicants should be rated either "suitable" or "unsuitable." An applicant could be unsuitable for reasons related to insubordination or inadequate performance or a criminal background record; or he could be unsuitable because he was a chronic drunk or a sexual pervert or a person afflicted with wanton carelessness—someone, in short, whose personal conduct under the old rules would have stigmatized him as a "security risk"; or he could be unsuitable because of membership in or a sympathetic association with fascist, communist, or other subversive organizations or of organizations committed to the use of force or violence to deny other citizens their constitutional rights. The various reasons justifying rejection of the applicant would have to be separately and specifically set forth. The applicant would have to be informed of the charges or allegations and provided with an opportunity to defend himself, and with a further opportunity to appeal if he is turned down. But an adverse determination would simply state that the applicant had been found "unsuitable" for federal employment—not that he had been turned down as a "loyalty risk" or "security risk." [*Personnel Security*]

7. Consideration should be given to using the polygraph for critical-sensitive positions throughout the United States government. [*Personnel Security*]

8. The investigation of employees of the U.N. and other international organizations called for by EO 10422 should be upgraded from an NAC to a full field Background Investigation. [*Personnel Security*]

9. DOD should, at the earliest possible date, abandon the Interview-oriented Background Investigation (IBI) and return to the requirement of a full field Background Investigation for all those with access to Top Secret or higher. [*Personnel Security*]

10. Some formula must be found for recasting the *nexus* provision so that agencies are not placed in the ridiculous position of having to hire employees whom they have many valid reasons for not hiring, but about whose flaws and weaknesses they cannot provide a definite *nexus* to ability to perform the job. [*Suitability*]

11. Despite the difficulties created by the long-term task of reestablishing a comprehensive domestic intelligence data base, the Administration, basing itself on the Supreme Court's decision in *Law Students Research Council v. Wadmond et al.*, should instruct the Department of Justice to prepare a revised questionnaire for all applicants for sensitive and critical-sensitive positions in the United States government. Among other things, this special questionnaire should include a question or series of questions bearing on the matter of loyalty. In the paragraphs that follow, the author has made a first effort at the wording of such a question.

Proposed Question to be Included in the Federal Government Questionnaire for Applicants for Employment in Sensitive and Critical-Sensitive Positions

- Have you ever belonged to

- any organization committed to the violent overthrow of the government of the United States or any subdivision thereof, or to the use of violence for political purposes?
- any organization which conspires to deny civil rights to any group of American citizens?
- any organization which operates under the control of or in collusion with hostile foreign powers?
- any organization which serves as a front or support organization for any of the above categories?
- any organization which has engaged in conspiratorial activities directed against the security of the United States government or the integrity of its operations?

*Note that mere membership in such organizations, by itself, does not disqualify an applicant for employment. The sensitivity of the position applied for, and the quality of the membership, including whether or not it was knowing membership and whether or not the applicant shared the specific intent to carry out the unlawful purposes of the organizations, must also be considered.

If the answer to the above question is yes, please write a brief summary of your membership, including such facts as the duration of your membership in the organization in question, whether or not you ever held office at any level or played a leadership role at any level, whether or not you ever made speeches or wrote articles or statements for publication, and the nature of any other activity in which you engaged as a member. Also state in your summary whether you were aware at the time of your membership of the unlawful purposes of the organization, and whether you shared the specific intent to carry out these purposes.

Essential Requirements II:

Long-Term Problems Involved in Restoring the Employee Security Program

The revitalization of the personnel security program, as distinct from the suitability program, will require much more time and effort—although here, too, there are some things that can be undertaken without delay (e.g., rewriting the domestic intelligence guidelines imposed on the FBI by Attorney General Levi).

While the GAO and OPM proposals have much merit, they do not address two of the central problems. The first is the lack of specific organizational criteria to guide agency directors, adjudicators, and investigators; and the second is the destruction of the domestic intelligence data base at the federal, state, and local levels, and the virtual cessation of all domestic intelligence activities.

The criteria available for the guidance of adjudicators and agency heads today—to the extent that any exist—are vague and ambiguous, often contradictory, and leave so much open to interpretation that investigators, who are naturally fearful of committing a transgression against rules they do not understand, frequently tend to avoid negative reports out of the fear that they may get themselves into trouble. An investigator is always safe if he compiles no adverse information bearing on loyalty about the applicants he is assigned to check out. But if he pursues his investigation conscientiously and reports adverse information as it is given to him—especially information of a national security nature—he enters an area of undefined risks, which have now been enhanced by the *Jane Doe* decision.

It is not sufficient for the rules governing disqualification to speak in general terms about membership in or a relationship with "any foreign or domestic organization, association, movement, group or combination of persons which is totalitarian, fascist, communist or subversive, or which has adopted, or shows, a policy of advocating 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." (This is the language which has been used since the Truman Executive Order 9835 of March 21, 1947. It is indicative of the lack of sophistication of those who wrote executive orders and legislation at the time. The language quoted suggests that the order was directed against five different types of organizations. Actually, the Communist Party would have qualified under every criterion but "fascist" in this five-part enumeration.) Adjudicators and agency directors cannot be expected to accept the responsibility for interpreting such general language in a manner which covers the hundreds of organizational affiliations that may come to light as a result of applicant investigations. They have to be provided

—presumably by the Department of Justice—with specific and authoritative and constantly updated criteria, setting forth the essential facts about those organizations in which membership would automatically raise questions about the applicant's loyalty and reliability.

Partly because of the post-Watergate hysteria on the issue of domestic intelligence programs, partly because of the traditional hostility of the media to law enforcement activities in the field of domestic security, any talk about reinstituting some kind of domestic intelligence program is bound to encounter serious obstacles. Whoever is brave enough to take the initiative will not find it easy sledding. There will be brickbats and threats of legal challenges and denunciatory editorials, charging "McCarthyism." But we have to come back to the basic fact that, without concrete organizational criteria, presumably provided by the Department of Justice, it will be impossible to get any meaningful personnel security program back in operation; and to the correlated fact that, without a domestic intelligence program, it will be impossible to reconstitute the data base essential for an effective personnel program.

If it were simply a matter of having a clear conception of what the Communist Party and the KKK were all about, the situation would be relatively simple, because every personnel security officer knows about the CPUSA and the KKK. But there are many more organizations, some of them on the right, the great majority of them on the left, that should be the object of continuous monitoring operations in the interest of the national security. Thanks to the deceptively bland names they sometimes bear, there is much public confusion about these organizations. The Socialist Workers Party and the National Lawyers Guild, to take two prime examples, have names sounding innocent enough, and the press almost invariably writes about them without indicating their true political nature. The SWP, for instance, is almost invariably referred to by the press as a "socialist organization," whereas it is in fact a Marxist-Leninist organization. The NLG, similarly, is generally referred to as a "civil rights organization," whereas in reality it operates as a legal front for the Communist Party and other revolutionary groups. The Chinese Communists, Castro, and more recently the Sandinistas in Nicaragua and the guerrillas in El Salvador have all been portrayed as benign agrarian reformers by important segments of the media, when they were making their bids for power. Not surprisingly, there exists today a whole host of revolutionary organizations, some of them fronts for the Soviet Union or the Communist Party, some of them Trotskyists, some of them controlled fronts of the Castro government, some of them Maoists, some of them New Left revolutionaries (these are in most cases sympathetic to Castro, sometimes sympathetic to North Korea, occasionally sympathetic to China). The total number of the organizations covered by these various spectrums may very well exceed 100.

Among the frankly revolutionary organizations—pro-Moscow, pro-Chinese, Trotskyist, or New Left—we would have to include, in addition to the Communist Party (CPUSA), the Communist Labor Party, the Marxist-Leninist party of the USA, the Revolutionary Socialist League, the Revolutionary Communist Party, the Communist Party Marxist-Leninist, the Socialist Workers Party (Trotskyists), the Spartacist League (a breakoff from the SWP), the Workers League, the Workers World Party, the Young Workers Liberation League (the youth organization of the SWP). None of these organizations, with the exception of the CPUSA and its youth organization, is directly controlled by Moscow. Most of them (but not the Maoists as of this moment) are committed to the disruption of our defense in the event of war with Russia. All of them have contact in varying degrees with Cuba, and some of them are in liaison with the Chinese Communists.

Cuba, in addition, commands a formidable array of its own front operations. There is the so-called Nicaragua Network, committed to the support of the Sandinista regime in Managua. There is the National Network in Solidarity with the People of Guatemala, committed to the support of the Castroite guerrillas in that country. There is the U.S. Committee in Solidarity with the People of El Salvador, which plays the same role with regard to that country. There is the Puerto Rican Socialist Party, a frankly Castroite organization, operating in mainland USA as well as Puerto Rico, which maintains a permanent representation in Havana. There is the Armed Forces of National Liberation (FALN), a terrorist organization whose actions are enthusiastically supported not only by the Puerto Rican Socialist Party, but also by front organizations such as the Puerto Rican Solidarity Committee, and allied organizations such as the Puerto Rican Nationalist Party. It was the last-named organization that was responsible for the attempted assassination of President Truman in 1951. There is also a host of communist front organizations, such as the National Lawyers Guild, the U.S. Peace Council, and the National Emergency Civil Liberties Committee, etc.

Not all the organizations that should be designated and monitored are Marxist-Leninist or communist fronts. Other organizations should be monitored because they pose a threat to domestic and national security. These would include:

- Organizations which engage in or threaten criminal actions directed against the civil liberties of any of our citizens.
- Organizations which conspire against the U.S. government in a manner affecting the national security and the integrity of government operations.
- Terrorist organizations which engage in bombings, hijackings, and other violent actions, or engage in threats of violence, for the traditional terrorist purposes of influencing policy or intimidating

their opponents, e.g., the Weather Underground, the FALN, and the Palestine Liberation Organization.

- Organizations which law enforcement authorities and the Department of Justice determine pose a danger to the tranquility of our communities and/or to the security of the nation, e.g., the Black Panthers, the American Nazi Party, the Young Lords.

The proposal that the FBI engage in surveillance against terrorist organizations should encounter no opposition. However, the proposal that it be instructed to reinstitute surveillance of the other categories of organizations listed above will unquestionably bring protest from civil libertarians in the center as well as from the organized left wing which will point hysterically to the abuses of the past. True, there were some abuses in the past, though they were very rare. (In the case of COINTELPRO, for example, only a tiny percentage of the 2,370 COINTELPRO activities approved and acted on by the FBI and an infinitesimal percentage of all the 10,500,000 investigations conducted during the same period of time involved demonstrable improprieties.) With the existence of effective oversight and with a chastening knowledge of the damage that can be done by a single impropriety, domestic intelligence activities in the future will be able to avoid some of the pitfalls that helped bring about the current paralysis of domestic intelligence operations at all levels.

In the past, unquestionably, there have been some adjudicators—not very many—who could not distinguish politically between membership in the Communist Party and membership in the Norman Thomas socialist movement, or who failed to draw a line between the identifiable Marxist-Leninist elements who played a decisive role in the leadership of the anti-Vietnam war movement and the very large numbers of people, by no means radical, who provided the masses for the series of anti-war demonstrations. With a more careful selection of personnel, better training, more sophisticated direction, and clearer guidelines, there is also every reason for believing that any future domestic intelligence operation will properly confine its surveillance activities to the hard-core extremists and will avoid extending them to embrace the innocents who get caught up in these activities.

Reinvolving the FBI in domestic intelligence operations would pave the way to the reestablishment of a list of organizations, membership in which would raise serious questions of suitability for government employment. But the reestablishment of such a list is something that will have to be done with great care. A lot can be learned from the experience with the so-called Attorney General's List. This list, which became a favorite target of the left-liberal establishment in later years, was set up by President Truman in March of 1947 under Executive Order 9835. As noted, it was to embrace totalitarian, fascist, communist, or subver-

sive organizations, organizations committed to the use of unconstitutional means to effect political change, and organizations which seek to deny other persons their constitutional rights. In practice, most of the groups listed were communist action organizations, communist front organizations, and organizations that had been heavily infiltrated by the communists. At its apogee, the list contained the names of over 200 such organizations. It was used as a guide by the Federal Employee Security Program, and applicants for employment were given copies of the list and asked whether they belonged to any of the named organizations.

The Attorney General's List, although it performed useful service for a number of years, suffered from several weaknesses. One of its weaknesses was that the Attorney General had to take entire responsibility for the designation of organizations—which led to the accusation that he was serving as policeman, judge, and jury. It would have been much better if the responsibility for designation had been given to a board of eminent citizens. A second weakness was that there was no provision for constant reviewing and updating of the list. A third weakness was that, on the Marxist-Leninist side, the list was confined to organizations under the control or influence of the Communist Party USA; apparently no one foresaw the explosive proliferation of independent Marxist-Leninist and violence-oriented organizations not directly controlled by the CPUSA.

In the 60s and early 70s, the Attorney General's List, which had become increasingly dated, fell into progressive disuse. After seeking unsuccessfully to obtain congressional funding for an expanded operation of the Subversive Activities Control Board, President Nixon in June 1974 promulgated EO 11785, which added to EO 10450 the amendment that "the list of organizations previously designated is hereby abolished and shall not be used for any purpose."

How does one go about establishing a list of organizations, membership in which would raise serious questions of suitability for government employment?

It has been suggested that, if a list of organizations is ever reestablished for the guidance of law enforcement and personnel security officials, it should not be made public because this might open the way to challenges by all or many of the organizations listed. It is highly questionable that Congress would sustain such a procedure, because a secret list would be eagerly seized upon by all those who are opposed to any kind of federal employee security program.

If there is a list, it should, as in the past, be made public. It might even be advantageous to provide in each case a public summary of the reasons for the designation. Obviously, there will be situations where, in the interest of security, some of the reasons for the designation have to be withheld. But such instances are a minority. In the majority of the

cases the designation can be justified on the basis of the public record —publications, statements made by leaders and activists, activities, evidence of control or influence by a hostile foreign state, and the record of involvement by members in criminal activities.

Francis W. Niland, in the study already quoted,* reports on an interview he had with Robert Keuch, Deputy Assistant Attorney General for the Justice Department's Criminal Division, which focused on the problem of guidelines. Keuch told him that in 1969–1971 the Internal Security Division of the Department of Justice had sought to amend EO 10450 in a manner that would have transferred the "designation" function from the Attorney General to the Subversive Activities Control Board. The proposal provided, said Mr. Niland, "that the SACB, after full notice and hearing, would make recommendations to the Attorney General concerning those organizations that should be listed pursuant to the provisions of the executive order." The SACB would hold such hearings and make such findings only upon a petition by the Attorney General.

Mr. Keuch expressed the opinion that an appropriate manner in which to handle the problem of "designation" would be to set up a separate Board under the Domestic Council which would function in much the same manner as the SACB did under EO 10450 before it was terminated. His proposal also provided for "delisting" hearings to be held in the case of organizations which had evolved away from those characteristics that led to their original "designation." Keuch apparently believed that this proposal still had merit at the time of the interview.

The Keuch concept in several respects is superior to the Attorney General's List as a vehicle for establishing specific loyalty-security criteria. Its major weakness is that the time involved in giving every organization an administrative hearing *before* being "designated" would mean that it would take many, many years for the board to conduct hearings on the hundred or more organizations and front organizations that fall in the extremist spectrums. In the interest of making the proposal operational in a reasonable period of time, it would be essential to provide for provisional designations, subject to a later hearing and review whenever the designation was challenged by the organization in question. (It is noteworthy in this connection that, of the 200 organizations listed in the Attorney General's List, only a handful challenged their designation.) Each designation would be supported by a summary of the information which led the board to make the designation.

Let us examine a few possible summaries.

In the case of the Puerto Rican Socialist Party (PSP), a summary might state that the Party's positions on international matters have

*Francis W. Niland, *The Present Dilemma of the Federal Employee Loyalty/Security Program* (Washington, D.C.: The National War College, May 1977).

consistently and faithfully mirrored the positions of Fidel Castro; that on every issue where there was a conflict between the Castro regime and the United States, its publications have sided with the Cuban government against the American government; that it has sympathetically covered all acts of terrorism committed by the FALN and that at least several members have been arrested as FALN bombers; that it maintains a permanent office in Havana; and that, based on these essential facts, the PSP would have to be considered an organization in which membership would automatically raise serious national security questions about suitability for sensitive government positions.

In the case of the Socialist Workers Party, a summary might state that the SWP, although not formally affiliated with the Fourth International, is a part of it for all practical purposes. It provides most of the money for its international operation, and one of its members sits on the executive committee of the International—ostensibly in an individual capacity. The Fourth International is an organization which unites the many Trotskyist communist movements scattered around the world. It is a Marxist-Leninist group committed to forceful revolution and establishment of a proletarian dictatorship after the revolution. It supports the Soviet Union critically and Fidel Castro by and large uncritically; although it is denounced by the Soviet communists, it has had frequent contact with Cuba. Although it presents itself as a nonterrorist organization and has not to this date itself engaged in terrorist activities in the United States, it does not oppose the terrorist activities conducted by its sister organizations of the Fourth International in Latin America, Ireland, and other countries. It supports and has close ties with the Palestine Liberation Organization. In certain cases, it has even raised funds for Trotskyite-terrorist comrades who have been arrested in other countries. Based on its total record, the SWP would have to be put down as an organization in which membership automatically raises serious national security questions about suitability for sensitive government positions.

In the case of the KKK, the summary might say that it is an organization, or complex of organizations, which is basically racist and anti-Semitic in orientation; that it has a long record of violent actions directed against blacks in particular and against black churches and synagogues; that its activities constitute a continuing danger to the country, especially in the case of its armed forces. For these reasons, the KKK is also designated as an organization in which membership would raise serious questions of suitability for government employment.

In order to avoid indefinite delays and instill public confidence in the integrity of the operation, the organizations initially to be targeted for monitoring should be designated by the Attorney General, in consultation with the FBI and an independent advisory board of citizens drawn from the academic community, the judicial community, and labor and

business. This board might be called the Domestic Intelligence Advisory Board (DIAB). Organizations designated as belonging to one of the categories listed above would be free to appeal the designation to the DIAB—with the stipulation that the review procedures be implemented within a fixed time frame.

The government should not be required to provide absolute proof of intent to engage in criminal activity in order to bar identified members of extremist organizations from sensitive positions. If the evidence is strong enough to raise serious doubt as to the advisability of employing members or associates of such organizations in sensitive positions, that should be enough. In cases where the evidence is strong, but still leaves an element of doubt, the government should have the right to resolve the doubt on the side of protecting the national security rather than the right of the individual to employment in a sensitive position. Where the nature of the position is such that the consequences of mistaken judgment would do no damage, or easily reparable damage, to the national security or national interest, consideration might be given to resolving the doubts about an applicant's suitability in his or her favor.

This discussion points back to two conclusions:

1. Somewhere in government there must be criteria—there must be an official list of organizations, membership in which would raise serious questions of suitability for government employment.
2. As matters stand today, the FBI has withdrawn from internal security activities to the point where it is no longer monitoring and clipping extremist publications. In order to enable the Attorney General to provide guidance criteria and in order to provide meaningful replies in response to National Agency Checks, the FBI will have to be instructed to resume the active monitoring of extremist organizations of the far right and far left. This will involve the complete rewriting of the domestic intelligence guidelines promulgated by Attorney General Levi in 1976.

In order to avoid indefinite delays, the organizations initially to be targeted should be designated by the Attorney General, in consultation with the FBI, and a citizen's committee to be called the Domestic Intelligence Advisory Board.

The restoration of a personnel security program will, however, require a series of long-term measures that go beyond the reactivation of the FBI in the field of domestic intelligence and the establishment of concrete criteria for investigators and adjudicators.

1. In order to provide itself with an in-house research and analysis capability, the Office of Personnel Management will have to reconstitute the Security Research and Analysis Section, which served the Civil Service Commission well for many years, and re-

activate and update its research files, which are now in storage. [*Personnel Security*]

2. The Freedom of Information Act and Privacy Act will have to be amended in a manner that exempts from disclosure the actual files developed by the federal government in connection with the investigation of applicants and appointees for federal positions. The GAO report already quoted underscored the difficulty of obtaining information both from institutions and from members of the public when they are advised, as they must be, that any information they provide may be made available to the applicant or appointee under the Privacy Act or the Freedom of Information Act. Even federal judges informed the GAO that, if they possessed adverse information about an applicant, they would not make this information available to government investigators because of the knowledge that it could be released in response to a privacy petition. [*Personnel Security and Suitability*]

The argument will unquestionably be made that such an exemption might open the way to denunciations of applicants and appointees on various grounds by neighbors or acquaintances who are motivated to do them harm. There are two answers to this criticism.

The first answer is that, without such an exemption, it will be impossible to operate an effective personnel security program. The second answer is that the nature of the investigative process by itself would be enough to nullify the testimony of a single vindictive witness. If twenty people who are interviewed in connection with an application for federal employment have only affirmative things to say about the applicant, and if a solitary interviewee against this record were to come up with some serious adverse information, it is virtually inconceivable that this one piece of adverse testimony, in the absence of confirmation from any other source, would serve to disqualify the applicant. Indeed, any competent investigator, when confronted with such information, would immediately ask whether there was proof available from other sources to confirm the allegations.

The argument will also be made that, unless applicants for government employment are given access to the derogatory information in their files that might serve to disqualify them, due process will be impossible. This matter has already been discussed in the section on the *Jane Doe* decision. The difficulty lies in giving them access to their files with the totally inadequate precaution of blacking out the names of witnesses. Clearly, every applicant should be entitled to know the general nature of any disqualifying derogatory testimony so that he will be in a position to respond to it. The question is whether administrative due process cannot be observed by providing applicants, before a decision on nonselection is made, with a *summary* of the derogatory information

in his file and inviting his response—which is the way things were handled in the days before the Privacy Act. In addition to this, a nonselected applicant already has the right to appeal an adverse decision to an autonomous board of arbiters, the Merit Systems Protection Board. [*Personnel Security and Suitability*]

3. The GAO report of 1978 discussed the possibility of legislation that would compel the cooperation of state and local authorities with the OPM, the DOD, and other government agencies in the matter of personnel investigations. The GAO also suggested the possibility of offering to compensate them on a per capita basis for the cost of this cooperation. The enactment of such legislation would unquestionably result in a marked enhancement in the cooperation of state and local officials. [*Personnel Security and Suitability*]

4. The Federal Tort Claims Act should be amended to provide relief from personal liability to investigators, adjudicators, and administrators if they have acted in good faith. Such legislation is now pending in both the House and Senate. [*Personnel Security and Suitability*]

5. There is a need for a blue ribbon panel similar to the Loyd Wright Commission set up in 1955. It ordinarily takes a very long time for such a commission to conduct an in-depth inquiry and draft a report. Because of the urgency of the situation, perhaps it would not be inappropriate to suggest that the commission be instructed to submit its report six months after it begins its deliberations.

   In anticipation of the establishment of such a blue ribbon panel, the newly established Senate Subcommittee on Security and Terrorism might consider the advisability of taking testimony from those who have knowledge of the situation for the purpose of calling the problem to the attention of Congress and the public. [*Personnel Security and Suitability*]

* * *

In discussing the erosion of the Federal Employee Security Program with the author, the recent director of the employee security office in a major federal agency expressed the conviction that the program had been going downhill for the past twenty years or more because no president since Eisenhower and Truman had manifested a strong personal interest in the situation. If the negative or indifferent attitude of so many government bureaucrats toward personnel security is ever to be transformed into a positive attitude, President Reagan must speak out on the issue and promulgate rules facilitating the restoration of the program.

These are some of the many things that will have to be done over the period of the coming years if the U.S. is to restore a meaningful Federal Employee Security Program. The problems are unquestionably enormous—but they must be addressed because the penalty for failing to do so jeopardizes the security of the nation.

Appendix I

Department of Justice Definition of Sensitive Positions

(taken from DOJ 2610.2)

b. Sensitive Positions within DOJ will be those positions which:
   (1) Involve legal, fiduciary, public contact, or other duties demanding the highest degree of trust, including all attorneys, law clerks and supergrade positions;
   (2) Require access, or afford ready opportunity to gain access, to classified national security information and material described in Executive Order (E.O.) 11652 as Top Secret, Secret, and Confidential, which includes classified information revealing intelligence sources, methods, and analytical procedures;
   (3) Require access, or afford ready opportunity to gain access, to any classified information which is controlled by special access procedures established by the head of a department or agency (e.g. access to Sensitive Compartmented Information granted by the U.S. Intelligence Community pursuant to the provisions of Director of Central Intelligence Directive 1/14; access to Restricted Data so classified by the Department of Energy (formerly AEC and ERDA "Q" clearance), and/or access to NATO, CENTO information, etc.);
   (4) Entail final authority for recommending or approving the collection, grant, exchange, loan, payment or other use of property or funds of high individual or aggregate value, such that it impacts on the national welfare;
   (5) Involve duties directly concerned with the enforcement of laws, or which involve the protection of individuals or property;
   (6) Entail involvement in the design, operation or maintenance of Federal computer systems, or access to data contained in manual or automated files and records of Federal computer systems, when such data relates to the national interest, personal, investigative, proprietary or economically valuable information, or when the duties or data relate to distribution of funds, requisition of supplies, or similar functions involving significant monetary value;
   (7) Entail responsibility for making selections and appointments

of persons performing any of the duties listed in (1) through (6) above, investigative duties, the issuance of personnel security clearances, or the making of personnel suitability and security determinations;

(8) Involve responsibility for security education or orientation of DOJ personnel;

(9) Are temporary positions in direct support of sensitive activities or functions described above;

(10) Are so designated by the Attorney General or his designees.

Appendix II

Cost of Personnel Investigations, By Agency

(Taken from GAO report "Costs of Federal Personnel Security Investigations Could and Should Be Cut," August 31, 1979)

Agency and type of investigation	FY 1978 Number of investigations	FY 1978 Cost per investigation[a]
OPM:		
Full-field investigations	23,760	$ 836.00
Limited field investigations	2,477	458.00
NACI	270,148	8.81
NAC	59,761	7.25
Total	356,146	
DIS:		
Special background	48,572	394.00
Background	57,723	208.00
Special background—update investigation	12,747	108.00
Background—update investigation	1,300	178.00
Expanded NAC	21,826	60.00
Special investigative inquiries	1,934	—
Limited inquiries	2,357	—
NAC	364,343	3.57
Entrance NAC	391,437	
Total	902,239	
FBI:		
Administrative Services Section:		
Special agent	1,057	5,452.00[b]
FBI support	3,000[c]	—
Maintenance, contractors, vendors with access to Hoover Building	1,000[c,d]	—
Civil Rights and Special Inquiries Section:		
Nonreimbursable full-field investigation	2,173	—
Reimbursable full-field investigations	1,579	979.00
National FBI Academy:		
Limited full-field investigation of candidates	1,200[c]	500.00
Total	10,009	
Department of Treasury:		
IRS:		
Security (full-field investigation)	39	$1,058.00
Character	4,312	1,095.00
Limited character[e]	6,881	194.00
Security—clearance	46	
Security—5-year update investigation	4	276.00[f]
Preappointment	217	
NACI	380	
Police check	197	
Enrollee applicant	1,374	34.00
Total	13,450	

Agency and type of investigation	FY 1978 Number of investigations	FY 1978 Cost per investigation (note a)
Customs Services:[g]		
Full-field investigation	1,796	700.00
Bureau of Alcohol, Tobacco and Firearms:		
Full-field investigation	432	242.13
Update investigation	375	—
Total	807	
Bureau of Engraving and Printing:		
Full-field investigation	112	250.00
Update investigation	11	—
Total	123	
Secret Service:		
Full-field investigation	600	750.00
Update investigation	1,200	225.00
Total	1,800	
Department of State:		
Full-field investigation	2,630	613.00
Update investigation	245	—
Total	2,875	
U.S. Postal Service:		
Full-field investigation	1,516	—
Update investigation	893	—
Total	2,409	
Coast Guard:[h]		
Background investigation	147	—
Department of Commerce:		
Full-field investigation	2	—
National Aeronautics and Space Administration:		
Full-field investigation	1	—
Agency for International Development:		
Full-field investigation	356	650.00
NACI and NAC	654	—
Total	1,010	
ACTION:		
Full-field investigation	50	500.00
Update investigation	5	—
Total	55	

[a]Includes actual or estimated costs.

[b]Includes recruiting, testing, physical examination, and full-field investigation.

[c]Estimated.

[d]Persons with regular access to the FBI building receive full-field investigations. Persons with limited access receive NACIs.

[e]Limited character investigation for nonsensitive (specified) positions is scheduled to be eliminated. Positions will be reclassified as nonsensitive and OPM will conduct a NACI for IRS.

[f]The total for these five types of investigations is 844. The $276 is the average cost per investigation.

[g]A limited full-field investigation was added in January 1979 for non-critical sensitive positions.

[h]Military personnel only.

Appendix III

Results of Interagency Study on GAO Recommendations (1981)

STATISTICAL SUMMARY
(not including DoD, State, or CIA)[1]

TOTAL POSITIONS [Federal Civilian Service]

	Number of Old Positions (Including ADP)	Number of New Positions (Including ADP)		% at Each of New Levels
Nonsensitive	1,388,891	I	1,098,166	66%
Noncritical-Sensitive	190,998	II	399,046	24%
		III	97,078	6%
Critical-Sensitive Normal 5 Year BI	55,539	IV	44,864	3%
		V	19,528	1%
Critical-Sensitive More Than 5 Year BI	23,254			

ADP POSITIONS [Federal Civilian Service]

	Number of Old Positions	Number of New Positions		% at each of New Levels
ADP III	39,681	I	22,818	21%
ADP II	62,988	II	52,572	48%
ADP I	7,040	III	29,432	27%
		IV	4,651	4%
		V	236	—

NON-ADP POSITIONS [Federal Civilian Service]

	Number of Old Positions (Excluding ADP)	Number New Positions (Excluding ADP)		% at each of New Levels
Nonsensitive	1,349,210	I	1,075,348	69%
Noncritical-Sensitive	128,010	II	346,474	22%
		III	67,646	4%
Critical-Sensitive Normal 5 Year BI	48,499	IV	40,213	3%
		V	19,292	2%
Critical-Sensitive More Than 5 Year BI	23,254			

[1]DoD estimates included civilian positions as well as military and contractor activities. A breakdown of civilian positions from the DoD total was not available. State and CIA did not provide estimates.

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Critical Issues

Are there persons working for the federal government who do not serve the best interests of the United States? Are there incompetents? Subversives? The federal government cannot answer these questions. It does not know because it no longer has the relevant data.

At one time, the U.S. could insure that its employees did not endanger national security. But appeals to "fairness," budget-cutting, burdens imposed by the Freedom of Information Act, Privacy Act and many court decisions, plus the domestic intelligence guidelines of former Attorney General Edward Levi, have transformed a viable loyalty-security program into a shadow of its former self. The current program, in fact, barely passes muster as a suitability check.

How federal personnel security policy got into its present mess and what can be done to remedy it are the central themes of this study by David Martin. A twenty-year veteran of the Senate Subcommittee on Internal Security, Martin details the sorry state of personnel policy and its frightening implications:

1. Priceless files, sources of checking applicants for critical and critical-sensitive positions, have been destroyed at national, state, and local levels.
2. The FBI has withdrawn from the domestic security business.
3. The vicious "nexus" principle has made it nearly impossible to run even an adequate suitability check. Such flaws as heavy drinking cannot disqualify a candidate unless a definite nexus between the weakness and the applicant's possible performance can be proved.
4. Staffs within agencies for investigations have been so severely cut that waiving even the most cursory security checks has become the order of the day.

Despite these developments over the past decade, most Americans blithely trust that their government protects itself—and them—adequately against disloyal, not to say treasonous infiltration.

David Martin performs a valuable service in exposing the facts of U.S. security weakness and suggesting specific measures to remedy the situation. Among them: completely revising the current lax guidelines for adjudicators and investigators; and reactivating the FBI's domestic intelligence division and the Security Research and Analysis Section at the Office of Personnel Management.

The problems, Martin concludes, unquestionably are enormous. But they must be addressed because failing to do so jeopardizes the security of the nation.

David Martin is a former senior analyst with the Senate Subcommittee on Internal Security. Since retiring from the Senate, he has served as a consultant for the Standing Committee on Law and National Security of the American Bar Association.

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